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HUMAN RIGHTS COMPLIANCE AND THE GACACA JURISDICTIONS IN RWANDA

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Abstract: Following the 1994 genocide in Rwanda, the Government of National Unity embarked upon the ambitious task of trying over 100,000 detainees suspected of participating, at some level, in the genocide. By 1998, having experienced little success with formal trials, the government began developing plans to amend the traditional dispute resolution mechanism, known as gacaca, in an attempt to achieve both justice and reconciliation. Serious criticism has been voiced over the gacaca jurisdictions, claiming, in part, that they fail to meet Rwanda's due process obligations under the International Covenant on Civil and Political Rights (ICCPR). While perhaps not conforming to the letter of the law, the gacaca jurisdictions do have the potential to embody its spirit by serving the need for justice and accountability in Rwanda while fostering a culture of human rights protection in a country that has long ignored them.

INTRODUCTION

More than eight years have passed since the 1994 genocide in Rwanda, which took the lives of between 500,000 and 800,000 Rwandanese Tutsi along with tens of thousands of politically moderate Hutu.1 Following the genocide a transition government came to power, dominated by Tutsi exiles.2 This new government "inherited a totally destroyed country, with a traumatized and impoverished population, a collapsed state and destroyed infrastructure."3 While much of the physical infrastructure has been rebuilt during the past eight years, the transitional government has been largely unable to achieve justice

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1 See Alison Des Forges, Leave None to Tell the Story: Genocide in Rwanda 14 (1999).


3 Id.
and reconciliation for the Rwandese people. In 1998, after ambitious and severely flawed attempts to try over 100,000 detainees suspected of some level of participation in the genocide, the government of Rwanda began to investigate the possibility of amending a traditional dispute resolution mechanism, called gacaca, in order to process efficiently the daunting detainee caseload in an attempt to achieve both justice and reconciliation for the country. Gacaca soon became the government of Rwanda’s latest, and perhaps best, hope to achieve both justice and reconciliation for the deeply polarized people of Rwanda. Organic Law 40/2000, (Gacaca Law) passed on January 26, 2001, clearly indicated the government’s intent to go forward with establishing gacaca jurisdictions throughout the country to try crimes associated with the 1994 genocide.

Since draft legislation on establishing gacaca jurisdictions surfaced, numerous concerns over the gacaca jurisdictions have been raised by human rights activists, lawyers’ groups, and academics over whether the Gacaca Law would signal that protection of human rights has taken a back seat to expediency. It is important to recognize, however, that the current situation itself in Rwanda constitutes a serious violation of numerous internationally protected human rights. The criticisms surrounding the gacaca jurisdictions often rely on the claim that Rwanda must comply with its international treaty obligations—namely, to the International Covenant on Civil and Political

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4 Id.
Rights (ICCPR). These criticisms fail to take into account the difficult nature of protecting human rights in developing countries. In countries like Rwanda, which are economically and infrastructurally very poor, there is little difference between protecting civil and political rights and protecting economic and social rights in that they both require countries with limited resources to enact positive law and to expend limited resources. Therefore, "[t]hese rights cannot be guaranteed in the same way in a poor country as in a rich country, despite that admonition in relevant international instruments to the contrary."11 Ultimately, the government of Rwanda must prioritize which rights it can and will protect given its limited resources and the socio-historic context in which it is operating.

This Note examines the newly legislated gacaca jurisdictions established by the Gacaca Law in light of Rwanda’s international obligations under the ICCPR to ensure that those charged with criminal acts receive a fair trial, as stipulated in Article 14 of the ICCPR. Part I briefly discusses the genocide in Rwanda and the attempts by the new government of Rwanda following the genocide to establish judicial accountability and foster reconciliation in the country. Part II examines the traditional practice of gacaca in Rwanda and traces its evolution through to the new gacaca jurisdictions established by Gacaca Law. Part III analyzes Rwanda’s fair trial obligations under the ICCPR and argues that, while not perfect, the gacaca jurisdictions minimally comply with fair trial obligations. This Note concludes by advocating that the application of international standards must be based on the possible—but not unrealistic—ideals in countries like Rwanda, which are actively engaged in post-conflict reconstruction and reconciliation.

I. GENOCIDE AND THE SEARCH FOR JUSTICE IN RWANDA

On April 6, 1994, then-president of Rwanda, Juvenal Habyarimana died when the plane carrying him and Burundian president, Cyprien Ntaryamira, was shot down by two missiles as it prepared to land in the Kigali airport.12 Before dawn the following day, the Presidential Guard and militia members began to kill political opposition

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9 See Troubled Course of Justice, supra note 8, at 35.
11 Id.
leaders along with moderate Hutu. The capital, Kigali, became enveloped by violence as Tutsis were sought out and massacred. These massacres, however, were not spontaneous acts of violence. Rather, systematic violence against ethnic Tutsis, who represent approximately 15% of the population, had begun during the decolonization process at the end of the 1950s. In the early 1960s, and then again in the 1970s, violence against the Tutsi population generated waves of displacement as Tutsis fled Rwanda and resettled predominantly in the surrounding countries. Following independence, the Rwandan government in Kigali, dominated by Hutus since 1962, continually obstructed the return of Tutsi refugees. On October 1, 1990, the Rwandese Patriotic Front (RPF), predominantly comprised of Tutsi exiles who had been living in Uganda for years, invaded from across the northern border between Rwanda and Uganda, and a civil war ensued. After three years of sporadic fighting, an agreement was reached between the Habyarimana government, the RPF, and other political constituencies in Rwanda. Signed on August 4, 1993, the Arusha Accords provided for power-sharing in a transitional government, the return of Rwandan Tutsi refugees, and eventually democratic elections in 1997.

Extremist elements in Rwanda refused to accept the Arusha Accords, viewing them as unacceptable compromises. Importing arms from abroad, they trained two militia groups that eventually helped to carry out the genocide—the Interahamwe “Those who Attack Together,” and the Impuzamugambi “Those with a Single Purpose.” Soon after the massacres began in April 1994, following the death of president Habyarimana, civil war in Rwanda resumed, ending the cease-fire that had been in effect since August 4, 1993. From April to July of 1994, between 500,000 and 800,000 Rwandan Tutsis and tens of thousands of politically moderate Hutus were brutally killed in the

13 Id. at 229-30.
14 Id. at 231.
15 See Shabas, supra note 10, at 523.
16 Id. at 523-24.
17 Id. at 524.
18 Id.
19 Id.
20 Shabas, supra note 10, at 524.
21 Id.
22 Id.
24 Id. at 4.
genocide.25 By July 17, 1994, the Tutsi-dominated RPF had established the Government of National Unity, bringing both the genocide and the civil war to an end.26

Following the genocide, Rwanda entered a precarious phase of post-conflict reconstruction.27 The RPF and the international community pushed for criminal trials that would bring the perpetrators of the genocide to justice.28 Shortly following its establishment, the new government announced that it would not extend amnesty to the perpetrators of the genocide, but would prosecute all those accused instead.29 Between July, 1994, and September, 1998, arrests averaged between 1000 and 3000 per month.30 As a result, the overall prison population in Rwanda increased from 10,000 in 1994 to nearly 130,000 by 1998.31 Initially, Human Rights Watch/Africa leveled charges at the government of Rwanda for improper arrests without warrants, arrests based on denunciation rather than criminal investigation, and detention without arraignment in violation of Rwandan law.32 Rather than collecting evidence and filing formal charges, the RPF soldiers entered villages in which most of the Tutsi population had been massacred and simply rounded up individuals who appeared to be genocidaires and incarcerated them in local facilities.33

Although arrests in Rwanda following the genocide increased drastically, initial efforts to bring the perpetrators to justice were in fact quite limited.34 In November 1994, the United Nations Security Council established the International Criminal Tribunal for Rwanda; however, Non-Governmental Organizations (NGOs) criticized the international community for failing to deliver sufficient aid to the new

25 DES FORGES, supra note 1, at 14.
26 See Shabas, supra note 10, at 524.
27 See id.
31 Drumbl, supra note 28, at 571.
34 RWANDA: A NEW CATASTROPHE?, supra note 29, at 2.
Rwandan government to rebuild a competent civilian administration and judicial system. According to Human Rights Watch, "many judges and prosecutors [who] were killed during the genocide, were themselves implicated in the killings, or fled the country." Others have charged additionally that "[i]n fact, the Rwandan legal system has never been more than a corrupt caricature of justice," in which "[e]ven well-meaning lawyers and judges within the system were powerless to prosecute the numerous atrocities during the few years that foreshadowed the 1994 genocide." This suggests that even if the judicial system had not been decimated during the genocide it would not have been capable of administering impartial justice, especially in the wake of the violence and conflict that had subsumed the country. Mired in a history of impunity, and with few resources, the new government of Rwanda found itself largely unable to carry out this type of large-scale judicial process, yet bound rhetorically to do so despite the crippling constraints.

Compounding this already dire crisis, in mid-July 1994, approximately 850,000 Rwandans of predominantly Hutu origin fled with the defeated Rwandan Army and the paramilitary across the Rwandan border into the North Kivu province of what is now the Democratic Republic of the Congo (DRC). Causing a humanitarian crisis of epic proportions, this large displacement of Rwandese Hutus also provided a human shield for the genocidaires, enabling them to regroup in the camps and to call for renewed war. The government-in-exile continued to destabilize the already volatile situation by spreading propaganda that in fact the RPF was responsible for genocide against the Hutu, making no mention of the massive slaughter of Tutsi. The situation across the border in Zaire occupied the RPF forces, who were the only force maintaining any sort of order in much of

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35 Id.
36 Id. at 9.
37 Shabas, supra note 10, at 531. Shabas describes massacres of Tutsi that took place in March of 1992 in which 466 individuals were arrested and detained illegally for this atrocity. Id. A lawyer retained by an extremist political party was able to get the detainees released. Rather than correcting the situation and issuing new warrants, the prosecutors' office did not pursue the matter further. Id. at 531–32.
38 See id. at 531.
40 See Shabas, supra note 10, at 524.
41 See Rwanda: A New Catastrophe?, supra note 29, at 3.
42 Id. at 3–4.
Rwanda—including arresting those accused of genocide.\textsuperscript{43} It also made the task of ensuring justice and promoting reconciliation within Rwanda nearly impossible.\textsuperscript{44}

\textbf{A. Attempts at Justice: Organic Law 8/96}

Although Rwanda had ratified the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, Rwanda’s penal code did not expressly punish genocide or crimes against humanity.\textsuperscript{45} As a result, emotional debates ensued in the Rwandese Transitional National Assembly over how to adopt new measures that would satisfy the need for justice in Rwanda.\textsuperscript{46} In November, 1995, the government of Rwanda organized an international conference on “Genocide, Impunity, and Accountability” (Conference) in Kigali.\textsuperscript{47} The meeting brought together leaders of Rwandan society, foreign legal experts, representatives of local NGOs, and genocide victims’ associations to discuss the complex problems that would arise in prosecuting the perpetrators of the 1994 genocide.\textsuperscript{48} The Conference recommended that the Rwandan government create new mechanisms to deal with the genocide cases.\textsuperscript{49} These new mechanisms included creating “specialized chambers of the existing courts, a classification scheme to separate the main organizers of the genocide from criminals with lesser degrees of responsibility, and a unique scheme aimed at encouraging offenders to confess in exchange for substantially reduced sentences.”\textsuperscript{50}

Following this Conference, the Rwandan Ministry of Justice began to prepare legislation giving effect to recommendations made at the Conference.\textsuperscript{51} On August 30, 1996, the National Assembly adopted Organic Law 8/96 on the Organization of Prosecutions for

\textsuperscript{43} Id. at 9. In addition to providing security, the RPF themselves were also engaged in several massacres of unarmed and unresisting civilians. Id at 8–9. These human rights abuses have largely gone un-addressed in Rwanda. Id. at 8.

\textsuperscript{44} See id.


\textsuperscript{46} Id.

\textsuperscript{47} Shabas, supra note 10, at 528.

\textsuperscript{48} Id. at 528–29.

\textsuperscript{49} Id. at 530.

\textsuperscript{50} Id.

\textsuperscript{51} Id.
Offenses Constituting the Crime of Genocide or Crimes against Humanity Since October 1, 1990 (Organic Law 8/96) to organize genocide trials. The Constitutional Court subsequently approved the new statute, which then came into force on September 1, 1996. In passing Organic Law 8/96, the government of Rwanda hoped to reduce the number of trials, to encourage people to give incriminating evidence that would facilitate other prosecutions, and to enhance the process of reconciliation in the country.

Following the recommendation of the Kigali conference, Organic Law 8/96 created special chambers within the twelve First Instance Courts to try people accused of genocide. It also established four categories of genocide suspects. Category I includes planners, organizers, instigators, supervisors, and leaders of the genocide. Generally, Category I suspects are those who held positions of power within Rwandese society and thus were able to use this power and the trust of the populace to carry out the genocide. Category II comprises perpetrators of, or accomplices to, intentional homicide or serious assaults that resulted in death. Category III includes those who committed serious assaults against others without causing death. Finally, Category IV suspects are those who committed offenses against property.

In addition to establishing the procedure whereby genocide suspects would be categorized into four separate groupings, Organic Law 8/96 also attempted to deal with potential prosecutorial barriers such as the lack of evidence for the majority of crimes committed between October 1, 1990 and December 31, 1994. For instance, while there is some evidence of top level involvement that can be verified through lists of arms distributions, newspaper articles, and radio broadcasts, "there is hardly any evidence to substantiate the involvement of the

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53 Shabas, supra note 10, at 530.

54 Prosecuting Genocide, supra note 45, § VIII-C.

55 Organic Law 8/96, supra note 52, art. 19.

56 Id. art. 2.

57 Id.

58 Id.

59 Id.

60 Organic Law 8/96, supra note 52, art. 2.

61 Id.

62 See Vandeginste, supra note 5, at 8.
large majority of 'ordinary' killers: most eyewitnesses had been killed or had left the country." As a result, Organic Law 8/96 instituted a confession and guilty plea procedure that would allow those who confessed according to the law and provided evidence against other suspects to receive considerable reduction in penalty. This confession procedure, unfamiliar to the Rwandan judicial system, was inspired by “plea bargaining,” which is widely used in common law criminal justice systems. Viewed as an instrument to overcome the general lack of evidence available to try suspects of genocidal crimes, the confession and guilty pleas were also intended to establish the truth of the genocide, which had been continually challenged by extremist Hutu revisionism, and to serve as a source of justice and reconciliation for victims.

B. Further Attempts to Address the Growing Detainee Caseload in Rwanda

Despite these procedures for categorizing suspects, which would enable speedier prosecution, the massive number of arrests and detentions meant that thousands of detainees languished for years on end in prisons with little hope of facing trial. In September, 1996, the Rwandan government attempted to regularize the tens of thousands of illegal arrests and detentions that had taken place since the genocide by issuing the Organic Law 9/96—Law relating to provisional modifications to the Criminal Procedure Code (Organic Law 9/96), which entered into force retroactively to April 6, 1994. The objective of passing Organic Law 9/96 was to establish temporary derogations from statutory deadlines prescribed by the Code of Criminal Procedure for issuing an arrest record, a provisional arrest

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63 Id.
64 Organic Law 8/96, supra note 52, arts. 4–9. According to the law, Category I suspects are not able to avail themselves of reduced sentencing for confession. Id. art. 5. Suspects in Category II may attempt to receive a reduced sentence of seven to fifteen years imprisonment for confession and implication. Id. arts. 15, 16. Those who do not avail themselves of this procedure will face life imprisonment if found guilty. Id. art. 14. Category III suspects may also seek reduced sentences of 1/2 to 1/3 of the full sentence. Id. arts. 5, 15–16.
65 Shabas, supra note 10, at 539.
66 See Vandeginste, supra note 5, at 8; Rwanda: A New Catastrophe?, supra note 29, at 3–4; Shabas, supra note 10, at 539.
68 Vandeginste, supra note 5, at 9.
warrant, and a preventive detention order.\textsuperscript{69} According to Organic Law 9/96, individuals who had been detained before the enactment of Organic Law 9/96 were to have a record of arrest drawn up and a warrant for arrest issued by December 31, 1997, and then appear before a judge within ninety days of the issuance of the arrest warrant.\textsuperscript{70} For those who became detained after the enactment of Organic Law 9/96, they were to have a warrant issued within four months of the actual arrest and were to appear within three months after the warrant had been issued.\textsuperscript{71} These accelerated deadlines, while an attempt to ameliorate arrest and detention procedures, were unrealistic.\textsuperscript{72} As a result, the Rwandan government had to extend the application of the law until August 31, 1999, providing little if any relief to tens of thousands of detainees being held without case files.\textsuperscript{73}

With few prospects for expediting the justice process in Rwanda, many believed that the best way to ease overcrowding would be to release prisoners.\textsuperscript{74} Considering that the Transitional Government of National Unity had maintained since 1994 that there could be no reconciliation without justice, there was serious debate as to how releases could be accelerated in a manner that would be compatible with justice and that did not provoke protests or violent reprisals from the local people.\textsuperscript{75} Special Representative of the United Nations Commission on Human Rights, Michel Mousalli, in a report to the United Nations General Assembly, noted that "[t]here was fierce resistance when the Government announced, on 6 October 1998, that it planned to release 10,000 prisoners who had no judicial files."\textsuperscript{76} Ibuka, one of the main genocide survivors' organizations, staged a public campaign to denounce the release of pre-trial detainees as a denial of justice.\textsuperscript{77} By June 15, 1999 only 3365 pre-trial detainees of the 10,000 promised had been released.\textsuperscript{78} In addition, reports surfaced that those who had been released from detention were targets

\textsuperscript{69} Id.
\textsuperscript{70} Drumbl, supra note 28, at 574.
\textsuperscript{71} Id.
\textsuperscript{72} Id.
\textsuperscript{73} See id.
\textsuperscript{75} See id.
\textsuperscript{76} Id.
\textsuperscript{77} Vandeginste, supra note 5, at 9.
\textsuperscript{78} Id.
of violent acts. Some individuals even sought refuge back in the prisons. Even when they were not directly targeted, those released found it hard to reintegrate. Faced with this daunting detainee load and the prospect of further violence if large numbers of detainees were released, on October 17, 1998 Rwandan President Pasteur Bizimungu, in consultation with both political and civil society leaders, decided to establish a Commission to look at possible mechanisms for increasing public participation in judicial proceedings. Chaired by the Minister of Justice, this fifteen-member Commission published an official document detailing a proposal for gacaca tribunals on June 8, 1999.

II. GACACA: THE LATEST HOPE FOR JUSTICE IN RWANDA

A. Historical Roots of Gacaca

Relatively little is known about the practice of gacaca, a community-based dispute resolution forum, in pre-colonial Rwanda. "The name [gacaca] is derived from the word for 'lawn', referring to the fact that members of the gacaca sit on the grass when listening to and considering matters before them." It has been suggested that in the pre-colonial period, prior to bringing a civil dispute before the Mwami, or king, individuals had to bring the dispute before the community. Serious crimes, however, such as conflicts between hierarchical chiefs and homicide, were not brought to gacaca first, but rather were taken directly to the Mwami. In gacaca proceedings, respected community figures served as "judges" who involved the entire community in a dispute resolution process. Typically, gacaca considered disputes around inheritance, civil liability, failure to repay loans, thefts, and conjugal matters. There is some evidence that gacaca was also used in conflicts amounting to minor criminal offenses such as

80 Id.
81 Id.
82 Vandeginste, supra note 5, at 1.
83 Id.
84 Hovsepian, supra note 67, at 7.
85 Sarkin, supra note 7, at 159.
86 Hovsepian, supra note 67, at 7, 8 n.30.
87 Id. at 8.
88 Sarkin, supra note 7, at 159.
89 Id.
theft. In these situations, sanction for the act still resembled a civil settlement, such as compensation for the damage incurred, rather than imprisonment. The sanction arising from a gacaca proceeding was meant to serve two objectives. First, it allowed the accused to better appreciate the gravity of the damage that he or she caused. Second, the sanction allowed the accused to reintegrate into the local community.

During the colonial period beginning in 1897, first the Germans and then the Belgians introduced a more formal state-centered legal system into Rwandan society. As the Belgian colonial project in Rwanda began to replace the traditional administration system based on family elders with appointed administrative leaders, it also created tribunals for each administrative unit. These tribunals "slowly departed from customary law and began applying modern written legal texts, imported by the colonial powers and whose logic regarding penalties differed from gacaca's sole purpose of reconciliation." Consequently, legal pluralism evolved with gacaca, on the one hand, as an indigenous procedure based largely on traditional values and determining standards of individual and community behavior, and state laws, on the other hand, which were based predominantly on the Belgian framework.

Following the decolonization process in the late 1950s and early 1960s, gacaca saw somewhat of a revival in Rwanda. Throughout the colonization period, what had once been purely traditional had gradually evolved into a system more closely affiliated with state structures. Despite the closer connection to state structures and the locus of political power, post-colonial gacaca proceedings still maintained restitution and reconciliation as their primary aims. According to Phillip Reyntjens, who has produced one of the only field studies on gacaca, there seemed to be a certain complementarity

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90 Vandeginste, supra note 5, at 15.
91 Id.
92 Id.
93 Id.
94 Id.
95 Hovsepian, supra note 67, at 9.
96 Id.
97 Id.
98 See Vandeginste, supra note 5, at 15.
99 Hovsepian, supra note 67, at 9.
100 Vandeginste, supra note 5, at 15.
101 See Hovsepian, supra note 67, at 10.
that developed between the gacaca and the state tribunal systems.\textsuperscript{102} At times, the state tribunals served as appeals courts, taking into consideration the decision made through the gacaca process.\textsuperscript{103} At other times, gacaca served as both first and final forums.\textsuperscript{104} Reyntjens also noted that people seemed to turn to gacaca when the dispute was between family members or neighbors, whereas they were more likely to seek out state tribunals for disputes with strangers.\textsuperscript{105}

Reports following the 1994 genocide confirmed that in some parts of the country, gacaca continued to function throughout the civil war.\textsuperscript{106} In fact, in the months shortly after the genocide, the Minister of Justice issued an action plan that called for the revalorization of gacaca as "a means of peaceful settlement of disputes as well as a way to reduce the number of cases submitted to the formal judicial structures and to return to a climate of confidence" in Rwanda.\textsuperscript{107}

Some evidence has even suggested that after the genocide, while the judicial and cantonal courts were not functioning in Rwanda, the breadth of conflicts heard before gacaca increased.\textsuperscript{108} While still not hearing the types of cases proposed by the Gacaca Law in the aftermath of the genocide, it is clear that the expansion of gacaca since independence paved the way for the innovative approach proposed and eventually accepted by the government of Rwanda to try tens of thousands of people suspected of participation in the genocide.\textsuperscript{109}

\section*{A. The Gacaca Law (Organic Law No. 40/2000)}

On October 12, 2000, the Transitional National Assembly of Rwanda adopted Gacaca Law on the creation of gacaca jurisdictions.\textsuperscript{110} A few months later, on January 26, 2001, President Paul Kagame sanctioned this legislation and the Constitutional Court approved it.\textsuperscript{111} While based upon the traditional practice of community dispute resolution, the current manifestation of gacaca has been

\begin{footnotesize}
\begin{enumerate}
\item See id. at 11.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id. at 13.
\item Id.
\item Id. at 13–14.
\item See id. at 14.
\item See generally Gacaca Law, supra note 6.
\end{enumerate}
\end{footnotesize}
adopted specifically for the challenges posed by adjudicating crimes of a severe magnitude.\textsuperscript{112} The Rwandan government has tried to distinguish traditional gacaca from the proposed gacaca system by referring to it as either "modernized gacaca" or as "gacaca jurisdictions."\textsuperscript{113} Similar to the temporal jurisdiction established in Organic Law 8/96, pursuant to the Gacaca Law, the gacaca jurisdictions will try genocide-related crimes that occurred between October 1, 1990 and December 31, 1994.\textsuperscript{114} The Gacaca Law also essentially follows the framework of Organic Law 8/96 with regard to the categorization of suspects; however, gacaca jurisdictions will only hear Category II through IV cases.\textsuperscript{115}

1. Functioning of Gacaca Jurisdictions

According to the Gacaca Law, each administrative unit in the country will have a gacaca jurisdiction.\textsuperscript{116} Each gacaca jurisdiction will have a General Assembly, a Bench, and a Coordinating Committee.\textsuperscript{117} At the Cellule level, the smallest administrative unit in the country, the General Assembly will be comprised of all cellule inhabitants over the age of eighteen.\textsuperscript{118} The General Assembly of each cellule will then elect twenty-four people over the age of twenty-one of "high integrity."\textsuperscript{119} Of these twenty-four individuals, five will be selected to serve as delegates to the General Assembly at the Secteur level and nineteen will remain to serve on the Bench at the Cellule level.\textsuperscript{120} Out of those nineteen who remain at the Cellule level, the Bench will elect five of its own members to serve on the Coordinating Committee.\textsuperscript{121} This process of selecting delegates from the General Assembly to serve on the General Assembly at the next administrative level, as well

\textsuperscript{112} See id.
\textsuperscript{113} Uvin, supra note 2, at 7 n.5.
\textsuperscript{114} See Gacaca Law, supra note 6.
\textsuperscript{115} Id.
\textsuperscript{116} Hovsepian, supra note 67, at 16. The country of Rwanda is broken down into a series of administrative units. Id. The top administrative structure is comprised of twelve prefectures. Id. Each prefecture is subdivided into about ten communes, totaling 154. Each commune has approximately 50,000 citizens. Id. Each of these 154 communes is further divided into approximately ten secteurs, which are then further subdivided into six cellules. Id. The cellule is the lowest administrative unit. Id. There are approximately 8,987 cellules in Rwanda with each cellule representing a little over 800 citizens. Id.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} Id. at 17.
\textsuperscript{120} Id.
\textsuperscript{121} Hovsepian, supra note 67, at 17.
as determining the Bench and electing the Coordinating Committee, will then continue at the Secteur, Commune, and Prefecture levels.\textsuperscript{122} In all, more than 10,000 gacaca jurisdictions will be created under Gacaca Law.\textsuperscript{123}

Gacaca jurisdictions will be able to hear cases involving genocide suspects in Categories II through IV as determined by Organic Law 8/96.\textsuperscript{124} Those suspects who are in Category I, as defined by Organic Law 8/96, will not be transferred to gacaca jurisdictions, as their cases can only be heard by the ordinarily constituted courts.\textsuperscript{125} The entire categorization process begins at the Cellule level. Initially, the General Assembly in each Cellule level gacaca jurisdiction will provide testimonies and other evidence against suspected perpetrators and it will help the Cellule level Bench to draw up a list of individuals who participated in the killings as well as a list of victims.\textsuperscript{126} The General Assemblies will also participate in the hearing, without actively taking part in the final judgments.\textsuperscript{127} It is then the Bench’s responsibility to work with the Public Minister to complete investigations based on the testimonies provided by General Assembly members and to classify suspects in the categories established by Organic Law 8/96.\textsuperscript{128} The Bench at the Cellule level will judge Category IV suspects—those who committed crimes against property.\textsuperscript{129} Judgments are made by consensus or by majority voting.\textsuperscript{130} The Cellule level Bench will send the list of Category III suspects, along with any files it may have compiled, to the Secteur level gacaca jurisdiction.\textsuperscript{131} It will also send the list of Category II suspects and any files onto the Commune level gacaca jurisdiction. The list of Category I suspects will also be transferred to the Commune level gacaca jurisdiction, which will subsequently forward the materials to the prosecutor’s office at the court of first instance.\textsuperscript{132} The Coordinating Committee of each gacaca jurisdiction is

\textsuperscript{122} See \textit{id.} At the Secteur, Commune, and Prefecture levels there will be a General Assembly composed of fifty representatives from the level below it. \textit{Id.} Each General Assembly will choose a bench of twenty persons. \textit{Id.} The Bench will then choose its own five-member Coordinating Committee. \textit{Id.}

\textsuperscript{123} Vandeginste, \textit{supra} note 5, at 18.

\textsuperscript{124} Gacaca Law, \textit{supra} note 6, art. 2.

\textsuperscript{125} \textit{Id.}

\textsuperscript{126} Vandeginste, \textit{supra} note 5, at 19.

\textsuperscript{127} \textit{See id.}

\textsuperscript{128} \textit{Id.}

\textsuperscript{129} \textit{Id.}

\textsuperscript{130} \textit{Id.}

\textsuperscript{131} Vandeginste, \textit{supra} note 5, at 19.

\textsuperscript{132} \textit{Id.}
responsible for supervising the activities of the General Assembly and the Bench.\textsuperscript{133} It is also responsible for writing down the judgments in an ad hoc register.\textsuperscript{134} Finally, the overall functioning of the gacaca jurisdictions will be supervised at the national level by a new Gacaca Tribunals Department within the Supreme Court.\textsuperscript{135}

2. Sentencing in the Gacaca Jurisdictions

Gacaca jurisdictions will generally follow the sentencing guidelines established by Organic Law 8/96.\textsuperscript{136} Similarly, gacaca jurisdictions will rely heavily on confessions, which will result in reduced sentencing for those found guilty.\textsuperscript{137} Individuals convicted of Category IV crimes will be made to either repair the damage that they caused or to carry out community service that is equivalent to the restitution owed.\textsuperscript{138} Those convicted of Category III crimes at the Secteur level, will generally receive a combination sentence of prison time and community service or public utility work.\textsuperscript{139} For those who do not confess and enter a guilty plea, they will receive sentences between five to seven years, with half of the sentence to be served in prison.\textsuperscript{140} Those who confess after they have been placed on the list of perpetrators by the Bench at the Cellule level will receive sentences ranging from three to five years, with half the sentence to be served in prison.\textsuperscript{141} Finally, those convicted of Category III crimes who confess prior to being placed on the list of perpetrators will have their sentence reduced to between one to three years, with only half of the sentence to be served in prison.\textsuperscript{142}

Similarly, Category II suspects who do not avail themselves of the confession and guilty plea procedure will receive prison sentences ranging from twenty-five years to life.\textsuperscript{143} Those who avail themselves of the procedure after an indictment has been issued will be liable to serve a twelve to fifteen year sentence, with half of the sentence to be served in prison and the other half outside of prison participating in

\textsuperscript{133} Id.
\textsuperscript{134} Id.
\textsuperscript{135} Id. at 20.
\textsuperscript{136} See Gacaca Law, supra note 6, arts. 68–71.
\textsuperscript{137} See id.
\textsuperscript{138} Vandeginste, supra note 5, at 20.
\textsuperscript{139} Id.
\textsuperscript{140} See Gacaca Law, supra note 6, art. 70(a).
\textsuperscript{141} Id. art. 70(b).
\textsuperscript{142} Id. art. 70(c).
\textsuperscript{143} Id. art. 69(a).
community service. Those who confess prior to being indicted are liable to serve a sentence lasting between seven and twelve years, with half of the sentence to be served in prison and the other half outside of prison participating in community service.145 While the sentencing will generally follow the guidelines initially established by Organic Law 8/96, the community service element as a means to reduce prison population and to effectively reintegrate those convicted back into Rwandan society is entirely novel.146

3. Appeals Procedure

Improving on draft legislation for the gacaca jurisdictions, which did not allow for appeals at all levels, the Gacaca Law allows those accused and sentenced by the Bench in a particular jurisdiction to appeal the decision one time to the next administrative level. As a result, decisions rendered at the Cellule level may be appealed at the Secteur level. Those rendered at the Secteur level may be appealed at the Commune level. Finally, those rendered at the Commune level may be appealed at the Prefecture level. In addition, the Prosecutor General of the Supreme Court can decide, on his own initiative or pursuant to a request, to seize a case before a gacaca jurisdiction in the interest of justice.148

II. HUMAN RIGHTS CONCERNS AND THE GACACA JURISDICTIONS

The right to a fair trial as it is elaborated in international law, encompasses numerous guarantees to ensure the independence, objectivity, impartiality, and equity of judicial processes.149 Seeking to ensure the proper administration of justice, international treaties codify various state party obligations with regard to the individual rights of the accused.150 These rights include: the right to be equal before the law, the right to be presumed innocent, the right to a fair and public

144 See id. art. 69(b).
145 Gacaca Law, supra note 6, art. 69(c).
146 See Vandeginste, supra note 5, at 20.
147 See Uvin, supra note 2, at 6; Hovesepian, supra note 67, at 25.
148 Gacaca Law, supra note 6, art. 89.
150 See ICCPR, supra note 149, art. 14; Banjul Charter, supra note 149, art. 7.
hearing by a competent, independent, and impartial tribunal established by law, the right to a defense, and the right to appeal.\textsuperscript{151}

As a party to both the ICCPR and the African (Banjul) Charter on Human and People’s Rights (Banjul Charter), the Rwandan government must undertake to protect fair trial guarantees.\textsuperscript{152} The prior culture of impunity in Rwanda and the almost total devastation of the country’s infrastructure and civil society in the early 1990s, however, has made this obligation nearly impossible to meet.\textsuperscript{153} While gacaca jurisdictions are the latest hope for justice in Rwanda, various international human rights organizations and scholars on human rights have voiced concerns over whether or not the proposed gacaca jurisdictions will comply with Rwanda’s obligations, specifically under the ICCPR.\textsuperscript{154} In particular, Amnesty International has pinpointed the failure of the law establishing gacaca jurisdictions explicitly to ensure the right to legal defense.\textsuperscript{155} It has further questioned whether the composition of the gacaca jurisdictions can respect the principle of “equality of arms,” which ensures that the defense and the prosecution have “a procedurally equal position during the trial and are in an equal position to make their case.”\textsuperscript{156} Finally, they have raised questions as to whether gacaca jurisdictions can provide a competent, independent, and impartial hearing for those who are accused.\textsuperscript{157} Although all fair trial protections are critical to the full protection of

\textsuperscript{151} See ICCPR, supra note 149, art. 14; Banjul Charter, supra note 149, art. 7.

\textsuperscript{152} See Troubled Course of Justice, supra note 8, at 4; see also ICCPR, supra note 149; Banjul Charter, supra note 149.

\textsuperscript{153} See Uvin, supra note 2, at 2–3; Shabas, supra note 10, at 531–32.

\textsuperscript{154} See Troubled Course of Justice, supra note 8, at 35–36; Hovsepian, supra note 67, at 29–30; Sarkin, supra note 7, at 21; Vandeginste, supra note 5, at 25. The Rwandan government is further obligated to ensure fair trial guarantees under its own constitution following the Arusha Peace Agreement, in which Rwanda adopted into domestic law the Universal Declaration of Human Rights (UDHR) and stated that the UDHR “shall take precedence over corresponding principles enshrined in the Constitution of the Republic of Rwanda, especially when the latter are contrary to the former.” See Hovsepian, supra note 67, at 31. Since they are fully enshrined in Article 14 of the ICCPR, I will not deal with Rwanda’s obligations under Articles 10 and 11 of the UDHR. In addition, while Rwanda is equally obligated under the ICCPR and the Banjul Charter, the due process obligations of the ICCPR are more specific and have been interpreted frequently by the Human Rights Committee. Therefore, I will not address Rwanda’s obligations under the Banjul Charter in this analysis.

\textsuperscript{155} Troubled Course of Justice, supra note 8, at 33.

\textsuperscript{156} Id.

\textsuperscript{157} Id. at 33–34.
civil and political rights, perhaps these three form the core concerns surrounding the gacaca jurisdictions.\textsuperscript{158}

Arguably, the gacaca jurisdictions, while not normally constituting courts, still fall within the domain of fair trial standards as established by the ICCPR.\textsuperscript{159} The Human Rights Committee, which was established pursuant to Article 28 of the ICCPR, has dealt specifically with the right to fair trial provisions codified in Article 14 of the ICCPR only once—in General Comment 13, adopted at its 21st session in 1984.\textsuperscript{160} While largely talking about the failure of states to report adequately on the specific implementation of their treaty obligations under Article 14, paragraph 4 of Comment 13 critically states that “[t]he provisions of Article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized.”\textsuperscript{161} Article 14 of the ICCPR states: “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”\textsuperscript{162} It is clear from the Gacaca Law that persons to be tried in the gacaca jurisdictions fall within the ambit of Article 14 of the ICCPR, in that they are being brought before this forum “in the determination of any criminal charge against him.”\textsuperscript{163} The gacaca jurisdictions are “established by state law, they will apply state law, overall control will by exercised by state institutions (both judicial and executive power), penalties will be executed in state prisons; “clearly this type of tribunal should be governed by international human rights norms.”\textsuperscript{164} Furthermore, the Human Rights Committee in issuing Comment 13 makes it clear that the ICCPR does not prohibit special courts, and states that “the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in Article 14.”\textsuperscript{165}

\textsuperscript{158} See id.; Moussalli Report 2000, supra note 74, at 34.
\textsuperscript{159} See Vandeginste, supra note 5, at 25.
\textsuperscript{161} Id. ¶ 4.
\textsuperscript{162} ICCPR, supra note 149, art. 14(1).
\textsuperscript{163} See id.
\textsuperscript{164} See Vandeginste, supra note 5, at 25.
\textsuperscript{165} General Comment 13, supra note 160, ¶ 4.
The Dakar Declaration, adopted on September 11, 1999, following a seminar on the Right to a Fair Trial in Africa and organized by the African Commission on Human and Peoples’ Rights, further acknowledges that traditional courts must comply with the fair trial provisions of the Banjul Charter, which are similar to, although somewhat less detailed than, those articulated in Article 14 of the ICCPR.\textsuperscript{166} While recognizing that traditional courts play a critical role in many African countries, the Dakar Declaration also notes that “these courts also have serious shortcomings which result in many instances in a denial of fair trial.”\textsuperscript{167} Therefore, the Dakar Declaration announced unequivocally that, “[t]raditional courts are not exempt from the provisions of the African Charter relating to fair trial.”\textsuperscript{168} By analogy, the European Court of Human Rights has repeatedly found that fair trial standards apply equally to administrative and disciplinary legal procedures.\textsuperscript{169} Finally, the government of Rwanda has also acknowledged that international human rights instruments apply to the gacaca jurisdictions.\textsuperscript{170}

A. Right to a Defense

According to Article 14 of the ICCPR, anyone facing criminal charges has the right “to defend himself in person or through legal assistance of his own choosing . . . .”\textsuperscript{171} In addition, if the person facing criminal charges does not have legal counsel, he is entitled to be informed of his right to have legal assistance assigned to him “in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it . . . .”\textsuperscript{172} While it appears clear from the language of the ICCPR that a person charged with a crime has an undisputed right to a defense, it is less obvious when legal assistance must be provided by the state in order for the state to meet its obligations under the ICCPR.\textsuperscript{173} According to the language of the Article, the requirement to provide counsel

\textsuperscript{166} See Vandeginste, \textit{supra} note 5, at 25–26.
\textsuperscript{167} Id.
\textsuperscript{168} Id.
\textsuperscript{169} See id. at 25.
\textsuperscript{171} ICCPR, \textit{supra} note 149, art. 14.3.d.
\textsuperscript{172} Id.
\textsuperscript{173} See id.
is two-pronged. First, a defendant seeking state-appointed counsel must demonstrate that he or she does not have the financial means to pay for counsel. Second, the case must be one in which the interests of justice require that the person accused have free legal assistance. The Human Rights Committee has not addressed the substantive criteria for this latter determination in Comment 13 of Article 14. In addition, it has not addressed a state’s obligation to provide free legal counsel in non-capital cases in its published Views on communications submitted to it. As a result, it is unclear what kind of obligation, if any, Rwanda has to provide free legal counsel for suspects of Category II through IV crimes in the gacaca jurisdictions, which are statutorily unable to apply the death sentence.

Although Rwanda is not bound by any decisions handed down by the European Court of Human Rights, it is useful to look at how this court has interpreted Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), which articulates a state’s obligation to provide free legal counsel under particular circumstances. Unlike the Human Rights Committee, the European Court of Human Rights has been faced with determining whether a person accused of a crime has the right to free legal counsel in non-capital cases on a number of occasions. Interpreting Article 6(3)(c) of the European

174 Id.; Memorandum from Marguerite M. Dorn, Professor, Suffolk University Law School, to Jan Rocamora, Special Assistant, Ministry of Justice Rwanda (Jul. 11, 1997), at http://www.law.suffolk.edu/academic/ihr/papers/counsel2.html [hereinafter Memorandum].

175 ICCPR, supra note 149, art. 14.3.d.

176 Id.

177 See General Comment 13, supra note 160, ¶ 4.

178 See Memorandum, supra note 174.


180 See generally Granger v. United Kingdom, 12 Eur. Ct. H.R. 469 (1990) (stating that whether legal aid must be provided shall be determined by considering the case as a whole—including the complexity of the issues involved and the potential sentence for the crimes and holding that a “difficult” and dispositive issue in the appeal along with a potential sentence of five years were sufficient to require the appointment of free legal aid); Quaranta v. Switzerland reprinted in 12 Hum. Rts. L.J. 251 (1991) (stating that the seriousness of the offense and the severity of the sentence must be considered in determining whether appointing free legal counsel is in the interest of justice and holding that a maximum sentence of three years, combined with the possibility of activating a suspended sentence, and the “wide range of measures” available to the court, were sufficient to require the appointment of free legal counsel without which [the defendant] would not have been able to present his case in an adequate manner); Pham Hoang v. France, App. No.
Convention on Human Rights, the European Court of Human Rights has determined that the complexity of the case, the seriousness of the offense, and the potential maximum punishment all contribute to whether the interests of justice require the state to provide legal assistance to the accused.181

Interestingly, the Gacaca Law does not mention the right to a defense per se. Under the previous domestic system to try Categories I through IV, as established by Organic Law 8/96, the government of Rwanda acknowledged the right of the accused to defense counsel of his/her choosing, yet denied the right to free legal counsel provided by the state.182 The government of Rwanda has maintained that this compromise applies for the gacaca jurisdictions as well, although it has not stated this specifically in legislation.183

Certainly there are a number of arguments that can be put forth as to why allowing for the appointment of free legal aid is preferable to the current stance by the government of Rwanda. Among these arguments are that the majority of the accused have little or no formal education, they have limited awareness of their rights, and they have no knowledge of how to defend themselves against the very serious allegations that they will face.184 Applying the framework established by the European Court of Human Rights to determine whether the interest of justice requires that free legal aid be appointed to the accused, it seems that the complexity of the case and the potential sentencing taken as whole for at least those accused of Category II would rise to the level where free representation was required. According to the Gacaca Law, those falling into Category II are charged with criminal acts intending to cause death.185 Category II sentences range from a minimum of seven years, with half of the term to be served in prison and the other half to be served performing community service, to a maximum of life imprisonment for those who do not confess.186 Arguably, the element of intent that differentiates Category II defendants from Category III defendants is an important element that

13191/87, 16 Eur. Ct. H.R. 53 (1991) (holding that the defendant did not have the legal training essential to enable him to present and develop the appropriate arguments on complex issues himself).


182 Organic Law 8/96, supra note 52, art. 36.

183 Republic of Rwanda, supra note 170, at 29.

184 Troubled Course of Justice, supra note 8, at 33.

185 See Gacaca Law, supra note 6, art 51.

186 Id. arts. 69, 70.
would require legal assistance for an accused to present an adequate defense.

In Quaranta v. Switzerland, the European Court of Human Rights found that the defendant would not have been able to present his case adequately without legal representation.\(^{187}\) In addition, in Pham Hoang v. France, the European Court of Human Rights found that the defendant did not have the sufficient training necessary to enable him to develop and present arguments without legal counsel.\(^{188}\) Although these holdings can only be persuasive, it is clear that both the complexity of the intent issue in Category II crimes along with the likely low level of training and competency of Category II suspects suggests that, supervening interests aside, Category II suspects should receive legal representation. In comparison, the remaining defendants in Category III and IV both face less complex cases: those in Category III are charged with criminal acts without the intent to cause death and those in Category IV are charged with crimes against property.\(^{189}\) In addition, their sentences are considerably less with the sentence for Category IV being restitution of the damage caused and the sentence for Category III ranging from one to seven years with half of the sentence to be served through community service.\(^{190}\) While the European Court of Human Rights has found that, in conjunction with other factors, sentences of three to five years sufficed to require appointment of legal counsel, arguably the possible sentences for Category III and Category IV crimes combined with the relatively straightforward cases would enable a person accused to defend him or herself adequately.\(^{191}\)
A larger question about the "interests of justice" that arises in the case of Rwanda that neither the Human Rights Committee nor the European Court of Human Rights has had to deal with specifically, is the magnitude of those accused of crimes between October 1, 1990 and December 31, 1994. Currently, the government of Rwanda claims that approximately sixty lawyers are in private legal practice in Rwanda.\textsuperscript{192} While this number has increased in the eight years since the genocide, it remains an inadequate number to address the cases of over 100,000 people who remain detained and who will come before one of the 10,000 gacaca jurisdictions established under the Gacaca Law.\textsuperscript{193} Those who had previously received free counsel in their cases before one of the twelve court chambers specializing in handling genocide cases, did so with the support of Advocats Sans Frontiers, not the Rwandan government.\textsuperscript{194} Despite this outside assistance, not all genocide suspects were able to receive assistance.\textsuperscript{195} Given this track record, it seems impossible to imagine a scenario whereby all suspects—or even simply Category II suspects—are able to receive legal counsel.

While it appears that those accused of Category II crimes should have the right to free counsel, in this case the larger interests of justice are at stake. Certainly Category II suspects cannot be detained indefinitely while awaiting representation.\textsuperscript{196} Similarly, the Rwandan government has made it clear, and victims groups have demonstrated, that releasing these detainees without any adjudicatory procedure is not in the interest of justice in post-genocide Rwanda.\textsuperscript{197} Furthermore, the Human Rights Committee has noted that in capital cases, states must provide free legal counsel when a suspect does not have the means to pay for one himself in order to be in compliance with the ICCPR.\textsuperscript{198} As a result, it seems as if Rwanda must make the unsavory yet prudent decision to focus efforts toward providing legal counsel to those who are accused of Category I crimes and who may face the death penalty. Arguably, they should also publicly reaffirm

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\textsuperscript{192} \textit{Republic of Rwanda}, supra note 170 at 28.
\textsuperscript{193} \textit{Id.} at 28–29.
\textsuperscript{194} \textit{Id.} at 28.
\textsuperscript{195} \textit{Id.}
\textsuperscript{196} \textit{See generally Troubled Course of Justice, supra note 8; see also ICCPR, supra note 149, arts. 9, 10.}
\textsuperscript{197} \textit{See Moussalli Report 2000, supra note 74, at 30.}
\textsuperscript{198} \textit{See Memorandum, supra note 174.}
the right of the accused to a defense before the gacaca jurisdictions, while maintaining that the government cannot provide free legal counsel to the accused in these procedures.

B. Equality of Arms

The concept of Equality of Arms often goes hand in hand with the right to a defense discussed above. The equality of arms principle necessitates that both parties in a case have a procedurally equal position during the trial and are in an equal position to make their case.\textsuperscript{199} According to Article 14(3)b of the ICCPR, among the minimum guarantees entitled to a person accused of a criminal charge is the right "to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing . . . ."\textsuperscript{200} The Human Rights Committee has interpreted this Article in Comment 13 to mean that a person accused of criminal charges must have access to the documents and evidence necessary to prepare his case.\textsuperscript{201} The Committee does note, however, that what constitutes "adequate time" depends on the circumstances of each case.\textsuperscript{202} Finally, the Human Rights Committee has reaffirmed that when the accused does not want to serve as his own defense, he should have recourse to a lawyer.\textsuperscript{203} Unlike the concerns raised in the previous section regarding how to determine whether the "interests of justice" require that a lawyer be appointed to a defendant, the right to consult with counsel as articulated in Article 14(3)b pertains to the need for procedural equality for both the prosecution and the defense.\textsuperscript{204}

To some extent, the structure of the gacaca jurisdictions obviates the need for a defendant to consult with a lawyer for this purpose.\textsuperscript{205} According to Gacaca Law, once the Cellulelevel gacaca jurisdiction has compiled a list of suspects, pre-trial investigation and dossiers will be completed by \textit{les parquets} and \textit{les auditorats militaries} as they had under Organic Law 8/96.\textsuperscript{206} Once the dossiers are complete, they will be

\textsuperscript{199} Troubled Course of Justice, supra note 8, at 33.
\textsuperscript{200} ICCPR, supra note 149, art. 14(3)b.
\textsuperscript{201} General Comment 13, supra note 160, ¶ 9.
\textsuperscript{202} Id.
\textsuperscript{203} Id.
\textsuperscript{204} See Troubled Course of Justice, supra note 8, at 33.
\textsuperscript{205} This is not to argue that the ability to consult with a lawyer might not be preferred, but rather that the structure of the process reduces the threat that the prosecution will outmatch the defense in legal acumen.
\textsuperscript{206} Gacaca Law, supra note 6, art. 47; Hovsepian, supra note 67, at 22.
returned to the Cellule level gacaca jurisdictions for categorization of
the suspects and the transfer of dossiers to the relevant gacaca juris­
diction or to the courts of first instance. 207 Although there is some
concern that the cases would be judged on the basis of the dossiers
compiled and passed on by what can be considered the prosecution,
the process by which the actual hearing takes place reduces the risk
that a defendant will not have an adequate chance to participate in
his defense. 208

Recall that the process before the gacaca jurisdiction varies in
part based on whether the accused has availed himself of the confes­
sion and guilty plea. In all cases, however, members of the General
Assembly will be asked to give testimony either against the accused or
on his behalf. 209 The Bench will question those who choose to give
testimony and the accused will be able to respond to the testimony
provided. 210 Arguably, "the play of argument and counter-argument,
of witness and counter-witness by the community basically amounts to
the same as a fair defense, may be even better than what the formal
justice system has until now produced." 211 In addition, it is important
to note that while the Bench will receive some training and the mem­
bers of the community will be educated about the Gacaca Law, the
process of the gacaca jurisdictions remains community-based. There
are no "lawyers" for the prosecution, nor are there rules of procedure
that would prejudice the accused without legal representation. Ulti­
mately, it is the responsibility of the Bench to discern the truth and to
render a majority decision. Again, it is important to reiterate that un­
der the Gacaca Law, those accused and sentenced have the right to
appeal the Bench’s decision once. In addition, the Prosecutor Gen­
eral of the Supreme Court can decide on his own initiative, or pursu­
ant to a request, to seize a case in the interest of justice. Based on
these safeguards, it appears that the accused will have ample oppor­
tunity to participate equally in this judicial process.

207 Gacaca Law, supra note 6, art. 48; Hovsepian, supra note 67, at 22.
208 See Troubled Course of Justice, supra note 8, at 33 (describing that defendants
who do not have the aid of counsel will be unable to effectively refute accusations estab­
lished in the dossier).
209 Gacaca Law, supra note 6, arts. 64–66.
210 Id.
211 Uvin, supra note 2, at 5.
C. Fair, Independent, and Impartial Tribunal

The principle of a fair, independent, and impartial tribunal, codified in Article 14(1) of the ICCPR, encompasses both procedural guarantees enumerated in the subsections to Article 14—specifically paragraph 3, which outlines the minimum procedural guarantees for criminal hearings—and includes an intangible element that is not necessarily met even when all of the procedural elements are. The Human Rights Committee has tried to elaborate on this intangible element by specifying that qualifications for judges, the manner in which judges are appointed, and the actual independence of the judiciary from the executive and legislative branches, all play a role in whether tribunals succeed at being fair, independent, and impartial. The Human Rights Committee had further opportunity to address specifically the notion of an independent and impartial tribunal in its Views adopted on October 20, 1993, pertaining to the communication submitted by Oló Bahamonde against Equatorial Guinea. In this case, the Human Rights Committee stated that "a situation where the functions and the competence of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent and impartial tribunal within the meaning of article 14, paragraph 1, of the Covenant."

Considering the long history of impunity in Rwanda, and the initial track record of the genocide trials that proceeded under Organic Law 8/96, the concern over whether the gacaca jurisdictions can and will proceed in a fair, independent, and impartial manner is quite understandable. Although much of the analysis on this aspect of Rwanda's compliance with Article 14 of the ICCPR cannot be completed until actual trials begin sometime in 2002, there are a number of initial questions that can be addressed. First and foremost, in line with Comment 13 by the Human Rights Committee, critics have raised the question as to whether gacaca jurisdictions can be fair and impartial considering the general lack of legal training afforded to those who will be judging the accused. According to Article 10 of

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212 See General Comment 13, supra note 160, ¶ 5.
213 Id. ¶ 3.
215 Id. ¶ 9.4.
216 See Troubled Course of Justice, supra note 8, at 34; Hovsepian, supra note 67, at 37; Sarkin, supra note 7, at 163–64.
the Gacaca Law, the General Assembly of each gacaca jurisdiction will elect members to serve on the Bench and the Bench will in turn appoint members to the Coordinating Committee.\textsuperscript{217} Both elected and appointed members are to have lived in good conduct and to have always told the truth. They are to be honest, to speak openly, and have never been convicted of a crime with a sentence of more than six months. Finally, they are never to have participated in the crime of genocide or other crimes against humanity, and they are to be non-discriminatory.\textsuperscript{218}

Despite these requirements, it is inevitable that some elected and appointed members will need to be replaced for either failing to meet these criteria or failing to fulfill their mandates. As a result, Article 12 of the Gacaca Law establishes the reasons for which a member can be replaced and the procedure for that replacement.\textsuperscript{219} In addition, the government of Rwanda stated that the judges will receive training and, to this end, has approved the international NGO Advocats sans Frontiers to provide a two-week seminar to train the judges' trainers, who are people from the Rwandan Supreme Court.\textsuperscript{220} Advocats sans Frontiers is also providing additional technical assistance for the gacaca jurisdictions by preparing and distributing a handbook on the Gacaca Law to educate the Rwandese populace.\textsuperscript{221} Obviously, this is a far cry from an optimal judicial situation; however, traditional courts such as the gacaca jurisdictions are not prohibited by the ICCPR, so long as they genuinely afford the guarantees stipulated in Article 14.\textsuperscript{222} Compared to the current situation, in which many of the judges in the ordinary courts have only a few months' training and the trial process is prohibitively slow, the stipulations in the Gacaca Law that seek to increase the level of impartiality and competency of the judges, as well as the efficacy of the entire process, appear to be a step forward.\textsuperscript{223} Certainly, major concerns remain. Monitoring and continued assistance by the international community are the best means of ensuring that the judges can live up to this enormous task.\textsuperscript{224}

\begin{thebibliography}{99}
\bibitem{Pitsch} See Pitsch, \textit{supra} note 111, at 10.
\bibitem{Gacaca Law} Gacaca Law, \textit{supra} note 6, art. 10.
\bibitem{Id.} Id. art. 12.
\bibitem{Hopes and Fears} \textit{Hopes and Fears}, \textit{supra} note 220.
\bibitem{General Comment 13} See \textit{General Comment 13}, \textit{supra} note 160, ¶4.
\bibitem{TROUBL ED COURSE OF JUSTICE} See \textit{TROUBL ED COURSE OF JUSTICE}, \textit{supra} note 8, at 34.
\bibitem{Uvin} See Uvin, \textit{supra} note 2, at 14–26.
\end{thebibliography}
Another critical concern is whether the gacaca jurisdictions will be able to function independently. On its face, the Gacaca Law appears generally to respect this principle. Complying with the Views adopted by the Human Rights Committee in *Bahamonde v. Equitorial Guinea*, the Gacaca Law attempts to draw clear distinctions between the gacaca jurisdictions and both the executive and legislative branches of the government. According to Article 11, individuals who occupy any administrative or executive positions at any level of local or national administration, who are active members of the police force or military, who are professional judges, or who sit on the governing body of any political party, religious order, or non-governmental organization cannot be elected to the Bench. In addition, the mere structure of the gacaca jurisdictions, which will comprise over 10,000 different tribunals across the country with nineteen judges sitting on the Bench of each tribunal, decreases the possibility of manipulating the outcome of the gacaca proceedings. As the actual proceedings get underway, it will become readily apparent whether the gacaca jurisdictions will in fact offer the accused a fair, independent, and impartial tribunal. The Gacaca Law, however, establishes a solid foundation—given the post-conflict settings and the country’s resources—for the observance of this core due process right.

**Conclusion**

For more than eight years Rwanda has been searching for both justice and reconciliation. While there have been large improvements in the domestic genocide trials, which began in 1996 after the Transitional National Assembly passed Organic Law 8/86, it is undisputed that the system of justice that Rwanda has maintained for over five years has failed. With over 100,000 pre-trial detainees languishing in over-crowded prisons and local cachots, a compromise is unavoidable. Simply releasing pre-trial detainees, however, is not a feasible option for the government of Rwanda. In the face of this

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226 *See id.*
227 *Gacaca Law,* *supra* note 6, art. 11; *see also* Hovsepian, *supra* note 67, at 39; *Sarkin,* *supra* note 7, at 163-64.
228 *See Uvin,* *supra* note 2, at 11.
229 *Uvin,* *supra* note 2, at 2.
230 *Id.; Republic of Rwanda,* *supra* note 170, at 27.
daunting situation, the new gacaca jurisdictions have emerged as Rwanda's newest, and certainly most innovative, hope for justice and reconciliation. While perhaps not conforming to the letter of the law as laid out in Article 14 of the ICCPR, the new gacaca jurisdictions have the potential to embody its spirit by serving the need for justice and accountability in Rwanda while fostering a culture of protection for civil and political rights in a country that has long ignored them.232 Certainly, international human rights standards cannot be modified infinitely to suit the particular circumstances of each country without losing all of their power.233 At the same time, however, international standards must be based on the application of possible—not unrealistic—ideals.234 As was aptly put by Special Representative, Michel Moussalli: "The question facing Rwanda's international partners is relatively simple: Do they grasp the nettle and participate, on the grounds that anything is preferable to the abuse in prisons, or do they hold firm to established legal principles and stay aloof, thus increasing the likelihood that gacaca will fail?"235 Ultimately, the government of Rwanda will proceed with the gacaca jurisdictions as outlined in Gacaca Law. The best way to ensure that the gacaca jurisdictions protect fair trial standards is for the international community to work with the government of Rwanda to further educate the populace, encourage transparent participation, monitor the impartiality of the proceedings, and foster reconciliation and reintegration into Rwandese society. Perhaps the gacaca jurisdictions can be a first step toward greater observance of human rights in Rwanda.

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232 See Uwin, supra note 2, at 5; ICCPR, supra note 149, art. 14.
233 See Kerrigan, supra note 9, at 10.
234 See id.
235 Moussalli Report 2000, supra note 74, at 35.