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By Maureen E. Laflin

Throughout the world, nations and communities are turning increasingly to alternative dispute resolution methods in an attempt to heal wounds cut by years of ethnic, cultural, and religious conflicts. Rwanda is making a creative and promising effort to adapt its traditional community-based dispute resolution method, the Gacaca Courts, to punish the perpetrators of the genocide which took place in 1994 and to bring resolve and reconciliation to the country.

Over a span of just one hundred days in 1994, upwards of 1,000,000 people died in the genocide in Rwanda. As one author commented, "The Rwandan genocide stands out from other atrocities in a number of ways: It was astounding in the number and concentration of deaths, the intensity of the killing, the extensive use of rape as a form of ethnic violence, and the massive involvement of the Rwandan population."[1] Rwanda's population prior to the genocide was between seven and eight million people.

The website for the Rwandan government states, "The 1994 genocide was a carefully planned and executed exercise to annihilate Rwanda's Tutsi population and Hutus who did not agree with the prevailing extremist politics of the Habyarimana regime. One million lives were lost in only one hundred days. It is the fastest and most vicious genocide in human history."[2]

Today Rwanda continues to struggle with its brutal past, an impoverished present, and a future clouded in uncertainty. Many place hope in the country's traditional dispute resolution system, the Gacaca courts, to reconcile decades of division and hatred.

The genocide must be understood in the country's historical context, and yet this is not really possible. There is no agreement about the historical interrelationship between the Hutu and the Tutsi. Some, including the current government, claim the two groups co-existed for centuries. Others claim the tension began hundreds of years ago when the Tutsi herders and warriors moved into Rwanda and created a quasi-feudal system.[3] It is unclear if Rwanda and the international community will ever reconcile this issue. What is known is that most of the victims of the genocide were from the minority Tutsi community and that most but not all the perpetrators were Hutus. [4]

During the three decades following Rwanda's independence in 1962, hundreds of thousands of Tutsis were killed, exiled or fled into neighboring countries. This ethnic tension increased from 1990 until early 1994 as the Rwandan government forces and the Rwandan Patriotic Front (RPF), the army of the Tutsi refugees or expatriates, engaged in an on-going, yet sporadic armed conflict. This fighting culminated in the one hundred days of genocide. The genocide ultimately ended when the RPF took control of the capital city of Kigali, and the Hutus fled. The RPF established a new government called the Government of National Unity.

The government's web page captures the state of the country post-genocide:

> The government of national unity inherited a deeply scarred nation where trust within and between communities had been replaced by fear and betrayal, whose economy had ground to a complete halt, where social services were not functioning, and public confidence in the state had been shattered. Almost the entire nation was either internally displaced or had been forced to flee to neighbouring countries by the perpetrators of the genocide.[5]

In July 1994, the Government of National Unity made it one of its top priorities to apprehend and bring to justice the perpetrators of the genocide. The Government made it clear that there could be no reconciliation without justice and that it would ensure individual accountability for the perpetrators. How to find "justice" in the wake of the genocide and the years of conflict prior thereto presents a daunting task.

The enormity of this task begins at the most fundamental level. Rwandese cannot even agree upon basic facts. Other than the actual dates of the genocide, little else is agreed upon. As the Organization of African Unity's (OAU) International Panel of Eminent Personalities noted, "[T]here are hardly any important aspects of the story that are not complex and controversial; it is almost impossible to write on the subject without inadvertently oversimplifying something or angering someone."[6] The disputed topics go not only to the causes and historical tensions between the Hutus and Tutsis before the genocide, but include as well how many people died, where they died, and who participated in their killing. There is so little agreement over the facts that the Rwandese have 'agreed' that history cannot be taught in their schools.

The estimates of the number of people who died varies from 500,000 to 1,000,000. Either number is unthinkable. As the Organization of African Unity notes about the numbers, "the truth is that we have no way of being certain. The fact is that even if the most conservative figure is used, it still means that over three-quarters of the entire population registered as Tutsi were systematically killed in just over 100 days."[7]

The names, identities, and number of perpetrators are also disputed. What is clear is that hundreds of thousands of people, both Hutus and Tutsis, participated in what has been called a "populist genocide."[8] The estimates of the number of persons directly or indirectly involved in the genocide run as high as one million people.[9] In contrast to modern technological warfare, these killings were not depersonalized or sanitized by distance, anonymity, or high tech equipment. Numerous accounts describe teachers killing students, neighbors hacking neighbors to death in their homes, clerics murdering parishioners, doctors intentionally terminating the lives of patients, and even children as young as eight participating in killings. Assailants used household tools such as machetes. Others used sticks and clubs, causing their victims to endure slow, agonizing deaths.[10] The accounts are gruesome.

The widespread participation of so many, the alleged propaganda campaign which "forced" people to participate, and the close, slow, and brutal nature of so many of the killings make the Rwandan incident unique from other tragedies. It has been described as the "most efficient mass killing since the atomic bombings of Hiroshima and Nagasaki."[11]

The addition of non-deadly physical violence, the destruction of property, and theft further complicate the situation. While Tutsis suffered the brunt of the atrocities, Hutus who were viewed as too sympathetic to the Tutsis were also brutalized and killed. Tutsis and Hutus were both victims and perpetrators. Allegations of gross human rights violations have been filed against Tutsis for their actions during and after the genocide. The lack of a clear demarcation between perpetrator and victim makes the task of sorting through the situation even more complicated.

The impoverished nature of Rwanda after the genocide further compounds the situation. The World Bank described Rwanda as the poorest country on earth. Seventy percent of the population lived below the poverty level; little in the country worked; and most of the infrastructure was destroyed during the genocide.[12]

Given the horrific nature of the situation, the current government has had to determine how to resolve the overwhelming human rights problems and achieve some measure of reconciliation in the country. Amnesty International has characterized the problem as "how to efficiently combat an ingrained culture of impunity and foster reconciliation between two communities whose mutual distrust and political rivalry has caused so much death and suffering over a prolonged period of time."[13]

In contrast to South Africa's Truth and Reconciliation Commission which granted amnesty for full and complete truth, Rwandan's government has opted for a more punitive justice approach vowing to ensure individual criminal accountability for all perpetrators. Three forums—the International Criminal Tribunal for Rwanda, the domestic criminal justice system, and the Gacaca courts—all seek to address the crimes and human rights violations during the genocide. The country played a critical role in the creation of the International Criminal Tribunal for Rwanda (ICTR) located in Arusha, Tanzania. Unfortunately in seven and one-half years, the ICTR has brought less than a dozen cases to judgment.[14]

The pre-genocide judicial system in Rwanda was extremely weak, suffering from limited resources, insufficiently trained personnel, and a lack of judicial independence. The genocide totally destroyed it. For over two years following the genocide the country was without a functioning legal system. Not until the latter part of 1996 did the Rwandan judiciary become operational once again.[15] By the end of 2001, the country's domestic criminal justice system had conducted approximately five thousand genocide-related trials, leaving approximately 125,000 suspects still in jails or prisons designed to accommodate only 15,000.[16] It has been estimated that using the conventional court system would take over two hundred years to try the cases of those already incarcerated for crimes related to the genocide.[17] There are simply not enough judges, prosecutors, and lawyers. Post genocide, most qualified professionals either fled the country or were disqualified from the legal processes due to their own participation in the atrocities. In mid-July 1994, the qualified bench and bar consisted of five judges, none of whom had functioning cars or offices, and fifty lawyers, some of whom refused to defend the accused.[18] The country had to create another forum to resolve its disputes.

With the realization that the current judicial system was woefully inadequate to handle the situation, the government turned to the country's traditional dispute resolution method, the gacaca courts, to address the burgeoning caseload, to pursue retributive justice, to rebuild a sense of community, and to reconcile the country's past. Amnesty International describes the process as "an ambitious, groundbreaking attempt to restore the Rwandese social fabric torn by armed conflict and genocide by locating the trial of those alleged to have participated in the genocide within the communities in which the offenses were committed."[19]

The contemporary gacaca courts, legally sanctioned in January 2001, are adaptations of the traditional Rwandese method of dispute resolution. Gacaca is Kinyarwanda for "lawn" or "lawn justice" which is where the local community traditionally gathered to settle disputes.[20] Historically, the elders in a community presided over informal, temporary, ad hoc proceedings to address conflicts within the community. "The primary goal was to restore social order, after sanctioning the violation of shared values, through the re-integration of offenders into the community."[21]

The government has taken this traditional method and saddled it with western criminal justice concepts and procedures. The question is whether the merging of these two philosophies can bring forth reconciliation. Many guardedly hope so but maintain misgivings at the herculean task before this financially, culturally, and historically impoverished country.

While the contemporary courts retain certain characteristics of the traditional or customary system such as being based in the local community and the need for community involvement, they also differ in dramatic ways. The customary courts traditionally addressed predominately inter-family and/or inter-community disputes. Their method of dispute resolution was predominantly consensual decision-making aimed at balancing collective and individual interests. They commonly imposed sanctions based on the best interest of the community. And judicial compulsion was largely unheard of—offenders would usually appear voluntarily, seeking forgiveness and reintegration into the community, and judgments were enforced through social pressure alone. The focus was clearly restorative justice.

Today, the Rwandese government believes that punitive justice is a prerequisite for reconciliation. With retributive justice as its goal, the Rwandan government has taken the traditional

restorative process described above and, through the power of the state, granted the contemporary Gacaca courts jurisdiction over all but the most egregious cases of genocide and crimes against humanity. The courts have been laden with substantive and procedural rules, from sentencing guidelines to the authority of the state to subpoena witnesses. At the same time, the hope is to rebuild the community.

Gacaca jurisdiction is intended to shift power to the local community, to strengthen and unify the people, and to make "justice" more visible. The system's premise is the belief that Rwanda's future lies with the ability of its people to rehabilitate the country. Thus the Gacaca courts have the dual goals of "retributive justice and community rebuilding."

This raises another major impediment—the lack of community.

A significant obstacle to this community-based program is that the composition and the interrelationships in the communities have dramatically changed as the result of the Rwandese armed conflict and genocide. The recent villagization program which relocates people from the hillsides to newly created villages further exasperates the lack of functioning communities as the current inhabitants have no historical connection with one another. Communities that never were are difficult to 'rebuild'.

The contemporary Gacaca courts are completely dependent on community participation and support. The state has set them up as community forums. Each cell or local community selected twenty-four local representatives or judges, and community members are expected to investigate the genocide offenses committed within their own communities. In total, over 250,000 Gacaca Judges were selected.

The country has created a confession option for persons charged with all but the most serious charges. Persons, who provide accurate and complete confessions, plead guilty and apologize to the victims, are entitle to a reduced sentence. Some question the veracity of some of the confessions.

> There were 500 confessions in 1997 and approximately 9,000 by the end of 1998. Over 2,000 confessions were received in the weeks following the execution on 24 April 1998 of 22 defendants found guilty of genocide. About 15,000 detainees had confessed by 1999 and approximately 20,000 detainees by early 2000. The slow and cumbersome hearing and review process, and lack of personnel, insured that at any given time only one-fourth of the confessions were verified by the Public Prosecution Department. To make matters worse, the 18,000 or so detainees who confessed to genocide-related crimes are housed in the same facilities as detainees who could resent their confessions. Their safety or protection from reprisals is questionable.[22]

While there is significant support for the contemporary Gacaca courts, especially among those suspects languishing in prison,[23] there are many who are skeptical. Time will tell. Contemporary Gacaca courts are still in their infancy. In June 2002, the country started a four-month pilot project with eighty courts. By December 2002, some 600 courts had opened. The goal is to have an estimated 10,000 courts in operation. They are expected to address the judicial backlog within three to five years.

My concerns are first whether the focus on retributive versus restorative justice may backfire as each may reach a different end. Amnesty International has stated, "Rwandese people need justice, not vengeance."[24] Second, whether the decision to take an organic, grassroots dispute resolution method and imposed top down substantive and procedural requirements may in the end be the demise of the attempt to discover the truth, to find justice, and to bring peace and reconciliation to Rwanda.

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Endnotes

1 Erin Daly, *Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda*, 34 Intern'l Law and Politics 355, 355 (2002).
2 *See* www.rwanda1.com/government/genocideef.html.
3 Daly, *supra* note 1, at 359-60.
4 *See* www.rwanda1.com/government/genocideef.html
5 Organization for African Unity, Special Report of the International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events, ¶2.1 (2000), available at http://www.oau-oua.org/documents/ipep/ipep/htm.
6 *Id.* at ¶ 14.80.
7 Daly, *supra* note 1, at 361.
8 Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*,75 N.Y.U. L. Rev. 1221, 1249-50 (2000).
9 Daly, *supra* note 1, at 363.
10 United States Institute for Peace, *Rwanda: Accountability for War Crimes and Genocide* (1995) at http://www.usip.org/oc/sr/rwandal.html. It is important to note that the allegations of forced participation is also disputed.
11 Drumbli, *supra* note 8, at 1245-46.
12 Daly, *supra* note 1, at 366.
13 Amnesty International, *Rwanda Gacaca: A Question of Justice*, December 2002 at 4.
14 *Id.* at 1.
15 Amnesty International, *supra* note 13, at 6.
16 Drumbli, *supra* note 8, at 1242-43.
17 Daly, *supra* note 1, at 369-70.
18 OAU IPEP, *supra* note 5, ¶ 18.4.
19 Amnesty International, *supra* note 13, at 2.
20 Amnesty International, *supra* note 13, at 1,n. 1.
21 *Id.* at 20.
22 Amnesty International, *supra* note 13, at 18.
23 Daly, *supra* note 1, at 374.
24 Amnesty International, *supra* note 13, at 17.