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Challenges in the post-genocide Rwanda regarding criminal accountability

Rwanda gained its independence in 1962 as a consequence of an uprising organized by the majority ethnic group of hutus.[2] Following this event hutu people obtained political leadership and tutsis became the objects of persecution. As a result, thousands of them fled Rwanda and in the 1960's ethnic atrocities became frequent.[3]

The ethnic differences could have been pushed into the background only by the common aim of economic development, after Commander Habyarimana who supported more moderate ideas, gained presidential power in the way of a coup d'état. Calm years did not last too long, since the consolidating factor of economic development disappeared in the 1980's with the drastic decrease of the prize of coffee which was one of the most important export goods of the country.

While the economic depression and reappearance of democratic movements occurred, the country was attacked from outside the boundaries. The Rwandan Patriotic Front (RPF) organized by tutsi refugees occupied a part of Rwandan territories in order to create proper circumstances for the return of tutsi people. On the other side, members of the hutu political elite organized around Habyarimana (the so-called AKAZU) were considering the possibility of achieving exclusive political power by massacres.

Under these circumstances the conclusion of a peace treaty, the Arusha Accords with the support of the UN in 1993 did not ensure a long-lasting consolidation. None of the parties was satisfied with its content, especially certain hutu groups who did not accept the long enlistment of rights ensured to the RPF. These unsatisfied circles created a coalition called „Hutu Power". In order to serve the aims of the coalition in the media, a radio channel was established (*Radio Television Libre Mille Collines,* hereinafter RTLM) at the end of 1993 which immediately started to broadcast its anti-tutsi propaganda. At the same time the coalition began a military organizing activity as well and a special force was born out of young hutus, the Interahamwe.

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[2] The administration of the Rwandan territories was obtained by Belgian colonizers during World War I. In this era a new artificially created preference system was created which ensured a privileged position to the ethnic group of tutsis against the hutus. The question is debatable whether any real ethnic difference existed between the two major local social groups as they share a common language, the Kinyarwanda, a common culture, traditions and religion and they belong to the same major ethnic group, the Banyarwanda. The Belgian authority handled them already as two entirely separated groups and new identity cards were issued already according to this distinctive approach: tutsis having thinner physical appearance received tutsi-stamps and hutu stamps were put into the identity cards of hutus. Political leader positions, good job and education opportunities were available for tutsi people.

[3] The expression „ethnic atrocities" is used in the present study in the meaning of hostilities between tutsis and hutus.

Political killings were committed from this time on. The head of the Rwandan mission of the United Nations (UNAMIR) informed the world organization about the plans of hutu extremists about the genocide, but in vain. The warning message about a probable mass catastrophe was never followed by any reaction.

Finally 6th April of 1994 was the day when the idea and fear of massacres became reality as a consequence of the successful assassination attempt committed against the airplane of the President. Although at that time it was not yet proven that the assassination was organised by the RPF[4], these news were a perfect crown on the anti-tutsi propaganda. Elite military forces occupied the streets of the capital, Kigali within hours with lists of names of RPF members. In this way, large scale political killings became the first level of massacres.

Foreigners were immediately evacuated and UNAMIR presence was reduced from 2500 to altogether 270 troops. These reactions made it clear that the international community left the tutsi population on their own, and the process of genocide could step into its second phase which meant the accomplishment of the intent to totally destroy the group of tutsi people.[5]

The consequence of the strong propaganda against tutsis was an extremely broad involvement of the civilian population into the killings. The main tool of local farmers usually used for agricultural works, machetes became weapons. There were people who joined groups of the Interahamwe out of hope for pillage under the pressure of poverty, there were others who did it with conviction and there were many people who were enforced to kill.[6]

Members of hutu military forces and civilian hutus who joined them went from house to house. Both tutsis and hutus who helped them to hide were executed. Blockades were established on the roads where every single person who wanted to cross had to identify itself. If they were tutsis, if they seemed to be tutsis or they did not have any identity card to prove the opposite, they were executed on the spot.

As a consequence of news arriving from Rwanda, finally the UN Security Council took a decision to send a new contingent to the country in May, but till the decision achieved the phase of realization, the counter-attacks of the RPF resulted in the end of the hundred days massacres. A new transitional government was established as part of the political change which led to the power of a new repressive regime.

During the three months of the genocide approximately 800,000 people lost their lives in spring of 1994. The broad involvement of the population in killings created such a situation which required a unique approach of the question how to call to account more than 650,000

[4] Later on evidences obtained by the International Criminal Tribunal for Rwanda proved the fact, that the assassination was committed by the RPF.

[5] Timothy Longman, *Rwanda, in* Encyclopedia of Genocide and Crimes Against Humanity (Macmillan Reference USA, 2005) p 925-932

[6] Ten per cent of the hutu population took part in the genocide that meant at that time 650,000 people.
Erin Daly, *Between Punitive and Reconstructive Justice: the Gacaca Courts in Rwanda, in* 34 New York Journal of International Law and Politics (2001-2002), p 364

perpetrators as it was initially estimated. Traditional models of criminal justice simply did not fit to this situation. Extremely high number of persons involved in the genocide was only one of the reasons that showed that a new solution must have been found. The other side of the problem was that the justice system (that had not functioned properly either before 1994) was broken down and could not have been reestablished from one day to the other. Most of the court buildings were destroyed or damaged and most of the professional lawyers (who had composed a narrow circle already before the genocide) were dead, fled the country or were involved in the killings. As a consequence, only 5 judges and approximately 50 practicing lawyers remained in the country and were available for the reestablishment of the Rwandan justice system.[7]

The role of the International Criminal Tribunal for Rwanda in reconciliation

The International Criminal Tribunal for Rwanda (ICTR) established by the United Nations in 1994 could not be considered as a possible judicial body to solve this problem especially because its mandate has been to proceed in cases of high-level perpetrators. Rwanda was a member of the Security Council at the time of the establishment of the ICTR. Although she was the one who initiated the establishment at the beginning, at the end she voted against the specific resolution. Objections listed by the state regarding the time effect, organizational structure, system of appointment of judges, detainment of accused outside Rwanda, lack of death penalty and the seat of the Tribunal highlighted the problem that neither the leadership nor the population of the country would accept the legitimacy of the Tribunal without reservation.[8]

Since the seat of the Tribunal has been in Arusha, Tanzania the Rwandan population considered its functioning as distant and irrelevant related to their personal state. The situation was moreover harmed by the lack of a proper regulation regarding the relation between the ICTR and the Rwandan domestic judicial bodies. They were functioning actually in an entirely separated way. The Tribunal did not accept any regulation regarding the separation of personal jurisdiction either. This issue rather depended on the factual circumstances, namely that which country the affected person was arrested in. For instance, the case of a commentator of the RTLM, Georges Ruggiu was proceeded by the Tribunal, but the case of Béméríki who was a commentator of the RTLM as well (being at the same level regarding the seriousness of the crime) was handled by a Rwandan domestic criminal court. The only one determining difference between the two cases was that Ruggiu had been arrested in Kenya, while Béméríki in Rwanda[9]

In addition, the other reason of the lack of acceptance was that death penalty (which was abolished in Rwanda only in 2007) obviously did not appear on the list of possible penalties to be imposed by the Tribunal, and imprisonment in comfortable Western prisons did not seem to be a proper penalty from the point of view of relatives of the victims of genocide.[10] Moreover, another factor to be considered is that the Tribunal has not proceeded in cases of leaders of the RPF,

[7] *Id*, p 368
[8] L.J. van den Herik, The Contribution o the Rwanda Tribunal to the Development of International Law (Martinus Nijhoff Publishers, 2005), p 43
[9] Herik (2005), p 53
[10] Wendy Lambourne, *Justice and Reconciliation. Postconflict Peacebuilding in Cambodia and Rwanda, in* Reconciliation, justice and coexistence: theory and practice (Lexington Books, 2001), p 325

although they were responsible for numerous serious atrocities as well. This opened a door on doubts regarding the impartiality of the Tribunal, and sent the message that those in power do not need to be afraid of accountability.

Case law of the ICTR has shown that criminal proceedings cannot ensure an overall picture about past events that would be necessary for reconciliation. Refusal of the Tribunal regarding the request to investigate the circumstances of the attack against the presidential airplane proves this fact as well. The Tribunal declared that the question who stands behind the attack has an extreme political significance, but in a legal sense it does not have any relevance, since even if the RPF is responsible for the attack, it does not hinder the accountability of the perpetrators of genocide.[11]

Another weak point of the functioning of the Tribunal is that there are still dominant figures whose cases should be proceeded by the Court but these actors are fugitives from justice, such as Félicien Kabuga who was one of the masterminds of the genocide, financed the importation of machetes and other weapons used for the massacres and owned the RTLM.[12] Until these suspects are walking free, it cannot be stated that the ICTR accomplished its mission.

At the same time it cannot be debated that it facilitated the "cleaning process" of the political arena having completed 27 cases of leaders and organizers of the genocide. It imposed life-imprisonment among others on Jean Kambanda, the former Prime Minister of the interim government of 1994, Jean de Dieu Kamahunda, the former Minister of Higher Education and Scientific Research or Emmanuel Ndindabahizi, the former Minister of Finance, and condemned for long-term imprisonment numerous Interahamwe leaders, Mayors and Préfets who had been the highest-level government officials in the administration-units of Prefectures and most responsible for the massacres in the country.[13] Besides, the function of the Tribunal helped the country overcome the culture of impunity to a large extent.

Moreover, a significant practical advantage is that due to death penalty which could have been imposed earlier in Rwanda and the inhuman circumstances in Rwandan prisons numerous affected states could not have extradited the arrested perpetrators to Rwanda what became possible to the ICTR.

Furthermore, although the Tribunal was not expected to create an overall picture about past events, by its proceedings the commission and fact of genocide was officially and impartially recognized. This supports the idea that international criminal courts contribute to reconciliation to a large extent, but they cannot ensure it on their own. As it was obvious after the genocide that the Rwandan domestic judicial system was not able to deal with high-profile cases, it was also above any question that in cases of lower-level perpetrators a solution must have been found within the boundaries of the state.

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[11] Herik (2005), p 70

[12] *Trial Watch,* 9 November 2007, available at: www.trial-ch.org/en/trial-watch/profile/db/facts/felicien_kabuga_96.html

[13] *Status of Cases* (Website of the International Criminal Tribunal for Rwanda), 10 November 2007, available at: www.69.94.11.53/default.htm

Declaration of any kind of amnesty was not a possible alternative as this idea faced a radical objection from the population. Even the possibility of a South African style reconciliation process was strongly opposed by the victims who required the enforcement of full criminal accountability. Without this first inevitable step, reconciliation would have remained an empty word without realization. On the other hand, the enforcement of accountability did not seem to be an easy deal, especially as the new government was not open to any kind of external support.[14]

The first attempt for the solution was the involvement of confession as a mitigating factor in the regular criminal proceeding. In this way, confession could have contributed to the reduction of the high number of detainees in the overcrowded Rwandan prisons. On the other hand, there were serious concerns about the procedures that did not ensure due process guarantees. Furthermore, prisoners who confessed about their crimes could not been separated from those who did not make the same decision that raised further security problems. Besides, statements given by those who confessed (mostly perpetrators who were already in prisons waiting for their sentence or their trial to be commenced) were not properly analyzed, that could have contributed to truth-revealing.

Traditional gacaca courts as criminal judicial bodies

The special situation required an extraordinary solution, and the establishment of an alternative system of transitional justice seemed to be unavoidable. Finally, the modification of traditional *gacaca* system became this alternative solution. The traditional process served the aim of settlement of internal disputes of local communities and reestablishment of their integrity. It meant *ad hoc* meetings of inhabitants of a locality chaired by the leaders of the community. The main aim of these sessions was the settlement of marital, property or heritage disputes. This process did not ever affect criminal cases and it did not result in individual judgments, it rather lead to community solutions and many times it required only a symbolic act of reparation from the perpetrator such as providing beer to the members of the community as a gesture of reconciliation.[15]

This system was the ground of the solution that turned into the creation of a decentralized, non-reliable and non-fair criminal justice system. The first Organic Law no. 40/2000 on the establishment of *gacaca* courts included a plan of an ideal structure for the *gacaca* system which seemed to be utopian under the real circumstances. After the original plan 250,000 individuals would have been necessary to be employed as lay judges. After the first years it became obvious that this strategy cannot be followed in reality, therefore, the new Organic Law no. 16/2004 was adopted in order to simplify the system with a reduction of number of personnel to 170,000.[16] This new law became the ground for the function of *gacaca* courts that began their real operation in 2005.

[14] William A. Schabas, *Genocide Trials and Gacaca Courts, in* 3 Journal of International Criminal Justice (2005), p 883
[15] Lars Waldorf, *Rwanda's failing experiment in restorative justice, in* Handbook of Restorative Justice (Routledge, 2006), p 425
[16] Schabas (2005), p 894

There are two main levels of *gacaca* system: at the cell level more than 9000 courts were established as pre-trial chambers and at the sector level more than 1500 "higher level" courts deal with more serious cases, and the sector courts for appeal proceed for possible remedies. In the pre-trial process the cell level courts prepare lists of names of those who lived in the affected community before the genocide, those who were killed and who are entitled for compensation and those who can be accused of the involvement in the genocide. Indeed, they are supposed to prepare the history of the local community during the genocide.[17] Their other main task is to qualify the crimes and put the accused individuals in the right category. This classification system determines which courts have authority to proceed in the case of a certain perpetrator. The first category of crimes falls outside the authority of *gacaca* courts. It includes leading, planning or organizing the genocide, killing of more than one person, rape, and following the 2004 Organic Law torture, degrading treatment of human corps and the commission of more sexual abusive acts. Killing of one person belongs to category 2, causing of physical injury appears as category 3 and crimes committed against property count category 4 crimes. Cases belonging to these latter categories from 2 to 4 can be proceeded by the *gacaca* courts, and category 1 perpetrators shall be called to account by regular criminal courts.[18]

Similarly to criminal proceedings, confession became an important mitigating factor in the *gacaca* proceedings as well. Those who confessed before their name appeared on the list of the accused persons, in the case of category 3 crimes can be sentenced to 1-3 year imprisonment that means in the case of category 2 crimes 7-12 years. If the accused confesses after accusation, it may mean at category 3 an imprisonment of 3-5 years and at category 2 a sentence of 12-15 years imprisonment that would be in case of lack of confession 5-7 years and 25 years or more. In cases of category 4 crimes perpetrators may be obliged to pay compensation to the family which was affected by their criminal act.[19]

Consequences of the irregular solution

This solution could have contributed to the reduction of number of detainees living in overcrowded prisons, but the realization of this purpose was hindered by unexpected obstacles. The first problem appeared due to the strong mitigating effect of confession. The more former perpetrators confessed in the hope of a restricted sentence identifying their fellows, the more new names appeared on the list of accused individuals that resulted in an unexpected increase of number of detainees. Between 10 March 2005 and 14 July 2006 considering cell, sector and appeal level together, 2365 perpetrators were released, since they were found not guilty or were sentenced to a prison sentence less than or equal to time spent already in detention. On the other hand, 2579 accused persons were condemned to imprisonment longer than the time spent in prison and imprisonment of 25 to 30 years was imposed to 1404 perpetrators.20 On the other hand, the results of the trials till now do not indicate a high efficiency in a general sense either.

[17] Waldorf (2006), p 426
[18] Daly (2001-2002), p 371-373
[19] Charles Villa-Vicencio, *Rwanda: Balancing the Weight of History, in* Through Fire with Water: the Roots of Division and the Potential for Reconciliation in Africa (Africa World Press, 2003), p 22
[20] *Report on Trials in Pilot Gacaca Courts,* National Service of Gacaca Jurisdictions, 5 November 2007, available at: www.inkiko-gacaca.gov.rw/En/EnIntroduction.htm

Out of the 818,564 persons who have been prosecuted for having committed genocide, 741295 were qualified as perpetrators of crimes falling into category 2 and 3 and as such fall under the authority of *gacaca* courts.[21] In the one year and three months period till summer of 2006 only 8836 trials were completed. On the sector level 7721 trials were completed that was the 22 per cent of the files forwarded to sector courts. The appeal courts tried 1115 further perpetrators that covered 67 per cent of the total number of cases sent to the appeal level.[22] After examining these statistics one cannot be surprised that the original goal to close the proceedings till the end of 2007 was not achieved.

The other main problem is that the system has been built mostly on non-professionals who work without any salary (that opens a door to corruption), in many cases they are personally affected by the atrocities and sometimes their decision is influenced by personal interests. As an extreme example can be mentioned the case of Francois-Xavier Byuma, a member of the local non-governmental organization, Turengere Abana (Rwandan Association for the Protection and Promotion of the Child) who investigated the case of a person who is alleged to have raped a 17-year-old girl. Although the Organic Law no. 10/2007 ordered the dismissal of judges from the *gacaca* courts if he or she does any act which is incompatible with the quality of a person of integrity, Mr. Byuma was sentenced to 19 year imprisonment which decision was taken by the very same person who was the subject of his investigation, but recently works already as a *gacaca* judge.

This extreme example illustrates well the fact that gacaca judges make decisions about long-term (and even life) imprisonment in proceedings where fair trial guarantees cannot be ensured. The gacaca courts are entitled to issue arrest warrants, subpoenas, to proceed with search and seizure while the accused persons have not the right to look into their own files before their hearings and their legal representation is not solved either. The accused does not have the right to silence, he or she is obliged to answer all the questions posed by the court. Statements given by witnesses are often not reliable either the witness had been corrupted or had a personal interest not to tell the truth (as a perpetrator for mitigation, as a victim out of vengeance). Besides, both witnesses and judges are targets of street atrocities[23] As a consequence, many Rwandans do not trust these courts and boycotted them with their disappearance, have fled to neighboring countries fearing false accusations and unfair trials.[24]

Beyond the numerous negative consequences of the *gacaca* system, some advantages can be mentioned as well. These special courts ensure a forum for perpetrators, victims and affected members of the community to meet and discuss together all the past events that can become a common experience of truth revealing and in this way, may facilitate reconciliation and reintegration of former perpetrators into their communities.[25] Besides, processes require less time than regular criminal proceedings and the education was not a problem to solve at the establishment of the system as it is based on non-professional personnel, but there are far more

[21] *Summary of Person Prosecuted forhaving committed Genocide,* National Service of Gacaca Jurisdictions, 5 November 2007, available at: www.inkiko-gacaca.gov.rw/En/EnIntroduction.htm
[22] Report on Trials in Pilot Gacaca Courts
[23] Jacques Fierens, *Gacaca Courts: between Fantasy and Reality, in* 3 Journal of International Criminal Justice (2005), p 911
[24] Erin Daly and Jeremy Sarkin, Reconciliation in Divided Societies (University of Pennsylvania Press, 2007), p 84
[25] Daly (2001-2002), p 376

weak points of the system that can be mentioned. One of them and probably the most significant problem is the basis of the alternative solution itself, namely the broad involvement of non-professionals.

Conclusion

The main idea of the system that local traditional justice system was the basis of transitional justice might have ensured high reputation in the local population and proper efficiency. On the other hand, sufficient involvement of professionals would have been needed for a reliable judicial system strengthening the rule of law. The other question may be whether a truth commission should have been established in order to analyze past events. The desire of the local population for that was mirrored in the words of a tutsi who returned to his home after the massacres: *"A truth commission would be very important for Rwanda. Otherwise the people are closed up and could explode again in the future."*[26] Since the mandate of the ICTR and the *gacaca* courts did not allow them to investigate the complex background of the conflict, such as the question how events occurred in the era of colonization had contributed to the escalation of the conflict and genocide, this task could have been entrusted to an impartial fact-finding institution. At the same time, the subsequent establishment of a truth commission for the time being would not be possible, since too much time has passed after the genocide and local political circumstances would not permit it either.

The example of Rwanda calls the attention of the international community that no matter how advantageous the usage of local, already existing justice systems seems to be, proper institutional framework and the involvement of professional lawyers are essential for the functioning of an efficient and reliable justice system.

[26] Lambourne (2001), p 327