Justice and Genocide:
Post-Genocide Transitional Governments

An essay by August Dombrow

Transitional governments in post-genocidal states typically prop up victim groups in positions of power where they seek a policy of justice, usually by filling prisons and courtrooms with the perpetrators. Such action generally results in a mutual, lingering resentment between ethnic and religious groups, which generally translates into continued conflict or a mass exodus of refugees. Either outcome can have a destabilizing impact on the region. Ultimately, individual states and the international community must grapple with the question of how to "set things right" after they have gone so horribly wrong.

Recent and ongoing humanitarian crises in the world suggest that previous attempts to address this problem have missed the mark. In the past, the world has responded with a variety of trials and tribunals where past reactions share a common theme – one of retributive justice. This tendency to rely on punishment as retaliation against such crimes has provided neither closure nor conclusion and has failed to prevent additional atrocities. As a look at a few recent examples will show, such tactics can actually perpetuate the logic that facilitates genocide as transitional governments trade peace for justice.

In order to break this cycle of retribution, justice in post-genocidal societies must emphasize reconciliation – that is, political inclusion for dispossessed parties, particularly the leadership, which may necessitate the contentious policy of amnesty. Initially, a post-genocidal society that forces perpetrators and victims into close physical proximity will no doubt be fraught with tension. International

organizations must contribute to an atmosphere of equity and security that ensures such a society has the opportunity to heal.

A New Brand of Justice?

All too frequently, the perception of justice involves visions of courtrooms and high-profile leaders led away in handcuffs. As Marko Hoare observes in an article highly critical of international tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY), "their victims deserve *justice*. Yet the international courts have, essentially, failed to deliver it…there has been practically no *punishment* for this genocide" (192, emphasis mine). Hoare and similar critics seem to correlate punishment directly with "justice for victims," yet a criminal trial for each individual complicit in a genocide is an impractical and, ultimately, inconsequential conclusion to genocide.

The primary concern of post-genocidal justice should be the prevention of reoccurrences, and the poor track record of convicting war criminals as well as the lack of deterrence on war crimes suggests a new approach is needed, one that does not prioritize this retributive brand of justice. Additionally, this narrow concept of justice inevitably leads to disillusionment when the legal process drags out interminably or ends in a stalemate that spares the accused.

Transitional justice is concerned with helping devastated communities cope with the damages of war. But these effects are not limited to casualty counts and destroyed physical infrastructure. As one recent report phrases it, "transitional justice…lies at the nexus of public health, conflict, and social reconstruction" (Pham 98). Though such areas can be difficult to measure, more-so than prison sentences, they are central to resolving the question of justice in a post-genocidal society. Monty Marshall of the University of Maryland also acknowledged this when he developed his "societal impact of war measure,"

which takes into account "not just war deaths but population dislocations, damage to 'societal networks', environmental and infrastructure damage, resource diversion and 'diminished quality of life'" (Human 126). Accordingly, justice must address more than simply the suffering of grieving kin.

Additionally, the presence of violence cannot even be considered a reliable indicator of conflict. In her book *Gender, Justice, and the Wars in Iraq*, Laura Sjoberg writes about positive and negative conceptualizations of peace:

> "In the negative sense, peace is the absence of armed conflict; in the positive sense, peace is the affirmative fulfillment of security and justice in politics. Negative peace is when there is no shooting; positive peace is when there is no conflict." (10)

It is important to note that negative is not applied in its pejorative sense; it is used to convey the absence or *negation* of an attribute. These definitions correlate with what she describes as negative and positive justice. The former is "concerned with retribution, the justice given to one who breaks the laws" (for example, denying a criminal his or her rights to freedom or life through imprisonment or execution); "positive interpretations of justice are concerned with fairness" (27). It is also important to point out that these concepts are not mutually exclusive, and can actually benefit and reinforce one another.

A Spectrum for Peace and Justice?

Shortly after the fall of Saddam Hussein regime in Iraq in 2003, the US led coalition emplaced the Coalition Provisional Authority (CPA). Hussein's Ba'ath party, a Sunni Arab dominated political entity, had committed a number of war crimes against the Shi'ite and Kurd populations during his reign, and now the Shi'ite majority had the ear of the CPA. The coalition immediately enacted a policy of De-Ba'athification, which denied former Ba'ath members a role in the new government to include disbanding the military. The now-infamous move

took jobs away from a lot of armed young men and is considered a contributing factor the early robust insurgency the military faced during the initial stages of the war.

Relationships between the ethno-sectarian groups that divide Iraq have not improved since then, and once-diverse neighborhoods in the capital city of Baghdad now sit segregated behind walls of concrete meant to deter the large bombings that plague the city. According to Gen. Jones (ret.) report to Congress in 2007, a decline violence accompanied the formation of these sectarian enclaves, but as Sjoberg pointed out, an absence of attacks does not mean peace has settled on the city.

And the new strategy for US military embraces this trade, arguing that this "peace" equals stability, offering governance an opportunity to assert itself. But as recently as 27 April 2010, elections were stymied by the specter of De-Ba'athification (Myers). Sarah Sewall enshrined this trade-off in military canon when she wrote in her introduction that "counterinsurgency favors peace over justice" (xxxix). Unfortunately for Iraqi and US interests in the region, the legacy of De-Ba'athification is one of continuing violence (seen as a legitimate (i.e. only) alternative to political participation), segregation and, ultimately, injustice.

If the current situation in Iraq rests at one end of a spectrum, towards the other end sits Rwanda. Immediately following the 1994 genocide, the new government turned to trials and tribunals as "the only option to come to terms with the problems of the past" and "retributive justice and reconciliation were seen as mutually exclusive objectives" (Ingelaere 508). In more recent years, however, the Rwandan government has shifted towards a more positive conceptualization of peace, promoting reconciliation through the traditional Gacaca courts. The eventual shift towards a policy that encompasses reconciliation seems an implicit acknowledgment that retributive justice alone is not enough.

The Gacaca consist of community courts where the accused are essentially tried by their neighbors. Intended to rebuild the communities devastated by the genocide, the Gacaca are also meant to alleviate the burden on the state's courts overwhelmed by the arrest of Hutu males in the wake of the genocide. While the idea sounds great on paper, Bert Ingelaere describes a few of the shortcomings in the actual implementation:

> "…the traditional Gacaca had the objective to restore social harmony…But the content of the meetings is handled in a purely prosecutorial fashion, limiting the non-discursive aspects of ritual or the dialogical aspects of truth-telling activities… Moreover, trials creat an 'us versus them' dynamic." (517)

The language of "us versus them" invokes the dehumanization and "otherization" that frequently accompanies genocide. But this dynamic is not unique to Gacaca courts – it closely resembles the interior of a traditional courtroom, with an emphasis on proving one side "right" to the detriment of the other. Incidentally, the International Criminal Tribunal for Rwanda (ICTR) has enjoyed relative success, being the first to hand out a genocide conviction (to Jean-Paul Akayesu) and the first to convict a head of state (Prime Minister Jean Kambanda).

Individual versus State Responsibility

In February of 2007, the International Court of Justice (ICJ) ruled on a case filed against Serbia-Montenegro, challenging the state's culpability in the genocide of the early nineties. The court, which decided the state did not commit or was complicit in genocide, set a new precedent regarding state culpability for genocide conducted within their borders.

As Amabelle Asuncion points out in her article, "Pulling the Stop on Genocide," aside from establishing legal precedent, this decision illuminates a very

important question regarding the difference between individual and state responsibility. While such a distinction might seem abstract, it could have concrete consequences for the way courts handle future cases. Asuncion writes:

> "On the preliminary question whether a state can be made responsible for committing genocide, the ICJ ruled that states are themselves obligated not to commit genocide…The Court clarified, however, that state responsibility under the [Genocide] Convention is not criminal, but a breach of international obligations." (1203-4)

While such a statement might seem obvious, the language of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide necessitates the clarification. Article 5 of the Convention mandates how states respond to genocide, with an emphasis on assigning individual responsibility: "The Contracting Parties undertake to enact…the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide."

The language of the Convention is largely retroactive, plagued by verbs such as "punish," "prosecute," and "extradite" "persons committing genocide." The promise "to prevent," however, implies a proactive effort on the part of the Contracting Parties (i.e. states) to ensure genocide does not occur. Additionally, the Convention was prompted by promises of "never again," to prevent a reoccurrence of the tragedy and not merely to provide the legal framework for future litigation.

That is not to say leaders should be exempt from accountability for their actions (or lack thereof) in a genocide. Heads-of-state and the upper echelons of the military operate as an embodiment of the state and may therefore serve as a bridge between the state and individual. Hoare writes that "the ICTY…singled out Milosevic for indictment among the top-ranking Serbian and Yugoslav

leadership – effectively personalizing the guilt of what had been a joint criminal enterprise" (192). While highly publicized trials of certain leaders might give the wrong impression, assigning individual blame for what is essentially a collective crime, they also provide an opportunity to put the state on trial.

Aside from the theoretical implications, it would be a logistical nightmare to try every individual complicit in genocide on every level. Benjamin Valentino affirms the importance of leadership responsibility in his work on mass killings: "the impetus for mass killing usually originates from a relatively small group of powerful political or military leaders, not from the desires of broader society" (2).

While Asuncion is concerned primarily with the prosecution of genocide, her findings can be applied to help heal post-genocidal communities. The role of leaders, those individuals within the state who wield tremendous influence, whether through *de jure* or *de facto* authority, is central to her argument. A similar emphasis is granted through legal proceedings with charges directed specifically towards those with authority who fail to act accordingly in a time of crisis.

Rather than looking to leaders to shoulder the blame, however, such individuals might be integral to the reconciliation process. Opponents might argue that integrating former government figures might present a moral hazard, especially if there is any possibility that individual was complicit in genocide. As Asuncion demonstrates, state and individual responsibility, though they may overlap at times, can also be separate entities (1218). Finally, trying individuals has done little to deter future actors from participating in genocide at any level. Perhaps a shift towards collective guilt at the community or state level, rather than singling out individuals who absorb the blame, would promise better results.

A Place for Reconciliation

Advocates of reconciliation face the difficult task of justifying it. Measures meant to promote reconciliation over retribution are frequently difficult quantify and causal relationships can be notoriously elusive. If one goal of reconciliation is to integrate communities, trends of political participation in a transitional government might offer some insight into the impact of particular policies. Examining representation of minority group interests as well as the constituents' active involvement in politics, via elections for example, over time could reveal whether policies are encouraging participation or abuse of power. Although poll numbers never fully reflect the political astuteness of voters, they do provide a glimpse into the system, whether it adequately accommodates minority and opposition groups. Statistical methods could identify any anomalies in election numbers, as a check against inequality built into the election process.

In a paper on amnesty in Bosnia-Herzegovina, Lousie Mallinder mentions a correlation between minority political participation and signs of reconciliation such as the decline of extreme nationalism (3). This participation, in turn, establishes channels of communication between opponents and offers the potential to resurrect integrated communities.

A policy of reconciliation depends heavily on acceptance from the victimized community. Previous attempts at leniency for perpetrators have been met by firm resistance from those who consider it a form of appeasement. The United States, for example, opposed the Vance-Owen peace plan, "arguing that it made too many concessions to the Serbs" (Mallinder 39). Unfortunately, the alternative frequently draws out any search for justice and, in cases such as the former Yugoslavia, may even expose victims to additional harm.

Reconciliation, of course, is not without its inherent risks. It places tremendous faith human capacity for forgiveness and sharing power has always tested the limits of political good will. All too often, such disputes are resolved with armed force that results in more lives lost and a continued repression by the majority. This is why foreign involvement would be required for the initial stages of a transitional government built on reconciling differences.

Despite the presence of a neutral third-party, violence might still occur among faction unwilling to participate in the political process, likely making an international troop presence unfavorable for constituents of the host countries. Negative perceptions of an occupation and conspiracy theories of shadowy puppet-governments, similar to certain characterizations of the US presence in Iraq, could also hinder foreign efforts. In terms of lives ultimately saved and regional stability, however, the effort merits further examination. Additionally, the commitment in time and resources guarantees that foreign militaries need not intervene to prevent future wartime atrocities. The domestic government maintains their sovereignty while foreign states conserve blood and treasure.

In his book War Crimes, Aryeh Neier equates amnesty to yielding to terrorist demands:

> "Where no indictments have been issued, general amnesties are seductive. The alternative is the potential for more conflict. To reject an amnesty may seem to manifest lack of concern for those who would suffer the consequences of a new military takeover or a prolonged war. Yet the grounds for resisting an exemption for great crimes are compelling. That justice should be done and the appearance of justice maintained are the most important reasons to reject amnesties." (106)

But this insistence on the "appearance of justice," or immediate, short-term results has long-term repercussions, namely justifying the perceived grievances of the prosecuted individuals and the affiliated group. Such handling ensures

that the divisions that facilitated the initial war crimes remain intact, alongside the heightened probability of future atrocities, perpetrated in the search for the next round of justice. A policy that reasonably and responsibly incorporates the political leadership of the prosecuted group could circumvent the tautology of genocide and, by allowing the victim group the space to begin a true recovery and, consequently, achieve true justice. In other words, a limited amnesty policy is not simply a bargaining chip for war criminals at the negotiating table, it is a necessary part of a larger package that guarantees justice is actually served.

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