

A Legacy Deferred?: The International Criminal Tribunal for Rwanda at 20 Years

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NIGEL ELTRINGHAM, APR 29 2014

This article is part of an E-IR series marking the twentieth commemoration of the Rwandan Genocide.

On 7th April 2014 at the opening ceremony of 'Kwibuka20' (Remember20), the week-long twentieth commemoration of the 1994 Rwandan genocide, United Nations Secretary General Ban-Ki Moon spoke of the legacy of the International Criminal Tribunal for Rwanda:

International criminal justice is expanding its reach. Leaders and warlords alike face the growing likelihood of prosecution for their crimes. The remarkable work of the International Criminal Tribunal for Rwanda has shown once again how justice is indispensable for sustainable peace. [1]

The notion of 'legacy' pervaded the last few years of the ICTR's full operation. At a Symposium held in Arusha in 2007 on 'The Legacy of International Criminal Courts and Tribunals in Africa', [2] jurisprudence and legal precedent bequeathed to international criminal justice were highlighted as the Tribunal's legacy. At a counter-workshop organised by defence lawyers in The Hague in 2009 ('ICTR Legacy from the Defence Perspective'), [3] unfair practice and 'Victor's Justice' were emphasised as the Tribunal's legacy. It is significant that neither (competing) workshop formulated legacy in the same terms as the Secretary General. Furthermore, it could be argued that the Secretary General was simply reiterating the promises contained in the UN Security Council resolution that created the Tribunal, rather than a realistic assessment of what had happened in the intervening twenty years. [4] This article will interrogate the Secretary General's summation of the work of the ICTR and reflect on what the Tribunal's legacy may be. It will first provide some background to the Tribunal. The discussion draws on research conducted in Arusha (Tanzania), seat of the Tribunal, from 2005.

The International Criminal Tribunal for Rwanda

Between 7 April and mid-July 1994, an estimated 937,000 Rwandans, the vast majority of who were Tutsi, were murdered in massacres committed by militia, the gendarmerie, and elements of the army, often with the participation of the local population. [5] As *de facto* custodian of the term genocide, the UN was slow to designate the events as such. Only in his report of 31 May 1994, did the Secretary General declare genocide had been committed. [6] In a letter to the President of the Security Council on 28 September 1994, the post-genocide Rwandan government requested that an international tribunal be established, [7] a suggestion supported on 4 October by a UN Commission of Experts appointed by the Secretary General; [8] the President of Rwanda on 6 October [9] and, on 13 October, by the Special Rapporteur of the Commission on Human Rights on the situation of human rights in Rwanda. [10] A UN Security Council Resolution, [11] initially sponsored by the United States and New Zealand, contained four purposes for the ICTR: to bring to justice those responsible for violations of international humanitarian law (referring to genocide, crimes against humanity, and war crimes); to 'contribute to the process of national reconciliation and to the restoration and maintenance of peace'; and to halt violations of international humanitarian law (deterrence). Trials began in 1996 and lasted an average of four years (one lasted nine years). [12]

The organs of the Tribunal investigated, and put on trial, *any person* accused of committing the following in Rwanda in 1994: genocide (as defined by the 1948 UN Convention for the Prevention and Punishment of the Crime of Genocide), crimes against humanity (a widespread or systematic attack on a civilian population), and

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'war crimes' (Article 3 common to the 1949 Geneva Conventions). The Tribunal's four courtrooms and offices were located in two rented wings of the Arusha International Conference Centre (Tanzania). The Tribunal had three principal organs: the Office of the Prosecutor (which investigated allegations, issued indictments, and prosecuted the case in court); the Registry (administration); and three 'Trial Chambers' composed of sixteen permanent and nine *ad litem* judges. There was no jury; the three judges who sat in each trial assessed the evidence and issued a judgement. At the time of writing, seventy five cases have been completed (including twelve acquittals), sixteen cases are on appeal, and nine indictees remain 'at large'. The Tribunal has been the subject of sustained criticism regarding the selection of the accused, cost (\$1.5 billion), and length of trials. [13] In 2009, the Security Council called on the Tribunal to complete all its work by the end of 2012. [14] On 20 December 2012, the Tribunal's judges issued their final sentence (apart from appeals), sentencing Augustin Ndirabatware (Minister of Planning during the genocide) to 35 years imprisonment for genocide and crimes against humanity.

Influence on Post-Genocide Rwanda

Despite an ICTR outreach programme in Rwanda, [15] surveys suggest that Rwandans have very little knowledge of the institution. [16] This is in a large part due to the post-genocide government's antagonistic attitude, from the outset, to the Tribunal. Even though the Rwandan government called for its creation, the Rwandan representative on the Security Council voted against the resolution that established the Tribunal on the grounds that the government believed that the temporal jurisdiction should have been broader (from 1990-1994); that the Tribunal should have had its own prosecutor and appeals chamber (rather than initially sharing these with the International Criminal Tribunal for the Former Yugoslavia, ICTY); that the judges should have had recourse to the death penalty; and that the Tribunal should have been located in Rwanda. [17]

That antagonism has been exacerbated by another issue. The ICTR was created in response to the interim report (4 October 1994) of a UN Commission of Experts which concluded that Tutsi had been victims of genocide between 6 April and 15 July 1994 [18]. But the report also concluded that there were 'substantial grounds' to conclude that 'Tutsi elements' had committed 'mass assassinations, summary executions, breaches of international humanitarian law [i.e. war crimes] and crimes against humanity'. [19] These 'Tutsi elements' were the Rwandan Patriotic Front that has dominated Rwandan politics since 1994. The intention of investigating members of the RPF remained a stated policy throughout the Tribunal's operation. In 1995, the UN Secretary General justified the choice of Arusha as the seat of the ICTR by saying that it would ensure 'complete impartiality and objectivity in the prosecution of persons responsible for crimes committed by both sides to the conflict', [20] a position reiterated in a Security Council resolution in August 2003 that called on Rwanda to 'render all necessary assistance to the ICTR, including on investigations of the Rwandan Patriotic Army'. [21] When the ICTR Prosecutor, Caral del Ponte, revealed in 2000 that investigations into the RPF were on-going, the Rwandan government obstructed access to witnesses [22] and, according to Del Ponte, [23] was instrumental in her removal from the post of ICTR prosecutor in 2003. The lack of indictments for alleged RPF crimes has resulted in severe criticism of the Tribunal by NGOs [24] and accusations of 'Victor's Justice'. [25]

One cannot assume that a deeper engagement on the part of the Rwandan population with the ICTR would have strengthened 'sustainable peace'. Research in the former Yugoslavia suggests that wider knowledge of international trials may actually strengthen rather than diminish ethnic chauvinism. [26] And yet, antagonism on the side of the Rwandan government must have diminished the engagement of the Rwandan population with the ICTR and, therefore, its potential to contribute to 'sustainable peace'. As regards the Secretary General's comment that 'Leaders and warlords alike face the growing likelihood of prosecution for their crimes', this may apply elsewhere, but it cannot be applied to the ICTR, whose prosecutor failed to indict anyone from the RPF. Equally, the comment regarding 'sustainable peace' would also seem rather inappropriate given the allegations made against RPF soldiers in the war in the Democratic Republic of Congo by the Office of the United Nations High Commissioner for Human Rights. [27] If the claim of ending impunity and 'sustainable peace' are not, on closer inspection, legacies of the ICTR, what are?

An Historical Record

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In his 2008 report to the UN Security Council, the President of the ICTR stated that 'Among the most basic and most important of the Tribunal's achievements has been the accumulation of an indisputable historical record'. [28] The capacity of trials to produce an historical record has been the subject of sustained debate, [29] a debate I also encountered among lawyers and judges at the ICTR. [30] And yet, one cannot ignore the sheer enormity of the material that the Tribunal has collected. A rough calculation based on information available in 2009 would suggest that at least 10,000 exhibits (Party Manifestos, transcriptions of radio broadcasts, UN cables, minutes from Rwandan government meetings, etc.) had been entered into evidence. [31] Given that more than 2,500 witnesses gave testimony, there is in excess of 110 million words of transcripts. A defence lawyer explained to me that in his case there were 30,000 pages of motions and submissions, and 1,500 exhibits; amounting in all to 700,000 pages of material, plus 400 trial days of transcripts. The bulk of this material is publicly accessible through the Tribunal's 'Public Judicial Records Database.' [32]

In addition, given that cameras in three of the Tribunal's courtrooms videoed the proceedings, there is an archive of tens of thousands of hours of audio-visual recording. All proceedings were also digitally recorded using "For the Record" software and on to C90 audio cassette, the preferred format of Court Reporters. The sheer volume of this material was apparent to me on a visit to the archive in 2007: cardboard boxes full of labelled VHS tapes cover the floor, DV Cam tapes and audiotapes were piled on the floor, desks, and filing cabinets – only a week's worth.

This historical record is a concrete legacy that the ICTR has left behind. And yet, while the 1946 International Military Tribunal (Major War Criminals) at Nuremberg (IMT), a precursor of the ICTR, is attributed a crucial role in preserving material that would be the basis of the history of the Holocaust, [33] it is not certain whether the ICTR's historical record will play the same role. While public consciousness of the Holocaust was delayed in terms of both history and cinema/literature, [34] allowing time for the Nuremberg archive to be assessed, the mediatisation of the Rwandan Genocide has been immediate in terms of journalistic accounts [35] and film. [36] In circumstances where it is assumed that the story has already been adequately told, it remains to be seen whether there will be an appetite for the herculean task of trawling through this mass of material to pursue the particular, nuanced questions of scholarly research.

A Cadre of International Lawyers

There has been substantial commentary on the Tribunal's bequeathal of jurisprudence to the project of international criminal justice. [37] There has, however, been little consideration of those lawyers and judges who populate the ICTR. [38] Given that when the ICTR was created there were no legal practitioners with experience of such fora, should the emergence of such a cadre not be considered as a legacy?

Few of the lawyers or judges I met in Arusha spoke of a prior burning commitment to international criminal justice. A defence lawyer, for example, explained that he had received an email from a friend who 'wanted someone with a bit of French and I thought it sounded interesting', while a prosecution lawyer who had been a banking lawyer for seventeen years simply 'wanted to do something different'. Despite these beginnings, once lawyers and judges are in the system, they tend to circulate, moving between the ICTR the ICTY, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon, and the International Criminal Court.

On first entering this system, lawyers' and judges' prior domestic experience of practicing law is challenged. Their habitual responses were questioned, novelty had to be negotiated, and new habits acquired. [39] Although the Tribunal's Statute and 'Rules of Procedure and Evidence' are formally a hybrid of common/adversarial/Anglo-Saxon and civil/inquisitorial/Continental practice (in the latter, the judge actively interrogates witnesses and defence/prosecution lawyers play a relatively passive role), the Rules are essentially adversarial, trials taking a form almost identical to that in the United States, the UK, and other Commonwealth countries. Lawyers told me about the need for civil law lawyers to accommodate to this predominantly common law practice, but observed that, generally, it was more to do with personality than the person's background. More surprisingly, common law lawyers spoke of the differences within common law, for example, that American lawyers and British Barristers

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differ in their emotional investment in a case, their deference to the bench, and their use of written submissions. [40] Overall, I found that civil lawyers were quick to adapt and welcomed the challenge, while common law lawyers, unexpectedly, also took the opportunity to reflect and alter habitual approaches in this innovative context. For legal practitioners, the transition in 'transitional justice' was a matter of reflection on prior assumptions and reformulating their procedural and habitual preferences.

Whatever criticisms one may level at international criminal justice, there can be no doubt that a significant legacy of the ICTR is not jurisprudential or Rwanda-specific, but the creation of a cadre of lawyers and judges who are equipped to populate international courtrooms in the future.

Conclusion

To claim, as the Secretary General did, that the ICTR has contributed to 'sustainable peace' and the eradication of impunity cannot hold, in light of the failure to indict any person from the RPF and the apparently limited knowledge of the ICTR among the Rwandan population. I have suggested that the legacy of which we can be more certain is also more modest: the jurisprudence celebrated by legal scholars, an historical record awaiting analysis, and a cadre of legal practitioners equipped for the future of international criminal justice. To claim anything else without empirical evidence would be speculative. Such speculation would be ill-advised in light of the IMT. Today, a 'Myth of Nuremberg' maintains that the IMT succeeded in discrediting the Nazi leadership and building the foundations for 'sustainable peace'. And yet, Michael Newton and Michael Scharf [41] note that opinion polls conducted by the US State Department from 1946 to 1958 revealed that 80 per cent of the West German population did not believe the findings of the IMT and rejected it as 'Victor's Justice'. Nuremberg's immediate legacy was the opposite of its now venerated status. This suggests that beyond the concrete legacies considered here, caution should be exercised in claiming too much for the ICTR at this stage.

[1] United Nations, Remarks at the commemoration of the 20th anniversary of the Rwandan genocide Secretary-General Ban Ki-moon, Kigali (Rwanda), 7 April 2014; Accessed at: http://www.un.org/apps/news/infocus/speeches/statments_full.asp?statID=2186#.U05ChfnlBl1 (Apr. 19, 2014).

[2] See https://www.brandeis.edu/ethics/pdfs/internationaljustice/Legacy_of ICTR_in_Africa ICEJPL.pdf (Apr. 19, 2014). See Special Issue of the New England Journal of International and Comparative Law, Vol. 2. 2008.

[3] See http://www.tpirheritagedefense.org/Archive_Conference1_En.html (Apr. 19, 2014).

[4] The Preamble to the resolution states that through the 'prosecution of persons responsible for genocide' the Tribunal would 'contribute to the process of national reconciliation and to the restoration and maintenance of peace'; United Nations. *Resolution 955 (1994) Adopted by the Security Council at its 3453rd meeting*, United Nations Security Council. New York, 1994.

[5] Alison Liebhafsky Des Forges, "Leave none to tell the story": *Genocide in Rwanda* (New York: Human Rights Watch, 1999). Nigel Eltringham, *Accounting for Horror: Post-Genocide Debates in Rwanda* (London: Pluto Press, 2004). IRIN (Integrated Regional Information Network for Central and Eastern Africa), "Government puts genocide victims at 1.07 million," 19 December 2001 (2001).

[6] United Nations. *Letter dated 1 October 1994 from the Secretary General to the President of the Security Council transmitting the interim report of Commission of Experts on the evidence of grave violations of international humanitarian law in Rwanda, including possible acts of genocide (Annex: Preliminary Report of the Independent Commission of Experts established in accordance with Security Council resolution 935 (1994))*. 1994.

[7] United Nations. *Letter dated 28 September 1994 from the Permanent Representative of Rwanda to the United*

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Nations. 1994.

[8] *Ibid.*

[9] United Nations. *General Assembly Official Records Forty-ninth Session 21st Meeting*. New York: United Nations General Assembly, 1994.

[10] René Degni-Ségui. *Situation of Human Rights in Rwanda*. New York: United Nations, 1994.

[11] United Nations, *Resolution 955 (1994) Adopted by the Security Council at its 3453rd meeting, United Nations Security Council*. New York, 1994.

[12] Geneva Academy of International Humanitarian Law and Human Rights (GADH). *International Criminal Tribunal for Rwanda: Model or Counter Model for International Criminal Justice?* Geneva, 2009.

[13] International Crisis Group, *Tribunal Penal International Pour le Rwanda: Pragmatisme de Rigueur* (Brussels: ICG, 2003). Victor Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (Cambridge: Cambridge University Press, 2008), 151-234.

[14] United Nations. *Security Council Resolution 1901 (2009) Adopted by the Security Council at its 6243rd meeting, United Nations Security Council*. New York, 2009.

[15] Victor Peskin, "Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme," *Journal of International Criminal Justice* 3 (September, 2005).

[16] Timothy Longman, Phuong Pham, and Harvey M. Weinstein, "Connecting Justice to Human Experience: Attitudes Toward Accountability and Reconciliation in Rwanda," in *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge: Cambridge University Press, 2004). There has been no systematic investigation of the opinion of those who have testified at the Tribunal of the institution's work.

[17] United Nations, "Transcript of the 3453rd Meeting of the United Nations Security Council," (New York, 1994), 13-16.

[18] United Nations. *Letter dated 1 October 1994 from the Secretary General to the President of the Security Council transmitting the interim report of Commission of Experts on the evidence of grave violations of international humanitarian law in Rwanda, including possible acts of genocide (Annex: Preliminary Report of the Independent Commission of Experts established in accordance with Security Council resolution 935 (1994))*. .

[19] *Ibid.* See Lars Waldorf, "'A Mere Pretense of Justice': Complementarity, Sham Trials, and Victor's Justice at the Rwanda Tribunal," *Fordham International Law Journal* 33 (2010). Nigel Eltringham, "'When we walk out; what was it all about?': Views on 'new beginnings' from within The International Criminal Tribunal for Rwanda," *Development and Change* (Forthcoming 2014).

[20] United Nations. *Report Of The Secretary-General Pursuant To Paragraph 5 Of Security Council Resolution 955 (1994)*, 1995.

[21] United Nations. *Security Council Resolution 1503 (2003) Adopted by the Security Council at its 4817th Meeting*?. New York: United Nations, 2003.

[22] United Nations Wire, "Del Ponte Protests to Security Council that Rwanda is not Co-operating," *UN Wire/United Nations Foundation* 25 July 2002 2002.

[23] Carla Del Ponte and Chuck Sudetic, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals*

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and the Culture of Impunity (New York, 2009), 234-9.

[24] Human Rights Watch and Fédération Internationale des Ligues des Droits de l'Homme. *Letter to Council Members on Eve of Meeting with Lead Prosecutor* (New York: Human Rights Watch, 2006).

[25] Luc Reydam, "The ICTR Ten Years On: Back to the Nuremberg Paradigm?," *Journal of International Criminal Justice* 3 (2005).

[26] See Johanna Mannergren Selimovic, "Perpetrators and victims: Local responses to the International Criminal Tribunal for the former Yugoslavia," *Focaal* 57 (2010).; Jelena Tošić, "Transparent broadcast? The reception of Milosevic's trial in Serbia " in *Paths to International Justice: Social and Legal Perspectives* (Cambridge: Cambridge University Press, 2007).

[27] Office of the United Nations High Commissioner for Human Rights. *Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003* Geneva: Office of the United Nations High Commissioner for Human Rights, 2010.

[28] United Nations. *Address to the United Nations General Assembly by the President of the ICTR 13th Annual Report of the ICTR. United Nations General Assembly, 2008*

[29] Mark Osiel, *Mass Atrocity: Collective Memory, and the Law* (London: Transaction, 1997); Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, (Harmondsworth: Penguin, 1994[1963]). 253.

[30] Nigel Eltringham, "'We are not a Truth Commission': Fragmented Narratives and the Historical Record at the International Criminal Tribunal for Rwanda," *Journal of Genocide Research* 11 (2009).

[31] Geneva Academy of International Humanitarian, *International Criminal Tribunal for Rwanda: Model or Counter Model for International Criminal Justice?* (Geneva: Geneva Academy of International Humanitarian Law and Human Rights, 2009).

[32] See <http://trim.unictr.org/>

[33] Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (London: Yale University Press, 2001), 2.

[34] Peter Novick, *The Holocaust and Collective Memory* (London: Bloomsbury, 2001).

[35] Philip Gourevitch, *We wish to inform you that tomorrow we will be killed with our families : stories from Rwanda* (London: Picador, 1999).

[36] Nigel Eltringham, "Showing what cannot be imagined: 'Shooting dogs' and 'Hotel Rwanda'," in *Framing Africa: portrayals of a continent in contemporary mainstream cinema*, ed. Nigel Eltringham (Oxford: Berghahn, 2013).

[37] For example, rape and sexual violence see Askin, Kelly Dawn. "Gender Crimes Jurisprudence in the ICTR: Positive Developments." *Journal of International Criminal Justice* (2005); the crime of genocide Chile Eboe-Osuji, "Complicity in Genocide versus Aiding and Abetting Genocide Construing the Difference in the ICTR and ICTY Statutes," *Journal of International Criminal Justice* 3 (2005); and hate speech Gregory S. Gordon, "War of Media, Words, Newspapers, and Radio Stations: The ICTR Media Trial Verdict and a New Chapter in the International Law of Hate Speech," *Virginia Journal of International Law* 45 (2004).

[38] Elena Baylis, "Tribunal-hopping with the post-conflict justice junkies," *Oregon review of international law* 10

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(2008): 364.

[39] Nigel Eltringham, "A War Crimes Community": The Legacy of the International Criminal Tribunal for Rwanda Beyond Jurisprudence," *New England Journal of International and Comparative Law* 14 (2008).

[40] See Nigel Eltringham, "Judging the "Crime of Crimes": Continuity and Improvisation at the International Criminal Tribunal for Rwanda," in *Transitional Justice: Global Mechanisms and Local Realities in the Aftermath of Genocide and Mass Violence* (New Brunswick, N.J.: Rutgers, 2010).

[41] Michael A. Newton and Michael P. Scharf, *Enemy of the State: The Trial and Execution of Saddam Hussein* (New York: St Martin's Press, 2008). 210-212.

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