

# DETENTION IN RWANDAN GACACA COURTS

## IS INSISTENCE ON POST-GENOCIDE RETRIBUTIVE JUSTICE

### FRUSTRATING LONG-TERM RULE OF LAW OBJECTIVES?

Joseph Stefanelli, Jr.\*

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#### I. Introduction

Despite the inability of the scholarly community to agree on how to define the concept of rule of law, there is little question of the need for rule of law on both national and international levels.<sup>1</sup> It is often argued that this stems directly from the agreement to disagree upon a standard definition.<sup>2</sup> At first glance, it seems contrary to the purpose of the very concept of rule of law for there to be such disagreement as to how to define it.

When one looks deeper into rule of law, however, it becomes apparent that rule of law is not important because of its meaning, but because of what is gained by striving to achieve what the concept embodies. It is often nothing more than a means used by those who care about protecting people's rights to ensure that the citizens of a particular country or region are being treated fairly and guaranteed what is enumerated in human rights charters and agreements.<sup>3</sup> For people to be guaranteed these basic rights, there need to be rules that none are above, rules that apply equally to every human being regardless of birth, gender, or religion. This notion of universally

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\* The author is a Juris Doctor Candidate at Seton Hall University School of Law in Newark, NJ, USA as well as the Sub-Saharan Africa Legal Analyst for the Foundation for Post Conflict Development. Joseph will be a legal intern at the UN ICTR in Arusha, Tanzania in January 2009 where he plans to continue his research regarding the Rwandan National Court system's current developments.

<sup>1</sup> UN Member States unanimously recognized the need for "universal adherence to and implementation of the rule of law at both the national and international levels" and reaffirmed their commitment to "an international order based on the rule of law and international law." Simon Chesterman, *An International Rule of Law?* 56(2) AM. J. COMP. L. \_\_\_, p.2 of 39 (2008), quoting 2005 World Summit Outcome Document, U.N. Doc. A/RES/60/1 (16 Sept. 2005), available at <http://www.un.org/summit2005>, para. 134.

<sup>2</sup> See generally *Id.*; Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 LAW & PHIL. 137 (2002); Rachel Kleinfeld Belton, *Competing Definitions of the Rule of Law, Implications for Practitioners* (Democracy and Rule of Law Project, Working Paper No. 55, 2005).

<sup>3</sup> The most widely recognized of these documents is the Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. A/810 (10 Dec 1998). Hereinafter referred to as the "UDHR".

guaranteed rights was first codified by the United Nations (“UN”)<sup>4</sup> and has since been adopted by many regional international organizations including the African Union.<sup>5</sup> Regardless of their reasoning for doing so, nations are adopting the belief that a rule of law is necessary. On this, Professor Simon Chesterman writes:

Many developing and post-colonial States have also embraced law as a means to augment centralized authority rather than to restrain it. Promotion of the rule of law in such States by Western officials has thus sometimes been seen by those officials as a means of advancing human rights and liberal democracy, while their counterparts have seen it as a means of making government more efficient and therefore supporting the legitimacy of the state.<sup>6</sup>

Since the creation of law itself, this concept of rule of law has been deliberated by scholars and while it may not have had the support in ancient times that it does today, it has evolved into a concept that nearly all of the civilized world can agree is important to a functioning society in the globalized world of the twenty-first century.<sup>7</sup>

It is with this seeming agreement of the importance of this concept that I look at the United Nations supported prosecution effort in Rwanda and try to determine the extent to which the UN, which outwardly imposes and teaches rule of law, may be supporting a government’s effort that

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<sup>4</sup> Technically, the United Nations was not the first international organization to address human rights. Its predecessor, the League of Nations attempted, unsuccessfully, to enumerate basic human rights. Even in its charter, the United Nations did not put forth a meaningful attempt to codify what basic human rights should be. In 1948, however, the UN made what is considered to be the first real step toward codification of Human Rights in a document to be universally recognized in its creation of the 1948 Universal Declaration of Human Rights. This is the basis from which the 1998 version comes, having been fine-tuned throughout the twentieth century to help ensure its ability to stay current and embody the true meaning of Human Rights

<sup>5</sup> The African Nations’ collective commitment to ensuring human rights, including but not limited to those outlined in the UN Universal Declaration of Human Rights, is codified in the *African Charter on Human and People’s Rights*, adopted by the Organisation for African Unity (predecessor to the African Union) 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 Oct. 1986, available at [http://www.achpr.org/english\\_info/charter\\_en.html](http://www.achpr.org/english_info/charter_en.html). This document is also referred to as the *Banjul Charter* because it was signed in Banjul, The Gambia. The Organisation for African Unity was originally formed to ensure that the nations of Africa would band together to forever rid Africa of colonial rule.

<sup>6</sup> Chesterman, *supra note 1* at 12, citing generally Nathan J. Brown, *THE RULE OF LAW IN THE ARAB WORLD: COURTS IN EGYPT AND THE GULF* (1997).

<sup>7</sup> For a discussion on evolution of the concept of Rule of Law through time and across different geographic regions, see Chesterman, *supra note 1* at 2-16. Chesterman analyzes historical bases of rule of law definitions and outlines how and why rule of law is often defined very differently depending on who is doing the analysis and their motives for definition.

is actually frustrating a country and region's long-term rule of law objectives, namely the guarantee of the right to have one's cause heard within a reasonable time by an impartial tribunal.<sup>8</sup>

In this essay I examine the revival of an ancient Gacaca system in Rwanda aimed at bringing to justice all involved in the 1994 genocide to determine whether one of the most basic human rights guaranteed under rule of law established and agreed upon collectively by the vast majority of African nations is being overlooked and the whether any justification proffered is truly reasonable.

## **II. Defining Rule of Law**

While the aim of this essay is not to synthesize definitions of rule of law, before being able to examine whether rule of law is a fading concept in modern society, it is necessary to develop a working contextually relevant definition. To that end, I first examine several definitions of rule of law and from them determine what twenty-first century nations in an increasingly globalized society agree and disagree about when defining rule of law, thereby creating a foundational agreed upon definition for our purposes. Difficulties in reaching one concrete definition come from a variety of factors, including the stark differences in situations to which it is being applied and the level of government it is being applied to, whether local, national, or international. Regardless of the level of government, however, it is argued that rule of law has a bedrock that transcends cultures and levels of government to which it is applied.

Thomas Carothers deems the "legal bedrock" of rule of law to be:

A system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone. They enshrine and uphold the political and civil liberties that have gained status as universal human rights over the last half-

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<sup>8</sup> See African Charter on Human and People's Rights, *supra* note 5 at Article 7.1(d).

century. In particular, anyone accused of a crime has the right to a fair, prompt hearing and is presumed innocent until proved guilty. The central institutions of the legal system, including courts, prosecutors, and police, are reasonably fair, competent, and efficient. Judges are impartial and independent, not subject to political influence or manipulation. Perhaps most important, the government is embedded in a comprehensive legal framework, its officials accept that the law will be applied to their own conduct, and the government seeks to be law-abiding.<sup>9</sup>

Carothers' definition is relevant in our context because it focuses on rule of law reform and its ability to help transitional governments develop democratic governance and a market economy in an era where both are becoming increasingly popular forces.<sup>10</sup> Many of Carothers' ideals are embodied in the former Organisation for African Unity's 1986 Charter intended to promote the idea that African Nations need to work together to ensure that individual nations are creating laws that promote human rights, and that such laws are being implemented and enforced.<sup>11</sup> The United Nations has faced much difficulty in trying to help nations further a working system of rule of law that will last in the long-term in African nations. The conflicts that plague the area set back progress just as it is starting to really take shape. Kenya's recent post-election riots serve as a (relatively, in comparison) minor example of difficulties encountered that set back years of rule of law development. Post-genocide Rwanda is a much more austere example.

Promoting democracy where it has not been practiced (or at least has only been made to appear to have been practiced) in the past leads to many issues which stem from confronting the idea of creating a system based upon a rule of law. Often a root of this problem is the realization by the absolute ruler (be it a dictator on the country's own soil or a colonial ruler) that they too

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<sup>9</sup> Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF. 95, 96 (1998). Carothers was Director of Research at the Carnegie Endowment for International Peace when his essay was published in *Foreign Affairs*. *The Rule of Law Revival* essay would later be published as a chapter in a book by Carnegie. While this definition hardly embodies a realist view of how rule of law actually works as a functioning mechanism in any society, it cannot be ignored because it seems to embody the most basic and important ideals for which rule of law reform strives, regardless of the situation to which it is being applied.

<sup>10</sup> *Id.* at 97.

<sup>11</sup> See generally African Charter on Human and People's rights, *supra* note 5.

will have to follow the laws that are created. In times of transition this causes a great tension, even to a point where democratic ideas may be compromised in the interest of quickly achieving stability. While the people have now been freed from tyrannical rule, the result of this freedom is a government that looks like a shell of a democracy, created merely to present the façade of a free democratic government but in reality intended to limit the ability for the party in power to be removed. It is in this context that it is most important to overlook the meaningless complexities in definitions that hinder the ability to implement a working rule of law system.

There is great debate about the rule of law because of this complexity with which it is often evaluated. Legal instrumentalism and rule of law exist in tension with each other, while being promoted as a package that is necessary to the success of a developing or post-conflict nation.<sup>12</sup> Brian Tamanaha acknowledges the differing opinions of how to define rule of law and lumps them all into the categories of substantive and formal views. Substantive is the idea that there are limits on the government's power, and even in exercising its sovereign powers, these limits must be followed to ensure a feeling of "rightness" of the laws. The formal version looks more like Carothers' definition- laws should be certain, set forth in advance, and must be followed by the government along with people to ensure predictability of laws and so that people will know in advance of their actions what the consequences will be.<sup>13</sup>

The differences in these versions are essentially that the substantive allows for less flexibility in that usually it binds the government to creating just laws that will be fair to all, while formal essentially only requires that the laws must be universally followed and set forth in advance.<sup>14</sup>

Legal theorist Joseph Raz emphasized the key implication of this difference: A non-democratic legal system, based on the denial of human rights, on extensive

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<sup>12</sup> See Brian Z. Tamanaha, *The Tension Between Legal Instrumentalism and the Rule of Law*, 33 Syracuse J. INTL. L. & COM. 131, 132 (2005).

<sup>13</sup> *Id.* at 131-132.

<sup>14</sup> *Id.*

poverty, on racial segregation, sexual inequalities, and racial persecution, may in principle, conform to the requirements of the [formal] rule of law. . . . Substantive versions of the rule of law, by contrast, would rule out evil laws as invalid.<sup>15</sup>

In the context of a state working hard to fix a previously broken judiciary encumbered by enduring a great conflict, Tamanaha's point is well taken. While it is clearly important to establish formal rules, having the substantive "rightness" feeling amongst those who will be following the rules is equally necessary. So, in terms of Carothers' and Tamanaha's definitions, for our purposes it seems best to use some sort of middle ground that defines rule of law more broadly and encompasses more clearly what needs to be achieved in creating or reforming rule of law.

For this important postulation we find a third definition that can help us to find such a middle ground and bring together the most important core definitional agreements. Rachel Kleinfeld Belton compares an ends based definition to an institutional approach.<sup>16</sup> She posits that those in the scholarly community tend to use the ends based approach (emphasizing what are deemed to be the ends to be achieved by rule of law reform- i.e. upholding law and order and providing predictable and efficient judgments) while rule of law program practitioners lean toward the institutional definition (institutional attributes believed necessary to actuate rule of law reform/creation- i.e. comprehensive laws, well-functioning courts, and trained law enforcement agencies).<sup>17</sup> Belton believes that institution-based problems are the springboard for widely acknowledged problems with current rule of law strategies. She believes that consciously

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<sup>15</sup> *Id.* (citing Joseph Raz, *THE AUTHORITY OF LAW* 211 (1979)) (internal citations omitted).

<sup>16</sup> See Rachel Kleinfeld Belton, *Competing Definitions of the Rule of Law: Implications for Practitioners*, Carnegie Papers no. 55, January 2005 (available at <http://www.carnegieendowment.org/files/CP55.Belton.FINAL.pdf>).

<sup>17</sup> *Id.* at 7-8,16-17.

switching to an ends-based definition in practice would provide conceptual clarity to strengthen rule of law reform efforts generally.<sup>18</sup>

Taking into account these different ideas of how to define the rule of law, the most important elements in this context that seem to be common to all three are those enumerated below. This will serve as my working definition of rule of law for the purpose of deciding whether the long term goals of creating a stable rule of law are being frustrated in Rwanda's quest for retributive justice, and if so, whether it is justified by the horrible nature of the crimes whose punishment is sought through Gacaca.

The rule of law can be defined as having the following elemental necessities. First, is clear, concise descriptions of what the laws are, effectively communicated to the people who are expected to obey such laws. These clearly and effectively communicated descriptions of laws must create a general sense amongst the population that those creating the laws have done so with the intention that they also are to be bound by these laws, and that there are checks in place to be sure that this happens. This concept of equal treatment under the law must parallel predictable consequences that both limit governmental powers and allow the lay person to feel protected from the wrongdoing of others, yet accountable for his own wrongdoing. Finally, as part of this protection laws must encompass at least the most basic rights that every human being ought to have.<sup>19</sup>

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<sup>18</sup> *Id.*

<sup>19</sup> While there is no one document that *all* nations subscribe to as being a description of rights that all are entitled to, there are very few nations left who do not in some way subscribe to the UN Universal Declaration of Human Rights (described *supra* note 2). The Organisation of African Unity's (now the African Union) 1986 Charter on Human and People's Rights explicitly subscribes to the rights enumerated in the UDHR and the Charter of the United Nations and reaffirms the pledge made by African nations when joining the UN and signing the UDHR by requiring parties to it "undertake to adopt legislative or other measures to give effect to .... the rights, duties, and freedoms enshrined in the Charter [of the OAU]. The Charter on Human and People's rights goes even further than the UDHR in that it recognizes many civil and political rights in addition to the basic human rights it seeks to protect. Because this is a Charter subscribed to by nearly all African Nations, it has the ability to represent the embodiment of what African nations have combined to hold as rights that every person should be entitled to,

These enumerations of basic rights can come from very different sources, ranging from the UN Universal Declaration of Human Rights to such simple *jus cogens* norms as the prohibition of slavery and genocide to a Charter for Human and People's rights adopted by the African Union.<sup>20</sup> For our purposes, the right not to be held in detention indefinitely and to be guaranteed a "fair" trial should be considered one of the most important of those rights.<sup>21</sup>

Having established what is meant by rule of law, it is now time to turn to the analysis of a modern case where it is questionable whether the rule of law is being observed by those in power, whether any justification is given, and if so whether it is well-founded.

### **III. Post Conflict Reconstruction and Transitional Justice in Rwanda: is Gacaca the Answer, or Simply Frustrating Rule of Law Objectives?**

The former Organisation for African Unity (OAU) adopted the African Charter on Human and People's Rights (also known as the "*Banjul* Charter") on 27 June 1981. The Banjul Charter was entered into force 21 Oct. 1986. Since then, the OAU has become the African Union (AU), but it continues to use the Banjul Charter as a cornerstone of the rights the AU seeks to enforce in and through its member states<sup>22</sup>. Rwanda is one such nation. It also happens to be a nation in the process of trying to rebuild a court system that was broken before it was shattered by genocide more than fourteen years ago.<sup>23</sup> It is a nation that is struggling with implementation of a court system that was originally created to settle property disputes,<sup>24</sup> but has been modified to fit

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regardless of their race, ethnicity, color, sex, national origin, etc. African Charter on Human and People's Rights, *supra* note 5 at Preamble, Article 2, 3, 7, 11, 12.

<sup>20</sup> See *Id.*; Universal Declaration of Human Rights, *supra* note 2.

<sup>21</sup> See African Charter on Human and People's Rights, *supra* note 5 at Article 7.1(d).

<sup>22</sup> See *Id.*

<sup>23</sup> See William A. Schabas, *The Rwandan Courts in Quest of Accountability- Genocide Trials and Gacaca Courts*, 3 J. INT'L. CRIM. JUST. 879, fn 14 (2005).

<sup>24</sup> *Id.* at 891.

a modern problem of the national court system being unable to fairly try, in a reasonable amount of time, the ever increasing number of those accused of participation in the 1994 genocide.<sup>25</sup> The idea to bring back Gacaca was not hatched overnight, but was the result of much deliberation and looking at the various different methods used in Africa for post-conflict transitional justice to determine which worked well and which could use improvements. To fully understand the reasoning behind choosing Gacaca, therefore, it is necessary to better understand the background of transitional justice in Africa prior to Rwanda's choice of transitional justice measures.

A. Traditional Post-Conflict Justice Measures in Sub-Saharan Africa: The Road to Rwanda's Decision to bring back Gacaca

Transitional justice has taken many forms throughout the history of conflict; prosecutions being only one method of accountability. Truth seeking measures, reparations programs, and vetting have long been and continue to be other integral parts of the overall picture of transitional justice.<sup>26</sup> While all have their importance, I will be confronting mostly prosecutorial efforts to determine whether they have a tendency to forget that they are part of a larger effort to implement rule of law. It will be important to remember the context in which each prosecutorial (or other transitional justice measure) is being employed. Often there is very little time to decide the best way to restore order. International, National, and local measures must work in harmony to create a truly successful transitional justice scheme. Seemingly with that in mind, Rwanda's prosecutorial efforts combine an international ad hoc tribunal in the UN International Criminal Tribunal for Rwanda (ICTR), the Rwandan National Courts, and Gacaca courts. While the ICTR

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<sup>25</sup> *Id.*

<sup>26</sup> For a thorough analysis of transitional justice in Sub-Saharan Africa, see Lydia Bosiere, "Overpromised, Underdelivered: Transitional Justice in Sub-Saharan Africa," International Center for Transitional Justice Occasional Paper December 2006, available at [www.ictj.org/static/Africa/Subsahara/AfricaTJ3.pdf](http://www.ictj.org/static/Africa/Subsahara/AfricaTJ3.pdf).

and National Courts are strictly prosecutorial, Gacaca combines attributes of truth-seeking, reparations, and prosecution.<sup>27</sup> “Gacaca was devised as a middle path somewhere between the rigours of full-blown criminal prosecution and the moderate truth commission approach employed in many countries.”<sup>28</sup>

Prosecutions are often the most publicized of transitional justice measures, but in order to understand Gacaca, it is important to also understand the other systems it bears attributes of. The UN Secretary General has described truth commissions as “official, temporary, non-judicial fact-finding bodies that investigate a pattern of abuses of human rights or humanitarian law committed over a number of years. These bodies take a victim-centered approach and conclude their work with a final report of findings of fact and recommendations.”<sup>29</sup> Reparations initiatives aim to restore the status quo as much as possible, including “restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property.”<sup>30</sup> Also, reparations usually provide compensation for legal and medical fees, any damage to the person’s mental state, lost reputation and opportunities, mental and psychological rehabilitations, and guarantee of nonrecurrence.<sup>31</sup>

The combination of these and other transitional justice measures used during post-conflict reconstruction in such countries as Rwanda, South Africa, the former Yugoslavia, and Sierra Leone form what has become the modern model- many different governments and organizations working together to achieve a common goal of creation of a peaceful, lawful society in the wake

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<sup>27</sup> See *Id.*

<sup>28</sup> Schabas, *supra* note 22 at 881.

<sup>29</sup> See “Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post Conflict Societies,” UN Doc. S/2004/616, 2004, at xiv, para. 50.

<sup>30</sup> See UN, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, C.H.R. res 2005/35, UN Doc. E/CN.4/2005/L.10/Add.11, April 19, 2005.

<sup>31</sup> Bosiere, *supra* note 25 at 16.

of great conflict and/or tragedy. The measures used, while generally falling within the areas of truth-seeking, reparations, vetting, and prosecution, have transformed over time to encompass hybrid models, and are generally shaped by local customs as well as lessons learned from previous transitional justice efforts in the region and worldwide.

Sub-Saharan Africa is no exception to this. It is often referred to by scholars on the topic of transitional justice as a continent with a separate set of rules.<sup>32</sup> This view has an important impact on the perception of domestic prosecutions for war crimes and crimes against humanity. Where other parts of the world are afforded the luxury of more easily assumed legitimacy, Sub-Saharan African countries face the perennial problem of having had governments (and more specifically judiciaries) of questionable stability and corruptibility, reinforced by the tragedy or conflict that precedes the rebuilding. Such a view comes from the feeling that African states are dealing with state-building as much as with accountability, and as such have a harder time prosecuting the accused in a fair and internationally acceptable manner.<sup>33</sup> Rwanda struggled with this very issue in the wake of the 1994 genocide.

#### B. Gacaca the Only Solution to Managing Enormous Numbers of Accused

In the very early days after the Genocide violence had subsided, thousands were arrested and held against Rwandan law<sup>34</sup> in what could have been considered violations of human rights as enumerated in the Banjul Charter. At the time, if a person was accused of an offense involving a sentence of more than six months, serious grounds suggesting guilt were necessary to be shown, before a judge within five days, only to be exceeded where it was strictly necessary. At

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<sup>32</sup> See *Id.* at 2; See also generally Jennifer Widner, *Courts and Democracy in Postconflict Transitions: A Social Scientist's Perspective on the African Case*, 95 AMER. J. INT'L L. 64 (2001).

<sup>33</sup> *Id.* at fn 32 (citing Thomas Carothers, *The End of the Transitional Paradigm*, *Journal of Democracy* 12:1, 2002).

<sup>34</sup> *Id.* at fn 17.

this point, the court was able to find sufficient evidence to hold the person for up to thirty days, and this could be extended as necessary.<sup>35</sup>

With laws in place that should govern the detention of prisoners under criminal laws, it was necessary to quickly come up with a solution for trying the accused before detention became impractical and perpetuated violation of rule of law. President Bizimungu was quick to call for a conference (the 1995 Kigali Conference) to take advice on how to hold those responsible accountable for their actions.

Bizimungu was not persuaded by the South African idea that the appropriate ‘African’ way was a truth and reconciliation commission combined with some form of amnesty. The Rwandan government did, however, quickly adopt the formal recommendations of the Kigali Conference.<sup>36</sup> The report of the 1995 Kigali Conference recommended the use of new mechanisms of the Rwandan judicial system- a classification system to separate the organizers of the genocide from those with less responsibility, specialized chambers of the current court system (which would eventually become Gacaca), and the idea of giving reduced sentences to those who confessed.<sup>37</sup> It is not surprising to notice the support of what would later become the Gacaca process by the former Organisation of African Unity, now the African Union, seemingly in an attempt to help keep the rights guaranteed under the Banjul Charter intact by finding the most expedient process possible for dealing with the trials of the ever-growing numbers of accused.

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<sup>35</sup> See Code de Procédure Pénale, in F. Reyntjens and J. Gorus (eds.), CODES ET LOIS DU RWANDA (2<sup>nd</sup> ed., Butare, Bruxelles: Université Nationale du Rwanda, 1999), Art. 37, 561-578 ; Schabas, *supra* note 14 at fn 17.

<sup>36</sup> Schabas, *supra* note 22 at 882.

<sup>37</sup> Rwanda, Office of the President, *Recommendations of the Conference Held in Kigali from 1 to 5 November 1995, on ‘Genocide, Impunity, and Accountability:’ Dialogue for a National and International Response*, Kigali, 1995; *Id.* at fn 19.

In 1996 this decision was codified in legislation laying out the four categories of offenders<sup>38</sup> as well as what has been called the “confession and guilty plea procedure,” considered the heart of the legislation. Those in the second, third, and fourth categories were afforded the opportunity to receive a substantially reduced sentence by admitting to and expressing sorrow for their actions.<sup>39</sup> Included in this procedure was the necessity for a written statement describing the crimes admitted to as well as details about accomplices and any other relevant facts.<sup>40</sup>

Trials under the 1996 legislation began in December 1996, around the same time as the ICTR started its trials for those within its jurisdiction. But there was a flaw in the system under the 1996 legislation. Confessions began coming in at rates that the courts were not able to keep up with, and detention facilities were unable to separate those who had confessed from the general population, leading to cries from Human Rights organizations that something needed to be done.<sup>41</sup>

Less than two months after the commencement of trials in the National courts, alternative methods for adjudication of the incredible number of trials that had presented themselves began to be considered. In 1998 a 15-member commission chaired by the Minister of Justice was convened. Its conclusions were published on 8 June 1999, and encouraged establishment of Gacaca courts, the same idea that had been mooted at the 1995 Kigali Conference.<sup>42</sup> In 2001, an amendment to the 1996 legislation put forth the parameters for the Gacaca system, as well as

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<sup>38</sup> Category 1 was planners, military or civil infrastructure authority figures who committed or encouraged genocide, and persons who committed ‘odious and systematic’ murders (this was a very minimal number of people and overlapped with those to be tried in the ICTR). Category 2 included those who had committed murder or serious crimes that lead to death of a person, but did not fit into category 1. Category 3 was other serious crimes against a person or persons, and Category 4 consisted of property crimes.

<sup>39</sup> Organic Law N° 08/96 of 30 August 1996 on the Organisation of Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity committed since 1 October 1990, J.O., 1996, Year 35, N° 17, p. 14.

<sup>40</sup> *Id.*

<sup>41</sup> See Penal Reform International, *Gacaca Research Report No.7: Integrated Report on the Pilot Phase, January 2002-December 2004* (Dec 2005), available at <http://www.penalreform.org/resources/rep-ga7-2005-pilot-phase-en.pdf>; Schabas, *supra* note 22 at 887.

<sup>42</sup> Schabas, *Id.* at 891.

modified slightly the categories of crimes.<sup>43</sup> The law was adopted by the Transitional National Assembly of Rwanda on 16 January 2001. It followed the same approach as 1996 in terms of encouragement to admit guilt and express remorse. Modifications to the categories were as follows: Category 1 now also included crimes of rape and were excluded from Gacaca and restricted to National courts; Category 2 now consisted of homicide or attempted homicide; Category 3 was now for ‘serious attacks without the intent to cause the death of victims’; Category 4 still was confined to crimes against property.<sup>44</sup>

Because of the extremely organized and centralized government left over from the Belgian colonizers, Rwanda was split up into more than 9,000 ‘cells’ (the most local level of government), which fall within the country’s 1,500 sectors that are organized into districts.<sup>45</sup> Gacaca is based upon this local provincial government system, and consists of a General Assembly, a Bench, and a Coordinating Committee; all those working within the system are to be at least 18 years of age, and 24 members of each cell must be of ‘high integrity’ and over the age of 21, known as ‘inyangamugayo’ to form the General Assembly for each cell.<sup>46</sup> First came the election of judges, and then preliminary experiments as to how the system would work.<sup>47</sup>

Gacaca was then set in a ‘pilot phase’ that would last until early 2005, having 80 cells from 2002-2004, and then being enlarged to 750 cells in November 2005.<sup>48</sup> It was planned that the system would start holding trials for those whose information had been processed in the trial phase during the period of 2002-2004. In January 2005 the President of the National Service for

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<sup>43</sup> Organic Law N<sup>o</sup> 40/2000 of 16 January 2001, ‘on the Establishment of ‘Gacaca Jurisdictions’ and the Organisation of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed between 1 October 1990 and 31 December 1994.’ Available at <http://www.inkiko-gacaca.gov.rw/pdf/Law.pdf>.

<sup>44</sup> *Id.*

<sup>45</sup> Schabas, *supra* note 22 at 893.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 894.

Gacaca Jurisdictions said that they were ready to proceed with approximately 60,000 case files as of that date.<sup>49</sup> The sentencing of those who pled guilty was scheduled to begin in February 2005 and the trials of the 60,000 were scheduled to begin in early 2006.<sup>50</sup> The work done during these years led to several revisions of the legislation enabling the Gacaca courts. Each contains more refined versions of the categories and slightly changes the numbers of people required to run the Gacaca system. For example, the 2004 amendment reduced the number of judges from 250,000 to 170,000, merged categories 2 and 3, and redefined category 1 to include torture, indignity to a dead body, and a broader range of sexual crimes.<sup>51</sup> And the most recent addition is the 2007 organic law amendment.<sup>52</sup>

Throughout the early testing and pilot phases, the African Commission on Human & People's Rights made frequent visits to Rwanda, and continues to have scheduled visits to ensure that all is being done to adhere to the laws, both those of Rwanda and those international and regional laws that Rwanda has sworn to uphold in signing various Charters and Treaties.<sup>53</sup>

### C. Principal Concerns Regarding Gacaca Courts

In the wake of the genocide, the international community ascended upon Rwanda to create the ICTR out of a feeling of guilt for lack of UN military support to stop the genocide while it

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<sup>49</sup> See *id.*; Penal Reform International, *Monitoring and Research Report on the Gacaca: Community Service (TIG) Areas of reflection (March 2007)*, available at <http://www.penalreform.org/resources/rep-ga9-2007-community-service-en.pdf>.

<sup>50</sup> Schabas, *id.* at 894.

<sup>51</sup> *Id.*

<sup>52</sup> See Organic Law N° 10/2007 Of 01/03/2007 Modifying and Complementing Organic Law N°16/2004 of 19/6/2004 Establishing the Organisation, Competence and Functioning of gacaca Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and other Crimes against Humanity, Committed Between October 1, 1990 And December 31, 1994, as Modified and Complemented to Date. Available at <http://www.inkiko-gacaca.gov.rw/pdf/L.O%20N%2010.2007%20VERSION%20FINALE.pdf>.

<sup>53</sup> See African Commission on Human & People's Rights, REPORT OF PROMOTIONAL MISSION UNDERTAKEN BY COMMISSIONER MOHAMED ABDELLAHI OULD BABANA IN RWANDA (Feb 2004), available at [http://www.achpr.org/english/Mission\\_reports/Rwanda/Mission%20report%20to%20Rwanda.pdf](http://www.achpr.org/english/Mission_reports/Rwanda/Mission%20report%20to%20Rwanda.pdf). This report details a follow-up visit conducted by the Commissioner of Human and People's Rights to assess the current situation of human rights in Rwanda, following a troubling report issued in 2000.

was being perpetrated.<sup>54</sup> Additionally, the short lapse of time in which the UN's decision to create the ICTR followed its creation of the UN International Criminal Tribunal for the former Yugoslavia (ICTY) leads to the conclusion that there was no choice but to have an ICTY equivalent for the crimes committed in Rwanda.<sup>55</sup> In other words, it is questionable whether the UN would have created the ICTR if not for the ICTY. Prior to the ICTY, ad hoc tribunals were not the standard for prosecuting war criminals, and since have been used less frequently, the majority moving to the favor of the International Criminal Court (ICC) as the international body to prosecute such crimes.<sup>56</sup>

Since it was not even fathomable that the ICTR could prosecute any but the highest level of offenders from the genocide, it was necessary for some other court to handle some of the trials. While it has become more universally recognized that courts in other countries may exercise jurisdiction in condemnation and redress of certain categories of heinous conduct, including genocide and torture,<sup>57</sup> it was a matter of pride for the National Court System of Rwanda to take action to prosecute the remaining accused itself.<sup>58</sup> Once it became clear that the National courts would not be able to handle the rapidly increasing number of accused who were being detained illegally,<sup>59</sup> the idea of bringing back a new, improved version of the ancient Gacaca system

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<sup>54</sup> Justice Hassan B. Jallow, Chief Prosecutor, ICTR Guest Lecture at the T.M.C. Asser Institute, The Hague 4 Oct 2006, available at [http://69.94.11.53/ENGLISH/colloquium06/ictr\\_completion.pdf](http://69.94.11.53/ENGLISH/colloquium06/ictr_completion.pdf).

<sup>55</sup> See Schabas, *supra* note 22 at 880. Schabas describes the necessity for the ICTR as a parallel to the ICTY, saying "to do otherwise would have indelibly stained international justice as good enough for conflicts in the North, but relatively indifferent to those in the South. Yet, in all likelihood, had there been no ICTY at the time, it seems improbable there would have been calls for an international mechanism of accountability to deal with the Rwandan genocide." *Id.*

<sup>56</sup> See Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?* 95 AM. J. INT'L. L. 7, 28 (January 2001).

<sup>57</sup> See Donald Francis Donovan and Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AMER. J. INT'L. L. 142 (2006). Donovan and Roberts argue that "recognizing the need to end impunity for those crimes, international law permits a state, by the principle of universal jurisdiction, to prosecute them even when they take place outside its territory and do not involve its nationals." *Id.*

<sup>58</sup> See Schabas, *supra* note 22 at 880.

<sup>59</sup> *Id.* at fn 17.

seemed the best way to make sure all responsible, even the lowest levels of offenders, would be held accountable for their crimes.<sup>60</sup> While other nations responding to similar situations had chosen to go the route of truth commissions and/or reparations efforts,<sup>61</sup> Rwanda was determined that all be held criminally accountable for their actions. This resolve is what sets the Rwandan example apart from other post-conflict reconstruction efforts.<sup>62</sup>

The decision to use Gacaca would not be without its challenges, however. Legitimacy concerns and questions of the righteousness of the techniques of encouraging the accused to give up their co-conspirators for reduced sentences have plagued the system since its inception.<sup>63</sup> The principal concerns of the international community and local populations of Rwanda were also related to legitimacy of the Gacaca courts' increasingly lengthy detention of the accused and its possible inability to build consensus for this revived system of justice, include the questionable ability of the courts to process the exponentially increasing numbers of accused and the lack of legal training of those involved and appearance of Gacaca being only a pseudo-judicial system.<sup>64</sup>

Early concerns about National courts included their possible inability to ensure state-funded counsel for indigent defendants and fairness of the trials, but have lately turned to a general feeling of acceptance and even impressiveness with the system, especially by those familiar with

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<sup>60</sup> *Id.* at 891

<sup>61</sup> See Carsten Stahn, *Current Development: Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor*, 95 AMER. J. INT'L L. 952 (2001) for its analysis of East Timor's approach, starkly contrasting that of Rwanda in that it is almost entirely focused on truth and reconciliation, and different from traditionally recognized truth commissions in that past examples (i.e. Sierra Leone) have employed only truth-seeking investigative measures, and comprehensive reconciliation mechanisms such as that used in East Timor were not available.

<sup>62</sup> Schabas, *supra* note 22 at 882.

<sup>63</sup> See generally PRI Report on Gacaca Pilot Phase, *supra* note 41, recognizing that Gacaca was brought back out of necessity, and its integration into the National Court system has not been easy, but it would be impossible to try all of the accused otherwise. Based upon extensive research on the ground in Rwanda, the author institution, Penal Reform International, has issued a series of reports about the conditions of prisoners, the authority and legitimacy of the Gacaca system, and the sincerity and effectiveness of confessions in a system that not only encourages one to confess, but almost demands a confession and for one to accuse those with whom he was involved in order to receive a commuted sentence.

<sup>64</sup> See *Id.*; Schabas, *supra* note 22 at 886-7.

the 'civil law' approach Rwanda inherited from Belgium and France.<sup>65</sup> Implementation of *Gacaca* courts has added an interesting dynamic to the domestic court system, using an ancient dispute resolution method historically focused on property disputes to more quickly resolve some lower-level offenders' cases.<sup>66</sup> The use of *gacaca* tribunals, however, also adds to legitimacy concerns of the international community because of the lack of legal experience of its judiciary and ease of corruption possibilities. Schabas found that prior to the 1994 genocide, the Rwandan judicial system had never been more than

a corrupt caricature of justice... comprised of about 700 judges and magistrates, of whom fewer than 50 had any formal legal training. Of these, the best elements had perished during the genocide, often at the hands of their own erstwhile colleagues. There were only about 20 lawyers with genuine legal education in the country when I visited Rwanda in November 1994.<sup>67</sup>

In the early days after the genocide was over one thing is clear- the government of Rwanda was anxious to deal with the problem of holding those to be tried in the National system against Rwandan law, and was eager to take suggestions as to what would be the best way to approach accountability for genocide, but unwilling to consider any possibility of amnesty.<sup>68</sup>

#### D. Rule of Law Implications

National and *Gacaca* courts both stress accountability, favoring those who confess and give the names of individuals who were involved with them. This has caused the number expected to

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<sup>65</sup> Schabas, *supra* note 22. Schabas is convinced that most questions about Rwandan court systems come from those who are simply not used to a civil law system, and those who are familiar with civil law realize that Rwanda is becoming an exemplar of its use in a pos-conflict reconstructed judiciary.

<sup>66</sup> *Id.* at 880.

<sup>67</sup> *Id.* at 881. For more on the impossibility of a functional Rwandan government, see also William A. Schabas, *Justice, Democracy, and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems*, 8 *Crim. L. Forum* (1997) 523; William A. Schabas, *The Rwandan Case: Sometimes it's Impossible*, in M.C. Bassiouni (ed.), *POST-CONFLICT JUSTICE* (Ardsley, New York: Transnational, 2002) 499.

<sup>68</sup> This is evidenced by the Kigali Conference called for by Rwanda's President at the time, Pasteur Bizimungu, and the government's quickness to adopt the recommendations of the conference less than six months after its conclusion. *Id.* at 881.

be prosecuted by the Rwandan courts to increase exponentially from approximately 100,000 to over 1,000,000, causing a feeling amongst many Rwandans that they may be falsely accused of crimes they had nothing to do with.<sup>69</sup> With these new numbers, nearly 1/3 of the adult population stands likely to be prosecuted under the gacaca or National court systems.<sup>70</sup> These numbers are confirmed by a database prepared by ICTR investigators listing 550,000 suspects. This is based upon 87,000 genocide files assembled by Prosecutors as part of a German technical assistance department (GTZ) that is to be provided to the gacaca tribunals by the ICTR.<sup>71</sup>

While the Gacaca system has a website containing reports about the numbers of people who have been tried, it is unclear whether most of the tables are referring to trials that have taken place already in the process of trying the first 60,000 or whether it is a list of those who are to be prosecuted. Organizations such as Penal Reform International have been permitted to enter the detention facilities and even to interview those incarcerated therein, but there is little speculation as to what actual numbers detained may be, and for how long the average prisoner is detained.

One thing is clear, though. Hundreds of thousands of Rwandan citizens remain incarcerated while awaiting their trial. And more than 90,000 have already died while incarcerated.<sup>72</sup> These are shocking numbers when one considers that more than 760,000, slightly less than ½ of the adult male Hutu population in 1994, stand accused and await trial in the National and Gacaca systems according to the most recent available estimates.<sup>73</sup>

This poses serious implications for the rule of law. And the United Nations, though it has contributed to the efforts to create the gigantic lists of accused to be tried in Gacaca, is also

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<sup>69</sup> See PRI Gacaca Report on Community Service, *supra* note 49 at 26-32; See also Schabas, *supra* note 22 at 891-4.

<sup>70</sup> See Schabas, *supra* note 22. at 892.

<sup>71</sup> *Id.* (citing *UN Tribunal's Database of Genocide Suspects Ready for Use*, Xinhua News Agency, 20 Dec 2004).

<sup>72</sup> See "Report of Others Important Informations," NATIONAL SERVICE OF GACACA JURISDICTIONS, *Available at* <http://www.inkiko-gacaca.gov.rw/pdf/others%20informations.pdf>.

<sup>73</sup> Christopher J. Le Mon, *Rwanda's Troubled Gacaca Courts*, 14 No. 2 Hum. Rts. Brief 16 (Winter 2007).

playing a very important role in helping to try the highest levels of prisoners so that they can receive a fair trial outside of their home country where they would likely not find any impartial members of the community. This helps to add to legitimacy of the overall process in the eyes of the international community.<sup>74</sup> While the ICTR is regarded as successful in its trials, it is criticized for its inability to finish the amount of trials it needs to.<sup>75</sup> Additionally, there is much to be said for the fact that the ICTR has provided the list of hundreds of thousands accused of participation in the genocide. Has the UN become an enabler of rule of law violations? Or is the ICTR simply helping to bring order to what may otherwise be a completely chaotic system eliciting confessions from every man and boy who was a member of the wrong tribe in 1994. While the ICTR has its jurisdiction over those incarcerated within its borders, and has the right to hold those accused of crimes against humanity for lengthy periods, it is less clear that the Rwandan National court system and gacaca tribunals have the right to hold, almost indefinitely, the hundreds of thousands whose names were provided by the ICTR.<sup>76</sup>

Putting aside the issue of what role the UN sponsored ICTR plays in this scenario for the moment; let us take note of the implications of possible rule of law violations on the local and regional levels. Turning back to the definition proffered at the beginning of this essay, we are

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<sup>74</sup> See Erik Mose, *Appraising the Role of the ICTR—Main Achievements of the ICTR*, INT'L J. CRIM. JUST. 3.4(920) (2005);

<sup>75</sup> While the focus of this article is not on the ICTR, it is important to note that while it is criticized for not being able to complete its work in the time allotted, it is also widely posited that the UN should not have put such stringent time restrictions on the ICTR, forcing it to request continuances and possibly to hurry cases along when it has been running relatively smoothly and providing for what are increasingly being called fair trials in a matter that involves such unspeakable crimes that one would find it hard to imagine finding advocates to defend some of the highest level offenders. For more information on the ICTR's strategy for completion see Statement by Justice Hassan B. Jallow, Prosecutor of the ICTR, to the U.N. Security Council 10<sup>th</sup> December 2007, *available at* <http://69.94.11.53/default.htm>; Judge Dennis Byron, President [of the ICTR] Address To The United Nations Security Council: Six-Monthly Report on The Completion Strategy [of] The International Criminal Tribunal For Rwanda, 10 December 2007, *available at* <http://69.94.11.53/default.htm>; Report to The United Nations Security Council on the Completion Strategy of the International Criminal Tribunal for Rwanda by the President and Prosecutor of the Tribunal, 20 November 2007, U.N. S/2007/676, *available at* <http://69.94.11.53/default.htm>; Justice Hassan B. Jallow, Chief Prosecutor, ICTR Guest Lecture at the T.M.C. Asser Institute, The Hague, 4 Oct 2006, *available at* [http://69.94.11.53/ENGLISH/colloquium06/ictr\\_completion.pdf](http://69.94.11.53/ENGLISH/colloquium06/ictr_completion.pdf);

<sup>76</sup> See Schabas, *supra* note 22. at 892.

compelled to examine whether there are laws that are clear, effectively communicated, provide equal treatment to all, instilling enough fear to cause a second thought about committing a crime as well as a feeling of safety that comes with feeling as if those who commit crimes will be punished, all while providing for the most basic human rights every person should be guaranteed.

While it is true that these laws enacted post-genocide are punishing for some of the most unthinkable atrocities known to man, Rwanda is and has long been a deeply divided society.<sup>77</sup> It can justifiably be argued that the prosecutions are just victor's justice, the party in power at the moment punishing the tribe that was last in power and abusive. Granted, there is a system of justice being implemented in the current times, and none can accuse the current government of causing the unwarranted killing of people solely based on their tribal affiliation and want for revenge against those who harmed one's people in the past, can they? Is it really so outlandish to compare the current human rights violations of inhumane prison conditions and decade-long detention while awaiting trial combining to cause the death of nearly 100,000 inmates to *genocide*? Yes. It is. While it may not be possible to keep all in prison alive, surely not all are dying from inhumane conditions, a portion must be of natural causes, or disease (HIV, malaria, tuberculosis, measles, and tetanus are all rampant in Rwanda).<sup>78</sup> And death in a prison system is not the same as having one's head chopped off with a machete.

As noted earlier, there were laws in place in Rwanda that guaranteed the people the right to at least a hearing regarding their detention within one week for being detained.<sup>79</sup> These laws have since been amended to adjust the role of the judiciary to deal with atrocities that were

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<sup>77</sup> See Report of Promotional Mission, *supra* note 53 at 7. It notes in its preliminary observations that "the climate of ethnic exclusion and political instability of more than 30 years has for a long time compelled a number of Rwandans to live in exile in the neighboring countries and elsewhere in the world, since the 1950s, giving birth to the problem of refugees, which has been one of the factors which caused the explosion of armed conflicts in the 1990s and which, in part, led to the 1994 genocide." *Id.*

<sup>78</sup> *Id.* at 11.

<sup>79</sup> See Code de Procédure Pénale, *supra* note 35.

perpetrated leading to the killing of approximately 800,000 Rwandan citizens, nearly as many are expected to be tried for their part in the events of 1994.<sup>80</sup> But is it fair to forget about the human rights of those who are accused of crimes just because it is unfathomable to most people how anybody could have become involved in something such as the systematic extermination of a tribe of people?

On one hand, it goes against the very meaning of rule of law as defined in this essay for the government to hold members of one tribe in custody for such lengthy periods while they await trial, but on the other hand, those in custody are accused of participation in *crimes against humanity*. But does this give a government run by their rival tribe the right to subject them to violations of human rights before they even have the chance to be heard? Doesn't that make the government in power now just as bad as those whom they have set up these tribunals to give fair trials to? No, and No.

The Rwandan government is making the most concerted effort in recent history to bring to justice all of those involved in the crime of crimes, but it is extremely important that it does so in a manner that ensures it is not violating human rights.<sup>81</sup> Because in the case of human rights violations, it does not matter what you do it in the name of, you are still taking away the rights that a human being is guaranteed. While the world sat by and did not intervene in Rwanda's genocide, just as it is watching idly in the Sudan today, the human rights community seems to be more up-in-arms about the treatment of these prisoners than those who are being viciously murdered for no reason. This is just a testament to the fact that a rule of law actually does exist in Rwanda today.<sup>82</sup>The Report of Promotional Mission Undertaken by Commissioner Mohamed

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<sup>80</sup> See Schabas, *supra* note 22 at 894.

<sup>81</sup> *Supra*, note 53.

<sup>82</sup> *Id.*

Abdellahi Ould Babana in Rwanda<sup>83</sup> gives legal justification for its mission to Rwanda. During the early 1990s Rwanda did not submit reports as it was required to do under the Banjul Charter,<sup>84</sup> and again failed to submit a periodic report prior to 2004, thus the African Commission on Human and People's rights (ACHPR) had legal justification to come into the country and assess the situation of human rights in Rwanda.<sup>85</sup> While there are found to be human rights inadequacies occurring, both the Rwandan government and the African Union are working together with the UN and other NGOs to ensure that all problems are being dealt with in as timely a manner as possible.<sup>86</sup> Gacaca is a perfect example of this- its very creation stemmed from Rwanda fearing it would not be complying with the Banjul Charter and consequent appeal to the African Community to meet and help it come up with a solution.<sup>87</sup> Rwanda even has a National Human Rights Commission, tasked with protection and promotion of peoples' rights in Rwanda, mandated by the 2003 Constitution.<sup>88</sup>

So, are the rule of law objectives embodied in the African Union's Human & People's Rights Charter being frustrated by the Gacaca system? Perhaps. But according to interviews taken by Penal Reform International, there is hope for the Gacaca system and its community service based commuted sentences for those who plead guilty.<sup>89</sup> While this same system is

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<sup>83</sup> *Id.*

<sup>84</sup> *Supra*, note 5.

<sup>85</sup> The report notes many inadequacies when it comes to human rights of people in Rwanda, but they are not limited to just the prisons. In fact, while there are people in need of help with the most basic human rights, often the focus is placed, financially and in use of resources, on monitoring and improving prisoners' living conditions and helping to ensure that they are given a trial as quickly as possible. It is noted that the Rwandan constitution of 2003 incorporates the African Charter of Human and People's Rights in its preamble and devotes a whole chapter to fundamental rights of a human being as well as rights and responsibilities of citizens. It also notes that Rwanda has ratified the Charter on Human and People's rights, as well as the UDHR, the International Convention Relative to Civil and Political Rights, the International Convention Relative to Economic, Social, and Cultural Rights, and the Geneva Convention, amongst others. *Id.* at 5-6.

<sup>86</sup> *See Id.*

<sup>87</sup> *Id.* at 13. *See also generally* Schabas, *supra* note 22.

<sup>88</sup> *Supra*

<sup>89</sup> *See* PRI Gacaca Community Service Report, *supra* note 49 at 27.

criticized for causing some inside the prisons to lead propaganda campaigns against it out of fear of being falsely accused themselves, the research seems to show that the program is well-received overall, and that in fact both the victims allowed to take advantage of the community service and those serving their time in that manner seem to have the same objective- giving back to the victims and helping to rebuild a society that they participated in the destruction of.<sup>90</sup> Realization of the destruction that they have caused in the lives of so many has caused many to confess, saying they do not believe the country can be rebuilt without their help since they rendered so many victims unable to care for themselves and their homes and land.

#### **IV. Suggestions**

The best suggestions that can be made seem to be already in the works by the government of Rwanda, working together with the African Union and UN to remedy the human rights problems that currently exist, and, most importantly, focusing on the education of the children. Because the non-accused population is so young, the future lies squarely in the hands of the children. The ACHPR Report<sup>91</sup> not only recommends that Rwanda carry out education programs, it also notes and commends the Rwandan government for its continued efforts of education related to human rights issues, as well as dedication to providing an overall better learning environment. On this, Constance F. Morrill writes:

Making room in Rwandan society to consider the value in promoting the peace-building potential of youth detainees who have been provisionally released from prison also holds symbolic significance for adults, and can have a unifying effect. Practically speaking, “sensitizing” or shifting Rwandan society’s collective focus to the benefits of educating and supporting youth-particularly those who are found innocent via the Gacaca – is a palpable metaphor for reconciliation and for moving toward the future with some hope.<sup>92</sup>

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<sup>90</sup> *Id.* at 29.

<sup>91</sup> *Supra*, note 53.

<sup>92</sup> Constance F. Morrill, *Reconciliation and the Gacaca: The Perceptions and Peace-Building Potential of Rwandan Youth Detainees*, 6 Online J. of Peace and Conf. Res. 1 (Fall 2004), available at [http://www.trinstitute.org/ojpcr/6\\_1morrill1.pdf](http://www.trinstitute.org/ojpcr/6_1morrill1.pdf).

Perhaps Ms. Morrill is right, and the best step in the direction of creating a society that respects the rule of law that its government is so desperately trying to build over the long term is to target the future generations. We know that terrorist groups target children when they are impressionable with stories of all the glory that comes with violence. Perhaps targeting the youth of Rwanda (or any country for that matter) with romantic tales of a peaceful society will have the same effect. In any event, it can't hurt to attempt to teach peace. It seems like there is little else left for Rwanda to try at this point. At the rate Gacaca is going, children who aren't even born yet will be the ones trying the final genocide cases in Rwanda. Doesn't it make sense, then, to train the youth to respect the law and to be impartial so that they can play an important role in creating a future in a society that may have a chance for success?

## **V. Conclusion**

Rule of Law is a concept that seems so simple, yet its definition is so heavily debated that one may often be perplexed about what to make of it. With so many differing ideas and definitions, it is important to find the definition, or combination of definitions, that best fits the context to which you plan to apply it. In the case of post-conflict governmental reconstruction I have determined that rule of law need only be based upon the most simple building blocks. Clear, concise laws that are well communicated to the people are the first step. In addition, it is necessary that these laws not only hold the lawmakers (and everyone in society for that matter) to the same standards, but also that the citizens believe this is the case, and that they will be punished for their wrongdoings, but so will the "bad guys". I have also determined that to effectively ensure all people are treated equally under the laws, it is necessary to ensure that the

most fundamental human rights (at the very least) are guaranteed by these laws. These rights can basically be those determined by the Universal Declaration of Human Rights, or if the country has not adopted the UDHR, any similar regional charter or treaty should be the source where these rights are enumerated.

In the case of post-genocide Rwanda, there was already a document, the African Charter on Human and People's Rights, that Rwanda was bound by prior to the genocide. The African Charter contains a provision that the nations intend to be bound by and reaffirm their convictions to the UNDHR, and it also lays out more personal and civil rights that all countries party to it must adopt and create legislation to help enforce. When attempting to bring the society back to order post-genocide, it was necessary for Rwanda's Constitution to be amended, but at no time did it try to back out on its responsibilities under the African Charter. There is certainly a question of whether people are being detained for lengthy periods prior to receiving a trial of any kind in violation of a specifically enumerated right in the African Charter (Article 7) but under the circumstances it certainly appears that both the Rwandan government and the African Union are doing all that they possibly can to correct any human rights issues that are occurring. Creation of the Gacaca system was the first step in remedying the problem of too many trials and not enough judicial power.

With the limited resources available, and in comparison to some other similarly situated countries, Rwanda actually seems to be a model of a budding democracy. With the help of the ICTR the highest level of offenders should all be tried within the next few years. This is not to say that there have not been excessively long detentions and complaints of poor living conditions, accusations that human rights organizations speaking out against the Gacaca system are being banned from observing the trials, charges of misconduct against the judiciary as well as

government officials. But what country doesn't have all of those accusations? While it may be sad to think of it this way, in comparison with the rest of the world, Rwanda's Gacaca system, implemented with the help of the UN ICTR, may be one of the most just systems (at least of those trying war criminals in post-conflict developing countries).

There is always room for criticism, but I have come to be convinced that the good of the Gacaca system outweighs the problems. Rwanda could benefit from some extra outside assistance, but under the circumstances, the Gacaca system seems like the best possible way to prosecute such a large number of people. Rwanda could, of course, adopt some sort of amnesty program that would free many of the lowest level offenders, but it is actually doing that with its community service programs. According to recent studies, those convicted and then sentenced to community service actually feel that they have been pardoned, since they realize the crimes they have committed far outweigh this punishment, but it is also a way for them to give back to the people they have harmed. In the end, only time will tell whether Rwanda and the African Union will be thrown too far off track in the short term to return to their long-term rule of law goals of creating a stable system of rule of law that guarantees basic rights to all.