

CONSOLIDATING DEMOCRACY THROUGH TRANSITIONAL JUSTICE: RWANDA'S GACACA COURTS

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This Note asserts that the key to preventing reversion to violence in postconflict societies lies in the development of a civic culture among the citizenry. Civic culture is understood as the social internalization of democratic practices, which include political participation and public contestation. Accordingly, the field of transitional justice should include mechanisms that engage the members of postconflict societies directly in processes engendering civic behavior. To illustrate the foregoing thesis, this Note examines Rwanda's traditional, community-based restorative justice institution—Gacaca—and demonstrates how it helps to promote participation and contestation. First, the Gacaca process encourages the Rwandese people to voice their concerns openly and to begin to question authority, thereby weakening the authoritarian government's monopoly on power. Second, the Gacaca process channels the people's discord through a peaceful dispute-resolution process rather than through violence, thus demonstrating the potential for democratic contestation to serve as an alternative to violent conflict.

INTRODUCTION

It has been ten years since Rwanda, a country roughly the size of Connecticut,¹ suffered the massacre of eleven percent of its population² in a span of one hundred days.³ Masterminded and directed by

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¹ HUMAN RIGHTS WATCH, RWANDA: THE SEARCH FOR SECURITY AND HUMAN RIGHTS ABUSES 2 n.2 (2000) [hereinafter HRW 2000 REPORT].

² See REPORT OF THE INDEPENDENT INQUIRY INTO THE ACTIONS OF THE UNITED NATIONS DURING THE 1994 GENOCIDE IN RWANDA, in Letter from Kofi A. Annan, Secretary-General, United Nations, to the President of the Security Council 3, 3 (Dec. 16, 1999), U.N. Doc. S/1999/1257 ("Approximately 800,000 people were killed during the 1994 genocide in Rwanda."), available at <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N99/395/47/IMG/N9939547.pdf?OpenElement>; ALISON DES FORGES, "LEAVE NONE TO TELL THE STORY": GENOCIDE IN RWANDA 16 (1999) (reporting that Tutsi Rwandan Patriotic Front (RPF) "killed between 25,000 and 45,000 persons"); GÉRARD PRUNIER, THE RWANDA CRISIS: HISTORY OF A GENOCIDE 265 (1995) ("[T]he approximate number of deaths in the genocide could be placed at between 800,000 and 850,000, a loss of about 11% of the population.").

³ Erin Daly, *Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda*, 34 N.Y.U. J. INT'L L. & POL. 355, 361 (2002) (noting that massacre lasted from

government authorities,⁴ the genocide was carried out by Rwanda's people—neighbors, doctors, and schoolteachers.⁵ Even today, the entire Rwandese society still grapples daily with the living memory of the atrocities of 1994.⁶

It has been ten years since Rwanda's genocide, and the challenge remains: How do we prevent such things from happening again? Thus far, the prospects for sustainable peace in Rwanda seem dubious. Today's Rwanda already exhibits signs of percolating inter-ethnic conflict.⁷

The Tutsi-refugee-dominated Rwandan Patriotic Front (RPF) has governed Rwanda since it fought back the Hutu Power, or *genocidaire*, forces in 1994.⁸ Since the Tutsis represent the ethnic target of the 1994 genocide, as well as just fifteen percent of the population,⁹ the members of the Tutsi-dominated government justifiably fear any reversion of power into the hands of Hutus.¹⁰ Mahmoud Mamdani explains that, for the Tutsis, a power-sharing arrangement such as democracy is perceived to be "a mask for finishing an unfinished genocide."¹¹ Accordingly, since it took over the government, the RPF has systematically consolidated state power under the executive and the military.¹² Declaring itself the representative of all

April 7 to July 17, 1994); see also PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* 3 (1998) ("The dead of Rwanda accumulated at nearly three times the rate of Jewish dead during the Holocaust.").

⁴ See DES FORGES, *supra* note 2, at 1–2; see also *infra* note 37.

⁵ GOUREVITCH, *supra* note 3, at 115.

⁶ See *infra* notes 7–28 and accompanying text.

⁷ "[E]thnographers and historians have lately come to agree that Hutus and Tutsis cannot properly be called distinct ethnic groups." GOUREVITCH, *supra* note 3, at 48. The first group to distinguish Hutu and Tutsi by virtue of ethnicity was the Belgians, who instituted identity cards. Daly, *supra* note 3, at 359 n.11. In order to describe the conflict between Tutsis and Hutus, this Note will distinguish the two groups in terms of ethnicity.

⁸ HRW 2000 REPORT, *supra* note 1, at 2; see also INT'L CRISIS GROUP, AFR. REP. NO. 53, RWANDA AT THE END OF THE TRANSITION: A NECESSARY POLITICAL LIBERALISATION 2 (2002) [hereinafter ICG 2002 REPORT] (providing brief history of reign of RPF), available at http://www.crisisweb.org/library/documents/report_archive/A400817_13112002.pdf.

⁹ CENTRAL INTELLIGENCE AGENCY, *THE WORLD FACTBOOK* 450 (2003).

¹⁰ Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221, 1312 (2000).

¹¹ Mahmoud Mamdani, *When Does a Settler Become a Native? Reflections of the Colonial Roots of Citizenship in Equatorial and South Africa* 11, Inaugural Lecture at the University of Cape Town (May 13, 1998) (Univ. of Capetown Dep't of Communication, New Series No. 208, 1998) (transcript available at <http://www.bard.edu/hrp/events2000/Mamdani1.htm>).

¹² See HRW 2000 REPORT, *supra* note 1, at 5–6 (describing events that have stymied independence of National Assembly); ICG 2002 REPORT, *supra* note 8, at i ("The RPF wields almost exclusive military, political and economic control and tolerates no criticism

Rwandese people, the RPF has adopted a unification policy that purports to eliminate distinctions between Hutus and Tutsis.¹³ In the name of unity, any distinction along ethnic lines, as well as any criticism of the RPF,¹⁴ is labeled as "divisionist"¹⁵ and is banned by the recently adopted Constitution.¹⁶

Furthermore, in its efforts to deal with the genocide, the government has adopted an expansive prosecutorial strategy, incarcerating everyone it suspects of crimes of genocide throughout all strata of Rwandese society.¹⁷ It has proven unwilling, however, to prosecute its own members' crimes against humanity,¹⁸ seeing no moral equivalency between the crimes of *genocidaires* and those of the RPF.¹⁹

or challenge to its authority."); see also HUMAN RIGHTS WATCH, PREPARING FOR ELECTIONS: TIGHTENING CONTROL IN THE NAME OF UNITY 2-3 (2003) [hereinafter HRW ELECTION PAPER], available at <http://www.hrw.org/backgrounder/africa/rwanda0503bck.pdf>.

¹³ HRW ELECTION PAPER, *supra* note 12, at 2.

¹⁴ See Amnesty Int'l, *Rwanda: Deeper into the Abyss—Waging War on Civil Society* (July 6, 2004), at <http://web.amnesty.org/library/index/engaf470132004>; BBC News, *Rwandan Rights Activists 'Flee'* (July 15, 2004), at <http://news.bbc.co.uk/1/hi/world/africa/3896033.stm>; Human Rights Watch, *Rwanda: Parliament Seeks to Abolish Rights Group* (July 2, 2004), at <http://hrw.org/english/docs/2004/07/02/rwanda8996.htm> (reporting that Rwandan government has taken steps to dissolve domestic human rights groups).

¹⁵ HRW ELECTION PAPER, *supra* note 12, at 1, 6.

¹⁶ "The State of Rwanda commits itself to . . . [e]radication of ethnic, regional and other divisions and promotion of national unity." RWANDA CONST. (2003) tit. I, ch. 2, art. 9. Freedom of thought (Article 33), freedom of speech (Article 34), and freedom of assembly (Article 36) all are limited in the pursuit of unity for the country and possess clawback clauses that allow law to supersede the rights. *Id.* tit. I, ch. 2, arts. 33, 34, 36; see also DES FORGES, *supra* note 2, at 693-94 (describing RPF's promotion of nationalist ideology).

¹⁷ "[T]he victors went for a minimalist approach to justice, arresting not just leaders, planners, instigators and main implementers, but everybody suspected of any participation in the genocide of Tutsis or the massacres of moderate Hutus." Michel Moussalli, *Report of the Special Representative of the Commission on the Situation of Human Rights in Rwanda*, U.N. GAOR, 55th Sess., Agenda Item 116(c), at 9, U.N. Doc. A/55/269 (2000), available at <http://www.un.org/documents/ga/docs/55/a55269.pdf>.

¹⁸ DES FORGES, *supra* note 2, at 14.

¹⁹ See *Talking Point Special: Ask Rwanda's President* (BBC News broadcast, Apr. 27, 2004) (denial by President Kagame of commission of crimes against humanity) (transcript available at http://news.bbc.co.uk/1/hi/talking_point/3442577.stm); Human Rights First, *Leading Rights Groups Urge Security Council to Ensure Management Reforms Do Not Undermine Rwanda Tribunal* (Aug. 7, 2003) ("The government of Rwanda has vigorously resisted any [prosecutions of war crimes and crimes against humanity], making it impossible for the [International Criminal Tribunal for Rwanda (ICTR)] prosecutor to bring charges against members of the [Rwandan Patriotic Army], the armed branch of the Rwandan Patriotic Front in 1994."), at http://www.humanrightsfirst.org/media/2003_alerts/0807.htm; Human Rights Watch, *Human Rights Overview: Rwanda* (Jan. 1, 2004) [hereinafter Human Rights Watch, *Rwanda*] ("Until the end of 2003 the Rwandan government hindered investigations of RPF crimes by the [ICTR] and did little to investigate and prosecute its soldiers for war crimes and crimes against humanity . . ."), at <http://www.hrw.org/>

The Hutu majority does not view the aforementioned government policies as representative of their views and interests. The government's prosecutorial focus on genocide crimes has left Rwanda's Hutu majority fearing that "the demand for justice is a minority ploy to usurp power forever."²⁰ This perception is reinforced by the government's systematic exclusion of Hutus from positions of political and economic power.²¹ But the government's antidivisionist strategy effectively quells criticism of its policies and blocks political opposition.²²

Meanwhile, the iron-handed control of the government over its people promotes order, but not unity. Many Hutus have even stopped frequenting bars for fear "of Tutsi soldiers and of having . . . conversations overheard and interpreted as being hostile to the government."²³ Tutsis, in turn, find the Hutu absence from bars suspicious.²⁴ This "vicious circle of distrust"²⁵ deepens the enmity that currently spreads through "rumours, prophecy, and veiled criticism."²⁶

Although the RPF's tactics may allay the minority's fears in the short term, there is no guarantee that power will remain in Tutsi hands forever.²⁷ As the stifled animosities between Hutus and Tutsis continue, the risk that violence will recur in Rwanda remains. The

english/docs/2003/12/31/rwanda7009.htm; Human Rights Watch, *Rwanda: Deliver Justice for Victims of Both Sides* (Aug. 12, 2002) (reporting that, although President Kagame admitted that his soldiers had committed abuses, Rwandese government opposed trying accused), at <http://www.hrw.org/press/2002/08/rwanda081202.htm>.

²⁰ Mamdani, *supra* note 11, at 11. As a result,

[The government] has been . . . fostering division through law, the use of law in the form of the national trials against *genocidaires* as an essentially political tool. The interest of the government is not in justice in a broad sense, but in justice as retribution and a means of consolidating power. . . . The vast number of alleged *genocidaires* in jails have played an important role for the government in fostering rule by fear.

Jennifer Balint, *Law's Constitutive Possibilities: Reconstruction and Reconciliation in the Wake of Genocide and State Crime*, in *LETHE'S LAW: JUSTICE, LAW AND ETHICS IN RECONCILIATION* 129, 141 (Emilios Christodoulidis & Scott Veitch eds., 2001).

²¹ HRW 2000 REPORT, *supra* note 1, at 5 (reporting that RPF excluded Hutu leaders from political power); ICG 2002 REPORT, *supra* note 8, at i.

²² HRW ELECTION PAPER, *supra* note 12.

²³ ICG 2002 REPORT, *supra* note 8, at 17.

²⁴ *Id.* at 17–18.

²⁵ *Id.* at 17.

²⁶ *Id.* at 16.

²⁷ See *id.* at i ("[T]he rise to power by the opposition forces and the propagation of genocide denial pose a serious threat to the stability of the country, particularly at a time when the Rwandan government is preparing to liberate tens of thousands of prisoners through *gacaca* courts . . .").

authoritarian tactics of the RPF government might have Rwanda spiraling toward a repetition of its tragic recent history.²⁸

To prevent interethnic violence in the long term, the government would do better to promote democracy;²⁹ but democracy does not imply simply majority rule, as the Tutsi minority might imagine. Rather, democracy signifies rule by all the governed. It can be created and maintained by a people who possess a civic culture—a practice of constant participation through contestation. The presence of a civic culture would allow the population to maintain a check on governmental power.³⁰ Moreover, civic culture would develop a social practice of constantly channeling conflict into an open, peaceful, deliberative process, thereby allowing the Rwandese people to learn through experience that violence is not necessary to manage disputes or to compete for power. Such practices of checking power and peaceful dispute management may lead to the recognition that peaceful coexistence in disagreement is possible, as is national unity among Hutus and Tutsis.³¹ In a democracy consolidated by civic culture, the leadership will be less able to use the people as a tool for violence.

²⁸ Today's governmental tactics bear a striking resemblance to Gérard Prunier's depiction of the pregenocide Habyarimana regime. These include tightly controlled order coupled with single-party authoritarian rule, which is strictly controlled and supported through thorough spying. PRUNIER, *supra* note 2, at 74–83.

²⁹ See Jeremy Sarkin, *The Tension Between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the Gacaca Courts in Dealing with the Genocide*, 45 J. AFR. L. 143, 170 (2001) ("Paving the way to an inclusive democracy will be a critical step in dealing with the past and halting the continuing violence and division that still haunts Rwanda.").

³⁰ The term "civic culture" was first coined by Gabriel Almond and Sidney Verba. See *infra* note 114 and accompanying text. If democracy is seen as a process of socio-political development, see LARRY DIAMOND, *DEVELOPING DEMOCRACY: TOWARD CONSOLIDATION* 18 (1999), then mature democracies possess more democratic features than budding democracies. This Note focuses on the core features of democracy that need to exist even in the early stages of democratic consolidation in Rwanda. See *infra* notes 90–99 and accompanying text.

³¹ Democracy theory and the restorative branch of transitional justice both recognize that a society must possess a minimal level of unity, or agreement: People at least must agree to coexist without conflict, or better, to live under a democratic regime that requires power sharing. See generally Mark E. Warren, *Democratic Theory and Trust*, in *DEMOCRACY AND TRUST* 310 (Mark E. Warren ed., 1999) (outlining theory of importance of certain kinds of trust to democracy). Although such reconciliation commonly is viewed as a prerequisite for democracy building, it is not necessarily the case that these processes must occur linearly, with reconciliation predating democratization. In Rwanda's case, reconciliation seems distant. This Note proposes that interethnic conflict must be addressed through democratic processes, regardless of the existing level of reconciliation. It further asserts that such management of power and conflict will produce the agreement to coexist that reconciliation seeks, albeit in a different order. See *infra* notes 172–80 and accompanying text.

Given the unwillingness of the Rwandese government to foster such democracy, the people themselves must provide the catalyst for change. In the absence of a government desire to foster civic culture, Rwanda's best hope for achieving democracy—and thereby preventing future interethnic violence—lies in its transitional justice experiment, the Gacaca courts, or Gacaca (pronounced Ga-cha-cha). Gacaca is a traditional, community-based restorative justice institution that recently has been co-opted by the government to unburden the national justice system from the massive number of genocide detainees who have been awaiting trial, some since 1994.³² As a process that requires the members of Rwandese society to communicate with the State and with one another about the sensitive subject of the genocide, Gacaca serves as the only forum in Rwanda in which current interethnic and political tensions can be expressed relatively openly and therefore dealt with constructively.

The Gacaca process can be a means to provoke a Rwandese society that has been silenced for decades to voice its concerns openly and to begin to question authority. Through such civic participation, the people may begin to channel their animosities through a constructive dispute-resolution process rather than through violence. Furthermore, through contestation the people may begin to hold the Rwandese State accountable and thus begin to chip away at its authoritarian power structure.

This Note asserts that since Gacaca has the potential to play a seminal role in promoting democracy through encouraging popular participation and contestation, it is a potentially successful transitional justice mechanism. To support this assertion, this Note emphasizes that the fundamental mission of transitional justice is to generate sociopolitical conditions that will prevent the recurrence of conflicts in postconflict societies. Although transitional justice theory typically works toward this goal by helping postconflict societies address their past violent disintegration, this Note asserts that, to be successful, transitional efforts must engage the people of a postconflict society directly in justice processes that engender civic behaviors in order to develop the necessary citizen base for an integrated democracy. Gacaca addresses postconflict social tensions by channeling them into processes of contestation that are fundamentally democratic in their inclusion of voices from all strata of Rwandese society. It is therefore a forum in which civic culture can develop in Rwanda. By providing this forum, Gacaca promotes democracy, thus taking significant steps

³² AMNESTY INT'L, RWANDA: THE TROUBLED COURSE OF JUSTICE 1 (2000), available at [http://web.amnesty.org/library/pdf/AFR470102000ENGLISH/\\$File/AFR4701000.pdf](http://web.amnesty.org/library/pdf/AFR470102000ENGLISH/$File/AFR4701000.pdf).

toward preventing the recurrence of interethnic violence and fulfilling the mission of transitional justice.

To illustrate the importance of Gacaca's effect on civic culture in Rwanda, Part I provides an overview of Rwanda's past interethnic strife in order to analyze how, in past violent conflicts, Rwanda's authoritarian tradition has enabled the authorities to manipulate their people. Part II discusses transitional justice as it has been conceived of to date. It then demonstrates that the ultimate goal of transitional justice is democracy, a sociopolitical condition that can prevent the recurrence of conflict. To show how democracy prevents violence, this Note focuses on the core processes of democracy: political participation and public contestation. These processes are capable of transforming Rwanda's authoritarian tradition into a civic culture. Part III examines Gacaca in light of its traditional transitional justice goals, as well as its democratic goals. It demonstrates that Gacaca can develop civic culture in two ways: (1) through its structure as a community-based, participatory, restorative justice mechanism that bridges the gap between the people and the State, Hutus and Tutsis; and (2) through the very struggles between the people and the State that are addressed within the forum. Part IV returns to transitional justice and reanalyzes it in light of its preventative mission. Ultimately, this Note concludes that Gacaca-like mechanisms can be a significant addition to the menu of transitional justice tools for future postconflict societies.

I

RWANDA PAST AND PRESENT: AN AUTHORITARIAN CULTURE

The immensity of the challenge of ridding Rwanda of interethnic violence can be understood only in light of its modern history.³³ Interethnic bloodshed in Rwanda dates back at least to the colonial period of the late 1950s, when the Belgian colonialists' divide-and-conquer tactics established clear ethnic lines and promoted interethnic aggression.³⁴ Recurring violence has marked the entire duration of Rwanda's independence.³⁵ Attempts at democratic rule routinely have ended in alignment along ethnic lines, further provoking violent outbreaks between Hutus and Tutsis.³⁶

³³ It is unclear whether there was interethnic violence in Rwanda prior to colonialism. GOUREVITCH, *supra* note 3, at 48-49.

³⁴ *Id.* at 55-61.

³⁵ Incidents of Tutsi killings occurred in 1959, 1961, 1963, and so on, through 1994. *Id.* at 64.

³⁶ *See id.* at 58.

In this light, the genocide of 1994 appears to be the zenith of a morbid pattern rather than a spontaneous, isolated incident. Like previous violent incidents, the genocide was accomplished by the interplay between the Rwandese authorities and the people. The authorities promoted and exploited public interethnic animosities, and they planned as well as directed the killings.³⁷ However, the authorities are not the only ones to blame. Members of the public embraced the propaganda and—more alarmingly—carried out the orders to massacre.³⁸

Since the genocide, the international community and the postgenocide Rwandese government have set out to bring the perpetrators of the crime of genocide to justice. Through the International Criminal Tribunal for Rwanda (ICTR), the leaders and instigators of the genocide are being held accountable so as to deter future use of such tactics.³⁹ Domestically, Rwanda's expansive prosecutorial strategy aims to individualize responsibility for crimes committed by entire groups.⁴⁰

Nothing, however, has been done to address those underlying social conditions that enabled mass, popular compliance with the genocidal agenda.⁴¹ After all, the genocide was effective because ordinary citizens were quickly co-opted into the murder of Tutsis and moderate Hutus.⁴² As African Rights reports, "The killings would never have claimed so many lives if the killers had not adopted a

³⁷ The genocide required extensive coordination of the participants and the environment.

The Rwandan genocide did not occur by chance. It demanded an overall strategy, scrupulous planning and organization, control of the levers of government, highly motivated killers, the means to butcher vast numbers of people, the capacity to identify and kill the victims, and tight control of the media to disseminate the right messages both inside and outside the country.

INT'L PANEL OF EMINENT PERSONALITIES, ORG. OF AFRICAN UNITY, RWANDA: THE PREVENTABLE GENOCIDE 117 (2000); *see also* DES FORGES, *supra* note 2, at 1–2.

³⁸ PRUNIER, *supra* note 2, at 242–45.

³⁹ *See infra* note 80 and accompanying text.

⁴⁰ *See* Evelyn Bradley, *In Search for Justice—A Truth and Reconciliation Commission for Rwanda*, 7 DETROIT C. L. AT MICH. ST. U. J. INT'L L. & PRAC. 129, 130 (1998) ("There is simply no way that the present courts will ever be able to bring to trial the estimated 100,000 people that are currently held in prisons across the country on suspicion of having committed genocide . . ."); Daly, *supra* note 3, at 375 ("It is important for society to make individual determinations [of guilt] so as to minimize the tendency to demonize an entire group.").

⁴¹ This Note asserts that the antidivisionist policy of the current government, which aims to unify the people of Rwanda, does not address these conditions effectively.

⁴² "[T]he Rwandan atrocities were characterized by the deliberate attempt to force public participation on as broad a basis as possible, co-opting everyone into the carnage [of] Tutsis and moderate Hutus." U.S. INST. OF PEACE, RWANDA: ACCOUNTABILITY FOR WAR CRIMES AND GENOCIDE 5 (1995).

strategy to involve as much of the population as possible—men, women and even children as young as eight.”⁴³ This strategy proved effective, as “[t]ens of thousands, swayed by fear, hatred, or hope of profit, made the choice [to participate in the genocide] quickly and easily.”⁴⁴

How is it that the people of Rwanda repeatedly have been turned into a murder weapon at the hands of their authorities? Gérard Prunier, an expert on Rwanda and its genocide, points to the Rwandese people’s “unquestioning obedience to authority.”⁴⁵ Philip Gourevitch, author of a prominent account of the genocide, seconds this observation, quoting a Rwandan who explains: “People revere power [G]ive them arms, and say, ‘It’s yours. Kill.’ They’ll obey.”⁴⁶ However, the question remains: What is the source of this society-wide propensity for compliance?

Prunier explains that “two factors combine[d] to make orders hard to resist.”⁴⁷ One is a characteristic common to African societies, a communitarian culture that places “group identification” above “individual character.”⁴⁸ The other is “a strong state authoritarian tradition going back to the roots of Rwandese culture.”⁴⁹

It is questionable whether Prunier’s communitarian culture argument correctly accounts for Rwandans’ “obedience.” First, communitarianism is an overbroad and nebulous term that trivializes a complex and unique Rwandese culture. Also, it pigeonholes Rwanda, assuming that it shares certain characteristics with the rest of Africa. Accounts such as that of Gourevitch,⁵⁰ as well as the author’s personal observations while in Rwanda in 2003, call into doubt the assumption that Rwandans possess a communal mindset similar to that of other African societies.⁵¹ Furthermore, such an assertion is based on an

⁴³ AFRICAN RIGHTS, RWANDA NOT SO INNOCENT: WHEN WOMEN BECOME KILLERS 1 (1995).

⁴⁴ DES FORGES, *supra* note 2, at 2.

⁴⁵ PRUNIER, *supra* note 2, at 353.

⁴⁶ GOUREVITCH, *supra* note 3, at 23.

⁴⁷ PRUNIER, *supra* note 2, at 245.

⁴⁸ *Id.* at 245–46. According to Prunier, group identification exists where an individual “does not stand alone but is part of a family, a lineage and a clan, the dweller on a certain Hill.” *Id.* at 245. Thus, “[w]hen the authorities gave the orders to kill and most of the group . . . complied, . . . it took a brave man indeed to abandon solidarity with the crowd and refuse to go along.” *Id.* at 246.

⁴⁹ *Id.* at 245.

⁵⁰ Gourevitch cites several incidents in which Tutsis waited passively for their killers in their individual homes, although they knew that their Tutsi neighbors were being slaughtered and that they would be next. GOUREVITCH, *supra* note 3, *passim*. These responses seem to indicate a tendency towards individualism, rather than tribal unity.

⁵¹ During her visit to Rwanda in 2003, the author noted significantly less communitarian behaviors than she had observed in other African societies, such as Sierra Leone.

untenable inference that communitarian societies are more conducive to violence than individualistic societies.⁵²

Instead, Prunier's second argument, which identifies an authoritarian culture in Rwanda, seems both more defensible and more accurate.⁵³ It addresses a narrower phenomenon: the social response to the political arrangements that have dominated Rwanda since the beginning of its recorded history—colonialism.⁵⁴ For generations, Rwanda's people have lived under a rule that tolerates no challenge to authority.⁵⁵ As explained in a report prepared by the International Crisis Group, "A Rwandan citizen has never been given the floor, he has always been waiting for instructions from his superiors and he has always been guided by them."⁵⁶

A society that allows no means of voicing the dissatisfactions and desires of its population⁵⁷ spawns what Gourevitch identifies as "a culture of fear."⁵⁸ On one level, Rwanda's "culture of fear" creates a

The author, however, is not qualified to make anthropological assessments of culture, especially that of the Rwandese people.

⁵² Since some of the greatest genocides of our time were committed by individualistic societies, such as the German Nazi-perpetrated Holocaust, there is no clear indication that propensity towards violence is correlated in any way with individualistic or communitarian societies.

⁵³ As explained by the International Crisis Group:

The decades of authoritarianism, from the long monarchical tradition through to the one-party regime led by President Habyarimana, resulted in the concentration of political and economic power, and the reinforcement of top-down administrative control over the population. This control was so tight that the government was able to manipulate the population into committing genocide. For the RPF, it is important to help the population resist such political manipulation by tackling key issues such as hunger, illiteracy and obscurantism and by gradually instilling democratic principles.

ICG 2002 REPORT, *supra* note 8, at 5.

⁵⁴ Authoritarian culture refers to a type of political culture within a society. For further discussion of authoritarian culture, see *infra* note 116 and accompanying text. Political culture has been defined as "a people's predominant beliefs, attitudes, values, ideals, sentiments, and evaluations about the political system of their country and the role of the self in that system." DIAMOND, *supra* note 30, at 163 (italics in original, emphasis added). The political culture of a country not only is impacted by the political system, but also impacts the political system, as "causal arrows between culture and structure and performance go both ways." GABRIEL A. ALMOND, A DISCIPLINE DIVIDED: SCHOOLS AND SECTS IN POLITICAL SCIENCE 144 (1990).

⁵⁵ ICG 2002 REPORT, *supra* note 8, at i.

⁵⁶ *Id.* at 5 n.15 (quoting OFFICE OF THE PRESIDENT OF THE REPUBLIC, REPUBLIC OF RWANDA, REPORT ON THE REFLECTION MEETINGS HELD IN THE OFFICE OF THE PRESIDENT OF THE REPUBLIC FROM MAY 1998 TO MARCH 1999, at 40 (1999)).

⁵⁷ *Id.* at 10.

⁵⁸ GOUREVITCH, *supra* note 3, at 22 (quoting Laurent Nkongoli, Tutsi interviewed by Gourevitch after 1994 genocide).

generally silent and submissive population.⁵⁹ On another level, the lack of steam valves for expressing dissatisfaction cultivates a hostile energy⁶⁰ that, when released, can tend towards violence. The silence of Rwanda's people is not, therefore, an indication of apathy or passiveness. Behind their muted masks, "the two [ethnic] communities are deeply entrenched in antagonist stereotypes that in essence are mutually exclusive."⁶¹ Thus, orders to commit violence allow people to release a profound animosity.⁶²

This social and political phenomenon makes Rwandese society predisposed to commit violence under the direction of its authorities. The current authoritarian government promotes such a predisposition by maintaining a submissive population while fueling interethnic animosities below the surface.⁶³ What role can transitional justice—the field that purports to move postconflict societies away from their violent past—play in breaking this vicious cycle?

II

PREVENTING GENOCIDE THROUGH DEMOCRATIZATION: THE MISSION OF TRANSITIONAL JUSTICE

In this Part, Section A interprets the task of transitional justice broadly—as attempting to prevent the recurrence of conflict and crimes against humanity. It then demonstrates that transitional justice's preventative mission can best be achieved by promoting a democratic sociopolitical system within a postconflict state. Section B describes the exact dimensions of democracy that are necessary to prevent conflict, identifying political participation and public contestation as the defining processes of a democracy. Public contestation emerges as the process most lacking in Rwanda. Section C argues that this can change if Rwanda's people develop a civic culture, which will enable them to practice participation and contestation among themselves and against the State. Transitional justice should aim to foster civic culture as one of its strategies for preventing violence.

⁵⁹ *Id.* at 23 ("Conformity is very deep, very developed here In Rwandan history, everyone obeys authority. People revere power" (quoting Francois Xavier Nkurunziza, Kigali lawyer with both Hutu and Tutsi family ties interviewed by Gourevitch after 1994 genocide)).

⁶⁰ See *supra* notes 23–26 and accompanying text.

⁶¹ ICG 2002 REPORT, *supra* note 8, at 16.

⁶² "The amount of repression . . . was enormous. . . . The genocide was like an explosion taking place in a very small, overcrowded room." PRUNIER, *supra* note 2, at 349. It operated through "unquestioning obedience to authority [and] fear of the Tutsi devils." *Id.* at 353.

⁶³ See *supra* notes 20–28 and accompanying text.

A. *Transitional Justice: Its Evolution Towards Democracy*

[W]e must forge an unshakable oath with all civilized people that never again will the world . . . fail to act in time to prevent this terrible crime of genocide.⁶⁴

—Jimmy Carter

In the wake of the Holocaust of World War II, the world condemned crimes against humanity such as genocide. With the denouncement came the vow: "Never again." The transitional justice field responds to this call and thus pursues a preventative mission.

As human rights and the prevention of crimes against humanity gained international legitimacy and influence in the late twentieth century,⁶⁵ the question emerged as to how countries should address violations committed by previous regimes.⁶⁶ Nations began to ask this question as governments attempted to distance their new rule from those of the past.⁶⁷ In this context, the field of transitional justice emerged to assert that postconflict societies must contend with their violent past in order to move forward successfully towards a lasting peace.⁶⁸

Beginning with the Nuremberg Trials, transitional justice grounded its strategies in the justice paradigm.⁶⁹ It dealt with past crimes through international tribunals that aimed to punish violators of international humanitarian law in order to end impunity and deter such crimes in the future.⁷⁰ In this retributive spirit, the ICTR was established after Rwanda's genocide. The United Nations Security

⁶⁴ President's Commission on the Holocaust: Remarks on Receiving the Final Report of the Commission, 1979 PUB. PAPERS 1773 (Sept. 27, 1979).

⁶⁵ See José Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, 43 HASTINGS L.J. 1425, 1426 (1992).

⁶⁶ *Id.* at 1426–27.

⁶⁷ "[R]einstated democracy needs . . . legitimacy. Failure to prosecute and lustrate may generate in the population feelings of cynicism and distrust toward the political system." Luc Huyse, *Amnesty, Truth, or Prosecution*, in PEACEBUILDING: A FIELD GUIDE 322, 325 (Luc Reyckler & Thania Paffenholz eds., 2001); see also Daniel Rothenberg, *Burma's Democratic Transition: The Internationalization of Justice, the Challenge of Legitimacy, and the Necessity of Facing Past Political Violence*, HUM. RTS. BRIEF, Winter 2002, at 10, 11 ("[N]ew democratic regimes have an obligation to address the moral, political, and legal demands of victims as a means of distinguishing themselves from the past government and grounding their vision of democracy in a fundamental respect for basic rights and rule of law.").

⁶⁸ Sarkin, *supra* note 29, at 147 ("[A]n unresolved past inevitably returns to haunt a society in transition.").

⁶⁹ Miriam J. Auckerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39, 94–97 (2002).

⁷⁰ See Sarkin, *supra* note 29, at 147.

Council expressed the principal tenet of transitional justice in its creation of the ICTR: Without addressing the atrocities committed by the past regime, “national reconciliation and . . . restoration and maintenance of peace”⁷¹ in Rwanda will be impossible.

In addition to the retributive model, transitional justice theory has begun to develop a broad array of approaches to tailor its response more effectively to the needs of postconflict nations. The Truth and Reconciliation Commission (TRC) mechanism is a case in point. In TRCs, restorative justice theory has informed an extension of transitional justice’s reach to the formerly victimized society as a whole.⁷² Also, rather than simply punishing the criminal leadership, restorative justice theory works to reintegrate both perpetrators and victims into a unified society through processes of reconciliation.⁷³ Truth sometimes has even been substituted for justice altogether, as the value of a historical record that recounts the suffering of the victims has been emphasized and amnesty granted to those perpetrators willing to divulge the facts.⁷⁴ These developments step beyond the retributive strategy—and even the justice paradigm—towards an evolving understanding that any dealings with the past should focus on impacting the future of the postconflict society constructively.⁷⁵

This constructive, forward-looking approach⁷⁶ aligns transitional justice more closely with its preventative mission. Furthermore, it begins to identify the interrelatedness between transitional justice and democratization,⁷⁷ a process that historically has occurred alongside transitional justice mechanisms.

Transitional justice has always presupposed that democratic, constitutionally driven governance systems can prevent conflict within

⁷¹ S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 1, U.N. Doc. S/RES/955 (1994), available at <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N95/140/97/PDF/N9514097.pdf?OpenElement>.

⁷² See *infra* note 160 and accompanying text.

⁷³ *Id.*

⁷⁴ See generally TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS (Robert I. Rotberg & Dennis Thompson eds., 2000) (examining moral validity and societal effects of truth commissions that grant amnesty in exchange for testimony). The South African Truth and Reconciliation Commission (TRC) adopted this exact strategy.

⁷⁵ Gacaca is said to fulfill this mission as well. See *infra* notes 147–53 and accompanying text.

⁷⁶ While retributive mechanisms produce certain forward-looking effects, such as deterrence, they are relatively more focused on the past than restorative mechanisms such as the TRC.

⁷⁷ “‘Democratization’ is usually employed in discussing a ‘transition’ from an authoritarian or nondemocratic regime to a democratic regime.” E-mail from Robert A. Dahl, Sterling Professor Emeritus of Political Science and Senior Research Scientist in Sociology, Yale University, to author (Oct. 4, 2004, 9:57:00 EST) (on file with the *New York University Law Review*).

and among societies.⁷⁸ All transitional justice mechanisms—tribunals, commissions, and the like—are said to promote and legitimize a “shift[] from authoritarian to democratic rule.”⁷⁹ Tribunals reinforce democracy by fostering respect for the rule of law and human rights. They also enhance the legitimacy of current governments by establishing a moral distance between previous and current regimes.⁸⁰ TRCs generate the social cohesion, also termed reconciliation, necessary for opposing groups to coexist under one government as a unified state.⁸¹

While both criminal tribunals and TRCs impact democratization in useful ways, neither directly addresses the social conditions that place Rwanda at risk of reverting to violence—namely an authoritarian regime and a silenced yet compliant and explosive public. Does democracy address such social problems? If it does, how can transitional justice begin to target this issue as well? Incorporating a more direct approach to addressing these postconflict social problems would align transitional justice even more closely with its preventative mission.

⁷⁸ See generally R.J. RUMMEL, *POWER KILLS: DEMOCRACY AS A METHOD OF NONVIOLENCE* (1997) (arguing that, compared to other political systems, democracy minimizes collective violence).

⁷⁹ Rothenberg, *supra* note 67, at 11.

⁸⁰ See Auckerman, *supra* note 69, at 73 (“[P]rosecutions reinforce moral norms and contribute to a shared understanding that certain behavior is wrong.”); Stephan Landsman, *Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions*, 59 *LAW & CONTEMP. PROBS.* 81, 83 (1996) (noting that tribunals promote rule of law); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 *YALE L.J.* 2537, 2543 (1991) (“[Tribunals] foster respect for democratic institutions and thereby deepen a society’s democratic culture.”); Sarkin, *supra* note 29, at 147 (“Justice . . . promotes peace and human rights while consolidating the new government as one bound by the rule of law, and therefore distinctly different [from] the regime of the past.”).

⁸¹ See PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY* 24–25 (2001) (“[Commissions] lift the lid of silence and denial from a contentious and painful period of history.”); Sarkin, *supra* note 29, at 147 (“Facilitating an open and honest dialogue can effect a catharsis, and prevents collective amnesia which is not only unhealthy for the body politic, but also essentially an illusion . . .”). Through this process, clashing groups within a nation begin to reconcile. At a minimum, reconciliation refers to an agreement of “simple coexistence,” in which “former enemies comply with the law instead of killing each other.” David A. Crocker, *Reckoning with Past Wrongs: A Normative Framework*, 13 *ETHICS & INT’L AFF.* 43, 60 (1999). Put differently, through reconciliation, former enemies begin to respect each other as fellow citizens. They begin to demonstrate “a willingness to hear each other out, to enter into a give-and-take about matters of public policy, to build on areas of common concern, and to forge principled compromises with which all can live.” *Id.* In Rwanda, the minimalist notion of reconciliation, in which people simply “learn to live with each other,” may be the most for which we can hope. Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 *INT’L LEGAL PERSP.* 73, 168 (2002).

B. *Defining a Democracy That Prevents Genocide*

Is transitional justice theory correct in assuming that democracy prevents conflicts and crimes against humanity? For one, the question can be answered empirically: Rudolph Rummel's study of violent outbreaks such as genocide demonstrates that "every instance of mass murder by a state against its own people has happened under authoritarian rule."⁸² On a theoretical level, the answer is: Since democracy signifies the rule of the people, it will act in the interest of the people—protecting the people's security, well-being, political liberties, and other human rights. Thus, a democratic government will enjoy public legitimacy.⁸³

The elegance of this rationale is often lost in practice, however. While democracy is proposed regularly as a panacea for inter- and intranational conflict, it is simultaneously conceptualized vaguely, simplistically, or mechanically.⁸⁴ Defined and implemented incorrectly, democracy can prove to be an ill-suited solution for many societies. The very history of postcolonial Africa's collapsing "democracies" demonstrates the hazards of constructing institutions such as elections, majority rule, multibranch government, and constitutions in the daft hope that these signify—or even may spark—true democracy.⁸⁵ The success of democratization depends on more than just top-down government structures, the franchise, and a bill of rights.⁸⁶

⁸² DIAMOND, *supra* note 30, at 6 & 283 n.23 (citing RUMMEL, *supra* note 78, and Rudolph J. Rummel, *Focus On: Power, Genocide and Mass Murder*, 31 J. PEACE RES. 1 (1994)).

⁸³ See ROBERT A. DAHL, ON DEMOCRACY 45 (1998) ("Democracy produces desirable consequences: 1. Avoiding tyranny; 2. Essential rights; 3. General freedom; 4. Self determination; 5. Moral autonomy; 6. Human development; 7. Protecting essential personal interests; 8. Political equality. In addition, modern democracies produce: 9. Peace-seeking; 10. Prosperity."); see also *id.* at 44–61.

⁸⁴ There is a "lack of consensus on the meaning of democracy." DIAMOND, *supra* note 30, at 7.

⁸⁵ Goran Hyden, *Foreign Aid and Democratization in Africa*, 27 AFR. INSIGHT 233 (1997); *How to Make Africa Smile: A Survey of Sub-Saharan Africa*, ECONOMIST, Jan. 17, 2004, at 5.

⁸⁶ The first phase of democracy building, also called transition, often focuses on only the institutional, structural aspects of a democratic system. Juan J. Linz & Alfred Stepan, *Toward Consolidated Democracies*, in CONSOLIDATING THE THIRD WAVE DEMOCRACIES: THEMES AND PERSPECTIVES 14, 18 (Larry Diamond et al. eds., 1997). Democratic processes therefore are categorized separately from transition within the consolidation phase because they are presumed to require a system in which to operate. Whereas some, like Linz and Stepan, take the position that consolidation can begin only after transition ends, *id.* at 14, this Note takes the position of Robert Dahl—that democratic processes are just as fundamental to the creation of a democratic system as democratic institutions and therefore can and must occur in tandem with democratic transition. Telephone Interview with Robert A. Dahl, Sterling Professor Emeritus of Political Science and Senior Research Scientist in Sociology, Yale University (Feb. 21, 2004).

Although the concept of democracy has been debated since the time of Aristotle and Plato,⁸⁷ democracy theorists have yet to agree on a single definition of democracy.⁸⁸ The diverse contemporary strains of democracy theory pay heed, however, to the work of Robert Dahl and often fashion their theories around his core definition of democracy.⁸⁹

Robert Dahl effectively identifies the sociopolitical processes that create and drive true democracy. Dahl argues that democracy signifies "the continuing responsiveness of the government to the preferences of its citizens, considered as political equals."⁹⁰ He proposes that this citizen-based conceptualization can be achieved only when two processes—political participation and public contestation—operate at their fullest.⁹¹ Although these two processes do not account for all the characteristics of a mature democracy, they constitute the core that is necessary for democracy to exist at all.⁹² Furthermore, these processes directly diminish the risk of violence within society.⁹³

Democracy theorists (and Western policymakers) often limit the definition of democracy to a narrow reading of Dahl's political participation criterion. For example, Joseph Schumpeter defines democracy purely in terms of the electoral process, effectively limiting citizens' political participation in governance to a periodic choice among political rivals.⁹⁴ However, the favored litmus test for democracy—free and fair elections—does not necessarily complete Dahl's scale of political participation. The Shumpeterian approach risks the "fallacy

⁸⁷ ARISTOTLE, *THE POLITICS* §§ 1291–92 (Stephen Everson ed., Cambridge Univ. Press 1988); see also DIAMOND, *supra* note 30, at 2–8.

⁸⁸ See *supra* note 84.

⁸⁹ See DIAMOND, *supra* note 30, at 8–17 (describing electoral democracy, liberal democracy, and other midrange conceptions in reference to Dahl's "seminal elaboration" on democracy theory).

⁹⁰ ROBERT A. DAHL, *POLYARCHY: PARTICIPATION AND OPPOSITION* 1 (1971).

⁹¹ *Id.* at 4; see also DIAMOND, *supra* note 30, at 8.

⁹² A distinction can be made between civic and democratic culture. The latter subsumes civic culture and includes further social characteristics such as flexibility, trust, efficacy, and tolerance. DIAMOND, *supra* note 30, at 167. Democratic culture can be observed in more mature democracies, whereas civic culture can exist before, during, and after democratic consolidation. Telephone Interview with Robert A. Dahl, *supra* note 86.

⁹³ DAHL, *supra* note 90, at 27. As Dahl explains:

The lower the barriers to public contestation and the greater the proportion of the population included in the political system, the more difficult it is for the government of a country to adopt and enforce policies that require the application of extreme sanctions against more than a small percentage of the population; the less likely, too, that the government will attempt to do so.

Id.

⁹⁴ JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 269 (Harper & Bros. 3d ed. 1950) (1942).

of electoralism," which effectively "exclude[s] significant portions of the population from contesting for power or advancing and defending their interest."⁹⁵ Proper political participation, therefore, requires constant engagement of all citizens in the governance process.

A more complete understanding of democracy must include Dahl's second criterion, public contestation.⁹⁶ This criterion reveals that democracy is, in part, based on the open expression of a healthy suspicion of power—on the general public conviction that, "as a rule, those with power cannot or ought not be trusted."⁹⁷ Since contestation signifies open expression of opposition, it brings about two results. First, it channels conflict through peaceful dispute-management mechanisms, thereby preventing violent outbreaks. Second, expression of distrust of government through contestation allows democracy to control, limit, and distribute power.⁹⁸ The practice of open and constant contestation channels distrust and conflict into a web of checks and balances, thus ensuring that power is not monopolized in any one locus.

A democracy that includes public contestation is indispensable for sustainable peace in Rwanda.⁹⁹ Open management of conflict can preempt violent tactics. It binds opposing groups into a systematized process of expressing their disagreements. This process—contestation—ultimately also acquires its own independent value. As democracy consolidates, the commitment of opposing groups to the democratic process becomes stronger than the schisms that define the battle lines within the process.¹⁰⁰ Thus, when urged to violence, the people can decide instead to utilize alternatives to violence that are capable of resolving differences. In this way, contestation bonds opposing parties within a unifying dispute-management process, allowing them to coexist under one government system as a unified

⁹⁵ DIAMOND, *supra* note 30, at 9 & 286 n.37 (citing work of Terry Lynn Karl).

⁹⁶ DAHL, *supra* note 90, at 4. Dahl interchangeably refers to this criterion as "liberalization, political competition, competitive politics, public contestation, and public opposition." *Id.* at 4 n.2. In this Note, the author limits use of the term "public contestation" to a narrow reading, as compared to Dahl's more expansive readings of the term, which, among other things, include guarantees of protection of human rights. Telephone Interview with Robert A. Dahl, *supra* note 86.

⁹⁷ Warren, *supra* note 31, at 310.

⁹⁸ *Id.*

⁹⁹ See *supra* note 93.

¹⁰⁰ In order for democracy to consolidate, society must possess a commitment to the idea of democratic rule. DIAMOND, *supra* note 30, at 168–71. This belief in democracy, or lack thereof, is an element of political culture. *Id.* The social unity and trust in the new regime necessary for such a belief to develop is also a goal of TRCs. See *supra* notes 72–75, 81 and accompanying text; see also *infra* notes 172–80.

nation. The effect of open contestation thus is akin to the effects of reconciliation.¹⁰¹

In addition, as Rudolph Rummel argues, "The way to virtually eliminate genocide . . . appears to be through restricting and checking power."¹⁰² Constant contestation between government and the people, as well as between different groups within society, provides the check that prevents the complete usurpation of power by any one group or authority. In a contesting democracy, "no single group can be sure that its interests will ultimately prevail."¹⁰³ Balancing power between the people and the State can prevent the State from gaining so much power that it is capable of promoting violence in the future. A system of power distributed between two entities—the people and the State—is the most fundamental check and balance within a democratic system.

C. *Focusing on the People—Democracy's Foundation*

In Rwanda, political participation exists only to the extent that all citizens are permitted to cast their vote. Electoral participation soared to ninety-five percent in the 2003 constitutional referendum,¹⁰⁴ as well as in the first postgenocide presidential and parliamentary elections.¹⁰⁵ The value of this participation was diluted, however, by the forceful intimidation of citizens to cast their vote in favor of the constitution,¹⁰⁶ as well as the dearth of political opposition in the presidential and parliamentary elections.¹⁰⁷

¹⁰¹ See *supra* note 82 and accompanying text; *infra* notes 171–77 and accompanying text.

¹⁰² Rummel, *supra* note 82, at 8.

¹⁰³ GEORG SORENSEN, *DEMOCRACY AND DEMOCRATIZATION: PROCESSES AND PROSPECTS IN A CHANGING WORLD* 28 (1993).

¹⁰⁴ Alisha Ryu, *Rwanda Referendum* (May 26, 2003), at <http://www.globalsecurity.org/military/library/news/2003/05/mil-030526-2cd0606d.htm>.

¹⁰⁵ The presidential election turnout was 96.5% of registered voters, Electionguide.org, *Voter Turnout*, at <http://www.ifes.org/eguide/turnout2003.htm> (last visited Oct. 5, 2004), and participation declined only slightly for the later-held parliamentary elections, *id.* (reporting that voter-turnout rate for parliamentary elections held between September 29 and October 3, 2003 was 96.48%).

¹⁰⁶ Press Release, Amnesty Int'l, Rwanda: President Kagame's Inauguration—An Opportunity to Strengthen Human Rights Protection [sic] (Sept. 12, 2003) ("[E]lection monitors noted numerous incidents, acts of harassment and intimidation . . ."), at <http://web.amnesty.org/library/Index/ENGAFR470132003?open&of=ENG-RWA>.

¹⁰⁷ Press Release, Amnesty Int'l, Run-Up to Presidential Elections Marred by Threats and Harassment (Aug. 22, 2003) ("The RPF has used pressure tactics including the detention of opposition supporters, forced conscription into RPF par ranks, and violent intimidation, including death threats, to undermine support for the opposition."), at <http://web.amnesty.org/library/Index/ENGAFR470102003?open&of=ENG-RWA>.

Public contestation is even scarcer. Rwanda's civil society¹⁰⁸ is either government controlled or fiercely persecuted.¹⁰⁹ Since there are no avenues for the general public "to express [its] interests and preferences, to influence policy, and to scrutinize and check the exercise of state power continuously, in between elections as well as during them,"¹¹⁰ it does not challenge government tactics. Rather, the government is allowed to act as it pleases. This is troubling because, as stated by an activist in a civic movement credited with assisting the overthrow of the Soviet Union, "there is no greater threat to democracy than indifference or passivity on the part of citizens."¹¹¹

At this point in its transition to democracy, Rwanda no longer can count on the government to foster a participatory, competitive political process. It is clear that Rwanda's government is pursuing a strategy of power consolidation rather than constructing a sustainable democracy in which power is dispersed and trust in deliberation trumps distrust of opposition.¹¹² This challenge is therefore left to the "mass public."¹¹³

In order for democracy characterized by Dahl's dual processes to take root in Rwanda, the Rwandese people must develop what democracy theorists Gabriel Almond and Sidney Verba have coined a "civic culture."¹¹⁴ Civic culture describes both social attitude and action. Sydney Hook has defined this attitude as "an intelligent distrust of . . . leadership, a skepticism, stubborn but not blind, of all demands for the enlargement of power, and an emphasis upon critical method in every phase of . . . social life."¹¹⁵ Alternatively, Alex Inkeles has defined civic culture in the negative—as the reverse of "authoritarian personality syndrome, which includes faith in powerful leaders, hatred of outsiders and deviates, a sense of powerlessness and ineffectiveness, extreme cynicism, suspicion and distrust of others, and

¹⁰⁸ In this Note, "civil society" refers to the associational structures of citizens—from church groups to human rights nongovernmental organizations. For a description of these associational structures, see generally ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

¹⁰⁹ ICG 2002 REPORT, *supra* note 8, at 11–17; Drumbl, *supra* note 10, at 1309–10.

¹¹⁰ DIAMOND, *supra* note 30, at 219.

¹¹¹ Bronislaw Geremek, *Problems of Postcommunism: Civil Society Then and Now*, J. DEMOCRACY, Apr. 2002, at 3, 11.

¹¹² See *supra* notes 13–26 and accompanying text.

¹¹³ "The mass public matters for democratization in two senses: in its often pivotal role . . . in helping to effect a transition to democracy, and in the never-ending quest to deepen democracy beyond its formal structure." DIAMOND, *supra* note 30, at 219.

¹¹⁴ GABRIEL A. ALMOND & SIDNEY VERBA, *THE CIVIC CULTURE: POLITICAL ATTITUDES AND DEMOCRACY IN FIVE NATIONS* 31–32, 473–505 (1963); see also DIAMOND, *supra* note 30, at 165–68 (describing cultural correlates of democracy).

¹¹⁵ SIDNEY HOOK, *REASON, SOCIAL MYTHS AND DEMOCRACY* 290 (1940).

dogmatism.”¹¹⁶ This attitude of civic culture must be expressed through open, participatory discourse and action so as to continually impact the democratic process.¹¹⁷ Civic culture is therefore not distinct from Dahl’s democratic processes; rather it is the public propensity for participation and contestation.

When civic culture replaces authoritarian culture in Rwanda, the people will begin to act as a democratic citizenry. First, by dealing with conflict openly, they will begin to “balance cleavage and conflict with the need for consensus,”¹¹⁸ thus bringing to life the benefits of peaceful dispute management and thereby eschewing violence.¹¹⁹ As Erin Daly states, “Only when Rwand[ese] society is sufficiently transformed that it resists the homicidal urgings of a leader or resists the leadership of a killer, can it be said that genocide is truly unlikely to recur.”¹²⁰

Second, by engaging government, a critical citizenry will create a competitive relationship that will serve as “the basis for the limitation of state power, hence for the control of the state by society, and hence for democratic political institutions as the most effective means of exercising that control.”¹²¹ Ultimately, civic culture will provide a bottom-up force capable of directing Rwanda towards democratic consolidation.

Granted, such attitudinal change takes place slowly, subtly, and over the long term. Democracy is not an institutional order that can be put in place overnight. Rather, as democratization expert Larry Diamond explains, democracy is a process of long-term social development which requires “systematic, grassroots efforts to build social capital and cultivate democratic networks, norms, and expectations.”¹²² This consolidation, or deepening of democracy, must begin as early as possible, independent of any structural reforms.¹²³ Not addressing the barriers to democracy created by Rwanda’s authorita-

¹¹⁶ DIAMOND, *supra* note 30, at 167 & 327 n.21 (citing ALEX INKELES, NATIONAL CHARACTER: A PSYCHO-SOCIAL PERSPECTIVE 195–98 (1997)).

¹¹⁷ *Id.* at 168 (noting that distaste for open discourse helps explain Asian democracies’ tendency toward “blended” form of democracy).

¹¹⁸ *Id.* at 166.

¹¹⁹ Such a new way of interrelating with the opposition creates a commitment to coexist peacefully. This commitment is akin to the goal of reconciliation, which aims to unify opposing parties under a commitment to continue under one governing system—democracy.

¹²⁰ Daly, *supra* note 81, at 94.

¹²¹ Samuel P. Huntington, *Will More Countries Become Democratic?*, 99 POL. SCI. Q. 193, 203 (1984).

¹²² DIAMOND, *supra* note 30, at 238.

¹²³ See *supra* note 86 (discussing debate surrounding interrelationship between democratic consolidation and transition).

rian culture as soon as possible risks the country losing its chance at democracy and peace.

This Note proposes that civic culture can begin to develop in Rwanda through Gacaca—a community-based, restorative transitional justice mechanism which provokes contestation and participation. This Note argues that, given current Rwandese sociopolitical realities, Gacaca is Rwanda's best and only hope for the birth of civic culture and democracy, and thus for sustainable peace.

III

GACACA AS A DEMOCRACY-PROMOTING MECHANISM

Although the Rwandese government has progressively tightened its grip over the Rwandese people, at the same time it has, almost paradoxically, created a forum that mandates popular expression: the Gacaca courts. Established to unburden the national court system while simultaneously promoting truth and reconciliation,¹²⁴ Gacaca remains a bold transitional justice experiment.¹²⁵ It has provoked deep apprehension from the international community, with prognoses of failure and inadequacy buzzing.¹²⁶

However, neither the international community nor the Rwandese government fully or accurately grasps the democracy-engendering potential of Gacaca. Gacaca may serve as a crucial steam valve for the expression of opposing views because it: (1) functions as the only forum where citizens are required to communicate both with each other and with the State, (2) has the discussion of taboo topics in its very mandate, and (3) has emerged from a community-based, restorative past. Thus, it has the potential to: (1) engender a culture of discourse in a society whose political culture is primarily characterized by its silence and compliance, (2) develop a practice of peaceful dispute resolution, and (3) ultimately provide fertile ground for the development of democracy in Rwanda.

A. *The Gacaca Courts Experiment*

When the RPF took power in Rwanda in July 1994, thereby ending the genocide, it faced the daunting task of dealing with the

¹²⁴ See *infra* notes 146–53 and accompanying text.

¹²⁵ Moussalli, *supra* note 17, at 4 (“The Special Representative applauds the boldness of [the Gacaca] proposal.”); African Union, *Declaration on the Genocide in Rwanda* (Apr. 27, 2004) (“We . . . strongly commend the efforts made by the government and the people of Rwanda to create this enabling environment through . . . the ‘Gacaca’ and other appropriate institutions.”), <http://www.reliefweb.int/w/rwb.nsf/0/f96cbc5065e737fd85256e7c00519537?OpenDocument>.

¹²⁶ See Sarkin, *supra* note 29, at 161–66.

past.¹²⁷ Rather than opting for a TRC-like mechanism to cope with the society-wide crimes committed in 1994, the new government ambitiously embarked on a mission to bring every *genocidaire* to justice.¹²⁸ As President Paul Kagame has explained, “‘There can be no durable reconciliation as long as those who are responsible for the massacres are not properly tried.’”¹²⁹ Rwanda initiated this plan through the use of a judicial system composed of the mere five judges and fifty lawyers that remained in the country.¹³⁰ Nevertheless, the government incarcerated 125,000 genocide suspects—about ten percent of the adult male Hutu population—and placed them in jails meant to hold only 15,000 people.¹³¹

To manage the overwhelming nature of its task, the government passed a genocide law¹³² in which it divided the crimes committed during the genocide into four categories: Category I for leaders of genocide or crimes against humanity, Category II for homicides and accomplices, Category III for serious assaults, and Category IV for offenses against property.¹³³ Although the government managed to try 5000 individuals by mid-2001,¹³⁴ the number of detainees languishing in prisons, along with international abhorrence of the conditions of confinement and concerns over possible due process violations, forced Rwanda to reconsider its strategy.¹³⁵

In 2001, the government passed the Gacaca Law,¹³⁶ which transferred crimes in Categories II–IV to an institution the government had co-opted from Rwandan customary law—Gacaca. Before the genocide, Gacaca was a traditional, community-based mechanism for

¹²⁷ Daly, *supra* note 81, at 162–63.

¹²⁸ *See id.* at 165–66.

¹²⁹ INT’L PANEL OF EMINENT PERSONALITIES, ORG. OF AFRICAN UNITY, *supra* note 37, at 187 (quoting then–Vice President Paul Kagame).

¹³⁰ *Id.* at 188.

¹³¹ Drumbl, *supra* note 10, at 1233.

¹³² Organic Law on the Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990, No. 08/96 of August 30, 1996 (Rwanda), in OFFICIAL GAZETTE OF THE REPUBLIC OF RWANDA, Sept. 1, 1996, at 16 [hereinafter Genocide Law], available at <http://129.194.252.80/catfiles/0215.pdf>.

¹³³ *Id.* art. 2.

¹³⁴ Daly, *supra* note 3, at 369.

¹³⁵ René Degni-Ségui, *Report on the Situation of Human Rights in Rwanda*, U.N. ESCOR, 52d Sess., Agenda Item 10, ¶ 69–96, U.N. Doc. E/CN.4/1996/7 (1995); *see also* Sarkin, *supra* note 29, at 156 (describing poor confinement conditions).

¹³⁶ Loi Organique No. 40/2000 du 26/01/2001 Portant Création des ‘Juridictions Gacaca’ et Organisation des Poursuites des Infractions Constitutives du Crime de Genocide ou de Crimes Contre L’Humanité, Commises Entre le 1 Octobre 1990 et le 31 Décembre 1994 (Rwanda) [hereinafter Gacaca Law], <http://www.inkiko-gacaca.gov.rw/pdf/loi.pdf>.

resolving local civil disputes.¹³⁷ In their traditional form, Gacaca proceedings were conducted by community members, with respected community figures serving as judges.¹³⁸ The principles applied in Gacaca emerged from local customary values.¹³⁹ The proceedings aimed to emphasize to the wrongdoer the gravity of the wrong committed so that he or she could reconcile with the community and thus be reintegrated into society.¹⁴⁰

When the Rwandese government adopted the Gacaca system, it retained certain traditional characteristics of the original model.¹⁴¹ These characteristics include requiring members of society¹⁴² to provide testimony and evidence against suspects, as well as to participate in hearings.¹⁴³ However, it departed from the restorative nature of traditional Gacaca¹⁴⁴ by granting the elders who serve as judges the power to sentence defendants to punishments ranging up to lifetime imprisonment,¹⁴⁵ thus substituting retributive characteristics for some of Gacaca's rehabilitative ones.

The Gacaca courts established by the government were put in place to serve two official purposes: justice and reconciliation. Most pressingly, the Gacaca courts supplement the national courts in their mission to try genocide crimes retributively.¹⁴⁶ Second, the community involvement element¹⁴⁷—the existence of a forum for community members to voice their concerns and make known their suffering—endeavors to imbue this retributive mechanism with the spirit of social rehabilitation¹⁴⁸ and reconciliation.¹⁴⁹

¹³⁷ Sarkin, *supra* note 29, at 159–60; see also L. Danielle Tully, *Human Rights Compliance and the Gacaca Jurisdictions in Rwanda*, 26 B.C. INT'L & COMP. L. REV. 385, 386 (2003).

¹³⁸ Sarkin, *supra* note 29, at 159.

¹³⁹ Tully, *supra* note 137, at 396.

¹⁴⁰ *Id.*

¹⁴¹ Maureen E. Laflin, *Gacaca Courts: The Hope for Reconciliation in the Aftermath of the Rwandan Genocide*, ADVOCATE, May 2003, at 19, 20.

¹⁴² This body of community members has been named the "General Assembly." See Tully, *supra* note 137, at 399–400.

¹⁴³ Gacaca Law, *supra* note 136, art. 33.

¹⁴⁴ Laflin, *supra* note 141, at 20–21.

¹⁴⁵ For suspects sentenced in Category II, the maximum sentence ranges from twenty-five years to life imprisonment. Genocide Law, *supra* note 132, art. 14(b).

¹⁴⁶ Sarkin, *supra* note 29, at 159 (noting that Gacaca courts were adopted to ease burden of national courts).

¹⁴⁷ COUR SUPRÊME DÉPARTEMENT DES JURIDICTIONS GACACA, MANUEL EXPLICATIF SUR LA LOI ORGANIQUE PORTANT CRÉATION DES JURIDICTIONS GACACA 15 [hereinafter GACACA MANUAL], available at http://www.asf.be/FR/FRnews/manuel_gacaca.pdf.

¹⁴⁸ Gacaca Law, *supra* note 136, pmbl.

¹⁴⁹ GACACA MANUAL, *supra* note 147, at 27.

Therefore, the single institution of Gacaca aims to do the work for which two distinct transitional justice mechanisms—criminal tribunals and TRCs—are typically utilized. In light of Gacaca's goals, the international community has raised concerns about its efficacy.¹⁵⁰ Whether Gacaca will prove to be a success in light of these official goals remains to be seen. Gacaca has only recently begun its operations. As of 2003, only ten percent of Gacaca courts had held pretrial hearings, and none had actually begun to try suspects.¹⁵¹ Thus, any discussion of Gacaca's success or failure remains speculative.

B. Gacaca Courts—The Birthplace of Civic Culture

Even if Gacaca fails to attain its stated goals of justice and reconciliation, that does not necessarily discredit Gacaca as an effective transitional justice mechanism. Because it can contribute to the consolidation of democracy, in order to truly pass judgment on Gacaca it is important to reexamine it in light of the link between transitional justice and democracy.¹⁵² Assessing Gacaca through the lens of Dahl's democracy criteria of participation and contestation—critical processes for Rwanda—it becomes apparent that Gacaca can serve as the birthplace of civic culture in Rwanda. This can happen in two ways. First, Gacaca's structural characteristics can promote civic culture, thus facilitating their replication in future transitional justice mechanisms. Second, civic culture can be promoted incidentally, as a byproduct of the power struggles between the government and the people currently taking place through Gacaca.

1. Gacaca's Structural Characteristics and the Multiple Dimensions of Developing Civic Culture

In its contemporary form, Gacaca draws its unique strength from its combination of indigenouness and state involvement. Although Gacaca has been co-opted and altered by the government, it nevertheless retains its traditional origin and communal style. As such, it allows the Rwandese people to retain a sense of ownership and com-

¹⁵⁰ Critics discount the success of the justice-seeking purpose, arguing that there is a high risk of violating due process standards due to Gacaca's dependence on community-provided evidence, as well as the underqualified and partisan nature of judges, lack of defense counsel, and minimal appeals options. See AMNESTY INT'L, *supra* note 32, at 33–38; Daly, *supra* note 3, at 356, 374, 382–84. The reconciliatory purpose of Gacaca also has been doubted due to the antirestorative tendencies that the retributive aspect imposes on the process. *Id.* at 385.

¹⁵¹ Human Rights Watch, *Rwanda*, *supra* note 19.

¹⁵² According to Erin Daly, "The gacaca plan . . . aims to link two important goals—retributive justice and community rebuilding—by making them interdependent." Daly, *supra* note 3, at 378.

fort within the forum. This innate familiarity may encourage the people to approach Gacaca with a participatory attitude. Furthermore, the very fact that this community-based mechanism is now utilized by the government creates a critical communication bridge between the people and the State that did not exist before. Consequently, any effects that Gacaca's structure may have will impact not just local communities, but also the *relationship* between the people and the government. Such linkage plants civic culture directly where it should reside: in the space between society and the State.

Gacaca's procedural dependence on public participation has made it a forum in which speech is relatively free and protected.¹⁵³ Thus, the democracy-engendering consequences of free speech can begin to emerge within this forum. To start, freedom of speech in Gacaca can serve as a crucial safety valve for the ethnic opposition and discontent that is currently building up in Rwanda. As Thomas Emerson writes:

[F]reedom of expression is a method of achieving . . . a more stable community [T]he process of open discussion promotes greater cohesion in a society because people are more ready to accept decisions that go against them if they have a part in the decision-making process. . . . Freedom of expression thus provides a framework in which the conflict necessary to the progress of a society can take place without destroying the society.¹⁵⁴

Freedom of speech allows the Rwandese people and government to confront their conflicts openly. Furthermore, open discussion of differences is apt to promote public autonomy¹⁵⁵ and public inquisitiveness.¹⁵⁶ These characteristics fall squarely within civic culture.

Notwithstanding the retributive characteristics the government has added to Gacaca, it remains a restorative instrument.¹⁵⁷ Because

¹⁵³ To clarify, speech is free within Gacaca, as well as within all of Rwanda, only to the extent that it is called upon as an evidence-gathering method. This is not to say that the law protects speech or that speakers are free from fear of retaliation in Rwanda.

¹⁵⁴ THOMAS EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 7 (1970).

¹⁵⁵ Self-governance functions as a classic justification for free speech. See generally ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948) (arguing that self-governance and freedom of speech are codependent).

¹⁵⁶ "[F]ree speech . . . can serve in checking the abuse of power by public officials." Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527 (1977). "[T]he role of the ordinary citizen is not so much to contribute on a continuing basis to the formation of public policy as to retain a veto power to be employed when the decisions of officials pass certain bounds." *Id.* at 542.

¹⁵⁷ Gacaca shares its restorative characteristics with the already-existing transitional justice mechanism—the TRC. See John Braithwaite & Heather Strang, *Introduction to RESTORATIVE JUSTICE AND CIVIL SOCIETY* 1, 1–13 (Heather Strang & John Braithwaite eds., 2001) for an explanation of restorative characteristics. Although both institutions aim

of its restorative nature, it serves as a precedent for peaceful dispute resolution while engendering the civic engagement and empowerment that are necessary for civic culture to develop.¹⁵⁸

Restorative justice mechanisms are defined in terms of both procedure and values.¹⁵⁹ Procedurally, rather than isolating the criminal and the State from the victim and the community, restorative mechanisms bring all stakeholders in an offense together for the purpose of reintegrating the accused into society.¹⁶⁰ In Gacaca, the stakeholders include the accused, his or her family, the village, and the victims, as well as the government.¹⁶¹

Rather than operating on the basis of retributive, eye-for-an-eye tactics, restorative values introduce to the justice process "healing rather than hurting, moral learning, community participation and community caring, respectful dialogue, forgiveness, responsibility, apology, and making amends."¹⁶² In Gacaca, great value is placed on the accused's admissions of guilt and on expressions of shame and regret.¹⁶³ Punishments are significantly reduced to reward such restorative behavior.¹⁶⁴ Similarly, Gacaca incorporates restorative punishment mechanisms, such as community service, for many lower-level crimes.¹⁶⁵

Restorative justice and democracy are conceptually linked. Anthony Alfieri, in arguing for community prosecution for politically isolated ethnic minorities in the United States, explains that "[t]he theory of restorative justice offers a model of democratic citizenship."¹⁶⁶ Restorative justice creates community networks of interde-

to bring the community and the victim together in order to rebuild a common foundation through reconciliation, the commissions conduct this process at a macro level. Aiming to foster reconciliation at a national level, commissions are forced to centralize and streamline their restorative process, thereby involving most victims only through reporting by radio, television, and the press. Gacaca, however, is community based. Thus, it places the restorative process back in the hands of the people. The community-based nature of Gacaca's restorative structure allows Gacaca to bring about the democracy-engendering consequences of restorative justice in a way that commissions cannot. *See* Daly, *supra* note 3, at 376-78; *see also id.* at 376 ("Gacaca requires the participation of individuals within the communities. . . . Rwandans of all stations will literally be defining justice for the post-genocide society rather than having it defined for and imposed on them.").

¹⁵⁸ *See* Daly, *supra* note 3, at 376-78.

¹⁵⁹ Braithwaite & Strang, *supra* note 157, at 1.

¹⁶⁰ John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, in 25 CRIME AND JUSTICE: A REVIEW OF RESEARCH 1, 5 (Michael Tonry ed., 1999).

¹⁶¹ *See* Braithwaite & Strang, *supra* note 157, at 1.

¹⁶² Braithwaite, *supra* note 160, at 6.

¹⁶³ *See* GACACA MANUAL, *supra* note 147, at 27-35.

¹⁶⁴ Gacaca Law, *supra* note 136, arts. 68-71; GACACA MANUAL, *supra* note 147, at 27.

¹⁶⁵ Tully, *supra* note 137, at 400.

¹⁶⁶ Anthony V. Alfieri, *Community Prosecutors*, 90 CAL. L. REV. 1465, 1478 (2002).

pendence and develops a demand for accountability, thus engaging and empowering individuals in society and building a civic culture that promotes democracy.

Restorative justice is based on "communitarianism, a belief that the rights of individuals cannot be preserved without citizens taking responsibility, both individually and collectively, for the good of the community as a whole."¹⁶⁷ However, the concept of community does not simply signify homogeneity of views. Rather, a closer assessment of community reveals that it actually connects groups of individuals with similar interests to groups of individuals with opposing interests.

At one level, when individuals meet in a restorative forum, they have the opportunity to find that their interests place them within a distinct stakeholder group. Finding safety and support in numbers, such "common-interest" groups can begin to voice their concerns and interests more courageously and openly, even in the presence of other groups that may possess opposing interests. This phenomenon can occur in Gacaca, where Hutu villagers find that their sense of oppression by the government is shared by other villagers.¹⁶⁸ Thus, restorative forums place individuals within common-interest groups that may oppose one another.

However, the restorative process also counterbalances stakeholders' common-interest positions by placing them in an interdependent relationship with opposing groups.¹⁶⁹ This interdependence emerges from the fact that, to resolve a problem, opposing communities must come together and cooperate. Thus, in Gacaca, Hutu villagers, Tutsi victims, and Tutsi government officials must work together if they are to achieve justice. In order to achieve justice, groups that hold opposing views first must develop an egalitarian, deliberative, cooperative *modus operandi*.¹⁷⁰ By fostering teamwork,

¹⁶⁷ Myrna S. Raeder, *Chair's Report to Members: Fundamental Change in the Criminal Justice System May Be Closer Than We Think*, CRIM. JUST., Winter 1999, at 1, 1 (1999).

¹⁶⁸ Similar to Hutus, Tutsi villagers—particularly genocide survivors—also report feeling isolated from the power that RPF Tutsi returnees now hold. Mark A. Drumbl, *Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials*, 29 COLUM. HUM. RTS. L. REV. 545, 567 & n.96 (1998). Membership in a common-interest group therefore changes according to the interest at stake.

¹⁶⁹ Interdependence creates a loose sense of community.

Gacaca requires people within the communities to work together as voters, witnesses, tribunal personnel, and jurors. It creates a common experience in which everyone works together toward a common goal. In a sense, it aims to replace the divisive experience of the genocide with the cohesive experience of securing justice.

Daly, *supra* note 3, at 376. This new, restorative experience is akin to reconciliation. See *infra* notes 172–80 and accompanying text.

¹⁷⁰ See Braithwaite, *supra* note 160, at 77–78 ("Disputing over daily injustices is where we learn to become democratic citizens.").

restorative mechanisms allow stakeholders to learn that the concept of "community" can, and indeed must, include the opposition. In this way, the concept of community in Rwanda can be transformed effectively from an ethnic, us-versus-them paradigm into a paradigm that includes all citizens.¹⁷¹

Fundamentally, the experience of peaceful management of opposing interests should generate a public preference against violent resolution of schisms. It is this new preference for peace, coupled with practices of both contestation and participation, that may emerge as a unifying force within Rwanda, thus creating a national community.¹⁷² The interdependence among contesting common-interest groups may effectively achieve the minimal national unity necessary for Rwandese society to coalesce into a democracy.¹⁷³ Similar to the mission of nationally focused TRCs, the mission of the community-focused restorative justice experience is to redefine the relationship between opposing communities from violence that leads to disintegration to constructive engagement that leads to a polity and thus to a functioning democracy.¹⁷⁴ Whereas the TRC achieves this linearly, prior to or distinct from the political process, a community-level restorative mechanism such as Gacaca develops commitment to the processes of democratic participation and contestation by engaging in them directly. As parties engage in these processes, the commitment to them emerges and feeds back into the processes themselves.¹⁷⁵ In effect, Gacaca's democracy-engendering function may fulfill Gacaca's official goal of reconciliation, albeit in a circular way.¹⁷⁶

Experiencing interdependence with the opposition within a restorative context facilitates the development of a practice of peaceful dispute management that must exist for democracy to operate fully. Opposing common-interest groups balance power through the processes of participation and contestation. However, opposition is counterbalanced by the recognition that society is interdependent, thus preventing the disintegration of the common-interest

¹⁷¹ "If [citizens] can learn to deliberate wisely and respectfully in the most provocative contexts, then they are citizens well educated for democracy." *Id.* at 79.

¹⁷² See *supra* note 100 and accompanying text.

¹⁷³ Warren, *supra* note 31, at 337-43 (discussing deliberative generation of trust).

¹⁷⁴ The deliberative process, which combines opposition with interdependence, creates results similar to that of a repeat-player prisoner dilemma. In his book, *The Evolution of Cooperation*, Robert Axelrod delineates the process by which opposing parties, caught in an extended interdependent relationship, come to a mutually beneficial solution of cooperation. Trust therefore develops over time as a result of cooperation, rather than the other way around. ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 182 (1984).

¹⁷⁵ See *supra* notes 117-22 and accompanying text.

¹⁷⁶ See *supra* note 157 and accompanying text.

communities' commitment to living together with their opposition in a cooperative and tolerant democratic state.¹⁷⁷ Restorative mechanisms therefore highlight the interrelationship between these two seemingly opposing notions of community and demonstrate how opposition and cooperation function in tandem to drive the democratic process.

Beyond creating a network of communities, restorative mechanisms tie stakeholders, both citizen and state, into a system of mutual accountability.¹⁷⁸ By seeking justice through participation and deliberation with state officials, the society creates "an important restraint on state actions in this area."¹⁷⁹ In this way, accountability begins to flow in two directions: top-down from the State to the communities that remain closest to the criminals, and bottom-up from society to the State that may be dispensing punishment unjustly.¹⁸⁰

Finally, through encouraging and protecting participation, Gacaca ought to create a sense of empowerment among the people of Rwanda. Restorative justice mechanisms have been found to empower communities that are typically isolated from the democratic process. Alfieri reports that "the enlargement of citizen participation, institutional decentralization, and accountability of [government] prosecution offices to local communities stimulates citizen-state collaboration and grassroots equality initiatives broadly within the criminal-justice system, thereby ameliorating the conditions of poverty, disempowerment, segregation, and crime pervading communities of color."¹⁸¹

Similarly, beginning with community engagement on the subject of criminal justice, Rwanda's people can begin to develop a sense of empowerment that will allow further pursuit of "citizen-state collaboration and grassroots . . . initiatives aimed at alleviating . . . powerlessness . . . and . . . violence,"¹⁸² Rwanda's most pressing problems.

¹⁷⁷ See generally AXELROD, *supra* note 174 (developing "Cooperation Theory," which posits that opponents, when they are aware of probability of future interactions extending indefinitely into future, and when future results matter sufficiently, may behave cooperatively based on self-interest).

¹⁷⁸ "Restorative practices demonstrate mutual accountability—the collective responsibility of citizens to care about and take care of one another." Ted Wachtel & Paul McCold, *Restorative Justice in Everyday Life*, in *RESTORATIVE JUSTICE AND CIVIL SOCIETY*, *supra* note 157, at 114.

¹⁷⁹ *Id.* at 110.

¹⁸⁰ See Daly, *supra* note 3, at 376–77 ("[T]he government's influence [in the Gacaca process or its outcomes] will be moderated by the conduct of thousands of individuals at the local level and therefore felt less than it would be if the central government were managing the prosecutions directly.").

¹⁸¹ Alfieri, *supra* note 166, at 1466.

¹⁸² *Id.* at 1477.

2. *Democracy Through Struggle*

Any structural benefits Gacaca may offer will, however, be tempered by the political realities in which Gacaca operates. On the ground, it is apparent that Rwanda's power schisms are reflected within Gacaca¹⁸³ in a way that puts the goals of justice and reconciliation at serious risk.¹⁸⁴ However, the tensions that may weaken Gacaca's twin missions paradoxically can only strengthen the emergence of civic culture. In her visit to Rwanda in 2003, the author witnessed a snapshot of how political frictions between the people and the State fortified the democracy-engendering function of Gacaca.

There exists a serious risk that Gacaca is seen by the Rwandese people as an institution imposed by outsiders. Since Hutus, and even Tutsi genocide survivors, do not see the current government as representing their interests, they approach the co-opted Gacaca with general distrust.¹⁸⁵

Ethnic lines are reemphasized through Gacaca, as the trials substantively focus only on Hutu-generated crimes.¹⁸⁶ Although the Gacaca Law does not exclude the possibility of focusing on other crimes against humanity committed during the relevant time period,¹⁸⁷ in practice the government permits only Hutu crimes of genocide to be tried in Gacaca. This focus on Hutus creates the perception of victor's justice.¹⁸⁸

Due to these perceptions, Gacaca is currently struggling, as members of the community offer insufficient evidence to obtain convictions. The Rwandese people rarely give incriminating evidence,¹⁸⁹ and when they do, the evidence is often false or skewed to favor the perpetrator.¹⁹⁰ In light of these problems, Gacaca may not succeed in meting out the justice it was created to ensure.

Furthermore, the power schisms reflected in Gacaca do little to promote Tutsi-Hutu reconciliation, at least in the classic TRC sense. The focus of all prosecutorial efforts on Hutus has created a percep-

¹⁸³ The author observed Gacaca meetings in July and August 2003.

¹⁸⁴ Assuming that the arguments discussed *supra* notes 173–81 and accompanying text are true, the mission of reconciliation may yet succeed, albeit in a less traditional way.

¹⁸⁵ See Drumbl, *supra* note 10, at 1310 (stating that many Hutus consider RPF regime to be foreign government).

¹⁸⁶ CATHERINE HONEYMAN ET AL., GACACA JURISDICTIONS: INTERIM REPORT OF OBSERVATIONS, JUNE 10–AUGUST 8, 2002 § IV(E), <http://www.fas.harvard.edu/~socstud/rwanda>.

¹⁸⁷ Gacaca Law, *supra* note 136, art. 1.

¹⁸⁸ HONEYMAN ET AL., *supra* note 186, § IV(E); Sarkin, *supra* note 29, at 149.

¹⁸⁹ PENAL REFORM INT'L, REPORT V, RESEARCH ON GACACA 9 (2003), available at <http://www.penalreform.org/download/Gacaca/september2003.pdf>.

¹⁹⁰ Observers report receiving admissions that the evidence presented in Gacaca was substantially diminished to protect the alleged criminal. *Id.* at 22–24.

tion among Hutus that a constant wrong is being done only to them.¹⁹¹ A combination of factors, including: (1) the detainment without due process of 125,000 Hutu suspects over ten years,¹⁹² (2) regular incidents since 1994 in which ordinary citizens have been attacked or killed or have disappeared without explanation,¹⁹³ (3) strict military rule, and (4) now a Hutu-focused Gacaca process, has created a "nearly universal and overwhelming sense of injustice."¹⁹⁴ Martha Minow foresaw the potential problem that Gacaca may perpetuate: "Prosecutions . . . may be viewed as obstacles to reconciliation . . . [as they] may solidify the resistance of a particular sector in the society . . . while feeding a sense of being wronged and misjudged."¹⁹⁵ Gacaca therefore may be dividing the country.¹⁹⁶

However, Gacaca is currently a forum in which the schisms between the people and the government can be played out rather openly. While it is true that the government wields military and political power over the people, in Gacaca the government is paradoxically dependent on the people. This is because the government needs the people to speak openly and honestly in order to gather the information it needs to try the accused.

The way in which Gacaca meetings play out varies. Typically, people are unwilling to speak at all.¹⁹⁷ The government is then faced with a task of procuring speech, which it can do either by threat¹⁹⁸ or by persuasion. Threats may bring immediate results, but the veracity

¹⁹¹ "Most [Hutus] still either deny the genocide ever happened or even insist that they . . . were its victims." Drumbl, *supra* note 10, at 1291.

¹⁹² The RPF is seen as "'imprison[ing] tens of thousands of genocide suspects in appalling conditions, fail[ing] to prevent massacres of thousands of Hutu civilians . . . , and allow[ing] Tutsi squatters to seize the property of many absent Hutus.'" Drumbl, *supra* note 10, at 1311 (quoting Chaim Kaufmann, *Possible and Impossible Solutions to Ethnic Civil Wars*, in NATIONALISM AND ETHNIC CONFLICT 265, 273 (Michael E. Brown et al. eds., 1997)).

¹⁹³ HRW 2000 REPORT, *supra* note 1, at 14–19.

¹⁹⁴ NEIL BOISEN, U.S. INST. OF PEACE, FOCUS GROUP STUDY REPORT: KNOWLEDGE, ATTITUDES AND PRACTICES AMONG INMATES OF RWANDAN DETENTION FACILITIES ACCUSED OF CRIMES OF GENOCIDE 17 (1997).

¹⁹⁵ MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 128 (1998).

¹⁹⁶ It is difficult to assess whether the problems of Gacaca outweigh its benefits. Alison Des Forges of Human Rights Watch assesses Gacaca's potential success by stating: "'The fairness of the proceedings will vary enormously, because they will be essentially political rather than judicial proceedings The result in any one community will be determined by the local balance of power.'" Anita Sriameswaran, *In Search of Justice*, PITTSBURGH POST-GAZETTE, Sept. 24, 2000, at G16 (quoting Alison Des Forges).

¹⁹⁷ See PENAL REFORM INT'L, *supra* note 189, at 9 (noting "widespread fear among the population of daring to speak").

¹⁹⁸ The Gacaca Law penalizes unwillingness to give evidence. Gacaca Law, *supra* note 136, art. 32.

of the statements obtained through coercion is inherently questionable. Furthermore, threats work counter to the trust-building, reconciliatory purpose of Gacaca. The government therefore has been forced to engage in trust-building sensitization campaigns. Government officials often devote entire Gacaca meetings to building trusting relationships with the people¹⁹⁹—an atypical role for today's Rwandese government.

This author witnessed the potential consequences of soliciting public speech within Gacaca during her observation visits. The people at Gacaca meetings do want to talk about crimes; however, the crimes on their minds reflect their sense of present injustice and powerlessness. In response to a plea from a government official to speak, a brave member of the community puts forth a provocative question: "Why should we talk about the genocide when a young man in our community disappeared a month ago?"²⁰⁰

This time, rather than silencing or arresting the speaker, the government's interests force the official to listen. The official's answer must reflect responsiveness to the people's concern if he is to win the trust necessary for success in the Gacaca process.

"You are right, the disappearance is wrong," the official replies.

"The prefect is behind this," asserts the community member.

The official concludes, "That may be so. I will look into this. We will do an investigation. You will see the results because we are a trustworthy government."²⁰¹

This dialogue is striking for many reasons. First, it indicates that the government has accepted its dependence on the people. More importantly, it shows that Rwandese community members challenge government requests by raising issues of their own—issues that criticize the government and call for its accountability to the people. In this way, Gacaca courts can beget civic discourse even as struggles for justice and reconciliation continue.

Put simply, Gacaca is the only forum in which members of Rwandese communities and government officials speak with each other relatively openly and accountably. Their interactions consist of dialogues regarding the most emotional, politically charged issues in

¹⁹⁹ Interview with Geraldine Umugwanga, Head of Gacaca Courts, Gacaca Office, Kigali, Rwanda (Aug. 2003). The author also observed this practice during her visit to Rwanda in July and August 2003.

²⁰⁰ See *supra* note 193 and accompanying text (noting that since 1994 disappearances have occurred regularly in Rwanda).

²⁰¹ To protect the confidentiality of the brave few who challenge the government in Rwanda through deliberative, nonviolent means, the exact time and place of this dialogue is not disclosed in this Note.

Rwanda—ones that touch on sources of hatred, distrust, and hostility that continue to brew within Rwandese society. Within Gacaca, a direct link has been created between citizens and the State, Hutus and Tutsis, and ultimately between transitional justice and democracy. As a purely public-generated, non-government-censored phenomenon, this interactive process is evolving naturally, organically. Therefore, it slowly can become engrained in Rwandese culture.

IV

GACACA IN THE TRANSITIONAL JUSTICE MENU

Over the past fifty years, the international community has been developing a menu of transitional justice mechanisms and a body of international criminal law to fulfill its commitment to putting an end to crimes against humanity and systemic abuse of human rights. The Gacaca experiment serves to remind those involved in this continuing international effort that the primary recipient of transitional justice is not the international community, but the postconflict society—composed of both victims and perpetrators—that suffered during mass atrocities. As Neil Kritz, a leading authority in transitional justice, argues, “It is essential that the needs of those people not be given short shrift for the sake of a feel-good international exercise in justice.”²⁰² Kritz calls for bringing transitional justice mechanisms ever closer to the society that experienced conflict: “From a pragmatic, political perspective, insofar as post-conflict justice is a necessary ingredient to successful peace-building and long-term stability in the country, . . . ensuring a form of post-conflict justice that is maximally effective vis-à-vis the local population needs to be a higher priority”²⁰³

This issue has particular resonance in Rwanda’s case. The measure of success of the ICTR as a transitional justice institution will not depend on whether it has provided international criminal law with a body of precedent, but on whether Rwanda will revert to mass murder. Should interethnic violence return to Rwanda, it will discredit not only the ICTR, but the entire transitional justice effort.

To be sure, the existing transitional justice mechanisms all play useful roles in promoting peace and democracy. However, no one mechanism suffices to address the complex undertaking of healing and

²⁰² Neil J. Kritz, *Progress and Humility: The Ongoing Search for Post-Conflict Justice*, in *POST-CONFLICT JUSTICE* 55, 59 (M. Cherif Bassiouni ed., 2002).

²⁰³ *Id.*

transforming a postconflict society.²⁰⁴ The recent coupling of a tribunal and TRC in Sierra Leone reflects an understanding within the transitional justice field that such mechanisms can complement each other and thus answer a postconflict society's needs more thoroughly.²⁰⁵ In this context, a mechanism modeled on Rwanda's Gacaca—an indigenous, community-owned, restorative bridge between the people and the new State that fosters local participation and open management of conflict—emerges as an addition to the existing transitional justice menu.²⁰⁶ With this addition, transitional justice not only will be more effective, but will be recalibrated more closely to its preventative mission.

In addressing mass atrocities such as genocide, transitional justice scholars must remember that they are tackling society-wide calamities. Miriam Auckerman conveys this by arguing that mass atrocities are more akin to natural or humanitarian disasters than to crime.²⁰⁷ Such a conceptualization of social conflict directs our responses away from punishment and toward “rebuilding societies by developing shared histories, establishing democratic institutions, or ensuring greater economic and political equality.”²⁰⁸ With this understanding, transitional justice is seen less as a means of managing calamities and more as a means of altering their preconditions and thus preventing them from occurring again.²⁰⁹ This reasoning shifts the transitional justice field from the justice paradigm towards one of democratization.

If democratization requires a change in the political culture of a people, then, as Erin Daly submits, transitional justice is more appropriately called “transformative” justice.²¹⁰ “Transition” refers to top-

²⁰⁴ See Sarkin, *supra* note 29, at 143 (“Criminal trials are one way in which the facts of past abuses may be established. The establishment of a truth commission is another. However, either strategy in isolation can have dire consequences.”).

²⁰⁵ Kritz, *supra* note 202, at 68.

²⁰⁶ This is not to imply that all future postconflict societies ought to replicate the Gacaca mechanism. Rather, the indigeneness and context of Gacaca make it a valuable mechanism in Rwanda's reality. Contextuality is critical to successful transitional justice strategies. See Daly, *supra* note 81, at 77–78. The strengths of the Gacaca mechanism ought to be kept in mind, however, as new mechanisms are considered in future transitions.

²⁰⁷ Auckerman, *supra* note 69, at 96.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ Daly, *supra* note 81, at 74. The word “transform” more accurately describes the changes societies must undergo to eschew violence in the future. Daly argues:

In a transformed society, the people will not only have democratic elections or a constitution, they will actually believe in democracy, human rights, and the principles of constitutionalism. Institutions that are part of transitional justice must then do more than restore or even advance; they must actually foster change in the society, leaving it qualitatively different than it was when they found it.

down processes, and "it does not reach deep into the soil of the new society where the commitment to democratic values actually takes root."²¹¹ Transformation, on the other hand, calls upon a society to "reinvent[] itself."²¹² As the field develops in light of experiments such as Gacaca, it may well seek to change even its very name to better reflect the scope of its mandate.

It remains to be seen whether Gacaca will bring about justice or truth in relation to the genocide of 1994. Nonetheless, Gacaca will serve the mission of transitional justice if it creates a forum through which democracy can take root in Rwanda. By engendering civic culture, Gacaca addresses the preconditions that have made violence part of Rwanda's history. Consequently, Gacaca can fulfill transitional justice's fundamental goal of preventing the events of 1994 from recurring.

CONCLUSION

This Note posits that Rwanda would benefit from allowing freedom of expression and a clash of opposing opinions on the most volatile issues. Such a position may cause discomfort, particularly for those who recognize that Rwandese society's wounds are still festering and that Rwandese peace remains precarious. While, ideally, Rwanda could benefit from first undergoing a process of reconciliation to prepare it for the risks inherent in open contestation, this sequence of events already has been foregone. Meanwhile, the authoritarian culture continues to cultivate interethnic animosities that fuel distrust, and the inevitability of recurring violence remains.

The argument delineated in this Note takes account of Rwanda's realities and seeks to identify an alternative path that can lead to democratization. Such is the mission of transitional justice—healing wounds and developing democracy. Gacaca provides one alternative path. Rather than evading existing conflict, Gacaca can channel conflict between ethnic groups and between the people and the State through a restorative process that effectively fosters tolerance of opposition. Albeit a precarious path, contestation within Gacaca may be the only process through which conflict, which must be dealt with to prevent the recurrence of violence, can be addressed openly.

The fulfillment of Gacaca's potential for engendering civic culture will depend solely on whether the Rwandese people take advantage of the floor given to them to express their concerns and find

Id. at 83.

²¹¹ *Id.*

²¹² *Id.*

solutions to them.²¹³ Such is the nature of organic democratic development. It must be rooted internally, and so the risk remains that such opportunities may never be harnessed.²¹⁴ Democracy develops as imperceptibly as culture changes, but these changes are deep-rooted and internalized by society. The extended duration of the Gacaca process ought to provide the opportunity for such cultural changes to take root.

²¹³ ICG 2002 REPORT, *supra* note 8, at 5 n.15 (citing OFFICE OF THE PRESIDENT OF THE REPUBLIC, REPUBLIC OF RWANDA, REPORT ON THE REFLECTION MEETINGS HELD IN THE OFFICE OF THE PRESIDENT OF THE REPUBLIC FROM MAY 1998 TO MARCH 1999, at 46 (1999)).

²¹⁴ The value of leaving the development of civic culture to the people lies in an assumption—an element of hope—that people, when given the opportunity, will raise their voices against the oppression and injustice that affects them personally and express a preference for living in a system where their rights and liberties are respected.

