

Research Brief

International and Hybrid Criminal Jurisdictions: Stigmatizing or Reconciling?

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Cécile Aptel

International and hybrid jurisdictions have been created in response to the commission of heinous international crimes: genocide, crimes against humanity and war crimes, including mass rape. This article shows that, by their legal definitions, genocide and crimes against humanity are linked to identity, as their core constitutive elements require targeting specific human groups on discriminatory grounds.

In the context of the perpetration of such crimes, the victims' identity is primarily defined by others, usually those who conceive, orchestrate or commit the crimes, namely the perpetrators and the propaganda machinery deployed to create or reinforce identity divisions. For instance, to establish a crime of genocide, it does not matter whether or not victims value the identity ascribed to them or feel part of such an identity-based group; instead, what matters is that it is conceived as such in the perpetrators' minds, who then target individuals on the basis of this perceived identity. Thus, generally, for criminal accountability, there is a clear distinction between "objective" and "subjective" identity, and only the former matters.

This article concentrates on the international criminal tribunals established by the United Nations for the former Yugoslavia and Rwanda, and on the War Crimes Chamber in the Court of Bosnia and Herzegovina.

The International Criminal Tribunal for the Former Yugoslavia

In the former Yugoslavia in general, and in Bosnia and Herzegovina in particular, ethno-religious identities that opportunistic politicians made politically salient played a key role in the conflict, which devastated the region and its people beginning in the early 1990s. Ultimately, the situation in the former Yugoslavia was not merely a matter of conflict between belligerent "breakaway" states' armies, but rather paramilitary groups and regular armed forces involved in targeting and terrorizing civilian groups on the basis of their ethno-religious identity.

Research Project

Identities in Transition

In post conflict societies, histories of exclusion, racism and nationalist violence often create divisions so deep that finding a way to agree on the atrocities of the past seems near-impossible. This project seeks, first, to ensure that transitional justice measures are sensitive to the ways in which targeting people on the basis of their ethnic or religious identity may cause distinctive harms and, second, to clarify the difficult political challenges that arise in societies where communities are not ready to cooperate, or even agree on a definition of who the victims are. If transitional justice can find ways to act as a means of political learning across communities, foster trust and recognition, and if it can serve to breakdown harmful myths and stereotypes, then this will be at least a small step toward meeting the challenges for transitional justice in divided societies. The project is managed by Paige Arthur, Deputy Director of the Research Unit at the ICTJ.

The lack of progress toward peace in the former Yugoslavia, and the wish to demonstrate that the international community was not idly standing by during ethnic cleansing and mass rape against thousands of civilians prompted the Security Council to establish the ICTY in 1993. The attitude that each country and party to the conflict in the former Yugoslavia developed in response to the creation of the ICTY has been highly predictable, depending on their changing perceived geostrategic or political interests.

In principle, the ICTY has tried to focus its limited resources on the so-called big fish, or architects of international crimes. Since these architects often represented leaders that various communities hailed as “heroes,” however, the ICTY had an uphill battle persuading domestic constituencies that it was legitimate and unbiased. One reason the court offered for pursuing criminal accountability of the leaders was to individualize guilt and thereby prevent the stigma of collective responsibility to be attached to entire communities.

International or hybrid tribunals cannot entirely escape the identity politics that have engulfed societies emerging from identity-based conflict.

The International Criminal Tribunal for Rwanda

In Rwanda, the terrible crimes committed in the 1990s, and in particular in 1994, were also clearly linked to group identifications. There are three so-called ethnic groups in Rwanda: Hutu, Tutsi and Twa, the latter being a tiny minority. Traditionally, the distinction among them was based on lineage, but in exceptional cases one could move from one group to another. As many African countries moved toward independence, political developments in Rwanda followed ethnic lines, with the emerging political parties differentiating themselves primarily on the basis of ethnicity. After independence and the Tutsi king’s death, Hutu leaders aimed to establish dominance, leading to decades of ethnically based violence in which many Tutsi fled to neighboring countries. A Hutu-extremist-led backlash toward peace with Tutsi-led rebels of the Rwandan Patriotic Front (RPF) and political liberalization led to the 1994 genocide in which hundreds of thousands of Tutsi and moderate Hutus were killed.

A year after it had established the ICTY, the Security Council was severely criticized for its treatment of Rwanda’s situation. It finally decided to act in the Rwandan case as it had done for the former Yugoslavia, establishing the ICTR in 1994 with its own specific jurisdiction, but sharing common organs with the ICTY.

Like the ICTY, the ICTR focused on prosecuting the architects of international crimes, concentrating notably on governmental officials, high-ranking army officers and those who used the media to diffuse propaganda. The Rwandan government had initially supported the idea of creating the ICTR. It ultimately voted against its establishment, however, and has remained cautious of the support it provides, fearing that the tribunal

may look beyond Hutu *génocidaires* at the allegations of crimes committed by RPF forces (mainly Tutsi). So far, due to political pressures and the need to cooperate with the current government, the ICTR has not prosecuted crimes committed by the RPF.

The Bosnian War Crimes Chamber

Just as concerns over capacity, political interference and local identity-based biases animated the decisions to establish ad hoc international tribunals, they also helped drive the creation of a specialized War Crimes Chamber in the Court of Bosnia and Herzegovina. Up to the early 2000s, efforts to prosecute war crimes in each of the sub-state political entities encountered a tangle of courts and different criminal codes, not to mention varying levels of political will to undertake prosecutions in the first place. The UN Office of the High Representative, prompted by the ICTY, deemed it important to foster the rule of law, increase the transparency of justice and dispel notions of ethnic bias in the prosecutions. In 2003, it proposed changes to the legal system that included creation of a specialized “War Crimes Chamber” (WCC) within the Court of Bosnia and Herzegovina. The WCC is competent to try war crimes cases in Bosnia and Herzegovina, but it is also part of the ICTY’s completion strategy and takes over cases transferred from that court.

The WCC has faced various challenges. Its location in Sarajevo, the capital, makes it difficult to reach out to Serbs living in the Republika Srpska. While a program to educate the public about the WCC’s work was established early on in conjunction with a network of local civil society organizations, the program was discontinued after a year’s time. Moreover, since most of the WCC’s early cases were against Bosno-Serbs, ethnic bias charges were initially leveled at the court.

Analysis

Criminal jurisdictions are generally marked by identity divisions at the source of the crimes. International or hybrid tribunals cannot entirely escape the identity politics that have engulfed societies emerging from identity-based conflict. Whether intended or not, their choices may be perceived publicly as politically motivated and biased. With respect to prosecutorial choices, for example, they may be criticized for disproportionately “blaming” a particular group through one-sided prosecutions. On the other hand, if they attempt to “balance” prosecutions among groups, this may equally be perceived as politically motivated or biased.

Ultimately, justice is not meant primarily to fight nationalism, racism, sexism or any other ideology that exploits communal identities. It would be unreasonable to expect that judicial accountability mechanisms alone could provide all the necessary circumstances for any reconciliatory process to actually take place. An approach to foster rec-

About the Author

Cécile Aptel is Senior Fellow at the ICTJ. She has more than fifteen years experience in international criminal justice, human rights and international affairs, working and living in Africa, Europe and the Middle East. She is a former legal adviser for the ICTY and ICTR.

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conciliation in a divided society that has suffered heinous identity-based crimes should be holistic and multi-faceted, including, depending on the circumstances, establishing different mechanisms such as human rights commissions, national reconciliation commissions, etc.

Nevertheless, impartial and reputable courts' work, and their end-result taking the form of indisputable judgments, imposes and asserts the truth, hopefully preventing further myths and revisionism, even if that truth is not initially accepted by all. They may also contribute to shoring-up the rule of law and deterring revenge attacks among communities. Although the reasons and nature of the intervention of the international community differ in each case, a recurring objective for establishing international or hybrid courts has been to bring a measure of impartiality or neutrality to societies that have been divided and marked by identity politics as well as the widespread occurrence of identity-based attacks and persecutions.

Prosecutions and judicial trials may play an important role in divided societies' reconciliation, and often appear to be, at least, a sine qua non condition for reconciliation. Yet, to realize this contribution, they must do much more to understand and reach out to the communities they serve. While criminal justice cannot by itself instigate reconciliation, it may provide tools—especially through its truth-telling function—to those ready to prompt a move away from divisive identity politics, as well as to forthcoming generations.

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The International Center for Transitional Justice assists countries pursuing accountability for past mass atrocity or human rights abuse. ICTJ works in societies emerging from repressive rule or armed conflict, as well as in established democracies where historical injustices or systemic abuse remain unresolved. To learn more, visit www.ictj.org.

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