

22nd May 2014

ICTR:

Contribution to Reconciliation or Victor's Justice?

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The International Criminal Tribunal for Rwanda (ICTR) faced an unprecedented challenge when it was established to address the crimes of a genocide that cost the lives of an estimated 800,000 Tutsis and moderate Hutus. The 100 days of slaughter were characterised by crimes that shocked humans' conscience, including the crime of genocide[i], crimes against humanity[ii] and war crimes.[iii] During the course of the conflict, the international society stood by and witnessed crimes that cost more lives per day than the Holocaust. The genocide ended when the Rwandan Patriotic Army – the armed wing of the Tutsi-led Rwandan Patriotic Front (RPF), led by Rwanda's current President Paul Kagame – took over control of Rwanda in July 1994. The former Hutu leadership, responsible for the planning and execution of the genocide, was to be brought to justice by the ICTR which was set up by UN Security Council Resolution 955.

However, not only the former Rwandan Government responsible for the genocide, but also the RPF has been accused of massacres that led to the death of an estimated 25,000-45,000 people, civilians and militias alike[iv]. The Tribunal's decision to turn against members of its former advocate and the subsequent lack of cooperation from the RPF, would turn out to be a major obstacle for Rwanda's reconciliation process in the years to come. The subsequent one-sided application of the Tribunal's jurisdiction led to a lack of legitimacy of the ICTR and thus to a limited contribution to the reconciliation efforts in Rwanda.

As early as the start of the genocide in April 1994, the RPF demanded the set up of a tribunal similar to the International Criminal Tribunal for Yugoslavia (ICTY). In July 1994 the UNSC implemented the Commission of Experts for Rwanda (the Commission) to investigate violations of international humanitarian law in Rwanda. The Commission concluded that

'individuals from both sides [...] have perpetrated serious breaches of international humanitarian law', 'crimes against humanity' and 'that acts of genocide were perpetrated by Hutu elements in a concerted, planned, systematic and methodical way.'[v]

22nd May 2014

As a consequence of the Commission's findings, the UNSC adopted Resolution 955[vi] to

'establish an international tribunal for the sole purpose of prosecuting 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 neighbouring States, between 1 January 1994 and 31 December 1994'

The Resolution was not only based on the premise of exercising justice, but the work of the ICTR, which was to be based in Arusha, Tanzania, was also expected to contribute to the reconciliation efforts.

Although, the number of individuals killed by the RPF is of a significant lower scale as the number of people killed by the Hutu militia during the genocide, it is quintessential that these crimes are addressed to advance reconciliation between the former conflict parties. Human Rights Watch summarised the need to address the need for justice for all victims of the conflicts as follows:

To insist on the right to justice for all victims, as did the UN Commission of Experts, is not to deny the genocide, nor does such an insistence equate war crimes with genocide; it simply asserts that all victims, regardless of their affiliation, regardless of the nature of the crime committed against them, and regardless of the affiliation of the perpetrator, must have equal opportunity to seek redress for the wrongs done them.[vii]

The Rwandan government voiced several objections against the Tribunal, including towards the temporal jurisdiction ranging from 1 January 1994 to 31 December 1994. The RPF requested that crimes before 1994 should also be covered and the jurisdiction should further be limited to mid July 1994 when the RPF took over control.

Furthermore, the RPF demanded the inclusion of the death penalty as a possible punishment and hoped to exclude crimes outside the ambit of genocide.[viii] The RPF also hoped to gain the prerogative to veto any judge who it considered to be 'partisan or incompetent'[ix]. It is also important to note that the jurisdiction was extended to the neighbouring states, such as the Democratic Republic Congo, in order to investigate crimes committed in refugee camps. The Rwandan Government claimed that its objections were not sufficiently addressed and voted against the Resolution. Nonetheless, the Rwandan Government assured it would co-

22nd May 2014

operate with the Tribunal.

To date, the Tribunal has completed 75 cases, nine accused remain at large.[x] This success underlines the willingness of the international to community to pursue justice for the victims of the genocide. The UNSC expects the ICTR to finish its work by the end of 2014. Thereafter, the functions of the ICTR will be carried out by the International Residual Mechanism for Criminal Tribunals.

However, International Criminal Tribunals and Courts are often subject to criticism. Their legality is oftentimes questioned and they are accused of an incoherent application of their jurisdiction. This sometimes leads to the accusations of 'victor's justice', resulting in the undermining of their legitimacy and therefore efficacy. Today, this is all too evident in the case of the ICTR, often criticised by African politicians as a tool of western neo-colonialism[xi].

The International Criminal Tribunal for Rwanda was not spared such criticism. Although the Tribunal was successful in bringing most genocidaires to justice, it was accused of merely focusing on crimes committed by Hutus whereas killings by the RPF were not investigated. Notwithstanding, the ICTR has undertaken several attempts to bring alleged perpetrators among the RPF to justice. These attempts were severely criticised and blocked by the Rwandan Government.[xii] Whilst the Government acknowledges that crimes were committed by members of the RPA, it downplayed the extent and nature of the killings, describing them as revenge killings exercised by a small number of soldiers.[xiii]

However, as Alison Des Forges, senior adviser to the Africa Division at Human Rights Watch stated,

'These killings were wide-spread, systematic and involved large numbers of participants and victims. They were too many and too much alike to have been unconnected crimes executed by individual soldiers or low-ranking officers. Given the disciplined nature of the RPF forces and the extent of communication up and down the hierarchy, commanders of this army must have known of and at least tolerated these practices'[xiv]

Moreover, the Rwandan leadership does not allow civilian courts to investigate crimes allegedly committed by the RPF. Community-based *gacaca* courts had initially subject-matter jurisdiction over RPF crimes. The jurisdiction, however, was revoked after the pilot phase. Thus, the ICTR was the only possibility left for the victims of RPF crimes to achieve justice.

22nd May 2014

The biggest problem with gacaca is the crimes we can't discuss. We're told that certain crimes, those killings by the RPF, cannot be discussed in gacaca even though the families need to talk. We're told to be quiet on these matters. It's a big problem. It's not justice[xv]

Legality, legitimacy and the Tribunal's efficacy

The 20th anniversary of the genocide and the fast approaching closure of the ICTR offer reason to assess the courts contribution to Rwanda's reconciliation process and its possible legacy.

A critical factor for the success of transitional justice mechanisms is its legality and high degree of legitimacy among the former conflict parties. Whereas the concept of legality is rigid, the degree of legitimacy is characterised by a wide range of fluid factors. Legality is required to fulfil the tribunal's objective of exercising justice and legitimacy is *sine qua non* in order for tribunals to be accepted as a tool to advance reconciliation. Thus, an assessment of the International Criminal Tribunal for Rwanda requires an evaluation of the 'legality-legitimacy' correlation.

Advocates of positivism consider law as a rigid set of rules from which deviation is not allowed, thus 'like cases' need to be treated 'alike'. However, law does not necessarily equal with our understanding of justice which is based on our morals and ethics. Consequently, legal norms need to be underpinned with legitimacy to achieve efficacy. Advocates of natural law consider international law as being based on and developed by a political, legal and ethical process. International law is argued to have an inherent social function and subsequently law needs to adjust if social norms develop over time. The lack of a moral dimension induced by developing social norms, then, would merely establish law without legitimacy.

The principle of legality in criminal law is based on a wide range of rules. First, the basic maxim of legal thinking – *nullum crimen sine lege*– states that an act does not constitute a crime if it was not expressively forbidden at the time it was committed. Further, the principle of *nulla poena sine lege* states that if the act was not forbidden by law one shall not be punished for it. In addition, courts have to have jurisdiction at the time of the alleged act. Moreover, the rules for the use of evidence at the time of the alleged act need to be considered and it must have been widely known that a certain act was prohibited at the time it was committed. The interpretation and application of the law must be consistent and

22nd May 2014

collective punishment for individually committed crimes is prohibited. Legality then, presents a rigid concept. Appeals might be conducted, but the final decision clearly identifies an act as legal or illegal.

The concept of legitimacy, on the other hand, presents tribunals with a conundrum as morals cannot be clearly divided into a black and white category. There is no right or wrong answer to the morality of acts. Even the most heinous crimes might be considered as legitimate by some individuals. Nonetheless, tribunals require moral acceptance in order to contribute to reconciliation processes. That is, the majority of individuals affected by the tribunal's decisions need to approve and consent with the proceedings for the tribunal to achieve a high degree of efficacy.

In addition to legal norms, social norms and values which might be embedded in religious or ethical beliefs influence the concept of legitimacy. Thus, legitimacy of a committed act or trial is judged by a varied range of actors who each apply each their own norms and values. Subsequently, legitimacy needs to be considered as a much more fluid concept than legality. Initial legitimacy for a tribunal might wane during the processes or, *vice versa*, it might increase after initial suspicion is replaced by perceived fairness. Furthermore, the concept of legality can be assessed at an early stage of the process whereas the legitimacy is assessed during or after the process.

The coherent application and adherence to the law are prerequisites and emphasise the need for the fairness of legal procedures which is essential if legitimacy is to be achieved. The incoherent application of legal rules by international tribunals is more likely to be perceived as victor's justice and consequently undermines the efficacy of the Tribunals. Stuart Ford of the John Marshall Law School, summarises the need for coherent application in order to achieve legitimacy by stating that the perception of a court 'will be determined largely by whom the court prosecutes'.^[xvi] A tribunal that lacks legitimacy is therefore severely limited in its function. It might be able to exercise its jurisdiction, but it is unlikely to contribute to the wider reconciliation process.

Domestic law is often rigid and provides a more stringent degree of flexibility for interpretation, but international law, in contrast, is less rigid. As a consequence, the requirement of legitimacy of jurisdictional proceedings is more prevalent on the international level if a high degree of efficacy is to be achieved. Only a high degree of legitimacy bestows

legal norms with a high degree of power and compliance. The degree of legitimacy, then, can exercise and influence legal norms and either support or challenge them.

The Tribunal and its lack of legitimacy

The ICTR was established on the basis that the conflict in Rwanda constituted a threat to security and peace according to Chapter VII of the UN Charter. Nonetheless, the Tribunal's legality was challenged in the case of *The Prosecutor v. Kanyabashi*[*xvii*]. The defence lawyer argued that the UNSC had no authority to set up the Tribunal. Moreover, the defence argued that Chapter VII focuses on 'peace' which requires a forward rather than backward looking process. A further objection focused on the sovereignty of states which is claimed to be infringed upon by the Tribunal. In the same context, the defence argued that the principle of *jus de non evocando*, that is, the accused has the right to be tried in a domestic court, had not been respected. The defence claimed that international and tribunal did not have the authority to exercise primacy over national courts. Furthermore, in the case of *The Prosecutor v. Kanyabashi* the defence claimed that the UNSC's actions ought to focus on states and not individuals and the trials were argued to be merely politically motivated.

The ICTR judges rebutted the arguments made by Kanyabashi's defence lawyers. In reference to Rwanda's sovereignty, the Tribunal emphasized that initially Rwanda itself requested the establishment of the Tribunal. The ICTR judges also rejected the claim that it was politically motivated as it offers fair and impartial trial proceedings. Finally, the ICTR judges argued that political bodies establish courts in general through legislation. Therefore, the establishment of the tribunal itself is a political process.

The ICTY in The Hague was subject to similar accusations and its appeals chamber reviewed state practice before concluding that international and internal conflicts are increasingly interrelated and therefore 'some war crimes provision' might also relate to internal conflicts[*xviii*]. The ICTR followed this argument. The international dimension of the conflict was therefore clearly acknowledged and due to its implications on neighbouring countries more than evident. The legality of the ICTR, then, could not be disputed.

The legitimacy of the Tribunal, however, was significantly more difficult to establish. Both, the ICTY and ICTR were accused of victor's justice and suffered from a lack of legitimacy. Whilst the ICTY and ICTR mirrored each other in many aspects, the former tried and sentenced individuals from all conflict parties in the Former Yugoslavia, the ICTR focused merely on

22nd May 2014

crimes committed by Hutus despite benefiting from a jurisdiction covering crimes committed by all conflict parties.

The then-Chief Prosecutor of the ICTR, Del Ponte, exercised significant pressure on the Rwandan Government to enable the ICTR to investigate crimes committed by the RPA. As a consequence, the Rwandan Government threatened to withdraw its cooperation with the Tribunal. Subsequently, the ICTR was not able to apply a coherent application of its jurisdiction during the proceedings. The crimes committed by the victors were practically excluded from ICTR trials.

The impartiality of a tribunal does not have to result in equal numbers of accused on the sides of the conflict parties, especially as the crimes committed by the Hutu regime are of a significantly larger scale than the crimes committed by the RPF. But the jurisdiction of the ICTR needs to be applied coherently to all individuals that bear responsibility for the crimes committed in order to ensure a high degree of legitimacy of the Tribunal among all parties concerned. The lack of indictments of RPA members connotes victor's justice and is thus an obstacle to reconciliation. Moreover, one sided application of the Tribunal's jurisdiction signals a continuation of impunity in Rwanda – one of the root causes of the genocide. The process also lends itself to historical revisionism as no accurate historical narrative can be established.

The inevitable result is a lack of legitimacy among the people of the defeated party – a party whose consent to the court proceedings is required if the reconciliation process is to prove successful.

It is obvious, then, that the lack of cooperation by the Rwandan Government and the lack of pressure exercised by the international community defeats the objectives of the ICTR in particular and the wider reconciliation process in general. The ramifications of impunity are already thought to have emerged in the years following the genocide when Rwanda's Government committed human rights violations in neighbouring DRC. Kigali's attitude and behaviour towards the ICTR is also counterproductive as the Government's opponents are now more likely to dismiss the Tribunal a political weapon.

The ICTR has to be applauded for bringing genocidaires to justice. The Tribunal has sent a clear signal to the individuals responsible for the genocide and will hopefully serve as deterrence for the future. However, its contribution to the reconciliation process in Rwanda

22nd May 2014

did not live up to its expectation. The ICTR's efficacy which is manifested in its legality and legitimacy is of great significance for the future relationship between the former conflict parties. Both, the legality and legitimacy of the ICTR were challenged. The affirmation of its legality supports its legitimacy, but the use of the Tribunal as a tool of victor's justice severely diminishes it.

To hold individuals of the RPF accountable does neither equate their acts with genocide nor does it deny the killing of 800,000 innocent Tutsis. It is an acknowledgement of the suffering of all people of the conflict, no matter which side they were on. Justice for both sides of the conflict is *sine qua none* for reconciliation to be achieved. If the Rwandan Government is serious about its reconciliation efforts, all perpetrators need to be brought to justice.

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[ii] International Criminal Court, 'What are Crimes against Humanity?', http://www.icc-cpi.int/en_menus/icc/about%20the%20court/frequently%20asked%20questions/Pages/12.aspx

[iii] International Committee of the Red Cross, 'Definition of War Crimes', http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter44_rule156

[iv] Gersony report cited by Human Rights Watch, <http://www.hrw.org/legacy/reports/1999/rwanda/Geno1-3-04.htm#TopOfPage>

[v] United Nations 1992, 'Final Report of the Commission of Experts', p.1-2, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N94/381/91/PDF/N9438191.pdf?OpenElement>

[vi] United Nations Security Council 1994, 'Resolution 955 on establishment of an International Tribunal and adoption of the Statute of the Tribunal', <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N95/140/97/PDF/N9514097.pdf?OpenElement>

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Progress in Judicial Reform in Rwanda', July 2008,

22nd May 2014

http://www.hrw.org/sites/default/files/reports/rwanda0708_1.pdf

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[x] ICTR, Status of cases, March 2014, <http://www.unicttr.org/Cases/tabid/204/Default.aspx>

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[xii] Haskell, L. & Waldorf, L. 2011, 'The Impunity Gap of the International Criminal Tribunal for Rwanda: Causes and Consequences', *Hastings International & Comparative Law Review*, Vol. 49, No. 1, pp.49-86.

[xiii] Peskin, V. 2005, 'Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda', *Journal of Human Rights*, Vol. 4, pp.231-231, <http://www.tandfonline.com/doi/pdf/10.1080/14754830590952152>

[xiv] Des Forges, Alison. *Leave None to Tell the Story: Genocide in Rwanda*. New York: Human Rights Watch, 1999.

[xv] Quoting Human Rights Watch interview with former police officer in Kigali, Rwanda, May 2004.

[xvi] Ford, S, 2012, 'A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of

Transitional Justice Mechanisms', *Vanderbilt Journal of Transitional Law*, Vol, 45, pp.405-475,476. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1908281

[xvii] Prosecutor v. Kanyabashi, Case No. ICTR-96-15, International Criminal Tribunal for Rwanda, <http://www.unicttr.org/tabid/128/Default.aspx?id=76&mnid=3>

22nd May 2014

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