

Preconditions and processes for establishing a Truth and Reconciliation Commission in Rwanda – the possible interim role of Gacaca community courts¹

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1 INTRODUCTION

Possibly a million people died in Rwanda in the genocide of 1994.² Many others have been killed subsequently, largely because the tragedy remains unresolved in terms of both truth and justice (Sarkin 1999:767). The victims of the genocide were mostly Tutsis, although Hutus who had demonstrated support for power sharing in government between Tutsis and Hutus were also targeted.³

A critical issue facing Rwanda is the present state of the criminal justice system. Around 125 000 people accused of participating in the genocide

1 This paper was written in 1998 for the NGO Relationships Foundation also called the Newick Park Initiative (NPI) for its ongoing work in Rwanda. It was presented to the government of Rwanda in 1998 which subsequently announced that the Gacaca would be brought into the justice process in the year 2000. While the government of Rwanda released its model at the end of 1999, using the Gacaca structures to deal only with issues between 1990 and 1994, their model is highly problematic to say the least. This paper does not examine the government's model, but rather places on record the suggestions given to the government of Rwanda. This paper draws from another background paper on the history of the use of the Gacaca drafted for NPI by Mary Taylor. An examination of the Rwandan government's Gacaca model is to be published as Sarkin forthcoming 2000.

2 See Amnesty International 1995 and Zarembo 1997. Reports differ significantly as to the actual number of people killed. Estimates range from 500 000 to one million. Most media reports estimate the number to be closer to 500 000 while international NGOs which have been to Rwanda to investigate estimate the number is closer to one million. Zarembo estimates there were 800 000 deaths.

3 See, for example, Amnesty International 1994. While the independent Commission of Experts commissioned in terms of Security Council Resolution 935 (1994) found that the Tutsis had not perpetrated any acts which would fall within the definition of the Genocide Convention, a report drawn up for the High Commissioners of Refugees accused the Rwanda Patriotic Front of summarily killing 30 000 Hutus between June and September 1994. See UN document S/1994/1125: Letter by Boutros Boutros-Gali October 7 1994 Preliminary Report of the Independent Commission of Experts in accordance with Security Council Resolution 935 (1994) par 148. *Des Milliers de Hutus Massacrés au Rwanda* 1994. See Philpot 1996.

are in prison. Some of them have been held for up to three years without trial.⁴ No judicial system anywhere in the world was designed to handle the stress presented by an attempt to prosecute over 100 000 people accused of committing crimes. Rwanda's system in particular does not have the capability to handle these demands. Some mechanism to aid the criminal justice system is of vital significance.

Steps have to be taken in Rwanda to deal with the many other problems that continue as a legacy of the genocide. Dealing with the pain and suffering of the victims on the one hand and with large prison numbers and problematic prison conditions on the other are both essential. The government has begun to consider options to alleviate the situation and reduce the numbers in detention. One possibility being investigated is the involvement of local communities in the justice system.

2 A TRUTH AND RECONCILIATION COMMISSION

A proposal that might play a role in dealing with the issue in Rwanda is the idea of a truth and reconciliation commission. These institutions create a record of human rights abuses that is as complete as possible, including the nature and extent of the crimes and a full record of the names and fates of the victims. Some such commissions have covered very short periods while others have covered much longer but still well-defined periods.⁵ A truth and reconciliation commission can be set up in a variety of ways. Tailoring the commission's mandate and powers to both the country's current situation as well as its history provides the best chance for success.⁶

Although Rwanda presents many daunting challenges for a truth and reconciliation commission, or any other process that would promote unification and tolerance, it is appropriate for a number of reasons.⁷

4 In fact, as of June 1996, two years after the killings occurred, only a very few of the accused had been given hearings to determine if there was sufficient evidence to hold them, and none had been tried. See McKinley 1996. The first trial under the auspices of the International Criminal Tribunal for Rwanda did not take place until 10 January 1997, two and a half years after the events at issue. See Hranjski 1997. At the time of the first trial, only 21 others been indicted under the tribunal and of these, only 13 were in custody. See Turner 1997.

5 See generally Sarkin 1996.

6 The high profile investigation by the Organisation of African Unity into the causes of the 1994 genocide in Rwanda and its effects on Africa's Great Lakes Region announced at the beginning of June 1998 could also assist in the healing process in Rwanda as well as in other countries of the region. The Secretary-General of the OAU said the inquiry would not be a criminal investigation nor would it run counter to the work being done by Rwandan courts and the International Criminal Court on Rwanda in Arusha, Tanzania and that a special fund had been created to support its work. See Electronic Mail and Guardian June 4/5 1998 at <http://www.woza.co.za/africa/genocide.html>.

7 Schabas 1996: 559 notes that "Rwanda has rejected . . . a truth commission. The idea of having a truth commission has, however, been explored by the Rwandan Government. Thus, a large delegation of the South African Truth and Reconciliation Commission went to Rwanda in October 1996 and met with government officials. Rwandan officials then went to South Africa to visit the TRC in January 1997. However, the Rwandans commented that reconciliation would be nice but that they preferred justice and reconciliation could wait". The Minister of Transport also commented "we don't need truth, we know who did what". See Goodman 1997.

Firstly, the ongoing animosity and retributive violence between the current and former governments and their respective followers is evidence that the *status quo* is not working. While the violence has been reduced in the recent past, if a new method for addressing the problems is not implemented, the violence will continue.

Secondly, the Rwandan government is not equipped to channel all responsible parties through the traditional legal system.⁸ Thus far, attempts to do so have led to increased human rights violations, anger, and distrust of the system among both victims and accused.⁹ Even if the system could accommodate the tremendous number of accused, it does not provide victims with a means of telling their stories and venting their hostilities in a controlled and non-violent manner. They are not participants in the process and therefore do not receive the kind of psychological benefits achieved by a truth and reconciliation commission.

Additionally, a truth and reconciliation commission can facilitate a national catharsis (Sarkin 1998). Should the commission be successful in its work, future generations will be served by the knowledge that the record of past abuses is as complete as it can be. Such a record should include the nature and extent of the crimes committed, the names and fates of the victims, and the identities of those who gave the orders and those who executed them.¹⁰ The hope is that such a record, in combination with the recommendations made by the commission, will ensure the avoidance of such human rights violations in the future and will also further the development of a human rights culture.

A properly-constituted commission would generate public awareness of what really happened. This is necessary to counter the extensive propaganda being circulated by the displaced Hutu leadership that denies the genocide and places the blame for all past violence on the genocide victims.¹¹ This has led to further anger and resentment on the part of the victims and to an entrenched belief among the perpetrators that they truly were acting in self-defence. Government tactics also assist in confirming the perceptions of perpetrators who believe that they were not the instigators of the violence. The benefit of this would allow forums in many communities all over Rwanda to come together and hear testimony about events during the genocide. Survivors would be able to tell their stories to their communities and thereby have an opportunity to restore their dignity and self worth.

In the absence of the processes envisaged in the workings of a truth and reconciliation commission, anger, resentment, hatred, and revenge tend to be the order of the day. If the future is to offer an improvement on the past, there must be both a conscious and a continuing rejection of the crimes committed and the ideology that justified them. In the case of

8 See Reis 1997: 648 and Cousineau 1996.

9 See Reis 1997: 648.

10 See Zalaquett 1989.

11 See Human Rights Watch 1994. Amongst the Hutu the view that is held is that there was no genocide but rather killings by both sides in the context of a war and that there was no extermination of the Tutsis by the Hutus.

Rwanda, the current tendency of the Hutus to deny the genocide while at the same time justifying their actions on the basis of their own perceived or feared losses (of property, prestige, position, security, self-esteem and so on) will continue, and they will mourn only for themselves. Such a mindset makes true reconciliation all but impossible. Only by publicly and collectively acknowledging the horror of past human rights violations is it possible for a country to establish the rule of law and a culture of human rights.

Should a truth and reconciliation commission be established, victims across the spectrum will have a credible and legitimate forum through which to reclaim their human worth and dignity; perpetrators, irrespective of persuasion and motivation, will have a channel through which to expiate their guilt. "The confession itself, irrespective of any eventual criminal sanction, is seen as an important source of justice for victims" (Schabas 1996:557). Failure to establish this kind of process disregards the rights and views of victims, denies the need for a healing process, prevents recovery of the past, imagines that forgiveness can take place without full knowledge of whom and what to forgive, and fails to establish human rights values as the core standard for the future.

In Rwanda resentment and hostility are still prevailing sentiments. A truth and reconciliation commission could develop a complete picture of the causes, nature, and extent of gross violations of human rights and, importantly, make this known. It could also provide a mechanism that would facilitate confession of crimes and ease the pressures on the weak criminal justice system. If the route of granting amnesty is chosen, it can assist in this process or suggest sentences for persons who make full disclosure of all the relevant facts relating to acts associated with a political objective. Such a truth and reconciliation commission should establish and make known the fate or whereabouts of victims and restore the human and civil dignity of survivors of abuse by granting them an opportunity to relate their own accounts of the violations they suffered. By recognising and publicising the victim's story, the inherent worth and dignity of the person is acknowledged. In addition, the commission can recommend such reparation measures as are possible in the circumstances.

A commission can also compile a public report detailing its activities and findings and recommend measures to prevent future violations of human rights. Several positive consequences would flow from this. First, it would deter new governmental authorities from committing abuses themselves because they will have to follow the rule of law as there will be greater scrutiny and accountability. It would demystify the past and expose the previous regime's brutality and its inability to govern fairly. It would imbue the new government with respectability because, especially by prosecuting the planners of the genocide, it would be sending the clear message that no one is above the law, and that ethical values may not be discarded in the name of a political goal. Finally, it would legitimise the new government's actions because it upholds the rule of law.

A possible danger, and something that should be anticipated and proactively addressed, is the fact that a truth and reconciliation commission holds the potential of opening up old wounds, renewing resentment and hostility against the perpetrators of abuses. Therefore, careful planning

and preparation is crucial to ensure that the process achieves its aims and objectives. If this is not done, revenge and retaliation killings might result.

3 A Gacaca Truth, Reconstruction and Rehabilitation Enquiry (GTRRE)

Although a national truth and reconciliation commission is a necessity, the government of Rwanda believes that such a commission is not a feasible option at the present time for a number of reasons. One reason is that the process should begin at local level to bring these communities together. The war occurring in the region involving Rwanda and Congo is another reason why such prospects are remote. In addition, the Rwandan government, which would have to establish and support such a process, seems to be unwilling to do so at present. The main reason for this reluctance to have a national process seems to be more for political reasons than any other. Failing to have such a process will almost definitely have major long term negative effects for individual and group relations.

It is possible that the Gacaca, a traditional community-based mechanism, could be used as an interim measure at local level to ease some of the pressures and problems that face Rwanda in the immediate future. This must, however, be seen to be short-term, interim solution being a prelude to a national truth and reconciliation process. It is critical that in the not too distant future a national truth and reconciliation process is established, otherwise the spiral of ethnic violence will continue to remain a feature of the Rwandan landscape.¹²

The Gacaca has a dispute resolution focus and derives its name from its meaning 'lawn' that is, referring to the fact that members of the Gacaca sit on the grass when listening to and considering matters before them. The Gacaca, similar to nearly all systems of traditional law, is contingent upon culture. It is established upon principles of morality and reverence of life. As such it cannot be examined in a detached way but has to be examined in the context of the society it forms part of. Taking the context into account is crucial given the changes that have occurred since the genocide in Rwanda. As a result of the killings and population movements that have occurred, Rwandan society has fundamentally changed and changes to the family and family relationships have also occurred. This has resulted in changes in the use of the Gacaca and the role these structures play. The system is still uncomplicated, but families approach the Gacaca less frequently and people tend to prefer using the state courts.

In the past the Gacaca has considered issues around marriage, divorce, succession, parental authority, injury, and land disputes. One of its major purposes was to re-establish order in a community. However, it did not deal with murder, and certainly not ethnically-motivated murder. Allowing the Gacaca to change its role to move into dealing with issues such as murder, as well as rehabilitation, reconstruction and reconciliation after the genocide, could be outside of what it could manage. In addition, many of the people who have returned to Rwanda after living outside the country

12 See Sarkin & Varney 1993.

for many years have no experience with the Gacaca. It may be possible to remedy this with training, but the need for skills would be enormous. An enormous benefit of a local-level Gacaca is that language is generally not a problem.

The Gacaca has been operating in a few communities since the genocide. It involves the community in the process of dispute resolution, making the process community-based. It acts as a local healing and dispute resolution mechanism that is cheap and accessible. In general where these structures operate, people have some degree of confidence in the system as they see respected community figures serving on the Gacaca and are able to observe the proceedings without leaving the areas where they live.

The name of the Gacaca should be changed for the purpose of dealing with the legacy of the genocide. This name change would designate specific functions, aims and objectives. It may be useful to use the term Gacaca Truth, Reconstruction and Rehabilitation Enquiry (GTRRE). It may even be useful to include the term 'reconciliation' in the name. This may be controversial in Rwanda but the benefits of its inclusion would be enormous. It would help to instill confidence in members of the community who feared such a process that the exercise would be beneficial in the long term. It would also help to ensure that the process is free of revenge, animosity and bitterness. The focus of the Gacaca would also be to reduce these feelings in order to allow neighbours to coexist in peace. While it would be useful to use the Gacaca in all communities in Rwanda for this process, the problems in setting them up all over the country immediately and in a proper, orderly fashion will be enormous. It therefore makes sense to establish two or three pilot Gacaca to test the process. If these are successful, the government could allow an increasing number of *communes* or *secteurs* to have Gacaca. Eventually the system could be expanded to all parts of the country, possibly over a five-year period. It would probably be wise to allow the system to expand slowly to avoid problems.

Customarily the Gacaca were composed of older men who were respected in their communities. Their role was to impart justice impartially, with sincerity, wisely, honestly, and freely without benefiting themselves. However, it may be that the GTRRE might need to be composed of all members of the community, men and women, Hutu and Tutsi, to ensure that its process would encompass all issues and so that certain groups of people would not feel marginalised. For the process to work, how people were placed onto the GTRRE would be a critical factor. Unless everyone as in a particular community bought into the process, the work of the structure would be doomed from the outset. To overcome the fears of survivors, any application to establish a GTRRE must show that all groups in the cellule agree to apply. Victims of the genocide expressed fears at workshops in Rwanda that the use of the Gacaca could lead to arbitrary and summary justice. If a precondition of establishing a GTRRE is that all groups in the community must agree to apply, this will encourage local bargaining and discussion about the choice of people to serve on it. To facilitate the agreement of local groups to apply for a GTRRE, there may be a need, in some cases, for special counselling, especially for widows

and widowers who feel they have nothing to gain from co-operating. This would also be an important aspect of the preparation programme.

Mechanisms need to be found to ensure that both Hutus and Tutsis sit on the GTRRE. Membership should not be appointed, and people should be encouraged to participate. It is critical to the effectiveness of a GTRRE that it is seen to be fair and unbiased. Individuals who serve on it must command the respect and support of the people and all who appear before it.

Government should provide space, assistance and encouragement for the GTRRE. This will make the local population less suspicious and give the people a greater sense of ownership. If the government is seen to be imposing these structures on communities, this will have a highly negative effect on the mission and the process will be seen to be a witch hunt, rather than something suited to everyone's needs. The government should set out terms of reference, which should be as inclusive as possible, and procedures that allow *secteurs* or *cellules* in Rwanda to establish local GTRRE structures. The desire of the survivors to get the truth, and the desire of prisoners and their families to speed up the process of justice, would lead communities to apply.

The benefits of the process to all must be advertised and promoted. While truth would be a major goal, the opportunity to promote reconciliation should not be lost. Bringing together a community where rifts exist should not be undertaken without ensuring that a process to heal those rifts is in place. The aims and goals of the GTRRE need to be fully discussed and accepted. On the one hand, it is useful to bring local communities in on the process of justice to alleviate some of the difficulties facing the formal legal system. However, it must be clear that certain activities of perpetrators like those of the organisers of the genocide should not be placed before the GTRRE. These individuals should still be prosecuted in the courts to ensure accountability and the rule of law. It is critical that the courts trying these people should be above reproach and be perceived as fair and independent. Whether these trials occur inside or outside Rwanda should depend on the ability of the courts to achieve the independence and neutrality. GTRRE structures should be able to hear everything concerning people who appear before them, and should be able to hear testimonies both from victims and perpetrators. The exercise should aim to arrive at an understanding about what happened and why things were done. An additional component could be some very low level of compensation, although this could cause complications for the process and see it have a financial focus.

Part of the exercise must be to ensure that perpetrators feel confident that this is a fair, impartial process, and they will be dealt with and treated fairly. Members of the GTRRE structures must therefore be fair in carrying out their mandate. Also, the method by which people are appointed, or elected, or to the GTRRE must be seen by all to be inclusive and fair. If the GTRRE is viewed as a government-established and government-run structure, or one staffed by people who do not instill confidence in all the people, especially those who may appear before it, the process will be doomed even before it begins.

The manner in which people are dealt with by the GTRRE will also be crucial in determining whether the process is successful. It will also be necessary to attempt to educate the communities where GTRRE structures are to be set up about the benefits of a process conducted with dignity; the way preconceived notions and beliefs about people who appear before the GTRRE could undermine its work; and how the process will take place. This will help to avoid the jeering and booing which has occurred in the courts when alleged genocide perpetrators are on trial.

GTRRE structures should not be permitted to sanction people by way of imprisonment or other types of physical sanction. As far as possible, the process ought to attempt to get consensus and hand down punishments that are accepted by all and which serve to heal the community. Fines or community service could be useful in achieving that goal. Services that can rebuild community activities or infrastructure will lead to positive results. It is necessary that punishments imposed are not seen to be the imposition of sanctions by victors on the vanquished. The GTRRE will also have to deal with ancillary items such as land appropriation and the numerous complaints about the possession or occupation of land by returnees and others.

3.1 Whose commission?

It is, of course, vital that such a process is credible and legitimate. Otherwise it will not be accepted by all parties and whatever result it arrives at will be questioned. In other words, it is crucial to ensure that the commission has political legitimacy. In the absence of such legitimacy, whatever record of past human rights abuses the commission produces will be contested and reconciliation will remain a vain hope.

No model is ideal for all purposes and no model can be transplanted from one situation to another, particularly in view of the cultural, historical, political and other differences across the world. However, it is obviously useful to attempt to learn from the experiences of other countries and to adapt their models to fit specific circumstances.

Various key factors have to be considered when establishing a process. For example, the choice of the time period over which human rights violations are to be examined will often determine the acceptability of the process. In order to promote reconciliation it is vital to ensure that the process has political legitimacy. If the GTRRE has the power to suggest sentencing, it is vital that proceedings are characterised by due process so that those who appear before it are given sufficient legal advice and assistance.

One cannot take a truth issue forward without addressing the wider political context. The question is: how does one produce a process that also moves toward national reconciliation?

3.2 Legitimacy

It is vital to the success of the project that all sectors of the population buy into the process. If the process is not seen as independent of the government it will affect the objectivity of the process, at least in the perception of the population.

If such a process is to enjoy legitimacy and fulfil its function of enabling reconstruction, rehabilitation and reconciliation, its establishment must be informed by an understanding of the particularities of the history and transition of the country within which it is to operate. The extent to which a process is established by the new order, in co-operation with those who were vanquished, plays an important part in determining whether such a process can assist in national reconciliation. On the other hand, the extent of the involvement of the vanquished perpetrators also has a bearing on the acceptance of that institution by those who suffered human rights abuses. Great sensitivity is called for in this regard.

Even though there cannot be one final “objective truth”, it is critical that the version of “the truth” arrived at by the commission embraces the experience of all. Unless the people feel that they have been a part of the process of decision making, they will doubt the integrity and motivations of those setting up the commission and those involved in its processes.

Legitimacy for a commission means that the process is accepted as an objective body capable of finding an unbiased “truth”. This perception is generally achieved by having a well-balanced commission of highly respected people. A process is perceived to be well-balanced when the individuals serving on it are from a variety of ethnic and political backgrounds and constituencies. The key to legitimacy is that the enquiry must not only be unbiased and nonpartisan in fact, but it must also be perceived as such by the Rwandan population as a whole.

To attain legitimacy, an enquiry must be an officially designated non-partisan entity.¹³ This means that the process cannot be controlled or influenced by the government or even appear to be under the government’s control or influence. To ensure that this is the case, the very creation and setup of the process must be unbiased and, most importantly, perceived as such by the country’s nationals.

3.3 Establishment of the GTRRE and appointment of members

Who appoints the members of the enquiry is crucial. If the government appoints the members many will feel that it is not sufficiently independent to arrive at a version of the truth with which they will be satisfied. Thus, a neutral process is critical to ensure that those who serve have the public confidence and trust.

Much of the violence in African states revolves around ethnic, religious, geographic boundary, or other group-identity antagonisms. Rwanda is no exception. If a sector (or sectors) of the population believe the enquiry is partisan then whatever truth about the past it discovers and reports, regardless of whether or not it is true, will not be believed and respected by that group of people. Thus, it is particularly important that the GTRRE structures represent a wide cross section of society and not be perceived as one-sided or oriented to a certain outcome, otherwise, they will be considered biased and therefore illegitimate.

¹³ See Hawthorn 1997.

3.4 Assistance and resources

A GTRRE process needs financial, training and other support. It must have sufficient resources for carrying out its work. Any community that wishes to establish a GTRRE must agree to a preparation programme of at least three months duration. The government could define the key elements of the preparation programme and then accredit NGOs to carry it out. This would help maintain the independence of the GTRRE from government. The content of the programme could include elements such as a description of what the GTRRE will do and what powers it has, which cases it will hear first, what proposals the GTRRE can make to the courts, preparation of witnesses, arrangements of prisoners to come to the hearings, and other matters. After the preparation programme is successfully completed, the community would establish its GTRRE. The GTRRE members would then need a further short training programme that would also be run by the appropriate NGO. In this regard it is important to note that the research by PSMC, the Community Mental Health Care Programme in Butare, Rwanda, which has shown that many local people at the *cellule* level and many prisoners have only a very limited understanding of the genocide law and of the legal procedures, and that they do not have adequate access to radio or written information.

3.5 Process of the GTRRE

If the process is not well managed, the danger is that it will open wounds without facilitating healing. It is vital to consider what happens when victims go home because many must live alongside perpetrators. The process must allow for the victim/perpetrator relationship to be dealt with thoroughly. The process of airing the evil done and acknowledging the suffering of the victims sparks the catharsis required for reconciliation. However, there is a danger that a truth and reconciliation commission can do more harm than good and therefore any process must be carefully structured and sufficient groundwork laid to prepare a community for events and issues that emerge.

Public hearings should be held, listening to statements from victims' family members, additional testimonies, and other reports. The hearings should be open to the public so that the Rwandan people can attend and experience for themselves that the commission is unbiased in its process. Broadcasting hearings over the radio would also help to ensure popular awareness and participation in the process.¹⁴ Such open processes will give the GTRRE operations the transparency required to achieve legitimacy.

3.6 Relationship to the criminal justice system

In order for a GTRRE to maintain its legitimacy, it must be independent of the national criminal justice system. However, the proceedings of such a commission and criminal prosecutions need not be mutually exclusive. An

14 However, a concern is that Radio Rwanda is government-owned and therefore might not be perceived to be impartial. See US Department of State 1997: 7.

enquiry process may exist where criminal trials are being pursued. In fact, such a combination could be tremendously useful, if not necessary, for determining the truth and for reconciliation. In isolation, trials allow for recognition of only a single version of events.¹⁵ An enquiry, on the other hand, analyses various versions of events and can validate more than one version by accepting differing testimony and incorporating all versions into a report. Trials can help lead to truth; however, the judicial system must always adhere to international human rights norms such as due process and assignment of individual, not collective, responsibility.

In Rwanda, while a GTRRE can work with the criminal justice system, it will have to preserve its independence. If it is seen to be simply an arm of the criminal justice system, its credibility will be questioned. There are various possible ways forward.

Firstly, the GTRRE could accept confessions from those who are in prison. It would then prepare a dossier for each case and the case would be passed back into the criminal justice system where the process could continue.

Secondly, the GTRRE could be completely separate from the criminal justice system and play no part in collecting confessions. It could, however, play a facilitative role by being a neutral link between the criminal justice system and the accused.

A third option would be for the GTRRE to impose sentences itself. However, this option would be very controversial and could undermine the whole process of reconciliation and may taint the Gacaca structures forever.

Even if the GTRRE is given the very limited mandate which requires it to pass cases back to the criminal justice process, its role would still be valuable. It is probable that individuals would be more willing to take their accounts to a legitimate GTRRE structure rather than directly to a government prosecutor. In this sense, the GTRRE could act as a facilitator and, in effect, is passing a sentence even though the formal sentencing process still lies with the criminal justice process. The extent to which the government would be willing to give the GTRRE this power would be a matter to be negotiated in crafting the commission's mandate.

The question as to whether the GTRRE has the power to grant restitution is one that needs to be carefully considered. It might make perpetrators suspicious and unwilling to accept the process. It should also be remembered that many of them have few assets and thus expectations could be raised which cannot be fulfilled.

4 CONCLUSION

If the Rwandan government wishes to adequately address the massive human rights violations of the genocide, it must go beyond mere criminal trials. Despite the existence of the UN Security Council's war crimes tribunal, the immense task of trying all the accused who are within the Rwandan system is currently too great for the system to bear. The deficiencies of

15 See Chayes 1997. But see how Osiel (1996) explores how criminal prosecutions contribute to the collective consciousness and truth-telling.

the Rwandan judiciary are a major concern. Thus, reliance on the Rwandan judicial system, and to even a lesser degree the international tribunal, to achieve reconciliation and break the country's lengthy cycle of violence will prove fruitless.

The key concern in combating impunity is to develop an objective truth¹⁶ to which all can turn for a reliable assessment of what has occurred.¹⁷ Unless an independent national process is developed, with institution or institutions, which provides the opportunity for victims to tell their stories and for those who are guilty of human rights violations to confess, Rwandan society will continue to live under the shadow of division, tension, and violence. A credible and legitimate national truth and reconciliation commission could address the problems of Rwanda's history and ongoing crisis.

The use of the Gacaca institutions can only be an interim measure that helps to alleviate the pressure on the courts and the prisons. Rwanda must start down the road of a national reconciliation process soon. Unless this happens, ethnic violence will continue. A national truth and reconciliation commission in its work and in its report should be comprehensive and public. Because so many of the Rwandan people are both rural and illiterate, its report should be dealt with in nationwide radio broadcasts, in order to reach the widest audience possible.

This body need not replace criminal prosecutions or grant amnesties. In fact, international law prohibits the granting of amnesty for certain crimes that have occurred in Rwanda.¹⁸ However, political and practical considerations, such as resource constraints, must lead to the conclusion that not everyone can or should be prosecuted. The commission should instead complement other initiatives already under way in Rwanda, serving as a forum in which victims can tell of their suffering, be heard and acknowledged, and so regain their dignity.

16 While one may argue that no such thing exists, the term "objective truth" describes as complete and unbiased account of the facts of a situation as possible, achieved through extensive fact-finding by a legitimate, independent body.

17 See Fellous 1993: 343: "Regardless of the situation, we all agree that the chief priority is to establish the facts, that is, to pursue an investigation. This is an obligation owed the victims and their relatives, an obligation owed historical memory and a safeguard against forgetting".

18 See Scharf 1996: 41; Bassiouni 1996: 62; Orentlicher 1991 (highlighting international legal obligations to prosecute); Joyner 1996: 127. The Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948, specifically creates a duty for state parties to prosecute. Article I obliges the contracting parties to "confirm that genocide . . . is a crime under international law which they undertake to prevent and punish". Article IV provides that persons "committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals". Article V calls on state parties to "provide effective penalties", and Article VI provides for trials by "a competent tribunal" of the state where the act occurred or by an international tribunal. See also Orentlicher (2562-2566): "If the punishment of (genocide) was left to the State in question, the convention on genocide would be in the nature of a fraud."

As important is the contribution a truth and reconciliation commission can make towards a process of justice for the future. If it is a legitimate and impartial body and if its processes facilitate participation by all, so that all Rwandans can discern in its report some acknowledgement of their particular truths, then catharsis and reconciliation can be the fruits. The ground is then prepared for the prevention of future abuses and the need for a culture of human rights becomes part of the official record. Additionally, the truth and reconciliation commission's process and recommendations should attempt to re-establish the rule of law. The best way to prevent future human rights abuses is by strengthening the rule of law and the corresponding independent judicial institutions and uncorrupted governmental bodies.

Sources

- Amnesty International *Mass murder by government supporters and troops in April and May 1994* AI Index AFR 47/11/94 London: Amnesty International 1994.
- Amnesty International *Rwanda: crying out for justice* 6 April AI Index 47/0/95 London: Amnesty International 1995.
- Bassiouni MC. "International crimes: *jus cogens* and *obligatio erga omnes*" *Law and Contemporary Problems* 59 Autumn 1996.
- Chayes A "Statement" in *Truth commissions: a comparative assessment: an interdisciplinary discussion held at Harvard Law School in May 1996* edited by Henry J Steiner Cambridge Mass: Harvard Law School Human Rights Program 1997.
- Cousineau M *L'Établissement de l'État de Droit au Rwanda: un But Irréalizable* *Ottawa Law Review* 28 1996.
- Des Milliers de Hutus Massacrés au Rwanda Liberation* October 1 and 2 1994.
- Fellous G "General Report of the Commission Nationale Consultative des Droits de l'Homme" in *Justice not impunity: International Meeting on Impunity of Perpetrators of Gross Human Rights Violations* edited by the International Commission of Jurists & Commission Nationale Consultative des Droits de l'Homme Geneva: International Commission of Jurists 1993.
- Goodman D "Justice drowns in political quagmire" *Electronic Mail and Guardian* <http://web.sn.apc.org/wmail/issues/970131> 1997.
- Hawthorn G "Statement" in *Truth commissions: a comparative assessment: an interdisciplinary discussion held at Harvard Law School in May 1996* edited by Henry J Steiner Cambridge Mass: Harvard Law School Human Rights Program 1997.
- Hranjski H "Tribunal's 1 Rwanda genocide trial starts/war crimes: a former Hutu mayor is accused of sending 2,000 Tutsis to their deaths" *Orange County Register* A26 10 January 1997:

19 Nino 1996: 145 "Radical evil requires an evil political and legal framework in which to flourish."

- Human Rights Watch Rwanda a new catastrophe? Increased international efforts required to punish genocide and prevent further bloodshed *Human Rights Watch/Africa* Nov 6(12) 1994.
- Joyner CC "Arresting impunity: the case for universal jurisdiction in bringing war criminals to accountability" *Law and Contemporary Problems* 59 Autumn 1996.
- McKinley JC "76000 languish in Rwanda jails/prisoners accused in ethnic massacres are victims of ravaged judicial system" *Houston Chronicle* A8 24 June: 1996.
- Nino CS *Radical evil on trial* New Haven Conn: Yale University Press 1996.
- Orentlicher DF "Settling accounts: the duty to prosecute human rights violations of a prior regime" *Yale Law Journal* 100 1991.
- Osiel MJ "Ever again: legal remembrance of administrative massacre" *University of Pennsylvania Law Review* 144: 470-505 1996.
- Philpot J "The International Criminal Tribunal for Rwanda: justice betrayed" in *Challenges for law and lawyers in the next millenium: democracy in domestic and international law* Final report of the XIV Congress Proceedings of the International Association of Democratic Lawyers Brussels: IADL 1996.
- Preliminary Report of the Independent Commission of Experts in accordance with Security Council Resolution 935 par 148 New York: United Nations 1994.
- Reis C "Trying the future, avenging the past: the implications of prosecuting children for participation in internal conflict" *Columbia Human Rights Law Review* 28 1997.
- Sarkin J & Varney H "Traditional weapons, cultural expediency and the political conflict in South Africa: a culture of weapons and a culture of violence" *South African Journal of Criminal Justice* 6(2) 1993.
- Sarkin J "The trials and tribulations of the South African Truth and Reconciliation Commission" *South African Journal on Human Rights* 12:617 1996.
- Sarkin J "The Truth and Reconciliation Commission in South Africa" *Commonwealth Law Bulletin* 528 1997.
- Sarkin J "The development of a human rights culture in South Africa" *Human Rights Quarterly* 20(3) 1998.
- Sarkin J "The necessity and challenges of establishing a truth and reconciliation commission in Rwanda" *Human Rights Quarterly* 21(3) 1999.
- Sarkin J "Forthcoming. Promoting justice, truth and reconciliation in transitional societies: evaluating Rwanda's approach in the new millenium of using community-based Gacaca tribunals to deal with the past". *International Law Forum* 2(2) 2000.
- Schabas WA "Justice, democracy, and impunity in post-genocide Rwanda: searching for solutions to impossible problems" *Criminal Law Forum* 7 1996.
- Scharf M "The letter of the law: the scope of the international legal obligation to prosecute human rights crimes" *Law and Contemporary Problems* 59 Autumn 1996.

- Turner C "Rwanda war crimes tribunal mismanaged, report says; Africa: the problems have slowed efforts to prosecute killers in genocide UN says" *LA Times* A8 13 February: 1997.
- US Department of State *Rwanda country report on human rights practices for 1997* Washington DC 1997.
- Zalaquett J "Confronting human rights violations committed by former governments: principles applicable and political constraints, in *State crimes: punishment or pardon*" Aspen Institute Justice and Society Program reprinted in *Hamline Law Review* 13:623 629 1989.
- Zarembo A "Judgment day: in Rwanda, 93 392 genocide suspects await trial" *Harper's Magazine* 68 April: 1997.