

**Dealing With Mass Atrocities and Ethnic Violence:
Can Alternative Forms of Justice be Effective?
A Case Study of Rwanda**

A problem common to all countries moving from [ethnic violence] to democratic rule is how to deal with the past, and in particular, how to deal with former leaders and their collaborators responsible for past egregious human rights abuses....The solution must take into account both the nature of that society's past illness as well as the present and future needs of such a society.

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1. Richard Goldstone, "Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals" (Spring 1996) 28:3 N.Y.U. J. Int'l L. & Pol 485 at 485-86.

During the one hundred days that followed the assassination of their president on April 6, 1994, the inhabitants of tiny African republic of Rwanda embarked on what some have described as the most vicious genocide that the world has ever witnessed. In the period between early April and the middle of July, some 750,000 to 800,000 people, mainly of the minority Tutsi tribe, were massacred by members of the Hutu majority. The involvement of the general population in the genocide was incredible. The killings were carried out with unspeakable cruelty; neighbours killed neighbours; Hutu husbands killed their Tutsi wives and their families; roving gangs tortured and raped women then cut off their breasts before killing them; people were burnt alive, thrown dead or alive into pit latrines or drowned in communal wells. Tutsis were hunted all over the country. There were no safe havens. Some of the worst massacres were directed against people seeking refuge in churches or seeking medical assistance in hospitals. Everyone seemed to join in the frenzy, including police, priests, school teachers and bourgomeistres.

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2. The population of Rwanda in 1994 was approximately 8 million. Of this population approximately 85 % were of Hutu origin and 15% were Tutsi. Although the majority of Tutsis were wiped out in the genocide, the breakdown by percentage of the population has remained virtually the same due to a huge influx of Tutsi refugees from neighbouring countries when the Rwandan Patriotic Army (RPA) took over control of the government and formed the Government of National Unity.
 3. Estimates as to the actual number of people murdered range from a low of 300,000 to nearly one million. By December 1994, the Intelligence Office in the United Nations Assistance Mission for Rwanda (UNAMIR) headquarters had counted more than 350,000 bodies.
 4. G. Prunier, *The Rwanda Crisis: History of a Genocide* (New York:

As Gerard Prunier, one of the most accomplished authors on Rwanda points out, "the daily killing rate was at least five times that of the Nazi death camps" of World war Two.

Some five years after the genocide ended, Rwanda continues to be haunted by its demons. In the years following the genocide numerous attempts have been made to bring justice to the country, closure on its horrific past, and reconciliation to its deeply divided people. Thus far, the programs implemented to bring about the rule of law and the healing of the nation have been largely unsuccessful.

This paper will review the efforts that have been made to establish the rule of law in Rwanda during the five years following the genocide. It will outline the mechanisms that were instituted to deal with those responsible for visiting the genocide upon the country, and discuss the effectiveness of those mechanisms in accomplishing dispute resolution and national reconciliation. There will also be an examination of the Gacaca (a traditional African dispute resolution system) as a possible tool to tackle the problem of dealing with those who had committed genocide and crimes against humanity on one hand, and

Columbia University Press, 1995) at 237-238.

5. *Ibid* . at 261.

trying to achieve national reconciliation on the other.

Background

As with any society emerging from a brutal civil conflict, Rwanda has faced the daunting challenge of building peace, stabilizing its security situation, reconciling its population and preventing a relapse into violence. Given the culture of ethnic hatred and impunity that had been fostered in the country during the years following the termination of Belgian colonial rule in 1959, and the deep wounds caused by the genocide itself, this task has proven to be exceptionally difficult.

6. R. Mani, "Conflict Resolution, Justice and the Law: Rebuilding the Rule of Law in the Aftermath of Complex Political Emergencies"(1998) 5:3 International Peacekeeping 1 at 2.

Following the genocide Rwanda's justice system was left in disarray. There was no police force left in the country. Many of the country's police had taken part in the massacres; fearing reprisals from the advancing Rwandan Patriotic Army, they had scrambled away to take refuge in neighbouring countries. Those who had not fled were looked upon with suspicion by the new government. As Marc Cousineau points out, "Le système judiciaire a été [aussi] paralysé par le génocide et la guerre. Des 750 magistrats en fonction en mars 1994, seuls 256 ont survécu aux massacres, dont seize seulement sont juristes." Most of the court houses in the country were left in ruins and the jails had been ransacked. In essence, the new government was faced with building a justice system from the ground up, attempting to construct new foundations grounded in the rule of law.

Breaking the Culture of Impunity

L'histoire du Rwanda depuis son indépendance de la Belgique atteste la réalité du postulat voulant que celui ou celle qui choisit de ne pas respecter les principes de l'État de droit choisit simultanément de privilégier l'oppression et le sang. De 1962, date de son indépendance, jusqu'à la victoire du Front patriotique rwandais en juillet 1994, le peuple rwandais a été victime de massacres, de génocides, et de violations systématiques des droits de la personne, et, de façon générale, de tous les effets perniciose de l'exercice d'un pouvoir arbitraire et absolu exercé par un régime qui échappait au contrôle judiciaire.

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7. During Operation Turquoise, the French army re-established the Gendarmes in the "Humanitarian Protection Zone". When the French left the RPA moved in and dismissed most of the remaining Gendarmes.
 8. M. Cousineau, "L'établissement de l'État de Droit au Rwanda : un but irréalisable" (1996-97) 28 Ottawa L. Rev. 171 at 176.
 9. *Ibid.* at 174.

The early 1990's in Rwanda, in particular, were characterized by immunity from prosecution for those who partook in violent acts against the Tutsi minority. The government had established a political and social climate in which lawlessness and an absolute disrespect for the value of human life prevailed.

As Payam Akhavan notes, "[at] the time of the genocide in 1994, no legal steps had been taken against those responsible for the earlier and present massacres: there was no fear of punishment."

Consequently, when the orders to kill the Tutsis were disseminated throughout the country in the days following President Habyarimana's death, none of those who joined in the slaughter had any fear that they would ever be held accountable for their actions.

When the new government took power in Rwanda following the victory of the Tutsi-dominated Rwanda Patriotic Army in July 1994, it publicly committed itself to dealing with the perpetrators of genocide in a just manner and in respect to the

10. P. Akhavan, "Justice and Reconciliation in the Great Lakes region of Africa: the Contribution of the International Criminal Tribunal for Rwanda" (Spring 1997) 7 *Duke Int'l & Comp. L.J.* 325 at 334.

11. President Habyarimana was killed on the evening of 6 April 1994 when his presidential airplane was shot down by Hutu extremists who felt that he was selling out to the RPA. Within hours of the crash his death was being blamed on the Tutsis, and Hutus were being encouraged to kill their neighbours. By the following morning the genocide was in full swing.

rule of law. In the days immediately following its victory, the new Government of National Unity had to determine how it would administer justice to those who had been responsible for the atrocities. As justice Richard Goldstone, the first Chief Prosecutor of the International Criminal Tribunal for Rwanda and Yugoslavia notes, a country emerging from a period of chaos and violence has four options for dealing with those who were responsible for the violence:

1. grant a blanket immunity from prosecution for past criminal acts;
2. allow a regular justice system to operate and ordinary courts to try and sentence anyone proven guilty of criminal conduct;
3. establish a truth and reconciliation commission or its equivalent in order to enable confessions of guilt for past human rights abuses to be traded for indemnification; or,
4. establish a modified truth commission under which the most serious offenders remain subject to... prosecution.

The Government of National Unity categorically rejected any possibility of granting amnesty to those who had perpetrated the violence. While it was interested in developing innovative methods of dealing with criminals under the rule of law, it was equally determined that Rwanda's culture of impunity would have to be stopped once and for all.

The ICTR

11. Goldstone, *supra* note 1 at 492.

Legal experts tend to ignore the society's history, culture and traditions, including its pre-existing legal traditions. Alien legal systems are designed (often based on the model of the donor's legal system) and imposed on the country with little or no consultation and scant knowledge of the local ...culture and history.

In the haste to deal with the aftermath of the genocide the United Nations set up the International Criminal Tribunal for Rwanda (ICTR) in the autumn of 1994, and Rwanda adopted the "Organic Law " one year later. Developed mainly by westerners, both the Organic Law and the ICTR display little understanding of the complexities of Rwanda's society. Based on and dedicated to a model of retributive punishment, neither forum has been able to effectively deal with the complicated issue of what to do with those who participated in the 1994 genocide.

12. Mani, *supra* note 6 at 7.

The goals of the ICTR were to, "[bring] the perpetrators of acts of genocide to justice [and to support] national reconstruction and reconciliation." Styled after the model of the post World War Two tribunals in Nuremburg, the ICTR is a justice mechanism based on western concepts of criminal law. It embodies the latest in European and western legal procedures and carries with it all of the rights and privileges accorded to those accused in western societies. It also incorporates western forms of punishment, many of which are foreign to traditional African societies.

For a variety of reasons, the government of Rwanda has been opposed to the ICTR from its very inception. The most contentious issues between Rwanda and the ICTR revolve around the tribunal's refusal to incorporate the death penalty as a form of punishment for the organizers and leaders of the genocide (Rwanda's Organic Law includes the death penalty), jurisdiction, and the location of the seat of the court. Procedural issues, such as the recent release of one of the primary leaders of the

13. G.Erasmus & N. Fourie, "The International Criminal Tribunal for Rwanda: Are all the Issues Addressed? How Does it Compare to South Africa's Truth and Reconciliation Commission?" (1997) 321 International Review of the Red Cross 705 at 706.

14. The seat of the ICTR is in Arusha, Tanzania. Rwandan officials protested the selection of Tanzania, arguing that the vast majority Rwandans would never be able to participate in the forum. When the resolution establishing the ICTR was tabled at the UN Security Council, Rwanda, which was a non-permanent member of the UNSC at the time, was the only country to vote against it.

genocide, Jean-Bosco Barayagwiza, because the tribunal was too slow in bringing him to trial after his arrest, have led to a strong condemnation of the ICTR by Rwanda and its people and a further distrust of the tribunal.

15. "Rwandan Genocide Accused Freed by Tribunal" *The National Post*, 6 November 1999 A15.

The court also enjoys little respect from the people of Rwanda who see it as a foreign instrument. Most Rwandans have no means of accessing the court. The vast majority of them are far too poor to travel to Arusha, and therefore cannot participate in its forum. There is virtually no television in the Rwanda, and very few Rwandans have access to foreign or unbiased media reports. Consequently, the people do not get the opportunity to hear how the genocide was planned and executed, nor do they get to see the individuals who masterminded the horrible events of 1994 being brought to justice. Insofar as the victims of the genocide do not get the opportunity to face their abusers as individuals they continue to collectivize the guilt of the Hutu, the result of which is a severe impediment to national reconciliation. As Payam Akhavan notes, in order for Rwanda to move forward with reconciliation "the Tutsi must absolve the Hutu of indefinite collective responsibility for the genocide while also having a legitimate means of vindicating their suffering through a 'collective catharsis'."

Whereas the ICTR has been fairly successful in hunting down

16. The main source of information for most Rwandans is the transistor radio. Virtually every Rwandan family owns one. The main radio station in the country, Radio Rwanda, is a government controlled entity and it is used effectively to broadcast the government's messages. In 1994, the former government used the radio extensively to spread anti-Tutsi propaganda and to incite the Hutus to slaughter their neighbours.

17. Akhavan, *supra* note 10 at 338.

those leaders of the genocide who fled Rwanda in 1994, and giving notice that the world community will not permit such heinous crimes to go unpunished, but it has been very unsuccessful in its objectives of healing or reconciling Rwanda's divided society.

The Organic Law

In early November 1995, the Government of National Unity, searching for solutions to its formidable internal legal problems, convened an international conference in Kigali on "Genocide, Impunity, and Accountability." The meeting brought together several dozen foreign legal experts, as well as leaders from Rwandan society "[to wrestle] with the manifold problems of prosecuting the 1994 genocide." From the Kigali conference emerged the Organic Law "a classification scheme to separate the main organizers of the genocide from criminals with lesser degrees of responsibility, and a unique scheme [developed principally by William Schabas of the University of Quebec at Montreal] aimed at encouraging offenders to confess in exchange

18. W. Schabas, "Justice, Democracy and Impunity in Post-genocide Rwanda: Searching for Solutions to Impossible Problems"(1996) 7:3 *Crim. L. F.* 523 at 528.

19. *Ibid.*

20. Organic Law On The Organization of Prosecution for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Since 1 October 1990, J.O., 1996, Year 35, No. 17 at 14 (Rwanda) [hereinafter *Organic Law*]

for substantially reduced sentences;" in essence adopting the a mixture of the second and fourth options as outlined by Goldstone above.

Article two of the Organic Law creates four categories of offences as follows:

- Category 1: includes organizers or planners of the genocide, persons in positions of authority within the military or civilian infrastructure who committed or encouraged genocide, ...notorious murderers who acted with great zeal...and persons who committed acts of sexual torture. Penalty- Death.
- Category 2: includes individuals not in the first category who committed murder or serious crimes against the person that caused death. Penalty - life imprisonment.
- Category 3: those who committed other serious assaults against the person. Penalty - as per the Rwandan penal code - 6 months to five years.
- Category 4: those who committed offences against property. Penalty - civil damages as agreed between the parties.

The key elements of the Organic Law are the procedures for confession and guilty pleas as outlined in articles 4-16; a procedure unusual in the civil law environment in that it permits a form of plea bargaining not normally found outside of the

21. Schabas, *supra* note 19 at 530. It should be noted that William Schabas was not in favour of incorporating the death penalty into the Organic Law.

23. See Goldstone, *supra* note 12 and accompanying text.

22. Organic Law, *supra* note 21, Articles 2 and 14.

common law system. In return for a confession and guilty plea for an accused charged under either of the second, third or fourth categories, there is provision for substantially reduced penalties. Category one offenders can also benefit from reduced sentences, but only if their confessions are made prior to their names being listed in the Official Gazette.

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23. *Ibid.* Article 9. The Official Gazette is a list maintained by the Rwandan Government. It contains the names of genocide suspects and a list of the crimes of which they have been accused. It should be noted that most individuals registered in the Official Gazette were listed prior to their arrests. There is little, if any realistic chance, that a prisoner will be arrested for a category one crime prior to having his name registered.

In spite of the good intentions of those who drafted the Organic Law, its effectiveness was severely limited by the fact that it is a system based on a western procedural model, a system which is optimized for dealing with small numbers of accused at any given time. Furthermore, the confession option provides little incentive for the accused to tell the truth. Under the Organic Law, category one offenders face the death penalty, in spite of a confession, unless they confessed before being registered in the Official Gazette. For those who had participated in the genocide but had not already been listed in the Official Gazette, there was little incentive to confess, especially if they had not yet been indicted or arrested. Even for those few who wished to confess, the sheer numbers of people incarcerated and awaiting trial without the benefit of *habeas corpus*, plus the lack of defence counsel, made the option nearly impossible.

Four years after the development of the Organic Law, some 120,000 people, crammed into severely overcrowded prisons inside Rwanda, continue to await trial. In many cases, the incarcerated individuals still do not know the charges against them. This

24. *Ibid.*

25. U.S. Department of State: *Rwanda Country Report on Human Rights Practices for 1998*, (Feb.26, 1999) on line:<http://www.state.gov/www/global/human_rights/1998_hrp_report/rwanda.html>last accessed 27 October 1999.

situation has several very serious implications for the national reconciliation process. Realizing that approximately one percent of all Hutu males are incarcerated, many are accusing the Government of National Unity of carrying out "victor's justice" against the Hutu population. As John Prendergast and David Smock point out, "The impartiality of the Rwandan justice system will be key to genuine reconciliation and social development. [The] Rwandan population needs to be convinced that the justice system is being rebuilt in an impartial manner...." This can only be accomplished by showing the average Rwandan citizen that the justice system can function fairly and effectively. Due to the vast numbers incarcerated, and the inability of the court system to deal with such a huge burden, there is little hope that under the current scheme the perception of victor's justice can be overcome.

Interest Versus Position

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26. John Prendergast and David Smock, "Postgenocidal Reconstruction: Building Peace in Rwanda and Burundi" (September 1999) United States Institute for Peace online:
<<http://www.usip.org/oc/sr/sr990915/sr990915.html#encouraging>>last accessed 22 October 1999.

The conflict resolution process, and the manner in which the [complex political emergency] is brought to a close is of critical importance both for determining the political context that emerges and for shaping the long-term prospects of peacebuilding and the restoration of the rule of law.

When Rwandan Prime Minister Pasteur Bizimungu opened the Kigali Conference on October 31, 1995, he "...called for innovative forms of justice while at the same time ruling out any possibility of amnesty." It was the position of the Government of national Unity that under the terms of the Convention for the Prevention and Punishment of the Crime of Genocide, to which it was a signatory, it was obligated to punish those responsible for the violence that had devastated the country.

Although Mr. Bizimungu expressed his desire to develop innovative forms of justice, in adopting the position that amnesty was not to be considered he effectively set the tone that committed Rwanda to the establishment of a retributive criminal justice system. It was immediately clear that "innovativeness"

27. Mani, *supra* note 6 at 6.

28. The Kigali Conference was hosted by the Rwandan Ministry of Justice in the autumn of 1995. It was a gathering of legal experts whose goal it was to establish a justice system within Rwanda which would focus on dealing with those who were involved in ethnic crimes between 1990 and 1994.

29. Schabas, *supra* note 19 at 529.

30. Convention on the Prevention and Punishment of the Crime of Genocide, adopted Dec.9, 1948, 78 U.N.T.S. 277 (entered into force January12, 1951) [hereinafter: Genocide Convention].

was to be focused on process design, not system design. In essence, the Kigali conference was limited from its very inception to designing the procedures that Rwanda would implement in establishing a criminal trial system, one which would impose western style procedures and punishments on Africans, many of whom have never left their jungle villages. By stressing its position that all perpetrators must be punished, instead of focusing on its stated interests of establishing the rule of law and bringing about national reconciliation, the Government of Rwanda missed an opportunity to develop a truly innovative and culturally appropriate justice system.

Whereas it is clear that parties signatory to the Genocide Convention are obligated to provide effective penalties to those found guilty of the crime of genocide, the convention does not contain sentencing provisions, nor does it stipulate the design of the justice system to be used. The Genocide Convention reads in part:

Art .4. Persons committing genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Art. 5. The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article 3.

Art. 6. Persons charged with genocide or any of the other acts enumerated

in Article 3 shall be tried by a competent tribunal of the State
in the
territory of which the act was committed, or by such international
penal
tribunal as may have jurisdiction with respect to those
Contracting Parties
which shall have accepted its jurisdiction.

When one looks at the effectiveness thus far of both the ICTR and the Organic Law, one has to question whether the sentencing models being used are "effective." Six years after the genocide, approximately ninety percent of those charged or incarcerated have still not been tried.

Had Rwanda focused on its interests when developing the Organic Law, it might well have adopted a completely different system than the one currently in place. When Prime Minister Bizimungu categorically dismissed amnesty at the outset of the Kigali conference, the delegates to the conference interpreted his position to mean that no forms of punishment found outside of the contemporary western penal model would be considered. Thus, the door to many other forms of punishment, including traditional African models, was closed. The result has been that Rwanda is burdened by an ineffective justice system, and a society which has not yet come to terms with its past.

Truth Commissions and Gacaca

"Exposure [to] the truth enables a society to move beyond the pain and the

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32. As of 15 May 2000, the ICTR had convicted 7 people. In 1998, under the Organic Law, 22 individuals were sentenced to death and publicly executed. Although many more have been sentenced to death, no executions have been carried out since April 1998. Sources: "ICTR Detainees-- Status on 27 April 2000", International Criminal Tribunal for Rwanda, online: <<http://www.ictr.org>> last accessed 15 May 00, and "Rwanda: Human Rights Developments 1998", Human Rights Watch, online: <<http://www.hrw.org/hrw/worldreport99/africa/rwanda.html>> last accessed 5 Nov 1999.

horror of the past."

33. Goldstone, *supra* note 1 at 486

It appears, as noted above, that there was an assumption that when Prime Minister Bizimungu stated that there would not be any amnesty granted, that the idea of truth commissions for Rwanda was dismissed. The fundamental error the Kigali Conference made in adopting this assumption was the misconception that truth commissions necessarily result in amnesty for those who participate. As Theresa Klosterman notes, "...truth commissions serve four compelling purposes: (1) establishing an authoritative record of events; (2) providing flexibility over formal prosecution; (3) laying a foundation for later prosecutions; and (4) promoting national reconciliation. Truth commissions also provide tools for giving victims catharsis and deterring further violations of human rights." In the past two decades there have been several truth commissions established to deal with situations where there have been mass violations of human rights. While some commissions have offered amnesty to the accused, others have not. All have, however, provided "...an effective way of ensuring that history is recorded more accurately and more faithfully than would otherwise have been the

34. Theresa Klosterman, "The Feasibility And Propriety Of A Truth Commission In Cambodia: Too Little? Too Late?"(1998) 15 Ariz. J. Int'l & Comp. L. 833 at 856.

35. For a concise over-view of Truth Commissions in Chile, El Salvador and South Africa see, E. Bradley, "In Search For Justice - A Truth and Reconciliation Commission for Rwanda" (1998) 7 J. Int'l L. & Prac. 129 at 136-137.

case." It is this history which is crucial for a society emerging from a situation in which so many of its inhabitants have been subjected to massive human rights violations.

Insofar as Tutsis and Hutus continue to live together as neighbours, it is essential that they learn not only about what happened in their communities, but which of their neighbours were or were not involved. Many of the survivors of Rwanda's genocide do not know who organized the violence in their neighbourhoods or, in many cases, which of their neighbours took part in the killings. Nor do they know the fate of many of their missing relatives. All of this has led to a situation wherein there is a large amount of secrecy, distrust and fear. As Evelyn Bradley notes:

36. Goldstone, *supra* note 1 at 489.

A truth commission would provide the opportunity to recognize and celebrate the lives of the many Rwandans who died. The stories of the many Hutus, some of whom died trying to save their fellow Rwandan Tutsis, must be told and recorded. There is rightly much Rwandan and international attention to the importance of investigating the killings, naming those responsible, and bringing them to court to answer charges of mass murder. However, it is also fundamentally important for the future of Rwanda for those who resisted the killings to be chronicled, named and celebrated. It would [also] afford perpetrators the opportunity to confess to their crimes and seek forgiveness. Only in this context can reconciliation, in the sense of forgiveness and the re-establishment of communities, be attempted.

37. Bradley, *supra* note 37 at 145-146.

In an effort to boost the process of national reconciliation, the Rwandan government recently adopted a new approach to dealing with those responsible for the genocide; an approach which accords much more with the government's expressed interests, and with Rwanda's culture. Under the leadership of Aloysie Inyumba, the National Reconciliation Commission "...initiated consultations throughout the country on issues related to coexistence. Perhaps its most innovative mandate [was] to monitor all government programs to determine how they affect peace, reconciliation, and national unity." One of the recommendations from the commission was that Rwanda adopt the traditional Gacaca, "a form of mediation performed by a village council of elders, ... as a method of promoting reconciliation at the communal level by promoting justice through mediation." In

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38. Under the direction of the National Reconciliation Commission, late in 1997, the Rwandan government transformed its brutal counterinsurgency strategy into a much more political and social effort, which within a year, broke the back of the insurgency. Stability was restored to northwest Rwanda, an area which had been subjected to continuous attacks and incidents of ethnic violence since the beginning of the former government forces insurgency in November 1994.
39. Prendergrast, *supra* note 28.
40. Gacaca is a term used to describe a field of grass, or an open space in which, under traditional law, members of a community gather to arbitrate disputes. Generally the Gacaca is not used to address serious crimes. It is likely that once it is functioning, the Gacaca will resemble a restorative justice model, similar in scope to the sentencing circles found in Canadian native communities.
41. "Rwandans Begin Task of Bringing to Justice the Perpetrators of Genocide" (Spring 1996) African Voices Volume 5, Number 1 on line: <[http://gopher.info.usaid.gov/regions/afr/abic/avoices/avspr96/avspr96.htm#Rwandans Begin Task of Bringing to Justice the Perpetrators of Genocide](http://gopher.info.usaid.gov/regions/afr/abic/avoices/avspr96/avspr96.htm#Rwandans%20Begin%20Task%20of%20Bringing%20to%20Justice%20the%20Perpetrators%20of%20Genocide)> last accessed 10 November

March 1999, Justice Minister Jean de Dieu Mucyo announced that in January 2000, the Gacaca system would be implemented "... to try accused people in the second and third categories of Rwanda's genocide law." Gacaca will not be available to those who are listed as category one prisoners. They will remain in the court system and continue to be eligible for the death sentence under the Organic Law.

[The] tribunals will operate at four levels - cellule, sector, commune and prefecture...." with the aim of bringing victims and accused face to face to tell their stories. Sentences will be decided at the completion of each Gacaca. In this manner, it is believed that justice will be swifter and fairer. Many of those who have languished in prison for years will finally get their day in "court" in front of a jury of their peers. It is hoped that through Gacaca the reconciliation process will be rehabilitated and the rule of law will be restored.

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42. Prendergrast, *supra* note 28.

43. "IRIN Update No. 636 for Central and Eastern Africa" (24 March 1999) United Nations Office for the Coordination of Humanitarian Affairs Integrated Regional Information Network for Central and Eastern Africa, on line: <http://www.sas.upenn.edu/African_Studies/Hornet/irin636.html> last accessed 5 November 1999.

On its face, it appears as though the Gacaca is a solution to many of the problems in Rwanda's justice system. It may, however, prove to have some fatal flaws. As one Western observer in Kigali points out, "... most Hutus were involved with the genocide in some capacity. Placing a genocidaire [someone who committed genocide] in front of his community will put the community itself through a test of innocence or guilt." Insofar as one of the effects of the current Organic Law has been the isolation of Rwandan society into two camps (the Guilty Hutu vs the Tutsi Victim), it may be very difficult to extract confessions out of those who were responsible. The fact that the Tutsis now control the country, and thus far have used very brutal methods to deal with insurgents and others that they consider to be a threat, has caused a very real (although not necessarily realistic) fear that those who do volunteer information will be severely punished once they confess. Given the impunity that the Hutus enjoyed for decades, many are concerned that the new government will adopt the same policies of impunity that the Habyarimana regime followed, allowing the Tutsi population to take revenge once the perpetrators are exposed.

44. "Rwanda Attempts an Atonement" *The Christian Science Monitor Electronic Edition* (5 August 1999), online: <<http://www.csmonitor.com/durable/1999/08/05/text/p5s1.html>> last accessed 13 November 1999.

Another possible impediment to Gacaca lies in what Mark Drumbl describes as a "sense of moral ambiguity...[and a] "world where almost no-one feels guilty." Many of those involved in the violence of 1994 refuse to acknowledge that there was a genocide, preferring to characterize their actions as a patriotic duty. One of the most common refrains from those who have admitted killing their Tutsi neighbours is that they did so in the context of the war their government was fighting against the Rwandan Patriotic Front, and that all Tutsis were the enemy. In many cases, spurred on by propaganda from Radio Mille Collines, and by local government officials, the Hutus were brain-washed into believing that their neighbours were part of a Tutsi conspiracy to take over the country and force Hutus into slavery.

The Gacaca process will likely be presented with its most significant challenge in communities in which the majority of the people involved in the process were also participants in the slaughter. There is a very real possibility that the rule of law could be undermined in such communities if persons who were actually guilty are freed by their friends and relatives. Equally harmful to the process might be a situation in which

45. M. Drumbl, "Rule of Law Amid Lawlessness: Counselling the Accused in Rwanda's Domestic Genocide Trials" (1998) 29 Columbia H.R.L. Rev at 587. [hereinafter *Drumbl*]
Also see generally P. Gourevitch, *We Wish to Inform You That Tomorrow We Will be Killed With Our Families* (New York: Farrar, Straus and Giroux, 1998) at 303-318.

people are unjustly accused and held accountable due to a large Tutsi population in the area. The potential for such circumstances is very high.

If the Gacaca system is to work, then it must be monitored and overseen by people who are educated and trained for their responsibilities. Thus far, the lack of qualified and non-biased arbitrators has been one of the most significant impediments to the establishment of a Rwandan justice system. In order for the Gacaca to work effectively, both Hutu and Tutsi will have to be convinced that under the regime that justice will be done fairly, no matter who the accused or who the victim is. Many observers have noted that an increased number of educated and impartial Hutu arbitrators and/or foreign observers will be key to ensuring the success of the Gacaca. Only through seeing non-Tutsis meaningfully involved in the system will the Gacaca win the confidence and trust of those who stand accused. Only then will the truth of the genocide begin to be told by those who carried it out.

Conclusion

Writing about the Rwandan genocide in 1995, Gerard prunier stated that, "The immensity of the crime cannot be dealt with through moderate versions of European criminal law made for radically different societies." He was correct. Although the concept of Gacaca was considered in the Kigali conference in the autumn of 1995 it was dismissed as a possibility since it did not fit with the models of justice that were familiar to the majority of those who had gathered. The result of the Kigali Conference was the development of an Organic Law which, as many observers noted, was bound to fail, if for no other reason than the Rwandan justice system was completely incapable of handling such an enormous task.

When Prime Minister Bizimungu dismissed the idea of amnesty, he set the tone for the development of the Organic Law. By focusing on the aspect of punishment, the last step in the justice process, the opportunity to create a truly innovative justice system was foreclosed before the conference even got under way.

It is quite apparent that those at the Kigali Conference were of the impression that the Genocide Convention requires "punishment" in the western meaning of the word. However, articles five and six of the convention require only that accused

46. Prunier, *supra* note 4 at 265.

persons "shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.", and that the tribunal shall "...Provide effective penalties for persons guilty of genocide." The Genocide Convention neither stipulates the type of punishment nor the type of justice system. All that is required is that the tribunal shall be competent and that the penalties shall be effective.

It is understandable, given international lawyers' general abhorrence for impunity, that a gathering of them to design a legal system will incorporate the Nuremburg model of dealing with war crimes and other issues of international law. However, it must also be kept in mind that not all societies are the same. International (and national) responses to issues such as those in Rwanda need to be sensitive to both the differences and commonalities between various societies and their concepts of law. In many ways, intra-societal violence is analogous to family violence. Families which have been victim to violence do not heal simply by placing the offender(s) in jail. Just as there are numerous procedures and methods for attempting to heal

47. Genocide Convention, *supra* note 32, Article 6.

48. *Ibid*, Article 5.

the scars of family violence, so should there be for dealing with violence within a community or nation.

As Rama Mani notes, a country emerging from chaos faces three challenges: clarifying the concept of the rule of law; recognizing the political nature of the task, and, incorporating the local population in rule of law programs. The Gacaca was rejected because it did not fit into a preconceived notion of what justice should look like. By overlooking the Gacaca in 1995 the Rwandan government denied its people the opportunity to establish and deal with the story of the genocide while it was still fresh and relatively undesecrated. This traditional form of cultural law had within it the tools to support national reconciliation and to establish a permanent record of what really happened in Rwanda. Rwanda's people have had five years to solidify their positions and reinforce in their own minds their own versions of what occurred in 1994. Neighbours have lived together in fear of one another; one fearing retribution, the other fearing a recurrence of the past. Many have designed ingenious methods of coping with the past and are unwilling to revisit those horrible times. Persuading these people to come out of their shells and address the horrors of the past will be a monumental task.

49. Mani, *supra* note 3 at 8.

The challenge Rwanda faced and continues to face in the aftermath of the genocide is incredible. The fledgling government, faced with an enormous task should be commended for bringing together experts from around the world to help it build a new justice system out of the ashes. The fact that it lost sight of its most important goals in the process is understandable. If anything positive can come from the last four years of the Organic Law, it should be the acknowledgement that the western criminal law model might not be the most effective model for dealing with complex legal problems in non-western societies, and that traditional forms of conflict resolution and truth finding might be effective methods with which to deal with a wide variety of conflicts. Therefore, they should not be categorically dismissed in favour of systems which are inherently foreign to the target culture.

In January Rwanda will institute the Gacaca, a system that it rejected four years ago. Gacaca will likely prove to be effective in at least some communities, especially if it gets the proper levels of support and expertise it needs in order to function. In many communities, however, the success of Gacaca is likely to be limited, but it will at least convey the message that the government is serious about resolving the huge problems it is facing with respect to the thousands of people currently detained and waiting trial..

The ICTR and the Organic Law have failed Rwanda. Gacaca is likely the last chance that the government has to establish a society in which the rule of law is seen as being supreme and "national reconciliation" is something more substantive than the name of a government commission. To some, Gacaca may seem to be a program with very little potential. Others regard it as a solution to Rwanda's problems and have been proponents of the process since before the Organic Law was incorporated. In either case, it is highly likely that it will be an improvement over the system that is currently struggling to operate in Rwanda. Even more importantly, it is probable that it will be seen by many as a government attempt to involve the population in the justice system and as a tool which empowers the people to participate in society. It will likely not be the perfect solution to Rwanda's problems but, as Theresa Klosterman notes, " A step toward justice may be better than no justice at all."

50. Klosterman, *supra* note 36 at 869.