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Rwanda's Troubled Gacaca Courts

by Christopher J. Le Mon*

Many countries emerging from periods of mass violence or dictatorship have recognized the limits inherent in criminal prosecutions. In such cases, transitioning societies have decided that criminal trials simply cannot address the wide scope of the crimes committed, bring to justice the large number of perpetrators, or promote the country's need for reconciliation. As a result, these transitioning societies have chosen to prosecute only the most senior perpetrators of past violence, and have created alternative justice mechanisms such as truth commissions or lustration programs to address the crimes committed by lower-level actors. Rwanda, however, has differed in its response to the mass atrocities of its recent past.

From April to July 1994, Rwanda's ethnic Tutsis and moderate Hutus were targeted for extinction in a genocide that had been planned for years. At least 800,000 people were killed in the violence that ensued. The number of people suspected of taking part in the killings was staggering: state authorities have estimated that more than 761,000 persons, or slightly less than half the adult male Hutu population of Rwanda in 1994, ultimately would be accused of crimes related to the genocide.¹

After the violence subsided, Rwanda's government, like others emerging from periods of atrocity or repression, had numerous goals: to rebuild the country, establish a historical record of the genocide, ensure that those who committed crimes did not escape with impunity, impart to survivors and victims that justice was being done, and reintegrate the vast numbers of perpetrators into their communities without provoking retributive violence against them. Like many transitioning societies, however, Rwanda's courts were in shambles, and prosecution and imprisonment of all perpetrators seemed an impossible task.² But while many other countries responded to similar dilemmas by devising alternatives to widespread prosecutions, Rwanda embraced a model centered on criminal prosecution. In an attempt to overcome its institutional incapacities and the logistical hurdles involved in such an endeavor, the government took a traditional Rwandan mechanism, known as *gacaca*, and transformed it into a system of informal criminal courts, which it called *gacaca* courts.

The details of Rwanda's *gacaca* court system have been explored at length by other authors, and so I recount them only briefly here.³ Historically, a *gacaca* was a community-based informal arbitration convened by the parties to a civil dispute; its legitimacy was founded upon the willing participation of the parties and the community. The parties typically chose a respected person to serve as a neutral arbiter, and the outcome was limited to resolution of the minor dispute at hand. *Gacaca* had as its goal the achievement of a settlement that was accepted by both

parties to the dispute, and the restoration of tranquility within the community.

Yet the *gacaca* courts established to try perpetrators of the 1994 genocide bear sharp contrast to this traditional Rwandan conciliation institution for which they are named. *Gacaca* courts are state-sanctioned criminal tribunals created by statute, whose legitimacy is derived from their status as governmental institutions. Their stated functions are to punish crimes committed during the genocide, establish a truthful history of that period, eliminate a "culture of impunity" within Rwanda, and reconcile Rwandans with each other.⁴ Their mandate empowers them as the courts of first instance for cases ranging from theft or destruction of property through homicide. Judges for *gacaca* courts are chosen by community election; they are given minimal training in criminal law, serve without pay, and may impose sentences ranging up to 30 years' imprisonment. Each adult Rwandan not accused of involvement in crimes during the genocide is tasked with taking part in the *gacaca* court proceedings as a type of co-prosecutor and witness.



Courtesy of Guyneth Hesser

Billboard of the Gacaca

Most commentary on Rwanda's *gacaca* courts can be roughly grouped into three categories. The most critical measures the *gacaca* court process against objective international human rights standards, and finds it to be sorely lacking. Meanwhile, the panglossian position celebrates *gacaca* courts as a novel new direction in transitional justice, one that couples traditional local institutions with more modern judicial practices, and will be responsible for transformative democratic change in Rwanda. The middle position accepts both the former criticism, and, drawing somewhat on the latter applause, concludes that given the resource limitations and the political and social conditions in post-genocide Rwanda, genocide trials by *gacaca* courts were the best possible mechanism for attempting to achieve Rwanda's transitional justice goals. Although commentators espousing either the critical or pan-

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glossian positions take the time to challenge the other, little attention has been devoted to questioning the moderate position, namely that Rwanda could not have done any better, given its social and political situation.

By relying on gacaca courts, Rwanda sought to pursue a comprehensive prosecution strategy and set out to try every person who took part in the genocide. But for the hundreds of thousands of accused perpetrators, the Rwandan government has lowered its standards of justice in the name of expediting trials and convictions. And in pursuing prosecutions of questionable fairness, the government may also have sacrificed the possibility of societal reconciliation and risked unleashing another cycle of violence in a country that has yet to recover from the genocide.

courts likely face shorter overall terms of imprisonment (including pretrial detention) regardless of the verdict. For a criminal defendant, then, categorization is critical.

Soon after the gacaca courts' inception, the media began uncovering incidents of gacaca court judges being bribed by defendants in order to ensure that the defendants' cases were not classified as Category One, and thus making certain that defendants would appear before gacaca courts rather than ordinary criminal courts.⁷ Further, since gacaca proceedings began in mid-2006, corruption scandals have only continued, further marring public support for these courts. Under the law establishing the gacaca courts, judges (who number approximately 200,000) serve without pay, thus raising their susceptibility to corruption. Although no com-

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TACKLING CORRUPTION WITHIN GACACA COURTS

Early on, many Rwandans believed that the gacaca court system could serve as an effective transitional justice mechanism for their troubled country. During an 18-month pilot phase that established a mere 750 gacaca courts across the country, more than 2000 defendants pleaded guilty, and during the first nine months of nationwide gacaca court trials, nearly 6000 defendants were convicted. For comparison, a total of just over 7000 were tried by Rwandan criminal courts from 1996 to 2002.⁵ However, even in the initial stages of this process, not everyone believed the gacaca courts would be fair; more than 10,000 Rwandans fled the country in anticipation of gacaca court inquiries, fearing “false accusations and unfair trials.”⁶ Unfortunately, many of these fears were quickly realized.

Troubles began with the first phase of the gacaca trials. At this stage, cell-level gacaca courts were tasked with classifying the crimes of which defendants stood accused. Category One crimes include the planning or organization of killings, as well as the commission of sexual crimes such as rape. Rwanda's ordinary criminal courts retain jurisdiction over these Category One offenses, which carry with them penalties ranging from 25 years imprisonment to capital punishment. By contrast, murder, complicity in murder, and causing bodily injury are classified as Category Two offenses, while property crimes fall under Category Three. These Category Two and Three crimes are tried before gacaca courts, with the possibility of more lenient punishment – including community service and credit for pretrial detention. Moreover, a defendant in Rwanda's judicial system faces an agonizing wait before the beginning of an ordinary criminal trial; because gacaca court trials for most defendants would begin far sooner than trial by the ordinary criminal courts, defendants who are prosecuted in the gacaca

prehensive statistics are available to establish the exact number of gacaca court judges accused of bribery or removed from their positions, news articles from the Rwandan media announce with unfortunate regularity such occurrences.⁸

Perhaps more important than the number of gacaca court judges sacked for corruption, however, is the public perception of judicial wrongdoing. Given the prevalence of media reports citing such bribery, and their geographical distribution, many people believe that there is a widespread problem of corruption among gacaca court officials. Public statements by the administrative head of the gacaca courts confirm that the Rwandan government itself recognizes the seriousness of the bribery issue.⁹

VIOLENCE AND THREATS OF VIOLENCE DETERRING WITNESSES

Even more concerning than corruption scandals is the increase in violence toward genocide survivors who are called as witnesses in gacaca court trials, and toward gacaca court officials themselves. Sadly, a number of witnesses and gacaca court officials have been killed across the country, often in a brutal manner echoing the savagery that marked the 1994 genocide. In one chilling case, the president of a gacaca court in Gisanza cell was murdered, with her body “hacked into pieces” and her “eyes plucked out.”¹⁰

A recent report by a respected Rwandan human rights organization concludes that gacaca court witnesses suffer harassment and intimidation, and lack physical security.¹¹ In the second half of 2006 alone, at least 40 gacaca court witnesses were victims of murder or attempted murder.¹² According to another Rwandan NGO that tracks reprisals, this figure represents a severe rise in the level of violence against gacaca court witnesses. One witness had her house set on fire while her family slept inside; they narrowly escaped.¹³ Another witness, an 80 year-old widow, survived after

she, her daughter, and her grandchildren were attacked with a machete.¹⁴ Although these egregious incidents of violence were reported, it seems likely that many other attacks have not found their way into the media.

Clearly, attacks against witnesses are aimed at discouraging or punishing testimony before the gacaca courts. Threats of violence have had a chilling effect on witness testimony, and thus on the ability of gacaca courts both to establish a historical record of the genocide and to signal an end to impunity. Entire communities of survivors have refused to testify after suffering harassment and threats, afraid to risk their lives after receiving no action or reassurance of safety from police or other state authorities.¹⁵ In a cruel twist of fate, at least one gacaca court conducted its proceedings at the precise site where remains of genocide victims had been hastily buried in 1994, though as a result of threats from a perpetrator's family, "no member of the 450 families in the three villages came up to reveal the information."¹⁶

that "attendees, often numerous, only participated minimally in the proceedings."²¹ From this, Human Rights Watch has concluded that gacaca courts "were supposed to draw their legitimacy from popular participation, but many Rwandans did not trust them and boycotted the sessions."²² As one goal of the gacaca courts is to create among the citizenry an established truth of what occurred during the genocide, this marked decline in public participation bodes poorly for the effectiveness of this justice strategy.

The reasons for the decline in public participation are varied. As noted above, these include the fear of violence against participants, and the perception that gacaca court judges are corrupt. In addition, tens of thousands of gacaca court judges have been accused of participating themselves in crimes during the genocide; no doubt the suspected culpability of those intended to sit in judgment has discouraged or intimidated potential witnesses.²³

“So long as this intolerance for criticism remains, the public disaffection with the gacaca courts will result not in needed policy shifts, but instead in decreasing participation and abandonment of the noble goals that the gacaca courts set out to accomplish.”

The pattern of violence surrounding the gacaca courts is not lost on Rwandan citizens. As an opinion piece in Rwanda's leading daily newspaper noted, "[o]ne may wonder why all the deaths today are associated with either Gacaca leaders or genocide survivors."¹⁷ The violence against gacaca court officials and witnesses preparing to testify in genocide trials before the gacaca courts has become so severe that Rwandan president Paul Kagame and other senior government officials have highlighted it as a rising concern, urging Rwandans to take steps to prevent it.¹⁸ But in spite of such calls for solidarity with survivors and victims, the reactions to these killings and acts of intimidation offer further evidence of the continuing divide within Rwanda; while victims and survivors have spoken out against these serious problems, persons who have been accused of crimes, or who fear being so accused, have remained silent even when present at the murder of gacaca court witnesses.¹⁹

PUBLIC PARTICIPATION EVAPORATING

In another ominous sign for gacaca courts, public participation in these proceedings is on the decline. Penal Reform International has reported that although attendance at gacaca court proceedings has remained high (likely in part due to the fact that absence is punishable by law), participation has markedly decreased since the proceedings began.²⁰ Avocats Sans Frontières, a Belgian human rights NGO, seconded this observation, noting

With Rwandan citizens increasingly detached from the process of rendering justice in gacaca courts, the country seems close to a dangerous abandonment by would-be participants of the goals of the gacaca courts process. If this continues, many survivors will not testify about their experiences, and perpetrators may not be convicted of all the crimes they committed. As Penal Reform International concludes, "a meaningful participation of the population is the only way to know the truth about the genocide intimately and also to give full meaning to a process where the final objective is to lead to the reconciliation of Rwandans."²⁴ In the absence of meaningful public participation in the gacaca proceedings, it will also prove impossible to establish a historical record of the genocide, conduct fair trials, or impart to survivors and victims that justice has been done.²⁵

FAILURE TO PROVIDE RECONCILIATION

Another of the gacaca courts' goals, namely societal reconciliation, is proving elusive as well. In particular, the refusal of the gacaca courts to investigate crimes committed by Rwandan Patriotic Army (RPA) forces (who were led by Rwanda's current president Paul Kagame)²⁶ against Hutu civilians, or reprisal attacks after the genocide, have led many Hutus to question the stated goal of reconciliation.²⁷ Instead of healing the rift between Hutus and Tutsis, the operation of the gacaca courts is threatening to

reinforce it by affirming group personas of victim and perpetrator, innocent and guilty.

In part, it is the gacaca courts' structure, which pits the population against the perpetrators, that makes them unlikely to be able to effect societal reconciliation. Even traditional criminal trials, which by their adversarial nature focus on determining individual guilt rather than establishing a comprehensive historical truth, focus on retribution and deterrence at the expense of reconciliation. If ordinary criminal prosecutions do not constitute a justice strategy conducive to reconciliation, gacaca court trials, which are administered by minimally-trained civilians without significant organization or legal rules, are even less likely to do so.

Even the official explanation by the Rwandan government of the reconciliatory effect of the gacaca courts fails to convince, reading more like a chance for participatory popular punishment, rather than an opportunity to bring together perpetrators, victims, and survivors. In one official document, the government has explained:

The Gacaca Courts system will allow the population of the same Cell, the same Sector to work together in order to judge those who have participated in the genocide, identify the victims and rehabilitate the innocents. The Gacaca Courts system will thus become the basis of collaboration and unity ...²⁸

To the extent, however, that gacaca court proceedings assign collective guilt to Hutus by ignoring crimes committed by the RPA, and permit primarily Tutsi survivors to stand in judgment of primarily Hutu perpetrators, gacaca courts will hinder reconciliation within the country. As William Schabas has noted, “[r]ather than resolve the outstanding cases ... the initial gacaca [court] hearings appear to have opened a Pandora’s box.”²⁹

NO ROOM FOR CRITICISM

Given these concerns, the absence of political space for criticism of the gacaca courts is disconcerting. When a member of Rwanda’s senate misspoke in response to a legal question about the powers of the gacaca courts, his statement was made out to be “a scandalous attack on Gacaca courts.” Three commissions of inquiry were opened, and the senator faced severe pressure to resign from office.³⁰ Because of incidents like this, many Rwandans have been too intimidated to challenge gacaca courts.

The Rwandan government has itself undermined its policy of national unity, at times having accused those who have spoken out against gacaca courts of harboring a “genocidal ideology.”³¹ One local government official, who accused Rwandans that failed to attend gacaca court proceedings of having “genocide and ethnic ideologies,” threatened that their continuing failure to attend would be “seriously punished.” Illustratively, the citizens were undertaking a boycott of the local gacaca court based on allegations that the judges had been soliciting bribes from criminal defendants.³²

Human rights groups have also been forced to suspend their operations, sometimes permanently, after questioning aspects of the gacaca court process. Human Rights Watch has noted that “as high-level [Rwandan government] officials focused on ‘genocidal ideology’ in speeches and ceremonies, Rwandan and international NGOs tailored their activities to avoid confrontation with authorities. Human rights organizations ... avoided taking stands likely to draw official ire.”³³ Unfortunately, this government crackdown

on criticism has served to silence those best positioned to speak frankly about the gacaca process.

Ordinary citizens have suffered from the government’s conflation of criticism regarding gacaca courts and disloyalty to the state, as well, and sadly there are signs that this climate of intolerance for criticism may be undermining the very participation upon which the legitimacy of the gacaca courts depends. As such, gacaca courts have not led to the sort of “democratic dialogue” between the governed and the government that they might otherwise have fostered.³⁴



Courtesy of Guyneth Heiser

St. Famille Church in Kigali, site of where many sought refuge during the genocide.

CONCLUSION

Torn between the need to reconcile a deeply divided population and the duty, both moral and legal, to punish those who sought to eradicate an entire people, Rwanda’s attempt at combining criminal justice and community reconciliation might have provided a “third way” for societies in transition. As it has been implemented, however, the gacaca court system — fraught with corruption and violence, and insulated from much-needed change by a government that brooks no criticism — is quickly proving that in seeking to achieve both justice and reconciliation, the gacaca courts may very well achieve neither.

Sadly, the net effect of the gacaca courts on the development of open discussion in Rwanda has been nil to negative; not only has their operation not resulted in a free dialogue between the government and the population, they instead have provided another basis for the government to accuse critics and dissenters of possessing a “divisive ideology.”³⁵ So long as this intolerance for criticism remains, the public disaffection with the gacaca courts will result not in needed policy shifts, but instead in decreasing participation and abandonment of the noble goals that the gacaca courts set out to accomplish. Unfortunately, the establishment of the gacaca court system may foreclose the possibility of other transitional justice institutions, such as a truth commission, that could help the country to achieve reconciliation.

Ultimately, then, the gacaca courts likely will be unable to achieve their stated goals of psychologically rebuilding Rwanda,

establishing a historical record of the genocide, avoiding impunity, showing that justice is being done, and reintegrating hundreds of thousands of perpetrators into their communities without provoking retributive violence. By themselves, the gacaca courts today seem to be offering only popular punishment — and “popular” only in the sense that it is carried out by members of the population, not in that it enjoys broad approval. Yet the gacaca courts are a reality, and the Rwandan government seems unlikely to significantly alter their operation, even in the face of obvious deficiencies.

If Rwanda is to break the cycle of violence and vengeance that has plagued it since independence, it must find a new way to achieve reconciliation between perpetrators and victims who must live side by side in a densely-populated territory. If the current relative peace is to be sustained, the government must accept that the impartial rule of law, and not draconian treatment of policy critics, can best prevent the escalation of grievance into violence. If the goals of justice and reconciliation are not met, Rwandans will live daily with the risk that another tragic collective bloodletting may follow. HRB

ENDNOTES: Rwanda's Troubled Gacaca Courts

1 See Human Rights Watch, *Overview of Human Rights Issues in Rwanda* at 1, available at <http://hrw.org/wr2k6/pdf/rwanda.pdf> (Jan. 2006) (accessed Dec. 4, 2006) (761,000 figure); Compare with Jacques Fierens, “Gacaca Courts: Between Fantasy and Reality,” 3 J. Int'l Crim. Just. 896, 897 (2005) (“no other genocide has torn apart the social fabric to this extent, as those in power mobilized an unprecedented majority of the civilian population against a minority which often included neighbours, friends and relatives.”).

2 Compare Rwanda National Service of Gacaca Jurisdictions, “Gacaca Overview,” available at <http://www.inkiko-gacaca.gov.rw/En/EnIntroduction.htm> (gacaca courts were created in part because of estimates that ordinary criminal trials of the roughly 120,000 Rwandans already imprisoned for crimes relating to the genocide “would take more than a century”), with CIA World Factbook, “Rwanda,” available at <https://www.cia.gov/cia/publications/factbook/geos/rw.html> (accessed Dec. 9, 2006) (average Rwandan life expectancy is 47.3 years).

3 See generally Erin Daly, *Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda*, 34 N.Y.U. J. Int'l L. & Pol. 355 (2002); Fierens, “Gacaca Courts: Between Fantasy and Reality”; William A. Schabas, *Genocide Trials and Gacaca Courts*, 3 J. Int'l Crim. Just. 879 (2005).

4 See Rwanda National Service of Gacaca Jurisdictions, “The Objectives of the Gacaca Courts,” available at <http://www.inkiko-gacaca.gov.rw/En/EnObjectives.htm> (last visited Dec. 10, 2006).

5 See Amnesty International, “Gacaca: A Question of Justice,” at 17 (Dec. 2002), available at [http://web.amnesty.org/library/pdf/AFR470072002ENGLISH/\\$File/AFR4700702.pdf](http://web.amnesty.org/library/pdf/AFR470072002ENGLISH/$File/AFR4700702.pdf) (accessed Dec. 1, 2006).

6 Human Rights Watch, *supra* note 1, at 1.

7 See, e.g., *The New Times (Kigali)*, “Gacaca Judges Arrested Over Corruption,” (Sept. 26, 2006).

8 See, e.g., *The New Times (Kigali)*, “Gacaca Judges Fired Over Corruption,” (Dec. 12, 2006); Emmy Namurinda, *The New Times (Kigali)*, “Gacaca Judges, Leaders Grilled,” (Nov. 19, 2006); *The New Times (Kigali)*, “Corrupt Inyangamugayo Will Hurt Gacaca Justice,” (Sept. 30, 2006); *The New Times (Kigali)*, “Graft Threatens Gacaca Courts,” (Sept. 27, 2006); *The New Times (Kigali)*, “Gacaca President Held Over Corruption,” (Sept. 19, 2006).

9 See *The New Times (Kigali)*, “Graft Threatens Gacaca Courts,” (Executive Secretary of the National Service of Gacaca Jurisdictions said to comment that “corruption had eaten into some Gacaca courts”).

10 Paul Ntambara, *The New Times (Kigali)*, “Gacaca Head Murdered,” (Nov. 26, 2006) (referring to “anti-Gacaca campaign against genocide survivors and Gacaca judges”).

11 Edward K. Mwesigye, *The New Times (Kigali)*, “LIPRODHOR Launches Report on Gacaca,” (Nov. 21, 2006).

12 Karen McVeigh, *The Observer (London)*, “Spate of Killings Obstructs Rwanda's Quest for Justice,” (Dec. 3, 2006).

13 *The New Times (Kigali)*, “Gacaca Witness' House Set Ablaze,” (Oct. 22, 2006).

14 *The New Times (Kigali)*, “Gacaca Witnesses Attacked,” (Dec. 18, 2006).

15 See Steven Baguma, *The New Times (Kigali)*, “Genocide Survivor Boycotts Gacaca, Cites Harassment,” (Nov. 16, 2006).

16 *The New Times (Kigali)*, “Mushubati Residents Silent on Genocide Remains,” (Dec. 14, 2006).

17 Gashhegu Muramila, *The New Times (Kigali)*, “Why France Should Keep Quiet,” (Nov. 27, 2006).

18 See *The New Times (Kigali)*, “Stern Measures Adopted for Survivors' Murders,” (Dec. 21, 2006); Robert Mukombozi, *The New Times (Kigali)*, “Kagame Warns on Killings,” (Nov. 28, 2006).

19 See Paul Ntambara and Ignatius Ssuna, *The New Times (Kigali)*, “Genocide Survivor Hacked to Death,” (Nov. 23, 2006) (“despite calls for help, no one had come to the victim's rescue”); Paul Ntambara, *The New Times (Kigali)*, “Tackle Genocide Survivors, Witnesses' Security Issue,” (Dec. 7, 2006) (“other residents looked on as Musasira [witness] was being chopped into pieces”).

20 See Penal Reform International, “Monitoring and Research Report on the Gacaca: Information-Gathering During the National Phase,” at 48 (June 2006), available at <http://www.penalreform.org/publications/reports/gacacalrep-ga8-2006-infogathering-en.pdf> (accessed Jan. 2, 2007).

21 Avocats Sans Frontières, “Rapport Annuel 2005,” at 11, available at <http://asf.be/FR/FRpropos/Rapport%202005.pdf> (accessed Dec. 10, 2006) (author's trans.).

22 Human Rights Watch, *supra* note 1, at 1.

23 *The New Times (Kigali)*, “Gacaca Jails Over 800, Acquits 700,” (Aug. 5, 2006) (citing report by Rwandan government office in charge of gacaca courts indicating that authorities suspect 45,396 gacaca court judges of having committed crimes during the genocide).

24 Penal Reform International, “Monitoring and Research Report on the Gacaca: Information-Gathering During the National Phase” at 40.

25 See *id.* at 25 (“everything depends on the active and voluntary participation of the population, which it alone can allow.”).

26 Human Rights Watch, *supra* note 1, at 1.

27 See Andrew England, *Financial Times (London)*, “Reconciliation: The Next Generation Need to Be Brought Up as Agents of Peace,” at 5 (Dec. 5, 2006).

28 Rwanda National Service of Gacaca Jurisdictions, “The Objectives of the Gacaca Courts.”

29 Schabas, *supra* note 3, at 881.

30 James Munyaneza, *The New Times (Kigali)*, “Senator Augustine Iyamuremye Under Probe,” (July 12, 2006).

31 Human Rights Watch, *supra* note 1, at 1.

32 See *The New Times (Kigali)*, “Kamembe Residents Boycott Gacaca,” (Sept. 29, 2006).

33 Human Rights Watch, *supra* note 1, at 3.

34 Cf. Aneta Wierzynska, “Consolidating Democracy Through Transitional Justice: Rwanda's Gacaca Courts,” 79 N.Y.U.L. Rev. 1934 (2004).

35 *Contra id.* at 1963, 1966 (noting that “Rwanda's power schisms are reflected within Gacaca in a way that puts the goals of justice and reconciliation at serious risk” though nonetheless concluding that “[w]ithin Gacaca, a direct link has been created between citizens and the State, Hutus and Tutsis, and ultimately between transitional justice and democracy” and referring to gacaca courts as “a purely public-generated, non-government-censored phenomenon”).