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Gacaca Courts in the Light of Public International Law: Bold Step in Achieving Reconciliation and Justice in Rwanda

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"…if we all together support Gacaca Courts, we'll have shown the love we have for our country and Rwandans. Justice that reconciles Rwandans will be a fertile ground for unity and a foundation for development"[2]

Abstract
Despite the fact that the Gacaca Courts have been the focus of a range of academic research, this work intends to demonstrate a detailed analysis of the Gacaca Courts from the viewpoint of public international law. The Gacaca Courts began their activities on the 18th of June 2002 and were terminated on the 18th of June 2012, and had prosecuted and tried around 2 million files of suspects of genocide and crimes against humanity committed between October 1990 and December 1994 in Kigali and the cities around. This research will examine such courts with regards to their objectives, establishments, legal framework, challenges, and their compatibility with the international standards agreed upon by the international community.
Keywords: Gacaca, Organic Law 40/2000, International Law, Presumption of Innocence,

1. Introduction and Background Information: "African Solution To African Problems"

What happened in Rwanda in 1994 was the result of old policies based on racial discrimination between the people of one nation, which had its origin in 1959. Despite this, no one imagined, either inside or abroad, that this racial discrimination would lead to the worst atrocity of genocide occurred on the African soil after the extermination of the Jews in Europe.

following the assassination of the Rwandan President Juvénal Habyarimana on 6 April 1994, the civil war has stared in Rwanda between two tribes Hutu And Tutsi[3] resulting the worst massacre ever happened not only in Rwanda but in the world. An estimated 1,000,000 Rwandans were killed during the 100-day period from 7 April to mid-July 1994, hundreds of thousands were wounded, rapped or burned alive. Since then, Rwanda has since changed radically and embarked on an ambitious justice and reconciliation process with the ultimate aim of all Rwandans once again living side by side in peace. The post-genocide government has made remarkable progress through its efforts to bring "union and reconciliation" into practice. Some politicians have proposed a general amnesty as a way to achieve national reconciliation, but this proposal had been rejected by all the components of the Rwandan society, because justice requires that the criminals should be prosecuted and brought to justice, and that any national conciliation must be conducted through the doors of the courts, not through the closed doors.

"Gacaca courts were established on cell and sector administrative level. In this regard, three types of Gacaca courts were created: Gacaca courts of cell, Gacaca courts of sector and Gacaca court of appeal on the sector level. Around 9,013 Gacaca courts of cell, 1,545 of Gacaca courts of sectors and 1,545 of Gacaca courts of appeal based in villages, were established countrywide"[4].

The term Gacaca is derived from a word in Kinyarwanda[5], and refers to an old mechanism for settling down local massacre that had been happened during the Rwandan genocide and bring its perpetrators to justice. Rwandan President Paul Kagame described the initiative as an "African solution to African problems"[6]. At the beginning the idea was to create specialized chambers within the existing Courts of First Instance. But this idea was rejected since the current legal system was not equipped with the needed arsenals to face the huge number of suspects persons. "In more than nine thousand communities throughout Rwanda, panels of elected lay judges known as Inyangamugayo ("those who detest dishonesty" in Kinyarwanda) preside over genocide trials in the

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The researcher had the opportunity to work with the International Criminal Tribunal for Rwanda ICTR as a legal intern, which was an important step to conduct the research.
Email: Fakhoury2000fr@yahoo.fr
[2] Paul KAGAME, President of the Republic of Rwanda launching Gacaca Courts activities on the 18th June 2002
[3] Rwanda's population consists of two ethnic groups: Hutus (88%), Tutsis (11%) and others
[4] P. Clark, The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda, Justice without Lawyers, (Cambridge University Press, December 2010),
[5] Rwanda's official national language
[6] Remarks of President Paul Kagame at the international Peace institute, New York, September 21, 2009

same cities, towns, and villages where the crimes were committed".[1]

It's important to know that the perpetrators in the Rwandan civil war were persecute in three different legal jurisdictions. The first one is the Rwandan State criminal courts and the second one is the International Criminal Tribunal for Rwanda (ICTR) located in in Arusha, Tanzania and the last one is the Gacaca[2]. "This court had been established for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring States, between 1 January 1994 and 31 December 1994" [3]

2. Objectives and Reasons for The Creation of The Gacaca Jurisdictions: Alternative Solution.

For all the people around the world, specially victims from Genocide, like the Rwandan people, Justice is not only important but is a basic need for all the society without which it cannot continue to coexist normally. If the accused is innocent until proven guilty, however, the condemned or convicted persons must be punished and pay the price for the crimes that they committed, specially in a society that had been changed completely due to the absence of law. Failure to punish criminals simply means that not only the society is unable to restore rights to its owners, but also, it was considered as an invitation to victims to take their rights away from the corridors of courts.

2. 1: Objectives of The Gacaca Court:

During the Rwandan civil war there were many negative feelings among the average citizen: the state was unable to protect its citizens, and impunity and absence of law. But the Rwandan government was aware that bringing justice for mass killings was going to face a number of obstacles represented in the huge number of genocide cases, and the complexity of each one of them, which would have overwhelmed even the "best-equipped judicial system [4]. "Actually, there was almost unanimous agreement among the Rwandan judicial and political institutions that establishing Gacaca courts was the most reliable solution to trial the large number of people who polluted their hands by blood during the massacres committed against the Tutsi minority. According to many scholars, these courts had the responsibility to achieve the following key purposes: "revealing the truth about genocide; speeding up the genocide trials; eradicating the culture of impunity; contributing to the national unity and reconciliation process; demonstrating the capacity of Rwandan people to resolve their own problems[5]." Furthermore, the preamble of the organic law of 2001 added another objective by saying: "to provide for penalties allowing convicted prisoners to amend themselves and to favour their reintegration into the Rwandese society without hindrance to the people's normal life".

2.2: Reasons for The Creation of The Gacaca Jurisdictions :

There is no single reason for the establishment of such courts, but a number of motives called the the decision maker to adopt the idea of Gacaca Courts: Large number of accused and suspects vis -a-vis inadequate detention conditions, the limited Resources, Both Material and Human and encourage reconciliation between war-torn people: Mass Justice for Mass Atrocity:

2.2.1: Large Number of Accused and Suspects vis-a-vis Inadequate Detention Conditions:

Thousands of suspects were arrested after the genocide and the number of detainees grew rapidly and quickly overwhelmed the prison system. "By October 1994, an estimated 58,000 persons were detained in prison space intended for 12,000[6], and by 1998, the number of prisoners had reached around 130,000[7]. Extreme overcrowding and lack of sanitation, food, and medical care created conditions that were universally acknowledged to be inhumane and which claimed thousands of lives. Many persons were held for years without charge and without their cases being investigated[8]" According to Human Rights Watch, "From 1996 to 2002, the government brought some 7,000 persons to trial on charges of genocide and made some progress both in recruiting new staff and rebuilding the infrastructure of the judicial system. But as of 2001 more than a hundred thousand persons were still detained and the courts continued to operate much as they had in the past, slowly and inefficiently.[9]"

[1] M. Rettig, 'Gacaca: Truth, Justice, and Reconciliation in Post conflict Rwanda' African Studies Review, Volume 51, Number 3, (December 2008): 25-50

[2] The ICTR has been created by security council resolution 955 for the year 1994.

[3] See United Nations Security Council Resolution N 955, S/RES/955 (1994) 8 November 1994

[4] Human Rights Watch, Justice Compromised, The Legacy of Rwanda's Community-Based Gacaca Courts, see https://www.hrw.org/report/2011/05/31/justice-compromised/legacy-rwandas-community-based-gacaca-courts

[5] J. Riddell, Addressing Crimes Against International Law: Rwanda's Gacaca in Practice, University of Aberdeen, (2005), p. 53.

[6] United Nations, Office of the resident Coordinator, Rwanda: United Nations Situation Report covering the month of October, October 1994

[7] International Criminal Tribunal For Rwanda: Delayed Justice ICG Africa Report N° 30, 7 June 2001, p.33, https://www.files.ethz.ch/isn/28698/030_international_criminal_tribunal.pdf

[8] A. Forges, Leave None to Tell the Story: Genocide in Rwanda, (1999), Alison Des Forges was Human Rights Watch's senior advisor in the Africa Division and one of the world's foremost experts on Rwanda.

[9] Human Rights Watch, Law and Reality Progress in Judicial Reform in Rwanda, July 2008,

Many law and policy makers agrees that by referring to traditional judicial system (Rwanda's existing court system) to prosecute all those who took part in the massacres that took place in Rwanda, it would take approximately 100 to try everyone[1].

2.2.2: Limited Financial and Human Resources

In addition, as a result of the limited financial and human resources available to deal with such mission in the absence of international support, the government of Kigali had realized that it was unable to prosecute all the killers within a reasonable period in which the rights of the accused are respected. In Rwanda, where resources were already under pressure before the genocide, the task became even more difficult due to the losses of a large number of judges and judicial staff, who lost their lives during the genocide and due to the destruction of much of the country's infrastructure[2]. According to National Service of Gacaca Courts, the judicial system was completely destroyed due to, in addition to the above-mentioned loss in judicial staff, the destruction of working materials, loss of documentations, failure of the state machinery and judicial police[3].

2.2.3: Encourage Reconciliation Between War-Torn People: Mass Justice for Mass Atrocity:

According to Lars Waldorf, in his PhD, Gacaca is a "Mass justice for mass atrocity" [4]. Actually, in addition to what have been mentioned previously, we can say that there are other purposes for the creation of this kind of courts. "The aim of these tribunals is at once daunting and inspiring: punish *génocidaires*[5], release the innocent, provide reparations, establish the truth, promote reconciliation between the Hutu and the Tutsi, and heal a nation torn apart by genocide and civil war in 1994[6]".

"This is the main reason why the government has promised to implement an alternative solution of gacaca, decentralized people's courts based on some of the operating principles of traditional Rwandan justice.[7]". in spite of all these challenges, Rwandan Government, was determined "to put an end to impunity for the perpetrators of the most serious crimes of concern to the International Community as a whole and thus contribute to the prevention of such crimes".[8]

3. The Gacaca Jurisdictions: Customary Conflict-Resolution Processes

The Gacaca Courts are adapted to address crimes linked to the genocide. Originally, "Gacaca gatherings were meant to restore order and harmony within communities by acknowledging wrongs and having justice restored to those who were victims[9]"

Since there was no legalization of these courts in Rwanda, the government had adopted a new law called Organic Law No 40/2000 of 26/01/2001 (3:1), for framing these courts and indicating the nature of their work. Some of the provisions of this law have been introduced to give legal weight to those who confess their crime (3:2). However, the execution of the sentence did not follow the traditional methods of detention behind bars but it follows an alternative penalty based on Community service (3:3).

3.1: Organic Law No 40/2000 Of 26/01/2001 And Its Amendment: Rwandan Character with International Flavor.

"The Government of Rwanda has adopted Organic law No 40/2000 of 26/01/2001,setting up Gacaca Jurisdiction and organizing prosecutions for offences constituting the crime of genocide or crimes against humanity committed between October 1, 1990 and December 31, 1994". This Organic Law was considered an important step to persecute those who participated and committed crime of genocide or crimes against humanity. According to the Organic Law, article 51, the accused persons committed offences during the period between 1 October 1990 and December 31, 1994 have been divided into 4 categories:

"a) The person whose criminal acts or criminal participation place among planners, organizers, incitators,

https://www.hrw.org/reports/2008/rwanda0708/rwanda0708webwcover.pdf

[1] M. Maskulak, A Spirituality of Reconciliation: Lessons from Rwanda, wiley onlione library, https://onlinelibrary.wiley.com/doi/pdf/10.1111/nbfr.12149; T. Gallimore, Rwanda's dilemma, JUNE 7, 2000, https://www.csmonitor.com/2000/0607/p21s1.html, T. Longman, 'Memory and Justice in Post-Genocide Rwanda' (Cambridge University Press, 2017), p.95; J. Balint, Genocide, State Crime and the Law: In the Name of the State, (Routledge, 2012), p.115; A. Baguma, Rwanda: Gacaca - Country 's Solution to Genocide, (2008), http://allafrica.com/stories/200808140185.html.

[2] Human Rights Watch, Justice Compromised, The Legacy of Rwanda's Community-Based Gacaca Courts, see https://www.hrw.org/report/2011/05/31/justice-compromised/legacy-rwandas-community-based-gacaca-courts

[3] National Service of Gacaca Courts, Kigali, 2012, file:///C:/Users/hp/Downloads/gacaca_courts_in_rwanda%20(1).pdf

[4] L. Waldorf, Mass Justice for Mass Atrocity: Transitional Justice and Illiberal Peace-Building in Rwanda, PhD Thesis, Irish Centre For Human Rights Faculty of Law National University Of Ireland, Galway, November 2013,

[5] French term means genocidaires

[6] M. Rettig, *Ibid*, p.26

[7] International Criminal Tribunal for Rwanda: Delayed Justice ICG Africa Report N° 30, 7 June 2001, p.33, https://www.files.ethz.ch/isn/28698/030_international_criminal_tribunal.pdf

[8] See the preamble of the Rome Statute of the International Criminal Court, The Statute entered into force on 1 July 2002. https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

[9] L. Huyse & M. Salter: Traditional Justice and Reconciliation after Violent Conflict Learning from African Experiences, (International Institute for Democracy and Electoral Assistance 2008),

supervisors of the crime of genocide or crime against humanity; b) The person who, acting in a position of authority at the national, provincial or district level, within political parties, army, religious denominations or militia, has committed these offences or encouraged others to commit them; c) The well-known murderer who distinguished himself in the location where he lived or wherever he passed, because of zeal which has characterized him in killings or excessive wickedness with which they were carried out; d) The person who has committed rape or acts of torture against person's sexual parts" .

The second category covers two point " a) The person whose criminal acts or criminal participation place among authors, co-authors or accomplices of deliberate homicides or serious attacks against persons which caused death. b) The person who, with intention of giving death, has caused injuries or committed other serious violences, but from which the victims have not died".

the third category covers " The person who has committed criminal acts or has become accomplice of serious attacks, without the intention of causing death to victims. "; and the last category talks about "persons who committed offences against assets".

Its seems that there is a direct connection between this organic law and the international criminal tribunal statute adopted 1998 in terms of "superior-subordinate relationships". Both of them have engaged the responsibility of superior once their subordinates have committed crimes within the jurisdictions of both courts. Article 28 from the ICC provides: "… a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control…" and article 3 from the organic law says : "...The fact that any of the acts referred to in this organic law was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to punish or prevent such acts while these measures were available to him".

3.2 The importance of Confession for the Gacaca jurisdiction

The Rwandan courts had given particular importance to the confession made by the accused, and this could be seen as evidence that the public prosecution, after the civil war, was not able to play his role due to the deterioration of the security situation in the country as well as the destruction of the infrastructure of many prosecution offices in the country. The state encouraged the defendants to confess their crimes, as a legal provision that was added to the organic law.

This procedure, Procedure of guilty plea and confession, played a significant role in Genocide trials; its main objectives were; "revealing the truth about Genocide, speeding up Genocide trials and contributing to national reconciliation" [1], however, three conditions should be taken into consideration as follows:

" To be received as confession in the context of this chapter, the defendant's declarations shall contain: a) The detailed description on everything relating to the confessed offence, in particular the location where it has been committed, the date, the witnesses, the names of the victims and the damaged assets; b) The enquiries relating to co-authors and accomplices as well as any other enquiry useful to the exercise of public action; c) The apologies offered for the offences that he petitioner has committed)[2]"

Actually, the organic Law, as mentioned earlier, had encouraged the confession by halving the sentence prescribed by the courts in some cases. However, not all crime categories were included in such procedures. According to article 56, the perpetrators of the first categories are exempted from penalty commutation due to the seriousness of the crimes concerned. The article says: "The persons whose criminal acts or criminal participation place in the first category do not enjoy penalty commutation[3]"

However, for the second category the penalty becomes "ranging from 12 to 15 years to the maximum, but out of the pronounced sentence, they serve half of the sentence in custody and the rest is commuted into community services [4] "and "Defendants coming within the third category who already appearing on the list of perpetrators of offences of genocide and incur a reduced prison sentence ranging from 3 to 5 years to the maximum, but out of the pronounced sentence, they serve, as for the previous one, only half in custody and the rest is commuted into community services" [5] and "Defendants coming within the fourth category are sentenced to the only civil reparation of damages caused to other people's property".[6] from article 56 up to article 67, the organic law examined in detail the "procedure of confession and guilt plea before the public prosecution hearing and judgment" Etienne Dusabeyezu, in his research [7], had clarified the penalties, including the alternative

[1] National Service of Gacaca Courts, Kigali, 2012, p. 23. file:///C:/Users/hp/Downloads/gacaca_courts_in_rwanda%20(1).pdf
[2] Article 54 from the organic law.
[3] Article 56 from the organic law
[4] Article 69 para B
[5] Article 70 para B
[6] Article 71
[7] E. Dusabeyezu, Closing gacaca─analysing Rwanda's challenges with regard to the end of gacaca courts, (LLM) in Transnational Criminal Justice and Crime Prevention – An International and African Perspective, Faculty of Law, University of the Western Cape, 2013. p. 24

penalties as follows

Category	No confession or confession rejected	Confession after appearing on the list of suspects	Confession before appearing on the list of suspects
Category 1	Life imprisonment with special provisions	25-30 years of imprisonment	20-24 years of imprisonment
Category 2(1)-(3)	30 years or life imprisonment	25-29 years (1/3 in custody; 1/6 suspended; ½ commuted into community services)	20-24 years (1/6 in custody; 1/3 suspended; ½ commuted into community services)
Category 2 (4)-(5)	15-19 years	12-14 years (1/3 in custody; 1/6 suspended; ½ commuted into community services)	8-11 years (1/6 in custody; 1/3 suspended; ½ commuted into community services)
Category 2 (6)	5-7 years (1/3 in custody; 1/6 suspended; ½ commuted into community services)	3-4 years (1/3 in custody; 1/6 suspended; ½ commuted into community services)	1-2 years (1/6 in custody; 1/3 suspended; ½ commuted into community services)
Category 3	Return or compensation of the property.		

Source:[1]

3.3: Community Services as an Alternative Sanction for the Gacaca Courts

Let us say first of all that Punishments issued by Gacaca Courts varies from life in prison to community service and rehabilitation. Many countries are moving to amend their legislation in order to introduce the idea of community service as an alternative penalty. Community service contributes to reduce the burden from the penal institutions by reducing the number of its people, and more importantly, it prevents the perpetrators of minor offenses from turning into more serious criminals. Many of the concerned organizations, especially non-governmental organizations, agree that community service should take its rightful place in the courts instead of incarceration as it corrects behavior and devotes national responsibility. The diversity of legal systems between countries leads, as a result, to encourage some countries to impose places on detainees where they can conduct the community services , so we find the followings institutions such as special needs centers, juvenile care centers, digging wells, nursery and kindergarten services, maternity and childhood centers and women's associations, as well as service in traffic management, ambulance or transport, building schools, collecting donations or distributing aid and subsidies, or even teaching at adult education centers etc. However, the application of this alternative punishment seems from the first insight incomprehensible or conceivable. Actually, the idea of community service concerns those who committed minor offences, such as driving without license, traffic offences that do not involve any damage or injury, drink driving, littering, possession of very small amounts of illegal drugs with no intent to sell, fishing or hunting without a license, jaywalking, or riding public transportation without paying a fare. However, the situation in Rwanda is completely different. We are not talking about minor offences but the most serious crimes of concern to the international community as a whole. And the question here: Is it acceptable that the punishment be commuted to those who committed the most serious crimes by conducting voluntary work or other community service? According to Mr Anastase Nabahire[2], Community Service is "a new form of repression and re-socialization, an attempt, indeed bold, but one which, once well-established can bring many benefits to both Rwandan citizens and the country"[3]

Actually, charged offenders who are called upon to benefit from Community Service in Rwanda are those who have committed, in such extreme violence, the most serious crime possible: the crime of genocide. Indeed, according to the Gacaca Organic Law N0 40/2000 OF 26/01/2001, article 69, Community Service is administered to persons classified in Category 2, which includes "The person whose criminal acts or criminal participation place among authors, co-authors or accomplices of deliberate homicides or serious attacks against persons which caused death. b) The person who, with intention of giving death, has caused injuries or committed other serious violence, but from which the victims have not died."

[1] E. Dusabeyezu, *Ibid*, p. 24
[2] Associate Executive Secretary of the Executive Secretariat of the National Committee of Community Services
[3] Monitoring and Research Report on the Gacaca, Community Service (TIG) Areas of reflection, With support from the Belgian Ministry of Foreign Affairs, the Direction of Development, and the Coopération Suisse (DDC), PRI - Gacaca Report – March 2007, p.5; see article 69, 71, 75 from the organic law.

However, and above all, and beyond the more common aim of social rehabilitation of the convict at the individual level, "this system is meant to rebuild social bonds at the collective level, and thereby create some national cohesion in a post-genocide context".[1]

Few years later, the notion of community service has been modified after the adoption of new organic law for the Gacaca Courts, Law of 19 June 2004, it contains five articles on the subject contrary to the previous law which contains 3 articles. The new provisions pertaining to Article 74 of the Law of 2004 which says : "Should a person who is serving community services sentence commit another crime, the period he or she has already served becomes void and he or she shall serve the remaining prison sentence in custody as well as be prosecuted for the new crime he or

she committed.[2]"

The question here is, what if the convicted person did not perform the community service in the proper manner required by the Gacaca court, could the convicted person be returned to prison as a subsequent procedure? Article 80 from the new organic law of 2004 says in this regards that: " In case of default by the convicted person to carry out community services, the concerned person is imprisoned for serving the remaining prison sentence in custody" .

4. Gacaca's Compliance with International Norms:

It is natural that the Gacaca courts had faced many challenges. These courts, which were used by the villagers to solve their daily problems, became a center of attention not only for the local government but also for the international community. At that time, the government had gone so far by covering these courts with a legal flavor by putting in place organic law that was amended several times. However, it has been shown during the procedures that there are many challenges facing Gacaca. From the international human norms perspective, there are many standards that the international community should observe to ensure a fair trial for accused persons. These international human rights standards offer a number of protective procedures to guarantee that persons are not deprived from their freedom in an arbitrary manner, and there is no abuse for the prisoners' rights.

However, if we make a simple comparison between the international rules of the international courts and the ones applied in the Gacaca courts, we would easily observe that there are many legal gaps that must be taken into account. This reflects the many flaws that could negatively affect the fairness of the decisions of the court. The Gacaca courts have been subjected to numerous criticisms from both civil and governmental institutions. Many criticisms have been made against the rights of the accused, such as the lack of respect for the principle that the accused is innocent until proven guilty, or the principle of confronting witnesses, or arbitrary detention and other criticisms. In this part of the research I will focus on three criticisms:

4.1: The Judges of The Gacaca Courts: Huge Mission and Limited Training
4.2: The Absence of Legal Counsel: Dramatic Exception
4.3: The Right to be Presumed Innocent until Proved Guilty

4.1: The Judges of The Gacaca Courts: Huge Mission and Limited Training

The members of the bench of Gacaca judges[3], should be Rwandans of integrity elected by the General Assembly of the Cell[4] in which they reside. These judges are elected to serve on a nine-person council. As we are all aware that one of the most important conditions in the appointment of judges, both in domestic and international courts, is that judges shall enjoy integrity, as it is considered as a basic condition, whether mentioned or not. It is the duty of states to establish whatever conditions they want to ensure the integrity of the candidate for the post of a judge, which also applies to Gacaca's judges. The Rwandan government has set many conditions for those who wanted to be appointed as judges in these courts, but added special conditions linked to the legacy of the post-genocide situation. According to article 7 from the Presidential Order n° 12/01 of 26th June 2001 "the following conditions should be fulfilled: a) to have a good behavior and morals; b) to be truthful; c) to be trustworthy; d) to be characterized by a spirit of sharing speech; e) not to have been sentenced to a penalty of at least 6 months' imprisonment; f) not to have participated in perpetrating offences constituting the crime of Genocide or crimes

[1] Monitoring and Research Report on the Gacaca, Community Service (TIG) Areas of reflection, With support from the Belgian Ministry of Foreign Affairs, the Direction of Development, and the Coopération Suisse (DDC), PRI - Gacaca Report – March 2007, p.7

[2] Official Gazette of the Republic of Rwanda, N° 16/2004 of 19/6/2004 Organic Law establishing the organization, 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 1st, 1990 and December 31, 1994, Year No. 43 Special of June 19, 2004

[3] known as Inyangamugayo

[4] "The General Assembly of each "Gacaca Court" holds an ordinary meeting once a month and an extraordinary session wherever it is required for the good functioning of the "Gacaca Court". Decisions of the General Assembly are taken by consensus or, otherwise at the absolute majority of its members"

against humanity; g) to be free from the spirit of sectarianism and discrimination".[1] But there is a challenge, even if the chosen judges have integrity nonetheless they often not legally qualified to face a major legal challenge resulting from genocide. The judges were trained for a short period of time not enough to qualify the judges. "The training lasted for 10 days and was carried out in various training centers. The training mainly focused on the Organic Law no 40/2000 of 26/01/2001 and adult training methodology. According to the trainers, the subjects and the issues discussed therein permitted the beneficiaries to have general knowledge on Genocide crime in".[2]

The question remains as of whether the judges appointed to run the Gacaca courts were qualified enough to carry out the enormous job at hand, or their appointment was merely to finish the legacy of genocide regardless to the price, even if their decisions were against the rules of justice? Amnesty international, as one of the most important human rights organizations, has submitted a detailed study on the issue and reached a conclusion that "Between 4 February and 14 March 2002, 781 trainers consisting primarily of magistrates and final year law students, received adult education training. Following their training, they divided into small groups to train the selected gacaca judges in different parts of the country. They had six weeks beginning from 6 April 2002 to train the 254,152 magistrates. Each group, containing 70 to 90 gacaca judges, received a few days of instruction in the basic principles of law (particularly the organic law on gacaca), group management (how to organize and chair meetings), conflict resolution, judicial ethics, trauma (understanding and recognizing trauma and learning how to behave with trauma victims), human resources and equipment and financial management[3]"s

Being a judge is one thing, but being a judge in a genocide case is another thing. In addition to intelligence, ethics, courage and integrity, all judges should have extensive experience and education.[4]

Furthermore, it should be noted that the judges of the court known as (Inyangamugayo) were working voluntarily in the court without remuneration, considering that as national and moral duty towards the country. This may put them at risk of accepting bribes, which indeed claimed by a number of reports stating that some judges have been found guilty of bribery. Ombudsman Office[5] has submitted a report in which 12 judges were found guilty of taking bribes in 2010.[6]

4.2: The Absence of Legal Counsel: Dramatic Exception

If it is unexpected to have a court without judges, it is unimaginable to have a court without lawyers too. It is admitted that legal assistance is an indispensable component of a fair and efficient criminal justice system that is based on the rule of law. According to "United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems" the "foundation for the enjoyment of other rights, including the right to a fair trial as a precondition to exercising such rights and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process"[7].

This principle, the right to be represented by a lawyer, was adopted by all domestic and international legislations. Many United Nations instruments stresses that a fair trial, specially, in the criminal situation, involves that the accused have the right to be represented by a lawyer

for example, article 11 from the Universal of Human Rights, paragraph (1) says that "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense". This declaration, though devoid of the mandatory power of States, was later consolidated by the International Covenant on Civil and Political Rights[8] which says in article 14 paragraph 2 that "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment

[1] Human Rights Watch, Justice Compromised, The Legacy of Rwanda's Community-Based Gacaca Courts, see https://www.hrw.org/report/2011/05/31/justice-compromised/legacy-rwandas-community-based-gacaca-courts
National Service of Gacaca Courts, Kigali, 2012, p. 35

[2] Human Rights Watch, Justice Compromised, The Legacy of Rwanda's Community-Based Gacaca Courts, see https://www.hrw.org/report/2011/05/31/justice-compromised/legacy-rwandas-community-based-gacaca-courts
National Service of Gacaca Courts, Kigali, 2012, p. 51

[3] Amnesty International, Rwanda: Gacaca: A question of justice, 17 December 2002, p.26

[4] For more information about this point please see: R. Leflar, 'The Quality of Judges', Indiana Law Journal, Volume 35 | Issue 3, (spring 1960); J. Nelson, 'What Makes a Good Judge?', Journal of the National Association of Administrative Law Judiciary, Volume 9 | Issue 2, (1989).

[5] An ombudsman, is an official who is charged with representing the interests of the public by investigating and addressing complaints of maladministration or a violation of rights. https://en.wikipedia.org/wiki/Ombudsman

[6] 1 Ombudsman Office, List of suspects convicted of Corruption offense (all semesters), Kigali, 2010

[7] United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, United Nations, June 2013, Resolution adopted by the General Assembly [on the report of the Third Committee (A/67/458)], p. 2

[8] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49

by him in any such case if he does not have sufficient means to pay for it" . noting that Rwanda has ratified the aforementioned treaty on 16 April 1975. [1]

A similar right in the Standard Minimum Rules for the Treatment of Prisoners[2], according to which "an untried prisoner, for the purposes of his or her defence, shall be allowed to receive visits from his or her legal adviser." This position has been reiterated later when the United Nations General Assembly has adopted new resolution called "Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment" in which it confirms in principle 11 para (A) "that person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law".. In the same direction, we believe that the absence of legal defense during Gacaca proceedings contraries with Rwandan constitution of 2003 which confirms in article 18 "…the right to be informed of the nature and cause of charges and the right to defence are absolute at all levels and degrees of proceedings before administrative, judicial and all other decision making organs" in addition to article 137 that " A declaration of a state of siege or of a state of emergency shall not under any circumstances violate…, the right to legal defence …" Human Rights Watch says in the same direction "Gacaca jurisdictions, however, remain the one dramatic exception to the exercise of that right with accused persons having no access to counsel at any stage of the proceedings". National Service of Gacaca Courts explain the reason why Gacaca court was supposed to respect the right to defence by saying that "This ensures fairness because in most criminal cases, the prosecution is represented by a legal expert while the suspect is a regular citizen who does not know much about criminal procedure rules. It is therefore necessary to ensure that the both parties are equally prepared for the case. However, having a legal counsel is not mandatory, it is a right that one can use or not".

4.3: The Right to be Presumed Innocent until Proved Guilty.

Other prominent principle in domestic laws related to the rights of the accused called "the presumption of innocence or "the accused is innocent until proven guilty[3]." Its admitted that this principle serves to emphasize that the prosecution has the obligation to prove each element of the offense beyond a reasonable doubt and that the accused bears no burden of proof[4] . Due to this principle, a person cannot be obliged to admit guilt or give evidence against himself. It is for the prosecutor office and investigators to submit evidence of guilt, "not for the defendant to prove innocence".[5] because they should "never present a case to court until they have gathered irrefutable evidence" [6]. This principle has been confirmed not only by domestic laws but also by the international conventions and international jurisdictions such as International Criminal Court ICC[7], International Criminal Tribunal for Rwanda ICTR[8], International Criminal Tribunal for The Former Yugoslavia ICTY[9], and The Extraordinary Chambers in The Courts Of Cambodia ECCC[10]. However, there have been no traces for such principle in the Nuremberg and Tokyo Military Tribunals[11].

[1] See also "European Convention for the Protection of Human Rights and Fundamental Freedoms, article 6, c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require "furthermore, African Charter on Human and Peoples' Rights says in article 7 that "Every individual shall have the right to have his cause heard. This comprises: The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; The right to be presumed innocent until proved guilty by a competent court or tribunal; The right to defence, including the right to be defended by counsel of his choice; The right to be tried within a reasonable time by an impartial court or tribunal"; for more details about the legal aid please see the following researches A. Flynn & J. Hodgson & J.Mcculloch, & Bronwyn Naylor, 'Legal Aid and Access to Legal Representation: Redefining the Right to a Fair Trial', Melbourne University Law Review, vol 40:207, (2016): pp. 207-239; A. Edwards, 'Legal Aid, Sentencing; Ovey, Clare; White, Robin C. A. (2006); Jacobs & White, The European Convention on Human Rights, 4th ed. Oxford University Press; G. Steven, The European Convention on Human Rights: Achievements, Problems and Prospects, (Cambridge University Press, 2006); J. Hodgson, 'Plea Bargaining: A Comparative Analysis' in James D Wright (ed), International Encyclopedia of the Social and Behavioral Sciences (Elsevier, 2nd ed, 2015) vol 18, 226.

[2] Human Rights: A Compilation of International Instruments, Volume I (First Part), Universal Instruments (United Nations publication, Sales No. E.02.XIV.4 (Vol. I, Part 1)), sect. J, No. 34.

[3] For more details about the principle please see: K. Pennington,' Innocent Until Proven Guilty: The Origins of a Legal Maxim', 63 Jurist: Stud. Church L. & Ministry 106 (2003): 106-124.

[4] M. Christopher & L. Kirkpatrick. Evidence; 4th ed. (Aspen, Wolters Kluwer, 2009) . pp. 133–34

[5] https://www.fairtrials.org/about-us/the-right-to-a-fair-trial/the-presumption-of-innocence/

[6] http://theduckshoot.com/tag/innocent-until-proven-guilty/

[7] See article 66 from ICC statute "Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law. The onus is on the Prosecutor to prove the guilt of the accused. And in order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt"

[8] See article 20/3 "The accused shall be presumed innocent until proven guilty according to the provisions of the present Statute"

[9] see article 21/3 "The accused shall be presumed innocent until proven guilty according to the provisions of the present Statute"

[10] see article 21/d from the internal rules: " Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established."

[11] The only article in this matter is 26 from the Nuremberg charter which says "The Judgement of the Tribunal as to the guilt or the innocence

This principle is found in the main international conventions, agreements and charter such as the Universal Declaration of Human rights of December 10th 1948 [1], and International Covenant on civil and political rights[2], and African charter on human and peoples' rights[3], and charter of fundamental rights of the European union[4].

The persons accused before the Gacaca Courts were supposed to be judged fairly in accordance with the sacred principles: the accused is innocent until proven guilty. This principle has to be applied to all different stages of the proceedings before the Gacaca Court, including the investigation stage. Nonetheless many international observers have noticed that this principle has not always been taken into account either by the office of the persecutors or by the judges[5].

Conclusion

Examining the legal framework of the Gacaca courts is a problematic but not an impossible mission. Although many earlier studies have examined the question, this study concentrates on observing the question from the international perspective rather than national facet. What draws our attention here is the distinctive way in which the Rwandan government dealt with the many crimes committed by the Hutus against the Tutsis during the genocide. The government had no choice but to resort to the idea of the Gacaca courts. It seems that the old Rwandan proverb which says "*Laws are heavier than stones. Laws require impossible architects*", reflects the legal challenge at the time of adoption Gacaca Organic Law. In this context, the tremendous pressure on the post-Rwandan government at that time can only be imagined. It wanted to restore security and stability, to reveal the reality about what happened during genocide, to eradicate the culture of freedom of criminality, to restore the unity, and to address the intolerable consequences of genocide through the idea of traditional courts used in the past to solve simple problems between neighbors. This law has been adopted to face the heaviest challenge not only by Rwanda but for the entire African continent. This law came in a time when even the most powerful global governments could not easily deal with a similar challenge. I wonder what would have happened if what happened in Rwanda has occurred in other developed countries. What would have been their reaction?

Regardless to the different views that surrounds the concept of introducing the Gacaca Courts as an adopted alternative method to deal with the Rwandan atrocities, it was the only viable solution to encounter the challenge at the time. I believe the outcomes would have been better if the international community had offered more assistance than merely establishing The International Criminal Tribunal for Rwanda (ICTR). The Rwandan people deserve more than that.

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[1] See article 11/1 from UDHR "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence"

[2] see article 14/2 "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law"

[3] See article 7/1/b "Every individual shall have the right to have his cause heard. This comprises:The right to be presumed innocent until proved guilty by a competent court or tribunal"

[4] See article 48/1 "Everyone who has been charged shall be presumed innocent until proved guilty according to law"

[5] avocats sans frontières, monitoring des juridictions gacaca phase de jugement rapport analytique n°5, janvier 2008 - mars 2010, https://asf.be/wp-content/publications/Rwanda_MonitoringGacaca_RapportAnalytique5_Light.pdf; Human Rights Watch, Law and Reality Progress in Judicial Reform in Rwanda, July 2008, p. 78, https://www.hrw.org/reports/2008/rwanda0708/rwanda0708webwcover.pdf

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