

Justice And Peace: The Role of International Tribunals in Transitional Justice

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REBECCA DEVITT, JAN 24 2012

'The purpose of a trial is to render justice, and nothing else....Hence, to the question that is commonly asked about the Eichmann trial: What good does it do? There is but one possible answer: It will do justice.'[1]

The task of dealing with perpetrators following mass atrocity and conflict is at the very heart of questions about transitional justice and rebuilding the state following mass violence. This creates a complex web involving the rebuilding of political machinery, healing the victims and prosecuting the perpetrators. The establishment of the ad hoc international tribunals in Rwanda and Yugoslavia (ICTR and ICTY) following crimes of genocide was seen as a way of linking this with 'a system of accountability and the maintenance of international peace and security.'[2] However questions have been raised about whether international war crimes tribunals can promote reconciliation. Whilst they can foster reconciliation through establishing the truth about crimes committed, individualizing guilt and by ensuring that justice is done, by 'doing justice' do these courts do peace?

The ICTY and ICTR were seen as being important to maintain peace and security straight after conflict, yet in recent years it seems that criminal prosecutions are not enough to deal with state crimes as legal responses are 'inevitably frail and insufficient.'[3] Therefore it can be argued that it is important to take into consideration the demands of victims, rebuilding the rule of law and the view that restorative justice has more potential to further reconciliation than retributive justice'[4] In this context other forms of justice have surfaced including truth commissions and hybrid courts that mix domestic and international law such as the Extraordinary Chambers of the Courts of Cambodia.

Using the case studies from Cambodia, Yugoslavia and Rwanda it will be argued that international tribunals have made considerable contributions to international law and retributive justice can further reconciliation in association with other forms of justice and peace building. Furthermore it is important to recognize the impact that tribunals have had locally as the public outcry following the recent 'Duch' case at the Extraordinary Chamber of the Cambodia Courts highlights the disparity between local and international views on justice.[5]

This reflects the fact that international tribunals are limited in scope and focus, which can lead to adversely affecting public perceptions of tribunals and hinder its ability to play a role in post conflict-reconstruction.[6] That said perceptions of justice are often affected by various factors which virtually make it impossible to draw a consensus on whether justice has been done and therefore whether peace has been achieved as there is no one formula of justice for every situation. In order to understand the complex interplay between international and local views on justice and the challenges that international tribunals have faced we must first look at the establishment of international tribunals in Yugoslavia and Rwanda and their contributions to transitional justice.

THE ICTY AND ICTR: THE PROMISE OF JUSTICE

Since the establishment of the International Criminal Tribunal of the former Yugoslavia in 1993, tribunals and the

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judiciary have become increasingly essential to reconstruction and reconciliation in post-conflict situations.[7] The ICTY and the International Criminal Tribunal of Rwanda created a year later were seen by the Security Council and the international community as imperative to preventing a cycle of violence that would occur in the absence of an independent judiciary in societies that were fractured and in which a culture of impunity existed.

In order to prevent a culture of impunity and support the return of the rule of law, the ICTY and the ICTR were framed not only as tribunals in which perpetrators would be prosecuted but also as a key component of United Nations peacekeeping operations and reconciliation.[8] Thus there was an expectation that both tribunals would promote and enhance justice and peace as Michael Humphrey explains:

'These international legal interventions then are designed not only to make perpetrators accountable but also to promote peace by restoring the rule of law, justice and individual rights after mass atrocity.'[9]

Tribunals are crucial for limiting renewed violence and prosecutions can be seen as deterrence against future abuses of human rights. Thus the creation of these courts was seen as sending a message that those who commit mass atrocities will not go unpunished.

The promise of justice that accompanied the creation of ad hoc international tribunals was met with some skepticism as many believed that the Security Council's reasons for setting up the tribunals were to relieve the collective guilt that the international community had for idly standing by whilst people were slaughtered.[10] As Kamalati has pointed out many viewed the establishment of the ICTR as being an 'international instrument of relief for the benefit of spectators of the 1994 genocide whose conscience needed to be eased.'[11] These doubts and skepticisms however were overshadowed by the belief that retributive justice was essential for the rebuilding of societies and addressing victims' needs.

There was great hope that both the ICTY and ICTR would hold those accountable for mass crimes, however, it can be argued that in reality the application of international law and the use of international tribunals as mechanisms of justice is a complex one that depends on political and social factors. Both the ICTY and ICTR have been faced with and political challenges that have hampered efforts to effectively prosecute perpetrators and contribute to reconciliation and its this that we shall turn to next.

POLITICAL CHALLENGES TO JUSTICE AND PEACE

Addressing state crime and issues of justice following conflict are 'inevitably, contentious and riddled with dilemmas.'[12] They depend on political and social factors that impact on how effective justice can be in meeting collective and individual grievances. The expectations and impact of the International Criminal Tribunals in the former Yugoslavia and Rwanda have been hampered by the realities of working within highly politically charged situations. From the onset both tribunals were marred by the fact that they were held outside of the states in which the atrocities took place.

The Tribunal for the former Yugoslavia is held in The Hague in the Netherlands whilst the Tribunal in Rwanda is held in Arusha, Tanzania, with the reasons for holding the tribunals outside of Rwanda and the former Yugoslavia being that both conflicts had left the judicial systems corrupt, understaffed and dysfunctional and holding the prosecution of perpetrators outside the states would prevent the view that 'victors justice' would be employed.

Whilst the attempt by the tribunals to present the view that the trials would be fair and based on the rule of law, the government of Rwanda led by President Paul Kagame, the former leader of the Rwandan Patriotic Front (RPF) has refused to cooperate with the ICTR as they believe that reconciliation could not occur unless the tribunal was held in Rwanda.[13]

Furthermore Kagame and his government have been obstructing the tribunals attempt to try members of the RPF for

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crimes committed during the genocide, which has led to criticism that the ICTR has only focused on Hutu perpetrators whilst doing nothing to try members of the RPF for the murder of some 45,000 people.[14] Coupled with this is the fact that Kagame has been accused of using the specter of genocide to stamp out opponents and consolidate his power, ensuring that the tribunal has become overburdened with cases as any referral back to Rwanda would be 'politically fraught.'[15]

This reflects the delicate balance that tribunals face between addressing mass atrocities and promoting reconciliation and peace. Kagame's government has been praised for encouraging reconciliation between Hutu and Tutsi's and rebuilding Rwanda's shattered economy thus pursuing trials of members of the RPF could be seen as destabilizing whilst any association with a government that may be subjected to prosecution could undermine the credibility of the ICTR.[16] This may lead to the view that the ICTR's work in Rwanda is incomplete, as insecurity in Rwanda has continued whilst the underlying economic and political inequalities between Hutu and Tutsi's remain unaddressed.[17]

The ICTY has faced many of the same problems, as the indicted of Radovan Karadzic and Ratko Mladic for crimes against humanity were marred by the refusal of NATO forces to arrest the two believing that this could be destabilizing for peace talks at Dayton.[18] The refusal to arrest Karadzic and Mladic has been viewed by many as a failure of the international community and has significantly diminished the credibility and impact of ICTY in the former Yugoslavia.[19]

The fact that it has taken fourteen years to arrest Karadzic and Mladic has avoided arrest for over a decade reflects the belief that the ICTY has been ineffective in bringing those responsible to justice. However it can be argued that this is an example of the failure of the international community as a whole to effectively set up a mechanism for enforcing indictments. Furthermore there have also been criticisms by Serbs that the court has focused solely on crimes committed by Serbia during the conflict a view, which has led to reactions to decisions handed down by The Hague 'divided along ethnic lines', adding to doubts that the ICTY could ever contribute to reconciliation.[20]

As explained by Laurel Fletcher and Harvey Weinstein, Bosnian Serbs 'alleged that the tribunal was politically biased against them, basing their view on misinformation that the ICTY had indicted only Serbs.'[21] This misinformation of what the tribunals have in fact been doing has undermined the ability of the courts to make an impact on local populations and reflects the failure of tribunal outreach programs to inform the public, an issue that shall be explored later in this piece. Furthermore it can be argued that views such as those of Serbs who deny the Tribunals findings can be associated with genocide denial and reflect the minority of views in the former Yugoslavia.

Whilst both the ICTR and the ICTY have been hampered by political constraints, both tribunals have contributed significantly to justice and peace including ensuring that crimes do not go unpunished, establishing the truth within historical records and ensuring that victims' rights are upheld. The tribunals' contributions to international humanitarian law and acknowledgement that crimes committed in Srebrenica and Rwanda was genocide are significant for understandings of peace and justice both locally and internationally.

CALLING A CRIME BY ITS PROPER NAME: GENOCIDE

Perhaps one of the greatest contributions that ad hoc international tribunals have had is recognizing that a crime has actually been committed and calling it by its proper name: that is genocide.

Whilst there has been widespread concern over the performance of both tribunals there have been various cases in both Rwanda and The Hague that have had a major impact on how the tribunals are perceived locally including the determination by the ICTY in the case against Radislav Krstic that genocide occurred in Srebrenica.

The naming of the atrocities committed in Srebrenica as genocide have had a major impact on local views of the tribunal with various witness explaining that 'clarifying that Srebrenica was a genocide was the tribunals most

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important achievement and without the ICTY it wouldn't be possible.[22] The significance of this decision was monumental, making it extremely difficult for Serbs to deny atrocities occurred in Srebrenica and giving recognition to the pain and suffering that victims had endured during and since the murder of 7-8,000 Muslims.

Putting a name to the crime also meant that there was now a recorded historical document affirming that crimes committed at Srebrenica where in fact genocide, this recognition along with the belief that it would deter future crimes was not lost on the Appeals Chamber, which upheld the Trial Chambers decision stating:

'The Appeals Chamber states unequivocally that the law condemns, in appropriate terms the deep and lasting injury inflicted, and calls the massacre at Srebrenica by its proper name: Genocide. Those responsible will bear this stigma and it will serve as a warning to those who may in future contemplate the commission of such a heinous act.'[23]

Recognition that these crimes were committed, it seems has been one of the ad hoc tribunals greatest achievements, with many of those prosecuted by the International Criminal Tribunal in Rwanda representing the most senior perpetrators of the genocide including the former prime minister, high ranking officials and military officers. The case of Jean-Paul Akayesu brought before the ICTR was the first time a person had been found guilty of genocide in an international court and both the ICTY and ICTR have been integral in recognizing that rape was a tool of genocide.[24] The inclusion of rape as a weapon of genocide and as a crime against humanity is significant as it 'contributes to the preservation of post-conflict collective memory by establishing a historical record of rape as a war crime.'[25]

In doing so this ensures that the crimes are acknowledged as punishable offences that cannot be denied and allows for the voices of victims to be heard. This in no doubt is due to the role of rape victims in coming forward to testify against perpetrators, however coming forward to testify can lead to marginalization and stigmatization within the community and this often prevents witnesses from testifying. Whilst many advocates claim that international tribunals can help with the healing process for victims, Nicola Henry points out that international criminal tribunals are 'not therapy centers' supporting claims that reconstruction, reconciliation and rehabilitation are not within ad hoc tribunals mandates.[26]

This has led to serious concerns about the protection of witnesses and victims who come forward in addition to questions over consistency of sentencing as whilst both the ICTY and ICTR have highlighted the crime of rape, in many cases the crime of sexual violence is omitted due to constraints such as lack of evidence and expediting trials with sentences often leaving victims disappointment. The ICTY prosecutions failure to include rape charges in the *Lukic* case is an example of the shortcomings that plague international tribunals.[27]

That said both the ICTY and the ICTR's work has reaffirmed core values and international standards set forth in the 1948 Genocide Convention and the Geneva Conventions and has resulted in the prosecution of some senior figures who committed genocide during both conflicts.

Whilst both the ICTY and the ICTR have made considerable contributions to humanitarian law and the development of international criminal law, they have suffered from problems and weaknesses that have undermined confidence and trust in their work. This raises questions about whether they can be effective in pursuing peace and reconciliation post-conflict.

Most criticisms focus on the location of the courts, the misperceptions of local population's and the inefficiency of courts to hold those accountable. These criticisms cast serious doubt on the ability of international tribunals to contribute to the reconciliation process and it is to these criticisms that we shall turn next.

INEFFECTIVE AND INEFFICIENT: THE FAILURE OF AD HOC TRIBUNALS?

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Ralph Zacklin, former Assistant Secretary General for Legal Affairs at the United Nations has stated that the 'ad hoc Tribunals have been too costly, too inefficient and too ineffective.'^[28] The ICTY and ICTR have both faced the same problems that have led to observations like Zacklin's. These primarily have to do with the inability of courts to effectively meet victim's needs due to the fact that both courts are remote and distant from the local populations and the time and length of trials. Extended periods of impunity and lengthy trials have led to anger and resentment within communities and placed a significant burden on victims and witnesses who 'whilst still desperate for justice, are deeply frustrated by how long it is taking.'^[29]

The fact that the ICTY and the ICTR are removed from the local population means that victims and families are denied access to the work of the tribunals. In Rwanda for instance the public has little to no knowledge of the ICTR, with most Rwandans knowing little about proceedings or sentences.^[30] This is in large part due to the failure of outreach programs, which are meant to disseminate knowledge about the cases to the Rwandan public. Whilst initiatives have been launched to encourage the dissemination of information, websites published by NGO's to provide information about the Tribunal are not getting to the local populations as the majority of Rwandans do not have access to the Internet.^[31]

This oversight has severely hampered positive messages about the ICTR and its contributions to Rwandan reconciliation from reaching the public reinforcing a perception that the Tribunal is ineffective and ignorant of the needs of the Rwandan people. Outreach problems have been major impediments for both the ICTR and ICTY as misconceptions about the ability and scope of the tribunals has led to many becoming disillusioned and less supportive of their work.

Whilst an outreach program was launched in 1999 at the ICTY to increase local awareness of the Tribunals activities, this seems to be having little effect on perceptions that it is slow, biased and ineffective particularly in light of the fact that there has been little input from civil society and communities at a grass-roots level.^[32]

This has much to do with the expectation that all those who committed crimes would be punished. This expectation is reflected in interviews with witnesses conducted by Eric Stover at the ICTY who were 'adamant that *all* suspected war criminals in the former Yugoslavia, regardless of their ethnicity, should be arrested and tried for their alleged crimes.'^[33] This is idealistic and somewhat impracticable because if every relevant Rwandan or Bosnian Serb were to be put on trial the total could reach over 100,000 people for each conflict, a task that would take hundreds of years and leave victims with little sense of justice.

These expectations have led to many advocates arguing that in individualizing guilt, the Tribunal acts as a symbol for collective guilt thus quelling fears that ethnic groups will be targeted for retribution, a factor that can further exacerbate conflict. Yet many in Rwanda and the former Yugoslavia have argued that it has done exactly the opposite.

Some critics have argued that in addressing past injustices the danger is always that new ones will be created thus threatening any chance at peace or reconciliation.^[34] And to an extent there is a risk that international tribunals could incite ethnic clashes. The largest number of perpetrators indicted by the ICTY is predominately Serbian and this has led to much resentment and claims of bias with one interviewee proclaiming that the tribunal cannot achieve peace and justice because: 'all the other sides in the wars have been favored....one nationalism feeds another and creates euphoria and hatred.'^[35]

It can be argued that the consequences of retributive justice can lead therefore to increased ethnic tensions and whilst individualizing guilt tribunals do not adequately deal with patterns of atrocities, nor political or moral responsibility. As pointed out by Jennifer Balint 'these are ideological, state driven or state complicit, nation-building exercises. Individuals killing individuals is not what identifies this kind of crime.'^[36]

This raises questions about whether ad hoc international tribunals can realistically contribute to peace and reconciliation. Addressing the underlying reasons and root causes of the genocide and mass atrocities is essential for fostering better relations and recognizing the need for reconciliation. The fact that issues of poverty and social

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marginalization are not covered through retributive law reflects a wider problem within transitional justice; that is how to reconcile or promote peace in societies that face a past of injustice and divided identity? The prosecution of mass atrocity through the application of criminal law is thus burdened 'by a selective process in which it is expected to fulfill larger political and symbolic functions' which goes beyond justice reach.[37]

The complex situations that prosecutors and practitioners of transitional justice face in balancing political, judicial and societal factors in decision making processes suggests that greater involvement at a grass roots level is needed to facilitate cooperation and trust. One aspect of the ICTY's outreach program that has been effective in facilitating cooperation and trust is through its Bridging the Gap initiative.

Bridging the Gap involved explaining the Tribunals work to local populations in many of the places where the most notorious crimes were committed during the war and in communities in which views of the past were widely different to that of the Tribunal's.

This initiative included the participation of members of local victims associations, municipal authorities, civil society and politicians. One of the towns visited, Foca, was a city notorious for rape crimes committed by Serbs during the war, where officials focused on cases, which proved that rape was used as a weapon of terror. This initiative also functioned as a forum for promoting accountability at a national and local level and sort to reconcile perceptions about what had occurred during the war.[38]

This suggests that the involvement of communities on a grass-root and national level with the ICTY can be beneficial to greater understanding of the past and if tribunals engage in outreach programs from the beginning they can contribute to reconciliation by allowing communities to discuss listen and understand a legal process of accountability.[39] That said it should be made clear that international tribunals are not the only form of justice and the use of such retributive justice should be applied with other post conflict strategies, as it is often politically necessary to seek other forms of justice through truth commissions or traditional forms of justice such as the *gacca* courts in Rwanda.[40]

It is clear therefore that the application of international tribunals to situations of complex political and social backgrounds cannot be handled with a 'one shoe fits all' approach. Indeed in an effort to combat difficulties with outreach programs and problems of distance, hybrid or internationalized courts have emerged as new forms of retributive justice.

HYBRID COURTS IN BOSNIA AND HERCEGOVINA AND CAMBODIA: A NEW BRAND OF RETRIBUTIVE JUSTICE?

Hybrid or internationalized courts emerged in the late 1990's as a way to avoid the limitations and weaknesses of ad hoc tribunals as consensus grew that these trials were too expensive and too lengthy.[41] Supported by the United Nations, hybrid courts have sort to overcome limitations of international tribunals and domestic proceedings and it can be argued that this perhaps is where retributive justice can have its greatest impact on the rule of law and reconciliation.

As pointed out by Jane Stromseth, unless 'leaders confront the difficult issue of accountability for past atrocities, they run the risk that new structures of law will be built upon shaky foundations.'[42] Hybrid or internationalized courts combine domestic and international law, are located in the country in which atrocities have taken place and the international community financially backs hybrid courts with the view being that an international element would guarantee expeditious prosecutions, impartiality and compliance with international law as well as providing for capacity building if it is lacking in country.[43]

The establishment of the War Crimes Chamber (WCC) in Bosnia and Herzegovina was in response to the scheduled closure of the International Criminal Tribunal of the former Yugoslavia in 2013 and the fact that national courts had

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failed to hold up to international justice standards in which a situation of ethnic tensions was allowed to fester.[44]

Conceived as a hybrid court the WCC is aimed at becoming integrated into a national institution, which would be run wholly by national staff, however the mandate of international judges and staff has been extended till December 2012 due to perceived risks that the Court would be open to political attacks and issues over financing.[45] Whilst the WCC has had a smooth transition, the development of the Extraordinary Chambers of the Courts of Cambodia (ECCC) has been 30 years in the making. Before the establishment of the ECCC there had been little effort on the government's part to try Khmer Rouge perpetrators, and apart from the show trial of Pol Pot, the domestic judicial system had been largely corrupt and lacked credibility.

A report by the UN in 1997 recommended that an international criminal tribunal would be most appropriate, however Prime Minister Hun Sen wanted limited international involvement and would not cooperate with a court outside of Cambodia. A compromise was struck with the development of a hybrid court which mixed domestic and international judges who would make decisions based on supermajority, meaning that at least one foreign judge would have to agree with the Cambodian judges.[46] The Extraordinary Chamber in the Courts of Cambodia was established in 2003 and so far has only passed one verdict, reflecting the challenge of holding individuals accountable for crimes committed more than thirty years ago.

The ECCC is unique in its courtroom style as victims are given a greater role and voice in proceedings. The enhanced role of the victim through Civil Party representation allows victims to not only give their side of the story but also to claim reparations (though these are not monetary) and appeal a decision made by the Trial Chamber.[47] The interaction between victims, prosecutors, defence and the accused is more holistic and can allow for greater understanding and reconciliation. Hybrid Courts thus can demonstrate accountability in a way that resonates more effectively within local populations.

By mixing international and domestic law and staff, internationalized courts may be perceived as being more legitimate and participation from citizens and victims allows for a greater sense of ownership over the decisions made in the court. Hybrid courts can also foster greater understanding and knowledge within the wider community. Attendance and involvement of the wider community within the ECCC suggests that community involvement and genuine interest in the courts decision-making can be achieved, as by the end of August 2009 attendance at the *Duch* trial had reached over 20,000 people.[48]

That said the ECCC has suffered from many of the same problems that have plagued international tribunals. Much of this has to do with public perceptions about sentencing in the *Duch* case and accusations of government interference in the courts.[49] The verdict of the case in which the Trial Chamber sentenced Duch to 30 years jail for crimes against humanity committed at Office s-21, the infamous Khmer Rouge Prison, was met with much criticism as the verdict amounts to only 20 years following the subtraction of time already served.

This has been met with bitter disappointment by victims and is understandable in light of the thousands of deaths in the Killing Fields.[50] Whilst this can be seen as failure of outreach programs to foster understanding and explanation of the courts dealings it can be argued that this reflects the high expectations that victims and families have in the ability of the courts to bring justice to them and highlights the gap between what is achievable through retributive justice and what is not.

Initiatives by NGO's in Cambodia have been carrying out informal programmes of reconciliation and groups such as Youth for Justice and Reconciliation have encouraged discussion of the root causes of the genocide.[51] These initiatives suggest that there is 'a space and need for other transitional justice mechanisms and that prosecutions and a hybrid tribunal on its own are not enough.'[52] This reflects the need for a more holistic approach to transitional justice, which incorporates not only retributive but also restorative justice.

CONCLUSION

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The role and impact of ad hoc tribunals and hybrid courts in facilitating justice and peace is a complex one, depending on political, social and legal factors. Whilst the ICTY and ICTR have been instrumental in providing recognition that genocide and crimes against humanity have taken place and provided a forum for historical recording, it can be argued that they are limited in their capacity to facilitate peace as ethnic tensions can be exacerbated by misunderstandings of court decisions and can be ineffective in healing victims pain.

That said hybrid tribunals suggest that the rule of law is a pre-requisite for peace and can foster greater understanding and reconciliation when applied within the context of other transitional justice mechanisms and strategies. Victims' needs and dealing with the root causes of conflict are essential for ensuring that peace and justice can be achieved.

This reflects the fact that expectations that tribunals or hybrid tribunals can achieve substantial peace and reconciliation are premature and it has to be remembered that peace is not achieved over night. The ability of international tribunals to enhance the domestic capacity to prosecute war crimes is perhaps one of their greatest achievements. What needs to be remembered is that the primary role of a tribunal or hybrid tribunal is to ensure that justice is done in terms of accountability and that the law provides 'a *strong message to society that there is not anybody who committed a crime who can stay untouched, unpunished.*' [53]

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