

# Do Criminal Tribunals as Transitional Justice Model Have a Positive Influence on Post-Conflict Reconciliation?

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## Introduction

Exploring the influence of any factor on post-conflict reconciliation is a challenging task, as reconciliation itself is a highly contested term. Nevertheless, as Clark (2009a: 361) points out, there are two core elements found in almost every definition. Firstly, reconciliation entails the repair and restoration of relationships (Appleby, 2000: 194; Bloomfield, 2006: 28; Philpott, 2006: 3) and secondly, it includes dealing with the past, taking responsibility, and acknowledging wrongdoing (Jeong, 2005: 156). Criminal tribunals are one of three predominant models<sup>1</sup> of implementing transitional justice, and are often considered crucial to transitional justice- the way in which post-conflict societies or emerging democracies deal with the legacy of former human right abuses committed or permitted by former authoritarian regime (Crocker, 2001: 270). Despite this, the literature suggests that insufficient attention has been paid to the effects that tribunals have on post-war societies (Stover and Weinstein, 2004a: 27). As stated by numerous academics (Akhavan, 1998: 741; Clark, 2008; Kritz, 1996 :128; Moghalu, 2004: 216), the claim that war crime tribunals help achieve reconciliation in post-conflict societies remains underexplored. In addition, academics commonly evaluate criminal courts on theoretical presumptions, without sufficient empirical support for their assertions (Clark, 2011). Therefore, the aim of this article is to examine the influence of criminal tribunals on post-conflict reconciliation with the support of empirical case studies, as opposed to theoretical models.

While reviewing the literature, the existing case for criminal trials appears clear: they are proactive, provide an impartial record of the conflict based on concrete evidence (Kerr, 2007:

<sup>1</sup> Truth Commissions or Amnesty are other two conventional choices of models of transitional justice to adopt (Minow 1998: 4).

379), punish individuals rather than entire groups (Kritz, 1996: 128) and offer some compensation to the victims (Pankhurst, 1999: 242). As a result, they seem to foster reconciliation in post-conflict society. However, this article disputes the inherent benefits of criminal tribunals on the reconciliation process, highlighting their numerous limitations which can negatively influence reconciliation.

Criminal trials can be run at both the international and domestic level, as well as a combination of the two (as in the case of Rwanda<sup>2</sup>), and this might influence their dynamics and consequently, their influence on post-conflict reconciliation. The article is divided into two parts. In the first part, I will explore the example of International Criminal Tribunal on former Yugoslavia (ICTY). This example illustrates how international tribunals can negatively influence post-conflict reconciliation in societies with widespread denial, where communities are not ready to accept tribunal decisions (Clark, 2011: 261). Two explanations are provided: the 'externalisation' of justice and 'hijacked justice' by domestic political elites. In the second part, I explore the dynamics of tribunals run by the domestic actors on the example of local *gacaca* system in Rwanda, which do not suffer from the same weaknesses as international tribunals, but face other issues such as the strength of military forces responsible for violations, lack of political will, or weak legal systems (Zoglin, 2005: 43). Both international and domestic tribunals share the risk of being instrumentalized by domestic political elites, inhibiting their potential contribution to reconciliation. The article concludes with suggestions to improve the quality of criminal tribunals based on the explored cases, highlighting the limits of criminal tribunals and their alleged benefits to the reconciliation process, thus avoiding the phenomenon of equating 'aspiration with empiricism' (Borer, 2004: 20).

## Truth for the sake of truth?

### Facts vs. 'Truths'

Clark (2009a) claimed that although the ICTY played a fundamental role in establishing war facts in the former Yugoslavia, the people were not ready to acknowledge and accept it. 'Acknowledging wrongdoings' was previously defined as a core element of the reconciliation, which was hindered by overarching denial (ibid: 369). Despite the prosecutions and verdicts of the ICTY, people in the succeeding republics of former Yugoslavia continued to nurture their own perception of truth, predominately based on their ethnicity. For example, Slobodan Milošević, the Serb wartime leader, who was charged by the ICTY in 1999 with war crimes including genocide and crimes against humanity, was viewed as 'very positive' or 'somewhat positive' by 1.6 per cent of Croats, 0.6 per cent of Bosniaks, but 64.2 per cent of Serbs; and as 'very negative' by 90.2 per cent of Croats and 97.2 per cent of Bosniaks, while 'somewhat negative' or 'very negative' by 23.7 per cent of Serbs (Kostić, 2007).

Mass atrocities "create and reify categories of people in a society- victim and victimiser, collaborator – and yet there is unlikely to be a true consensus as to who belongs in which category" (Sriram, 2007: 587). As this example illustrates, the ICTY has not changed the pre-existing perceptions of the wartime leaders and mass atrocities that exist decades after the end of war. Such divergent views on the same categories cause rising tensions in the post-conflict society and certainly do not contribute to the reconciliation process. The claim of the truth being arbitrary (despite the ICTY trying to establish the truth based on facts and evidence), has an important repercussion: the lack of the compensation. Compensation is an integral part of retributive justice. Since the truth was not internalised, evictions

<sup>2</sup> In Rwanda, in addition to international level (The International Criminal Tribunal for Rwanda), domestic level was 'divided' into national and local level, at least *de iure*.

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were everything but just – both for the victims and victimizers. Not surprisingly, Clark (2009b) noted that the people who suffered the most - due to their great expectations- were the least satisfied with the ICTY. Since ICTY did not bring the justice that was expected, grievances of the victims and their relatives remained and were often exacerbated.

### 'Externalisation' of justice and instrumentalisation of tribunals

What could explain the existing gap between facts and perceived truths? First of all, one of the key reasons for the rejection of the facts established by the ICTY is that people perceive the international tribunal's decisions as taken by 'the remote other'. This makes the decisions and actions by the ICTY hard to accept and internalise. The Tribunal was not successful in reaching out to ordinary people (Clark, 2009b: 467) whilst, at the same time, the accused individuals were perceived as war heroes. As Stover and Weinstein (2004b: 332) explain, "it is an illusion to suppose that international criminal tribunals, located hundreds of miles away from where the massacres took place, can forge a common version of the history of these conflicts that would be accepted by all sides". Many of the problems that arose were arguably influenced by the fact that the ICTY was often seen as "an external imposition that may disrupt delicate domestic peace and reconciliation process" (Sriram, 2007: 590). It was seen as an imposition since it was both established and conducted by an 'outside Leviathan', while new indictments by the ICTY in these 25 years kept bringing 'revival of the war past' and hindered already fragile relations as well as future prospects.

Another complementary explanation concerns the process of internalisation of the truth delivered by the ICTY, which did not take place in a vacuum, but rather in interaction with domestic political actors who can try to twist or misinterpret the facts. Although criminal tribunals place focus on prosecuting and putting individuals on trial, nationalist political elites can generalize these accusations by presenting them as damaging for all their countrymen as well. In the same vein, the supposed strength of the criminal courts- the fact that they punish only individuals rather than entire ethnic, religious or political group (Kritz, 1996: 128)- is reframed as a weakness, i.e. nationalists pursue to foster identification of the entire (in this case) ethnic group with the accused political leader/ army official. They portrayed trials as Western impositions that undermine war-achieved national sovereignty and dishonour the nations wartime conduct (Peskin and Boduszynski, 2003; 2011). Several academics explored this case in depth (Clark, 2009; Hayden, 2011: 316; Subotić, 2005) and concluded that the ICTY contributed to mutual recrimination within and between successor republics and that the main political wins were for nationalistic parties in these republics. Subotić (2005) uses the concept of 'hijacked justice' to explain the self-serving usage of the ICTY by local politicians. By making Karl Schmitt's famous 'Friend-Enemy' distinction and implying that you are 'either with us or against us', radical right politicians continue to divide the society along the same divisions that existed during the war.

### The ICTY's negative impact on reconciliation

It is difficult to measure a tribunal's contribution to reconciliation since international tribunals do not simply have a positive or negative influence on reconciliation process in a direct way, but rather an indirect and interactive influence in what I call the 'post-conflict basket of local realities'. Reconciliation can also be assessed in many ways, but I am going to focus on the two core elements previously defined: 1) repair and restoration of relationship, and 2) dealing with the past, taking

responsibility, and acknowledging wrongdoing. The ICTY did not have a positive influence on either of these elements, despite its intent. Meernik (2005: 287) based on his research concluded that “more often than not, ethnic groups responded with increased hostility toward one another after an arrest or judgment”. Clark (2009c: 135), who did her research in BiH, noted that 90 % of the people she interviewed responded that the ICTY has not contributed to reconciliation in BiH, offering different reasons to support their claim. However, the most common response was that the ICTY was not able to contribute to reconciliation in BiH because it is too far away (ibid: 136). With this in mind, I will now examine the *gacaca* trials, conducted domestically at the local level, and their influence on the reconciliation process in Rwanda, to determine if community involvement helps to combat denial.

## Multidimensional justice and the bottom-up approach

Unlike South Africa, which chose ‘pardon’, or Mozambique, which chose ‘amnesia’, Rwanda chose ‘punishment’ as its post-conflict method (Graybill, 2004: 1117). The International Criminal Tribunal for Rwanda (ICTR) was established in 1994, and was funded by the UN. It was subject to a great deal of criticism, similar to the ones that the ICTY faced<sup>3</sup>. Due to the emerged criticism, Rwanda passed legislation in 1996 authorising the state courts to prosecute the smaller perpetrators under the state Organic Law. Depending on whether war criminals were prosecuted by the ICTR or by the state, they were filtered under different justice mechanisms.

To explore bottom-up criminal tribunal, the following analysis focuses on the traditional justice mechanisms adopted in Rwanda, specifically the local *gacaca* trials. In 2001, the government established the *gacaca* courts as a third method of administering justice. These courts met once a week nationwide; in each of approximately 9,013 cellules and 1,545 sectors<sup>4</sup> (Megwalu and Loizides, 2010: 3). In theory, the local nature should have helped overcome some of the challenges presented by the lack of internalisation of the ICTY/ ICTR. While that may have been the case, bringing criminal trials at the local level also created another set of challenges, the most severe being the potential for trials to become political tools, thus undermining post-conflict reconciliation.

### Gacaca Trials

Since the ICTR was very slow in bringing justice, and filled prisons with 85 000 people awaiting trial, local *gacaca* trials were established, depending on the participation of the entire community. Rather than being introduced as more culturally appropriate, traditional justice mechanisms were introduced due to pragmatic reasons, since the formal justice system was not able to deal with the large number of perpetrators (Sriram, 2007: 590). More than nine thousand communities throughout Rwanda organised genocide trials in the same places where these crimes were committed. The goal of these tribunals was very ambitious: “punish *genocidaires*, release the innocent, provide repatriations, establish the truth, promote reconciliation between the Hutu and the Tutsi, and heal a nation torn apart by genocide and civil war in 1994” (Retting, 2008: 25-26). *Gacaca* trials were praised for having a restorative approach to issues of justice (Cobban, 2002: 8) and fostering reintegration among genocide perpetrators (Drumbl, 2000). This restorative approach includes compensation and builds upon the

<sup>3</sup> Both were ad hoc tribunals, accused of imposing political agenda of the international community (see, for example: Pankhurst, D. (1999): 'Issues of Justice and Reconciliation in Complex Political Emergencies: Conceptualising Reconciliation, Justice and Peace', *Third World Quarterly*, 20, 1, 239-256).

<sup>4</sup> A cellule is the smallest administrative unit, and sector is the second smallest administrative unit in Rwanda.

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traditional system. For example, those found guilty had to pay into a compensation fund and often performed community service projects, such as repairing schools or rebuilding homes. This kind of compensation led to individualising blame and prevented the creation of generalisations (Graybill, 2004: 1124). Furthermore, the level of participation of the public was so high that it could not be compared to the ICTR or the national court system (Megwalu and Loizides, 2010: 5). However, there were numerous concerns regarding these trials, but before going into them, it is crucial to notice the authoritarian nature of the government in Rwanda, which did not hesitate to imprison the ones that critiqued both the regime and its policies (International Crisis Group, 2002; Human Rights Watch, 2003). Since no critiques are allowed, these trials were often seen as government propaganda.

### Questionable grassroots project

Judges for the trials (called *Inyandamugayo*) were elected based on their integrity. There were very few trained jurists, and they usually received only three days of training before assuming their duties. An important problem was that some of the elected judges had to resign, as they turned out to be perpetrators of the genocide themselves (Sriram, 2007: 590). A lawyer existed neither for the prosecution nor for the defence, and the truth was supposed to be reached by using community dialogue.

Since the communities were the ones organising and conducting the trials, the *gacaca* trials seemed to have overcome the problem of an 'outside Leviathan'. However, Retter (2008: 32), who conducted his research in Rwanda and observed the trials himself, casted doubt, since *gacaca* was controlled by the national government. Unlike traditional *gacaca*, which existed in pre-colonial Rwanda and was voluntary, 'new' *gacaca* was obligatory. The government took attendance and threatened to fine the people who did not attend it. In addition, *gacaca* was not a grassroots project since it was a national program designed by officials in Kigali, who maintained tight control over the process (ibid: 32-33). The decisions of the traditional *gacaca* system were limited to minor civil disputes, while new *gacaca* system dealt with genocide. Furthermore, in contrast to traditional *gacaca*, this new version was established by state law and was expected to implement the state law (Megwalu and Loizides, 2010: 4). In contexts where the rule of law is weak and traditional justice mechanisms are modified by the government, there is a higher chance that the judicial process will become politicised. This is what happened in Rwanda. As Betts (2005: 743) remarks, the coercive, prosecutorial and administrative functions radically altered the logic of *gacaca* and moulded them to facilitate state interests.

If there is no equilibrium and justice serves one side, there is a serious hindrance to reconciliation. Without disputing the fact that the number of casualties on the Hutu and Tutsi side is incomparable, it cannot be neglected that the Rwandan Patriotic Front (RPF) committed war crimes in the aftermath of the genocide<sup>5</sup>, and the *gacaca* system exclusively judged the Hutu perpetrators of the genocide (Graybill, 2004: 1124). Corey and Joireman (2004: 86-87) have warned that the *gacaca* was used as a tool for imposing Tutsi defined collective memory. These factors seem to perpetuate division, exclusion, and revenge, rather than reconciliation.

### The influence of *gacaca* on reconciliation

The very few studies carried out (Retter, 2008; Megwalu and Loizides, 2010) in Rwanda on this topic

<sup>5</sup> The number of civilian casualties caused by Rwandan Patriotic Front ranges from tens of thousands to 100 000 (Graybill, 2004: 1124).

lead to contradictory findings. Megwalu and Loizides (2010) concluded that *gacaca* has had positive influence on reconciliation within communities. Megwalu and Loizides (2010: 19) concluded that *gacaca* has had positive influence on reconciliation within communities. Megwalu and Loizides (2010: 19) found out<sup>6</sup> that 79 per cent of respondents agree that *gacaca* can help promote reconciliation, only 9,2 per cent disagreed, and 11 per cent remained neutral. They concluded that *gacaca* strengthened the justice process in Rwanda, and that the country would have been worse off without it, especially in the absence of the workable alternatives (ibid: 20). On the other hand, Retter (2008), who conducted his field research in Rwanda, discovered a more troubling reality. He concluded that *gacaca* fuelled or at least exposed resentment, conflict and ethnic disunity (ibid.). He mostly focused on the fact that it was a one-sided process, that *gacaca* was not locally, but nationally led, and that there were many half-lies and denials in the process. This suggests that there ought to be more research to examine the true influence of the *gacaca* trials on post-conflict reconciliation.

## Different prescriptions

Criminal tribunals involve various approaches, actors, and interactions, leading to different outcomes. As illustrated by the examples of the ICTY and *gacaca* trials, the dynamics of international and domestic criminal tribunals are inherently different, and so are their strengths and weaknesses. Hence, it is challenging to find generic lessons for the improvement of criminal trials. In practice, there are no optimal solutions, only trade-offs. However, based on the explored cases, two suggestions are proposed, which may have a beneficial influence on the reconciliation process.

Firstly, it is important for the criminal tribunals to have a deadline that is not decades away from the end of conflict. Gathering evidence, examining potential witnesses, and ‘finding the evidence-based truth’ are indisputably time-consuming. Rushing through these might have malicious consequences. However, the fact that ICTY was still in place for more than two decades after the start of the conflict in Bosnia and Croatia<sup>7</sup>, did not benefit the reconciliation process, especially not in the circumstances of ingrained denial. It also costed a tremendous amount of money- around \$2, 3 billion (Ford, 2010), and the opportunity costs were very high. For example, some of this money could have been invested in education, as the lack of it perpetuates ethnic division in society (Clark, 2009a: 365). Furthermore, the more distant trials are from violations, the more the trials are likely to become about the ‘politics of the present’ rather than the ‘politics of the past’.

Secondly, for multilevel criminal tribunals like Rwanda’s (*gacaca* trials, national level tribunal and ICTR), it is important that the justice mechanisms are consistent. When this does not happen, ‘pure luck’ can determine the destiny of the accused. This is because the punishments of the ICTR were milder than the ones of the national courts. Thus, ‘the big fish’ would receive life imprisonment from the ICTR and smaller figures would receive the death penalty (Magnarella, 1998: 8). In addition, ‘masterminds’ of the genocide enjoyed better conditions in jail while waiting for trial in Tanzania, than the individuals who were supposed to have trial at the national level or at *gacaca* trials. Different punishment for the same (or even worse) genocide crimes does not lead to justice and only raises grievances.

<sup>6</sup> Their research included two hundred and twenty-seven Rwandans, and it represents a diversity in terms of economic development, region, level of urbanisation and experience of the genocide (Megwalu and Loizides, 2010: 10).

<sup>7</sup> For example, Nuremberg Trial lasted for less than four years (Hayden, 2011: 315).

### Conclusion

Connections between criminal tribunals and reconciliation are complex. The aim of this article was not to normatively oppose the existence of criminal tribunals, but to point out to their limitations in practice in relation to their contribution to the reconciliation process. Based on the example of the ICTY, I have demonstrated how the theoretical advantages of international criminal tribunals can turn out to be disadvantages in practice. Objectivity can be seen as remoteness and individualisation of guilt can be turned into collectivisation of guilt by domestic political elites. This can consequently lead to the rejection of wrongdoings. In that sense, domestic criminal tribunals, especially local ones, seem to have an inherent advantage. Rather than being obliged to adopt the externalised justice, the justice is created within the community and in that way, internalised more easily.

However, despite their different dynamics, it turns out that the division among various levels can be blurred due to complicated relations of interdependence and interactions. The explored case of *gacaca* trials in Rwanda leads to a conclusion that it is not as 'local' as it appears to be, since it was both created and controlled by the authoritarian government. In both cases, one common hindrance to potential positive influence of criminal tribunals on reconciliation is the existence of 'spoiler actors'. For criminal tribunals to contribute to post-conflict reconciliation, there ought to be the willingness of all actors at all levels to accept the wrongdoings of their own (in these cases) ethnic group and be ready to accept the verdicts of the trials, in accordance with principles of proportionality and individual rights. In the aftermath of the conflict, this may sound utopian, but international actors could assist this process in different ways. Rather than establishing their own criminal tribunals outside of the community that is supposed to internalise their decisions, as it was done by establishing the ICTY and ICTR, it may be wiser to foster domestic ones, mediate them, and ensure the aforementioned proportionality and individual rights.

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