

Changing Patterns of Acceptance. International Criminal Justice after the Rwandan Genocide

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Patrick Rowanda¹ and Susanne Buckley-Zistel²

1. Introduction

On 7 April 1994, after an attack on an aircraft carrying the then President of Rwanda Juvénal Habyarimana, a killing machine moved into action in an attempt to extinguish all Tutsi in the Central African country, Rwanda. In just 100 days, about 800,000 Tutsi, as well as a number of Hutu political opponents, were murdered by Hutu militias, government troops and Hutu community members. In many ways, the Rwandan genocide remains an unprecedented example of violence and terror at the end of the 20th century.

Although tragic, the Rwandan genocide did not happen in a vacuum, but in the midst of a democratisation process following a four-year insurgency by the Tutsi-led Rwanda Patriotic Front/Army (RPF/A) of General Paul Kagame, now President of Rwanda. Sparked by the insurgency and the subsequent pressure of the international community to share power and to allow democratic multi-party elections, Habyarimana's people incited nation-wide violence and hate through spreading fear of a Tutsi victory and the ensuing suppression of all Hutu. Given the history of the country in which violence against the Tutsi had occurred before, these hate discourses fell on fertile ground, leading even family members to turn against each other.

Three mechanisms which draw on international criminal justice (ICJ) principles have been applied to deal with the genocide crimes, and which will be discussed in this chapter: the UN *ad-hoc* International Criminal Tribunal for Rwanda (ICTR); the national Rwandan courts who prosecute genocide crimes on the basis of an Organic Law by which principles of international criminal justice were included in national legislation; and foreign courts in third countries which prosecute genocide suspects on the basis of the principle of universal jurisdiction. While all three mechanisms are important, this work refers mainly to the ICTR.

This chapter is part of a broader research project on the acceptance of international criminal justice in situation countries, carried out at the International Nuremberg Principles Academy from 2015-2017.³ The idea of researching acceptance is 'to move beyond the mere reception of international criminal justice, such as the passive acknowledgement of its processes, to a more active reception or approval by various actor groups' (Buckley-Zistel 2016a, 1). Acceptance is

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³ International Nuremberg Principles Academy. Accessed 12 May 2017.
<https://www.nurembergacademy.org/resources/acceptance-online-platform/overview/>.

hence defined 'as the agreement, either expressly or by conduct, to the principles of international criminal justice in one or more of its forms (legal systems, institutions, or processes)' (ibid.). This incorporates a range of responses from recognising, to giving consent, to expressing outright approval.

Its insights of this particular chapter are based on original data collected by the author in Rwanda over the course of two months in 2016, and follow the acceptance methodology which underlies the project (Buckley-Zistel 2016b). The research focuses on the changing patterns of acceptance of international criminal justice over time due to the conflicting expectations of different actor groups in response to the legal redress, and it answers the following research questions:

- What different International Criminal Justice mechanisms are used to deal with the legacy of the 1994 genocide and how are they used?
- What are the expectations of actors with regard to these mechanisms?
- How are these mechanisms accepted?

The data for this research is drawn from interviews and two focus group discussions with various actors including government officials, experts in different capacities, community representatives, civil society organisations and political parties. Interview sessions for local communities involved ordinary citizens and community representatives. The civil society interviewees can be divided into three groups: religious leaders, journalists and national NGOs (in headquarters or decentralised branches). The latter were mainly active in human rights, women rights and peace building. In total, more than 70 people were consulted.

This chapter first explains the three different retributive justice mechanisms which draw on principles of international criminal justice. It then presents the findings of the data collection in order to, finally, draw some conclusions. In essence, it concludes that there was a strong level of acceptance of ICJ shortly after the genocide, with much hope placed in the ICTR in particular. Over time, though, there has been disillusionment if not frustration and outright anger by different actor groups as their high expectations were not met, leading to a change in patterns of acceptance.

2. International Criminal Justice in Rwanda

To prosecute crimes committed during the genocide, three facets of international criminal justice have emerged: prosecution by the International Criminal Tribunal for Rwanda (ICTR), prosecution by national courts in Rwanda, and prosecution by foreign courts in third countries in which genocide suspects are residing after their flight from Rwanda after the violence.

2.1 International Criminal Tribunal for Rwanda

Shortly after the genocide, the United Nations Security Council set up the ICTR in Resolution 955 to 'prosecute persons responsible for genocide and other serious violations of international

humanitarian law committed in the territory of Rwanda and neighbouring States, between 1 January 1994 and 31 December 1994'.⁴ The Resolution stipulates that the ICTR should 'contribute to the process of national reconciliation and to the restoration and maintenance of peace' and to deter further violations of international humanitarian law.⁵ The establishment of the ICTR followed an initial request by the post-genocide Rwandan government in a letter to the UN Security Council shortly after the end of the violence in 1994 (Barria and Roper 2005, 354), an initiative which was subsequently taken up by various UN committees. Since Rwanda was heavily damaged by war and genocide, but also to guarantee impartiality and fair trials, the UN decided to locate the tribunal in the Tanzanian city of Arusha.

The ICTR operated from 1995 to 2015 and indicted 93 people for genocide (as defined by the 1948 UN Convention for the Prevention and Punishment of the Crime of Genocide), crimes against humanity and war crimes (as defined by Article 3 of the 1949 Geneva Convention). The tribunal consisted of four chambers with a total of 16 judges as well as nine *ad litem* judges. Of the 93 individuals indicted, 62 were convicted, 14 acquitted and 10 referred to national courts.⁶ After almost two decades, the tribunal issued its last judgment in 2012, and now only deals with appeal cases. It was officially closed on 31 December 2015 with the Residual Mechanism taking over much of its operations.⁷

The ICTR has contributed to the development of international criminal justice in a number of ways. It has aided the definition of genocide by acknowledging that rape and sexual violence may constitute crimes of genocide, it has recognised the role of the media in inciting genocide, and held that the Geneva Conventions are also applicable to civilians (rather than only military personnel) as perpetrators of war crimes. The court also destroyed the notion of sovereign immunity since it prosecuted former leaders for atrocities committed while in office (Jallow 2008).

A number of criticisms have been raised against the tribunal, including its costs, the length of the trials, and its selection of accused (Eltringham 2014). In addition, the geographic distance to Rwandans, for whom justice should be served, has been viewed with scepticism. In response, the tribunal set up an outreach programme to facilitate a better understanding of its work and to enhance its confidence amongst Rwandans (Peskin 2005). Its brief was to disseminate information locally and to provide communication and training for the Rwandan media and for legal professionals.

However, the main point of contention regarding the ICTR relates to the selection of the accused. Despite the fact that the genocide was committed against the Tutsi, allegations abound that Hutu also became targets of violence and retaliation. Paul Kagame, leader of the Tutsi rebel group Rwandan Patriot Army/Front and now President of the country, was particularly targeted due to his command responsibility. In 1999, the then Prosecutor Carla del Ponte

⁴ United Nations Security Council. S/RES/955. 8 November 1994.

⁵ United Nations Security Council, see *supra* note 4.

⁶ United Nations Mechanism for International Criminal Tribunals. 'The ICTR in Brief.' Accessed 22 January 2017. <http://unictr.unmict.org/en/tribunal>.

⁷ United Nations Security Council. S/RES/1966. 22 December 2010.

opened investigations against the RPA/F, leading to strong reactions from the Rwandan Government such as preventing witnesses travelling from Rwanda to Arusha to testify (Eltringham 2014). After a few years of discord between the Rwandan Government and the ICTR, del Ponte was removed from office and replaced by Hassan Bubacar Jallow. During the rest of the tribunals operation, there were indictments against members of the RPA/F.

2.2 National Proceedings of International Crimes

After the war and the genocide, Rwanda's justice system lay in ruins. The Government as well as international donors invested heavily in reconstructing the courts and the justice ministry, as well as in training and recruiting new legal personnel, judges and lawyers, but this required time (Des Forges and Longman 2004). There were also legal challenges to prosecuting genocide crimes nationally. Although Rwanda is a signatory to the 1948 Convention on the Prevention and Punishment of Genocide and to the 1949 Geneva Conventions and their Protocols, by 1994 they had not been domesticated into national legislation, rendering prosecution of genocide crimes difficult (Gahima 2013). The post-genocide Government therefore wrote a new Organic Law to try genocide suspects which was adopted in 1996 and which led to the establishment of special courts, including a special chamber at the Supreme Court (Des Forges and Longman 2004). Trials in national courts began in December 1996 reaching nearly 10,000 prosecutions in a decade (Bouwknegt 2014).

Since many genocide suspects are not in Rwanda – because they are either at large, standing trial in third countries or at the ICTR – the Rwandan Government has been eager to bring them to Rwanda for prosecution in national courts. It has undertaken a number of legislative reforms to achieve the transfer of cases from the ICTR and the extradition of genocide suspects held in third countries, including the abolition of the death penalty in 2007 and the establishment of a witness protection unit, which was initially without success (Human Rights Watch 2014). In 2008, ICTR judges remained sceptical, turning down requests by the ICTR Prosecutor to transfer cases because they did not consider that Rwanda's judiciary could guarantee fair trials. As a consequence, additional reforms were introduced by the Rwandan Government, such as the principle of command responsibility and certain rights of the accused, opening the way for case transfers to national courts which was first granted in 2011 (Horovitz 2013). In 2012 an international crimes chamber was created within Rwanda's High Court to prosecute extradited suspects. It seeks to put on trial 'those persons accused of genocide, war crimes and crimes against humanity transferred from foreign countries and from the International Criminal Tribunal for Rwanda' (Radio News Rwanda 2012). There are however some restrictions:

The High Court of Rwanda has jurisdiction to hear transferred cases and, in some exceptional circumstances, deportation cases at first instance. Article 3 of the Organic Law states that 'notwithstanding the provisions of other laws applicable in Rwanda, a person whose case [is] transferred by the ICTR to Rwanda shall be liable to be prosecuted only for crimes falling within the jurisdiction of the ICTR.'⁸

⁸ Organic Law No 11/2007 of 16 March 2007 concerning the transfer of cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from other States.

The topic of referral was also relevant regarding crimes committed by the RPA/F which were not prosecuted by the ICTR. In 2008, four RPA/F members suspected of committing war crimes was deferred to Rwanda by the ICTR Prosecutor, who stated that he would refrain from indictment if they were prosecuted in Rwanda (Horovitz 2013, 350). The trials were held in 2008 by a military tribunal in Kigali.

There are still a number of genocide suspects at large, and international arrest warrants are being issued by the Government of Rwanda. In doing so, the Rwanda National Public Prosecution Authority continues to highlight that the entire international community has an obligation to address the challenge of genocide fugitives.⁹ As things stand, the Authority has some 600 files against people who have gone into hiding, 8 cases which are or were being tried in local courts of suspects' host countries, and 13 which have been transferred to Rwandan courts (Hitimana 2016).

2.3 Foreign Courts Applying International Criminal Justice Principles

Given that many suspects fled abroad, trials are also being conducted in third countries based on the principle of universal jurisdiction which enables third countries to exercise criminal jurisdiction over a person accused of committing international crimes, regardless of where the alleged crime was committed or what nationality the person has. This has taken place in courts in Germany, Canada, Belgium, Switzerland, Finland, the Netherlands, France and Sweden.

Most of these third countries had initially decided not to extradite genocide suspects to Rwanda because, like the ICTR, they felt that the Rwandan judiciary could not uphold fair trial standards. This changed with the ICTR reaching its first transfer decision in 2011 and, in the same year, the European Court of Human Rights (ECtHR) ruled that it was safe to extradite a genocide suspect from Sweden to Rwanda (Human Rights Watch 2014). An increasing number of suspects are thus now being transferred from third countries to Rwanda.

3. International Criminal Justice in the Rwandan Public Eye: a Necessity with Many Downsides

On the question of the acceptance of ICJ in Rwanda, the research reveals a mixed picture. During the two-month field work, a large number of interviewees replied that they were aware of the ICJ mechanisms and acknowledged their role in prosecuting genocide crimes and other related human rights abuses. There has always been a great emphasis in Rwanda on prosecuting genocide crimes, as was apparent in the appeal of the post-genocide Government to the UN to apply ICJ mechanisms in the absence of a functioning national legal structure. That there is no reconciliation without justice has been the credo of the Government from the very beginning (Lambourne 2004). The imperative to prosecute genocide crimes was, for instance, expressed by an academic interviewee:

⁹ A Kinyarwanda version of the keynote speech to a meeting of Rwanda Justice Sector Members by the Chief Prosecutor of Rwanda. Accessed 10 July 2016. <http://nppa.gov.rw/ikaze/>.

‘Even States that may be in two minds about this issue [of prosecution], they do not get room to derogate from their international legal responsibilities. Rather, an obligation is imposed on every member of worldwide community to take steps for the punishment of all those responsible of genocide and take concrete actions to put a stop to a culture of impunity.’¹⁰

There was strong agreement amongst the respondents that, although the primary responsibility to render justice falls to the successor Government, in 1994 it was incapable of fulfilling this obligation and so calling on international criminal justice was the only option.¹¹ Of the 70 survey respondents, all but 10 replied that ICJ filled the vacuum created by the destruction of the judicial system after the genocide in 1994.¹² A Government official stated that one benefit of ICJ lies in its ability to track, prosecute and put on trial the most important fugitives, and that this could not have been done under national legislation. For most lawyers and human rights activists, the ICTR and some of the foreign countries which tried genocide cases played an utmost role in the adjudication of the 1994 genocide.

Legal and academic experts emphasised the positive impact of the international system of criminal justice on the development of national legislation. They also emphasised that ICL may have an influence on the national justice sector and attitudes to legal justice more generally, leading to an enhanced acceptance of and adherence to laws in Rwanda. In the same vein, some journalists argued that ICJ helped Rwanda to improve its domestic legal framework, and so to gain international recognition. For them, it is of great importance to eradicate impunity.

Despite the overwhelming view that ICJ was the only way to go in 1994, the various mechanisms have not been accepted without reservations. On a general note, a government official stated:

‘Shortly after while ICTR was still a baby institution, we started to see signs that were not right and we found a set of different activities that were compromising a proper implementation of the ICTR mandate. This tribunal turned out to be misused by some international actors and Rwandan politicians working in bad faith. Certainly, the use of international criminal justice mechanisms was our accurate attempt but had already failed and there was no other.’¹³

To begin with the points of critique, there is a feeling – amongst members of the government in particular – that the ICTR tried too few perpetrators. As expressed by an interviewee from the Ombudsman Office:

‘Today in Rwanda, it depends on the side you want to focus on. On the negative side is that it tried only over 90 people which is a small number. On the positive side is that it

¹⁰ Personal interview, Kigali, 24 June 2016.

¹¹ All respondents regardless of their category expressed themselves favourably of this opinion.

¹² Three journalists working for public media, two religious leaders, one legal expert, a military judge, a prosecutor and two ordinary citizens preferred not to answer any question of the interview.

¹³ Personal interview, Kigali, 03 July 2016.

played a key role in prosecuting fugitives which was not easy for the government at that time.’¹⁴

The findings of this study mirror other research on the ICTR. For instance, the critical attitude of the Rwandan Government towards the court on the basis of its legitimacy and credibility is well documented (Peskin 2000). Despite these reservations, the Government always had a keen interest in the success of the tribunal since it, for a long time, was the only viable means to prosecute and punish those responsible for the genocide.

A religious leader pointed out that, although international courts have many facilities, they only try a small number of people while less well-equipped national courts have to take on the bulk of the work. Rwandan courts, he stated, have done important work with respect to the number of persons tried and sentenced in little time.

Researchers from the National Commission in Charge of the Fight against Genocide (CNLG) voiced considerable surprise that alleged perpetrators were sentenced to short prison terms which did not match their deeds (they referred to the case of Théoneste Bagosora who was sentenced to 35 years by the ICTR), while others were found not guilty and acquitted (such as the former Prefect Bangabiki Emmanuel and Protais Zigiranyirazo).¹⁵ Similarly, members of survivors’ associations voiced strong negative feelings towards the ICTR as they felt that it often acquitted their executioners or punished those convicted with sentences disproportionate to the gravity of their offences. In the eyes of genocide survivors, prosecuting genocide fugitives had been a laudable task but too little had been done. They also said that, despite their testimony, the ICTR acquitted real criminals for the simple fact that arrest and custody procedures were not properly applied or judges argued over the quality and weight of the evidence.

The length of the ICTR proceedings was also subject to a number of critical remarks. In the words of a journalist ‘justice delayed, justice denied’. It was also remarked that the court procedures were often so long that penalties for the crimes ended up being shorter than the length of the actual trials. A group of religious leaders suggested that, by contrast, the Government of Rwanda had established justice institutions which ensured a responsive, participatory and accountable system for dealing with genocide crimes. This resonates in the words of an officer of the CNLG:

‘The authorities of the post-genocide government have the merit of having created a strong and transparent judicial system. Also, there is always the will to keep developing and standardizing internal mechanisms. Looking at international indexes, the people of Rwanda have a strong trust in national judicial institutions. With no doubt, our courts offer enough guarantees-related fair trial principles. Domestic judicial bodies are a fruit

¹⁴ Personal interview, Kigali, 13 July 2016.

¹⁵ United Nations Mechanism for International Criminal Tribunals. ‘Bagosora et al. (Military I) (ICTR-98-41).’ Accessed 21 January 2017. <http://unictr.unmict.org/en/cases/ictr-98-41>.

of home grown solutions and the result is hugely satisfactory as long as their working approaches are more reconciliatory than being repressive.’¹⁶

A senior official in the National Commission for Unity and Reconciliation stated that the ICTR was too distant from the people that it was supposed to serve, and that the national courts were much closer.

Survivors also lamented the absence of ICTR compensation programmes and the lack of the socio-economic justice that this entails. This point was also raised in 2002 by the then-President of the Tribunal, Judge Navanethem Pillay who lobbied on behalf of the ICTR judges for compensation in front of the UN Security Council. In her words:

‘Many Rwandans have questioned the ICTR’s value and its role in promoting reconciliation if the issue of claims for compensation is not addressed. For every hour of every day over the past seven and half years, we have lived with the voices of the survivors of genocide and so we strongly urge the United Nations to provide compensation for Rwandan victims’ (United Nations Mechanism for International Criminal Tribunals 2002).

At the national level, there are also no compensation programmes for genocide survivors. There is, however, a government fund called Farg which provides health care and tuition to survivors paid out to an annual budget of 6 per cent of total state revenue (Mugiraneza 2014).

The question whether justice leads to peace and reconciliation – a connection made in the UN Resolution for the ICTR – was a further topic of discussion. From the perspective of some of the peace activists, ICJ was seen to be more responsive to peace and reconciliation since it is independent and less political than national trials. A human rights activist stated that:

‘The role of justice must be also be understood in the angle of a double-edged sword meaning that on one side justice deals with criminals, on the other side, it has to look at attempts to forge peace. In the case of Rwanda, the biggest worry is to wonder whether our society is likely to expect achieving peace through justice. My personal view about that remains pessimist. Our hope in the ability of the international criminal justice system to carry out acceptable trials has got watered down in the flood of political manipulations.’¹⁷

Two government officials argued that there was insufficient knowledge amongst the ICTR’s judges regarding the circumstances that led to ethnic hatred and genocide, that this affected their decisions and in the end the potential for reconciliation among Rwandans. A peace researcher added that he felt that the authority of the Court was compromised, alluding to the question of prosecuting the war crimes of the RPA/F. This was repeated by defence counsels and human rights activists who argued that the hope in the ability of international criminal justice to carry out just trials was dashed by political manipulation. A human rights activist

¹⁶ Personal interview, Kigali, 24 June 2016.

¹⁷ Personal interview, Kigali, 21 June 2016.

pointed out that the war zone has moved to hearing rooms as ‘the defeated remain judicially held beneath the feet of the winner’. In a similar way, a judge of the High Court said that dealing with the legacy of the genocide requires a neutral mechanism but that the ICTR was merely providing victor’s justice, an argument which was supported by most defence lawyers. In contrast, a survivor pointed out that some of the international judges have turned their liberators into war criminals. This tension between the different political views mainly refers to the prosecution of RPA/F crimes and is also referred to in the literature as one of the greatest challenges to the court’s contribution to reconciliation:

‘Perhaps the greatest obstacle to the Tribunal’s function as a reconciliation mechanism has been the exclusive prosecution of Hutu perpetrators of the genocide, and the non-prosecution of the RPF crimes of serious violations of international humanitarian law’ (Byrne 2006, 488).

Various public officials and parliamentarians thus agreed that the ICTR has had little effect on national reconciliation.

Another aspect evoked by interview participants is the sensitive issue of referring genocide cases pending in Arusha or in third countries to Rwandan courts. Government officials expressed appreciation of the ICTR’s decision to eventually transfer indictees for trials to Rwanda. They emphasised that the ICTR ruling has been outstanding and noteworthy, as well as a success of Rwandan lobbying, and for the dignity of survivors. The ICTR ruling provides a reliable legal reference point for other countries who consider extraditing suspects to Rwanda. To the government officials, all attempts to bring into disrepute the judicial system of Rwanda are now proving fruitless.

There were, however, different views regarding national trials expressed in the interviews. Some interviewees voice a growing concern about the political circumstances in Rwanda. They felt that external ICJ mechanisms were more transparent than national courts. They mentioned a low level of trust in the administration of genocide trials and an insufficient quality of the rule of law hampering the course of the trials which take place in the country. They thus preferred international criminal justice over national trails.

4. Conclusion

This chapter has investigated if and how international criminal justice has been accepted in Rwanda since the Rwandan genocide. It has focused on the ICTR, but also on national trials and trials in third countries to explore how different actor groups view these mechanisms, their strengths and their weaknesses. In line with the research design of the Acceptance Project the range of responses from recognising, to giving consent, to expressing outright approval is analysed.

The data reveals that, in 1994, almost all interviewees saw ICJ as the only option for retributive justice since there was no alternative means of prosecution. In it’s initially stages, there was thus a very high level of acceptance from all sides, combined with equally high expectations. Over the course of time, both acceptance and expectations have diminished due to the experience of ICJ, in particular in the form of the ICTR. Frustrations about the lengthy processes,

the high costs, the allegedly biased selection of indictees, incomprehension of the length of sentences, releases, and allegations of political bias have led to a rather mixed picture.

The acceptance of ICJ in Rwanda thus mirrors what Mieth (2016) describes as the 'temporal dimension to acceptance of international justice.' She argues that acceptance is a dynamic process and is thus likely to change over time. These changes might occur due to changes in the contexts in which the actors are embedded, such as changes in the political situation, or as a response to the activities of the court. Verdicts, structural problems, achievements and failures are all aspects that might turn actor groups towards or – as in the case of Rwanda – away from a tribunal.

In Rwanda, there is thus a changing pattern of acceptance from initial acceptance to discontent as the result of a number of developments. Given that the main institution analysed in this study – the ICTR – was one of the first courts to administer ICJ and has now closed down, it will be interesting to see if and how the way it is accepted by various actors' groups continues to change.

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The opinions expressed in this publication are solely those of the author and do not necessarily reflect the views of the International Nuremberg Principles Academy.

To cite this chapter: Rowanda, Patrick and Buckley-Zistel, Susanne. 2017. 'Changing Patterns of Acceptance. International Criminal Justice after the Rwandan Genocide.' In *After Nuremberg. Exploring Multiple Dimensions of the Acceptance of International Criminal Justice*, edited by Susanne Buckley-Zistel, Friederike Mieth and Marjana Papa. Nuremberg: International Nuremberg Principles Academy.