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“The International Criminal Tribunal for Rwanda in Perspective”

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I. INTRODUCTION

When the International Criminal Tribunal for Rwanda (ICTR) was established by the United Nations Security Council by its resolution 955 of 8 November 1994, there were high hopes for what the Tribunal would accomplish. The Tribunal became operational a full year later in November 1995 following the Council’s decision in February 1995 of the State of the Seat of the Tribunal and the election of its judges in May 1995. Other prerequisites to the commencement of the Tribunal’s operations included the signing of an Agreement between the United Nations and the Host Country, the United Republic of Tanzania in August 1995, and the appointment of the first Registrar of the Tribunal by the Secretary-General in September 1995. The first indictment was confirmed in November 1995.

Today, six and a half years after the Tribunal became functional,¹ what has it contributed to the struggle against impunity in Africa? Has it succeeded in the aims for which it was created? Has it failed, or is it more accurately on the path to success with much more work yet to be done?

At the outset it is important to note that the ICTR, like international criminal justice in general, has been the subject of unrealistic expectations relative to the means made available to it. Its work, like that of its sister Tribunal for the Former Yugoslavia, is an important but episodic contribution to the process of combating the culture of impunity that has characterized the larger part of human history. It is a necessary institution. To be accurately assessed, its strengths, weaknesses and the global, African and Rwandan political contexts must be well understood.

The Tribunal was established with the main objectives of accountability, deterrence and to contribute to national reconciliation and the maintenance of peace. It is against these objectives that the Tribunal’s progress must be measured.

II. RELEVANCE AND IMPACT

The dry warp of the law - the Tribunal’s contributions to the development of international law in a more abstract sense, of which there are many - is not the focus of this paper. The precedent-setting judgements of the ICTR are a matter of the record. This paper adopts a socio-political approach. It will interpret the Tribunal from the perspective of its relevance to, and impact on, the lives of real people and the political situation that led to the crimes that made the Tribunal’s creation necessary as an anti-impunity mechanism.

¹ This functionality was only barely so in its early years, as the Tribunal faced severe problems of infrastructure for at least three years afterward owing to the realities of its location.
Against that backdrop, the relevance and impact of the Tribunal is as follows.

First, the ICTR is an indispensable forum (in addition to the national courts of Rwanda) for the search for justice for the crimes of 1994. It is a reflection of this reality that it was the Government of Rwanda that requested the establishment of an international tribunal.\(^2\) In its letter to the Security Council, the Rwandan Government stated that it supported the establishment of such an international and impartial institution because, *inter alia*, of its desire to avert “any suspicion of its wanting to organize speedy, vengeful justice”\(^3\) This unique feature of impartiality, recognized by the Rwandan Government itself in its request, makes the Tribunal an indispensable forum for a society that has been a divided one for the past several decades.\(^4\) Furthermore, there is the practical fact that the Rwandan judicial system in 1994 had virtually no capacity to undertake the massive task of justice that the genocide engendered. In these contexts, the fact that the Rwandan Government ultimately voted against the resolution establishing the ICTR because its Statute did not include the death penalty provision can be viewed as a matter of policy disagreement that does not negate the essence of Rwanda’s request for the Tribunal.

Second, arising from its unique relevance to Rwanda as an impartial forum, the ICTR has contributed to the reconciliation process by establishing an indisputable historical record of the planning and direction of the genocide at the highest levels of the Rwandan State. This is exactly what the Rwandan Government wanted to achieve through the internationalization of accountability. The Tribunal was perhaps the only forum where the former Rwandan Prime Minister and Head of the Interim Government in 1994, Mr. Jean Kambanda, could have made his tremendously important confession to genocide and crimes against humanity as he did in 1998. That confession dealt a death blow to the then-active historical revisionist movement that sought to deny the genocide by clouding it in the mist of a mere conflict in which innocent civilians inevitably got killed. It also triggered several confessions by accused persons in Rwandan jails.

In this context also, the Tribunal is examining a uniquely important aspect of the mass crimes that occurred in Rwanda in 1994 - the role of the mass media - in the trial of three Rwandan former media executives popularly referred to as the “media trial”. The sociological and political impact of mass media-propagated hate messages in Rwanda in 1994 and in many other mass

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\(^2\) See Letter from the Permanent Representative of Rwanda Addressed to the President of the Security Council (September 28, 1994), UN Doc. S/1994/1115

\(^3\) Id.

\(^4\) Id. The letter stated that those “who were taught that it was acceptable to kill as long as the victim was from a different ethnic group or from an opposition party, cannot arrive at national reconciliation unless they learn new values”.

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crimes (including the Holocaust and the wars in the Former Yugoslavia) is a heavy one. While the individual criminal responsibility of the defendants in the ICTR media trial cannot be prejudged, the examination of this aspect of the crimes in Rwanda is likely to have a major sociological impact in Rwanda and around the world.

Third, the judgements of the ICTR have contributed to the individualization of guilt - a necessary element in reconciliation processes - as opposed to collective guilt that block avenues for reconciling fractured societies.

Fourth, the work of the ICTR has had the obvious effect of largely banishing extremists and extremist political philosophies from Rwanda’s political space. This is a very important contribution, one that should facilitate the longer-term development of a democratic culture in Rwanda and the region.

Fifth, by virtue of the international cooperation it commands relative to national jurisdictions, the ICTR has been able to bring to justice high-ranking individuals (such as Mr. Kambanda) who had taken refuge in third countries and were in effect beyond the reach of Rwandan justice. It would surely have made a mockery of the task of rendering justice for the genocide if this category of individuals, accused as they were of masterminding the massacres, had not been brought to justice. This reality is further strengthened by the reluctance of many States to hand over to Rwanda suspects who may face the death penalty if convicted.

Impact of the Tribunal in Africa

The work of the ICTR is contributing to the social and political evolution of the African continent. It is spearheading a shift from a culture of impunity to a culture of accountability. This is the first time that African political and military leaders have been held to account by an international court for mass crimes that have fuelled war, instability and poverty in the continent. The example of the success of the ICTR in addressing these issues has influenced the establishment of a Special Court for Sierra Leone. That Court will adopt the Rules of Procedure of the ICTR, and the ICTR is already contributing its expertise and its experience to the formation process of the Sierra Leone Court.

The Rwandan genocide was a major destabilizing event in the region. It created massive refugee flows, and is a major contributing factor to the conflict in the Democratic Republic of Congo. Extremists, some of whom participated in the genocide, have found safe haven in the countries of the region. Apprehending and bringing these individuals to trial is of critical importance, both for Rwanda and stability in the region as a whole. The impact
of the ICTR on the situation in the Great Lakes region is limited by the limitations to its mandate, which is restricted to events in 1994 and crimes committed only by Rwandans in neighbouring States during that period. However, the impact of the work of the Tribunal on political thinking in the region is increasing.

The major hindrance to actualizing the Tribunal’s potential impact in Africa still lies in the lack of active engagement in its work by African States. Though these States have largely cooperated in the arrests and handing over to the ICTR of suspects within their territories, there is still a certain reticence in being publicly and politically engaged with the Tribunal. Discussions on the ICTR in the United Nations tend to be dominated by non-African States. There are, certainly, a few exceptions. These include the African States such as Benin, Mali and Swaziland that have demonstrated significant political support to the Tribunal by signing agreements with the United Nations to enforce the Tribunal’s sentences. Others include the United Republic of Tanzania, the Tribunal’s Host Country, and Rwanda, where the crimes the Tribunal is adjudicating occurred.

Furthermore, with one exception, no African State has contributed to the Voluntary Contributions Trust Fund of the ICTR, a voluntary funding mechanism that is complementary to the assessed regular budget of the Tribunal. Since its inception, the Trust has received contributions to the tune of approximately $8 millions. Only one African State, Egypt, has contributed to the Fund, with a donation of $1,000. The significance of this situation is that the voluntary nature of contributions to the ICTR Trust Fund are a measure of how much a contributor is standing up to be counted for justice.

It is thus obvious that, generally speaking, the support African countries give the ICTR is largely operational but is not political. This situation raises troubling questions. Is it the case, then, that the search for justice for the victims of one of the twentieth century’s worst mass crimes -- a crime that was committed in an African country, against Africans, and mostly by Africans -- is more important to non-Africans than it is to Africans? Is it an indication that justice and the struggle against impunity are not yet a political priority in Africa?

The argument of the comparatively smaller resources available to African States is not a valid one. The issue is the act of significant contribution, and therefore political support, not whether African States contribute more than non-African States. It would appear that a major factor in the less-than-desirable level of political engagement of African States with the ICTR is an observable preference for amnesties and truth and reconciliation mechanisms that are believed to more in line with African traditions.
Whatever may be the reason for this situation, it important that it changes and that African States support the anti-impunity work of the ICTR more actively. The Tribunal is making active efforts to ensure that outcome.

III. WEAKNESSES OF THE ICTR

The ICTR has certain objective weaknesses, some of which are part of the imperfections of international criminal justice, while others are peculiar to the institution. Many of these weaknesses are reflected in the inadequate and largely critical publicity the Tribunal receives. Yet, the striking thing about these weaknesses, upon close analysis, is that many of them are either systemic, political or other factors over which the Tribunal has little control.

Coverage and image of the Tribunal

The Tribunal’s relatively remote location has negatively affected effective coverage of its work by international media, especially relative to coverage of the Yugoslavia Tribunal at The Hague. But the most important reason for the paucity of its media coverage is that it is not accorded as much politically priority as the Yugoslavia Tribunal, including the lack of political support for it by African States. Thus, its work, because of political and policy choices in comparative global responses to the need for justice in various parts of the globe, is not a compelling subject of interest for the powerful editors of global media outlets. While coverage of the Tribunal has increased markedly over the past several months as a result of the Tribunal’s own efforts, the problem of low visibility is one that reduces the potential impact of the ICTR in Africa.

Coupled to this problem is the frequently critical coverage the ICTR has received in the past as a result of its perceived shortcomings. The reasons for such criticism are varied. They include perceived weaknesses such as a relatively slow pace of trials and outdated perceptions that start-up management problems in the Tribunal’s early years, which have largely been overcome by subsequent management reforms, are still with the institution. Others include criticism that it is prosecuting only one side in the Rwandan conflict that existed in Rwanda in 1994.

There is no question that some criticisms of the Tribunal are valid. But perhaps the most important reasons for the criticisms the Tribunal receives are the double standards, skepticism and prejudice with which events and processes in Africa are viewed by institutions such as some media and non-governmental organizations that influence global opinion. In relation to Rwanda, a major reason for the criticism the Tribunal receives is a structural one that is not of its making: its inability to offer restorative material compensation to victims of the Rwanda massacres. Another is a feeling that
the Tribunal’s work is not close enough to the Rwandan people and so is not contextually relevant to the people for whom it is ostensibly seeking justice.

The Tribunal is addressing these challenges - to the extent that some of them can be addressed at all -- in a number of ways. It has become proactive in its strategic engagement with external stakeholders such as the media, NGOs and Governments. The Prosecutor has indicated that she expects to indict some members of the Rwanda Patriotic Front at the time of the conflict whom she has reason to believe committed war crimes. And the Tribunal is implementing an Outreach Programme to Rwanda.

**Ad Litem Judges and Exit Strategy**

The Tribunal has requested additional judicial manpower in the nature of 18 ad litem judges to enable it expedite its heavy caseload. The approval of this measure by the Security Council will be crucial for the Tribunal’s success. In response to complaints about a slow pace of judicial proceedings, the ICTR judges have changed their Rules of Procedure and Evidence over the past three years with a view to expediting trials. The results have been positive. However, given the significant number of persons in detention awaiting trial, the current heavy case load of the judges and anticipated future arrests of indicted persons, additional judges are necessary if the Tribunal is to complete its task of trying these individuals without undue delay. Twenty-seven *ad litem* judges were elected for the ICTY in 2001 for similar reasons. If such resources are granted to the ICTR, the Tribunal should complete its work by 2008.

**Suggestions for improving the experience of the ICTR**

The experience of the ICTR has shown that, despite its laudable aims and its undoubted impact and achievements, there is still room for the enhancement of its impact in Africa, and the adoption of similar or other mechanisms that avoid its institutional and operational shortcomings. We must remember that this Tribunal is a pioneer institution in the struggle against impunity and was necessarily bound to be imperfect. Three suggestions seem to be in order:

- To close the gap between national jurisdictions and international jurisdictions in Africa and increase the sense of ownership of justice, it is important that the Office of the High Commissioner for Human Rights and the Organization of African Unity launch a sustained campaign to ensure that the Protocol on the African Court for Human and Peoples Rights is ratified by the requisite numbers of African States and the Court becomes operational. There is need for a three-step approach that includes national jurisdictions, regional mechanisms, and international tribunals. The example of the impact of the European Court of Justice is a good one for Africa to follow.
The ICTR and the OHCHR need to enter into a systematic collaboration to enhance the impact of the ICTR in Africa. Indeed this conference is the beginning of that effort. One notes that, while there is a link to the ICTY on the OHCHR website, there is no link to the website of the ICTR. Details of such collaboration can be worked out between the two offices.

It would appear that, given the concerns that have been expressed about the functioning of the ICTR and its contextual relevance to Rwanda, any future ad hoc international criminal tribunal in Africa should be established along the model of the Special Court for Sierra Leone.

IV. CONCLUSION

The fundamental questions to ask regarding the ICTR is: Why was the Tribunal established? If the Tribunal had not been established, would the domestic courts of Rwanda have been able to bring the high-ranking perpetrators of the violations of humanitarian law in that country to justice? The obvious answer to the latter question is in the negative. The ICTR is in the process of accomplishing this goal for which Rwandan courts were ill equipped due to a lack of capacity, while the courts of other states were also ill equipped due to lack of jurisdiction or political will. It must be concluded that the ICTR is succeeding in its historic task, even if imperfectly by reason of its pioneering nature. It’s ultimate success will be hard-won, but the expected completion of its trials later this decade would be a better point in time at which to look back and reflect on the achievements of the Tribunal and attempt a historical judgement on the institution. Fifty years after the Holocaust, the impact, achievements and weaknesses of the Nuremberg trials are still being assessed. Criticism is easy, but too many pundits are prematurely writing history’s judgement with a presumption of conclusiveness while the Tribunal is still making history.