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Christine M. Venter

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ELIMINATING FEAR THROUGH RECREATING COMMUNITY IN RWANDA: THE ROLE OF THE GACACA COURTS

Christine M. Venter†

What justifies a conception of justice is not its being true to an order antecedent to and given to us, but its congruence with our deeper understanding of ourselves and our aspirations, and our realization that, given our history and the traditions embedded in our public life, it is the most reasonable doctrine for us.

- John Rawls[1]

I. INTRODUCTION

More than a decade after the Rwandan genocide, the sheer magnitude of what took place still has the power to shock us: 800,000 people brutally murdered in a 100 day period;[2] 500,000 who participated in some way in the genocide or in genocide related crimes;[3] and the fact that the U.N. and western powers could allow this to happen without intervention.[4] Given these horrendous facts, the notion of obtaining "justice" for the victims of the Rwandan genocide seems impossible.

† Christine M. Venter B.A, LL.B. University of Cape Town, LL.M., J.S.D. Notre Dame Law School.

1. John Rawls, *Kantian Constructivism in Moral Theory: Rational and Full Autonomy*, 77 J. PHIL. 515, 519 (1980).

2. Estimates vary widely on how many people were killed in the genocide, but it is generally agreed that it was between 500,000 and 1,000,000. The most widely used figure is 800,000. These figures do not necessarily include genocide related deaths—people who died from disease, starvation, etc. as a result of the genocide. *See* ALISON DES FORGES, HUMAN RIGHTS WATCH, LEAVE NONE TO TELL THE STORY 15 (1999).

3. Again, estimates regarding the number of people involved in the killing vary. Erin Daly claims it was around 500,000. Erin Daly, *Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda*, 34 N.Y.U. J. INT'L. L. & POL. 355, 355 n.1 (2002). Mark Drumbl claims that it may have been one million people. Mark. A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to* Civis *in Rwanda,* 75 N.Y.U. L. REV. 1221, 1250 (2000).

4. There is evidence that the West and the U.N. knew early on that genocide was being planned. *See* Samantha Power, *Bystanders to Genocide: Why the United States Let the Rwandan Tragedy Happen*, ATLANTIC MONTHLY, Sept. 2001, at 84, 88.

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How can one speak of justice when one group of Rwandan society, the Hutus, came to see the other group of society, Tutsis and moderate Hutus, as so alien to the general community that their extermination became not only imaginable, but desirable? How can one dispense justice when so many participated in the genocide or in genocide related crimes such as assault, rape, and destruction of property? How can one enforce justice when Rwanda has insufficient jails to house the accused; insufficient lawyers, courthouses, and resources to prosecute and defend the accused; and insufficient police to investigate the crimes and protect the witnesses?

Yet the knowledge that the persecuted and the persecutors must live together and somehow reforge society makes some accounting necessary. Some form of accountability is required if future genocides are to be prevented, or if the rule of law is to have any meaning in Rwanda. Forgetting the acts that took place is not really an option because as Douglas Sturm said, "[W]e are members of one another and depend on one another for the quality of our lives."[5]

Redefining and reforging the notion of community in Rwanda is a process that is fraught with complications. It requires an acknowledgment of, and an accounting for, the horrific acts that took place. It requires justice for the victims and the perpetrators. It also requires the Rwandan people to determine what justice means for them in a post- genocidal society and what form it should take.

Any true form of justice compels an examination of the how, what, and why of the genocide—How did Rwandan society become so polarized that genocide was seen as a solution? What factors influenced this polarization of society, and how can we address and eradicate them? What acts were perpetrated by whom and against whom? And why did a relatively large percentage of the population see genocide as a solution and participate in it?

Answering these questions requires Rwandans to closely examine their history and the context in which the genocide came to be a reality. It also requires them to determine how justice may best be served in a post-genocide Rwanda, so that the promise of "Never Again" becomes a reality. It is in the process of answering these questions, and determining a course of justice for the perpetrators and the victims, that Rwandans will define the qualities that they wish a post-genocidal society to embody and reforge a community that may not be so prone to fragmentation.

At least some of the soul searching required by the genocide appears to have been done, or is in the process of being done, by the Rwandan people. Numerous articles and books have been published

5. DOUGLAS STURM, *Process Thought and Political Theory: A Communitarian Perspective*, *in* COMMUNITY AND ALIENATION: ESSAYS ON PROCESS THOUGHT AND PUBLIC LIFE 31–32 (1988).

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detailing the history of Rwandan society, the roles played by colonialists and the Roman Catholic Church in fostering separation and conflict between Tutsis and Hutus, and the context within which the genocide took place.[6] A new Constitution that affords protection for minorities is in place.[7] Rwandans are seeking to create a "Rwandan" identity by abolishing identity cards that characterized a bearer by his or her ethnic group and replacing them with a national identity card.[8] The government is at pains to stress a national Rwandan identity, as opposed to an ethnic identity. The government web site on Rwanda, for example, details the factors that the two major ethnic groups have in common: they speak a common language, Kinyarwandan, and share many customs.[9] Some progress is thus being made in reforging a post-genocide Rwandan society that is not characterized by ethnic divisions.

But more than a dozen years after the genocide, the issue of dispensing justice for the victims and perpetrators remains a complex, and even overwhelming, task for the Rwandan people. Although an International Criminal Tribunal for Rwanda has been established in Arusha, Tanzania to try the primary architects of the genocide, as of December 2006, it has finalized judgments involving only 31 accused.[10] It is also seen by many Rwandans as somewhat extraneous, with justice being meted out by the international community rather than the Rwandan people themselves. Additionally, it is located outside of Rwanda, and many Rwandans do not have access to information about its operations.

Further, if an estimated 500,000 people participated in the genocide in some form, the number of people that the Tribunal has prosecuted, or has in custody (around 62 people as of 2006), is absurdly low. The Rwandan government has stressed its desire to craft a Rwandan response to the genocide[11] and has stressed that a blanket amnesty is not a possibility. It has thus arrested around 110,000 people who are

6. *See, e.g.*, PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA (1998); Drumbl, *supra* note 3.

7. *See* Adrien Katherine Wing & Mark Richard Johnson, *The Promise of a Post-Genocide Constitution: Healing Rwandan Spirit Injuries*, 7 MICH. J. RACE & L. 247, 258 (2002).

8. The Belgians were responsible for introducing the ethnically based identity card. *See* MAHMOOD MAMDANI, WHEN VICTIMS BECOME KILLERS 88 (2001).

9. *See* Rwanda Embassy Website, http://rwandaembassy.com/rwada.htm (last visited Apr. 1, 2007).

10. *See* The International Criminal Tribunal for Rwanda's, http://www.ictr.org.

11. In fact, the Rwandan government, after initially supporting it, opposed the creation of the ICTR, casting the only vote against it in the UN. *See* Fondation Hirondelle, Rwanda/Genocide Commemoration/Burundi: The Perennial "Bumpy" Relationship Between Kigali and Arusha (Apr. 1, 2004), http://www.hirondelle.org/hirondelle.nsf/0/2ff1b682927fb6a6c1256e69004c224b?opendocument.

suspected of participating in the genocide in some form or another.[12] Shortly after the genocide, several of the major architects of the genocide were tried, convicted, and publicly executed. These trials were condemned by international human rights organizations as "show trials," which were marred by the lack of or inadequate legal representation afforded the accused. Moreover, the public executions seemed to incite the large crowds to a frenzy of promoting bloodlust, rather than eliminating, the desire for revenge.

Now that these trials are over, attention has turned to the accused who remain in custody, charged with lesser crimes. But Rwanda clearly lacks the resources and infrastructure necessary to prosecute these people through the regular criminal court system. In the wake of the genocide, approximately 50 lawyers and five judges remained in the country.[13] With this dearth of legal professionals and lack of available funds, it has been estimated that it would take 125 years to prosecute the accused who are currently in custody, and who themselves represent a relatively small fraction of those who allegedly participated in the murder, rape, torture, and appropriation of property that took place in 1994.

One of the solutions advanced by the Rwandan people to deal with the overwhelming problems of dispensing justice to the vast number of accused has been the creation of the gacaca courts. The word gacaca means "in the grass." These community courts are modified versions of traditional, indigenous Rwandan community courts, which were characterized by their informality, the participatory nature of their process, and their focus on restoring harmony to the community. Since October 2002, the gacaca courts have been functioning in Rwanda, trying many of the accused who currently languish in Rwandan jails.

In creating these courts, the Rwandan people have attempted to craft a uniquely Rwandan response to the issue of providing justice for the victims and perpetrators of the genocide. Their grassroots efforts to deal with the genocide and its consequences by means of participatory, community-based courts are evidence of a desire to recraft Rwandan society from the bottom up, rather than from the top down. It is through the efforts of these local communities—struggling to come to terms with the polarization of society that resulted in neighbor killing neighbor—that a narrative, a common discourse, a shared memory of the genocide, and a Rwandan notion of justice may emerge. Through these elements, common bonds between members of the community may yet be created or recreated. Therefore, this paper will argue that by means of the creation of the "gacaca" courts,

12. Many of those arrested have been released because of the burden of housing and feeding them. In 2002, the Rwandan President granted many claims of amnesty, resulting in the release of many prisoners.

13. Daly, *supra* note 3, at 368.

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the Rwandan people have sought from within their past a notion of justice and healing that, while flawed, provides an opportunity to reforge Rwandan society and reestablish notions of community that were decimated by the genocide. Caveats abound.

Thus far, many of the gacaca courts have proven themselves poorly organized and publicized, under resourced, and partisan in certain areas. Nevertheless, the concept of gacaca should not be dismissed because its implementation has been deficient. Gacaca courts are a modified form of Rwandan indigenous courts. Gacaca courts themselves, if properly organized and funded, could become a metaphor for Rwandan society and provide a link between the past of the genocide and the participatory democracy that Rwanda hopes to become.

Rwandans have to face the divisions of the past, name them, account for them, punish those responsible, and move forward. Gacaca provides a means of doing that. This vision of gacaca has to be effectively communicated to Rwandans for such a plan to be sustained and implemented. Resources are crucial if gacaca is to meet its goals.

II. HISTORY AND CONTEXT OF THE 1994 GENOCIDE

Recounting the history of the genocide is an enterprise fraught with complexity. As the OAU'S International Panel of Eminent Personalities noted, "[T]here are hardly any important aspects of this story that are not complex and controversial; it is almost impossible to write on the subject without inadvertently oversimplifying something or angering someone."[14] Nevertheless, detailing Rwanda's pre-genocide history is an important step in trying to establish the conditions that gave rise to the genocide. In describing that history, it is crucial to explore the relationships between Tutsis and Hutus and the circumstances and context within which those relationships developed. As Margaret Mead has argued, the self is a product of society. So, a close examination of the society that gave rise to the "selves," who would commit to eradicating a whole ethnic group, is clearly warranted.

At first glance, ethnic differences between Tutsis and Hutu seem rather minor. Both groups comprise the "Banyarwanda"—people of Rwandan extraction. They speak a common language (Kinyarwandan), share common religions, and often intermarry. It has been argued that one quarter of Rwandans have both Tutsi and Hutu great-grandparents.[15] Many historians and ethnographers now claim that Hutus and Tutsis may not "properly be called distinct ethnic groups."[16] Given this claim, one must look beyond the actual ethnic heritage of these two groups to the social contexts within which they

14. INT'L PANEL OF EMINENT PERSONALITIES, RWANDA: THE PREVENTABLE GENOCIDE 2.1, http://www.visiontv.ca/RememberRwanda/ReportWordDoc.doc (last visited Mar. 27, 2007).

15. Daly, *supra* note 3, at 360.

16. GOUREVITCH, *supra* note 6, at 48.

operated on a daily basis to determine how one group could embark on the attempted extermination of the other.

Critical Race Theory (CRT) is extremely helpful in illuminating the way in which race and ethnic differences can be such a polarizing factor in Rwandan society. As Ian Haney Lopez reminds us, race is socially constructed, and even fabricated by humans, rather than abstract social forces.[17] In the case of Rwanda, both the Germans and the Belgians contributed in a variety of ways to this racial construction. But even prior to the colonial influence, political and social expectations for members of each group were beginning to manifest themselves in ways that differentiated Tutsi from Hutu.

In the precolonial period, Hutus and Tutsis constructed their identities, in part, through their clan membership rather than tribal or ethnic identity. Intermarriage between individual members of the two groups was not uncommon; therefore, there was some movement and flexibility in clan membership. However, the seeds for polarization between the two groups were sown by the Tutsis when Rwanda became a kingdom under a Tutsi Mwami, or chief. More Tutsi chiefs controlled the rural areas. The Hutus, who were largely farmers, were permitted by the Tutsi chiefs to occupy the land in return for donating their labor. The Tutsis became the political elite, and as Mahmood Mamdani notes, the polarization between the two groups became a political rather than an ethnic one.[18]

The existing political structure was exploited first by the German colonialists, and then by the Belgian colonialists to maintain their control and power, particularly in the rural areas. As in other parts of Africa, the chiefs were co-opted and used as agents of the colonial rulers. The chiefs were allowed to continue to govern as long as they acted in conformity with colonial expectations and legal mores and as long as they reported serious infractions to the colonial government. Both the Germans and the Belgians favored the Tutsis over the Hutus. Some have suggested that this was because the Tutsis' tall stature and narrower facial features were closer to European notions of beauty than those of the Hutu.[19] It was also probably because the colonial powers found a power structure in place that appeared to favor the Tutsis, and they would have been reluctant to disturb this.

Mamdani claims that identities are inextricably linked to the state, and consequently they are fluid concepts dependent on how the state enforces them.[20] In the case of Rwanda, the state began to create and foster the notion of Tutsi and Hutu identities as being separate ethnic identities—with the Hutu being indigenous to Rwanda and the Tutsi

17. *See* Ian F. Haney López, The Social Construction of Race: *Some Observations on Illusions, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 27–28 (1994).

18. See MAMDANI, *supra* note 8, at 75.

19. *See* Wing & Johnson, *supra* note 7, at 258.

20. *See* MAMDANI, *supra* note 8, at 34.

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non-indigenous. This process of racialization or ethnicization was reinforced in the 1933/34 census, which officially categorized the Hutu as indigenous and the Tutsis as non-indigenous. The separation of the two groups was further reinforced when the Belgians required the ethnic identity of each citizen to be stated on his or her state issued identity card.

This latter measure would tragically facilitate, some 60 years later, the identification of Tutsis by Hutu *genocidaires* during the 1994 genocide. Although the Belgians classified the Hutu as indigenous, they continued to favor the Tutsis in political and social life. This favoritism was subscribed to by non-governmental organizations like the Catholic Church, which tended to favor Tutsi children in admission to Catholic schools, thereby further entrenching inequality between Tutsis and Hutus.

Various events that occurred during the last few years of colonialism in Rwanda further contributed to the polarization of the two groups and created the conditions whereby they began to view each other as locked in a battle for dominance in society. In the 1950s, notions of democracy were beginning to be floated in Rwanda. The Tutsis saw the idea of majority rule as a threat to their dominance.

Conversely, the Hutus began to chafe under the yoke of their colonial rulers, whose rule was being enforced and upheld by a non-indigenous group. Hutus regarded themselves much more as victims of colonial rule than the Tutsis. Matters came to a head in 1960 in the Gitarama coup when the Hutus overthrew the main Tutsi Mwami and declared the monarchy at an end. Rwanda became independent in 1962. Meanwhile, thousands of Tutsis fled to Uganda where they later formed the Rwanda Patriotic Front ("RPF").

During the 1960s and 1970s, the Hutus were the dominant political power in Rwanda, although the Tutsis were allowed to reenter the political sphere in a limited capacity after President Habyanimara came to power in 1973. Meanwhile, the Tutsis in exile in Uganda were being treated as unwelcome foreign aliens by the Ugandan people and were anxious to return to Rwanda. The formation of the RPF, with its stated goal of facilitating the return of all Tutsi refugees to Rwanda, was a direct threat to Hutu power. The RPF invaded Rwanda in 1990 and forced the Hutu government to agree to peace talks after several years of fighting.

Among the concessions won by the RPF were: reserved seats in Parliament for Tutsis, the right of return for all Tutsi refugees, and a commitment that the Minister of the Interior post would be given to a Tutsi. The peace talks were carried out against a backdrop of violence taking place in neighboring Burundi—where Tutsi militants murdered the Hutu President. The concessions offered to invading Tutsis, apparently invoked in the minds of some, a return to Tutsi dominance. As a response to the RPF invasion, some Hutu extremists issued the

Hutu Ten Commandments—forbidding Hutus from interacting with Tutsis. In April 1994, President Habyanimara's plane was shot down by a missile.

Although no one claimed responsibility for the act, many believe that it was done by Hutu hardliners unwilling to share power with Tutsis. In the power vacuum created by President Habyanimara's death, the genocide began. Roadblocks and checkpoints were set up, and state issued identification cards were checked. Any male identified as Tutsi either by his identity card, or by neighbors, was killed. Tutsi children, particularly males, were also singled out and murdered, and hundreds of thousands of Tutsi women were raped; many of them were killed as well.

Human Rights Watch has concluded that "[t]his genocide resulted from the deliberate choice of a modern elite to foster hatred and fear to keep itself in power."[21] While not disputing that interpretation, it should be noted that the Hutu knew the consequences of not being in power and were unwilling to return to those conditions. The process of colonization had reinforced the notion of the Tutsi as outsiders and aliens to Rwanda, but they were outsiders whose presence in Rwanda was rewarded. This alienization of the Tutsi helped in part to make their elimination seem logical to hardline Hutus.

III. THE CRIMES OF THE GENOCIDE

"The widespread involvement of masses of people in the genocide distinguishes it from other national tragedies: . . . 'the Rwandan atrocities were characterized by the attempt to force public participation on as broad a basis as possible, co-opting everyone into the carnage . . . .'"[22] Co-opting people into the genocide had multiple implications. It meant that the violence and terror could be widely disseminated; that there were many culpable people responsible for genocide-related crimes; and that many children were co-opted into the violence, were witnesses to it, and were victims of it. As one of the participants involved in the genocide claimed, "No one person killed any one person[.]"[23] Murders were often carried out by groups of people wielding machetes and clubs. Often as a group, they hacked and clubbed their victims to death. The estimates of people murdered ranges from 500,000 to 1,000,000 people. Victims were often tortured before being killed. Many people suffered grave assaults but managed to escape. Rape of Tutsi women was routine, both as an act of violence and to forcibly impregnate the women so that they would bear

21. DES FORGES, *supra* note 2, at 1.

22. Daly, *supra* note 3, at 362 (quoting, in part, U.S. INST. FOR PEACE, [RWANDA: ACCOUNTABILITY FOR WAR CRIMES AND GENOCIDE] (1995), *available at* www.usip.org/oc/sr/rwanda1.html).

23. DES FORGES, *supra* note 2, at 770.

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Hutu children. The Special Rapporteur to the United Nations pointed out that "rape was the rule, and its absence the exception."[24]

Hundreds of thousands of women were raped. Many children were killed, and those that survived were exposed to unparalleled trauma. UNICEF has estimated that 96% of Rwandan children were exposed to the brutal murder of their family and friends. Children were used as soldiers both by Hutus and Tutsis and were often forced to participate in the genocide. Eighteen months after the genocide there were 47,000 orphans in Rwanda.[25]

Yet, murder, rape, torture, and assault were not the only genocide-related crimes. Often, the bodies of genocide victims were looted or property from their homes was stolen. Farms and homes that were abandoned by people either killed in or fleeing the genocide were taken over by their Hutu neighbors. Eighty percent of the country's cattle were lost and much land was destroyed by the movement of millions of internally displaced people.[26] Crafting a response to carnage and destruction on this scale is overwhelming, but it must be attempted if a sustainable Rwandan society is to emerge from the destruction of the genocide. Some form of justice for the victims and some form of accountability for the accused must be implemented despite Rwanda's limited resources if the country is ever to form a sustainable democracy and healthy communities.

IV. Responses to Genocide

In her seminal article, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice,* Miriam Aukerman has noted that states may pursue a variety of responses to crimes against humanity and mass violations of human rights.[27] Aside from prosecution, Aukerman suggests that these responses might take the form of truth commissions, civil liability, reports by international delegations, lustration, reparations, and historical inquiry.[28] States are of course free to use these responses in combination; they are not mutually exclusive of each other.

While Aukerman's point that prosecution need not be the only response to crimes like genocide is well taken, many human rights advocates argue that prosecution should be the primary response. Stephan Landsman takes the position that prosecution "makes possible the sort of retribution seen by most societies as an appropriate communal

24. U.N. Econ. & Council [ECOSC], Comm'n on Human Rights, *Report on the Situation of Human Rights in Rwanda*, ¶ 16, U.N. Doc. E/CN.4/1996/68 (Jan. 29, 1996) (*prepared by* René Degni-Ségui).

25. Wing & Johnson, *supra* note 7, at 278.

26. *See* Int'l Panel of Eminent Personalities, *supra* note 14, at 17.5.

27. *See* Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 Harv. Hum. Rts. J. 39 (2002).

28. *Id.* at 43.

response to criminal conduct."[29] Prosecution, as Landsman notes, can educate and deter, provide a predicate for compensating victims, enhance the rule of law, and help to heal a society's wounds.[30] Martha Minow contends that "[m]ost commentators assert that criminal prosecution is the best response to atrocities, and truth commissions should be used only as an alternative when such prosecutions are not possible."[31]

Despite widespread support for prosecutions as the optimal response to mass violations of human rights, the acknowledgment occasionally has to be made that prosecution might not be a viable option. In post-apartheid South Africa, for example, there was often insufficient evidence to prosecute perpetrators of apartheid-related crimes, and resources were probably insufficient to prosecute all who committed these crimes. Forgoing prosecution in favor of obtaining information about family members who were victims of apartheid was a price that many black South Africans were willing to pay. The Truth and Reconciliation Commission process was therefore the best option available in those circumstances.

In Rwanda, it might have been thought that the country's lack of resources might deter it from pursuing prosecution of genocide-related crimes. Post-genocide, Rwanda was deemed to be one of the poorest countries in the world, and there were only a few judges and 50 lawyers left in the country. Despite these impediments, from the outset the Rwandan government made it clear that any form of justice should be punitive and not focus exclusively on reconciliation. While initially supportive of the idea of an ICTR, they voted against its establishment, seeing it as something being done by the international community rather than by the Rwandan people. The Rwandan people strongly felt that justice in the form of prosecutions needed to be made visible and should not take place outside of the country. The government therefore began the process of accountability by arresting over 100,000 people.

Besides the show trials of the major perpetrators, the Rwandan government has prosecuted about 5,000 of those charged with genocide-related crimes, many of whom have been convicted. Additionally, several thousand have been released because of mass overcrowding in jails and the drain on the country's resources in feeding and clothing them. It should be noted that many of them have served more years in prison awaiting trial than they would have had they been convicted.

Rwanda has also availed itself of some of the alternative approaches suggested by Aukerman as appropriate responses to mass

29. Stephan Landsman, *Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions*, 59 LAW & CONTEMP. PROBS. 81, 84 (1997).

30. *See id.* at 83–84.

31. MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 58 (1998).

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violations of human rights. The OAU Committee of Eminent Persons conducted an investigation into the genocide and filed a report, as did organizations like Human Rights Watch. Some civil suits have been filed, establishing the civil liability of some of the *genocidaires*, and some prosecutions have taken place in countries other than Rwanda. Yet no long-term official truth process has been embarked upon, although an unsuccessful short term truth commission was set up by some international Non-Governmental Organizations ("NGOs"). The official focus and response to the genocide has clearly been on punishment rather than reconciliation.

While little criticism of this approach has been offered, its limitations have become clear over time. Nine years after the genocide, only a tiny fraction of the accused have been tried, and many languish in jail awaiting trials that may never come in their lifetimes. The ICTR has obtained the convictions of only a few of the major perpetrators. Its work is extremely slow, and as it is not located in Rwanda, the people feel disconnected from it. Additionally, one of the major perpetrators of the genocide was released by the ICTR because he had spent a long period of time in prison without being brought to trial.

The process of reconciliation of shared narrative has, however, remained largely unaddressed. Juan Mendez notes that "[s]ocieties that are in a position to provide both truth and justice to the victims of human rights violations should be encouraged to pursue both objectives as much as they can."[32] The gacaca courts, created by the government to deal with the backlog of cases awaiting trial, may provide the opportunity to meet the objectives of truth telling and justice. These traditional courts, which will try and sentence those convicted of genocide-related crimes, will allow opportunities for the victims and their families to share their stories. While the government's response may have been motivated by practical considerations (feeding and clothing the prisoners is a major drain on the economy, and jails are extremely overcrowded), the gacaca courts may well provide the opportunity for reconciliation and shared narrative that so far has been neglected.

V. THE GACACA COURTS

According to surveys conducted in Rwanda, 70% of the Rwandan population supports the gacaca process.[33] Although this number may be overstated, there is believed to be fairly widespread endorsement of the gacaca approach. This is important because it indicates that

32. Juan Mendez, *In Defense of Transitional Justice*, *in* TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES 1, 15 (A. James McAdams ed., 1997).

33. Peter Uvin, The Introduction of a Modernized Gacaca for Judging Suspects of Participation in the Genocide and Massacres of 1994 in Rwanda 8, http://fletcher.tufts.edu/faculty/uvin/reports/Boutmans.pdf (last visited Mar. 6, 2007).

many in the community feel that gacaca offers some form of justice or accountability. The gacaca courts have been set up at four administrative levels nationwide: the cell or cellule is the lowest level, followed by the sector, district, and province.

This system mirrors the administrative system set up by the Belgians during the period of colonial occupation. The respective levels judge different categories of crimes committed during the genocide, ranging from lesser crimes in the cellule to more serious ones in the province. The courts cannot try cases of those accused of committing the most heinous crimes of the genocide, such as inciting or planning the genocide, but have jurisdiction over intentional and unintentional homicides as well as various forms of assault and property crimes. The gacaca courts do not have the power to impose the death penalty but may impose prison terms, which will then be enforced by the state.

Gacaca judges are required to be persons of "integrity, honesty, and good conduct who have never been sentenced to more than six months in prison and are above suspicion of involvement in genocide or crimes against humanity. They must be 'free of sectarian and discriminatory attitudes' and known for a spirit of encouraging dialogue."[34] Around 260,000 judges were elected by the Rwandan population in October 2001. The courts are required to pass judgment based on the "wisdom of basic principles of social justice."[35]

The gacaca courts traditionally functioned in Rwandan society in order to address wrongdoing and restore harmony to the community. There was no distinction between civil and criminal cases, although the colonial authorities dealt with more serious criminal cases during the years of colonial rule. The courts were presided over by mwamis or village elders. Procedurally, they were very informal, with everyone (usually aside from women) permitted to express their opinion. The traditional form of the gacaca process is very similar to the kind of indigenous courts found elsewhere in Africa, which Dlamini characterizes as "inquisitorial, flexible, informal and simple."[36]

In writing about indigenous courts and the African legal system, Tony Allott reminds us:

> At the heart of African adjudication lies the notion of reconciliation or the restoration of harmony. The job of a court or an arbitrator is less to find the facts, state the rules of law, and apply them to the facts than to set right a wrong in such a way as to restore harmony within the disturbed community. Harmony will not be restored un-

34. Fondation Hirondelle, Gacaca Judges to be Elected on October 4th (Aug. 9, 2001), http://www.hirondelle.org/hirondelle.nsf/0/9117de1eb28f7a4241256beb006b4bc7.

35. *See* Gabriel Gabiro & Julia Crawford, Rwandans Express Mixed Feelings on New Court System (May 4, 2001), http://www.hirondelle.org/hirondelle.nsf/0/9117de1eb28f7a4241256beb006b4bc7.

36. C.R.M. Dlamini, *The Role of Customary Law in Meeting Social Needs*, *in* AFRICAN CUSTOMARY LAW 71, 83 (1991).

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> less the parties are satisfied that justice has been done. . . . [T]he party at fault must be brought to see how his behavior has fallen short of the standard set for his particular role as involved in the dispute, and he must come to accept that the decision of the court is a fair one. On his side he wants an assurance that once he has admitted his error and made recompense for it he will be re-integrated into the community.[37]

This notion of admitting the harm done to the community, and thereafter being reconciled to it, is at the heart of gacaca, as the Rwandan government has expressed the hope that gacaca can foster national reconciliation between the killers and families of the victims.[38] Traditional courts reinforced the concept of the group's importance and the individual's relationship with the community. As Thandabantu Nhlapo points out, "[T]he fundamental value of strong kinship ties and collective responsibility for the welfare of the group enriches African communities . . . ."[39] By using the gacaca courts to bring communities together to discuss how an individual wronged the groups and specific members of the groups, community ties may be reinforced.

VI. THE LIMITATIONS OF GACACA

The modified form of gacaca that has been instituted in Rwanda has come under fairly severe criticism on due process, procedural, and other grounds. Much of the criticism has been centered on the fact that the institution of gacaca appears to violate several international treaties to which Rwanda is a party. Gacaca does not allow for the legal representation of the accused, an apparent violation of the right to legal representation contained in the International Covenant on Civil and Political Rights (ICCPR)[40] and the Banjul Charter.[41] Thus, the accused will have to mount his or her own defense.

Moreover, it is unclear whether the accused will be able to cross-examine witnesses (another right guaranteed by the ICCPR and Banjul Charter) because the notion of "cross examination" is not a part of traditional gacaca proceedings. Traditional court proceedings are inquisitorial rather than adversarial. Critics have also pointed to

37. A.N. Allott, *African Law*, *in* AN INTRODUCTION TO LEGAL SYSTEMS 131, 145 (J. Duncan M. Derrett ed., 1968).

38. *See* Official Website of the Government of Rwanda, Genocide & Justice, http://www.gov.rw/ (follow the "Genocide" hyperlink) (last visited Apr. 1, 2007).

39. T.R. Nhlapo, *The African Family and Women's Rights: Friends or Foes?*, *in* AFRICAN CUSTOMARY LAW 135, 145 (1991).

40. *See* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 14(3)(d), U.N. Doc. A/6316 (Dec. 16, 1966) (giving a person a right to have legal council "in any case where the interests of justice so require").

41. Article 7 of the Banjul Charter provides for the right to be defended by counsel. African (Banjul) Charter on Human and Peoples' Rights art. 7(1)(c), Oct. 21, 1986, 21 I.L.M. 58.

the composition of the judiciary as another threat to due process. The ICCPR and Banjul Charter both guarantee a hearing before "a fair and impartial tribunal."[42]

Many people fear that the judges that have been elected to sit on the gacaca courts will not be fair and impartial, but they will have a stake in the outcome of the trials because they are members of the community in which the alleged crimes took place. It is possible that the victims or the accused may be acquainted with the judges. The judges will also have little or no legal training. The University of Rwanda Law School is attempting to facilitate some basic training of gacaca judges by sending out law students to give the judges a brief training course in running a trial. How successful this program will be remains to be seen. It is not clear how well trained the law students themselves are, nor is it known how many judges will participate in the program and how much time will be devoted to training.

Another area of concern is the right to appeal. The Gacaca process allows for the right of appeal to another gacaca court but not to the "regular" Rwandan courts. Moreover, the appeal will be based on the record constructed by the original gacaca court, which may be detrimental to the accused. Since the gacaca courts are a new phenomenon, there is no precedent for the courts to rely on in reaching a verdict or sentence.

Another concern, as several critics of the system have pointed out, is that there is no real distinction in the gacaca courts between the prosecutorial function and the role of participants and witnesses in the case.[43] The gacaca process envisions all adult members of the community forming part of the cellule. Designated members of the cellule will then gather evidence and classify cases under the Genocide Law, determining which category they will be prosecuted under.[44] These people will then be responsible for participating in the case and may be called as witnesses. This blurring of functions presents serious problems for justice and due process.

The criticism has also been made that the gacaca courts are not really traditional, and the manner in which they are being used is a corruption of their original function in society.[45] Werchick notes that the "traditional gacaca proceeding did not aim to determine guilt, but

42. *See* African (Banjul) Charter on Human and Peoples' Rights art. 7(1)(b), Oct. 21, 1986, 21 I.L.M. 58; International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 14(3)(d), U.N. Doc. A/6316 (Dec. 16, 1966) (giving a person a right to have legal counsel "in any case where the interests of justice so require").

43. *See* Daly, *supra* note 3, at 377; Wing & Johnson, *supra* note 7, at 281.

44. The Genocide Law divides genocide crimes into four categories with Category one being the most serious, reserved for planners and inciters, and Category four being the least serious. *See* ELIZABETH NEUFFER, THE KEY TO MY NEIGHBOR'S HOUSE: SEEKING JUSTICE IN BOSNIA AND RWANDA 258 (2001).

45. *See* Leah Werchick, *Prospects for Justice in Rwanda's Citizen Tribunals*, 8 HUM. RTS. BRIEF, Spring 2001, at 15, 17.

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rather the purpose was to make the community whole."[46] Traditional gacaca did not have the power to impose prison sentences; now gacaca courts may impose stiff prison sentences, including life imprisonment. They may also "plea bargain," offering to reduce an accused's sentence by up to half if that person confesses. This has lead to a fear that false confessions may be induced. Werchick has also pointed out that in traditional gacaca, distinctions between judges, parties, and witnesses were not relevant, as all members of society were "'parties' to the conflict."[47] Now these distinctions have become enshrined in the process.

Additionally, women were not traditionally permitted to participate in gacaca, but now they may act as judges if elected and are certainly considered parties. It is difficult to conceive of how this might be problematic because the lack of participation of women in processes meant to address mass human rights violations has long been considered a problem.[48] While this new version of gacaca does depart in several important ways from the traditional form, many of these changes seem to embody a creative adaptation of gacaca that makes it relevant and useful to a society attempting to emerge from overwhelming carnage. Critics who charge that the new gacaca departs from custom and tradition in significant ways ignore the fact that tradition is not forever fixed in time and form; it modifies itself to adapt to changing circumstances. That gacaca has its drawbacks is clear. Nevertheless, I will argue below that it is an essential part of the reconstruction of Rwandan society.

VII. THE ROLE GACACA CAN PLAY IN THE RECONSTRUCTION OF SOCIETY

The most obvious benefit of gacaca is its attempt to involve the whole community in addressing accountability for genocide-related crimes. Daly notes that gacaca aims to create a common experience and a common goal—that of replacing the "divisive experience of genocide with the cohesive experience of securing justice."[49] The real value of gacaca may come in the form of it providing a kind of truth commission, a community-wide discussion about what really took place during the genocide, and a beginning of the response to the question—How do we form a common society, knowing that one portion of society was bent upon the complete destruction of the other?

46. *Id.*

47. *Id.*

48. It has been noted that in the TRC proceedings in South Africa, women who had suffered greatly under the apartheid regime often did not present themselves as victims, but rather as relatives of people who had been targeted by the apartheid government. *See* 1 TRUTH AND RECONCILIATION COMM'N, TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 419 (Oct. 29, 1998), *available at* http://www.doj.gov.za/trc/report/finalreport/TRC%20VOLUME%201.pdf.

49. Daly, *supra* note 3, at 376.

The genocide, with the unfathomable numbers of participants and the hundreds of thousands of victims, is unfortunately a part of Rwanda's history. As such, it must be something that is acknowledged and talked about, and it must take its place in the past so that the future can be built. Martha Minow poses the provocative question: "Could it be that speaking to official listeners of the past atrocities accomplishes something important for the individual victims, and for the listening nation?"[50] The show trials and public executions that were carried out during the 1990s were a way of speaking to the nation, but the message they bespoke was one of vengeance and power. There was no thought of rebuilding the community or creating the appropriate conditions for a democracy.

Moreover, the state assumed the right to speak on behalf of the victims and their families; those who survived had no chance to speak for themselves. Gacaca, on the other hand, returns the power to speak to the people who have suffered and offers them a chance to tell their stories. It focuses on the issue of how society may be made whole, or at least recover in some measure, from past atrocities.

Although some of the complaints about the procedural aspects of gacaca may be well taken, gacaca's very lack of formality and lack of emphasis on procedure may provide an opportunity for the unstructured dialogue so important to rebuilding a fragmented society. The formal dialogue and procedure that are followed by "regular" courts often result in stylized versions of what took place. The number of people who are allowed to participate in "regular" trials is limited, and their participation is constrained to what is deemed "relevant" by the courts. Objections, evidentiary rules, and other strictures limit the type and amount of information that is produced during a trial.

While these limitations are usually regarded as providing protection for the accused, and indeed constitute important safeguards, they result in trials providing only a constrained and limited version of what passes for "truth." Gacaca courts, on the other hand, do not suffer from these constraints. Anyone, not just a duly approved list of witnesses, may participate in the gacaca trial, and the "relevance" or evidentiary value of the testimony is not so tightly regulated.[51] In gacaca courts, the language remains that of the people, not a formal version with references that only those trained in the law can understand.

While some of the testimony that is produced during the gacaca trials may not be relevant in a strictly legal sense, the information may be relevant to the community. Emotions that may not be legally ap-

50. MINOW, *supra* note 31, at 61.

51. Again, this is a double edged sword. On one hand, the concern is providing protection for the accused. On the other hand, getting to the truth and obtaining a detailed account of what took place is vitally important. The problem is compounded by the fact that the judges are not trained in law and may be unduly swayed by evidence that may not be relevant.

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propriate need to be aired. A shared narrative needs to be created and common terminology about the genocide needs to be established. Only in this way can Hutus and Tutsis begin to forge a common experience out of their shared history.

The shared tradition of recounting oral history is an important one in African culture. Much of the history of the genocide to date has been written by outsiders, and it is outsiders who are trying the main perpetrators of the genocide at the ICTR. The Rwandan people need to reclaim their past and their future by facing differing accounts of what took place. By affording people the opportunity to tell their stories, the gacaca courts in some ways mimic the roles of truth commissions, which undertake to write the history of what happened in a way that gives a broad and very human account of the events that occurred.[52]

It also needs to be established that what took place was a genocide. As Gourevitch has noted, it is difficult to find people in Rwanda who admit to participating in the genocide.[53] Many people describe it as a civil war between Hutus and the RPF. This interpretation is aided by the fact that western power characterized it this way during the early part of the genocide, often referring to it as a breakdown in the peace talks. Admitting the truth about the genocide is a vital part of aiding those who lost family members to heal. As Aukerman reminds us, "[T]ruth commissions return the conflict to those who participated in it."[54] They support the notion that "telling and hearing truth is healing."[55] By combining the functions of truth commissions and punitive justice, gacaca courts can help to provide restorative justice.

Government posters advertising the gacaca courts recently have referred to them as "ukuri kakiza" (or truth hearings). The Hirondelle Fondation also reports that some gacaca courts, which are currently taking place in prisons, are referred to colloquially as "truth commissions."[56] By acknowledging this role, those involved in gacaca courts can help bring healing to their communities. Those who have witnessed the truth commissions that took place in Chile argue that the "chance to tell one's story and be heard without interruption or skepticism is crucial to so many people, and nowhere more vital than for the survivors of trauma."[57] Chilean therapists who worked with vic-

52. *See generally* MINOW, *supra* note 31, at 52–90 (giving detailed analysis of the role of truth commissions).

53. *See* GOUREVITCH, *supra* note 6, at 20–21.

54. Aukerman, *supra* note 27, at 82.

55. MINOW, *supra* note 31, at 61.

56. *See* Fondation Hirondelle, Justice Made in Prison (Jan. 20, 2003), http://www.hirondelle.org/hirondelle.nsf/0/e50bea4b77a0482bc1256763005ac92a.

57. MINOW, *supra* note 31, at 58.

tims of the Pinochet regime found that by confronting the past, victims learned to distinguish the past, present, and future.[58]

For Rwandan survivors of the genocide, the ability to distinguish the past from the present and future is crucial given that many genocide survivors will have to live in the same community as people who participated in the genocide. Those involved in the Chilean experience also suggest that reestablishing a moral framework in which wrongs are correctly named and condemned is usually crucial to restoring the mental health of survivors.[59] Having a forum like the gacaca courts will hopefully assist survivors of the Rwandan genocide in being able to imagine a society with moral constraints.

The experience of those involved in the South African Truth Commission supports the conclusions reached by Chilean scholars. Many victims wanted the nation to see their tears and hear their suffering. Pumla Gobodo-Madikizela, a psychologist who served on the South African Truth and Reconciliation Commission, "report[ed] that many victims conceive of justice in terms of revalidating oneself, and of affirming the sense 'you are right, you were damaged, and it was wrong.'"[60] Tina Rosenberg, a journalist, suggests that individuals need to tell their stories to someone who listens seriously and who validates them with official acknowledgment.[61] The opportunity to do this is clearly available through the gacaca process.

Another very important function of the gacaca process is the reestablishment of group/societal morality. During the hundred-day period of the genocide, moral constraints on behavior were clearly absent; it became acceptable to rape, murder, loot, and destroy property. A notion of common morality needs to be reestablished for society to move forward in a positive direction. Richard Rorty suggests that we need to see morality as "the voice of ourselves as members of a community, speakers of a common language."[62] Rorty endorses the notion of Wilfrid Sellars, who defines an immoral action as "'the sort of thing *we* don't do.'"[63]

Establishing that genocide related crimes are "the sorts of things we don't do," is a crucial part of the role of the gacaca courts in rebuilding community in Rwanda. The gacaca courts need to affirm that not only the victims, but also the community, were violated by the actions of those involved in the genocide. They also need to reinvoke a language of common morality to remind everyone that: "A morality,

58. *See* David Becker et al., *Therapy with Victims of Political Repression in Chile: The Challenge of Social Reparation* 46 J. SOC. ISSUES 133, 142 (1990).

59. *See* JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY 195 (1992).

60. MINOW, *supra* note 31, at 60 (quoting, in part, James C. McKinley, Jr., *As Crowds Vent Rage, Rwanda Excuses 22 for '94 Massacres*, N.Y. TIMES, Apr. 25, 1998, at A1).

61. *See id.* at 61–62.

62. RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 59 (1989).

63. *Id.* (quoting WILFRID SELLARS, SCIENCE AND METAPHYSICS (1968)) 594

then, is neither a system of general principles nor a code of rules, but a vernacular language. General principles and even rules may be elicited from it, but (like other languages) it is not the creation of grammarians; it is made by speakers."[64] The gacaca courts, with their participatory and traditional nature and their practice of allowing members of the community to speak and contribute to the proceedings, help to recreate the vernacular of morality in Rwanda.

Some scholars have suggested that in order to get a full picture of the genocide, the gacaca courts need the ability to offer amnesty, as this will encourage more people to come forward.[65] It is true that probably only about one-seventh of the people who participated in genocide-related crimes are in custody, and amnesty may encourage more people to come forward. It is also true that the gacaca courts do not have the power to offer amnesty, although they theoretically may sentence the accused to time already served and offer reduced sentences to those who come forward and confess. They also have the power to listen to testimony from any witness and do not have to follow prescribed procedure or exclusionary rules. In their flexibility, they thus offer a forum for the kind of confessions and narrative that characterizes truth commissions, despite the fact that they cannot offer amnesty.

Moreover, the gacaca courts offer something that truth commissions do not always offer—the power to punish. Many victims of apartheid in South Africa who watched their torturers confess all and be granted absolution, as it were, in the form of amnesty felt betrayed. People that committed the most heinous crimes went home at night, while many of their victims felt that their lives had been destroyed. Minow argues that a "society cannot forgive what it cannot punish."[66] The gacaca courts have the power to sentence offenders to prison time. They also have more creative sentencing options, including the ability to reduce sentences and permit them to be served in the community. The courts can sentence convicted people to activities that address the needs of the homes if they were victims or their families, such as helping them rebuild their homes if they were destroyed. The families have the power to punish, but they also have the power to punish in a constructive way. By using this power judiciously, the gacaca courts may help restore some harmony in the community.

The limitations and flaws inherent in the gacaca process are real and should not be trivialized. The concerns raised by human rights organizations regarding lack of due process are serious concerns. Moreover, there are other dangers inherent in the process: the possibility that people in the crowd may move each other to more and more extreme positions, resulting in mob violence; the possibility that

64. MICHAEL OAKESHOTT, ON HUMAN CONDUCT 78 (1975).
65. *See* Daly, *supra* note 3, at 391–94.
66. MINOW, *supra* note 31, at 58.

individuals may react to moving testimony by seeking vengeance against the perpetrators; the possibilities that people may falsely confess to obtain a reduced sentence, that neighbors may falsely denounce someone against who they hold a grudge, that someone may be convicted on insufficient evidence, and that witnesses who testify may not be protected against the wrath of the accused's family. It is also possible that the airing of the horrific details of the genocide may once again polarize and divide Tutsis from Hutus and impede the notion of them living in peace together.

All of these possibilities pose real challenges for the gacaca judges, many of whom do not have the training and resources to respond to these situations. There is also fear that the gacaca process might be boycotted by those who feel betrayed by the fact that the atrocities committed by the RPF are not subject to the jurisdiction of the gacaca courts. Indeed, some reports from the Hirondelle Foundation suggest that anger over the fact that the gacaca process deals only with atrocities committed by Hutus, and not those committed by the RPF during the last days of the genocide, may be responsible for the lower turnout for the gacaca hearings in Northern Rwanda.[67]

Given these factors, it has to be acknowledged that the gacaca process may not result in what the international community might call "justice." Minow points out that what often emerges from narrative truth telling is, at best, "health" rather than justice. However, for a country hoping to forge a new democracy, healing is a necessary part of that process towards democracy. "Empowerment . . . and reconnection—reviving a sense of identity and communality—become the building blocks for healing."[68] More than anything, Rwandan society needs to find some form of healing in order to create a sustainable future. It is also important to note that Rwandans themselves have determined the method that they deem most appropriate for providing healing, the possible reconciliation of members of society, and some form of justice.

Moreover, the method they have chosen enjoys wide popular support and is part of the common history of Tutsis and Hutus. Gacaca is a culturally specific response to a culturally specific situation. The extraordinary evil of the genocide may not be able to be responded to by the ordinary forms of justice. This is not to suggest that all international standards for justice be abandoned or ignored.

It may, however, require a shift in focus and that the international community support the manner that has been chosen by the Rwandan people as the most appropriate way of providing healing and justice. After endorsing the approach itself, the international community

67. *See* Fondation Hirondelle, High Turn Out as Gacaca Courts Open Nationwide (Dec. 6, 2002), http://www.hirondelle.org/hirondelle.nsf/0/192d793b82d9b481c1256cb800591075.

68. MINOW, *supra* note 31, at 65.

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could work with the Rwandan people on ways to safeguard the rights of the accused within the framework of the gacaca process by providing support, resources, and training for the judges. As Mark Drumbl has pointed out, Rwandans must be able to establish a common framework for living, and be able to "imagine . . . themselves as Rwandans."[69] Gacaca may be the only response to the genocide that begins to allow them to do that.

69. Drumbl, *supra* note 3, at 1295.