

THE POSITION OF THE GOVERNMENT OF RWANDA ON THE PROPOSAL TO ESTHABLISH A PERMANENT INTERNALTIONAL CRIMINAL COURT

A. INTRODUCTION

This century has witnessed war and turmoil on a grand scale. Violence has occasioned death and suffering on a scale unprecedented in human history. It is a timely, indeed a long overdue, development that the community of nations should be exploring effective ways of ensuring that such violence does not recur.

B. THE CHALLENGE

Proponents of the Intemational Criminal Court would have the world believe that the establishment of the Intemational Criminal Court would end impunity and the suffering occasioned by violent crimes covered by the court's jurisdiction.

Punishing these admittedly horrendous crimes had become an end In itself.

This is not true justice. Justice does not mean merely accountability for crimes. The real challenge of Justice should be to establish, first and foremost, effective systems for preventing or stopping gross violations of human rights and protecting those exposed to them.

The trial, conviction and punishment of the perpetrators of genocide and other gross violations of human rights and intemational humanitarian law is little consolation to victims if such violence could have been avoided and was not.

The debate as to whether to establish an Intemational Criminal Court should have been preceded by an even more important debate on what kind of institutions and firm mechanisms the international community should put in place to prevent and where necessary stop such crimes as the genocide in Rwanda in 1994.

In the absence of such mechanisms, the establishment of Intemational Criminal Court would appear to be premature, ill conceived and guaranted to lead to certain failure.

The belief that the existence of an International Criminal Court alone could ever be a deterrent against gross violations of human rights is unfounded.

C. LESSONS FROM THE EXISTENCE OF AD HOC TRIBUNALS

The clamour for the establishment of a permanent International Criminal tribunal has reached fever peak.

It is very important, now more than ever before, to look at the experience of the two existing ad hoc tribunals and draw what lessons we can before any decision is made to set up the permanent International Criminal Court.

Thanks to the existence of the two ad hoc tribunals, we already have a foretaste of how an international criminal justice system would operate.

The experience we have had with regard to the operations of the two tribunals does not give us for optimism that an effective, worth while international criminal court is a possibility.

On the contrary, evidence in hand indicates that an attempt to establish it is doomed to end in failure, an embarrassment to those will pay to keep it alive and a focus of frustration and bitterness for the victims it is intended to benefit, which is how the existing ad hoc tribunals are perceived, certainly in the *case* of Rwanda.

The ICTR was established in November 1994. It has not clouded single trial. Its mandate is drawing to a close. Its credibility is exhausted. The people of Rwanda and many others who had nursed high expectations for the tribunal legitimately question where there exists any justifiable reason why its mandate should be extended at all.

We must ask ourselves: What went wrong ?

We must also ask ourselves: Can it ever be put right ?

We need not dwell at length with the issues of mismanagement (lack of proper leadership from its inception, poor organisation, unqualified personnel, lack of an investigation and prosecution strategy) because they have sufficiently documented elsewhere and are not in dispute.

There are , however, many other fundamental problems.

1. SCALE OF ACCOUNTABILITY

The ad hoc tribunals can only handle a very insignificant proportion of the perpetrators of the crimes covered by their jurisdiction.

The gap between what they could conceivably ever do and the expectations of the societies which were victims of the crimes is truly impossible to bridge.

The *raison d'être* for their very existence is in question.

2. THE SPEED OF PROCEEDINGS

The conduct of the tribunal's proceedings is painstakingly slow.

Eventually it becomes impossible to maintain the faith of the public in the bona fide of the proceedings.

In Rwanda in particular, some believe that the delay in trials of suspects (even those in custody) is an international conspiracy to thwart accountability by the perpetrators of genocide.

In view of the fact that the work load of the permanent court would be much more than that of existing tribunals, the wheels of international justice can only be expected to move even more slowly.

This will cause increasingly Morris resentment and frustration until the whole concept of international justice becomes an irrelevance.

3. LACK OF POWER TO ENFORCE RULING

In Bosnia, a lot of suspects have been Indicted but only a handful have been placed in custody.

In Rwanda's case too, the majority of the main criminals remain at large.

Countries the world over are not cooperating in apprehending and turning over suspects to the ad hoc tribunals or national jurisdictions .

A permanent International Criminal Court is unlikely to be any more successful in securing cooperation by states.

4. PENALTIES

The absence of capital punishment and the possibility of light sentences for often horrendous crimes (as in the single Yugoslav case where sentence have been passed) makes international justice an affront to justice in the eyes of the societies where the crimes were committed.

This translates into a continuing erosion of public support for the tribunal's work.

5. LOCATION OF THE COURT

International Justice is intended to be a tool for eradicating impunity in societies which have experienced gross human rights violations.

The conduct of the trials of the perpetrators of genocide and other serious crimes in far away countries leads to a situation where the societies against whom the crimes were committed know little about the tribunals work and care even less about it.

Any court that lacks contact with the victims of the crimes it is trying will always lack legitimacy.

6. MARGINALISATION OF VICTIM SOCIETIES

The statutes that set up the ad hoc tribunals give the tribunals primacy over national jurisdictions.

The rules in the draft statute of the International Criminal Court spelling out the complementary role of the court largely still give primacy to the International Criminal Court.

The application of this rule offends victim societies immensely as people feel that sovereign nation should have the right to judge its nationals who have committed heinous crimes against their compatriots within national territory.

The tribunals are seen as a new form of imperialism.

The empowerment of a society to judge those who have so wronged is a necessary prerequisite for the process of healing, reconstruction and stabilisation. This is an issue which the draft statute of the proposed court does not solve.

7. ALLOCATION OF RESOURCES

Societies emerging from authoritarian rule need support to rebuild national institutions, especially the judiciary.

This support is crucial because it is such national institutions which are intimately involved in the process of managing the post conflict situation, stabilising society and promoting the rule of law.

Investment in domestic Institutions would yield far better returns than setting up a new International court which costs so much money and can not deliver even a single judgement for several years.

8. ABSENCE OF MECHANISMS TO INVOLVE VICTIMS IN PROCEEDINGS

In civil law systems, victims of crimes are permitted to join proceedings, tender evidence and seek damages.

The rules of the ad hoc tribunals do not permit this.

The denial of the victims' rights to confront their tormentors in international courts causes deep resentment.

Examination of the experience of the ad hoc tribunals of Rwanda and Yugoslavia clearly indicates that they have been a total failure.

They have failed to meet the expectations of the societies which suffered the crimes they were supposed to investigate and prosecute.

They failed to meet the expectations who finance their operations.

Neither they nor any institution that might replace them, such as the permanent International Criminal Court stand any real prospect of being effective and useful.

D. THE INDEPENDENCE OF THE COURT

Advocates of the International Criminal Court insist that the Court and the Prosecutor in particular must be independent.

They advocate, in particular, the minimum possible authority by the Security Council over the operations of the court.

Where as the independence of the court is in itself a worthy goal, states would be well advised to bear in mind that many, especially in NGO community, may themselves, depending on their agendas, wish to influence officials of the court.

In an era when these unelected unrepresentative organisations are very skillful at influencing policy by manipulating the media and arm twisting governments, it would be disastrous to have the court or a prosecutor beholden to some of such groups. There is already evidence of such influence in certain decisions of the ad hoc tribunals.

The imperfections of the Security Council notwithstanding, it would in fact be a good idea to give a degree of oversight over the International Criminal Court to the Security Council.

E. CONCLUSIONS

1. Genocide war crimes and crimes against humanity are abhorrent crimes;
2. Humanity has an obligation to prevent these crimes where they are likely to occur and to stop them when their commission is in progress;

3. There must be accountability for the crimes of genocide, war crimes and crimes against humanity. The perpetrators must be brought to justice;

4. The trial and punishment of the perpetrators of the crimes in question must be left to national jurisdictions, giving a sense of ownership of the process of justice to the societies which have been the victims of these crimes.

5. Mechanisms should be devised to oblige states in which perpetrators of such crimes are residing to apprehend them and hand them over to the jurisdictions of the countries in which they committed crimes.

6. In view of the failure of the existing ad hoc tribunals and the certainty that the proposed International Criminal Court is also likely to fail as a result of fundamental handicaps which seem unavoidable, the proposed establishment of the permanent International Criminal Court ought to be abandoned for the time being.

Dakar, 6 February 1998.