

The International Criminal Tribunal for Rwanda

Are all issues addressed?
How does it compare to South Africa's Truth
and Reconciliation Commission?

by Gerhard Erasmus and Nadine Fourie

The international response to the Rwandan problem

The response of the international community to the massacres and genocide in Rwanda was at times "reluctant" and "inadequate".¹ This can partly be explained by the amount of human and material resources that would have been required to restore peace and address the more fundamental issues of the failure of the State itself.² The Rwandan experience does, however, also raise serious questions about the adequacy of international and regional structures responsible for maintaining and restoring peace.

The principles and assumptions underpinning the Security Council appear questionable with respect to situations like Rwanda. The massive scale of human suffering and the destabilization of the whole region were acknowledged, as was the fact that the situation came under Chapter VII

Professor Gerhard Erasmus and **Nadine Fourie** are both at the Department of Public Law of the University of Stellenbosch, South Africa.

¹ In a report to the Security Council, the Secretary-General wrote that the international community's delayed reaction to the genocide "demonstrated graphically its extreme inadequacy to respond with prompt and decisive action to humanitarian crises entwined with armed conflict". In his opinion, the entire system needed to be reviewed to strengthen its capacity to react. *The United Nations and the situation in Rwanda*, UN reference paper of April 1995, p. 13.

² According to estimates of the situation in late 1994, of a total population of approximately 7 million, as many as 500,000 Rwandans had been killed, 3 million had been internally displaced and over 2 million had fled to neighbouring countries. *Ibid.*, p. 17.

of the UN Charter. Nevertheless, Rwanda could not elicit the political resolve needed to agree that the indivisibility of international peace was indeed sufficiently clear in the case of this African tragedy.

The Rwandan “problem” has not been solved. It is hoped that the International Criminal Tribunal for Rwanda (ICTR) will contribute to a process of normalization and “reconciliation” which will result in the restoration of a peaceful society and a stable State. This article aims to provide a brief discussion of its mandate and to speculate about its impact. Will the Rwanda Tribunal help to promote respect for humanitarian law? How will it contribute towards solving similar problems elsewhere?

The Tribunal was set up in the belief “that those responsible for serious breaches of international humanitarian law and acts of genocide must be brought to justice.” At the same time it is hoped that “national reconciliation” and “respect for the fundamental rights of individuals” will be restored. It seems that it is the resurrection of the Rwandan State that is indeed necessary.

This requires the “restoration of civil administration and the reconstruction of the social and economic infrastructure of the country.”³ Is this latter objective given sufficient emphasis? Can justice and reconciliation be attained at the same time? Is it not the case that a more fundamental question — namely whether Rwanda is a viable nation-state — is being avoided?

A comparison will be drawn between the ICTR and the South African Truth and Reconciliation Commission (TRC). There are some obvious differences both in the histories of the two countries and in the mandates of the ICTR and the TRC. However, on a certain level they both aim at reconciliation and the reconstruction of their respective societies. How do they compare and what are the prospects of success?

The mandate of the ICTR

The ICTR was set up after the most serious acts of genocide had already taken place. Talks for the initiation of a cease-fire started in 1994.⁴ This took place within a broader framework, namely the search for a

³ Security Council Resolution 955 (1994), 8 November 1994, which established the ICTR.

⁴ After the adoption of Security Council Resolution 918 in 1994.

political settlement and national reconciliation. It was realized that these were long-term objectives which had to be pursued within the framework of the Arusha Peace Agreement, concluded in August 1993. The talks and the subsequent measures all took place within the context of a certain degree of international involvement. Whether the “internationalization” goes far enough is a different matter altogether. The South African process differs greatly in this regard. The transition to a democratic society was a home-grown process and the TRC was set up in that context.

The Rwandan process is based on a direct concern for international humanitarian considerations and bringing the perpetrators of acts of genocide to justice. The implications of such an approach for national reconciliation have not been properly addressed. The two pillars of the broader process are justice and the reconstruction of the Rwandan society. They are directly interrelated. The latter — national reconstruction and reconciliation — is mentioned, but does not directly form part of the mandate of the ICTR.

The Security Council requested the establishment of a Commission of Experts to investigate specific violations of international humanitarian law.⁵ The Commission found serious breaches of international humanitarian law on both sides of the conflict. Acts of genocide were then found to have been committed against the Tutsi group. It was decided to set up an international criminal tribunal for the purpose of dealing with these violations.

The ICTR was set up by the Security Council, acting under Chapter VII of the UN Charter.⁶ Chapter VII allows for UN action with respect to threats to international peace, breaches of the peace and acts of aggression. Action under Chapter VII thus provides an important indication of the international standing and the seriousness of the Rwandan problem.

The decision to establish the Tribunal was made in response to a request by the government of Rwanda. Its purpose is to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and in the territory of neighbouring States. It focuses on acts committed between 1 January 1994 and 31 December 1994. The Tribunal has the power to prosecute persons who have committed genocide as defined in the Statute of the

⁵ Security Council Resolution 935 (1994).

⁶ Security Council Resolution 955 (1994).

Tribunal. Article 2 defines genocide as killing members of national, ethnic, racial or religious groups, causing serious bodily or mental harm to those members, bringing about the physical destruction of the group, preventing births and forcibly transferring children. In addition to genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempts to commit genocide and complicity therein are also punishable. Crimes against humanity and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II are also included and defined in considerable detail.

The Tribunal has jurisdiction over natural persons and individual criminal responsibility cannot be disclaimed by reliance on superior orders. Its jurisdiction extends over the territory of Rwanda as well as to the territory of neighbouring States in respect of these violations.⁷ Other States are required to cooperate with and assist the Tribunal. Although concurrent jurisdiction⁸ with respect to other fora is recognized, the Tribunal shall have primacy over the national courts of all States.⁹ The principle of *non bis in idem* is included in the Statute.¹⁰

The Tribunal consists of two Trial Chambers, an Appeals Chamber, a Prosecutor and a Registry. The Chambers are composed of eleven independent judges, with three serving in each of the Trial Chambers and five judges serving in the Appeals Chamber. The election of the judges is dealt with in considerable detail, with emphasis on the criteria of impartiality, integrity, and the necessary qualifications and experience.

The remainder of the Statute deals with powers, procedures, rights of the accused, protection of victims and witnesses, judgments, penalties, appellate proceedings, review proceedings, enforcement of sentences, pardon or commutation of sentences, and the privileges and immunities of the Tribunal itself. Its expenses are to be borne by the United Nations in accordance with Article 17 of the UN Charter.

⁷ Articles 1 and 7 of the Statute of the International Criminal Tribunal for Rwanda (hereafter "the Statute").

⁸ Article 8(1) of the Statute.

⁹ Article 8(2) of the Statute.

¹⁰ Article 9 of the Statute provides that the *non bis in idem* rule applies strictly in the case of a person already tried before an international tribunal. There are some exceptions to the rule with regard to a person previously tried before a national court — e.g. where a person was not tried diligently or where a national trial was not impartial or independent.

Imprisonment is to be served in Rwanda or any of the States on the list of States which have indicated their willingness to accept convicted persons.¹¹ Convicted persons may be eligible for pardon or commutation of sentence according to the laws of the State in which a convicted person is imprisoned. This may, however, only happen in consultation with the judges of the ICTR.

The impression created is that the ICTR is to function as a true international tribunal, even though it is not of a permanent character. This international dimension indicates an international commitment to solving the Rwandan problem, but may also constitute a weakness. The success of the work of the ICTR will depend on the cooperation of a number of independent governments. So far this has not happened to the extent originally hoped for. One of the reasons is that the region is still very much in a state of flux and the related problems of stability in those countries continue to exist. The recent takeover in Zaire is an example. Many of the refugees have still not returned to Rwanda.

Some basic tensions exist within the mandate of the Tribunal. On the one hand, it has to ensure individual responsibility and deal with the problem of "the culture of impunity". On the other hand, there is a more basic requirement, namely to ensure reconciliation and to "reconstruct" the Rwandan society and State. Whether these aims are fully compatible is doubtful, at least given the way they are being pursued at present. The current indications are that this tension is still unresolved.

The South African reconciliation process is based on a different philosophy. It is an exercise in pragmatism and compromise that was designed by South Africans themselves.

Is the ICTR functioning successfully?

There are also indications that serious practical problems plague the Tribunal. Some of these relate to the cooperation provided currently by the Rwandan authorities. Other problems are the ineffectiveness of investigations in Rwanda itself and the limited nature of the mandate. Some crimes have been committed by those now in power in Rwanda and if these cannot be investigated by the Tribunal, the danger of "selective justice"

¹¹ Article 26 of the Statute.

poses a serious obstacle to reconciliation and reconstruction. The work of the Tribunal is also hampered by the ineffective protection of witnesses and an inadequate administrative infrastructure. One of the lawyers appointed to defend the accused has resigned and issued a statement expressing the view that the ICTR will not achieve what it is supposed to do. It is feared that justice will not be seen to be done, that the process will be viewed as partisan and that it will not be able to contribute to reconciliation and stability.¹²

An additional problem is the fact that simultaneous action with regard to the detention and conviction of suspects is being taken by the Rwandan domestic courts. One of the discrepancies that result from the dual system of prosecution is that, although the International Tribunal tries the more serious cases, the domestic courts impose more severe sentences.¹³ The first two defendants convicted of genocide and rape were both sentenced to death by a Rwandan court, even though they were seemingly minor players in the genocide.¹⁴

The signs are that these problems have been recognized and that they are being addressed. In order to be successful, the Tribunal must cooperate with the authorities in the various countries, including Rwanda. The extent of the willingness to do so is part of the current problem. It may be necessary to extend the Tribunal's mandate and investigate the actions of persons not covered at present by the Statute.

The Tribunal is not properly equipped to deal with the political complexities of the situation. It has to function in a context of widespread regional instability. The Tribunal does not operate in the type of environment which existed for the International Military Tribunal at Nuremberg¹⁵ in the sense that a war was over and conditions allowed for effective criminal investigation and punishment of offenders. In the case of the Rwanda Tribunal the more fundamental problems of stable nationhood and reconciliation are not sufficiently addressed.

¹² From a statement by a Belgian barrister who was appointed to defend some of the accused and who has subsequently resigned.

¹³ Under Article 23 of the Statute, the International Tribunal can only impose sentences of imprisonment.

¹⁴ F. Viljoen "The role of the law in post-traumatised societies: Addressing gross human rights violations in Rwanda", *De Jure*, 1997, p. 25.

¹⁵ The Nuremberg Tribunal was established under the London Agreement of 8 August 1945 to try war crimes committed during the Second World War.

The South African Truth and Reconciliation Commission

The South African exercise in reconciliation is based on a completely different premise. It is part of a process of national transformation and establishment of democratic rule. The demise of apartheid resulted from a decision of the government of that time to lift the ban on political parties and to start negotiations for the adoption of a new constitution and the holding of democratic elections. The latter took place in April 1994 and established the ANC as the new government. The negotiations also produced a new constitution of an interim nature containing 34 constitutional principles which had to be incorporated in the final constitution, to be adopted by the parliament elected in 1994.

That was achieved in 1996 and the text of that constitution was then submitted to the newly established Constitutional Court for certification. This was a unique process. The Constitutional Court had to certify that the final constitution respected and accommodated all 34 constitutional principles adopted during the negotiations which preceded the transfer of power.

One may say that the South African process was a home-grown one, in which the international community was not directly involved and which resulted in a contract being concluded between all the various groups constituting South African society. That contract is contained in the Constitution itself and various new institutions have been established in order to give effect to it. The Bill of Rights is very comprehensive and fully justiciable. A constitutional court may rule on all aspects of the constitution.

A statement on national reconciliation formed part of the interim constitution. It refers to national unity and reconciliation, the divided nature of society and the suffering and injustice of the past. It aims at creating a new society based on democracy, human rights and reconciliation. It also contains the following statement: "in order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of conflicts of the past. To this end, Parliament, under this Constitution, shall adopt a law determining a firm cut-off date ..."¹⁶

¹⁶ Postamble of the Constitution, Act 200 of 1993.

The inclusion of an amnesty provision in the interim constitution was in many ways a compromise designed to defuse national conflict in the interests of reconciliation.¹⁷ It did, however, leave many victims frustrated in their claims for justice through prosecution by the same Courts that upheld the systematic violence against them.

The TRC has since been established and is still conducting public hearings and hearing applications for amnesty. Its mandate has also been extended.

Its report will not be available until 1998. In the meantime, the exercise can be said to have been dramatic, with South Africans witnessing amazing revelations — some of them by prominent politicians who applied for amnesty — about actions of the previous government and to a lesser extent of the liberation movements. In certain quarters of society, the work of the commission has been criticized for being one-sided. It may, however, be said that the process has generally been quite successful and that it has provided a national opportunity to come to terms peacefully with a history of division and strife.

The Commission works in public and testimonies are published and reported through the media. The names of victims and perpetrators are known and a comprehensive report will eventually be issued.¹⁸ Amnesty is only granted if full disclosures have been made.¹⁹ The objective is to discover the truth in order to provide for amnesty and to heal the wounds of the past.²⁰ In that sense a national debate on the very foundations of the new society and on the need to establish and protect an effective *Rechtsstaat* [State under the rule of law] will, it is hoped, be achieved.

¹⁷ *AZAPO and Others v The President of the Republic of South Africa*, 1996(8) BCLR 1015 (CC) 1020 at para 2 per Mahomed J: "It was wisely appreciated by those involved in the preceding negotiations that the task of building such a new democratic order was a very difficult task because of the previous history and the deep emotions and indefensible inequities it had generated; and that this could not be achieved without a firm and generous commitment to reconciliation and national unity. It was realised that much of the unjust consequences of the past could never be fully reversed. It might be necessary in crucial areas to close the book on that past."

¹⁸ See section 3(1) of the Promotion of National Unity and Reconciliation Act, 34 of 1995 (hereafter "the Act"). The report will, apart from providing a comprehensive account of the activities and the findings of the Commission, also contain recommendations on the prevention of future violations of human rights.

¹⁹ Sections 3(1)b and 16 to 22 of the Act provide for the functioning of the Amnesty Committee.

²⁰ *AZAPO, supra* (note 17), p. 1028, para 17: "Without that incentive there is nothing to encourage such persons to make the disclosures and to reveal the truth which persons in the position of the applicant so desperately desire. With that incentive, what might unfold are objectives fundamental to the ethos of a new political order."

It is too early for a final evaluation. Our impression is that the TRC and the truth and reconciliation process have become accepted as part of the transition, and that it can therefore perform quite well. At least part of its success can be attributed to the personality of its chairperson, the widely respected former archbishop Desmond Tutu.

Components of the TRC include a Committee on Human Rights Violations,²¹ a Committee on Amnesty and a Committee on Reparation and Rehabilitation.²² The latter deals with applications for reparation and rehabilitation from victims of human rights violations. The work includes making recommendations on urgent interim relief and longer-term efforts aimed at “the creation of institutions conducive to a stable and fair society”. At present the work of the Amnesty Committee seems to be dominant, partly because of the dramatic revelations that are currently being made in public.

The work of the Commission has to be aligned with the requirements of the Bill of Rights, and particularly with the provision regarding fair trial contained in section 35 of the present Constitution. This has resulted in applications to the courts for the protection of the due process rights of people implicated in the public hearings on human rights violations.²³

The Constitutional Court also heard an application on the alleged unconstitutionality and incompatibility with international law of the granting of amnesty within the context of the TRC.²⁴ It was argued that it resulted in the suspension of the guarantee of having all disputes settled by a court of law or an independent tribunal. The application was rejected and the constitutionality of the TRC process was confirmed, *inter alia* on the basis that national reconciliation was provided for in the Constitution and that this was necessary in order to achieve the transition towards a democratic government.

A comparison

An outstanding feature of the Truth and Reconciliation Commission in South Africa is that it was born out of a truly national process of

²¹ Chapter 3 of the Act.

²² Chapter 5 of the Act.

²³ See *Du Preez and Another v Truth and Reconciliation Commission* 1997(4)BCLR 531(A). *Niewoudt v Truth and Reconciliation Commission* 1997(2) SA10 (SECLD).

²⁴ *AZAPO v The President of the RSA*, *supra* (note 17).

reconstruction, in which there is no direct international involvement. The reconciliation exercise forms part of a broader process of creating a stable democratic government in a divided society. Many compromises are called for in the name of long-term stability and peace, although this frustrates some in their search for more tangible retributive justice. For the whole rebuilding process to be successful, South Africans have to honour the contract which they have entered into with themselves.

Until now the process has been running relatively smoothly, despite accusations of a lack of even-handedness from some quarters. The last stage of the national debate will only occur when the final report has been completed and made public. Recently some top-ranking politicians from the previous government have testified before the Commission and indicated their personal responsibility and regret. Such actions do contribute to a spirit of reconciliation.

The Rwanda Tribunal, on the other hand, relies primarily on international support. The lack of national commitment and cooperation poses a serious obstacle to the successful implementation of its mandate. It is also unclear whether that mandate is indeed sufficiently broad and whether all the implications relating to achieving its objectives in practice have been thought through. The emphasis seems to be on prosecuting those responsible for violations of humanitarian law and on combating a culture of impunity. This is not fully compatible with the other objectives of reconciliation and reconstruction of society and of the State. Here lies a major difference with respect to the South African situation, in which qualified amnesty has been accepted in the interests of truth and national reconstruction.

Satisfying the needs of justice and national reconciliation simultaneously is a difficult task for the international community. International intervention in order to ensure reconciliation may potentially be in conflict with national sovereignty, though reliance on the latter may be undermined in cases of severe instability and ineffective rule. Reconstructing the Rwandan State and achieving true reconciliation will require a commitment and resources for which international organizations are ill-prepared. It also poses awkward questions on the very notion of statehood and the historical process preceding decolonization.

One lesson that may be learned by comparing the two cases is that processes such as these cannot be divorced from the fundamental issues of statehood, reconciliation and the reconstruction of divided societies. Rwanda is not the only African State facing the problems described above. It is not at all clear that the international community has learned the

necessary lessons from Rwanda to enable it to adopt realistic and comprehensive policies for effective action in the future.

International humanitarian law cannot be implemented effectively when there is inadequate preparation, a lack of proper infrastructure and resources, and clashes of jurisdictions.