

Has Genocide Jurisprudence Ended Impunity? Transitional Justice and the Case of Rwanda

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MARISSA WONG, AUG 22 2013

The international justice system is a symbol of human rights, global cooperation, and the foundation of genocide jurisprudence. International courts add a substantial dimension to global governance, in which countries are not only subject to authorised military intervention, but also to trial. Though it is tempting to refer to these institutions and conventions as proof of an 'end to impunity,' global justice is still far from being realised. Despite its achievements, international jurisprudence has limited the public's scope in understanding crimes of genocide. As Alexander Hinton explains, international justice mechanisms tend to impose Western conceptions of rule of law, human rights, civil society, retribution, and fairness to post-conflict areas (2010). Therefore, to assess the current extent of impunity, it is critical to consider international, national, and local approaches to administering justice. While international courts have been successful on numerous accounts, many developments in international jurisprudence have detracted focus from local realities and contexts, and given prominence to institutional procedures.

The United Nations tribunals, transitional justice systems established under the Rome Statute, are often cited in arguments that both deny and substantiate an end to impunity. The International Criminal Tribunal for the former Yugoslavia (ICTY), which was created in response to the Bosnian genocide, particularly puts into question the effectiveness of UN tribunals. As of 2008, only six leaders from Serbia and Montenegro have been convicted of war crimes by the ICTY, and only four people have been officially convicted of genocidal crime (Kent, 2013). Other cases tried by the ICTY have resulted in acquittals, sentences of 'aiding and abetting' genocide as opposed to committing it, and the deaths of major war criminals before their trials reach completion (Hoare, 2008). ICTY proceedings were influential in defining genocidal intent, including 'dolus specialis' which exacerbates the difficulty of proving crimes were premeditated, thereby preventing application of the term 'genocide' (Eboe-Osuji, 2005). While some view 'dolus specialis' as a mechanism that preserves the severity implicated in the term 'genocide,' the extremely small number of ICTY indictments demonstrates that legal terminology has acted as a layer of protection for genocide criminals. Furthermore, it signifies that genocide jurisprudence has not resulted in a questionable and subjective 'end to impunity.'

The Special Court for Sierra Leone, established by the UN Security Council in partnership with the Sierra Leone government, was also created to deter future crimes against humanity and genocidal crime. Without access to as much funding as ad hoc tribunals, the Special Court is failing to acquire evidence and prepare cases in a timely enough manner to convict criminals suspected of mass rape and sexual slavery, murder, the enlisting of child soldiers, and other genocide related crimes (Miraldi, 2003). Despite the numerous efforts of court lawyers, many war criminals will likely escape indictment due to a lack of monetary commitment by the international community. Obstructions of justice in legal systems for the former Yugoslavia and Sierra Leone illustrate the ways impunity is perpetuated in international courts. To provide a more in depth view on the efficacy of genocide jurisprudence, the remainder of the paper will focus on transitional justice in Rwanda.

The Rwandan genocide is a particularly noteworthy case study for genocide jurisprudence, as many different models of justice have been applied in response to the crisis. The International Criminal Tribunal for Rwanda (ICTR) was established by United Nations Security Council (UNSC) Resolution 955 in 1994 (Jallow, 2009). Though intended to work in cooperation with state courts, Rwanda's repugnance towards the UNSC's efforts undermined the ICTR's

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goals. Despite Rwanda's vote against the formation of the tribunal, the ICTR has poured an estimated one billion dollars into the prosecution of twenty-nine genocide criminals (Jallow, 2009: 266). Jallow argues that these convictions have been of great significance to the Rwandan people, who have regained a sense of humanity from testifying against their perpetrators (2009). In addition to publishing witness narratives, the ICTR also set legal precedents that refined the definition of genocide and increased the international justice system's capacity (Jallow, 2009).

However, many view the tribunal's failure to successfully cooperate with Rwanda and support the development of domestic justice systems as an unrecoverable mistake. Current Rwandan President Paul Kagame, a figure at the forefront of ICTR opposition, states that 'those critical of Rwanda's ways of dispensing justice should join hands in improving the existing judicial system, instead of positioning themselves as adversaries' (2009: xxv-xxvi). Schabas writes that other motives behind Rwanda's preference of national courts include the ICTR's limited jurisdiction to crimes in the year 1994, sentencing of criminals to regions outside Rwanda, eligibility requirements for court judges, and the absence of capital punishment (2005: 210). In Rwandan special genocide courts, 348 criminals have been sentenced to death (Schabas, 2005: 888).

Kagame also expresses concern over the location of the tribunal's hearings, stating that the courts are too removed for the people of Rwanda 'to see with their own eyes justice being done' (2009: xxv). This statement presumes that administering sentences to criminals is the only way to bring justice to genocide victims. It is important to view this assumption critically, because legal discourse limits ways in which society views the most heinous and atrocious of crimes. As Fierens states, 'explaining a crime muffles its violence' (2005: 897). Furthermore, the judicial system's dependence on documentation has made its process of evaluating evidence largely incompatible with assessing crimes of genocide; as genocide paper trails are often covered in layers of propaganda. Other forms of evidence, including witness testimony, are also difficult to procure information from in genocide trials. The ICTR case prosecuting Ignace Bagilishema, a political figure on trial for ordering and participating in the killing of thousands of Tutsi, is one instance of an acquittal resulting from inconsistent information provided by witnesses. Despite seven charges of genocide and related crimes, Bagilishema was not found guilty because conflicting witness testimonies prevented the prosecution from establishing their case 'beyond reasonable doubt' (Prosecutor v. Bagilishema, 2001).

The intricacies of legal definitions often delay court proceedings and dilute logical reasoning in favour of institutionalised principles. As of 2009, the ICTR has acquitted eight Rwandan political leaders suspected of planning the genocide, leaving many Rwandans in extreme disappointment and disbelief (Shaver and Pacella, 2010). Among these freed defendants is Former Rwandan President Habyarimana's brother-in-law, Protais Zigiranyirazo. The ICTR Trial Chamber found him guilty of genocide and extermination based on evidence that he ordered the slaughtering of over 1,000 Tutsis in Kigali. The ICTR Appeals Chamber later demanded his acquittal, on the basis that, 'The Trial Chamber improperly applied the burden of proof relating to the alibi defense' (Shaver and Pacella, 2010: 147). Though Zigiranyirazo's alibi did not refute the accuracy of the prosecution's case in the Trials Chamber, because his alibi testimony in the Appeals Chamber created 'reasonable doubt,' he was cleared of all charges (and later motioned for one million dollars in compensation from the ICTR) (Shaver and Pacella, 2010: 147) (UNICTR, 2012). Similar to the ICTY acquittal cases, Zigiranyirazo's trial is an example of legal reasoning and precepts acting as barriers to decision making based solely on evidence.

In cases of genocide, the categorisation of offences and narrow legal definitions produce convictions that are often poor representations of the actual crimes committed. It is arguable that the legal system is not capable of such accuracy, as its principle 'nullum crimen sine lege,' meaning 'no crime without accompanying law,' often invalidates offenses that have not been pre-established by precedent (Jones, 2006: 212). Categorisation also equalises crime. The pressure judges and lawmakers are under to make the crime of genocide distinct, especially from war crimes and crimes against humanity, results in more convoluted legislation that allows genocide criminals to evade judicial punishment (Akhavan, 2005).

There are numerous stipulations that complicate the process of convicting a criminal of genocide, such as: whether the perpetrator knew of similar killings happening at the time, killed with the intent to exterminate, killed on the basis of group membership (and for no other motive), killed a significant enough part of the group, held an adequate level

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of responsibility in the coordination of the killings, had the capacity to halt the killings (as opposed to being forced into complicity), etcetera (Akhavan, 2005). Furthermore, these abstract requirements vary from case to case, and have been applied to exclude certain defendants from the crime of genocide and not others (Eboe-Osuji, 2005). Trials that employ these stipulations to inhibit punitive sentencing have damaging effects on genocide survivors, and diminish their confidence in the efficacy of legal systems.

One of said survivors, Jean Baptiste Kayigamba (a Tutsi who lived through the 1994 Rwandan genocide), argues that the failure of the Rwandan state to establish a culture founded by rule of law, particularly in response to postcolonial Hutu crimes against Tutsi, enabled the organisation of genocide. Peter Uvin refers to this dynamic as a 'cycle of impunity' (2001: 86). Kayigamba's notion that impunity generates further impunity reemphasises the impact transitional justice systems have on post-conflict communities. Kayigamba also offers a valuable look into the perspective of Tutsi victims, whose wounds will not be healed until they can be assured justice has been done (2009). International institutions aim to support such a process, yet outsourcing the administration of justice to international bodies is often an added source of conflict.

The role of international tribunals is to convict perpetrators that the state cannot (Nsanzuwera, 2005). However, criminals brought to international courts sometimes receive less punitive sentences than those beneath them in rank, but have been tried by state courts (Minow, 1998). Additionally, an end to impunity in international legislation has not translated to courts under state jurisdiction. This has been made overwhelmingly apparent by the fact that the Rwandan Patriotic Front (RPF) has not been tried for any of their war crimes (Melvin, 2011). Beyond convicting who they name 'RPF dissenters,' the regime does not address any instances of their aggressive, dictatorial behaviour. The Rwanda National Unity and Reconciliation Commission (NURC), which house all government programmes for post-conflict reconstruction, are united under a single perspective and narrative of the genocide (Melvin, 2011). In dictating history, the victors (RPF) also dictate the justice process.

Parallel to the Nuremberg Trials, in which the term 'victors' justice' was first defined, the RPF has immunity as the winning party, while the focus of transitional justice is placed on convicting Hutu perpetrators (Jallow, 2009). Though there are ample grievances against the RPF throughout Rwanda, courts in the region are government sponsored and therefore incapable of prosecuting RPF officials (Melvin, 2011). Letting the RPF's crimes against civilians in Rwanda and in DRC go unpunished has severe consequences. First, it alienates Hutu moderates, which may result in their unwillingness to give testimonies that are crucial to convicting genocidaires (Reydams, 2005). Furthermore, Rwanda cannot be built upon the silencing of RPF victims if it is to end a culture of impunity and establish lasting peace.

Though the international community has recently recognised war crimes on behalf of President Kagame and the RPF in DRC, they have yet to take more formal punitive action (McGreal, 2012). While existing courts may not be capable of addressing these atrocities due to the immensity of their caseload (there is currently research compiled for approximately 550,000 genocide suspects), holding the Rwandan government accountable is a responsibility that must be assumed (Schabas, 2005: 226). The international community's failure to prosecute RPF and RPA criminals is proof that impunity remains alive and well in Rwanda, nineteen years post-genocide. Though crimes of genocide have been codified into law, international institutions have far more progress to make to ensure legislation is applied to opposition and government parties alike.

Gacaca courts, Rwanda's localised justice initiative, were established to garner mass community participation in the conviction of genocide criminals. While many legal scholars are skeptical of Gacaca tribunals, others consider them to be a revolutionary step towards reviving restorative models of justice and empowering Rwandans in the reconstruction of their country. Similar to the South African Truth and Reconciliation Commission, Gacaca courts emphasise truth, apology, and confession (Melvin, 2011). In a manner that is quite controversial to the Western world, Gacaca sacrifices the severity of punishment for honesty and remorse. Due to the magnitude of trials that Gacaca courts need to conduct, cross-examining and fact-checking are not often a reality (Schabas, 2005: 887). However, Gacaca can hardly be criticised for its reliance on witness testimony, as that is often the only evidence available in cases of genocide. Though the courts are much more efficient than centralised legal systems, they face many challenges, including providing adequate witness protection and compensation for the falsely detained (particularly the 120,000 Hutu rounded up by the RPF at the end of the genocide) (Clark, 2009: 297).

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The NURC also formed programmes aimed at longer term reconciliation. These projects apply restorative justice principles that require perpetrators to take an active role in supporting the individuals and communities they have hurt. While there is rarely direct monetary compensation for victims, the programme makes an effort to have former offenders produce tangible work that demonstrates their repentance (Nsanzuwera, 2005) (Melvin, 2011). Yet participation in civil reeducation camps and acts of community service are not viewed as sufficient forms of punishment by many Rwandans and advocacy organisations. Travaux d'Interêt Général (TIG) is a camp for second category genocide perpetrators that have been found guilty at Gacaca. The programme's official aims are to provide civil education and establish a 'new social intelligence' (Melvin, 2011). Perpetrators are mandated to contribute to the Fund for the Support of Genocide Survivors (FARG) through monetary donations or acts of service. However, FARG has yet to develop the capacity to support survivors of the genocide in any substantial way. Civil reeducation and community service camps are not focused on administering justice, and as survivors have claimed, are mechanisms to disguise amnesty (Waldorf, 2006).

Furthermore, the RPF has not only granted immunity to themselves, but also Hutu ex-combatants from DRC who have received economic incentives to reintegrate in Rwanda through Ingando, the national reeducation camp (Melvin, 2011). Designed to facilitate repatriation, Ingando is a reconciliation programme where the NURC teaches curriculum on human rights, development, and social problems. Former offenders also receive basic entrepreneurship training to increase the effectiveness of Ingando loans, which are given to ex-combatants for investment in small business (Melvin, 2011). Such a programme is uncharacteristic of a government that so highly values an end to impunity. Government loans in the name of reconciliation are insulting to Tutsi victims who have received no compensation for the crimes committed against them and have yet to benefit from TIG projects. Justice and reconciliation programmes at local levels within Rwanda demonstrate that ending impunity must not only be a focus of international law, but of domestic law as well.

Due to the confining terminology and subjectivity of legal proceedings, many genocide victims deserving justice, have been shortchanged by international courts. As Rwanda demonstrates, international tribunals have a restricted jurisdiction, and still perpetuate victors' justice. Furthering the capacity of transitional justice and ending impunity requires engaging multiple levels of governance in responding to the needs of victims on all sides of conflict. Given the significant influence transitional justice has on a state's post-conflict reconstruction, genocide jurisprudence can no longer afford to re-victimise communities with legal and bureaucratic procedures that allow war criminals to go unpunished. However, ending impunity is an asymptotic goal. Though developments in international jurisprudence have not yet achieved it, they have given the world many reasons to have hope, and to support the advancement of global justice. Armed with the knowledge of the current extent of impunity in society, the international community has never been better equipped to transform the international justice system to more effectively fulfil its remarkable mission.

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