

The ICTR and Reconciliation in Rwanda

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1. Introduction

It follows from United Nations Security Council resolution 955 (1994) that the main purpose of establishing the International Criminal Tribunal for Rwanda (‘ICTR’) was to bring to justice the persons who are responsible for genocide and other systematic, widespread and flagrant violations of international humanitarian law in Rwanda in 1994. But the preamble also states that the Security Council was convinced that such prosecution “would contribute to the process of national reconciliation” and the maintenance of peace.

As a judge in an international criminal tribunal one’s focus is on the daily judicial activities, which include pre-trial work, trials and judgment writing. As a consequence of the work-load, most attention is devoted to the completion of trials while at the same time ensuring fairness and efficiency. However, during my almost 11 years in Arusha, I also reflected on to what extent we were actually contributing to reconciliation in Rwanda.

In an article about the ICTR in 2005 my conclusion was as follows: “The impact of these and future measures should be assessed closer to the end of the Tribunal’s mandate, and, in the last resort, by Rwandans themselves. The point in this context is simply that the Tribunal is trying, within the resources available and despite numerous constraints, to contribute to the process of reconciliation”.¹

Now, in 2015, when the Tribunal has completed its work and will be replaced by the Residual Mechanism by the end of the year, I think there are reasons in favour of a more confident conclusion.

¹ “Main Achievements of the ICTR”, *Journal of International Criminal Justice (JICJ)*, 2005, vol. 3, no. 4, pp. 920–943 (on p. 939). For another positive assessment of the ICTR’s role, see Francois-Xavier Nsanzuwera, “The ICTR Contribution to National Reconciliation” in the same *JICJ* volume, pp. 944–949.

2. General Remarks

The relationship between international criminal justice and reconciliation is a complicated question, as illustrated by the references to relevant previous contributions in the concept note of the seminar in the Peace Palace on 29 May 2015 where this paper was first presented.² Approaches and views differ. As a first general remark, I do not think that there is any contradiction between international criminal justice on the one hand and truth and reconciliation commissions on the other. Both models have their advantages, and the choice between them will depend on an evaluation by national and international decision-makers of the circumstances in the country concerned. In some situations one approach may be preferable, in others both models can be used in parallel, supplementing each other. An illustration is Rwanda, where the National Unity and Reconciliation Commission has been in operation since 1999. This did not cause any problems to the work of the ICTR, and I am not aware of difficulties between the Commission’s work and the domestic courts in Rwanda.

Rwanda’s justice model is interesting for several reasons. Many judges were killed during the genocide, and it took some time until the ordinary courts were fully operative. It soon became evident that these courts could not dispose of all cases against the huge number of suspected *genocidaires* throughout the country. The authorities therefore set up a system of *gacaca* courts, which were to render justice on the lawn at the local level. These ‘grassroots’ courts were composed of lay persons who enjoyed confidence in the village. A bench of local lay judges rendered judgments in criminal cases after having listened to testimonies from members of the population who volunteered information about accused persons.

² See the seminar concept note and programme available at <http://www.ficHL.org/activities/reconciliation-v-accountability-balancing-interests-of-peace-and-justice/>.

There were no defence counsel in the *gacaca* trials, and it has rightly been pointed out – by international NGOs and other observers – that there was a lack of fair trial guarantees.³ However, in the present context it is worth noting that this justice model made it possible to dispose of a large number of cases within a few years, in parallel with the work done by the ordinary Rwandan courts. According to the ICTR web site, more than 12,000 *gacaca* courts tried more than 1,2 million cases throughout the country.

In my view, this can in itself be seen as a contribution to reconciliation: It allowed society to ‘move on’, which leads to detachment and reduces tension. The *gacaca* courts are also interesting because it has been argued that the justice models have a tendency to focus too much on individual criminal responsibility, and that there is little involvement by the population. Finally, it is noteworthy that the *gacaca* courts gave lower sentences if the person was repentant and sought reconciliation with the community.

More generally, the aftermath of the Rwandan genocide illustrates that a justice model can take many forms. There have been three parallel judicial proceedings, one international (ICTR) and two national (ordinary courts and *gacaca*). It would appear that such a multifaceted approach is useful and may increase the chances that justice contributes to reconciliation.

My second general remark is that a discussion about justice and reconciliation is not the place for bombastic statements. Real reconciliation must emerge from within the population, inside the country concerned. As outside observers we should show some caution when assessing the situation. In my view there are several reasons for this.

One question is how to measure reconciliation. Many sources indicate that there has been decreasing tension between hutus and tutsis in Rwanda. The media provide moving reports about convicts who live next to the family of victims they killed in 1994, perhaps even assisting the survivors with practical tasks in everyday life. Is such information a sign of reconciliation? And how typical are such stories, compared to the general situation in society?

Another question is how to assess the impact of the various factors contributing to reconciliation. It is not an easy task to evaluate the influence of the ICTR, the Rwandan ordinary courts, the *gacaca* courts, and the National Unity and Reconciliation Commission, respectively. Considerable time has elapsed since the events in 1994, which in itself contributes to reduced tension. Furthermore, Rwandan leaders have emphasised that “we are all Rwandans” and “never again”, and constitutional provisions

have been adopted to avoid the distinction between hutus and tutsis.

A brief anecdote may serve as an illustration. During my years at the ICTR, it was interesting to observe how some witnesses became reluctant to answer questions from the bench as to whether they were hutus or tutsis. In the early years, the answers were straightforward, but they gradually included statements like “I cannot answer that question” or “we are all Rwandans”. Was this development a sign of reconciliation or just political correctness?

It may not provide much clarity to ask questions to members of the Rwandan population about the ICTR’s contribution to reconciliation. The answers may well depend on their individual knowledge about the work that was done in Arusha. The level of education and whether the persons asked live in the town or in the districts may also complicate such clarification attempts. Furthermore, it cannot be excluded that political or ethnic factors may play a role.

My third general remark relates to the distance between the ICTR and the Rwandan population. Unlike the Special Court for Sierra Leone, based in Freetown, and the Extraordinary Chambers of the Courts of Cambodia in Phnom Penh, the ICTR was not based in the country directly concerned, but in Tanzania. At the time of the ICTR’s establishment there were good reasons for this decision: There was a severe shortage of premises in Rwanda that could properly serve the Tribunal’s need; the appearance of justice and fairness, including impartiality and objectivity, militated in favour of placing the institution in a neutral country; and there were serious security risks in bringing the leaders of the former regime into Rwanda.

Even though the flights between Arusha and Rwanda’s capital Kigali did not take long, it was obviously challenging to reach out to the Rwandan population from Tanzania. It was against this background that the ICTR set up its outreach programme already in its first mandate (1995-1999). The aim was to inform the Rwandan population about its work. Of particular importance was the establishment in 2000 of the ICTR Information and Documentation Centre in Kigali, which had the name *umusanzu* (reconciliation). Over the years, it has received a large number of visitors every day, from all walks of life – school children and adults. The centre has a library with information material, including video archives of the judicial proceedings, films and internet access. It has been organising press conferences, briefings, computer-assisted legal research training, and seminars for journalists. Many Rwandan institutions have regularly received information documents through the centre.

Originally awareness-raising workshops were held outside Kigali. As it was considered important to reach out to

³ For a general, critical assessment of the *gacaca* system, see Jacques Fierens, “Gacaca Courts: Between Fantasy and Reality”, *JICJ*, 2005, vol. 3, no. 4, pp. 896–919.

the entire country, not only to the capital, the ICTR established 10 additional provincial information centres in the provinces of Rwanda. This was an important reform. According to the 16th annual report of the ICTR, the information centre in Kigali received almost 36,000 visitors from July 2010 to June 2011, while the provincial centres were visited by approximately 18,000 persons.⁴

In my view the ICTR outreach programme is a good illustration of the need for a broad strategy if an international tribunal wants to contribute to reconciliation. The judicial process in the courtroom will certainly always remain the core activity, but it has to be communicated into the post-conflict territory and be addressed to all segments of the population.

Finally, and unrelated to the outreach programme, many other aspects of the ICTR's work may, directly or indirectly, have had an impact with respect to reconciliation. Examples include the numerous visits from Rwandan delegations in Arusha, Tribunal employees giving lectures in Rwanda, the ICTR's assistance to victims and witnesses, and counselling to rape victims. Many initiatives were taken to strengthen the capacity of the Rwandan judiciary. More generally, the ICTR influenced new legislation in Rwanda in connection with transfer of cases from Arusha to Kigali. This resulted in the abolition of the death penalty and improved fair trial standards.

3. Judicial Activities

The adoption of the ICTR Statute in 1994 and the Tribunal's subsequent establishment in Arusha showed the determination of the international community to ensure the prosecution of persons accused of serious crimes with a view to avoiding impunity. But it is hardly probable that the mere establishment of an international court contributes to reconciliation, in particular in view of the fact that the United Nations had been criticised for not having prevented the Rwandan genocide. Consequently, the ICTR had to demonstrate through action that it could accomplish its tasks.

After a difficult beginning, the Tribunal gained cruising speed, improved its efficiency continuously, and had at the close of its mandate indicted 93 accused. A total of 75 persons received judgments, including a former prime minister, several government ministers, political and military leaders as well as other individuals possessing leadership positions in Rwanda during the 1994 events. It would be surprising if such results did not have an impact on the Rwandan population. It should also be recalled that many judgments were ground-breaking from a legal point of view, for instance regarding the definition of 'genocide'

⁴ Report of the International Criminal Tribunal for Rwanda, 28 July 2011 (A/66/209, S/2011/472).

and the so-called Media case, which balanced the freedom of expression against the protection against genocide.

In order to build up confidence in the ICTR it was also important to show that the Tribunal was impartial and independent. In a legal perspective, such requirements may seem evident, as they follow from all international human rights conventions. However, seen in the perspective of reconciliation such demands of objectivity and neutrality have added value. It must be visible that international judges are listening with equal attention to the prosecution and the defence, and that they have an open mind to the versions of the truth offered by both *tutsis* and *hutus*.

The establishment of the guilt or innocence of the accused is of course a main event in any trial. In order to achieve reconciliation it is indispensable that this decision has been reached in an objective and meticulous way. A conviction is not only important to the accused, but also to the victims and the local community. An acquittal contradicts stereotypes at the national level, for instance to the effect that all *hutus* were involved in the genocide. Similarly, the significance of partial acquittals – which was the result in many trials – should not be underestimated. They illustrate the complexity of the events and provide a more nuanced picture of the accused's behaviour in 1994. If an international court were considered as a 'conviction-machine' it is unlikely that it would contribute to reconciliation. However, at the ICTR, 14 accused were acquitted – more than 18% of the 75 accused brought to trial.

Guilty pleas are well known in domestic proceedings. At the international level they serve many purposes, such as facilitating the administration of justice by expediting proceedings and saving resources. At the ICTR eight accused confessed their crimes. Without in any way overlooking that some pleas may be motivated by a wish to receive reduced sentences, it is noteworthy that several accused combined their pleas with expressions of regret, remorse and explicit acceptance of the fact that genocide had taken place. Such statements were taken into account as mitigating circumstances by the bench. After having recalled the objectives of the ICTR – achieving justice, ending impunity, promoting national reconciliation and restoring peace – the judgments in such cases assessed the specific role of the accused during the events, followed by a concrete assessment of his guilty plea and of whether his expressions of regret and remorse could be seen as sincere.⁵ The accused made such utterances publicly in the

⁵ See, as examples, *The Prosecutor v. Georges Ruggiu*, Judgment of 1 June 2000, paras. 53–55 and 69–72, and *The Prosecutor v. Vincent Rutaganira*, Judgment of 14 March 2005, paras. 113–114, 146–152 and 156–158. See, on the other hand, *The Prosecutor v. Jean Kambanda*, Judgment of 4 September 1998, where the Chamber noted that the former Prime Minister offered no explanation for his voluntary participation in the genocide, nor expressed contri-

courtroom, and they were transmitted directly, by radio and television, into Rwanda.

In my view there is reason to believe that guilty plea cases of this kind contribute to the reconciliation process. It appears that both the ICTR mandate and practice in guilty plea cases is based on this premise and also that reconciliation is an aim that the Tribunal should attempt to achieve.

Turning now to a more general observation, I think the trials are important to establish what happened in Rwanda. The judgments involving the 75 accused at the ICTR have provided a broad picture of the 1994 events. Case by case, province by province, there is now a wealth of information about how the event unfolded during the 100 days of the genocide. It is true that an international court is not a truth commission and may not have the same mandate, facilities and resources to do research in the field and to obtain a complete picture of what happened. Moreover, its legal methodology only allows it to accept facts that are proven beyond reasonable doubt, and the threshold for drawing inferences is high.

On the other hand, the judicial approach has several advantages. Witnesses from both sides come forward to convey their version of the truth in a formal, perhaps even solemn, atmosphere. The importance for witnesses to contribute to the judicial process should in my view not be underestimated. The evidence is tested in an adversarial process in a meticulous way, including cross-examination, in conformity with a well-established procedure. There is of course a risk that the ‘courtroom truth’ will not be identical to the ‘real truth’, but experience suggests that trials generally give a fairly accurate picture of the events. The establishment of an objective record assists society in moving on.

Furthermore, reconciliation is also facilitated because the trials have made it impossible to deny the genocide in Rwanda. In the first trials it was necessary to prove in each case that there was a genocide in the country and in the local community referred to in the indictment. With an increasing number of final judgments, the subsequent cases concentrated on the individual guilt or innocence of the accused, whereas the bench simply took judicial notice of

tion, regret or sympathy for the victims (para. 51).

the genocide.

Conveying information about the trials into Rwanda was complicated because the trials were time-consuming and lasted for months and years. One or two news agencies were continuously present in Arusha and covered the cases on a daily basis. Other media would normally focus on the important events, such as the opening of the trial, the closing arguments and the delivery of the judgment. In order to make it easier for the general population to understand the judgments, the presiding judge always read out a brief summary of about 15 minutes. The entire judgments normally amounted to between 100 and 400 pages. The reading out of the summary was transmitted by radio and television into Rwanda.

4. Concluding Remarks

There is no doubt that the ICTR deployed considerable resources – throughout its existence – to contribute to reconciliation in Rwanda. The practical organisation of its judicial core activities sought to facilitate this aim, and the outreach programme was built up with the intention to convey the results of the Tribunal to the Rwandan population. Events took place in Arusha, Kigali and the entire territory of Rwanda, and information centres were set up on a permanent basis in all provinces.

Under these circumstances, and even though it is difficult to measure reconciliation, there is every reason to believe that the ICTR has played a role in the reconciliation process. I think there is a more solid basis for this conclusion now, when the ICTR’s work has come to an end, than some years ago. In this connection I will stress that it was reassuring to participate at the ICTR’s 20th anniversary in Arusha on 8 November 2014, which was preceded by an International Symposium on the Legacy of the ICTR. On both occasions a representative of IBUKA, a victim organisation which previously from time to time has voiced criticism against the Tribunal, explicitly acknowledged the importance of the ICTR’s contribution to reconciliation.

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