

THE GACACA COURTS AND CONFESSIONS.

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ABSTRACT:

The unprovoked aggression against Rwanda by the Rwanda Patriotic Front (RPF) from Uganda on October 1, 1990 is well documented and no longer subject of reasonable controversy. According to the Rwandan Patriotic Front (RPF) it took up arms to put an end to dictatorship and violations of fundamental rights of Rwandans.¹

After the great human and material devastation caused in it's unprecedented ruthless search for political power, a devastation that till date has claimed millions of lives within Rwanda and neighbouring countries, the lives of two head of states and the displacement of millions of civilians across the Sub region, the RPF as a smokescreen, set for itself a plethora of goals which included, reconciliation, establishment of democracy, provide security an end to impunity and the establishment of the rule of law.

Among these goals, featured a controversial goal that the RPF has with time, consistently used to maximum effect to circumscribe meaningful enquiry about the crimes that since its attack on October 1, 1990. The RPF has succeeded in this perfidy, despite undisputed evidence that includes confessions and public statements by its leaders and public UN records documenting these crimes.²

To venture to request the prosecution of RPF crimes against Rwandans of all ethnicity, in particular against the Hutu, amounts to being liable to accusation and prosecution for negation of the Genocide of the Tutsi and "divisionism". Legitimate opinion about this has been criminalized, with it a major component of the history of Rwanda. This is the reason why those accused or denounced for committing these amorphous crimes constitute a sizeable percentage of persons charged retrospectively and kept indefinitely in Rwandan jails.

Prior to this attack according to the Rwandan official version, "Most of the world had never heard of the RPF until 1st October 1990 - the day the war of liberation began against the military dictatorship in Kigali. Taking up arms was not an easy decision to make. War has always been the last option in the consideration of the RPF. However, all efforts for peaceful and democratic change in had so far proved futile. *It had become apparent that only by taking up arms could anyone wishing to put an end to the dictatorship and the violation of fundamental rights hope to succeed. The regime had amassed a huge coercive state machinery using violence to oppress the people. The taking up of arms against the regime was therefore considered not just a right, but also a patriotic and national obligation.*

When the war began, Rwandese peasants, workers, students and intellectuals, men and women from every region and "ethnic" or social group, responded to the call of the RPF to rid Rwanda of dictatorship".¹

According to a Posting in the official website of the government of the Republic of Rwanda, <http://www.gov.rd>, "on the 4th July 1994, the capital city, Kigali, fell to the Rwandese Patriotic Army (RPA), the armed wing of the RPF. Over three million refugees fled to Tanzania and the DRC. Against a backdrop of entrenched **divisive and genocide ideology**, repeated massacres, the persistent problems of refugees in the Diaspora, and the lack of avenues for peaceful political change, the Rwandese Alliance for National Unity (RANU) which was formed in 1979 by some Rwandese in the Diaspora with the objective of mobilising Rwandese people to resolve these problems. Almost a decade later, in 1987, RANU which became the Rwandese Patriotic Front (RPF)", took power with the objectives to "promote national unity and reconciliation; To establish genuine democracy; To provide security for all Rwandese; To build an integrated and self-sustaining economy; To eradicate corruption in all forms To repatriate and resettle Rwandese refugees; To devise and implement policies that promote the social welfare of all Rwandese and; To pursue a foreign policy based on equality, peaceful co-existence and mutual benefit between Rwanda and other countries".²

There is no gainsaying, therefore, that once firmly entrenched in power, the RPF has used the pretext of fighting impunity to put in place institutions and laws whose purpose is to blackmail and silence potential political opponents, compel allegiance from the majority in order to monopolize and eternalize political power. This paper aims to show that without the use of the Gacaca justice system, the success of the RPF in emasculating the people of Rwanda would have been mitigated.

Co-opted as courts of Special Jurisdiction, the Gacaca Courts which played a laudable justice and reconciliation role in the history of Rwanda are now rather used as affronts to fundamental human rights, mockery of the International Human Rights Conventions acceded to by Rwanda and enshrined into her constitution; thus they have regrettably become political tools of oppression.

It is estimated that almost two hundred thousands people are presently under prolonged and indeterminate detention under subhuman standards under the Gacaca system. These conditions by and of themselves as well as the use of coercion, torture, blackmail and other nefarious means that include institutional provisions like those legislated into the GACACA fundamental law that recommend reprieve and lenient sentences for those who confess to crimes they might never have committed, makes the entire process fundamentally unfair. Furthermore, many of the detained persons have never been informed or notified of the crimes they committed. The practice is that they are publicly denounced and convicted. Many more detained since 1994, have been charged for the crimes of "negationism", "revisionism" and "divisionism"; crimes which did not exist at the time they were arrested and detained.

This paper intends to establish that the Gacaca system as a whole and the confessions obtained in and through the process are in fundamental breach of the International Conventions Rwanda has acceded. And that standing by while hundreds of thousands of Rwandans perish under a system that violates the decency of human conscience, the International Community which is the moral and legal guarantor of world peace and security, is once more betraying the people and future of Rwanda and with it, humanity that it committed itself in making the centre of its preoccupation.

INTRODUCTION:

The Gacaca court system as it should be properly called is a system common to most indigenous systems in Africa, Australia and New Zealand. In many indigenous systems where it is practised, there are no formal court proceedings initiated and conducted by the state. In this system, the community rallies around the chief and discusses the wrongdoing or palaver and a restorative solution found.

This system of restorative justice involves the victim more fully. The process aims to bring peace and reconciliation between the perpetrator of the wrong and the victim. It affords the victim the possibility of being compensated for the loss he suffered, the perpetrator the chance to atone for the wrong he has inflicted on the victim and the community; it additionally affords him the possibility of being fully rehabilitated into the community, once the matter is resolved.

Like in the rest of Africa where this system exists and operates, the Gacaca in Rwanda was constituted around the community leaders and sages, with the participation of the entire community with a right to every member of the community to be heard, to settle family and/or village disputes such as disputes over land, marital, property rights, theft, inheritance and other disputes that arose within the community. The rationale of these trials was the promotion of justice, peace, reconciliation and healing between the victim and the perpetrator in the presence of everyone.

In an opinion page in the New Times Newspaper dated April 30, 2010, Brigadier General Rusagara of the (RPF) writes that: "*As a modernised system of justice to address a difficult situation, the Gacaca had four objectives, i.e., to bring the conflict into the open, involve the whole community in resolving it, provide for compensation, and bring the offender back into the community fold*"³.

³ **Gacaca - Can Human Rights Be Universal and Have Respect for Cultural Relativism?**

Brig. Gen. Frank Rusagara, New Times, Kigali Rwanda April 30, 2010.

The stated advantage of this system is that it aims at repairing the damage done rather than inflicting punishment. This way, it brings closure to the matter. A majority of the people detained in Rwanda come under the jurisdiction of the Gacaca Courts.

By 2001, Rwanda had a prison population of more than 200,000 people mainly Hutu initially arrested and detained for their alleged participation in Genocide.⁴ According to the Government of Rwanda, it lacked the capacity or the means to bring all these persons to trial within the normal court system which was ill equipped and lacked adequate or trained personnel to handle the backdrop of cases.

As a solution, the Government of Rwanda co-opted the Gacaca traditional justice system and reorganized it and conferred it with the criminal jurisdiction to handle these cases. This mandate is unarguably completely at variance with the traditional mandate and purpose of these courts. In the result, the Gacaca Courts as we know them today are Gacaca only in name having become a politic weapon with which the Government punishes its adversaries or instils fear to a citizenry in need of peace and reconciliation.

THE GACACA COURT SYSTEM.

According to the official Rwandan government website the National Service of Gacaca Jurisdictions, the "Gacaca Courts" system has the following objectives:

- The reconstruction of what happened during the genocide
- The speeding up of the legal proceedings by using as many courts as possible.

Unlike the provisions relating to other courts, the Rwandan Constitution of **26 May 2006**⁵ in its article 152, does not define the competence and jurisdiction of the Gacaca Special Courts. The Supervision and coordination of the activities of the Gacaca Courts was to be determined by “a national commission” to be established by law. The organization, jurisdiction and functioning of the said courts was to be determined by an organic law to be promulgated subsequently⁶.

Not surprisingly, at the time this constitution purporting to create the Gacaca Courts was promulgated, the said Courts were already in existence operating under an administrative structure susceptible to political and executive control and manipulation.⁷ In effect the Gacaca system actually started operating in 2001 when its organic law was already in implementation then.

⁴ The target ethnic group criminalized as such as the Hutu since, the genocide has been officially qualified to be genocide of the Tutsi. The first provision in the preamble to the constitution of Rwanda of 26 May 2003 alleges: “In the wake of the genocide that was organised and supervised by unworthy leaders and other perpetrators and that decimated more than a million sons and daughters of Rwanda.”

⁵ Article 152 (2003) of the constitution of Rwanda states:-
There is hereby established Gacaca Courts responsible for the trial and judgment of cases against persons accused of the crime of genocide and crimes against humanity which were committed between October 1st 1990 and December 31st 1994 with the exception of cases jurisdiction in respect of which is vested in other courts.
An organic law shall determine the organization, jurisdiction and functioning of Gacaca Courts. A law shall establish a National Service charged with the follow-up, supervision and coordination of activities of the Gacaca Courts. This body shall enjoy administrative and financial autonomy. This law shall also determine its duties, organization and functioning.

⁶ The provisions of article 152 are an invitation for the Gacaca Courts to operate out of the guarantees of fairness and independence enshrined in article 140 of the constitution.

⁷ Since 2002, Gacaca Courts Department was replaced by the National Service of Gacaca Courts so as to coordinate the Gacaca Courts activities and speed up this process. (Introd., National Service of Gacaca Jurisdictions).^[4]

About the implementation of the Gacaca System in Rwanda, William A. Schabas⁸ writes that: “ Acting upon legislation adopted in 2001, a pilot phase convinced justice officials of the viability of the process throughout the country. The institutions have been fine-tuned, and become fully operational in the course of 2005. Because the pilot phase encouraged denunciation, instead of offering ‘closure’, the process has actually revealed a much broader popular participation in the atrocities of 1994. Authorities now say the process will prosecute more than 1,000,000 suspects”.

It may be argued that organic law no.16/2004 of June 19, 2004 was intended to bring the Gacaca court system within the ambit of the constitution of May 26, 2003, by the operation of article 152 of the said constitution. Unfortunately, this law and its subsequent amendment are totally inconsistent with the constitutional guarantees of independence enshrined in article 140 of the said constitutions making the Gacaca Courts mere instruments of terror at the service of government in power.

It may therefore be said that the organic law of 2004 considered in the context of the constitution of May 26, 2006 brings to the fore the truth about the fact that the Gacaca Courts operate in a manner inconsistent with the international obligations of Rwanda to respect the letter and spirit of international conventions to which she had acceded and pledged to respect.

The lack of independence of the Gacaca Court System for example is discernible in the overbearing commanding and supervisory role of the Executive Secretary of National Gacaca Courts on the entire system.⁹

Furthermore, the explanatory statement that accompanied the creation of the Gacaca Court System in 2001 clearly laid out the modus operandi, the competence and procedure before the Gacaca Courts that are not only inconsistent with the Constitution of Rwanda but violates international conventions which Rwanda has acceded to and incorporated into its 2003 Constitution.

For the purposes of this paper, I find it useful to refer at length to the explanatory statement to the Organic law of 2001 which justifies the procedure before the Gacaca courts. The explanatory statement states that the alleged offences that “constitute the crime of genocide or crimes against humanity were committed publicly in full view of the population”. The explanatory statement further state that the alleged “non-dissimulation” of information about the perpetrators of the alleged crimes “resulted from the fact that the public authorities, who had the mandate to lead the population in the right direction, themselves incited the population in to commit the crimes in all impunity without any attempt to conceal them.

For that reason the Gacaca system was conceived and put in place to enable all the citizens of Rwanda to “participate on the ground level” in the “gathering of evidence, denouncing alleged perpetrators and assigning criminal responsibility and punishment” for alleged crimes perpetrated.

⁸ Genocide Trials and Gacaca Courts: Williams Shabas is Professor of Human Rights Law, National University of Ireland, Galway and Director, Irish Centre for Human Rights.

⁹ For an example: “Instruction No.6/2005 of 20 July 2005 of the Executive Secretary-General of the National Service of Gacaca Courts Domitilla Mukantanzwa, on the dismissal of Judge Inyangamugayo from the Gacaca Court Bench, dissolution of a Gacaca Court Bench and report of Judges Inyangamugayo”. A careful reading of this instruction alongside the constitutional guarantees of judicial independence establishes that the Gacaca Courts as constituted are mere instruments of executive retributive and vindictive justice, thus incapable of dispensing justice that meets internationally acceptable standards.

According to the explanatory statement, the purpose of the Gacaca system was to make it difficult for accused to deny allegations brought against them *“since they will be in front of eyewitnesses to their actions”* and *“continue the eradication of the culture of impunity by using **any method** that makes it possible to identify a person who took part in the tragedy, since once the truth is known, none of those who were complicit shall escape punishment”*.

From the above, it must be of grave concern to the principles of fundamental fairness to have in place a system conferred with the power to inflict up to the life jail through the use of just **any method** to identify persons who are allegedly complicit in the perpetration of genocide and *“punish them”*.

Additionally the system is grossly unfair since trials are held without lawyers. The lack of fair trial guarantees encourages intimidation, false accusations, and revenge with a potential of transforming the process into mob justice and mob lynching that it has become.

The circumstances in which some of the crimes were perpetrated, the length of time between the perpetration of the crimes and the testimony makes alleged oral testimony unreliable.

The Gacaca system does not have the logistics and the means of controlling the trauma and emotions that may accompany the testimony of some victims and participants at the trial. This may unfairly influence the trial process and its outcome. Negative partisan press reports of the events, the over bearing interference of victims associations like Ibuka and Avega, political and religious interference during lengthy detention during which time accused are persuaded to confess, all make the entire process less credible and unreliable.

IDENTIFYING AND PUNISHING ALLEGED “GENOCIDAIRES” BY “ANY AVAILABLE METHOD”.

The intention of the Rwandan authorities in instituting Gacaca Courts as already explained in the explanatory statement to the fundamental law of 2001 was to confer it with a mandate to use **‘any method’** to identify persons complicit in genocide for punishment. The said **“any method”** is not defined in any legal text.

Because the Gacaca proceedings are not governed by uniform established written rules of procedure applicable to all, every panel develops its own ad hoc rules to deal with particular matters that are brought before it through public denunciation, confessions, or otherwise. Since lawyers are not permitted to appear before the said courts, the panels of Gacaca courts supported and guided by state prosecutors have restricted power to use **“any method”** to investigate, incriminate, charge, prosecute and sentence accused persons in ways that breed perverted justice and strengthen the hand and resolve of judicial tyranny.

As agents of political and executive powers, Gacaca panels have consistently abused the processes before them to effect arbitrary arrests and detentions, exceedingly lengthy detentions, non respect of the principles of non retrospection and the principles of ne bis in idem, intimidation, corruption, admissibility of false evidence, reversal of the burden of proof, trial and conviction by ambush and the use of false and / or coerced confessions to convict individuals to lengthy terms of imprisonment and forced or slave labour. This makes the system a vicious instrument of political tyranny and oppression.

For the Gacaca judges, the focus on genocide the elements of which they themselves like the accused before them have but a cursory understanding, obfuscate the distinction between the crime of genocide and all other crimes that were perpetrated in Rwanda. This explains why a call for RPF perpetrators of war crimes and crimes against humanity whose victims were mainly Hutu to be prosecuted is widely alleged as constituting the nebulous dreadful crime of negation of genocide. They are encouraged in this belief by the fact that the categories of crimes into which they are required to fit any or all the persons denounced, apprehended and

brought into the system, fall within the 2 categories specified in the Organic Law no. 08/96 of August 30, 1996 to establish the categorisation of genocide defendants.

CONFESSIONS BEFORE THE GACACA COURTS.

The category two and three over which the Gacaca system has jurisdiction list “confession’ a mitigating factor¹⁰.

The policy of encouraging, enticing, inducing and pressuring alleged perpetrators to confess is evident on the language of organic law no.10 /2007 of 01/03/2007 modifying and completing law no. 16/2004 of 19/6/2004 establishing the organization and competence of the Gacaca Courts which rewards those who confess and penalizes those who failed to do so.¹¹

Although the use of this system has been lauded by some as a creative means of rendering expedited justice, a claim which remains largely unsupported, considering the hundred of thousands of alleged perpetrators who are in Rwandese jails almost a decade after the start of the system, many people are concerned that this system legitimizes human right abuses on an unprecedented scale.¹²

Augustin Ngirabatware condemns the discriminatory nature of the prosecution in which the accused are almost all Hutu and no Tutsi even where there is documented

¹⁰ Organic Law 16/2004 of 19.06.2004,

In the 2nd category where the accused has not confessed or his/her confession has been rejected - 25 years imprisonment or life imprisonment; Where he/ she confesses after accusation and name put on the list made by the Cell's Gacaca Courts - 12 to 15 years imprisonment, half of it is spent in prison, the other is commuted to works of public interest; Where he/ she confesses before accusation and name put on the list made by the Cell's Gacaca Court - 7 to 12 years imprisonment, half of it is spent in prison, the other is commuted to works of public interest;

3rd category Where he or she has not confessed or his/her confession has been rejected - 5 to 7 years imprisonment, half of it is spent in prison, the other is commuted to works of public interest; Where he/ she has confessed before name being put on the list made by the Cell's Gacaca Court - 1 to 3 years imprisonment, half of the sentence is served in prison and the rest is commuted to works of public interest.

¹¹ **Article 12 : Confessions, guilty plea, repentance and apologies:**

Article 58 of Organic Law n° 16/2004 of 19/6/2004 establishing the organisation, competence and functioning of Gacaca courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994 is hereby modified and complemented as follows: The confessions, guilt plea, repentance and apologies are done before the Bench of the Gacaca Court, before the Judicial Police Officer or the Public Prosecution Officer in charge of investigating the case, in accordance with article 46 of Organic Law n°16/2004 of 19/6/2004 establishing the organisation, competence and functioning of Gacaca courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1,1990 and December 31, 1994.The Bench of the Gacaca Court, the Judicial Police Officer or the Public Prosecution Officer in charge of investigating the case, must inform the defendant of his or her right and benefits from the confessions, guilt plea, repentance and apologies procedure. However, the person who opts for the guilt plea procedure before the Gacaca Court of Appeal cannot have his or her sentence because it is too late.

¹² A report of the United Nations High Commissioner for Human Rights, while lauding the measures taken to bring alleged perpetrators of genocide to book, expressed serious concerns about “several aspects of the proceedings , in particular the lack of full respect for some fair trial guarantees as required by law and article 14 of the International Covenant on Civil and Political Rights, and the lack of legal representation in many cases, as well as a general lack of due process in some cases. (pp 64–65 of the *Report of the United Nations High Commissioner for Human Rights on the Human Rights Rwanda Field Operation in*. UN doc. A/52/486, annex). See also Decision 5(53) of the Committee for the Elimination of Racial Discrimination, adopted 18 August 1998, p 10.

evidence of the massacre of hundreds of thousands of Hutu by the mainly Tutsi dominated RPF aggressors from Uganda.¹³

The Government of Rwanda has co-opted international human rights conventions which it has signed and acceded to in the preamble and the body of its constitution. These conventions include the Covenant on Civil and Political Rights.

Article 14 of the International Covenant on Civil and Political Rights 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, every one shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

2. Every one charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to the law.

3. In the determination of any criminal charged against him, every one shall be entitled to the following minimum guarantees, in full equality:

- a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his choosing;
- c) To be tried without delay;
- d) To be tried in his presence, and to defend himself in person or through legal assistance of his choosing, to be informed, if he does not have legal assistance, of his right; and to have legal assistance assigned to him, in any case where the interest of justice so require, and without payment by him in any case if he does not have sufficient means to pay for it;
- e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions and witnesses against him; To have the free assistance of an interpreter if he cannot understand or speak the language used in court; **not to be compelled to testify against himself or to confess guilt**”

Under the provision of article 14 of the Covenant, it's expressly forbidden to compel any one to confess guilt or to testify against him. The organic law of Rwanda on Gacaca Courts and the practice of the said Courts compel or induce the confession of guilt.

The International Criminal Tribunal for Rwanda in its article 20 of its statute adopts the fair trial standards enshrined in article 14 of the Covenant on Civil and Political Rights, in particular on guilty pleas.

Rule 62 of the rules of evidence and procedure of the ICTR lays down the procedure that must be followed prior to a confession being accepted and admitted in evidence:

It stipulates that **“After satisfying itself that the right of the accused to counsel is guaranteed, V (a) In case of a plea, a Chamber shall satisfy itself that the plea is voluntary and is an informed plea, is unequivocal, is based on sufficient fact for the client and accused's participation in it, either on the basis of objective indicia or of lack of any material disagreement between the parties about the facts of the case”.**

¹³ Editions Sources Nil Collections Droit a La Parole states at Page 369.

In the case of the confessions before the Gacaca, the confessions are made before the Prosecutor or a Judicial Police Officer, both of whom have tremendous influence on the proceedings and its outcome.

The Statute of the International Criminal Court states in article 64 (8) that:

“At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber. The Trial Chamber shall satisfy itself that the accused understands the nature of the charges. It shall afford him or her opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty.

Article 65: (1) Where an accused makes an admission of guilt pursuant to article 64 (8) a, the Trial Chamber shall determine whether:

The accused understands the nature and consequences of the admission of guilt.

b) The admission is voluntarily made by the accused after sufficient consultation with defence counsel;

c) The admission of guilt is supported by the facts of the case that are contained in the Charge brought by the Prosecutor and admitted by the accused.

-The materials presented by the Prosecutor which supplement the charges and which the accused accepts;

- And any other evidence, such as the testimony of witnesses, presented by the Prosecutor or the accused.

2) Where the Trial Chamber is satisfied that any matters referred to in paragraph 1 are established, it shall consider the admission of guilt, together with any additional evidence presented, as establishing all the essential facts that are required to prove the crime which the admission of guilt relates, and may convict the accused of that crime.

Article 55: An Accused:

1) a. Shall not be compelled to incriminate him or her or to confess guilt.

2) No form of coercion, duress or threat, to torture or to any form of cruel, inhuman or degrading treatment or punishment.

Articles 66 and 67 emphasize the presumption of innocence and the fair trial rights of the accused.

The Republic of Rwanda in its 9th and 10 Periodic Report under the African Charter on Human and Peoples’ Rights covering the period 2005 to 2009 took pride in stating in paragraphs 1 and 2 that it had incorporated international human rights conventions she has signed and acceded into her constitution. What she failed to state was that through the operation of special legislation, she enacted, implement and enforce laws which violate internationally recognized human rights of her citizens with reckless abandon while the international community looks away.

Critics of the Gacaca system are alarmed at the manner in which the Gacaca process has been mobilized over time along state institutions to suppress political dissent and civil liberties. Among these Critics was the late Alison Des Forges a senior Human Rights Adviser and expert on Rwanda who for many years ardently supported the RPF until she broke ranks with them over the political uses of the law to perpetuate itself in power.

When I cross-examined Dr. Alison Des Forges at the ICTR about the ability of Rwandese Prosecution Witnesses to testify truthfully about the events that took place in Rwanda in 1994, after deep reflection, she testified that she had doubts on the accuracy of the information she got from witnesses in Rwanda due to possible subordination and coaching of witnesses to testify against the accused. Dr Alison Des Forges stated that based on her expert opinion and based on her own experience in many cases before the Rwandese courts, and in Rev. Father Tuenis’s case before the Gacaca Court in Kigali in which she testified, she was

convinced that there were cases in which the Rwandan government intervened to influence witness testimony in alleged genocide trials.¹⁴

Father Tuenis was a Belgian Catholic Priest who was arrested in Rwanda and prosecuted before the Gacaca Court in Kigali for genocide related crimes including the ill defined crime of harbouring genocide ideology. Alison Des Forges who was present and testified in that case, testified seeing witnesses who had never known Father Tuenis come forth to testify falsely against him.

She expressed the difficulties in handling and analysing and weighing eye witness testimony. One potential reason to justify her fears, she said, was the motivation by a witness to say something other than what was true. Others might have forgotten or remembered the facts wrong, or may over the course of listening to others' accounts of the events be persuaded that something was true which was not. Dr Des Forges said that these were major complications for the ICTR to deal with in a crime which is also a historical event.

She noted that with time, many of the hundred of thousands of suspects have made enemies during their spell in prisons. While out they accuse them for crimes they never committed so that they too may experience the ordeal they went through for as long as the system may hold them.

Dr Des Forges consistently expressed her concern about the role of the office of the Prosecutor in influencing under the pretext of assisting, the Gacaca Bench of Judges and the fact that the process is meant to instill fear. In a system where the Prosecutor directs the bench and the accused has no access to a lawyer, the outcome of the case is predetermined by the outcome that the government wants.

THE POLITICAL USES OF THE GACACA SYSTEM.

The Rwandan concept of the crimes of genocide, crimes against humanity and war crimes may not be the same as that contained in the respective conventions that criminalized the conduct constituting these crimes. The Rwandan Government argues that the particular context within which the alleged crimes were perpetrated in Rwanda justifies this policy.

In the above regard, the provisions of the Rwanda constitution and fundamental laws on the crime of genocide and the Gacaca Courts are vague and imprecise. They constitute mere policy and political statements about the said crimes. In this regard, the constitution of 26 May 2003, establishes a category of perpetrators of the crime of genocide and crimes against humanity on the basis of political and potentially Hutu ethnic identity.

Neither the said constitution nor the fundamental law defines what constitutes "Genocide ideology", "trivialising the genocide", "divisionism", "negationism" "revisionism" and several etc. It is unclear if these refer to one and the same crime differently described or different crimes written into the same provision of the constitution and the fundamental law, or different crimes written into the statute books and the constitution conjunctively and / or disjunctively having the same yet distinct meanings.

This deliberate rigmarole, is a wide web that widens the category of perpetrators to include all Hutu, born and unborn on the basis of their Hutu ethnic identity since Tutsi have been excluded on the basis of being the victims of the genocide.

¹⁴ Military Two Trial, Prosecutor Vs General Ndilindinyimana, General August Bizimungu, Major Nzuwonemeye and Captain Sagahutu, cross examination by Chief Charles Taku transcript of 11 October 2006 pg 52Ln 1-7.

This therefore tacitly confers the political authority the power of initiating the arrest of who ever they want, charge and define their alleged criminal conduct within the ill defined crimes and through the influence of the Prosecutor on the Gacaca Bench, convict without the person knowing for sure the nature of the crime he committed.

Similarly thousands of people have been induced or coerced to confess to and convicted for the alleged crimes of “negationism”, “revisionism”, “divisionism” and or “trivialisation of genocide”., without knowing what they were confessing to. Stated in these terms, this wide netting legislation is incapable of uniform application, thus discriminatory and unfair.

For this reason, this legislation has become the graveyard of many political opponents, real or apparent as well as ordinary citizens whose only sin is that they are Hutu, thus “genocidaire”.

In the past three years, Rwandan officials have prosecuted more than 2,000 people, including political rivals, teachers and students, for espousing “genocide ideology” or “divisionism”.¹⁵

The Rwanda Constitution of 26 May 2003 states the following about these crime(s):

Preamble:

We the people of Rwanda,

- 1) *In the wake of the genocide that was organized and supervised by unworthy leaders and other perpetrators and that decimated more than a million sons and daughters of Rwanda,*
- 2) *Resolve to fight the ideology of genocide and all its manifestations and to eradicate ethnic, regional and any other forms of division.*

Article 9 the state of Rwanda commits itself to conform to the following fundamental principles and to promote and enforce:

- 1) *Fighting the ideology of genocide in all its manifestations.*

Article 13. The crime of genocide, crimes against humanity and war crimes do not have a period of limitation. Revisionism, negationism and trivialization of genocide are punishable by law.

The above provisions of the constitution, criminalises crucial components of the history of Rwanda and creates a preconceived and identifiable category and class of individuals perpetrators. It may therefore be said that this classification in itself may constitute “divisionism” what ever that is.

Additionally, there is no gainsaying the fact that these provisions are interpreted and applied largely on Rwanda Hutu perceived to be the perpetrators of the “genocide of the Tutsi” from October 1, 1994 or even earlier, from 1958 the year of the revolution that first brought Hutu to power in Rwanda, thus making the law not only discriminatory but at variance with international human rights conventions which Rwanda signed and acceded to and incorporated into its constitution of the 26 May 2003.

Furthermore, the elimination of ethnicity in Rwanda is negated by political discourse and Court processes that compel and convict Hutu for “genocide of the Tutsi”, “revisionism of the genocide of the Tutsi”, “Negationism of the Genocide of the Tutsi”, “trivialising the

¹⁵ New Times, 30 April 2010

genocide of the Tutsi” and “divisionism” based essentially on Hutu and Tutsi ethnic identification.¹⁶

Practically therefore, the ban and criminalisation of the ethnic factor seems to concern only the Rwandese Hutu since the new category of crimes were conceived in the context of the “genocide of the Tutsi”. The US State Department website like the Rwanda Government Official website carries information that still refers to Rwandans in ethnic terms.¹⁷

The wide criminal web into which the Government of Rwanda has caught the Hutu ethnic group is a patently failed attempt to imitate the laws on the Holocaust and its denial. However, the history of the Holocaust is different from what happened in Rwanda. There is no evidence that the Jewish people in Germany committed crimes against the perpetrators of genocide against them.

The same can not be said about the RPF which took up arms against Rwanda and in its prosecution of the war committed serious international crimes. Once in power, it has put in place legislation and institutions to criminalize any mention of the said crimes, using such deliberately vague criminal notions like “reversionism”, “negationism”, “divisionism” etc to blackmail any one who dare call for them to be held accountable for their crimes.

The deliberate use of different words with potential variations in meaning to connote the same criminal conduct in the constitution and the fundamental laws of Rwanda is a mischievous attempt to criminalize any conduct no matter how innocent using any of the notions as the rationale to justify the outcome.

Despite the above criticisms, the Gacaca system under which these nebulous legal concepts are tested without any form of due process, has its admirers and staunch supporters and defenders within the politico-military structure of the RPA that created it.

¹⁶ The Official website of Rwanda states for example that “*The Genocide of the Tutsi in 1994 was a carefully planned and executed exercise to annihilate Rwanda’s Tutsi population and Hutus who did not agree with the prevailing extremist politics of the Habyarimana regime*”.

¹⁷ Us State Department. 2009. **People** Nationality: *Noun and adjective*--Rwandan(s). Population (July 2008 est.): approximately 10,180,000. Annual growth rate (2008 est.): 2.8%. **Ethnic groups: Hutu 85%, Tutsi 14%, Twa 1%.** ..The indigenous population consists of three ethnic groups. Accounts of their respective arrivals in the area of modern Rwanda were highly politicized during Rwanda’s post-colonial era, particularly in the years leading up to the genocide. **The Hutus**, who comprise the majority of the population (85%), are traditionally farmers of Bantu origin. **The Tutsis** (14%) are traditionally a pastoral people who by some accounts arrived in the area in the 15th century. Until 1959, they formed the dominant caste under a feudal system based on cattle holding. The Twa (1%) are thought to be the remnants of the earliest settlers of the region.

On October 1, 1990, Rwandan exiles banded together as the Rwandan Patriotic Front (RPF) and invaded Rwanda from their base in Uganda. The rebel force, composed primarily of **ethnic Tutsis**, blamed the government for failing to democratize and resolve the problems of some 500,000 Tutsi refugees living in the diaspora around the world. ...

.In 2001, the government began implementation of a grassroots village-level justice system, known as *gacaca*, in order to address the enormous backlog of cases stemming from the genocide. Despite periodic prison releases, including the most recent January 2006 release of approximately 7,000 prisoners, tens of thousands of individuals remain in the prison system, some scheduled to face the traditional court system, some awaiting trial by *gacaca* courts, some convicted by *gacaca* courts and returned to serve their sentences. **By the end of 2006, 818,000 genocide suspects had been identified by the gacaca courts; case totals are now over one million.** These courts hoped to complete their caseload by the end of 2008. On May 26, 2003, Rwanda adopted a new constitution that eliminated reference

A senior RPA commander Brigadier- General Rusagara in an opinion commentary in the pro-government News paper The New Times wrote :

“Gacaca literally means 'a resting and relaxing green lawn in the Rwandan homestead' where family members or neighbours met to exchange views on issues directly affecting them. Gacaca, like most traditional African justice systems, is collectivist, **where the individual has no rights or duties other than within his or her group.**

The individual and the group are mutually complementary in a continuously reconciliatory process”.

According to Brigadier Frank Rusagara “ By definition, Gacaca are traditional councils and tribunals made up of elders to resolve conflict and administrate justice.

. And, as the African proverb goes, when you want to resolve disputes, you do not take the knife to cut, but a needle to sew. **In this sense, in affirming the rights of the plaintiff and defendant in the context of the wider society, restorative justice takes precedence over punitive or retributive justice in the reconciliation process.**

Restorative justice applies more in a social context. It is today considered to be a forward looking, problem-solving approach to crime, which involves the parties themselves and the community generally.

The restorative justice approach presupposes dialogue between the parties to the crime; this is rare within typical criminal justice systems. Dialogue ensures that the offender understands the harm he or she has caused.

Holding the offender accountable and requiring him or her to make amends for the wrongs he has done is indeed greater than simple punishment.

The Gacaca process as currently applied in Rwanda is based on this very notion. In not only reducing the cost and speeding the justice process, **it aimed to create a forum for debate of the crimes committed and not simply punish the accused.**

The goal is to make the accused acknowledge the pain they have caused to their victims. The Gacaca process takes place in the communities in which the crimes were committed, and both the accused and the victims get a chance to be heard. **Accused persons who publicly ask for forgiveness and confess to their crimes are 'rewarded' with reduced sentences**

While that may remain in history, Rwanda was determined to go it alone in its disappointment in the failures of the international community. Along with reconstructing the shattered nation, justice and reconciliation was top-most on its agenda with a huge number of perpetrators to prosecute.

The **official figures put this number at 818,564 persons suspected of having committed genocide. Considering these hundreds of thousands of people accused of committing crimes of genocide,** it is clear that even the best criminal law justice system could not cope with these numbers

Some critics of the Gacaca courts have tended to dismiss them as ad hoc kangaroo courts. However, contrary to this perception the Security Council Resolution that established the International Criminal Tribunal for Rwanda (ICTR) stressed "the need for international co-operation to strengthen the courts and judicial system of Rwanda, having regard in particular to the necessity of those courts to deal with large numbers of suspects." (UN, S/RES/955 [1994],¹⁸

This defense of the Gacaca Court System as well as its vision and purpose stated by General Frank Rugesara coming as it were, from a senior commander of the armed forces of Rwanda, the RPA is a significant contribution to the debate about the Gacaca system. That the General has deemed it necessary to engage in this debate rather than blackmail the critics of the system as “negationist”, “revisionist” and “divisionists” or simply “propagators of the genocide” ideology is commendable.

It must be observed that few Rwandans have the luxury of proffering a critique of this system without being hauled before the very Court and given a long jail term for propagating genocide ideology or divisionism, negationism and revisionism.

¹⁸ Gacaca - Can Human Rights Be Universal and Have Respect for Cultural Relativism?
Brig. Gen. Frank Rusagara, New Times, Kigali Rwanda April 30, 2010.

Furthermore the fact that a senior member of the Military has responded to critics of this system may reasonably be a confirmation of the influence of the Rwandan Patriotic Army in the process.

Although the opinion states what the Gacaca process was intended to be and to do, it failed to explain in reasonable detail what it has achieved so far. It fails explain how a judicial process “ **where the individual has no rights or duties other than within his or her group**” and in which “**Accused persons who publicly ask for forgiveness and confess to their crimes are 'rewarded' with reduced sentences**” meets the fair trial standards enshrined in the International Covenant on Civil and Political Rights and other International Conventions that were incorporated into the Constitution of Rwanda.

On the contrary, the legal opinion of the General confirms in a more authoritative manner the criticism of the system, that although the Gacaca process may be an expedient response to a serious legal challenge it fails miserably to meet the fair trial standards that the Government of Rwanda in exercise of its much cherished sovereignty pledged to uphold. These principles of fundamental fairness are universal and have primacy over all local solutions that are at variance with their intentment.

The share number of genocide suspects stated in the General’s legal opinion was and is no reason to abandon the rule of law that is a core value of all civilized societies to the dictates of politically expedient methods of dispensing of human beings the manner the Gacaca process has turned out to be.

The revelation that the “**official figures put this number at 818,564 persons suspected of having committed genocide**” betrays the fact since confirmed by the stigmatisation of a target group of alleged perpetrators in the constitution, and which the Gacaca Court system and the legislation defining its mandate and competence were intended to apply to Hutu perceived and treated as “genocidaires”. This mechanism was never conceived to target the Tutsi, not to talk about RPF soldiers who admittedly perpetrated war crimes and crimes against humanity that led to the loss of hundreds of thousands of Hutu, Tutsi and Twa lives.

The General states that *the Gacaca system “**aimed to create a forum for debate of the crimes committed and not simply punish the accused**”*. *A nation wide debate of this matter would have afforded an opportunity for Rwandans to publicly examine the causes of the “collective madness” that plunged their beautiful country into one of the darkest moments that shocked the conscience of the world. Such a debate would have afforded them an opportunity to have collective expiation and the courage to forge a new beginning.*

But a genuine debate along this line has been criminalized safe the official RPF version that has found its way into the constitution and forced down the throats of Rwandans. Any idea or opinion is deemed to be “negationism”, “revisionism.” “divisionism” or propagation of genocide ideology. Worse, still, all debate on these matters before a Gacaca Court will lead to jail and forced or slave labour.

It is, for example criminal to demand that perpetrators of crimes against Hutu be brought to book or to suggest that the RPF perpetrators of crimes against Hutu be prosecuted even though Rwanda has made public commitments to the International Community, long ignored, to prosecute the same category of perpetrators.

*I agree with the General’s observation that the Security Council in creating the International Tribunal for Rwanda expressed “**the need for international co-operation to strengthen the courts and judicial system of Rwanda, having regard in particular to the necessity of those courts to deal with large numbers of suspects.**” (UN, S/RES/955 [1994”¹⁹*

¹⁹ Gacaca - Can Human Rights Be Universal and Have Respect for Cultural Relativism? Brig. Gen. Frank Rusagara, New Times, Kigali Rwanda April 30, 2010.

It is indeed the failure of the International Community, in particular the United Nations to take measures “ **to strengthen the courts and judicial system of Rwanda” to meet international standards,** as well as exercise reasonable oversight over compliance by Rwanda of its UN Charter obligations as well as the provisions of the various Human Rights Conventions that it acceded to that have encourage the culture of impunity that is presently helping the present government of Rwanda to think it can get away with murder, crimes against humanity and egregious violations that have claimed more than six million lives in Rwanda and Eastern Democratic Republic of the Congo.

DELIBERATE AMBIGUITY.

Rwanda justifies the operation of this monstrosity so-called the Gacaca Courts to sit in judgment over a predetermined category of people in its constitution for perpetrating deliberately vague, imprecise and ambiguous crimes introduced therein in the form of vague ideological and political statements as a contribution to the development of law. The experimentation of the system that has evolved from this process has been hailed and sustained by the international system and governments of civilized countries, as an innovation that has cleared a backlog of cases and brought about reconciliation to Rwanda.

The fact that none of the institutions and governments that have hailed and sustained this system has pointed out how this system conforms to the letter and spirit of the fair trial provisions of the different conventions that Rwanda has acceded to is another shameful neglect of Rwanda in its moment of need. This complicit and hypocritical silence strengthens the hand of tyranny, encouraged impunity and sustains the bloodbath that is ongoing in Rwanda and Eastern Congo.

Even the United Nations that is actively involved in Rwanda has failed yet again to urge Rwanda to respect its Charter obligations by complying with the provisions articles 1(3) and 55(c) of the UN Charter.

The UN, international public opinion and western governments that are sustaining the government of Rwanda and this system are sensitive about the true origins of some of the crimes that Rwanda has incorporated into its constitution and statute books and know that in both context and substance the government of Rwanda is abusing the memory and history of the Holocaust in equating its politics and policies to the Holocaust.

Contrary to the context, substance and framing of the crimes in the constitution of Rwanda and its fundamental laws, the word Revisionism in its proper context, is the terminology that Holocaust deniers use to distinguish what they perceive as legitimate intellectual enquiry and debate about the Holocaust using established historical methodologies. Revisionism is not a crime but Holocaust denial is.²⁰

²⁰ According to the Wikipedia free Encyclopedia, “Legitimate historical revisionism is the re-examination of accepted history, updating it with newly discovered, more accurate, or less-biased information. It is an academic approach that holds that a given part of history, as it has been traditionally told, may not be entirely accurate and should be reviewed and revised. Historical revisionism in this sense is an accepted part of the scholarly discipline of history. It is applied to the study of the Holocaust as new facts emerge to change the historical understanding of it:

With the main features of the Holocaust clearly visible to all but the willfully blind, historians have turned their attention to aspects of the story for which the evidence is incomplete or ambiguous. These are not minor matters by any means, but turn on such issues as Hitler's role in the event, Jewish responses to persecution, and reactions by onlookers both inside and outside Nazi-controlled Europe.”

“Negationism” simply means the denial of the fact that the established crime did not occur while “divisionism” developed in nineteenth century painting as artists discovered scientific theories of vision which encouraged a departure from the tenets of Impressionism which at that point had been well-developed. The scientific theories and rules of color contrast that would guide composition for divisionists placed the movement of Neo-Impressionism in contrast with Impressionism, which is characterized by the use instinct and intuition.²¹

Considering the above, hundreds of thousands of Rwandans mainly detained without charge since the RPF came to power are required to confess and denounce many more for committing crimes whose definitions are known only to the political power that has determined that its hold on political power will only last as long as it keeps the memory of genocide in the memory of Hutu Genocidaires alive. And this memory can only be sustained through bringing the every Hutu alive or unborn within the target zone of those harboring genocide ideology invariably called negationism, divisionism, revisionism, double genocide ideology etc.

CONCLUSION.

The world stood by while heinous crimes were perpetrated in Rwanda leading to the death of hundreds of thousands of innocent people who should never have died. The crimes that were perpetrated on the watch of the UN must be condemned in the strongest terms.

While the UNICTR has established that the crimes of genocide most of persons identified as Tutsi ethnic identity were perpetrated several UN reports have listed several war crimes and crimes against humanity perpetrated by the RPF against Hutu and Tutsi civilians within Rwanda.

President Kagame and senior Rwandan government officials have indicated publicly that crimes perpetrated by RPF soldiers would be prosecuted in Rwanda. In effect, some Rwandan Military Officers were prosecuted for the murder of clergy men at Kabgayi as a result. It is preposterous to expect the RPF whose leaders have admitted that it committed crimes during the war to organize free and fair trials against its own officers or against its adversaries.

The fallacy that the Gacaca Courts were a necessity to address a pressing security imperative has been exposed through the sheer number of persons in Rwandan Prisons without trial, the institutional imposition of confessions to secure convictions contrary to international conventions and the political uses of the system to instill fear and terror on the citizenry and the corruption that now plagues the entire system.

The violations of human rights on such a massive scale and the unfairness of the system demand an emergency intervention of the international community to redress the situation.

Any remedy that fails to abolish the Gacaca Courts, nullify all the convictions imposed under the system, free all the persons detained under the system with immediate effect, conduct an international enquiry into the political uses of the system to pursue a political agenda, cause an amendment of the Rwandan constitution and the fundamental laws to remove the impugned provisions. Anything short of this will only strengthen the hand of tyranny with a potential of accelerating the plunge the country and the sub region into a calamity worse than the one on which the RPF rode to power.

“Negationism” means the denial of historical crimes against humanity. It is not a reinterpretation of known facts, but the denial of known facts. The term “negationism” has gained currency as the name of a movement to deny a specific crime against humanity, the Nazi genocide on the Jews in 1941-45,

²¹ Cf Wikipedia Free Encyclopedia.

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