United Nations Association of Westminster

9th Annual Ruth Steinkraus-Cohen International Law Lecture

Judge Sir Dennis Byron

President, United Nations International Criminal Tribunal for Rwanda

"Lessons Learned from the Rwanda Tribunal"

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Introduction

It is a great honour to address you this evening. I would like to thank Khawar Qureshi, QC and David Wardrop and the United Nations Association of Westminster for inviting me. I have a fond association with Westminster which began in the mid-1960s when I became a Barrister-at-Law at the Honourable Society of the Inner Temple, which straddles the City of Westminster.

I would also like to express how delighted I am to give this lecture named in honour of Ruth Steinkraus-Cohen. While I did not know her personally, I have read much about her incredible contribution to the United Nations through her leadership in United Nations Associations in the United States and here in Westminster.

The topic of this evening's lecture is "Lessons Learned from the Rwanda Tribunal". Looking back at what we have achieved in a relatively short period of time, I am proud of our accomplishments; thus far, the Tribunal has rendered 46 first-instance judgements with respect to 55 accused persons, nine of whom pleaded guilty and referred two cases to national jurisdictions for trial. By the end of this year, we expect to deliver 9 judgements with respect to 15 accused. This will complete the first instance trials of all persons who have been arrested on indictments issued by the Tribunal (save one where the Prosecutor has brought an application to refer the case to Rwanda, and the decision on that application is expected during the next two months).[1] Through our work, we have helped establish justice as an indispensable element of international peace and stability.

[1] Since this speech was given, Bernard Munyagishari has also been arrested and proceedings against him are in process.

A pioneering institution like the ICTR has many lessons to be learned from its experiences. This evening, I will discuss a number of those lessons through three lenses – theoretical, jurisprudential, and practical. Then, I will conclude with a brief explanation of our Completion Strategy and the advent of the Residual Mechanism.

Theoretical Level

The information sheet on our distinguished patron reveals that she was a disciple of Hugo Grotius, a Dutch international lawyer, whose influence on modern international law is so paramount that the American Society of International Law holds annual series of Grotius Lectures. He lived from 1583 to 1645. This demonstrates that the rules and principles of international law are not new; they have been around for centuries. The missing link was an international system of enforcement.

The Security Council established the ICTR in Resolution 955 (1994) with the intention that it would prosecute those most responsible for the serious violations of international humanitarian law that occurred in Rwanda in 1994 and contribute to reconciliation and the restoration of peace and security in the region. It is important to recognise that the ICTR and its sister Tribunal, the ICTY, were the first truly international criminal justice institutions.

Although the Nuremberg and Tokyo Tribunals were also predicated on ideas of accountability and justice, fifty years had passed since the rendering of their judgements. The ICTR and the ICTY were created in the years following the end of the Cold War, a period that saw many heinous atrocities committed against civilians during internationalised internal conflicts where accountability was deferred to geopolitical interests.

I would like to highlight some important ideas underpinning the formation of the Tribunal that, in my opinion, are applicable to contemporary events.

Firstly, the Security Council selected a Tribunal, an international court of law, as a response to the Rwandan genocide. Inherent in this is a commitment to the rule of law and its universal application. Rare at the time, such a measure has now become normalised rather than exceptional. One only has to look at the recent referral of Libya to the International Criminal Court, investigations by its Prosecutor into the situation in the Ivory Coast and the ongoing case

against those allegedly responsible for the post-election violence in Kenya to realise that following atrocity, international criminal prosecution is now a regular response. This has surely sent, and will continue to send, a lesson to future perpetrators of such acts.

Secondly, the place of the ICTR at the vanguard of the movement to end impunity using an international rule of law is complemented by an additional key idea underpinning the establishment of the Tribunal: the prioritisation of individual citizens over the state. This can also be described as piercing the sovereign veil. Prosecuting individuals who are often high-level authorities in the government, civil society or military for crimes committed against their own civilians, as is the case at the Tribunal, bypasses the sovereign shield. Again, I can refer you to the current situation in the Middle East as evidence of this. The referral of a leader to an international criminal court after the killings of civilians during political revolution would have been unthinkable only fifteen or twenty years ago. In my view this also challenges the theories that the foreign policy of powerful nations are predicated on national interests, and that there are limits to the extent to which such nations are bound by international criminal and humanitarian law. If individuals in leadership positions in states can be held personally responsible for the violation of international criminal and humanitarian law, the argument that the state is not bound by these legal obligations becomes less relevant.

The prioritisation of individuals over the state also applies to the victims of atrocity who, theoretically, have the backing of the international community in their claims against the perpetrators of such crimes. Indeed, this is one area in which the ICTR could have perhaps done more. Although victims of the Rwandan genocide appear in front of the court as witnesses, their testimony is limited to the specific charges in the Indictment and they are not entitled to reparations from the Tribunal. In comparison, victims of other atrocities, for example, in the Democratic Republic of the Congo, are entitled to reparations and representation before the International Criminal Court. This is perhaps a development attributable to lessons learned at the ad-hoc tribunals.

The failure of the international community to intervene in a preventive capacity in the Rwandan genocide has been heavily criticised. Theories of criminology posit that one benefit of criminal justice is deterrence and although the threat of international criminal prosecution may resonate with potential future perpetrators, recent years have seen an increased focus on the prevention of

such crimes. This is evident in the developing norm of the Responsibility to Protect and with specific regard to genocide, the creation of a Special Adviser for the Prevention of Genocide, currently Francis Deng, who reports directly to the Security Council and a Special Advisor for Responsibility to Protect, Edward Luck. Again, this represents a continuation of the prioritisation of the protection of civilians over state interests and sovereignty.

The Jurisprudential Level

In 1994 the ICTR was, with the ICTY, at the vanguard of a new movement to fight impunity by ensuring that those responsible for genocide, crimes against humanity and war crimes would be held accountable under international criminal law. A significant challenge at the outset was interpreting the law to be applied by the Tribunal. Although the existence of a body of international criminal law was confirmed at the Nuremberg and Tokyo Tribunals, this area of law was significantly underdeveloped. In effect, the ICTR Statute created by the Security Council consisted of a skeletal framework informed by customary international law, *jus cogens* and the Genocide Convention of 1948. The Trial Chambers of the Tribunal injected life into this framework by interpreting the provisions and applying them to the factual realities of genocide whilst attempting to develop a dynamic and relevant body of case law. *The time limit for today's discussion prevents an in-depth analysis of this case-law; however, I will seek to highlight some main achievements and lessons learned by the Tribunal over the past almost seventeen years.*

Genocide is a socially complex crime as demonstrated by the widespread and rapid nature of the violence that was unleashed in Rwanda in 1994. This violence, which occurred in many cruel and brutal forms, sliced through the social, cultural and kinship ties that united communities. The Judges of the Tribunal were confronted with the testimony of witnesses who had lived through these events, often as victims or perpetrators of the crimes.

The ICTR initiated the process of interpreting and applying the definition of genocide in a criminal court. One aspect that proved interesting was the definition of a protected group. Socially, the Hutus and Tutsis of Rwanda shared many similarities; the same language, culture

and high levels of intermarriage.[2] Often, the division between the groups seemed predicated on class or political lines rather than biological difference.[3]

In the cases of *Seromba* and *Gacumbitsi*, the Trial Chamber concluded that the question of whether the Tutsi population constituted a protected group or not was dependent on both objective and subjective criteria, determined on a case-by-case basis.[4] Subjectively, this can be determined by considering the social and historical context of the perception of the perpetrators as to whether or not the victim is a member of the group rather than whether they are a member according to an objective conception of the group. The Chamber can also consider the self-perception of the victim and whether they believe they belong to the group.[5] This approach accords with the social fact that groups do not necessarily have defined and accepted boundaries that can easily fit into an objective classification. It also corresponds with the academic discourse on the concept of ethnicity being commonly constructed in order to achieve political or other aims rather than as a product of biological primordialism.[6] Indeed, the Trial Chamber in the "*Media*" case noted that the merging of political and ethnic identities does not negate genocide but that identifying enemies by virtue of their ethnicity actually underscores that their membership of an ethnic group was the basis for targeting them.[7]

Sexual Violence

Another example of the Tribunal's recognition of the complex social reality of genocide in its case law is illustrated by its treatment of sexual violence. Though endemic during the genocide, sexual violence was absent from the Indictment of the first case to be tried before the Tribunal against *bourgmestre* Jean-Paul Akayesu. During the *Akayesu* trial, several witnesses testified spontaneously about the rape of women and young girls by the *Interahamwe*. Exceptionally, this led the Prosecution to submit a motion to amend the Indictment in order to include allegations of sexual violence, which was approved by the Trial Chamber.[8]

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[2] For example see: Scott Strauss, *The Order of Genocide: Race, Power and War in Rwanda*, (Cornell University Press: 2008); Gerard Prunier, *The Rwanda Crisis: History of a Genocide*, (Columbia University: 1995).
[3] See above.
[4] *Seromba* Judgement (TC) para. 318; *Gacumbitsi* Judgement (TC) para. 254.
[5] *Rutaganda* Judgement (TC) para. 373.
[6] David Keen, *Complex Emergencies*, (Polity Press: 2007), Chapter 4: Defining the Enemy.
[7] *Nahimana et al.* Judgement (TC), para. 969.
[8] *Akayesu* Judgement (TC) para. 416.

At the time of the case, rape was undefined in international law. The Trial Chamber proceeded to define rape as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive", reasoning that a mechanical description of objects and body parts failed to capture its core element of aggression.[9] This is a critical departure from the "rape as non-consensual sex" discourse still prevalent in some domestic criminal law systems.[10] The context of genocide provided the violent backdrop necessary to conceptualise rape as primarily a form of aggression rather than a wrongful sexual encounter. Indeed, the Trial Chamber went on to state that sexual violence is broader than the physical invasion of the human body and can include acts that do not involve penetration or even physical contact, citing the example of a student who was forced to strip and perform gymnastics by the *Interahamwe*.[11] In an equally momentous section of the judgement, the Trial Chamber in *Akayesu* held that sexual violence can constitute both genocide and a crime against humanity.

Twenty-four completed cases at the ICTR have considered sexual violence, thirteen of which have upheld findings relating to such violence and there have been five convictions for sexual violence as genocide.[12]

Media

Genocide on the scale that occurred in Rwanda does not occur randomly as a result of ethnic hatred. A narrative of ethnic discrimination against Tutsis was present for several years prior to 1994 in the form of media propaganda. The *Media* case required the Tribunal to consider the role of the media in the context of international criminal law for the first time since the trial and conviction of Julius Streicher at the Military Tribunal in Nuremberg.[13]

Fundamentally, the legal question required determining the boundary between the right to freedom of expression and the right to freedom from discrimination and protection from genocide.

[9] *Akayesu* Judgement (TC) para. 687-688.
[10] For one example, see the discussion in the Scottish Law Commission Report on Rape and Other Sexual Offences, December 2007.
[11] *Akayesu* Judgement (TC) paras. 688.
[12] Akayesu, Gacumbitsi, Muhimana, Niyitegeka, Rukundo.
[13] Judgement of the International Military Tribunal, Trial of Major War Criminals (1946), Vol. 1.

The Trial Chamber in the *Media* case used the international law on freedom of expression and freedom from discrimination emanating from various human rights instruments to identify a number of principles that could be used as a guide to applying direct and public incitement to mass media. The Chamber considered the purpose of publishing the materials to be relevant, requiring an enquiry into the intent of the editors and publishers.[14] Secondly, the Trial Chamber considered context to be relevant in order to assess the impact of the expression upon the intended audience.[15] This was especially prescient with regards to Kinyarwanda, the expression of which is highly nuanced and can carry a multitude of meanings. In speeches that can be evaluated in different ways, the Appeals Chamber confirmed that the cultural context, including the nuances of the Kinyarwanda language, could be assessed in order to determine if the words used were clearly understood by the intended audience and could therefore constitute direct and public incitement because they were unambiguous to the intended audience.[16] The Trial Chamber concluded that a direct causal relationship between genocide and the media is not a necessary element of direct and public incitement because it is the potential of the communication to cause genocide that is being targeted.[17]

Concerning the distinction between hate speech and incitement to genocide, the Appeals Chamber considered an amicus-curiae-brief from the Open Society Justice Initiative which expressed concerns about stifling of speech that offends those in power because it was critical of them. The Appeals Chamber clarified that incitement to commit genocide requires more than just a vague or indirect suggestion to commit this crime. Incitement can be preceded or accompanied by hate speech, but only the direct and public incitement is covered by the jurisdiction of the Tribunal.[18]

Individuals and Mass Crime

Holding individuals responsible for mass perpetrator crimes challenges the doctrine of individual responsibility, a basic precept of criminal law. It is therefore no surprise that the jurisprudence on modes of liability for substantive crimes that attempt to capture the role of the instigators and

[14] *Nahimana et al.* Judgement (TC), paras. 1001-1003.
[15] *Nahimana et al.* Judgement (TC) paras. 1004-1006.
[16] *Nahimana et al.* Judgement (AC) paras. 698, 701-703.
[17] *Nahimana et al.* Judgement (TC) para. 1015
[18] *Nahimana et al.* Judgement (AC) 692-693.

masterminds in these crimes have attracted a great deal of criticism. For example, the doctrine of joint criminal enterprise, a mode of liability first discussed by the Appeals Chamber in the *Tadic* case at the ICTY and used at the ICTR has been heavily criticised for potentially rendering liable persons who have not had significant involvement in the crime, particularly in its extended form which uses a foreseeability rather than intent test. Conspiracy to commit genocide, a substantive crime, has also been critiqued at the ICTR where there have been few convictions for this crime. In the *Bagosora et. al.* case much of the evidence was uncorroborated and of little probative value leading the Trial Chamber to conclude that it was unsatisfied that a conspiracy involving the Accused had been proven beyond reasonable doubt, although [19] stating that although it found insufficient evidence to convict for conspiracy, this did not necessarily mean that there was no conspiracy to commit genocide in Rwanda 1994. Again, this highlights another tension of the Tribunal, that it is a criminal court, with a standard of proof beyond reasonable doubt and not a fact-finding or truth commission.

Conclusion Although the ICTR has faced many challenges from a legal point of view, a wealth of case law has been created that can greatly contribute to the jurisprudence of international criminal law at the ICC and in domestic prosecutions. It is also worthy to note that this case law has been developed by judges of the Tribunal from a range of different legal systems and legal cultures. If there is another lesson to be learned it is perhaps that this divergence of legal traditions has not been as much of a barrier as was expected.

Prior to the establishment and work of the ICTR, the meaning of "genocide" was concordant with the archetypal example of the Holocaust and, the work of the ICTR has expanded the understanding of the term and demonstrated that it exists as an independent, working legal concept that may be universally applied in a variety of contexts. The Tribunal has had to consider a range of difficult situations and nuanced sets of facts. This is manifested in its case law, which covers many aspects of the crime, created several landmark principles and illustrates the difficulties and tensions inherent in applying this body of law.

The Practical Level

[19] *Bagosora et al.* Judgement (TC) paras. 2097-2111.

I now move to the third part of the speech – lessons learned on a practical level. Time constraints have made choose one area. I have decided to consider the important area of State Cooperation. As a non state institution the Tribunal does not have many of the powers that normal courts have. It depends on the cooperation of states. Some of the issues are highly obvious, for example the lack of police powers on the investigative process. This evening I will look at some of the less visible challenges facing the ICTR.

At the outset, it is important to note that Article 28 of the ICTR's Statute obligates states to "cooperate with the [Tribunal] in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law." The method of enforcing State Cooperation is by report to the Security Council.

I will begin by discussing a pressing concern for the Tribunal - the issue of resettling acquitted persons as well as convicted persons who have completed their sentence. Despite significant efforts by the Registrar, three persons who have been acquitted by the Tribunal have not been resettled and remain in safe houses in Arusha. For one of them, André Ntagerura, it has been four years after the confirmation of his acquittal by the Appeals Chamber. Additionally, we believe that the issue of the relocation of convicted persons who have served their sentences needs urgent attention. These persons are afraid to return to their native country, and the countries to which they have applied for immigrant status do not have a legal obligation to approve their applications. There is the perception that they are still being treated as suspected genocidaires. Failure to find a solution challenges the rule of law in that a not guilty verdict is not being enforced, nor is the service of sentence effective in restoring the status of the convict. There will be many persons in this position in the coming years. This problem will also affect the International Criminal Court. In my last report to the Security Council, I called upon the international community to urgently commence a review process to develop a lasting mechanism for dealing with this problem.

We have to rely upon States to enforce our sentences. We have signed agreements with eight states - three in Europe: France, Italy, and Sweden and five in Africa: Mali, Benin, Swaziland, Rwanda, and Senegal. In Africa, the Tribunal has helped countries build their prison capacity in order to meet international standards. Further, once convicts are transferred to a State for enforcement of their sentence, we are responsible for the monitoring of the entire sentence.

The issue of tracking and arrest of fugitives also involves close state cooperation. The Tribunal not being a state does not have the power to arrest and it depends on states to arrest and transfer the indictees to its custody. In general there has been cooperation in that about 80 indictees have arrested in about 24 countries. However, ten fugitives still remain at large. The Tribunal continues to call on the International community to expedite the remaining arrests to avoid a denial of justice to the victims in the related cases, and prevent impunity from the suspects. Last Year after our report the Security Council passed Resolution 1932 *calling upon* on States, and especially those in the Great Lakes region to cooperate to bring indictees of the Tribunal to justice. .

An important element of our Completion Strategy is referring the cases of the lower level of indictees to national jurisdictions for trial. Of the remaining 10 fugitives 7 are earmarked for referral, as one person in custody whose referral proceedings are in progress. Until now, all referrals to Rwanda have been rejected by the Trial and Appeals Chambers due to, inter alia, fair trial concerns. Referrals to Norway and The Netherlands have also failed. However, on 4 November 2010, after a hiatus of about 3 years, the Prosecutor filed applications for referral of three ICTR indictees to Rwanda for trial. These proceedings are currently in process.

Two cases (Bucyibaruta and Munyeshaka) referred to France on 20th November 2007 under Rule 11*bis* for trial remain with the French judiciary. We are concerned about these two cases as they have not been progressing through the French system. We continue to watch these cases carefully.

A major logistical hurdle has been making witnesses available for trials. This includes bringing the witnesses to Arusha and accommodating them. Additional elements of state cooperation are involved in relation to witnesses who are in prison or in relation to whom we have to arrange testimony by video conference because they are unable to travel for security or other reasons. Without such cooperation, our trials simply cannot function. For the most part, States have been very cooperative, although there have been instances of non cooperation, at least temporarily, which have caused delay in the trial process. The management of witness attendance has required skill, effort and the need to overcome enormous difficulties. Thus, when we look at new institutions such as the International Criminal Court, we raise the question of the desirability of

having a Special Chambers close to the crime scene and the location of witnesses. It may be that Arusha is an ideal location with efficient access to the rest of the continent.

An important issue is the cooperation of national bar associations to discipline counsel. Defence counsel at the Tribunal are not staff members and are not subject to internal United Nations staff rules and regulations. However, they are subject to a Code of Professional Conduct. The disciplinary options for professional misconduct includes, as a major sanction, reporting to the national professional body regulating the conduct of counsel (Rule 46). Despite several such reports we are unaware of any action taken by these bodies. We believe that for future international trials, systems for guaranteeing high standards of profession conduct need to be further developed. The International Bar Association, or some other entity, should consider whether membership of a specialized association for lawyers practicing before International Courts and Tribunals should be compulsory.

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Completion Strategy & Residual Mechanism

I now turn to the last part of my talk, here we look briefly at the past through the lens of the Completion Strategy and then spend some time looking to the future with the International Residual Mechanism for Criminal Tribunals.

In 2003, the Security Council mandated, through Resolution 1503, that the ICTR and ICTY establish completion strategies in order to wind-up their work as soon as possible. Although the Completion Strategy has been a good tool to focus our efforts on finishing our work, it has had some adverse consequences. For example, staff facing the end of their employment have looked for new jobs, and an alarming number of staff departures have significantly delayed judgements. This has been coupled with difficulty in recruiting because only very short term contracts can be offered.

Looking to the future of our work, Security Council Resolution 1966 (2010) established the Residual Mechanism. This recognises that even after the closure of the Tribunal a number of functions will require to be performed, such management of sentences, witness protection, dealing with arrests and very importantly the archives of the Tribunal. This Mechanism will take

commence in July 2012. The Mechanism will be small, lean and efficient and will have one President, one Prosecutor and one Registrar, with two branches – one in Arusha and one in The Hague. The Mechanism will be able to scale-up or scale-down as the case load dictates; there will be a roster of judges and staff that can be called upon as needed.

The Tribunal has faced challenges throughout is development and one of the last is the difficulty of closing down a functioning court when fugitives are still at large. Some of the major questions we face now are: what will be stored in the archives of the Tribunal? How will witnesses and victims be protected after closure? How will Rule 71*bis* for the preservation of evidence be actualised, as seen in applications under this rule for Mpiranya, Kabuga and Bizimana, all accused at large.

Like the rest of the Tribunal, the mechanism is a first and it will likely bring its own lessons with what should be done for future similar institutions, and what could have been done to improve the completion of the ICTR's mandate.

Conclusion

The Tribunal, through the various challenges it has faced as a groundbreaking institution, has learnt many valuable lessons that could affect future efforts to fight impunity and render justice to the victims of mass atrocity. Thank you very much. I hope that my talk has raised some interesting issues that we can discuss further during the question period.