AFRICAPORTAL
a project of the africa initiative

BACKGROUNDER
NO. 18 > JANUARY 2012

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CHALLENGES OF TRANSITIONAL JUSTICE IN RWANDA

BY IZABELA STEFLJA

SUMMARY

- Two systems of retributive justice were set up by the international community and the Rwandan government to try suspects of the 1994 genocide: the Tanzania-based International Criminal Tribunal for Rwanda and the local grassroots *gacaca* courts in Rwanda.
- Achieving the twin objectives of justice and reconciliation in Rwanda is a complex process. While truth-finding and retribution can contribute to reconciliation, the potential of aggravating animosities and victimization in the process remains a concern.

RWANDA'S QUEST FOR RETRIBUTIVE JUSTICE

In the aftermath of the 1994 genocide in Rwanda, the international community and the Rwandan government embraced criminal prosecution as the primary approach to the restoration of law and order in the country. Leaders and policy makers inside and outside Rwanda cited breaking "the culture of impunity" and "the cycle of hatred" as the reasoning behind the retributive approach. Another key reason behind the quest for retributive justice is that the main organizers of the genocide were easily identifiable political, military and media leaders of Rwandan communities, not obscure actors. In general terms, the genocide was a collective act in which hundreds of thousands of Rwandans participated, many of whom found themselves in prison in the immediate years after the mass killings (Oomen, 2005: 885. See also Mamdani, 2002 and Prunier, 1995).

Two forms of retributive justice were adopted by the international community and the Rwandan government. The international community, represented by the United Nations Security Council, set up the International Criminal Tribunal for Rwanda (ICTR) to prosecute key players in the genocide. The ICTR's main purpose is "to contribute to the process of national reconciliation in Rwanda

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and to the maintenance of peace in the region" and to prosecute persons involved in the genocide and other violations of international humanitarian law (ICTR, 2011). In addition to these officially declared purposes, scholars and policy makers have assigned a number of aims to the tribunal, including the establishment of a collective memory of the genocide, the foundation for a democratic order and a human rights culture, as well as the promotion of reconciliation (Van der Merwe et al., 2009: 3-5; Betts, 2005: 737; Lu, 2006: 201).

On its part, the government of Rwanda established the "novel" yet "traditional" judicial initiative of *gacaca*. The *gacaca* are based on a three-point structure:

- Ordinary courts, including the ICTR and national courts, judge key orchestrators of genocide while *gacaca* courts judge the majority of the accused in their respective administrative units.
- The *gacaca* function by decentralizing or popularizing justice, with each *colline* (hill) carrying out its own trials and lay persons serving as judges.
- Confession, a discursive element, is key to the process as it is the main way of collecting information and allowing for the "truth" to surface from the bottom-up (Ingelaere 2009: 515-6).

The *gacaca* are an innovative attempt to promote accountability and the rule of law and, but most importantly, they are a relatively speedy way of handling the prosecution of hundreds of thousands of imprisoned Rwandans. The *gacaca* incorporate the traditional values of Rwandan dispute resolution mechanisms.

Over the years, the success of the two mechanisms in accomplishing justice and paving the way for reconciliation and reconstruction has been debated by various local and international, as well as actors inside and outside government. Key concerns include the quality of justice achieved, success in reestablishing the rule of law, the financial costs of transitional justice and the contribution to peace-building and healing.

CRITICISM OF THE ICTR

The ICTR has been widely criticized by international and Rwandan sources since its establishment in 1995. In particular, its inefficiency, the excessive length of the proceedings, bureaucratic troubles, corruption, and immense costs have been cited as main concerns.

A key problem of the ICTR is its disconnect from Rwandan communities; its audience seems to be international rather than Rwandan. There is a common perception that Rwandans are "unaffected" by the ICTR or find the institution "irrelevant" (Tiemessen, 2004: 60), with the ICTR's geographical location in Arusha, Tanzania, in itself suggesting a degree of distance from Rwandan every-day life. Although it has set up an outreach office in Kigali, the impact of this office is minor, since most ordinary Rwandans know very little about the tribunal and the information they receive is usually perceived as the propaganda of the Rwandan government. Since the government has an interest in ensuring its authority and legitimacy by favouring its own *gacaca* initiative, it transmits minimal information to the ICTR and often highlights the tribunal's negative aspects.

Additionally, individuals prosecuted at the ICTR are far removed from Rwandan communities because of their former elite status in pre-genocide times. This is in stark contrast to the persons prosecuted at the *gacaca*, who are reintegrated into local communities once their sentences are over.

Despite numerous criticisms leveled at the ICTR, it should be recognized that the institution managed to prosecute several key leaders of the genocide, including the prime minister, several officials in key ministerial positions, military leaders, as well as local leaders in media, business, and the church. In addition, the ICTR managed to bring about ground-breaking case law recognizing rape and sexual violence as acts of genocide.

CRITICISM OF THE GACACA

Criticisms of the *gacaca* largely originate from outside Rwanda. Human Rights Watch and Amnesty International were among the first to declare their disapproval of numerous elements of the *gacaca* process. Human Rights Watch and Amnesty International mainly object to the low standard of legal professionalism and human rights infringements, and point to examples like the inability of most defendants to obtain legal assistance in a country

with approximately 60 lawyers in total. They also point to *gacaca* judges as lay people who received very brief legal training. Amnesty International in particular has been severely critical of the credibility of the *gacaca* justice system because it does not meet minimum international fair trial standards; however, other sources emphasize that the accused have a chance to present their case, bring witnesses who add to the testimonies, and appeal and contest the categorization of their crime and sentence (Chakravarty, 2006: 133-5).

Other NGOs, such as Lawyers Without Borders, Citizen's Network and Penal Reform International, are more supportive of the *gacaca* and are important contributors of professional and technical advice and resources.

Some studies suggest that fear, prejudice, and resentment of families of the convicted increased since the establishment of the *gacaca* in 2002. The same studies highlight that distrust levels have gone up mainly because testimonies — which play a necessary part of the *gacaca* process — can create social animosity and tensions in communities. Because of their discursive public nature, *gacaca* proceedings were meant to bring a degree of restorative justice in a similar manner as that of truth and reconciliation commissions. An important aspect of restoration and reintegration is understanding the reasoning behind the actions of perpetrators; however, *gacaca* participants rarely pose the question "why" and the process is modeled more on criminal trials than small truth commissions or traditional conflict resolution and reintegration rituals (Ingelaere, 2009: 511, 515-6).

Both the *gacaca* and the ICTR have been criticized by international sources based on the lack of "inclusiveness" of the justice they bring about. The alleged crimes of the Rwandan Patriotic Front have not been addressed by either of the systems and, consequently, not all victims have been recognized. Some argue that this is a result of the Rwandan government's political involvement in the *gacaca* and the ICTR, and its diplomatic dealings with the international community. This significantly limits the independence of both justice systems and the potential of these institutions to influence reconciliation.

IMPLICATIONS OF RETRIBUTIVE JUSTICE FOR RWANDA

There are notable advantages of the *gacaca*. One of the objectives of transitional justice in Rwanda is to establish an initiative "belonging" to local communities. Grassroots approaches to justice, even if they are under top-level guidance, are important for bottom-up reconciliation. The investment in the domestic legal system is also crucial for the reestablishment of law and order. Some international NGOs, such as Lawyers Without Borders, understood the unique opportunity of the *gacaca* and decided to provide assistance (Chakravarty, 2006: 138). The *gacaca* have dealt with over one hundred thousand cases efficiently — a task that some argue could have taken an excessively long time to complete. The multiple and conflicting aims of the state are met with multiple and conflicting aims of international organizations and NGOs, and sometimes works to obscure the aim of the judicial process. Actors interested in the judicialization of international relations and the development of international criminal law are working alongside NGOs, which are hoping to raise the international bar for human rights, and the state, which is eager to ensure its legitimacy and authority. Immense criticism of both the ICTR and the *gacaca* is inevitable in the context of this political struggle. Extreme positions are unlikely to be satisfied and flexible and innovative agendas by domestic and international actors, who are at intersections of various sectors and understand the complexity of the Rwandan context, are more likely to succeed.

The dynamic between the goal of justice and the goal of reconciliation is complicated and there is no clear path from justice to reconciliation. Truth-finding and retribution can contribute to reconciliation but they can also result in further animosities and victimization.

Both the ICTR and the *gacaca* are bold experiments that set precedents at the international and national levels. Rwanda's experience with different transitional justice mechanisms has important implications for other post-conflict contexts facing political, legal, and social consequences of mass-scale violence.

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First published in 2010 by The Centre for International Governance Innovation

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