insights

American Society of International Law

June 23, 2011 Volume 15, Issue 17

Rwanda's *Gacaca* Courts: Implications for International Criminal Law and Transitional Justice

Shannon E. Powers

Introduction

On May 21, 2011, the Rwandan Justice Minister announced the imminent completion of all trials in *gacaca* courts, the modified community justice mechanism used across the country to try suspects of the 1994 Rwandan genocide.[1] That same month, Human Rights Watch issued a comprehensive report on the *gacaca* trials.[2] This *Insight* provides an overview of the *gacaca* system and highlights some of its successes and shortcomings in light of the varied, and often conflicting, goals of international criminal law and transitional justice.[3]

The *Gacaca* System

Named for the *Kinyarwanda*[4] word for grass, *gacaca* was a traditional form of communal justice, whereby communal elders would resolve disputes by devising compensatory solutions aimed at restoring societal harmony. *Gacaca* proceedings took place on an *ad hoc* basis and encouraged community participation.[5] Following the genocide in Rwanda in 1994, the UN Security Council set up the International Criminal Tribunal for Rwanda ("ICTR") in neighboring Tanzania to prosecute those most responsible for the organized violence.[6] However, over 120,000 lower-level suspects remained in Rwandan prisons, and the government soon realized it would take its dilapidated domestic judicial system over 200 years to try all cases. It therefore passed Organic Law N° 40/2000 in 2001, repurposing the traditional *gacaca* courts to deal with the remaining genocide cases.[7] It is estimated that over one million cases have been tried to date under this law and its subsequent modifications.

The *Gacaca* Law divides crimes into three categories: the first category, relegated to the exclusive jurisdiction of the national courts and the ICTR, is reserved for the planners of the genocide and people who held positions of authority; Category 2 crimes include murder and bodily harm; and Category 3 is comprised solely of property crimes.[8] Due to the slow pace of the national courts, in May 2008, the Rwandan parliament transferred most of the remaining Category 1 cases to *gacaca*, including cases of sexual violence.

The law also provided for the administrative structure of *gacaca*. Over 9,000 courts were set up across the country, with panels of nine locally elected judges hearing cases based on events that had taken place in that area.[9] The courts were divided into two levels: the cell

RELATED ASIL INSIGHTS

Venues for Prosecuting Saddam Hussein: The Legal Framework

The ICTR Appeals Chamber judgment in *Prosecutor v. Seromba*

Charles Taylor and the Special Court for Sierra Leone

The Trial of Slobodan Milosevic

Special Tribunal for Lebanon Issues Landmark Ruling on Definition of Terrorism and Modes of Participation

Insights Archive

DOCUMENTS OF NOTE

Organic Law N° 40/2000 of 26/01/2001

Organic Law N°16/2004 of 19/6/2004

Human Rights Watch Report

ORGANIZATIONS OF NOTE

National Service of Gacaca Jurisdictions

International Criminal Tribunal for Rwanda

Human Rights Watch

level, which handled information gathering and had jurisdiction over Category 3 cases, and the secteur level, which heard Category 2 cases and appeals from both levels. Collectively, the *gacaca* courts are coordinated by the National Service of Gacaca Jurisdiction ("NSGJ"), an agency under the auspices of the Ministry of Justice.

Because *gacaca* is a community-based institution, participation is mandatory for everyone,[10] and legal professionals are generally not involved in the proceedings. Judges are provided basic training by the NSGJ, and the community at large, which serves as the General Assembly, is responsible for reporting events that took place, for filing accusations, and for testifying at hearings. From the community's reports, dossiers are compiled about what transpired in a particular community during the genocide, and judges rely on these dossiers to conduct hearings.

In the conciliatory spirit of the original *gacaca*, suspects are encouraged to confess both before they have been accused and again following their hearing in return for a reduced sentence.[11] Victims are equally encouraged to forgive perpetrators. *Gacaca* judges can sentence those found guilty to imprisonment, order them to make reparations to victims, and/or complete community service, depending on the nature of the crime and whether or not the accused had confessed.[12]

Enforcement of International Criminal Law and Transitional Justice Goals

Many of the challenges in the *gacaca* process stem from the inherent contradiction of using a conciliatory process for a retributive purpose. The Rwandan government explicitly rejected the possibility of a truth and reconciliation commission because it refused to grant amnesty to perpetrators, preferring instead retributive measures. The institution of *gacaca*, however, with its emphasis on social reconciliation, foregoes many of the procedural safeguards awarded defendants in criminal trials in favor of a more participatory process. Such issues reflect broader tensions among the goals of international criminal law and transitional justice. The localized *gacaca* courts must be evaluated in light of each of these goals to fully understand the extent of their capacities and challenges.

Retributive Justice

Retributive justice emphasizes holding individuals accountable for their actions through commensurate punishment. On the one hand, *gacaca* has been credited with the swift delivery of results that could not possibly have been achieved by the ICTR or the national courts. This is significant because overcrowding in Rwandan prisons had rendered conditions intolerable, and delayed trials also raise significant human rights concerns. Tellingly, despite criticisms of the *gacaca*, virtually no feasible alternatives have been suggested.[13] Some observers have even lauded the *gacaca*'s ability to individualize responsibility and avoid the collective blaming of abstract groupings.[14]

Swift trials, however, are meaningless if the process employed is fundamentally flawed. The Human Rights Watch report pointed out a number of procedural concerns with *gacaca* trials. The major concern focuses on the rights of the defendants. The accused are often deprived of the fundamental right to the best possible defense. Defendants are encouraged to confess to crimes, and, because they are not represented by counsel, they may not always be making informed decisions. This is especially troubling as confessions judged to be incomplete may garner lengthy prison sentences anyway. Moreover, because participation in *gacaca* is mandatory, an accused may be forced to incriminate him or herself.[15] Other procedural concerns are rooted in the lack of legal professionalism, including the ability of judges to weigh the credibility of evidence and to render sound, impartial judgments. Finally, the adequacy of the appellate procedure has been questioned since cases can only be appealed within the *gacaca* system.[16]

A second area of concern is whether *gacaca* is the appropriate forum for trying cases of

sexual violence, which were pervasive throughout the Rwandan genocide. Article 38 of the 2004 *Gacaca* Law provides for closed door hearings in cases of sexual violence; however, victims emphasized that this special process itself draws attention to the nature of the issue being discussed. Furthermore, it can be more difficult for victims to testify about such experiences before members of their own community and harder to protect their identities. Some victims also feared reprisals.

Finally, in addition to the formal rules governing the *gacaca* process, problems have arisen in their implementation, including security concerns, allegations of corruption, and extensive government interference. Overall, in terms of retributive justice, *gacaca* has delivered swift results but could benefit from stricter procedural safeguards that would not necessarily impinge upon communal participation in the courts.

Compensatory Justice

Compensatory justice focuses on the attempt to restore the victims' property or provide them with some measure of reparation for the harm and losses suffered. *Gacaca* courts can order perpetrators to pay reparations or provide the equivalent value in labor for Category 3 crimes relating to property.[17] The original *Gacaca* Law also suggested a possibility of indemnification for Category 2 and 3 crimes by requiring judges to draw up lists of damages to be transferred to the government.[18] The 2004 version made clear, however, that before any indemnification could take place, enacting legislation would be required—a proposal that never materialized.[19] Many of those interviewed by Human Rights Watch cited the lack of compensation to be one of their greatest disappointments in the *gacaca* process. Although *gacaca* has not yet provided adequate compensation to the genocide victims, it appears to be more an issue of political will and implementation than a consequence of the institution itself.

Deterrence and Norm Creation

Deterrence emphasizes the need to demonstrate to would-be perpetrators that genocide and crimes against humanity will always be punished, thereby preventing such crimes. It is too early to judge whether the *gacaca* process will have a deterring effect on future behavior in Rwanda. However, another way in which deterrence is achieved is through the creation of norms that encourage peaceful conflict resolution and that stigmatize perpetrators of violence. Specifically in terms of international criminal justice, the goal is to create and reinforce an awareness of international law with real implications in people's everyday lives.

In this respect, *gacaca* can be considered more successful in Rwanda than the ICTR has been. The ICTR is perceived by many Rwandans as a remote, inaccessible institution that is controlled by foreign elements and has very little to do with their actual experiences.[20] The *gacaca* process, on the other hand, has become a part of virtually every Rwandan's daily life. The fact that *gacaca* is rooted in traditional practice, led by members of local communities, and does not rely on formal legalistic procedures, renders it accessible to all participants. Thus, the institution itself is ideally situated for purposes of norm creation and consolidation. Whether or not *gacaca* proves to actually be capable of socializing Rwandans into non-violent conflict resolution and faith in international law is contingent upon Rwandans' perceptions of the fairness and legitimacy of the proceedings.

Restorative Justice and Building a Historical Record

Restorative justice shifts the focus from individual punishment to the broader needs of the community and attempts to foster the healing and forgiveness required to move forward after large scale atrocities. *Gacaca* forces confrontation between victims and perpetrators on the theory that the experience of accusation, confession, and forgiveness will have cathartic effects for participants. It further carves out the space and audience for individuals to share their experiences and for the community to grieve together.

Interviews with Rwandans, however, indicate mixed results on the restorative effects of the *gacaca* experience. Some Rwandans have reported feeling a sense of relief and closure, but for others, participation has meant uncertainty, re-traumatization, and fear. Participation in *gacaca* has also declined steadily over the years, despite the legal requirement and penalties for truancy. This may reflect an increased stress stemming from participation and frustration with the process, or could simply be attributed to the necessities of life.

A related aspect of restorative justice is the ability to create a historical record. Courts are thought to be appropriate mechanisms for such endeavors as they invite dialogue from all parties, and also because survivors often value official acknowledgement of the wrongs they have suffered. In some cases, people remained uncertain about what had happened to loved ones, and finding out their fate through *gacaca* has provided emotional closure, or more pragmatically, the requisite information to find bodies for a proper burial.

The extent to which ordinary Rwandans are free to construct this narrative, however, remains in question. Some observers of the trials suggest that the informal structure of *gacaca* has enabled individual courts to conform to the needs of its participants.[21] Others, in contrast, view *gacaca* as local productions scripted by the state in which ordinary Rwandans are simply acting out prescribed roles.[22] In support of this latter view, observers point to Rwanda's sweeping laws prohibiting genocide ideology and sectarianism, the broad and ambiguous nature of which is said to have a chilling effect on expression in *gacaca*.[23] They further emphasize the taboo against participants deviating from their expected roles of Hutu perpetrators and Tutsi survivors, and the consequent distortion of their narratives where no true fit exists. Such an allocation of roles based on ethnicity flies in the face of individualized responsibility, and it is possible that this process will ultimately serve to re-harden ethnic divisions rather than improve them. Furthermore, the *gacaca* courts do not try crimes committed by the Rwandan Patriotic Front, the party in power in Rwanda since the genocide.[24] Such selectivity of prosecution omits integral passages from the historical record.

Another way in which *gacaca* has attempted to foster reconciliation has been in the partial or complete commutation of prison sentences into community service for those who have confessed. Arguably, this type of punishment is productive not only because it helps physically rebuild the community, but because it enables those found guilty to reintegrate into the community.

Overall, the record for *gacaca*'s restorative effects is mixed. While the institutions are well primed to be sources of healing and forgiveness, it remains unclear whether they can serve as such either because they may be premised on flawed theories or because they have been implemented imperfectly.

Conclusion

The *gacaca* courts are still ongoing, and their overall success in the process of transitional justice will continue to be debated for a long time to come. Perhaps the point that emerges most clearly from the *gacaca* experience is that the efficacy of informal judicial institutions depends not only on the constitutional or substantive rules applied but also on the context in which they actually operate. In the Rwandan case, a number of external factors influenced *gacaca* and its ability to meet the goals of international criminal law; regime type, rampant poverty, lack of security guarantees, and national laws regulating speech each exerted an influence over the ways in which *gacaca* functioned and the people related to the courts. Nevertheless, the lessons from all aspects of *gacaca*'s functioning are sure to inform future debate and endeavors in international criminal law and transitional justice.

About the Author:

Shannon Powers is a Ph.D. candidate in Political Science at the George Washington University and holds a J.D. from the University of Connecticut School of Law. She currently serves as an International Law Fellow at ASIL. The author would like to thank Leehee Goldenberg and Alana Tiemessen for their valuable contributions.

Endnotes:

[1] *Rwandan Genocide Courts to Close*, Radio Netherlands Worldwide (May 21, 2011), http://www.rnw.nl/africa/article/rwandan-gacaca-genocide-courts-close.

[2] Human Rights Watch, Justice Compromised: The Legacy of Rwanda's Community-Based *Gacaca* Courts (2011), *available at* http://www.hrw.org/en/reports/2011/05/31/justice-compromised.

[3] For an analysis of the different possible venues for internal criminal law enforcement and their implications in the context of the Saddam Hussein trial, *see* Diane F. Orentlicher, *Venues for Prosecuting Saddam Hussein: The Legal Framework*, ASIL Insights (Dec. 2003), *available at* http://www.asil.org/insigh124.cfm.

[4] *Kinyarwanda* is an official language of Rwanda, along with English and French.

[5] Traditionally only men could participate in *gacaca*. In the modern *gacaca*, however, women are full participants, serving not only as members of the general assembly but also as judges.

[6] For a selection of analyses related to different international criminal tribunals, *see* Gregory Townsend, *The ICTR Appeals Chamber judgment in* Prosecutor v. Seromba, ASIL Insights (Aug. 8, 2001), *available at* http://www.asil.org/insights080808.cfm; Mark A. Drumbl, *Charles Taylor and the Special Court for Sierra Leone*, ASIL Insights (Apr. 12, 2006), *available at* http://www.asil.org/insights060412.cfm; Leila Nadya Sadat, *The Trial of Slobodan Milosevic,* ASIL Insights (Oct. 2002), *available at* http://www.asil.org/insigh90.cfm; Michael P. Scharf, *Special Tribunal for Lebanon Issues Landmark Ruling on Definition of Terrorism and Modes of Participation*, ASIL Insights (Mar. 4, 2011), *available at* http://www.asil.org/insights110304.cfm.

[7] Organic Law N° 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 October 1, 1990 and December 31, 1994 (2001), *available at* http://www.inkiko-gacaca.gov.rw/pdf/Law.pdf [hereinafter Gacaca Law 2001]. The law was modified once in 2001. It underwent substantial revisions in 2004. *See* Organic Law N°16/2004 Of 19/6/2004, Establishing the Organisation, Competence and Functioning of Gacaca Courts Charged With Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes Against Humanity, Committed Between October 1, 1990 and December 31, 1994 (2004), *available at* http://www.inkiko-gacaca.gov.rw/pdf/newlaw1.pdf [hereinafter Gacaca Law 2004]. The 2004 version was modified slightly in 2006 and again in 2007.

[8] The original law had four categories, distinguishing between murder and serious attacks committed with intent and those committed without intent. Gacaca Law 2001 art. 51. The 2004 version of the Gacaca Law abolishes that distinction, leaving only three categories. Gacaca Law 2004 art. 2.

[9] Gacaca Law 2004 art. 13. Article 5 of the 2007 version lowered the number of judges required to a panel of 5-7.

[10] Gacaca Law 2004 art. 29.

[11] *Id*. arts. 54-63.

[12] *Id*. arts. 73, 75. Rwanda abolished the death penalty in 2007 to enable the transfer of genocide cases from the ICTR and foreign jurisdictions. *See The Death Penalty Abolished in Rwanda*, Hirondelle News Agency (July 30, 2007), *at* http://www.hirondellenews.com/content/view/4870/26/.

[13] The most feasible alternatives proposed were truth and reconciliation commissions and authorizing foreign lawyers and judges trained in international criminal law to temporarily practice in the Rwandan judicial system. The Rwandan government explicitly rejected the first option because of its non-judicial nature. It rejected the second option in favor of more local involvement. Even with foreign assistance, however, it is doubtful that the courts would have been able to complete as many trials as have the *gacaca*.

[14] *See, e.g.,* Phil Clark, *Truth and Reconciliation at a Price*, Radio Netherlands Worldwide (Aug. 24, 2010), *at* http://www.rnw.nl/international-justice/article/truth-and-reconciliation-a-price.

[15] Gacaca Law 2004 art. 29 (stating that a person who fails to testify is subject to prosecution before the *gacaca* and can incur a prison sentence of three to six months for a first time offense).

[16] In addition to the regular appeal process, complaints can be submitted to the government or NSGJ, and, in cases deemed to merit review,they will be sent back down to *gacaca* for correction. *See* Human Rights Watch, Justice Compromised*, supra* note 2.

[17] Gacaca Law 2004 arts. 75, 95.

[18] Gacaca Law 2001 art. 90. This provision was omitted from Gacaca Law 2004.

[19] Gacaca Law 2004 art. 96 ("Other forms of compensation the victims receive shall be determined by a particular law.").

[20] *See* Alison Des Forges & Timothy Longman, *Legal Responses to Genocide in Rwanda*, *in* My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity 56 (Eric Stover & Harvey M. Weinstein eds., 2004). *See also* Sigall Horovitz, *Rwanda: International and National Responses to the Mass Atrocities and Their Interaction*, DOMAC Report/6, 55-56 (Sept. 2010), *available at* http://www.domac.is/media/veldu-flokk/DOMAC6---Rwanda.pdf; Kingsley Chiedu Mogahu, *Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda,* 26 Fletcher Forum World Aff. 28-30 (Summer/Fall 2002), *available at* http://fletcher.tufts.edu/forum/archives/summer-fall02.shtml.

[21] *See* Clark, *Truth and Reconciliation at a Price*, *supra* note 14. *See also* Phil Clark, The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice Without Lawyers (2010).

[22] Susan Thomson & Rosemary Nagy, *Law, Power and Justice: What Legalism Fails to Address in the Functioning of Rwanda's* Gacaca *Courts*, 5 Int'l J. Transitional Justice (2011).

[23] Law No. 47/2001 of 18/12/2001 art. 1, Prevention, Suppression, and Punishment of the Crime of Discrimination and Sectarianism (2001); Law No. 18/2008 of 23/07/2008 arts. 2-3, Relating to the Punishment of the Crime of Genocide Ideology (2008).

[24] The 2001 Gacaca Law provided for jurisdiction over war crimes which would theoretically allow for prosecutions of the RPF. *See* Gacaca Law 2001 art. 1(a). This provision, however, was removed from the 2004 version.