

# **The Introduction of a Modernized Gacaca for Judging Suspects of Participation in the Genocide and the Massacres of 1994 in Rwanda.**

## **A Discussion Paper**

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prepared for the Belgian Secretary of State for Development Cooperation.

The opinions in this report are strictly those of its author, Peter Uvin. They do not reflect, nor engage, the Belgian government or its representatives in Kigali.

The first half of this report presents background and analysis; the second half (*Propositions for Action: Towards a Policy of critical Support*) outlines a series of propositions for international community support to the gacaca process. The latter part can perfectly be read independently from the former, although they obviously make more sense together.

In 1994, up to one million persons were killed in Rwanda. The very large majority of them were Tutsi, killed for their ethnic belonging –one of the three major genocides of this century. In parallel massacres, an estimated 100,000 to 200,000 Hutu were killed, for being opposed to the central government or to local power holders, too moderate, too sympathetic to Tutsi, too wealthy, or any other reason. This slaughter constitutes one of the saddest episodes of modern history, and the role of the international community in allowing it to happen remains a dark spot on western consciences.

After the genocide, a new government came to power, dominated by Tutsi exiles. It inherited a totally destroyed country, with a traumatized and impoverished population, a collapsed state and destroyed infrastructure. Today, much of the physical stuff of the state and the economy has been rebuilt --sometimes better than before. However, the giant tear in the fabric of Rwanda's society has not been repaired. Achieving justice, reconciliation, an end to impunity: these remain the great challenges for Rwanda.

The new government has always argued that unless the “culture of impunity” was once and for all ended in Rwanda, the vicious cycle of violence would never stop. Although some donors were interested in a South African “truth and reconciliation” model, the GoR firmly rejected this: only when the guilty had been punished, would it be possible for the victims, as well as the non-guilty, to create a joint future together. As a result, the government of Rwanda and the donor community invested heavily in the (re)-construction of justice in post-genocide Rwanda. In total, more than 100 justice-related projects have been funded by almost all donors: training of lawyers, judges, investigators, and police; salary supplements to judges; reform of administrative and court procedures; construction of buildings, libraries, prisons, and living facilities; grants of vehicles, fuel, and maintenance; etc.

It has often been observed that in the aftermath of mass violence, full, formal justice and complete adherence to human rights standards is literally unattainable. The political, economic, administrative, and social costs are simply exorbitant. Political risks include that full justice for perpetrators of past abuse may invite revenge, coups d'Etat, etc. Economic limitations refer to the expense to the state of imprisoning and judging tens of thousands of persons according to full standards of criminal law; as well as the cost to the families of the prisoners. Administrative bottlenecks refer to the need for a large number of competent, unbiased, and well-paid police forces, prosecutors, investigators, judges, and the like, which is unlikely to exist in countries with weak educational and administrative systems. Social constraints refer to the social consequences of full-blown criminal law trials: in other circumstances, authors have mentioned the fact that they focus on the past, rather than the future; the fact that they simplify by only focusing on the sins of the political losers rather than on the dynamics of the whole system; the fact that very often it is not the leaders but the followers who end up being judged; the fact that they are not victim-centered but state-centered, etc.

As a result, it comes as no surprise that Rwanda has failed to implement its strategy of full justice for the perpetrators of the genocide (a strategy, it must be noted, which no country in history has ever managed to successfully implement). By early 2000, approx. 3,000 persons have been judged. Although the quality of these trials has been improving, there remain problems in terms of prosecutorial bias, corruption of judges, intimidation of witnesses, and the like. Yet, the biggest problem is that, at current speeds, it would take more than a century to finish the trials for all those currently imprisoned, and everyone agrees that the justice system can simply not work much faster than it currently does<sup>1</sup>. Thus more than 130,000 persons remain imprisoned, usually under horrendous conditions. This is socially, economically, and politically very costly for Rwanda's government and society.

From late 1998 onwards, the Government of Rwanda has begun thinking about an unprecedented legal-social experiment of transforming a traditional community-based conflict resolution mechanism (mainly used for land conflicts and other local disputes) into a tool for judging people accused of participation in the genocide and the massacres. Throughout the country, gacaca tribunals will be created, composed of people of integrity elected by the inhabitants of cells, sectors, communes and prefectures --if things go as planned, more than 200,000 persons shall participate in more than 10,000 gacaca tribunals. Prisoners will be brought before these tribunals; the entire community will be present and act as a "general assembly", discussing the acts, providing testimony and counter-testimony, argument and counter-argument. In a first phase, cellule gacaca tribunals will categorize the prisoners, using the legal categories established in the 1996 law. In a second phase, gacaca tribunals at the levels of the cellule, sector, or commune (depending on the category) will decide on the penalty, applying penalty ranges laid down by the new gacaca law. Those prisoners who confess and ask for forgiveness will receive dramatic reductions in penalties. Part of the penalties is transmuted into community service.

The aim of the gacaca is twofold:

- speeding up the trials and emptying the prisons (the government's aim is to have all current detainees judged in three years)
- involving the community, including the victims, in establishing the truth and, through that, promoting reconciliation.

The gacaca system, however, profoundly compromises on principles of justice as defined in internationally agreed-upon human rights or criminal law standards: there is no separation between prosecutor and judge, no legal counsel, no legally reasoned verdict, strong pressure toward self-incrimination, a potential for major divergences in punishment, and so on. As a result, many foreign legal specialists and human rights observers have been highly skeptical about the gacaca proposal. However, the solutions

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<sup>1</sup> It can work faster, to be sure, but not, say, 50 times faster, which is what is really needed

they propose --such as guaranteeing the right to legal counsel-- basically end up reinventing the same formal justice system that is clearly not working. At the same time, generalized amnesty is currently politically and socially out of the question. Hence, against their spontaneous inclinations, they are forced to admit that gacaca shall be given a chance...

Here lies the major issue for all those concerned with Rwanda: the gacaca proposal could produce highly positive results, as well as fail to do so (or even produce negative ones, although it is not clear if these would be much more negative than continuing on the present path). Can the government, with the support of donors, put into place a system that maximizes the positive potentials and minimizes the negative ones? One answer is to add all kinds of legal safeguards --eventually ending up reinventing the classical justice system. Although legal improvements can and should be still made<sup>2</sup>, therein the key answers will not lie. The gacaca proposal is a social and political experiment, and it is at that level that the thinking needs to take place. This is what this report sets out to do. But before doing so, it is necessary to deal in some more detail with the question of the relation between the gacaca proposal and human rights.

### **GACACA AND HUMAN RIGHTS: HOW TO SOLVE THE INCONSISTENCIES?**

There are several possible answers to the charge that the gacaca proposal violates human rights and should thus not be considered, and I believe some of them to be sufficiently adequate to consider gacaca even from within a human rights perspective. The first argument is that some compromise simply is unavoidable. Criminal law standards were not designed to deal with the challenges faced when massive numbers of people --victims and perpetrators of crimes-- have to live together again, side by side, in extremely poor and divided countries. They were also not designed to function under conditions of extreme poverty, and the absence of a strong historical tradition of independent justice. Some adaptation to the real-world circumstances of Rwanda is needed.

The second argument is that the current practice, maintained for years now with massive international assistance, has failed as well --in other words, violates human rights as well. Most certainly, the basic right to a speedy trial and reasonable detention times, as well as decent conditions of detention, is being violated under the current practice, and there is nobody with credible plans on how to change this. In addition, approximately 60% of those brought to justice until now did not have legal counsel. And for many who had, this counsel was of low quality, as were the prosecutors, investigators, and judges. To be sure, this was not the case for all of them, and many

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<sup>2</sup> Such as the precise role of the public prosecutors, the inclusion of all rapes in category I, the nature and functioning of the TIPs; or the fact that for category II, the incentives for confession are stacked so high that there is an enormous pressure toward self-incrimination, even falsely.

observers agree that serious improvements have taken place; however, when discussing gacaca, we are not comparing a system that violates key provisions of criminal and human rights law with one that does not, but rather comparing various practices that are weak and incomplete in the real world.

Points 1 and 2 together, then, make the argument that full respect for human rights is simply impossible under the current circumstances, and the limitations and constraints of the gacaca systems are no more, and may be less, than those of any alternative. Merely pointing out the existence of provisions that are contrary to criminal law or human rights standards is thus not enough to suspend the operation; rather, what is needed is a thoughtful and politically astute reflection on how to minimize violations, or chose those least dangerous.

A third, rather legalistic, argument is that international human rights standards allow, under conditions of emergency, where the normal criminal law cannot work, to temporarily deviate from normal standards. Article 4 of the International Covenant on Civil and Political rights, states that "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation<sup>3</sup>." In lay terms, it seems that the key conditions for allowing this are: a) a recognition that the situation is of a one-time, unique, temporary, emergency nature, and b) the existence of some guarantees and oversight for fairness. The first point seems to be partly satisfied, although there is some debate if it still holds 6 years after the genocide; the second one is a matter of design, incl. the organization of the gacaca tribunals, as well as their monitoring.

A fourth argument is that the gacaca proposal actually respects the spirit of international criminal and human rights law if not the letter. In other words, the practice of gacaca may well be able to respect key conditions of fair trial and due process, but in an original, locally appropriate form, and not in the usual western-style form. For example, while there is indeed no independent legal counsel, one can argue that the play of argument and counter-argument, of witness and counter-witness by the community basically amounts to the same as a fair defense, maybe even better than what the formal justice system has until now produced. Similarly, if one accepts that people in the community by and large know the truth of whom did and did not kill, how and why, and with what degree of ruthlessness, gacaca is a superior tool of instruction of dossiers than what the formal justice system until now has produced. This argument is crucial. If it is decided to support the gacaca proposal, donors and the government will have to ensure that the spirit of gacaca is respected.

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<sup>3</sup> The European Court of Justice, for example, has accepted such behavior by the British government in Northern Ireland (detention without trial, secret judges, etc.)

Fifth, the evolution of the gacaca drafts has shown some notable improvements in terms of human rights and fair trial concerns. Among the most important are: appeals have been introduced at all levels, including double appeals at the category II level (up to the formal justice system); all accused will be present at the gacaca proceedings that concern them; the confession procedures have been made clearer, and will be available to the accused at all levels, including at the opening of the gacaca session against them; preference is now given to unanimity in the decisions; the indemnification procedure was greatly simplified, etc. These changes seem to have come about as a result of discussions with various actors in society, including local and foreign human rights organizations. They testify to a desire to precisely minimize the potential for abuse (or, for cynics, to play to the foreign audience....).

An important sixth argument is that much available information indicates that the categories of persons most affected by this --the prisoners, the communities concerned, the families of the victims-- are largely in favor of the proposed gacaca. Indeed, quite a few persons have told me that the prisoners themselves overwhelmingly favor gacaca. Admittedly, people who have often spent many years imprisoned in horrendous conditions are likely to be willing to try anything that gives them a chance to get out of prison, and thus this argument cannot be given any decisive weight. Still, people who work in prisons, both Rwandans and foreigners, told me that most prisoners are interested in the gacaca. In this respect, the ongoing gacaca's in Rwanda's prisons are of great interest. While the process is evidently organized by the authorities --it could hardly be different in prisons-- the actual form of the participation by the prisoners therein seems unscripted and not centrally controlled by any authorities, whether those among the prisoners (often officials of the previous regime) or those formally in charge of the prisons now. In other words, prisoners seem to be giving by their own behavior a certain legitimacy to the idea of gacaca, and, although their behavior is certainly heavily constrained, this is of some importance.

In addition, many people among the general population seem also in favor of the gacaca system. From the conversations I had with people who are in touch with what is going on in Rwanda's collines and neighborhoods, the large majority of the population, both Hutu and Tutsi, prefer the gacaca process over the current system. Every single one of the 65 or so persons I spoke to in Rwanda told me the gacaca initiative should proceed, and the international community should support it. Initial research data support this assessment.

In short, there seem to be a number of real-world reasons that should allow the international community to seriously consider the gacaca proposal. This does not mean that the human rights and criminal law violations enshrined in the gacaca proposal become suddenly irrelevant; it does mean, however, that it is worth critically

supporting the gacaca proposal, and trying to ensure that its costs/risks can be minimized and its benefits maximized.

The positive effects expected of the gacaca proposal will not happen automatically. They are easily compromised, if not annulled altogether. Precisely because the usual standards and safeguards of fair trial are not present, the resulting outcome is strongly tributary to local political and social dynamics. It will require imagination, goodwill, and vigilance to ensure that the positive potential of gacaca is realized, and the negative potential minimized. In that respect, Rwanda's record in the formal justice sector is not encouraging. While some of the limitations of the last 6 years certainly follow from the unique and almost insurmountable nature of the challenge, some of them also result from human choices. Human rights reports since three years document instances of prosecutors and judges with low professional standards, of intimidation and murder of witnesses as well as of people who were liberated from prison (by civilians as well as by soldiers or LDFs associated with the current regime and by guerilla's associated with the previous regime), of bureaucratic slowness and lack of work ethic, and of corruption. These man-made factors are sometimes entirely beyond the control of the government (guerilla attacks, for example, and revenge killings), sometimes condoned by it (some of the crimes committed by the military people, or the well-known biases of prosecutors, the low work ethic, etc.) and sometimes even organized by people with public positions. There is no reason to assume that these factors will suddenly and mysteriously disappear when gacaca is introduced. They will thus need to be explicitly discussed and prepared for.

## **TRADITION, COMMUNITY, LEGITIMACY, AND THE GACACA INITIATIVE**

It has been argued that the proposed gacaca system in reality has nothing to do with the "real", "traditional" gacaca, and that this is a major flaw. The latter was small-scale, both in terms of the number of people involved and in terms of the conflicts it dealt with, and "traditional", *i.e.*, beyond the reach of the state. The former is large-scale --large numbers of people involved, and major crimes to be judged-- and formal, controlled by the state. As a result, one could well think about the proposed gacaca as an entirely new system that should be judged on its own merits. Why not assume that the "gacaca" appellation is there just to lend a sense of history and legitimacy, an invention of tradition<sup>4</sup>.

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<sup>4</sup> Note that the consequences of this reading are ambiguous. On the one hand, it means that those critiques that are based on pointing out that the proposed gacaca parts significantly from tradition are unimportant: so be it. On the other hand, it does mean that the argument that treats gacaca as simply a continuation of a deeply anchored practice is incorrect as well, and that much closer inspection is required.

That said, while the proposed gacaca is not “traditional” in some sort of romantic, pure way<sup>5</sup>, its efficient and effective functioning *is* dependent on the existence of some basic social conditions, which are the same ones as those that undergirded the traditional gacaca. In that respect, one crucial element lies in our assessment of the nature --or even existence-- of "communities." Do "communities" in the traditional meaning of the term still exist in Rwanda? Development specialists have a long history of over-estimating the degree of community in societies, of being blind to the deep social divisions and differences of power and privilege that characterize societies. Clearly, Rwanda was no exception before the genocide --the latter would have been impossible if not. After the genocide, it is even more doubtful that such communities still exist, both for physical and socio-psychological reasons.

The socio-psychological factors are most evident. Will the rescapés --people deeply traumatized by the violence inflicted upon them, and often still socially and politically marginal, especially in rural areas-- have enough faith, in themselves and in the system, to participate, to speak out? Will the families of the accused, or the potentially accused, agree to participate in the proceedings given the stakes to them, their families, their community? What proportion of the population still subscribes, "deep inside," to the racist ideology that made the genocide possible?

People who work in the collines all told me that a large proportion of the rural population --one rather large survey quantifies it at 70%-- is interested in the gacaca initiative, and wants to give it a chance. Although this still leaves a sizeable proportion that is opposed, this is rather good news. People who work with prisoners said that similar proportions hold there as well: prisoners by and large prefer the gacaca system over the current one, and seem willing to give it a chance. This information seems to indicate that the gacaca proposal responds to a real need, and may find a rather favorable reception in the population.

One additional factor that may encourage the population to participate, at least at the side of the accused, is that the gacaca law contains strong incentives in favor of confession. The reduction in penalties is so high that confession makes eminent sense for most prisoners. Already, the rate of confession is quite high, and seems to have grown since the discussions and sensitizations around gacaca began a year ago. According to RCN data, approximately 26,000 persons have now confessed, although for only 16,000 does there exist a full, formal PV to attest to that. Everybody expects that, once gacaca gets underway and prisoners can see the effects of confession<sup>6</sup>, the rate of confessions will increase dramatically. Clearly, when people confess, they are

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<sup>5</sup> The government itself writes about "modernized gacaca" and "gacaca jurisdictions" --clear attempts to demonstrate the new nature of the beast.

<sup>6</sup> Unlike now, where confession does not procure a faster trial, because of a “spider effect”, in which files for the people newly implicated in the confessions need to be established first, which may take a long time, thus delaying judicial proceedings against the “original confessor.”

speaking –and, possibly, implicating others. These others, then, have a reason to talk as well, to defend themselves, to nuance matters, to implicate still others, to present their apologies—whatever the case, they are talking as well. In short, the confession system creates also strong incentives to speak out, to discuss, and to not follow the law of silence.

In that respect, it is encouraging to see that, with the exception of one prison with an extremely high confession rate (where all the foreign visitors are encouraged to pass) and one with an extraordinary low rate, prisons throughout the country by and large show similar confession rates. Even in Ruhengeri and Gisenyi, for example, which are prefectures with particular ethnic, political, and social histories, prisoners have confessed at the same rate as elsewhere. One can thus hope that some degree of public discussion will ensue throughout the country.

The gacaca system risks creating one giant new problem, though, *e.g.*, while it may end up freeing most current detainees, it may also at the same time fill the prisons up with new people currently not detained. The extent to which this could happen is impossible to predict as it depends on the actual number of people who were involved in the genocide and who are still free inside Rwanda, the extent to which confessions and community discussions will give rise to "new" people being incriminated, and the resulting decisions of the gacaca tribunals about categorizations and penalties. However, the problem could be a major one.

This possibility provokes a serious quandary. On the one hand, it seems evident that people who were involved in the genocide and managed to stay out of prison until now, have no particular claim to clemency or pity just because they were smart or lucky enough to elude justice until now. On the other hand, if this were to happen, it would pose a major problem to Rwanda:

- prisons could be as full as they had been, if not fuller, resulting in the same social, political and economic problems that provided part of the rationale for the gacaca initiative;
- the human rights flaws inherent in the gacaca process are easier to overlook if the net result is to free people rather than to imprison them, and international human rights criticism is thus bound to be fierce.

This problem was recognized by most people I spoke with, but without an explicit answer. While amnesty is impossible at this moment, some limited form thereof may need to occur in the future, especially if people's guilt has been established first. This will require a political solution at the level of the government and the parliament, and it seems impossible to pre-judge that solution in advance, or from a simple consultant's desk. It is something, however, that needs to be followed and eventually addressed by all actors concerned, in Rwanda and abroad.

Another issue is that almost everybody I spoke with agreed that the sensitization for the gacaca initiative had been useful in spreading the news, and in getting some input from people at higher levels of society. At the same time, almost everyone agreed as well that the sensitization had been, for most of the population, very limited, top-down, and one-way. A major example of that, if correct, is that I was told that no document regarding gacaca as yet has appeared in Kinyarwanda. If one wants the population to truly understand the spirit and the functioning of the new gacaca system; if one wants people to go against their long-standing habits of distrust and fear; if one wants people to try to set aside their immediate self-interest in the name of a greater social cause –then it will be necessary to take some time for some much more horizontal, participatory, slow work. It seems that NGOs should be involved in this: both judicial NGOs, for work in the prison, and development NGOs, who are well implanted in the countryside and have more experience with participatory techniques.

Another problem is geographical. With as many as people 800,000 killed during the genocide, a few hundreds of thousands still abroad or killed in the Congo after 1994, 130,000 imprisoned, 700,000 returned to the country after decades abroad (the “old caseload refugees”) and 2,000,000 or so who first fled the country and then returned (but did not all return to their place of origin), there may be considerable doubt as to the exact composition of the community. In many communities, there is a significant proportion of the population that did not live there during the genocide, and hence the process of witnessing and confrontation may be incomplete. Perfection in this matter is impossible; as long as there exists a significant proportion of the population that can testify, the process can proceed. However, the condition does not seem satisfied in the cities.

Indeed, many of the gacaca jurisdictions will be urban. Yet, all the discussions, all the texts, all the analyses, whether critical or sympathetic, of the gacaca proposals are based on a vision of the colline. Yet, in cities, the crucial conditions for success of the proposed gacaca –that the people present know the truth, and that they all will have to live together afterwards and are thus inclined to find ways of sorting things out– do not hold. Few are those who live now in city neighborhoods who lived there during the genocide. In addition, in cities, witnesses can hide easier in urban anonymity. Indeed, the prosecutor's office of Kigali is the one which has had by far the most difficulties in finding witnesses until now.

In conclusion, it is hard to be sure what the dynamics of urban gacaca jurisdictions will be, in terms of truth telling, the provision of just verdicts, and laying the foundation for reconciliation. There are serious a priori reasons to fear that the social conditions that make it possible for gacaca to be successful in rural areas are much less present in urban areas, although there is no full certainty to that effect. Intensive monitoring is required here, as well as innovative thinking if the problems described here do indeed occur.

The final possible factor that can decrease or destroy the potential of gacaca to produce a measure of truth, justice, and reconciliation, is interference by power-holders – whether they possess the power of the gun, of money, or of the state. Admittedly, most of these people are excluded from election into the gacaca tribunals, but they still are present during the sessions, as well as in the periods between sessions. For whatever reasons –personal vengeance, political conflict, issues of land and property, family ties, or simply ideology– powerholders may seek to influence the proceedings. If they do so, the gacaca process will not yield justice or truth, and it will not contribute to reconciliation; it may even do the opposite, rendering people even more distrustful, bitter, and ready to embrace ideologies of hatred and violence in the future.

The problem here is not so much a potential centrally organized conspiracy to produce results that are fixed in advance. By and large, the central state seems committed to gacaca and wishes for its positive outcomes to materialize. Rather, the problem lies at the level of local powerholders: military personnel, local defense forces, local administrators, people with wealth.

An oft-heard counter-argument is that it is significantly harder to manipulate the outcome of the gacaca proceedings than of the formal justice system. In the latter, the argument goes, all it may take is a nice bribe, or one credible threat, to a single judge or to a few witnesses, and the desired result can be achieved. In the gacaca proceedings, an absolute majority of 19 judges needs to be bought or threatened, and/or larger numbers of witnesses are to be silenced. That is a lot more work, and not certain to produce results. Another argument is that local powerholders may have different if not contradictory interests and aims, which may end up canceling each other out, by producing pressures in different directions.

Both these arguments are partly correct; however, they mis-understand the nature of Rwandan society and the relations between the people and the state. Rwanda's people have for decades been told to participate in all kinds of schemes devised by the state. Yet, from the colonial period, over the previous regimes, to the present, these schemes have been top-down, left little more than the smallest space for any form of true participation, and have often been used to mask policies that actively harm the people. From the *travaux forcés* to the *umuganda*; from the endless political sensitizations to the decades of so-called communal participation; from the top-down agricultural extension to the forced villagization, Rwandans have learned to distrust the state when it speaks the language of participation and lofty principles. Even if the intentions of the current government are perfectly pure; even if significant segments of the population are interested in the gacaca process –distrust reigns, and people are wary<sup>7</sup>.

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<sup>7</sup> Note that they are likely to be even more wary in regions where the state has recently acted highly repressively, such as the Northwest, or areas where recent *imudugudu* took place, or, for the *rescapés*, in regions where the killings were particularly brutal.

Under these conditions, the legitimacy of the gacaca proceedings will have to be established carefully, and it can easily be undermined. Envision the scenario. The first meeting begins. Ordinary people surely will not speak first: the chef de secteur, the primary school teacher, the parish priest, etc. will do so. Imagine that, eventually, one witness does speak truth, or an accused person confesses, implicating others. If that person, a few days later, is arrested, or intimidated in any other way, or disappears, people will recognize the message: they will not participate anymore. Their bodies will come, but their mouths will be shut, their words limited to what they think will not offend the powers-that-be. Gacaca proceedings may still take place, but nobody will be convinced that justice, truth, or reconciliation are being produced.

How is this to be avoided? It seems almost impossible to prevent such instances to happen: information and sensitization sure help, but, at the end of the day, people's interests will likely weigh heavier, and, if they have the power, they may try to make the process conform to their interests. The only thing that can help is strict control and law enforcement, as well as a flexibility to act fast, to correct abuses when they occur, etc. In the above case, for example, no meaningful gacaca will take place unless the person responsible for the abuse is punished; only that will send the signal that his time the state is serious with participation, that people will truly be able to speak freely. In project terminology, what is required is reliable and rapid monitoring of instances where the spirit of gacaca is being violated, and a willingness and capacity to rapidly act on these instances and correct the process.

## **WHAT TO DO: THE ROLE OF DONORS**

How to decide on a policy towards the gacaca proposal? From the analysis until now, it is clear that the proposal is simultaneously extremely promising and very dangerous; long thought-out and full of uncertainty; locally owned and weakly socially implanted; containing the seeds of reconciliation and potentially leading to increased conflict; preparing a decrease in the (current) prison population while possibly leading to increases in new detainees. There is no way to be sure of anything: it is a giant bet for the Rwandan authorities and population, as it would be for any donor supporting it (with that difference that for donors it is not a matter of life and death, whereas for the Rwandans it is).

In addition, the gacaca proposal clearly poses significant problems to a number of basic human rights and criminal law standards. Admittedly, until quite recently, the international community cared rather little for these standards anywhere, including in Rwanda, but that is not a reason to close one's eyes to them now. It is important to note, however, that successive gacaca drafts have made progress in terms of securing some rights (and more progress could still be made). In addition, it seems clear that a) large

parts of the population directly concerned are in agreement with this proposal, and b) if executed according to the spirit of gacaca, the proposal can ensure a number of fair trial concerns rather well, but in a non-western manner. Every single person with whom I have spoken –more than sixty of them, from all kinds of backgrounds, with very different attitudes towards the government, etc.– stressed to me that the gacaca process is very important for Rwanda, and should be given the best possible chance to succeed. In short, if gacaca proceedings take place along the letter and the spirit of the current law, possibly with some small final revisions, their departures from human rights and criminal law standards may well be acceptable, especially given the great social good that they can produce.

Finally, in discussing gacaca, one must compare it to the available alternatives, all of which –to the extent they exist– have a human rights cost as well. The choice, then, amounts not to one between a "clean," satisfying, safe, or easy to achieve alternative, and a "dirty," risky, unsatisfying one. Rather, it is between two real-world alternatives that both violate human rights, both contain political and social risks. It is, in other words, a deeply political decision, and not a technical or legal one.

That said, on what basis to make this decision? If the gacaca proposal can neither be rejected on legal-technical grounds out of hand, nor embraced blindly on political-social grounds; if the risks are enormous and largely borne by local people who have no say in donor decisions; if human rights concerns need to be traded off, compared, weighed–how is it to be done? What criteria to use? What safeguards to put into place? How to get to decisions on these matters? There is no clear or unanimous answer to this conundrum, but recent thinking on post-conflict assistance –foremost the 1997 OECD Guidelines and the 1999 follow-up studies on incentives and disincentives for peace– does suggest a few elements for a response.

Foremost, any donor decision can be made only after very broad and careful listening to the voices of those concerned. In general, this means the need for promoting local dialogues, listening to broad sections of people, stimulating local knowledge generation and research, finding means of bringing the voices of the weak to the attention of those in power (including donors themselves). We owe this to people both out of respect for their dignity, and because they are the ones who have to live with the consequences of being wrong. The present study was a small attempt to do this. I interviewed more than 60 people, the large majority of which were either Rwandans or people for whom I had good reason to assume that they were well informed of what ordinary Rwandans think (for that reason, I also interviewed many people who do not work with legal NGOs). But this study is merely a first, small step in a bigger journey, in which Rwandan NGOs, associations, researchers, and ordinary people are thinking about gacaca and timidly speaking about it. Donors should support all such work, and very seriously listen to its conclusions.

Second, both the process of making such choices and the final decisions themselves should be transparent to all concerned. As DFID's "Principles for a New Humanitarianism" state: "we recognize that humanitarian intervention in conflict situations often poses genuine moral dilemmas. We will base our decision on explicit analyses of the choices open to us, and the ethical considerations involved, and communicate our conclusions openly to our partners." The resulting clarity may benefit frank discussion and mutual understanding between the donors themselves, the GoR, and society. Clearly, any decision to support or not support the gacaca proposal must be the result of a fine political and ethical analysis, in which donors assess the challenges Rwanda faces, the way gacaca does or does not contribute to overcome some of these, and the kind of margin for maneuver donors have at home. Under all conditions, being transparent about these assessments, aims, and choices, is required – both as a democratic duty at home and as a tool for communication with Rwanda and its people. Again, this study must be read in this light –as a frank discussion of the hopes, doubts, and ideas of one sympathetic outsider and the people with whom he spoke.

Third, whatever policy adopted will absolutely require coordination. It is simply impossible to imagine donors developing ten or more different if not contradictory policies on the gacaca proposal, choosing their regions of predilection, imposing their individual conditions, using their specific monitoring criteria and mechanisms and the like. This would greatly increase the chance of failure.

Fourth, gacaca should be placed in its broader context. The gacaca proposal may make an important contribution to Rwandan justice and reconciliation. However, it will not do so alone, and, whatever positive effect it does have can be counteracted by negative trends that simultaneously occur. This includes attention to issues of compensation, broader justice and respect for human rights, and poverty eradication.

## **PROPOSITIONS FOR ACTION: TOWARDS A POLICY OF CRITICAL SUPPORT**

The gacaca proposal is simultaneously one of the best, most dangerous, and possibly last, chances Rwanda has to move ahead from a genocidal past and an increasingly dictatorial present. Not only does it deal with an almost insolvable problem faced by the current judicial practice; it also has the potential of creating significant benefits in terms of truth, empowerment, and reconciliation than the current system. For these reasons, it deserves, and needs, the full and coordinated support of the international community (propositions 1 and 2 below). Yet, this support must be of such a nature as to minimize the real negative potential of the gacaca proposal, as well as to move forward with the GoR on broader justice matters.

Synthesizing the foregoing analysis, we can say that the biggest threats to the success of gacaca fall into three categories, which need to be addressed by the government and the donors:

- legal and organizational challenges and uncertainties
- social and psychological dynamics in the population
- interference with the gacaca process by (local) powerholders

In addition, there are more challenges of justice in Rwandan society than only those posed by the 1994 genocide and massacres; these need to be addressed as well, by the donors and the GoR. Not doing so may undermine any progress that gacaca may make towards the end of impunity and reconciliation.

The first threat can be addressed through further preparatory work and significant funding (propositions 1, 2, 3, and 4). The second one requires significant additional sensitization of a more participatory nature (proposition 3 and 4) as well as further work on the compensation issue (proposition 7). The third threat requires rapid and reliable monitoring coupled with a capacity to correct problems when they occur (propositions 5 and 6). The final problem requires commitment and attention to broader justice issues (propositions 8 and 9).

In short, what is required is a policy of **critical support**, which should consist of the following:

1. Donors should provide significant financial and political support to the gacaca proposal. The gacaca initiative is costly: the logistics of it are daunting, the monitoring complicated. The gacaca dynamic needs to be fully supported: its potential, both negative and positive, is too large for a grocer's mentality. To the extent possible, this support should be *additional* to ongoing support for other programs in Rwanda, programs related to governance, economic development, reconstruction, and the like. This will not be a continuing activity, but for a three-year period or so, this is a program that is that important that it ought to be funded outside of the usual commitments.
2. Donor financing should be administratively and policy-wise coordinated. There are currently already tens of projects related to gacaca circulating in Rwanda. Each of these proposals consists of some organization doing something surely useful and justifiable – typically activities related to training, monitoring, capacity-building, and decentralization– in some place of its choice, whether one commune, 20 communes, 3 prefectures, or all of the country. These projects were made by all kinds of agencies – Rwandan government units, foreign NGOs, local NGOs– without reference to any of the other projects, and submitted to favorite donors without view of the totality; these donors themselves were sometimes busy preparing their own projects as well.

If donors wish to support the gacaca process, it is simply impossible to imagine them developing 10 or so different if not contradictory training and sensitization projects, 15 or more monitoring ones, almost none for the functioning of the gacaca; covering their regions of predilection, imposing their individual conditions, creating their specific management mechanism, etc. Yet, this is exactly what is happening now.

Those donors whom decide to provide significant support to the gacaca proposal should do so in a coordinated manner. Concretely, this can imply different mechanisms:

- 1) pooling donor resources and creating a "guichet unique" to support the gacaca program, managed by a committee of those countries who fund it;
- 2) making bilateral agreements (*i.e.*, having no pooled resources), but negotiating and monitoring jointly the overall terms and modalities of donor support;
- 3) having no pooled resources and no joint negotiation stance, but coordinating funding decisions on specific projects that are being proposed, so as to ensure that they do not duplicate each other or, conversely, leave odd gaps; and that their aims and methodologies do not conflict.

I personally would prefer option 1; yet, even option 3 would be better than current practice. Numbers 1 and 2 need a high-level political initiative; they cannot come from the mission people in Kigali. The initiative could either come from one or more donor Ministers or from Rwanda's Minister of Justice –or a combination of both. I strongly urge all parties to rapidly contemplate taking such an initiative.

It is very important to have a designated person to organize this coordination, both within the GoR and within the donor community; if not, all will depend on the willingness and capacity of over-worked individuals to voluntarily add this demanding task to their already overburdened agenda. At the government side, this should be a rather senior person, but it need not necessarily be the most senior one; after all, this person's job is not to decide as much as to organize the coordination. At the donor side, the same holds: this does not need to be the often rather senior justice specialist in the embassy or the aid mission, but can be a mid-level person who is simply mandated to centralize all information, maintain lines of communication, organize meetings, etc. The easiest is for such a person to simply be paid for by one of the donors (as a small stand-alone project, with a secretary, vehicle, etc). That donor then basically pays the actual cost of coordination.

3. This support should include significant support for the start-up phase, and enough time to do it well. There are two types of things that need to be done well before the gacaca begins; both take time and money. One is social preparation of the communities; the other is the legal-technical preparation of the process.

The "sensibilisations" the government has been holding until now have been useful in getting the news out, but they have also been very top-down, and limited to slogans.

The gacaca sensitization process should not resemble a solidarity camp (and should certainly not take place during them) but allow space for discussion, local feedback, and some degree of local ownership. It should include sensitization on gender issues. Such training should be done by Rwandans, but could be co-funded by the international community. NGOs should be involved in this: many of them have much more experience with participatory techniques of community mobilization than do government agents. Note that I refer here both to development NGOs implanted in rural areas and urban neighborhoods and to human rights NGOs who have increasingly solid local bases.

In addition, serious work needs to be done on creating a streamlined, internally coherent, simple-to-manage, easy-to-use system. This should imply:

- further technical assistance with the drafting of the gacaca law and the related laws and administrative procedures (including the design of simple and unambiguous forms that can be used by gacaca judges and monitors);
- technical assistance for the organizational/institutional aspects of the process (creation of the 6th cellule in the Supreme Court; specification of the role of various agencies in various ministries; development of the channels of communication and consultation, etc.);
- technical and financial assistance for training of the 200,000 or so citizens who will become gacaca judges (knowledge of the law, basic principles of justice, and basic notions of socio-psychological dynamics);
- financial assistance for start-up costs, such as the purchase of means of transportation; the printing and distributing hundreds of thousands of forms; etc.

All of this takes time—more time than the government has set aside in its planning. It is better to prepare the gacaca process a few months more and do it well, than to do it hastily and badly. In any case, the current calendar seems totally unrealistic; de facto, things will take more time. Use it well.

4. There is an important need to add a gender perspective to the discussions about gacaca. The key issue here is that, if no special efforts are made, women will simply not participate in the gacaca process. With few exceptions, they will not be elected into the sièges, and they will not provide testimony. During discussions on restitution and compensation, they may be neglected as well, contrary to the law.

Gender matters will need to be included centrally in the information/sensitization/discussion sessions (see point 3). Objective ought to include:

- assuring a significant representation of women on the sièges de gacaca (through the use of an informal objective of 30%, ?) ;
- ensuring that women are heard during the deliberations;

- ensuring that the members of the sièges are aware of the recent legal reforms in matters of land ownership, succession, and the like, so that they apply these rules during compensation proceedings.

It should also be possible to associate women's organizations, where they exist, at the sensitization stage, and encourage them to work with their members to assert their rights. There are quite a few such organizations, although they do not at all cover the whole territory.

Finally, some thinking should be done about the possibility of making available opportunities for trauma counseling with a strong gender sensitivity. There are organizations working on these matters in Rwanda; if they present projects to donors to provide such services linked to gacaca, donors should favorably view them.

5. A monitoring system that is fast, local, reliable, gacaca-specific, and centralized must be established. These monitors assist at the audiences and, using a standard, uniform monitoring system, they write short reports about the unfolding of the dynamics. If necessary, they take note of major violations of the spirit of the gacaca process: strong intervention by authorities, intimidation or harassment of witnesses or judges, systematic false testimonies or confessions, penalties that are vastly discordant from the provisions of the law, etc. They send these reports to the a central mechanism (see proposition 6) CSGG as well as to the 6th cellule of the Supreme Court.

*Mandate of the monitoring system.* First, monitoring shall be "fast," meaning that the feedback from the collines shall move up to the decision-making instances almost immediately, and that this information shall be considered right away. Documenting abuses that took place months earlier –the typical job of international human rights organizations– is too late to correct the process: the damage is done. The monitoring information should pass through as few as possible steps before reaching the apex. In the most expensive version, monitors could possess individual laptops with satellite phone connections for mobile e-mail. A cheaper scenario is that they pass once a week at the prefecture where they send their information to Kigali (while leaving a copy locally).

Second, the monitoring must be done by Rwandans. Foreigners who do not speak the language and do not have a deep understanding of the culture simply cannot do the job, so any system along the lines of foreign election observer teams will not work.

Third, monitoring shall be reliable, meaning that its objectiveness and truthfulness shall not be in doubt. This can be assured by having monitors hired and paid by a central and neutral agency, by good training and support to monitors, and by a strict control over the fate of the monitors, so as to avoid that they themselves become victims of intimidation or temptation.

Fourth, the monitoring should be gacaca-specific. The monitoring shall not become an instance where narrow legalistic concerns are suddenly imposed upon the process—it then would be sure to fail. It should also not be the occasion for the international community to dictate its standards of behavior, or its preferred outcomes. What should be monitored, however, is the extent to which the spirit of the gacaca process is being respected. This will require a fine political understanding of the gacaca enterprise. The gacaca dynamic must be one in which communities can play a big role, and build on their own resources to interpret the past, judge transgressions of the law, make social compromises, and resume life together. They will do so in ways that do not conform to criminal law procedures, and possibly with outcomes that do not conform to human rights standards, or to our own personal senses of justice. And yet, as long as they do with fairness, openness, and autonomy, they shall be allowed to continue.

*Organization of the monitoring system.* Two different systems can be envisioned:

A. Ideally, this system is organized under the authority of one central and neutral instance (such as the CSGG discussed in the next proposition). Such an agency, while retaining the authority over the monitors, could sub-contract the task of hiring, managing, and overseeing the monitors to a non-state agency such as CLADHO or LDGL or RCN or a joint venture thereof.

It may not be possible to centralize the monitoring into one organization. Achieving this would require both that the donors combine their resources into a guichet unique, and that the GoR accepts this policy. Both seem unlikely. Donors are already receiving tens of individual monitoring project proposals, and the GoR seems to encourage this. Indeed, the Ministry of Justice's policy is that anybody who wants to monitor the gacaca proceedings will be allowed to do so. The GoR's "let a thousand flowers bloom" approach to monitoring seems a priori rather sympathetic to the international community's style: donors generally like the pluralist approach to things, and it fits well with their un-coordinated project style of functioning. The Government itself seeks to hire a number of monitors through the 6e Cellule in the Supreme Court; the para-governmental Commission Nationale des Droits de l'Homme seeks to do as well; as do 20 or so local and foreign NGOs. Almost all these players have submitted proposals to that effect to individual donors.

And yet, I believe that it is very important that the monitoring be much more coordinated than it is likely to be, for the following reasons:

- geographic coverage: under the current emerging practice, there will be uneven geographical coverage, with some places over-monitored and some under-regarded;
- content: with current trends, monitoring will be different depending on who does the monitoring. Agencies will use different criteria—some more legalistic, others more social, for example—and different reporting forms and periodicity;

- audiences: all these different agencies doing monitoring --governmental, non-governmental, local and foreign-- will send their reports to different audiences, cutting down the possibility to get a view of the total.

B. A second scenario allows for the fact that donors will end up bilaterally funding a whole slew of specific monitoring projects executed by a variety of agencies, but seeks to ensure that:

- a) when donors make their funding decision, they do so knowing about the different projects submitted to each other, and they make their decision in function of this knowledge (including the possibility to request design changes in certain projects so as to increase consistency);
- b) a workshop will be organized at which the different players who will do monitoring seek to agree on a joint monitoring approach, both in terms of content and of form;
- c) all monitoring agencies are requested to send all their reports to some centralized structure(s).

Here again, an initiative by either one donor or, better still, by the Minister of Justice, may make the difference. Someone has to take the initiative to ensure that at the least this minimal form of coordination takes place. The donor justice specialists in Kigali are too overworked (and under-responsibilized) to take the initiative themselves: it must emanate from the political level.

Note also that an important part of the monitoring will need to focus on what happens after the gacaca jurisdictions make their decisions:

- are people who are liberated following gacaca proceedings (either acquitted or condemned to prison penalties less that what they already served) subjected to harassment, intimidation, or outright murder.
- Are the TIGs not abused? are they truly public? Do they respond to the rules as they will be laid out in the law?

One final remark. Can 154 persons with the kind of fine political, legal and social skills required to exercise this mandate be found in Rwanda? Especially that they are needed for a long period of time, for the gacaca process may last a few years. One should avoid emptying out Rwanda's human rights and other civil society organizations in this framework! This is an unanswered question. One possibility is to hire monitors nationwide only for the period of the elections and the first few cellule meetings (a total of, say, 3 months), and then employ only a limited number of them -30 or so- afterwards for urban areas, other targeted areas where problems are most likely, or random tests.

6. A high-level Comite de Suivi et de Gestion Gacaca should be created. It has two functions: a) receive and discuss the rapid monitoring results, and b) recommend concrete actions to correct the course of action.

*Structure of the CSGG.* Such a mechanism can come in different forms:

A. The CSGG could be a multi-party committee composed of representatives of donors, the GoR, and civil society. Membership could include: 3 donor representatives (1 bi, 1 multi, 1 NGO?); 3 civil society representatives (CLADHO, Pro femmes, Ibuka?); and 6 government representatives (Ministry of Justice, Ministry of the Interior, Ministry of Local Administration, Chief of Police, Supreme Court, and Commission Nationale des Droits de l'Homme). This Committee would have a small, high-quality staff (essentially consisting of the persons mentioned in proposition 2, working in one team), who organizes the feedback reports, prepares the regular meetings, and ensures communication between the members.

B. Instead of a joint institution, one could envision having two parallel apex structures: one at the donor side and one at the government side. The donor apex organization would consist of representatives of the participating donors (see point 2 above). The government one would be a coordinating structure bringing together the same players mentioned in the previous paragraph. The two organizations would regularly meet to assess the situation and discuss necessary modifications.

*Mandate of the CSGG.* The CSGG would be the highest oversight authority over the gacaca process, with the capacity to propose policy decisions and reallocations of resources, request administrative regulations and behavioral changes of its constituents, and propose innovative solutions for problems as they occur. For example, the CSGG could recommend to suspend operations in a certain area until a specific local issue is resolved; to provide more sensitization or training to the people of a certain area; to reallocate monitors (in case not all communes have one, that is), etc.

It would meet regularly (at the least monthly, if not more frequently, in the very beginning; possibly less thereafter). It would start each meeting by a discussion of the feedback from the monitors. It would then discuss the actions to be taken in the light of the problems encountered. It would pay special attention to the recommendations adopted at previous meetings, and check whether they have been implemented and, if so, to what effect.

There are two basic types of reasons to have such a central monitoring and management structure, whether joint or parallel. First, local abuses will occur, and that socio-psychological dynamics in certain regions will act as brakes on the gacaca process. It is important to know about these problems and to try to do something about them, if possible. Second, there clearly exist major uncertainties surrounding the gacaca process. To some extent there are no fixed answers possible in advance: a certain leap of faith needs to be taken. To mention but two major potential challenges: the urban problem (which may render the functioning of gacaca justice impossible in the absence of witnesses), and the possibility that large numbers of people who are not currently

imprisoned will become accused as the gacaca process proceeds (which would create a major social problem as well as continue the penitentiary nightmare, contrary to the aims of the gacaca). It is not totally clear whether these problems will arise, nor can one be sure of what their exact nature and size will be; in addition, there could be still other, unanticipated challenges. However, if and when they arise, there needs to be a high-level instance that can signal the occurrence of the problem and start thinking rapidly and credibly about solutions. The CSGG can be this instance. Having different players around the table may improve the quality of the deliberations, and increases the chance that they will all buy into the eventual solution.

7. The issue of the Compensation Fund requires some serious, politically astute and principled thinking. Donors need to direct resources to genocide survivors, and education may well be the prime way to do so. In addition, compensation issues exist as well for those Hutu who were victims of the massacres, and for people unjustly imprisoned. All of these issues require vastly more thinking than they have received until now.

Everyone assured me that there is a strong need for the establishment and functioning of such a Fund. The survivors truly expect this to happen, and, for many of them, desperately need it. If the forthcoming law on this matter will set reasonable forfaitary amounts of compensation and reasonable limits on the number of claimants, and if the gacaca proceedings will effectively determine people's true losses, then the legal basis would be laid for a well-functioning compensation mechanism.

The problem is that the money is simply not there; whatever funds can reasonably be expected will not remotely be on the scale required. Ball-park estimates easily range into the hundreds of millions of dollars. If only one person could claim a compensation of \$1,000 for every person killed (and all his/her possessions, even if they were worth much more), and using the usual estimate that the genocide and massacres killed 800,000 person, the cost, without administration, would be \$800 million -or approximately 4 trillion RwF. Few if any donors seem willing to make significant commitments here.

One possible solution is to lower the compensation to a truly symbolic level that can be funded by the government and some limited donor money. However, this would seriously disappoint survivors and their organizations. In addition, it can be argued that giving people only very small amounts of money is truly adding insult to injury, and may give rise to major frustration. Hence, it may well not be the right path. Note, in this respect, that the GoR's request before the ICTR to unblock and restitute the accounts of the genocide leaders is of crucial symbolic politics, and all Western donors should cooperate with it; however, it will not remotely provide enough money for compensation either.

On a practical level, the only more or less feasible path seems to go along the lines of the Fonds d'Assistance aux Rescapés, whereby donors, and the government of Rwanda, invest in social services targeted at rescapés, such as house reconstruction, schooling, health centers (including mental health), or other important social services of use to them. While this will not have the powerful symbolic value of financial compensation to victims of the genocide and the massacres, it does have the potential of making people's lives better. Especially subsidies for education can be crucial in this respect: higher education is, after all, one of the key means for social mobility in life, in Rwanda as elsewhere. Such action does not compensate for the past, but may help to create a better future. It also falls within the domain of what donors typically like to fund, and is thus much more likely to elicit their contribution, even over a longer term.

I thus strongly recommend that donors invest much more significantly than they have done until now in primary and secondary education in Rwanda. There are a few steps here. The first one is to clearly support children rescapés through their studies and to take a long-term commitment on this matter (note that it is the Rwandan state that ought to do so, not the donors, but the donors can commit themselves to long-term funding). This should be done in such a way as to link it to the genocide and the massacres, *i.e.*, it should possess the symbolical value of a society's commitment to make the future better than the past (in regards to education, this statement is symbolically even more powerful as under the previous regime, unequal access to education was one of the ways Tutsi were discriminated against). The second is to provide funding for increasing the opportunities for education for *all* Rwandans. At the end of the day, one does not want to create a society like Burundi's used to be, in which Tutsi are extremely over-represented in secondary and tertiary education. This is bound to lead to resentment and provide fodder for political radicalism in the future. What one really wants is a society in which all Rwandans have access to higher education: this may render Rwandan society more resistant to political manipulations of all kinds, and its economy capable of escaping the limitations of agricultural subsistence. Immediately after the genocide, the GoR prepared an interesting long-term economic policy statement in which Rwanda would focus its economic development strategy on the vision of a knowledge society. This idea seems to have been lost in the way, under the pressures of day-to-day crisis management and economic retrenchment. While it is clearly a long-term project, I deeply believe that it makes economic, social, and political sense for Rwanda, and for the donor community, to treat quality education for all Rwandans as the first of all priorities. This can be, for some years, combined with targeted financial support for rescape children.

I realize that it is easy to make theoretically perfect schemes, but still, I want to add one more remark. It is important that any policy of symbolic and financial compensation or support be available as well to those Hutu who were victims of the massacres: their suffering needs to be recognized as well.

Finally, writing about compensation, it would be important as well to provide a minimum of compensation, if at the very least symbolically (apologies), to people who have been unjustly imprisoned for a long time. In that respect, it is crucial that these people should be able to find the jobs back they lost when imprisoned: the law does guarantee them that treatment, but it clearly is not always happening.

8. Should donors chose to seriously support the proposed gacaca system, they should not do so at the expense of the formal justice system. After all, a significant number of prisoners remain in category I --a category that is bound to grow as a result of adding "rape" to the definition. Doing justice there, and doing it using the full and correctly applied standards of human rights and criminal law, remains important.

In addition, approximately 15% of the current prison population --especially in the communal cachots, where the conditions are very bad-- consists of prisoners of common law. Their situation has been neglected by the concentration of the justice system on the genocide. As the gacaca proceedings will finally change that situation, it is important to provide justice to all imprisoned people in Rwanda. Finally, there are also a great many other judicial procedures still running before Rwandan courts, some of which are sequels of the genocide: matters of paternity, of contracts, of inheritance --most of these have found no resolution for years already, and the justice system will need to deal with them. Hence, at least for some time to come, the formal justice system will need to benefit from significant international support.

9. If the gacaca process proceeds well, it will be important --and possible-- for donors and the GoR to engage more seriously on broader issues of impunity and justice. Human rights reports clearly indicate that serious human rights violations have occurred and are occurring in Rwanda during the tenure of the present government. One may legitimately disagree about the extent to which these violations are understandable under the difficult circumstances of a post-genocide society; whether they are centrally planned or individually initiated; whether the regime has shown a restrained or a purely militarized attitude; how to appreciate the improvements the government has produced in terms of justice and peace and a discourse of reconciliation; to what extent the continued military threat from outside and inside the country explains many of the alleged human rights violations; etc. These are extremely complicated issues, on which all sides should be heard carefully, and simple judgments are likely to be wrong. However, even if one were to answer all the above assessments on the positive side, there is no denying that a) serious and unjustified human rights violations have taken place and are still taking place in Rwanda, and b) these patterns do not favor reconciliation, and may well undermine the progress made by the gacaca process, even if the latter were to be successful. If the GoR is truly interested in establishing justice, peace, and good governance in Rwanda, it will seek to address these matters; if the gacaca proceedings are successful, it should be easier for all concerned --government, donors, and civil society--to work together on this.

This leads to two recommendations: one relating to crimes committed by the FPR/APR before Dec. 31, 1994 (and thus potentially covered by the gacaca proceedings), and one related to human rights violations thereafter.

A) It is widely known that a significant number of people were killed by the FPR/APR during the 1990-1994 period. It is generally accepted that most of these killings were related to the war, and as such, while regrettable, rather unavoidable. Other cases were revenge killings, often perpetrated immediately after liberation of a certain region or place: most –but not all– international observers have been impressed with the limited occurrence thereof, as well as with the fact that the GoR has always explicitly condemned these so-called “dérapages” and has often acted to punish those responsible. It must be noted, however, that:

- there have been a significant number of these killings during and immediately after the civil war, and there is some serious suspicion that some of these, rather than being spontaneous revenge acts, were planned exterminations of political opponents;
- yet, by no means have all those instances been addressed and followed by investigations and punishments of those responsible. There is thus, in all likelihood, a significant reservoir of cases of people killed by the FPR during or after the civil war without any judicial follow-up. As a result, it is quite possible that in discussions during the gacaca proceedings, these cases will come up.

The law declares nothing on this matter; many of those with whom I spoke recognized the fact that these instances would occur (*i.e.*, instances of people mentioning potential APR-committed killings), but had nothing specific to say about solutions. It is clear that the mandate of the gacaca will not be extended to deal with such accusations: to my knowledge, nowhere in the world have acts committed by military personnel been judged by popular tribunals, especially not acts committed during conditions of war -- not even by civilian justice systems, for that matter-- and there is no reason to set higher standards for Rwanda than for the rest of the world. Also, to my knowledge, the regular Rwandan law shall apply here. If during gacaca discussions instances of alleged FPR-committed murders come up, they shall be documented and handed over to the authorities (police, burgomaster) who shall pass them on the military tribunals in charge of following up on them.

An important aspect of the monitoring system discussed above will then need to ensure that people can feel safe to mention these instances and have them recorded. If the gacaca process is really to contribute to reconciliation, people must be allowed to speak freely, including about those things the current regime understandably would not like to hear about. Once again, the aim is not to turn the communities into military judges, but rather to establish a full historical record of what happened and pass relevant

information to military prosecutors. Both of these are crucial for ending impunity and promoting reconciliation.

B) The other issue relates to human rights violations committed under the current regime after 1994 –and foremost politically motivated ones as well as the recent dérapages in the Congo (rather than war-related ones, which are much harder to judge). Being politically realist, I do not suggest that international support to gacaca be made conditional to immediate major progress on human rights. Such a request --a dramatic departure from current policy-- may well block the process of working together on gacaca before it even takes off, and gacaca is too important to be doomed from the start. However, if and when the gacaca process proceeds well, the conditions ought to be ripe to extend the policy of critical support to the current human rights situation. If gacaca works successfully --if a major social problem is beginning to move towards some form of resolution; if the people in the government who supported the gacaca process come away strengthened; if the social capital between the donors and the government gets strengthened as a result of a successful close collaboration-- then it will become necessary, and possible, to take the next step.

An example to contrast the current situation with is the Kibeho incident. At that time, the international community did bring the issue up and insisted on an investigation. The GoR did organize one, which came to conclusions which were disputed by some, and accepted by others. The most important fact is that it was talked about, and that, in doing the investigation, it was made clear that this behavior was outside the acceptable. In addition, some people did go to trial (although few, and they received very small penalties), and, more importantly, similar events did not reoccur for a long time. For sure, this did not turn Rwanda overnight into a bastion of human rights respect and individual freedom; given its history, that could hardly be expected. However, it did achieve some results which looking the other way --the current attitude-- surely does not produce.

10. A number of people suggested that it may be useful to send on a regular basis an outside expert mission to assess the politics of the gacaca process. Indeed, a more or less neutral outside look by a person who does not work for any of the agencies concerned -- whether the government, civil society agencies, or the donors-- and who produces a public discussion paper that focuses on the political challenges (a sort of follow-up to this paper), may be a good way to regularly provide new impetus for a fresh look at the situation, and a platform for renewed discussion. It is not that such a person would possess the truth on the matter; rather, he or she may add an intellectual stimulus to the process.

## LIST OF PERSONS INTERVIEWED

- Aubin, Angele, Directeur, CECI, Kigali
- Badibanga, Jean-Jacques. Chef de mission, Avocats sans frontieres, Kigali.
- Bakhet, Omar. Former UNDP Res-Rep in Kigali, now Director Emergency Division UNDP, New York.
- Basimongera, Alberto. Director a.i. of Legislation, Ministry of Justice, Kigali
- Benomar, Jalal. Governance Specialist, UNDP, New York.
- Birasa, Fiacre. Special Counsellor, Ministry of Justice.
- Biruta, Vincent. President, National Transitional Assembly, Kigali.
- Bouchard, Andre Representative Dan-Agro, Kigali.
- Browne, Stephen, former UNDP Res-rep in Kigali, Director Social Development & Poverty Elimination Division, New York.
- Burnet, Jennie. PhD Candidate, Anthropology, UNC, residing in Kigali.
- Copine, Frederick. Expert juridique, Belgian Development Cooperation, Kigali
- Del Ponte, Carala. Chief Prosecutor, ICTR, Arusha.
- des Forges, Alison. Investigator, Human Rights Watch.
- DeWilde, Vincent. DCHR representative, Kigali
- Egan, Liz, International Alert, London.
- Fafin, Susanne. Director Governance Unit, NU DP, Kigali.
- Gahima, Gerard. Prosecutor Genera, Supreme Court, Kigali
- Gasana, Ndoba. President, National Human Rights Commission.
- Gasibirege Simon. Centre for Conflict Management, National University of Rwanda, Butare.
- Gatambiye, Sylvere. Public Prosecutor of Kigali.
- Gourdin, Jacques, Director, Belgian Development Coopeation, Kigali.
- Guichaoua, Andre. Professor, Universit of Lille, France
- Hamilton, Heather. researcher
- Hannum, Hurst. Professor of International Law, Tufts University
- Joannette, Benoit. Directeur Reseau de Citoyens, Kigali Office.
- Kagabo, Aisha. Justice Division, UNDP, Kigali.
- Karekezi, Alice. Centre for Conflict Management, Butare.
- Kehrer, Brigitte. Mission Chief, Swiss Embassy, Kigali.
- Kelly, Kevin. Former Director Trocaire, now Save the Children, UK.
- Kerrigan, Fergus. Danish Centre for Human Rights, Denmark
- Kimonyo, Jean-Paul. Scientific Coordinator, Centre for Conflict Management, Butare.
- Lizzio, Kenneth. Democracy and Govenance Advisor, USAID, Kigali.
- Mascini, Fransesco. First Secretary, Netherlands Embassy, Kigali.
- Metzger, Alexander. Stiftung for Zukunftsgestaltung, Switzerland.
- Mironko, Charles. Genocide Studies Program, Yale Univesity.
- Mucyo, Jean de Dieu. Minister of Justice, Kigali

- Mugambage, Frank. Commissioner General, Rwanda National Police, Kigali.
- Munzu, Simon. Director, Justice Division, UNDP, Kigali.
- Musoni, Protais. Secretary-General, Ministry of Local Administration, Kigali.
- Mutagwera, Frederic. President, IBUKA, Kigali.
- Nayinzira, Jean Nepomuscene. President, National Commission of Unity and Reconciliation.
- Nyirahabimana, Soline. Commissioner, National Human Rights Commission
- Nyirampabwa, Jeanne-Francoise. Director, Prison Administration, Ministry of the Interior, Kigali.
- Pozarny, Pamela. UNDP Governance Division, Kigali.
- Reyntjens, Filip. Professor of Law, University of Antwerp.
- Ruboneka, Suzanne, Program Manager Campagne Action Paix, Pro-Femmes/Twese Hamwe, Kigali.
- Ruga-Mbage, Eugene. Personal Assistant, Minister of Justice, Kigali.
- Rwagasore, Simeon. Preident, Supreme Court, Kigali.
- Siddle, Ben. Project Manager, Trocaire, Kigali.
- Simburundali, Theodore. Commissioner, National Human Rights Commission.
- Sinygaga, Silas. Executive Secretary, CLADHO, Kigali.
- Sommers, Marc. Researcher, Boston University.
- Storey, Andy. Lecturer, Development Studies Centre, Dublin.
- Tidjani, Fadila. Investigator, ICTR, Kigali.
- Turatsinze, Juvenal. Project Manager, Trocaire, Kigali
- Twagiramungu, Noel. Executive Secretary, Ligue des Droits de la Personne dans la Region des Grands Lacs, Kigali.
- Ukizemwabo, Florian. Executive Secretary, LIPRODHOR
- Umutoni, Christine, Advisor for Economic Affairs at the Presidency, Kigali.
- Vandegiste, Stef. Researcher, PhD Candidate in Law, University of Antwerp.
- Weber, Daniel. Coordinator, Penal Reform International, Kigali.
- Zellweger-Monin, Renée. Protection Coordinator, ICRC, Kigali.

+ numerous informal conversations