

# Justice in Rwanda: the ICTR and symbolic justice mechanisms after the genocide against the Tutsi

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**R**wanda, a society and state in transition following the 1994 genocide against the Tutsi, has clear successes and challenges relating to transitional justice. After the genocide, Rwanda became a site for experimental forms of justice, including the second international tribunal – the International Criminal Tribunal for Rwanda (ICTR, or the ‘Tribunal’); the *Gacaca* process of ‘local justice’; and memorialisation of genocide victims. These justice mechanisms have unique implications when considered through a survivor protection lens. We will analyse the ICTR and memorialisation efforts in Rwanda from the perspective of survivors, including interviews with survivors and a review of secondary literature. We will also provide lessons learned from the transitional justice processes that occurred in Rwanda after the genocide.

## History of the 1994 genocide against the Tutsi in Rwanda

During the genocide in Rwanda, approximately 800,000 civilians were massacred, both Tutsis and moderate Hutus, constituting as much as 20 per cent of the country’s total population and 70 per cent of the Tutsi then living in Rwanda.<sup>1</sup> Perpetrators belonged to the Rwandan army, the National Police (*gendarmérie*), government-backed militias including the *interahamwe* and *impuzamugambi*, and the Hutu civilian population.<sup>2</sup> Due to colonial influence, which was highly shaped by the European obsession with race relations and superior races, Hutu and Tutsi ethnicity in Rwanda became salient and divided.<sup>3</sup>

In 1973 extremist Hutu leader Juvenal Habyarimana controlled Rwanda’s political, military, and economic agenda. In October 1990 the Rwandan Patriotic Front (RPF) liberation movement, comprised mostly

of Ugandan-based Tutsi refugees, invaded Rwanda. The failed invasion resulted in the Arusha Accords to negotiate a power sharing agreement between the RPF and the Habyarimana government. However, Tutsi massacres continued throughout the Arusha negotiations, as did preparations for genocide.<sup>4</sup>

On 6 April 1994, a plane carrying President Habyarimana was shot down. In most areas of Rwanda, violence began on the following day. Militias led Hutu attacks of neighbouring Tutsi, ‘attempting to rob, rape, and murder them, and often setting fire to their homes.’<sup>5</sup>

The genocide officially ended in 1994 when the Rwandan Patriotic Army (RPA) liberated the country in mid-July, and formed a transitional government in Rwanda. From 1994 to 2003 the RPF and Paul Kagame led the transitional government. In 2003 the new Rwandan constitution was drafted.

## ICTR: the tribunal’s legacy and the perspective of the survivors

Two decades have now passed since the start of the fastest genocide in the modern history. The United Nations Security Council (UNSC) established the ICTR in the immediate aftermath of the genocide, in November 1994, to prosecute those most responsible for planning and implementing the genocide who were still beyond the reach of the government.<sup>6</sup> The prosecutions were intended, *inter alia*, to contribute to delivering justice for thousands of survivors who sought justice and were experiencing its pervasive effects on a daily basis.

At the outset, survivors had mixed perceptions – different hopes, and doubts about the ICTR.<sup>7</sup> The same UNSC that set up the ICTR had turned a blind eye to atrocities in Rwanda a few months earlier when their beloved ones were being massively butchered during the ‘machete’ genocide,<sup>8</sup> which many experts referred to as ‘preventable’.<sup>9</sup>

In addition, the ICTR journey was not easy for survivors. For the judges and staff of the Tribunal the mandate was clear. But the way forward was not. In their own way victims paid a heavy price to make the tribunal work; over 3,500 individuals flew to Arusha, Tanzania, nearly 750 miles from Rwanda, to serve as witnesses.

The technical ability of tribunal judges was also initially problematic. As the ICTR was a blend of common and civil law, trial chamber judges came from both legal traditions. Some judges were former academics or government officials who had no experience managing a courtroom.<sup>10</sup> The use of both civil and common-law procedures in the application and interpretation of the ICTR's Rules of Procedure and evidences (the 'Rules') also became a daunting task. Rule 89 stipulates that the Chambers are not bound by national rules of evidence, and the Chambers of the ICTR have repeatedly underscored that neither of the two legal systems prevailed at the Tribunal. The decisions rendered by the Chambers confirm that styles and solutions inspired by both systems were applied.<sup>11</sup> This caused specific challenges for the operational functions of the ICTR.

Twenty years later, the tribunal now celebrates its achievements and lessons learned. Today, despite the sensitive nature of the work they undertook, there are no concrete protection measures to ensure the security of those involved following the imminent closure of the tribunal. Although there have been positives and difficulties in the cooperation between the tribunal, the survivors, the government of Rwanda, and other UN Member States, today there is no doubt that the tribunal leaves a strong legacy in post-genocide Rwanda.<sup>12</sup>

There is belief among survivors that the ICTR has been successful in its mandate of holding accountable high-level of perpetrators.<sup>13</sup> The Tribunal indicted 93 genocide suspects, tried 75 cases and convicted 61 *genocidaires*. The trials completed by the Tribunal have challenged the historical impunity that existed for decades in Rwanda. However, the ICTR is criticised by survivors for failing to demonstrate the planning of genocide prior to its occurrence.<sup>14</sup>

As well as its success in holding the so-called 'big fish' genocide perpetrators accountable, the Tribunal has also made substantial contributions to international criminal jurisprudence and to the developing human rights legal regime. The Tribunal became

the first international court to interpret the definition of the crime of genocide enshrined in the 1948 Geneva Convention.<sup>15</sup> What happened in Rwanda remained nameless and was contested for years. But today, thanks to the ICTR's judicial notice in the case of *Karemera*, the genocide against the Tutsi in Rwanda is a matter of common knowledge.<sup>16</sup>

Under the theory of command and superior responsibility, the ICTR has held accountable military, government and media leaders for human rights violations committed by their subordinates during genocide.

Article 6(3) of the ICTR Statute holds superiors responsible for genocide crimes if they 'knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.'<sup>17</sup>

In 1998 Jean Paul Akayesu was held responsible for his actions – and non-actions – as mayor and police commander of a commune in which many Tutsis were killed, raped, tortured, and otherwise persecuted.<sup>18</sup> In 2007 another case, commonly referred to as the 'media case', prosecuted people in charge of the *Radio Télévision Libre des Mille Collines*, which encouraged genocide. The defendants were charged with genocide, incitement to genocide and crimes against humanity for their positions of control and command in the hate media, although they physically had not committed the acts. As a result, Jean-Bosco Barayagwiza, the chair of the executive committee for *Radio Télévision des Mille Collines* was sentenced to 32 years' imprisonment; Ferdinand Nahimana, the radio station's founder, to 30 years' imprisonment; and Hassan Ngeze, founder of *Kangura* newspaper, to 35 years' imprisonment.<sup>19</sup>

As a result of the *Akayesu* judgment, rape is now an act of genocide. It has been well-documented that at least 250,000 Tutsi women were systematically raped and sexually assaulted as part of the genocide. The ICTR played a pivotal role in developing the standards for adjudicating these cases of sexual violence and crimes.<sup>20</sup> The Trial Chamber enunciated a broad definition of rape that is not limited to forced sexual intercourse but also includes any physical invasion of a sexual nature committed under coercive circumstances.<sup>21</sup> This sent strong signals of recognition and solace to those victims of sexual violence in Rwanda who still suffer the stigma of this heinous crime.<sup>22</sup>

Although the ICTR has made great progress in terms of retributive justice, the Tribunal – along with the international community – has left behind the restorative side of justice in the form of reparation, compensation or compensatory actions for emotional pain, torture and loss of life suffered by the victims. The ICTR still lacks this important component of reconciliation because it does not have a victims' compensation fund. Previous presidents of the ICTR have asked the UNSC to create such a fund but so far the Council has not acted on behalf of their request.<sup>23</sup>

Last year the current President of ICTR commissioned the International Organization on Migration (IOM) to conduct an assessment study on reparations for the victims.<sup>24</sup> The limited mandate of the ICTR does not include a right to reparation and survivors are not entitled to participate in proceedings in their own right. Its statute and rules give the ICTR judges limited powers to order the return of any property and proceeds acquired through criminal conduct by the individual perpetrator to their rightful owners. While over 50 perpetrators have been convicted to date, the Tribunal has not ordered such restitution.

The assessment study report, as it is, lacks the political will to implement its potential recommendation. The survivors' organisations in Rwanda continue to call upon the government of Rwanda and the international community to join hands to address the issue of reparation as the pivotal way to cement the efforts to build sustainable peace and stability in Rwanda.

While the ICTR is now credited to have significantly contributed to the development of international law, the closure of the Tribunal does not mean the end of justice for the victims of genocide. Nine ICTR indictees, including Kabuga Felicien, 'the financier' of the genocide, are still at large. Instead, it is a good opportunity for all actors to cooperate to bring to account many genocide suspects that are still enjoying safe haven throughout the world and redress the plight of victims who live under the continuing effects of genocide.

### **Symbolic reparations: memorialising genocide in Rwanda**

There has also been a strong focus on symbolic reparations as a form of transitional justice to aid psychosocial

healing for survivors, particularly through the construction of memorial sites. Memorialisation is a process that satisfies the desire to honour those who suffered or died during conflict and provides a way of examining the past and addressing contemporary issues. The processes of memorialisation aim to promote social recovery after violent conflict, but can also reinforce sentiments of victimisation, injustice, discrimination and the desire for revenge. These processes take place at different points in the conflict and take on different manifestations depending on who initiates them, the stage of the conflict and the kind of society that emerges after the violence ends.<sup>25</sup>

Memorials can provide a space to allow survivors to grieve and to place their past histories into a socio-political context. They can affect and shape the discourse surrounding larger issues of rebuilding and reconciliation in post-conflict societies, even by bringing the issue of survivors' memory to the table. Memorials can help in identifying what role memory, personal narratives and history play in public conversations. Despite many challenges, official memorials can affect and shape the discourse surrounding larger issues of rebuilding and reconciliation. As time passes, quality research is performed, and some of these goals are realised, new memorialisation sites and processes can have greater affects.<sup>26</sup>

Survivors in particular remind us that memorials – helps mourn and honour the dead even if they are also politically employed to promote legitimacy or nationalism. Their initiatives illustrate survivors' political agency after mass death and its connection to memory. If the value of historical dialogue as a public good can be identified and embodied by both the Rwandan government and survivor groups, then memorial spaces can be created both for governmental preservation goals and to meet the salient needs of survivors in Rwanda. It is important to understand the benefit of creating spaces that appeal to a multiplicity of truths about the genocide, so that Rwandan society as a whole will better engage in healing, rebuilding and development.

Such healing through memorialisation process has, to a certain extent, begun in Rwanda. While it is necessary to discuss narrative formation and the differences between official state narratives and the rising culture of alternative narratives, attention to

symbolic reparations, as outlined by scholars Hamber, Lykes, and Mersky, supports the idea that memorials can play a positive role in psychosocial healing for survivors of mass violence and genocide in transitioning countries.<sup>27</sup> However, the material elements in addition to the symbolic elements are important, particularly if memorial sites are personalised and culturally relevant. This process can also help make the experience of a traumatic event real. In addition, the establishment of reparations programmes can represent a victims' ability to deal with and part from the past. Reparations programmes can help victims feel greater levels of integration, recognition and acceptance in society, and can help victims combat feelings of silence and isolation, which are clear consequences of political violence. Monuments, museums and memorial sites aim to serve as a vehicle for the intergenerational transmission of historical memory.<sup>29</sup>

When discussing the potential for psychosocial healing to take place for survivors at memorial sites, education can be identified as one main goal of psychosocial healing, specifically historical retelling and peace education. While museum exhibits and memorial designs are often static, educational programs and learning that takes place at memorial sites have the potential to be dynamic responses that adapt to current needs and salient issues in society.

In Rwanda, leaders have identified young people as those who can be positively influenced by learning from memorial sites. Students often come to such sites with a limited understanding of what occurred during the genocide, unable to place the stories and stereotypes they have heard from family and community members into a broader socio-historic context. The experience of visiting the memorials can cause students to think differently, especially when they are exposed to programmes and meaningful learning about the history of genocide, the role of individual action, peace education and the impact of positive deviance within society. According to the government of Rwanda's Ministry of Sport, Youth, and Culture, youth – specifically secondary school students – are identified as key agents of change, and the goal of the government is to educate young people so that they may one day take on leadership positions in the government and become decision makers on behalf of the Rwandan people. This is why the role of individual action and peace education

have been introduced into the secondary school curriculum. The goal is that this new curriculum will promote messages of peace and reconciliation rather than division, and will help give future leaders a clear respect for human rights. This is one example of positive effects that historical witnessing at memorial sites, public spaces and museums can have.

## Conclusion

Twenty years after the genocide in Rwanda, we see a closure of traditional juridical reparations programs, yet an increase in symbolic and social justice aimed at promoting reconciliation and peace in the country. The next generation will begin to take part in transitional justice, reconciliation, and rebuilding in Rwanda, and this constitutes an important period in the history of transitional justice of the country.

The importance of establishing a broad definition of sexual and gender-based crimes as a tool and calculated method of genocide was certainly one important contribution of the ICTR. In addition, many survivors felt that perpetrators should be punished and receive jail sentences in order for justice to be achieved in their country.

However, justice in the legal sense was not enough for many Rwandans. Through our interviews and conversations with survivors, we have found that symbolic reparation and social forms of justice, including memorialisation, remain important aspects of justice for many survivors. As many genocide victims were buried hastily in mass graves or were not buried at all, the respectful burial process and site that memorial spaces provide are essentially important in allowing survivors to feel peace of mind about their loved ones' final resting place. It also provides a concrete ability to mourn their loss, by having a physical site to visit on the anniversary of the deaths of family and friends. Finally, many survivors point to education as a key component of memorials. Education is created at the memorial site by the raw history and facts presented by the original massacre sites, displaying the weapons used by perpetrators and human remains of victims, often causing a visceral and physical reaction to what they see and witness, in addition to an emotional one. Memorials must be symbolically meaningful to survivors, and there remains room for improvement as the government of Rwanda and local communities construct future memorials.



One issue that remains is the right to remedy and reparation for victims of mass crimes, as established by the UN Basic Principles.<sup>29</sup> Currently, the Government of Rwanda, the Ministry of Justice, and genocide survivors' organisations are discussing possibilities of reparations. Survivors often feel that while reparations are a right, they still have to negotiate for this right to be solidified in law or policy. This is one main area to watch in the future, as the ICTR enters a transitional phase and as symbolic reparations become increasingly important in the reconciliation program in Rwanda.

#### Notes

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