AUS POLITIK UND WISSENSCHAFT

An alternative approach to justice – The Gacaca jurisdictions in Rwanda

By *Hildegard Lingnau*, Berlin

1. The challenge: coming to legal terms with the genocide in Rwanda

Rwanda, one of the world's poorest countries, was set far back in its development by the civil war of 1990-94 and the genocide of 1994. With the former government toppled and war and genocide brought to an end, the country is now in the process of reconstruction. This constitutes an unparalleled challenge. The conditio sine qua non for progress in all other areas is coming to terms with the genocide, which cost the lives of some one million people.[1]

Since then far over 100.000 persons suspected of involvement in the genocide have been confined to prison. In view of the limited capacities of this small country's judicial system, it would be impossible, even within a period of 100 to 200 years, for Rwanda's classic judiciary to take every single case to trial.

Apart from this enormous caseload, the situation facing Rwanda since 1994 is untenable in other respects as well: the country's prisons are overcrowded, many prisoners are held in unsuitable municipal facilities ("cachots"), and prison conditions are extremely poor. Rwanda's penal system constitutes a heavy financial burden for the country (roughly 4% of government spending). Furthermore, penal detention binds substantial capacities needed in other places; this applies in particular for women, who are expected to provide food for their imprisoned male family members in addition to the time they need to secure survival for themselves and their families.

[1] In 2001 the count of the victims of the genocide was completed: a total of 1.074.017 persons had been killed, for the most part with inconceivable brutality. 97.3% of the victims were Tutsi; 56% men, 50.1.% children.

There can be no quick solutions (e.g. release against bail, amnesty, etc.), since such approaches would be tantamount to continuation of the decades-long practice of impunity, which was one of the main causes of the 1994 genocide and would jeopardize the fragile reconciliation process.

As a means of overcoming the dilemma and speeding up the process of coming to legal terms with the genocide, the Rwandan law on the organization of the prosecution of crimes of genocide and crimes against humanity defined four categories for prosecution. While category 1 offenses will continue to be prosecuted in the framework of the classic judicial system, the majority of crimes are set to be dealt with in the framework of an alternative system of justice:

- Category 1 applies for all persons who stand accused of planning, instigating, or supervising genocide or crimes against humanity (the ”masterminds of genocide”).
- Category 2 includes all other persons accused of crimes involving homicide or sex offences.
- Category 3 applies for all persons accused of assaults against people without the intention to kill (i.e. causing unlawful bodily harm).
- Category 4, finally, includes persons accused of offenses against property.

As a means of facilitating the work of both prosecution and penal authorities, the law provides for the possibility of substantially reducing the sentences (i.e. the prison terms) of offenders who facilitate prosecution by volunteering a confession:

- While persons accused under category 1 would normally face the death penalty or life imprisonment, sentences may be reduced to 25 years for offenders who confess their guilt.
- The sentences faced by category 2 offenders who volunteer a complete confession may be reduced from life imprisonment to terms of at least twelve years, half of which may be worked off in community services.
- If they volunteer a confession, category 3 offenders may, accordingly, be sentenced to one to three years of prison instead of the five to seven years otherwise provided for. Here, too, the rule is that offenders are required serve half of their prison term and work off the rest of their term in community services.
- Instead of being sentenced to prison, category 4 offenders are ordered to make restitution for the material damage for which the are responsible.

2. Different approaches to tackling the challenge

2.1. The classic judicial system

Following the events of 1994 Rwanda's classic system of justice lay in ruins: after nearly all of the country's jurists had been either killed or forced into exile, Rwanda was left with a total of only 90 judges and 55 attorneys-at-law. Only eight of the surviving lawyers were prepared to defend accused offenders in genocide trails. It was only by training so-called para-juristes – what might be referred to as stopgap defenders who are prepared for their work in crash courses –as well as by accepting the help offered by a number of dedicated foreign lawyers (in particular from the NGO "Avocats sans frontières") that Rwanda was able improve the situation by providing defense counsel for 50% of all accused persons (1998).

Thanks to Gacaca, Rwanda's classic judicial system is now faced with the task of dealing "only" with category 1 offenders instead having to prosecute the over 100.000 persons who stand accused of genocide crimes. The Rwandan justice minister estimates that this group consists of some 10.000 persons, only roughly 2.000 of whom are incarcerated in Rwanda, while most others have sought refuge abroad, largely without having to fear prosecution. Yet this figure alone amounts to a huge challenge for Rwanda's system of criminal justice.

2.2. International Criminal Tribunal for Rwanda

The International Criminal Tribunal for Rwanda (ICTR) was set up in 1994 to deal with the genocide. Despite its excellent endowment (a budget of 90 million US dollars as well as a staff of roughly 800 persons, etc.) the tribunal was, by the year 2002, able to close the books on no more than nine cases (for more information, see: Le Verdict no.33, Décembre 2001, 10ff.).

The ICTR has come in for criticism for its poor performance record, but also for other reasons:

- Persons suspected of involvement in the genocide have been employed as ICTR staff;
- testimony of witnesses has been made public, and witnesses must therefore fear for their safety;
- witnesses have been treated like accused persons and subjected to extremely painful confrontations (above all women called upon to testify in cases of rape), while accused persons have been treated with respect and infinite patience, etc.;

The organizations of the survivors of the genocide (IBUKA, AVEGA, and others) have for these reasons refused to continue cooperating with the ICTR.

The International Crisis Group (ICG) also states: ”The performance of the ICTR is lamentable”. ”Every day, the mission of the ICTR becomes more of an historical exercise, with less and less chance of having an impact on events in the present. To tolerate such a situation, and support it for too long, would be a second betrayal of the people of Rwanda”[2].

2.3. Other approaches

Apart from national Rwandan and international justice, it is also possible to prosecute genocide crimes and crimes against humanity in other countries. In 2001, for instance, Belgium prosecuted and sentenced four Rwandans for involvement in the genocide. Regrettably however, this appears to be an isolated case.

3. Gacaca

Against the background of the inadequate performance of the classic system of justice, and following years of deliberation and discussion, early in 2001 a general consensus was reached – and gained the support of the international community – that provided for dealing with the majority of pending cases (all trials of persons accused under categories 2 to 4) in the framework of an alternative (decentral and participatory) system of justice called "Gacaca jurisdictions." The law required for the purpose was enacted in 2001, and the first Gacaca jurisdictions became operational in 2002.

3.1. The Gacaca jurisdictions

3.1.1. The origin of the approach

The word "gacaca" means "lawn" or "grass" and is used to refer to the traditional, precolonial system of justice under which lay judges (more precisely: family heads) were responsible for dispensing justice in public. In other words, this is a type of village jurisdiction or – to take into account the facts of Rwanda's settlement structure – a kind of "hilltop jurisdiction."

3.1.2. Development and discussion of an appropriate approach: 1997-2001

Initially, the international community viewed the idea of reviving Gacaca with a very skeptical eye. However, the year-long, highly constructive discussion (conducted in particular in the framework of the "Réunions informelles sur les droits de l’homme et l’état de droit") as

[2] ICG, International Criminal Tribunal for Rwanda: Justice delayed, Nairobi, Arusha, Brussels, 7 June 2001.

well as efforts aimed at further development of the concept of Gacaca finally led to the emergence of a broad national and international consensus on Gacaca; and once the Gacaca law had been adopted, international donors also declared their willingness to provide financial support to set up Gacaca jurisdictions[3].

3.1.3. The Gacaca law: 2001

Finally, in March of 2001, the "Organic Law Setting up Gacaca Jurisdictions" was adopted (cf. Loi organique no. 40/2000 du 26.1.2001 portant création des juridictions Gacaca et organisation des poursuites des infractions constitutives du crime de génocide ou de crimes contre l'humanité, commises entre le 1er octobre 1990 et le 31 décembre 1994)[4].

It pursues the following goals[5]:
- to find the truth about what happened and to make it public,
- to accelerate the administration of justice,
- to put an end to the culture of impunity,
- to reconcile and unite Rwandans on the basis of justice,
- to make it clear that the Rwandan family can solve its own problems.

Depending on the severity of the offence in question, accused persons are tried at one of four administrative levels[6]:
- The "cellule" level (9.201 Gacaca jurisdictions) searches for facts, categorizes the defendants and tries the cases of category four (crimes against property, no appeal);
- the "secteur" level (1.545 Gacaca jurisdictions) will deal with the third category cases (offenses involving unlawful bodily harm as well as for appeals on crimes against property);

3 *Simon Gasiberege / Stella Babalola*, Perceptions about Gacaca law in Rwanda: Evidence from a multi-method study, special publication no. 19, John Hopkins University Baltimore 2001; *Georg S. Grossmann / Hildegard Lingnau*, Vergangenheits- und Versöhnungsarbeit – wie die Technische Zusammenarbeit (TZ) die Aufarbeitung von gewaltsamen Konflikten unterstützen kann, GTZ Eschborn 2002.

4 Cf. Centre de Gestion des Conflits: Les Jurisdictions Gacaca et le processus de réconciliation nationale, Cahiers du Centre de Gestion des Conflits no.3, Butare 2001; Cour Supreme, Département des Juridictions Gacaca: Manuel explicatif sur la loi organique portant création des juridictions Gacaca, Kigali 2001.

5 Cf. *Paul Kagame*, Discours à l'occasion du lancement officiel des travaux des juridictions Gacaca, Kigali, 18 June 2002.

6 Cf. Loi organique no. 40/2000 du 26.1.2001 portant création des juridictions Gacaca et organisation des poursuites des infractions constitutives du crime de génocide ou de crimes contre l'humanité, commises entre le 1er octobre 1990 et le 31 décembre 1994, in: Journal Officiel du Rwanda.

– the "district" level (106 Gacaca jurisdictions) is competent for sex offenses, unlawful homicide (i.e. cases of the third category), and appeals on offenses involving unlawful bodily harm;
– the "province" level (12 Gacaca jurisdictions) is responsible for appeals involving sex offenses and unlawful homicide (i.e. cases of the second category).

Gacaca is predicated on the willingness of the parties involved to confess and to forgive. This means that confessing offenders are the first to face trial. These persons at the same time have the prospect that their sentence may be reduced by half. It is therefore not surprising that in 2001 and 2002 ten thousands of accused persons confessed their guilt.
The sentences provided for under the Gacaca procedure may not exceed a term of 15 years, half of which is served in prison, half worked off in freedom in the form of community services. Since most of the accused have already been in detention since 1994, nearly all of them are released immediate after trial.

3.2. Gacaca in practice: 2002ff.

The Gacaca jurisdictions are set to deal with the majority of persons accused of involvement in the genocide (some 80-90% of cases). Defendants are tried in the place where they are accused of having committed their crimes, i.e. where there may still be witnesses able to incriminate or to exonerate accused persons and where, in the end, the process of reintegration and reconciliation will have to take place[7].

The trials, which are public, are set to be conducted once a week. Beside the accused and their 19 judges, the proceedings may be attended by the entire population of the cell, although attendance of at least 100 persons per cell is required. By involving entire communities and directly confronting accused persons with victims, witnesses, and other community members, the public proceedings of the Gacaca jurisdictions are expected to advance the reconciliation process and facilitate the reintegration of offenders in their communities.

The first condition required to translate Gacaca into practice was the election of lay judges, which took place throughout the country in October 2001: a total of 260.000 inyangamugayo ("upstanding, honorable persons") were elected by the population, i.e. 19 lay judges (plus several substitutes and replacements) for each of the 11.000 Gacaca jurisdictions to be set up.

7 *Claas de Jonge*, Interim report on research on Gacaca jurisdiction and its preparations July-December 2001, Kigali January 2002.

Once elected, the lay judges were prepared for their duties in the framework of two crash courses. This training was followed by a two-week program of sensitization of the population. Finally, on June 18, 2002, Gacaca was officially launched by Rwanda's president, Paul Kagame[8].

To head off any possible problems that might emerge, a pilot phase was first conducted in 80 cells of 12 sectors (i.e. one per province). Once this phase has been concluded and reviewed, the Gacaca jurisdictions are to be set up countrywide beginning in 2003.

The first task facing a Gacaca tribunal is collection of facts about the genocide and the massacres by preparing the following documents[9]:

- a list of persons per household who lived in the cell before the genocide ("recencesement");
- a list of persons who were killed in the cell as a result of the genocide and massacres as well as a list of the persons from the cell who were killed elsewhere ("liste des personnes décédées");
- forms concerning the damage suffered by the victims during the genocide, per household ("fiche partie civile par ménage");
- a list of the accused ("liste des accusés").

Its second task consists of identifying individual defendants to be prosecuted for specific offenses - an individual form is made out for each defendant ("fiche individuelle de l'accusé") - and of assigning the defendants to one of the four categories (i.e. to the Gacaca jurisdiction under whose responsibility they fall).

Finally, the third task of the Gacaca jurisdictions is to conduct the actual trials.

4. The Gacaca jurisdictions as an important alternative approach to justice: Evaluation and outlook

Many justified questions and concerns have been expressed concerning the Gacaca jurisdictions. To name some of the most important ones:

8 *Paul Kagame*, Discours à l'occasion du lancement officiel des travaux des juridictions Gacaca, Kigali, 18 June 2002.

9 Cf. *Claas de Jonge*, Activities of the PRI research team, Report: January-March 2002, Kigali, April 2002; *Claas de Jonge*, PRI research team on Gacaca, Report III: April-June 2002, Kigali 2002.

- *Training of judges and information of the population*: Both are regarded – certainly rightly – as inadequate. However, in view of the existing constraints (above all time and funding) it was simply not possible to come up with a better solution.
- *Respect for the rule of law*: Even given the best intentions and all possible efforts to guarantee respect for principles of due process, it must be assumed that these principles will not always be observed in toto – and be it for lack of knowledge of the principles and procedures involved.
- *Trauma counseling*: The (enormous) needs for trauma counseling during the proceedings of the Gacaca jurisdictions is a known fact, although, in view of the pinched capacities and resources available, it will be impossible to come anywhere near meeting these needs.
- *Monitoring*: here, too, much remains to be done; but thanks to the dedicated work of many actors (in particular the VIth Chamber, the Human Rights Commission, and various NGOs, especially Penal Reform International) all possible efforts are being undertaken.
- *Compensation of victims*: Rwanda still lacks an indemnification law and the resources required for the purpose. The country is unable to mobilize the funds needed, and the international community has largely refused to provide any such transfers for fear that such payments might be construed as an admission of guilt.
- *Compensation for Gacaca judges*: Regrettably, there are no funds available for this purpose either. All Gacaca judges work without pay, and may for this reason very well be prone to corruption.
- *Community service programme*: It is still largely unclear what shape can and should be given to the community service program.
- *Prison conditions*: In Rwanda prison conditions are not in line with international standards. However, in judging this state of affairs it is important not to lose sight of the fact that prisoners are better fed and receive better medical care and social support than many of their blameless fellow citizens, who are forced to struggle for survival on a day-by-day basis.

There is, however, no alternative to the Gacaca jurisdictions. And it can therefore only be hoped that this wholly unique experiment will meet with a good measure of success and that Rwanda will prove able not only to come effectively to terms with its past and embark on a course of reconciliation but also to demonstrate to the world that alternative dispute-settlement procedures can be used to meaningfully supplement the classic system of justice.