Max-Planck-Institut
für ausländisches und
internationales Strafrecht

Holger- C. Rohne

International Jurisdiction and Reconciliation - Experiences from the ICTR

A discussion with Mathias Marcussen

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Abstract: The following is a discussion concerning issues of the International Criminal Tribunal for Rwanda (ICTR) in its aim to contribute to reconciliation as it is expressed in its Statute. The paper is based on an interview with Mathias Marcussen conducted during the visit at the ICTY undertaken by a research group of the Max-Planck-Institute for Foreign and International Criminal Law (Freiburg/ Germany) in April 2003.

1. Introduction:

The International Criminal Tribunal for Rwanda (ICTR) was established by the United Nations on the request of the Rwandan government[2] and is seated in Arusha, Tanzania. In cooperation with Rwandan courts, it prosecutes genocide and other violations of international humanitarian law committed in Rwanda in the year 1994.[3]

The prosecution of these crimes is based on a system categorising the various crimes and delegating their particular prosecution to the responsibility of the different courts. The ICTR itself is responsible for crimes of *Category 1* including suspects that are accused of playing a leading or significant role in the genocide. Crimes of other categories are brought to trial at local courts.

Due to the large number of people detained as suspects for participating in the genocide, soon the prisons were overcrowded and correspondingly, the courts were overburdened. In order to accelerate the process of prosecution, the Rwandan government implemented an additional system, named *gacaca*. This system is mainly

[1] On the occasion of a research visit at the ICTY (April 2003) – summarized by the author.
[2] UN Doc. S/1994/1115 (1994) – The establishment of the ICTR later faced reservations from the Rwandan government when the latter learnt about the ICTR' juridical competences are not limited to acts of genocide and that it will not grant impunity for the government and its members (see Art. 6 Nr. 2 Statute of the ICTR).
[3] For details see http://www.un.org/ictr/statute.html

rooted in a traditional communal system among the Rwandan population and bases on public hearings among the community.

2. The ICTR in the context of 'reconciliation'

The Statute of the ICTR expresses that by providing prosecution it aims to contribute to reconciliation within the Rwandan society.[4] Looking at the current situation, it might appear doubtful if and how such a contribution has been achieved. During the discussion with *M. Marcussen* questions arose concerning the content and the realization of such a demand. Correspondingly to the ICTY, the main task of the ICTR is to prosecute war crimes in a judicial procedure. In other words, the ICTR investigates a specific case, and if the accused is found guilty, it provides for his punishment. Different to the *Truth and Reconciliation Commission (TRC)* in South Africa, the ICTR is not primarily focussed on the question of *how* to contribute to reconciliation. Instead it expresses its 'conviction' that the legal prosecution in itself would contribute to this goal. In other words, the ICTR is concentrated on the prosecution of war crimes while embracing its assumed reconciliatory effects. If so, any contribution to reconciliation from the ICTR can derive solely from the original task to investigate and to punish the offenders. Obviously, this perception of contributing to reconciliation raises doubts and questions.

Traditionally, legal sciences do not consider 'reconciliation' as the main purpose of punishment. The latter is rather seen as a preventive measure simultaneously fulfilling any call for retribution. Due to the focus towards future, it appears to be artificial to assume that preventive aspects would somehow contribute to reconciliation, especially because of the unique nature and exceptional character of the investigated genocide. But if it is not prevention that contributes to reconciliation, then the Statute's assumption must be based on the idea that this is done by the Court proceedings releasing the innocent and punishing the guilty. In other words, the reconciliatory effects would be achieved by applying retributive principles. If so, obviously the question remains, if and how punishment can contribute to reconciliation. This question has been subject of various discussions on the micro-level and should

[4] "Convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace" -

certainly not be neglected on the macro-level either. On this background, the phenomenon of self-justice has to be explained that regularly occurs in Rwanda after the release of offenders. Obviously, to elevate the latter to be the answer of the previous question would be premature. Furthermore, it would lower the question of possible reconciliatory effects of retributive means to a mere rhetorical one.

Clearly, the complex question of reconciliation should be taken seriously and asked in consideration of its cultural dependence. If the aim of contributing to reconciliation is a serious goal of the ICTR, then it should foster research on the requirements of reconciliation among the Rwandan population. Is judicial prosecution of the ICTR wanted and accepted among the Rwandan population? To they seek other forms of reparation than the punishment of the offenders, like e.g. a restoration of losses? [5] If so, can these expectations be fulfilled? Questions like that appear to be crucial if reconciliation among the Rwandan population is seriously purchased.

Despite the doubts towards the effect of punitive measures, there are other reasons to question the reconciliatory contribution of the ICTR.

First, the prosecution is solely focused on persons of *Hutu* origin even though there is proof that between 30-40,000 *Hutus* were killed by *Tutsis*. Such a one-sided approach is obviously problematic when coming to terms of reconciliation. It is crucial to know how this imbalance is perceived and valued by the Rwandan population, particularly by the *Hutus*.

Second, there are still over 120,000 detainees in Rwandan prisons. They are often experiencing inhumane conditions e.g. in matters of living space, hygiene, medical treatment etc. The numbers reflect the overburdens of the courts. These circumstances are unlikely to contribute to reconciliation but rather constantly produce further dissatisfaction and hostilities among the detainees, their relatives and the society as such.[6]

Finally, even though the implementation of the *gacaca* system lightens the burden of the courts and the prison system, there are several doubts on the accordance of the

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http://www.un.org/ictr/statute.html.

[5] For discussion concerning the issue of reparation see http://www.iccwomen.org/resources/vwicc/reparations.htm

[6] Due to this situation, demands occurred to harness the Rwandan obedience towards authorities by letting the latter declare partial amnesty for detainees accompanied with the order to the public to respect this decision unconditionally.

gacaca procedure with international standards of fairness in court.[7] This brings about problems like, e.g. the danger of manipulation, the supervision of guaranteed rights for the accused and the lack of sufficiently trained and independent judges.[8]

3. Conclusion:

The aim of contributing to reconciliation among the Rwandan population by the jurisdiction of the ICTR, as it is formulated in its Statute, is unclear in its content and realization. If taken as more than the mere expression of a philosophical ideal, it should be further specified and seriously purchased.

Furthermore, there are reasons to assume that the current situation could increase dissatisfaction or even hostility between the rivaling ethnic groups. Without questioning the importance of an international jurisdiction, to effectively contribute to reconciliation, it appears to be insufficient to implement judicial prosecution and to hope for its reconciliatory effects.

Selected literature

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2. *Morrill, Constance F.:*
   Reconciliation and the *Gacaca*: The Perceptions and Peace-Building Potential of Rwandan Youth Detainees, in: The Online Journal of Peace and Conflict Resolution (6/1) 2004, 1-66 – available in internet URL http://www.trinstitute.org/ojpcr/6_1morrill1.pdf (last visit February 2005).

[7] http://web.amnesty.org/library/Index/ENGAFR470052002?open&of=ENG-RWA
[8] See also report at the www.web.amnesty.org