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A Comparative Analysis of the ICTR and ICTY: Which Tribunal Was More Effective?

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ABSTRACT

The ad hoc international criminal tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), were the first international criminal tribunals since Nuremberg and Tokyo to prosecute the gravest violations of international humanitarian law, committed respectively during the conflict in the Balkans and during the genocide in Rwanda in 1994. Almost ten years after the two tribunals closed, their efficacy remains a central concern in debate on the design of future mechanisms of international criminal justice, including the permanent International Criminal Court. This article compares the ICTR and the ICTY across six measures: convictions achieved, length of trials, costs, involvement of victims, reconciliation, and judicial legacy. It concludes that the ICTY's absolute conviction output was higher and its average cost per indictee significantly lower than the ICTR's, but that the ICTR's body of jurisprudence on genocide and on conflict-related sexual violence was a groundbreaking contribution to international criminal law. Neither tribunal built robust mechanisms for victims' involvement or reparation, a gap taken up, with only partial success, in the Rome Statute of the International Criminal Court. The article ends with the conclusion that there is no one-dimensional measure of effectiveness: the ICTY was the more efficient and judicially productive institution; the ICTR was the more jurisprudentially transformative institution; and a comprehensive measure of effectiveness must weigh institutional performance alongside legal innovation.

Keywords: *International Criminal Tribunal for Rwanda, International Criminal Tribunal for the former Yugoslavia, genocide, international criminal justice, ad hoc tribunals, victims, reconciliation*

I. INTRODUCTION

The twentieth century ended with two crimes so grave that they finally moved the international community to create international courts to punish their perpetrators, for the first time since Nuremberg and Tokyo. Acting under Chapter VII of the United Nations Charter, the Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY) in May 1993 to investigate the mass atrocities and ethnic cleansing committed during the violent

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break-up of the former Yugoslavia.¹ In November 1994 the Council established the International Criminal Tribunal for Rwanda (ICTR) to investigate and prosecute the genocide against the Tutsi, in which estimates of the dead run from the commonly cited figure of 800,000 to the Government of Rwanda's official count of more than one million.² Both were to be ad hoc bodies, expected to exist for only a few years. In the event, the ICTR closed only on 31 December 2015,³ and the ICTY continued until 31 December 2017, more than twenty years after both institutions opened.

The two are regularly mentioned in the same breath, and with reason. They were established under parallel Security Council resolutions, they shared an Appeals Chamber and, until the Council separated the two offices of the Prosecutor in 2003, a common Prosecutor, they drew on the same United Nations budget, and they were wound up into a single successor, the International Residual Mechanism for Criminal Tribunals. Behind this institutional kinship, however, stood two very different tribunals, differing in their speed of operation, their cost per indictee, the doctrine they generated and the visibility of their work to the constituencies they served. As the permanent International Criminal Court (ICC) struggles with the same problems of cost, delay and difficult relations with victims, the ICTY and the ICTR offer one of the most detailed records available for understanding what works and what does not in international criminal adjudication. This article asks a simple question: which tribunal was more effective? As the parts that follow show, effectiveness in international criminal justice cannot be measured along a single dimension. The next part outlines the different institutional mandates of the two tribunals; the six parts after it compare them on conviction rates, trial length, financial burden, victim involvement, reconciliation and legal legacy. Those threads are drawn together in the comparative assessment and in the conclusion.

II. INSTITUTIONAL ORIGINS AND MANDATES

The ICTY was established by Resolution 827 and had jurisdiction over crimes committed in the territory of the former Yugoslavia from 1991, with no fixed end date to its temporal jurisdiction; its subject-matter jurisdiction extended to grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war, genocide and crimes against humanity.⁴ The ICTR, by

¹ Statute of the International Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. Doc. S/RES/827, annex (May 25, 1993).

² Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955, annex (Nov. 8, 1994).

³ Press Release, SECURITY COUNCIL, *Security Council Press Statement on Closure of International Criminal Tribunal for Rwanda*, U.N. Press Release SC/12188 (Dec. 31, 2015), <https://press.un.org/en/2015/sc12188.doc.htm>.

⁴ Statute of the International Tribunal for the Former Yugoslavia, *supra* note 1, arts. 1-5.

contrast, was given a far narrower temporal reach, covering acts committed between 1 January and 31 December 1994, the calendar year of the genocide, and its subject-matter jurisdiction was confined to genocide, crimes against humanity and violations of Common Article 3 of the Geneva Conventions and of Additional Protocol II, which reflected the essentially internal character of the Rwandan conflict as against the at times international character of the Balkan wars.⁵ This difference in mandate has implications for almost every comparative measure discussed in this article. The ICTY was conceived with a broad temporal jurisdiction, while the ICTR was built to be limited, since new indictments could be brought only in respect of conduct falling within a single qualifying year.

The two tribunals also faced conflicts of different shapes. The ICTY confronted a dispersed and geographically fragmented struggle, with multiple armed groups, shifting front lines and changing command structures in Bosnia and Herzegovina, Croatia, Serbia and, later, Kosovo, whereas the ICTR's docket was dominated by those responsible for planning and implementing a centralised genocidal campaign in a comparatively small country. Their seats differed as well. The ICTY sat in The Hague; the ICTR sat in Arusha, in Tanzania, with its Appeals Chamber in The Hague. The distinction that mattered was not physical distance, since Arusha lies closer to Kigali than The Hague does to Sarajevo, but media access, regional infrastructure and the scale of investment in outreach. On each of those counts the proceedings at The Hague were more readily followed in the affected region than the proceedings at Arusha were in Rwanda, and that gap became a standing criticism of the ICTR at the very time it was expected to support Rwanda's reconciliation process, as discussed below.

III. CONVICTION RATES AND CASE OUTCOMES

The ICTY indicted 161 individuals. The ICTR, which operated for a shorter period and on a narrower docket, indicted 93, of whom, according to Human Rights Watch, 61 were convicted and sentenced and 14 acquitted, the remainder accounted for by referrals, withdrawals and deaths.⁶ On the ICTY's own final case record, 90 of the 161 it indicted were sentenced and 19 acquitted, 13 cases were referred to national jurisdictions, and the remaining 37 indictments were withdrawn or terminated on the death of the accused. Measured as a proportion of total indictments, the conviction rates were broadly similar, about 56 per cent at the ICTY and about 66 per cent at the ICTR. A more accurate comparison confines the denominator to cases that reached a final verdict, excluding referrals, withdrawals and deaths, none of which reflects a

⁵ Statute of the International Criminal Tribunal for Rwanda, *supra* note 2, arts. 1-4.

⁶ HUMAN RIGHTS WATCH, *Rwanda: International Tribunal Closing Its Doors* (Dec. 23, 2015), <https://www.hrw.org/news/2015/12/23/rwanda-international-tribunal-closing-its-doors>.

judicial finding of guilt. On that basis about 83 per cent of those whose cases reached a verdict were convicted at the ICTY and about 81 per cent at the ICTR. The two are close enough that neither can claim a decisive advantage on conviction rates.

The significant difference lies in the composition of each docket. Like the ICTY, the ICTR showed an apex bias, convicting former Prime Minister Jean Kambanda, the first head of government to plead guilty to genocide before an international tribunal,⁷ together with senior military commanders, media figures and clergy. Both tribunals, then, caught the leading suspects that ad hoc international prosecution is meant to reach, rather than the lower-level offenders more readily left to domestic courts. The ICTY's docket was significantly larger in sheer numbers, 90 convictions out of 161 indictments against 61 out of 93 at the ICTR, which reflects the greater scale of the Yugoslav conflicts and the greater number of factions involved. The ICTY therefore has a clear advantage when effectiveness is defined by the absolute number of convictions, while the two tribunals are hardly distinguishable when the yardstick is the proportion of cases brought to judgment that ended in conviction.

IV. TRIAL DURATION AND JUDICIAL EFFICIENCY

Both tribunals were slow. Their hybrid procedure, combining adversarial and civil-law features, often made proceedings more onerous than they had been designed to be, and trials ran for years because of the volume of evidence needed to establish command responsibility and genocidal intent and because of the logistical difficulty of gathering evidence from war zones. The ICTY's record illustrates the point starkly. Slobodan Milosevic's trial lasted more than four years, from February 2002 until his death in March 2006, and never reached a verdict.⁸ Radovan Karadzic's trial commenced in October 2009; the Trial Chamber convicted him on 24 March 2016 and sentenced him to forty years, and the Appeals Chamber affirmed the genocide conviction and increased the sentence to life imprisonment on 20 March 2019. The trial of Ratko Mladic began in May 2012 and ran until November 2017.

The ICTR's proceedings were, if anything, longer relative to its smaller docket. The Butare case, which produced the first conviction of a woman for genocide before an international tribunal, opened in June 2001 and did not reach trial judgement until June 2011, ten years later; it was not finally resolved until the Appeals Chamber judgement of 14 December 2015, the last

⁷ *Prosecutor v. Kambanda*, Case No. ICTR-97-23-S, Judgement and Sentence (Int'l Crim. Trib. for Rwanda Sept. 4, 1998).

⁸ *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Order Terminating the Proceedings (Int'l Crim. Trib. for the Former Yugoslavia Mar. 14, 2006).

judgement the ICTR delivered, more than twenty years after the crimes.⁹ The delays are attributable to structural features common to both institutions: multi-accused joinders and the proof of superior-responsibility liability, particularly in the ICTR's early years; extensive witness protection; and chronic understaffing relative to caseload, again most acutely at the ICTR. Neither tribunal solved the problem of trial length, and the ICTR's experience, a smaller conflict with charges of comparable gravity and delay of comparable length, offers no ready explanation for it. Neither offers a model to emulate without substantial reform, although the ICTY's later reforms, among them the encouragement of guilty pleas, the referral of mid-level cases to national courts under Rule 11 *bis* of its Rules of Procedure and Evidence,¹⁰ and the joinder of indictments, did modestly accelerate its work.

V. FINANCIAL COSTS

Comparing costs across the two tribunals is difficult, given the different reporting periods and currency conventions, but the direction of the finding is consistent across independent evaluations.¹¹ Measured against the number of persons indicted, the outlay works out at roughly US\$4.3 million per indictee for the ICTY against roughly US\$11 million per indictee for the ICTR, so that the Rwanda tribunal cost about two and a half times as much per accused as its Yugoslav counterpart.¹² Several explanations suggest themselves. The ICTR was established in Arusha, where the logistical and legal infrastructure was less developed than at The Hague, which raised the costs of transporting witnesses, of translation and of security. Much of the killing in Rwanda took place at community level rather than through a centralised military operation, which produced an unusually large volume of witness testimony by comparison with the documentary record of the more hierarchically organised military campaigns prosecuted at the ICTY. The ICTR also faced administrative and management difficulties in its early years, including gaps in witness protection and case-management practices that degraded in quality without improving efficiency, both of which told on its costs and its output.

Both tribunals were funded from the United Nations regular assessed budget, which left them periodically exposed to funding shortfalls caused by member States' arrears and, at times, to doubts among Security Council members about their continued existence. The appropriations

⁹ *Prosecutor v. Nyiramasuhuko (Butare)*, Case No. ICTR-98-42-T, Judgement (Int'l Crim. Trib. for Rwanda June 24, 2011); *Prosecutor v. Nyiramasuhuko (Butare)*, Case No. ICTR-98-42-A, Judgement (Int'l Crim. Trib. for Rwanda Dec. 14, 2015).

¹⁰ INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, *Rules of Procedure and Evidence* r. 11 *bis* (Referral of the Indictment to Another Court), U.N. Doc. IT/32/Rev.50 (July 8, 2015).

¹¹ David Wippman, *The Costs of International Justice*, 100 AM. J. INT'L L. 861 (2006).

¹² *The Comparative Cost of Justice at the ICC*, DENV. J. INT'L L. & POL'Y (blog), <https://djilp.org/the-comparative-cost-of-justice-at-the-icc/>. The post carries no named author and no date of publication on its face.

sought and approved for the two tribunals were substantial by any standard, and far greater than those of comparable domestic prosecutions;¹³ the doctrinal and reconciliatory returns examined in the parts that follow must be weighed against that expenditure. On cost-efficiency the ICTY was far the stronger institution, at roughly US\$4.3 million per indictee against roughly US\$11 million at the ICTR, even though its conviction rate per indictee was slightly lower.

VI. VICTIM PARTICIPATION

One of the most striking resemblances between the two tribunals is that neither developed an effective structure for engaging victims. Neither the ICTY Statute nor the ICTR Statute gave victims independent procedural standing: victims appeared before both tribunals, if at all, as prosecution witnesses, with no right to their own counsel, no right to apply for reparations before the tribunal and no right to claim compensation from the tribunal itself.¹⁴ Under the ICTY's Rules of Procedure and Evidence, a victim seeking compensation depended first on the judgment of conviction, which the Registrar transmitted to the competent national authorities, and then had to bring an action in a national court, in which the Tribunal's judgment was final and binding as to the criminal responsibility of the convicted person.¹⁵ In practice that route was largely illusory, since survivors of genocide and war crimes faced practical and financial obstacles in national legal systems poorly suited to claims of this kind.

The gap did not go unnoticed. On this point the ICTY and the ICTR share the same structural lacuna: neither moved beyond the traditional conception of the victim as a source of evidence towards recognition of the victim as a rights holder entitled to participate in the proceedings.¹⁶ If there is a difference between them, it lies in outreach rather than participation. Partly in response to widespread scepticism about its work in the region, the ICTY built a more comprehensive regional effort through the Outreach Programme established within the Registry in 1999, screening trial footage and hosting community dialogues across the former Yugoslavia. The ICTR's outreach was, given its remote seat and its limited early funding, comparatively modest in scale, though it grew in the tribunal's later years. That difference aside, neither tribunal gave

¹³ Statement of the Chairman, ADVISORY COMMITTEE ON ADMINISTRATIVE AND BUDGETARY QUESTIONS, *First Performance Reports of the International Criminal Tribunal for Rwanda, International Tribunal for the Former Yugoslavia and International Residual Mechanism for Criminal Tribunals for the Biennium 2014-2015* (Dec. 15, 2014), U.N. Doc. A/69/655.

¹⁴ Statute of the International Tribunal for the Former Yugoslavia, *supra* note 1; Statute of the International Criminal Tribunal for Rwanda, *supra* note 2.

¹⁵ INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, *Rules of Procedure and Evidence* r. 106, U.N. Doc. IT/32/Rev.50 (July 8, 2015).

¹⁶ Shaveta Gagneja, *Researching Victims of Crime Under International Criminal Law: Issues and Concerns*, 2 ILI L. REV. 218 (Winter 2019), <https://ili.ac.in/pdf/sg.pdf>.

victims a formal role, and both fall short of the standard later set by the ICC, whose Statute expressly provides for reparations to victims.¹⁷

VII. RECONCILIATION

Reconciliation does not lend itself to measurement in the way conviction statistics do, and is correspondingly harder to assess. Some patterns are nevertheless visible. The ICTR worked alongside a far larger domestic transitional-justice mechanism, the *gacaca* community courts, which tried the overwhelming majority of Rwanda's genocide cases and reached many times the ninety-three individuals the ICTR indicted.¹⁸ The ICTR's mandate was in that sense secondary: it built a credible international historical record and brought leading architects of the genocide to justice outside Rwanda, but it sat in Arusha, in Tanzania, carried a relatively modest caseload and had limited visibility among survivors in Rwanda. Its relations with the Rwandan government were at times tense, in particular over its largely unfulfilled investigation into alleged crimes by the Rwandan Patriotic Front.¹⁹

The ICTY's record in the Balkans has been mixed as well. Observers in the region and outside it reported repeatedly that each ethnic community regarded the Tribunal's record as either too harsh towards itself or too lenient towards its opponents. International recognition of the Srebrenica genocide and the convictions of Karadzic and Mladic were reported as successes in holding perpetrators to account, yet they were not accepted or acknowledged in parts of Republika Srpska and in Serbia, which marks the limits of judicial rulings as correctives to political narrative. Neither tribunal brought about a process of reconciliation; each instead produced a judicial record that domestic actors remained free to accept, contest or deny. Where they differed, perhaps, is that the ICTR's findings on the organisation and the intent of the genocide met less opposition than some of the ICTY's more politically charged conclusions.

VIII. LEGAL LEGACY

The comparison is sharpest, if not necessarily the most balanced, in substantive jurisprudence, where the ICTR's body of work stands out. The *Akayesu* judgement has been cited in courts and in scholarship across the world, above all for its treatment of genocidal intent, its understanding of ethnicity as a social construct for the purposes of the Genocide Convention, and its recognition of rape and sexual violence as constitutive acts of genocide rather than incidental

¹⁷ Rome Statute of the International Criminal Court art. 75, opened for signature July 17, 1998, 2187 U.N.T.S. 3.

¹⁸ HUMAN RIGHTS WATCH, *supra* note 6.

¹⁹ HUMAN RIGHTS WATCH, *supra* note 6.

harms of war.²⁰ The ICTR's Media Case, *Prosecutor v. Nahimana*, built on that precedent, convicting the accused of direct and public incitement to commit genocide under article 2(3)(c) of the ICTR Statute and of persecution as a crime against humanity, and so establishing that broadcast propaganda can attract criminal liability without direct participation in the killing, although the Appeals Chamber afterwards narrowed important parts of the Trial Chamber's reasoning.²¹ The precedent speaks directly to present concerns about mass violence and social media.

The ICTY's contribution is distinct but no less consequential. It was the first tribunal to characterise the Srebrenica killings as genocide, in *Prosecutor v. Krstic*,²² a characterisation the International Court of Justice confirmed in its 2007 Bosnian Genocide judgment.²³ The ICTY also did much to define rape in international criminal law, first in *Furundzija* and then in *Kunarac*, a definition since drawn on well beyond the region.²⁴ Its jurisprudence on individual criminal responsibility for violations of the laws of war in non-international armed conflict, beginning with the Appeals Chamber's jurisdiction decision in *Tadic*, reshaped the field.²⁵ Between them the two tribunals left bodies of law of different kinds and of lasting significance. The ICTR's influence lies at the definitional core of genocide, in genocidal intent and in the place of sexual violence and propaganda in establishing it, across a handful of landmark judgments. The ICTY's influence is wider in range, covering individual responsibility in conflict, command responsibility, sexual violence as torture and genocide in a European setting, across a far larger body of judgments. The ICTR's strength, then, is depth at the definitional core; the ICTY's is doctrinal breadth.

IX. COMPARATIVE ASSESSMENT: WHICH TRIBUNAL WAS MORE EFFECTIVE?

No single metric answers the question, and that resistance to a simple answer is itself a finding. On conviction rates the two tribunals are nearly equal, with the ICTY slightly ahead in absolute terms. On speed neither worked quickly, and the ICTR, despite its smaller docket, was at times

²⁰ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, paras. 498-523, 731-734 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998).

²¹ *Prosecutor v. Nahimana, Barayagwiza & Ngeze (Media Case)*, Case No. ICTR-99-52-T, Judgement and Sentence (Int'l Crim. Trib. for Rwanda Dec. 3, 2003); *Prosecutor v. Nahimana, Barayagwiza & Ngeze*, Case No. ICTR-99-52-A, Judgement (Int'l Crim. Trib. for Rwanda Nov. 28, 2007).

²² *Prosecutor v. Krstic*, Case No. IT-98-33-T, Judgement, para. 598 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001).

²³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, Judgment, 2007 I.C.J. Rep. 43, para. 297 (Feb. 26).

²⁴ *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgement, para. 185 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998); *Prosecutor v. Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001).

²⁵ *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

as slow as the ICTY. On cost the ICTY was by a wide margin the cheaper institution per indictee. On victim participation the two shared a significant failing, since neither gave victims any meaningful procedural footing. On reconciliation both produced authoritative judicial records that domestic communities remained free to contest, and the ICTR's ties to the society it served were the closer of the two. On doctrine, the ICTR's smaller docket yielded exceptionally rich material, at the definition of genocide and beyond it, while the ICTY's larger docket produced a more extensive body of international criminal jurisprudence.

Judged administratively, by output against cost and time, the ICTY was the more effective institution. Judged doctrinally, by the power to reshape substantive international criminal law, the ICTR's *Akayesu* judgement may well outweigh the ICTY's administrative advantages, having settled doctrines of genocide and of conflict-related sexual violence that the ICC, the hybrid tribunals and domestic courts still apply. The two tribunals were differently effective on different measures, and the honest comparison is not that one was more effective than the other at large, but that each was more effective at different things.

X. CONCLUSION

The ICTY and the ICTR were twin institutions born of two parallel humanitarian catastrophes, and in practice they were quite different. On the six-factor comparison undertaken here, the ICTY was the more efficient and cost-effective of the two, measured by convictions achieved against money spent and by the wider doctrinal reach of its considerably larger docket. Smaller, slower relative to its size and much more expensive per indictee, the ICTR nonetheless produced some of the most consequential judgments in the history of international criminal law, judgments that changed how the international community defines and prosecutes genocide and sexual violence in conflict. Neither tribunal solved the problem of delay, and neither built a meaningful mechanism for victim participation and reparation; the drafters of the Rome Statute were only partly successful in equipping the permanent ICC to address those failings. The lessons of the ICTY and the ICTR are instructive, but they call for caution: institutional efficiency does not necessarily accompany doctrinal change, and the ultimate success of an international tribunal should be assessed not against any single criterion but by what it contributed to accountability, to the historical record and to the development of international law. On that composite reckoning both tribunals, flawed, costly and slow as they were, delivered a measure of justice and left a body of law behind them.
