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RWANDA'S GACACA COURTS: HOW TO DEAL WITH WIDESPREAD AND MASSIVE CRIMES

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Challenges prior to the setting up of gacaca courts

When about one million Tutsis were killed within one hundred days between April and June 1994 in Rwanda, only a few could think about the puzzling justice dilemma that could follow. As a direct consequence of the genocide against the Tutsis, the entire Rwandan administration was knocked down, including the judiciary, of which only five professional judges could be identified countrywide. Furthermore, tribunals, prosecution offices, prisons, just to mention a few, were totally sacked,[1] yet at this specific time Rwanda was facing its biggest head count of criminals ever. In the late 90s, the genocide penitentiary population in Rwanda's prisons was about one hundred thousand men and women. On the other hand, there were also a countless number of victims.

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Both victims and detained suspects were expecting justice from the newly established national unity government. As many observers agreed, however, it was quite impossible to prosecute and judge all those who participated in the genocide. The UN Security Council decided to set up the International Criminal Tribunal for Rwanda (ICTR) with the aim of trying genocide masterminds and ringleaders, among others, who occupied political positions in the government during the perpetration of the genocide.[2] For the UN and the international community at large, the ICTR was the best solution possible in dealing with such a widespread criminality compared to the total amnesty that was suggested by some other voices.

Though the ICTR seemed the most feasible and realistic option considering the number of perpetrators and available resources, it naively overlooked the fact that the 1994 genocide had occurred at an individual level, meaning: *it was either John who killed Sam or Mary who looted Laura's properties.* Therefore, prosecuting the former prime minister, Jean Kambanda, or the director of the Radio-Télévision Libre des Mille Collines (RTLM), Ferdinand Nahimana, as those who manipulated *John* and *Mary* to commit these crimes, would not make the slightest sense to *Sam's* surviving relatives or to *Laura*. In other words, the ICTR's justice pattern would partially address Rwanda's post-genocide justice issues. This would be a tacit consecration of impunity, which would definitely hinder the whole reconciliation process that was to follow. Justice is a personal issue, especially in criminal law.[3]

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The emergence of gacaca courts

The prosecution of high personalities before the ICTR did not, in any way, mean that other courts would not try any other genocide suspects should this fall within their jurisdiction. In line with this, the Rwandan government immediately started to adjudicate genocide cases before its classical courts, though they had very limited human, material and financial resources.[4] Statistically, it would have taken more than one hundred years for the Rwandan classical courts to try all the detained genocide suspects.[5] Therefore, the following dilemma was posed: should the government of Rwanda decide to free the majority of the suspects despite justice concerns of victims or should it maintain them incarcerated for long periods of time, with the risk of keeping under arrest innocent people? In either situation, the consequences would be dramatic in terms of human rights protection.

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1 Government of Rwanda, 'Genocide and Justice', available at *http://www.rwanda1.com/government/genocide.html*. See also E. Daly, 'Between the punitive and reconstructive justice: the Gacaca courts in Rwanda', *New York University Journal of International Law & Policy* 2002, p. 359.

2 UN Security Council's Resolution 955 of 8 November 8 1994 creating the International Criminal Tribunal for Rwanda (ICTR).

3 This is supported by the principle of personal guilt according to which every person should be held liable for his or her own crimes.

4 C. Kirkby, 'Rwanda's Gacaca courts: a preliminary review', *Journal of African Law* 2006, p. 99.

5 Rwandan classical courts had judged some 9.000 cases between 1994 and 2003; therefore it would take around 100 years to judge the 100.000 detainees. See for instance Amnesty International, *Rwanda: The Enduring Legacy of the Genocide and War*, Report AFR 47/008/2004, London: Amnesty International 2004; F. Reyntjens, *L'Afrique des Grands Lacs en crise,* Bordeaux: Karthala 1994.

6 Etymologically, the word 'gacaca' derives from 'agacaca', 'urucaca' or 'umucaca', which means lawn. It is a kind of pretty and clean grass where people in the rural Rwanda are used to sit after their land labor in order to chat. See A. Muberanziza, 'Ubucamanza na Gacaca mu Rwanda', *Revue Scientifique du Droit* 1998, p. 43. Ancient gacaca used to operate in parallel with *Mwami*'s formal judicial system.

7 Organic law No 40/2000 of 26/01/2001 setting up gacaca jurisdictions and organizing prosecutions for offences constituting the crime of genocide or crimes against humanity committed between 1 October 1990 and 31 December 1994, *Official Gazette of the Republic of Rwanda* No 6 (15 March 2001). This law has been amended several times. The most noteworthy amendment is that of 2004 that introduced three categories of crimes (basically masterminding the genocide, killing and assault and crimes against property) instead of four, it reduced the number of judges per cell, and it removed the district and provincial level gacaca courts that existed in the law of 2001. It also made participation in the gacaca mandatory, and built in a number of protections against sexual abuse.

8 In opposite of the ICTR that has jurisdiction on crimes committed between 1 January and 31 December 1994, Rwandan courts (including gacaca courts) have an extended jurisdiction running from 1 October 1990, which is the date when the Rwandan Patriotic Front (RPF) started its rebellion from Uganda.

9 See art. 51 of Organic Law No 16/2004 as amended by art. 9 of Organic Law 2008. Compare both with art. 1(d) of Organic Law No 08/96 of 30 August 1996, On The Organization of Prosecution for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since 1 October 1990, *Official Gazette of the Republic of Rwanda* No 17, 1996.

10 In total there were 9013 and 1545 gacaca courts respectively at cell and sector levels. See A. Muhayeyezu, 'La justice et l'indemnisation des victims au Rwanda', presentation in the 27th International Conference of Francophone Bars (CIB) held in Kigali on 17-19 December 2012. The cell is the lowest administrative entity in Rwanda and is made of less than 500 households, while the sector is the third level administrative subdivision.

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Community justice came as a remedy to this puzzle. The overall objective was to accelerate the trial of the 1994 genocide related cases in order to foster national reconciliation among Rwandans. The concept of involving the help of community justice was very simple: the genocide occurred mainly at daytime, which implies that people had seen who did what and where. They had the information, hence they could easily identify those who were involved in the killings and property looting in their respective areas. Next, the question was to know the framework in which this information collection could be done and how it could be useful. It was then remembered that in ancient Rwanda, during the time of monarchs commonly known as the *Mwami*, there existed an informal framework competent for important issues including criminal matters which enabled people to solve their own problems. The process used by the people in ancient Rwanda to solve their own disputes was called *gacaca*.[6] It was primarily established to settle disputes within the family or between neighbors. The aim of ancient gacaca was not punitive but rather to reconcile parties in a dispute for a peaceful coexistence in the community. So the gacaca, as practiced in the past, inspired Rwandan leaders to find ways to solve the genocide cases backlog.

Organization and functioning of gacaca courts

It is worth mentioning that the modern gacaca courts that dealt with the genocide cases were different from the traditional ones. They only adopted the name 'gacaca' and the idea of involving the masses in justice delivery.

Other than their traditional predecessors, modern gacaca courts were set up by the law.[7] Their jurisdiction was restricted to crimes committed between 1 October 1990 and 31 December 1994.[8] Suspects were put in three categories.[9] The first category comprised genocide planners and perpetrators who held leadership positions in the country at the time of genocide occurrence. In the second category, one could find notorious murderers and those who committed 'dehumanizing' acts against dead bodies, intentional homicide and manslaughter, assault with the intention to kill (presumably attempted homicide) and all other offences against persons not included in the first category. Category three only consisted of property-related crimes.

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The structure of gacaca courts was built up along Rwanda's administrative entities. There was a gacaca court at the basic 'cell level' and two gacaca courts at the higher 'sector level', countrywide.[10] The gacaca court at cell level had exclusive jurisdiction on the suspects of category three. Before that, it was entrusted with the task of categorizing suspects

and compiling the information about what happened within the boundaries of that very cell during the 1994 genocide. Gacaca courts at sector level were competent to judge suspects in category two, whereas the sector gacaca court of appeal was competent to hear the appeal of the decisions delivered by both the cell and sector gacaca courts. The accused in the first category were subject to the classic courts.[11]

The seat of each gacaca court was composed of seven 'Inyangamugayo'[12] (judges) and two substitutes. The residents of the cell elected judges for the gacaca court at the cell level. The cell-level judges in turn elected those to sit in gacaca courts at the sector level. Literacy was not a requirement for a person to be elected as a gacaca judge.[13] This was frowned upon by many people, as they did not understand how an illiterate common person could judge a crime as serious as genocide.

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From a purely legal perspective, it is absurd to entrust an illiterate layman with the task of judging genocide suspects. This is partly due to the fact that from a classical point of view, justice is associated with complex written rules and procedures, so only people who went to law schools can be entrusted with such a complex task. With this approach, justice is what the judge decides after hearing both parties and most of the time, it is all about how well both parties' lawyers understand the law and how well they are able to find their way out. The discussion before the judge is not only about facts but more about the applicability of legal rules. For judges to follow such a discussion, they should be able to understand both parties' reflections and arguments. This means that the classical judges need to go to a law school; otherwise, judges would not be able to understand parties' submissions. But things were different with gacaca courts.

The philosophy of gacaca courts was essentially about finding out what *factually* happened during the 1994 genocide. Therefore, the gacaca judges' task was mainly to assess the accuracy of facts as described by witnesses. To do this, not much of law studies was needed, because common sense was the most important tool for these judges. For the sake of consistency, suspects were never allowed to be represented by a lawyer, nor was there any public prosecutor to formerly charge the accused before the gacaca courts. Information was collected through a house-by-house process within the cell. During a gacaca hearing, any person could stand and witness either in favor of or against the accused. The people attending the hearing played the role of either the prosecutor or the defense lawyer. In the end, the judges could decide on whether or not the accused committed the alleged crime based on attendees' submissions.[14] The accused in category two could face up to life imprisonment, while those in category three could only be condemned to restitute or pay back the looted or destroyed property. The amount of the sentence could vary depending on whether or not the accused confessed to his crimes before the trial or at a later stage of proceedings.

Achievements and legacy of gacaca courts

The occurrence of gacaca courts hearings countrywide in each cell once a week accelerated genocide trials. As of the time of their closure in December 2012, gacaca courts have heard and tried 1.958.634 cases in less than nine months. Only 14% of the accused were acquitted.[15]

This quantitative success, however, is clearly mitigated. On the one hand, most of the victims and accused are not fully satisfied. The former frequently assert that gacaca judges were most of the time lenient towards the accused, while the latter often allege that the gacaca process and its sentencing were not fair enough. This kind of dissatisfaction is not, however, a peculiar characteristic of gacaca courts. It is rare to find justice decisions that equally satisfy both parties. The most stringent criticisms against gacaca courts suggested that the gacaca process did not observe the modern fair trial standards.[16] To measure the applicability of such criticisms, one should bear in mind the context and the aim of gacaca courts.

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However, the legacy of gacaca courts is noteworthy. Unlike all other mechanisms put in place to address the aftermath of the 1994 genocide against the Tutsi in Rwanda, gacaca courts have brought justice closer to victims and suspects' communities. Gacaca courts have demonstrated that general amnesty or a justice system that prosecutes only criminal masterminds and ringleaders is not the only way to address massive human rights violations. For the Rwandan government, gacaca courts have played a pivotal role in eradicating the culture of impunity, truth telling about the genocide, and in strengthening unity and reconciliation among Rwandans.[17] Most importantly, no one – not even its opponents – has ever come up with a better option than the gacaca courts in addressing the genocide that happened in Rwanda.

11 However with the amendment of 2008, a portion of 1st category suspects were also sent to gacaca courts. See art. 1 of the Organic Law 13/2008 of 19 May 2008 (*Official Gazette of the Republic of Rwanda* No 11 of 1 June 2008).

12 The word *Inyangamugayo* means a person of integrity. These judges have to meet a number of criteria, like not having participated in the genocide, having a spirit that is 'free of sectarianism' and characterized by 'speech sharing', being of high morals and conduct and not holding political or administrative office. See art. 14 & 15 of the Organic Law of 2004 as completed and modified respectively by art. 3 of the Organic Law 2007 and 4 Organic Law 2006.

13 Only five of the seven members of the seat had to be literate. See art. 11 of the Organic Law 2004, that states: 'Members of the Seat for a Gacaca Court elect among themselves, with a simple majority, the Coordination Committee made up with a President, a first Vice-President, a second Vice-President and two secretaries, all of them must know how to read and write Kinyarwanda (…)'. This provision remained in force till the closure of gacaca courts in December 2012.

14 In substance, the debate before gacaca courts was about whether or not the accused was seen at the crime scene and the description of his role.

15 Muhayeyezu, *supra* note 10.

16 Human Rights Watch, *Justice Compromised. The legacy of Rwanda's Community-Based Gacaca Courts*, New York 2011.

17 Muhayeyezu, *supra* note 10.