Introduction

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Twenty-one years after having been set up, the International Criminal Tribunal for Rwanda (ICTR or Tribunal) completed all pending cases and closed its doors in December 2015, having issued its last appeal judgement in the *Nyiramasuhuko et al. ('Butare')* case on 14 December 2015. The UN Mechanism for International Criminal Tribunals (UNMICT) is still in place, however, to continue the 'jurisdiction, rights and obligations and essential functions' of both the International Criminal Tribunal for the former Yugoslavia (ICTY) and ICTR and to maintain their legacy. With the closing of the ICTR proper, this volume comes at a good moment to reflect on its work: what did the ICTR achieve, what challenges did it come across and what lessons can be learned from all of this?

This volume – *The Elgar Companion to the International Criminal Tribunal for Rwanda* – surveys and analyses, from different angles (law, criminology, sociology, victimology, history) and by different authors (academics, practitioners), the contributions of the ICTR in the field of international criminal justice and is comprised of four main parts. It begins with a part on establishment and key facts and figures, which discusses the setting up of the Tribunal, its mandate, structure, personnel and facts and figures on cases and accused/convicted. The second part explores substantive law and covers issues such as genocide, crimes against humanity, war crimes, sexual violence and modes of liability. The third part discusses procedural law and explores investigation and case selection, arrest and transfer, trial/appeal, evidence, rights of the accused, rights of the victims, and sentencing. The fourth and final part looks at the contribution of the ICTR to international criminal justice as well as to the lives of Rwandans.

It seems quite impossible to be all-inclusive when discussing the challenges and achievements of a tribunal like the ICTR. The Tribunal was in existence for over two decades (21 years) and was among the first *ad hoc* tribunals (together with the ICTY) since Nuremberg and Tokyo, thus pioneering in the field of international criminal law. Nevertheless, this volume sets out quite a number of the ICTR's achievements and

challenges. In this introduction we aim to give you some insights in the contributors' thoughts – in their own words – on the ICTR's legacy.

In Part I of this volume ('Establishment and Key Facts and Figures') Helen Hintjens sets out, in Chapter 1, how the ICTR came to be and reviews some broad debates around its creation and early significance. Some frequent criticisms of its early operation are identified, including questions of delays, bias, costliness and remoteness from most Rwandans. The origins of the ICTR are examined, along with some key debates that arose with the early elaboration of case law. One of the most significant features of the ICTR is how it established a historical record of the widespread occurrence of genocide in Rwanda between April and July 1994. This too may have been among the core aims of establishing the institution, to ensure that genocide would 'Never Again' occur in Rwanda. According to Hintjens, it seems that the original goals of the ICTR, and especially holding key figures responsible for the genocide, have been largely – though not entirely – achieved.

In Chapter 2, Barbora Holá and Alette Smeulders give an insight into the facts and figures of the cases, accused, judges, the length of trials, crimes, modes of liability and conviction rate, sentencing, appeals and imprisonment, and the prosecution of *genocidaires* outside the ICTR. For example, their research shows that the ICTR convicted 59 individuals (around 80 per cent of those tried) and 14 persons (20 per cent) were acquitted. The sentences handed out by the ICTR judges furthermore rank among the severest among the international criminal courts and tribunals. The ICTR sentenced 17 defendants to life imprisonment and the average determinate sentence is 24.7 years. Not only do Holá and Smeulders give the figures, they also provide (possible) explanations thereof. Their data can serve as a basis for further research and debates.

Part II ('Substantive Law') starts with Chapter 3 on the crime of genocide, authored by Payam Akhavan. According to him, the ICTR has made the most significant contributions of any jurisdiction to the law of genocide. From the landmark 1998 *Akayesu* Judgement onwards, the ICTR has elucidated, in fits and starts, a multi-layered range of issues in defining a complex crime, representing the coming of age of genocide as a norm of international law, from a distant legal monument enshrining condemnation of past Nazi crimes, to a burgeoning *corpus* of jurisprudence with contemporary relevance. Akhavan states that it is ironic that, just as the ICTR conferred the crown of ultimate importance to genocide in its jurisprudence, it also dethroned it through the seemingly mundane question of graduated sentencing. Genocide, it held, is just another international crime, not intrinsically more serious than war crimes or crimes against humanity. And yet, its historical imagery maintains a

powerful grip on our collective conscience, beyond the strictures of legal reasoning. Arguably, Akhavan states, the most perplexing challenge of ICTR jurisprudence was whether, or rather how, the law of genocide could be interpreted to encompass the Tutsi as a protected group. Somehow, it was unthinkable to deny this label of ultimate importance to a cataclysm that was extreme even by the sordid standards of the twentieth century. But just as jurists are master taxonomists and wielders of distinctions, the reality of what transpired in Rwanda in 1994 also explodes the rationalist credo of law, reminding us of the gross inadequacy of reducing the unspeakable to mere words, Akhavan states.

And although perhaps more celebrated for its jurisprudence on the crime of genocide, the ICTR has contributed in a significant manner to international criminal law in its consideration of the contextual threshold required for crimes against humanity, and in its deliberations on specific types of offences, as explained in Chapter 4 by Valerie Oosterveld. The ICTR's Statute differs from that of the ICTY by including an additional requirement that the attack be committed against any civilian population on national, ethnic, racial or religious grounds. Thus, the Tribunal had to consider the meaning of this divergence, concluding that these discriminatory grounds are specific to its own context and that they apply to the attack as a whole: the individual perpetrators need not intend to discriminate on these grounds. Within the prohibited acts, the ICTR's consideration of extermination, rape, persecution and other inhumane acts significantly enhanced the development of international criminal law. For instance, in the *Nahimana et al.* ('*Media*') case the ICTR specifically contemplated how hate speech fits into the crime against humanity of persecution. The ultimate conclusion by the Appeals Chamber carefully articulates that hate speech alone does not necessarily amount to a violation of key human rights, but that it is an expression of discrimination.

In addition to ICTR's important contribution in the interpretation of the crime of genocide and crimes against humanity, the Tribunal also made an important contribution in the interpretation and application of war crimes, as set out in Chapter 5 by Felix Mukwiza Ndahinda. The existence of a situation of armed conflict in Rwanda in 1994 motivated the inclusion of war crimes charges in a number of cases; yet, in a relatively limited number of cases in comparison with the cases including genocide and crimes against humanity charges. According to Ndahinda, in most indictments containing war crimes charges, they featured at the bottom of the list of charges or were dropped at some stage. In early ICTR cases, it was evident that both the prosecution and the Trial Chambers were very hesitant in, respectively, pursuing charges under or

interpreting the war crime provision of the ICTR statute. However, after the conviction of George Rutaganda, it became easier to establish a linkage between the killings and the armed conflict in cases in which the accused's responsibility in the commission of genocide and/or related crimes or crimes against humanity was established. In later cases, ICTR judges did not need to enter into lengthy legal argumentation in establishing the existence of a nexus between the committed crimes and the armed conflict. The collision between official security forces – soldiers, gendarmes and policemen – with armed militias or civilians involved in killings has been interpreted as a manifestation of the linkage between the armed conflict and the killings. Moreover, besides the normative grounds and jurisprudential accomplishments of the ICTR relating to war crimes, the latter category has also been the subject-matter of socio-politically charged debates over the contours of the ICTR mandate, particularly for the lack of prosecution of alleged crimes committed by members of the RPF/A. Ndahinda in his chapter revisits the main points of contention and arguments presented for (non-)prosecution of these crimes by the ICTR.

In Chapter 6, Anne-Marie de Brouwer and Usta Kaitezi discuss the topic of sexual violence as genocide, crimes against humanity and war crimes. Their chapter starts with a short introduction to the sexual violence as it took place in Rwanda during the genocide against the Tutsi in 1994 and the ICTR's statistics on prosecuting sexual violence, followed by the following topics seen from the ICTR's contribution or lack thereof to international criminal law with regard to sexual violence prosecutions: sexual violence as genocide, crimes against humanity and war crimes; the definition of rape; modes of liability in cases of sexual violence; female perpetrators of sexual violence, male victims of sexual violence and dead animals as subjects of sexual violence; and procedural issues related to sexual violence. They conclude, for instance, that the ICTR made considerable contributions by clarifying the law on genocidal sexual violence and the definition of rape. However, unfortunately the ICTR failed to all-inclusively charge the nature and complexity of the sexual violence, as male victims and female perpetrators were hardly given any attention before the Tribunal. In addition, where the ICTR did not charge the crimes for what they were (that is, genocidal rape), victims showed less satisfaction with the Tribunal as they felt their victimization was not properly recognized.

Chapter 7 is the final chapter in Part II, written by Kai Ambos and Stephanie Bock, and deals with individual criminal responsibility. Ambos and Bock state that in many respects, the ICTR's jurisprudence on

individual criminal responsibility corresponds to that of other international tribunals, in particular the ICTY. Its approach towards the responsibility of superiors, for example, is essentially based on the ICTY judgement in *Delalić et al.* With its detailed and sometimes even sophisticated rulings – for example, the controversy between the *Akayesu* Trial Chamber and the *Bagilishema* Appeals Chamber rulings on the required mental element – the ICTR nevertheless added to a deeper understanding and a coherent application of this important doctrine and thus paved the way for a more precise formulation of the requirements of superior responsibility in Article 28 of the Rome Statute of the International Criminal Court (ICC). In other respects, the ICTR emancipated itself from the ICTY and set its own marks. In particular, the ICTR relied less frequently on the joint criminal enterprise (JCE) doctrine, which was later rejected by the ICC's *Lubanga* Pre-Trial Chamber. More importantly, the ICTR, so far, is the only international tribunal which has dealt in detail with the special forms of participation in genocide and their relationship to the general modes of liability. Its rulings will thus be a valuable source of inspiration for the ICC when it comes to the first application of Article 25(3)(e) of the Rome Statute on public and direct incitement to genocide.

Part III ('Procedural Law') comprises seven chapters in total. The first chapter, Chapter 8, is written by Alex Odora-Obote and deals with investigations and case selection. According to Odora-Obote, investigation and selection of cases are two important components for successful prosecution. If not properly handled, many senior perpetrators are more likely to escape prosecution. In the conduct of investigation and selection of cases, the ICTR faced serious problems at the beginning of its work despite the good intentions of the United Nations, national governments and human rights organizations, journalists including individuals who freely handed over information to the prosecutor and provided support, but due to a lack of legal knowledge of those who had gathered information in these early stages a lot of the information could not be used as evidence. Gradually, as experienced lawyers joined the Office of the Prosecutor (OTP), the quality of the work of the OTP improved but they still felt the burden of dealing with less-performing members of staff who were recruited under the liberal UN recruitment rules. Besides their routine investigations and court work, the more experienced lawyers continued to provide necessary in-house training to other staff, thus improving the quality of the OTP work and performance. The result of the improved quality led to a rich body of jurisprudence developed by the ICTR for the good of humanity. The ICTR prosecutors' tenacity created conditions for the success of the Tribunal after a very difficult start.

In Chapter 9, Christophe Paulussen discusses the topic of arrest and transfer. After a very brief explanation of the ICTR's more general cooperation regime and a (more detailed and rather technical) description of its specific arrest and transfer procedures, this chapter delves into the practice. It examines the infamous case of *Barayagwiza*, which perfectly, and probably best of all ICTR cases, shows the practical complexities and challenges involved in the arrest and transfer proceedings, the consequences of when the arrest and transfer proceedings are not properly followed and finally, how politicized the arrest and transfer proceedings can be. This development painfully revealed that the Tribunal 'does not operate in a political vacuum' and remained dependent on third parties to act as its enforcement arm. In the final section of this chapter, the topic of arrest and transfer is discussed in the current context of the ICTR branch of the UNMICT, including the fact that more than 21 years after the Rwandan genocide, several fugitives are still on the run. Paulussen states that it is time for the international community to (better) understand that it has major responsibilities in the functioning, effectiveness and thus success and credibility of the international criminal justice project. In the same vein, critics should recognize that if arrest warrants are not executed, they should criticize not the Tribunal in question for being ineffective, but the states which refuse to cooperate. If the international community does not adequately react in the event of non-compliance, while fully respecting the human rights of the fugitives, states undermine the system of international criminal justice – of which they constitute the enforcement pillar – and hence the fight against impunity themselves.

Chapter 10 describes the trial and appeal processes and is authored by George William Mugwanya. According to Mugwanya, the Tribunal's trial and appeal processes represent a substantial contribution to the corpus of international criminal procedure. The adversarial nature of the proceedings is a critical component, but in practice, always requires deeper engagement and reflection, especially by the judges, as to ensure that both parties are afforded equal opportunity to present their cases. No doubt, the judges' decisions regulating the parties' number of witnesses, the length of time of examination, whether or not to grant extensions of time or word limits for filings, to mention but a few, cannot be lightly reached. Therefore, the importance of the Tribunal's efforts in different cases to balance the twin values of fairness and expeditiousness cannot be overemphasized according to Mugwanya. Besides the extensive elucidation of the rules governing the presentation and assessment of evidence, the provision of reasoned opinions and the standards of appellate intervention, the Tribunal's case law and practices have also touched on

such sensitive matters, such as when and how far judges can intervene to question witnesses in court and the taking of judicial notice, especially of matters relating to elements of the charged crime. Although not binding on the ICC, the ICC's references to the Tribunal's jurisprudence in some of its cases reflects an important legacy of the Tribunal's operation. Some areas (for example, whether the Appeals Chamber can itself enter a new conviction) have, however, generated dissenting opinions on the bench. Yet, the existence of dissenting opinions is more of a strength than a weakness. It creates room for remedying questionable positions taken by the majority, and may assist in improving the jurisprudence.

Chapter 11, by Nancy Amoury Combs, deals with the evidentiary system. Combs states that the ICTR had a somewhat lesser impact in this field than the ICTY. The ICTY and ICTR prosecuted very different kinds of atrocities, and they conducted their prosecutions against the background of even greater differences in facts and circumstances. For instance, Rwanda supported prosecutions whereas the states of the former Yugoslavia did not. That divergence created differing contexts in which to gather evidence. In addition, the oral nature of Rwandan culture played a substantial role in some of the evidentiary issues that arose at the ICTR, though not at the ICTY. Consequently, despite the similarity of their evidentiary rules, the two tribunals have confronted highly divergent evidentiary challenges. Yet, although its contributions to evidence law will not stand at the forefront of the ICTR's legacy, its evidentiary rules and decisions will be understood to have been profoundly important to the Tribunal's real and perceived success. The way in which evidence is gathered, shared, and presented to the judges has a dramatic impact on the length and cost of criminal proceedings. And the length and cost of international criminal proceedings is a matter of grave concern to scholars and court-watchers, along with – more importantly – victims and defendants. The ICTR took approximately 20 years and spent approximately US\$1.75 billion to prosecute 73 defendants. The \$2.3 million per defendant price tag results from a host of factors, but the Tribunal's evidentiary rules and practices are certainly among them. Likewise, the way in which evidence is evaluated is of key significance to the accuracy of its resulting judgements. What is clear from the ICTR's practice is, according to Combs, that safeguarding defendants' fair trial rights while simultaneously conducting expedient and efficient trials is one of the most pressing challenges facing international criminal justice.

Chapter 12 is on the rights of the accused and is authored by Caroline Buisman. The focus of this chapter is on a selective number of problem areas concerning fair trial, namely: (1) the right to be fully informed about the allegations; (2) state cooperation and efficient investigations;

(3) fair assessment of the evidence. But first, this chapter determines the desired scope of a fair trial. Whilst the position of the defence clearly improved over the years, even towards the end, there were still significant shortcomings, some of which remain unresolved, as is addressed. The chapter concludes by considering the lessons to be learned with a view to assisting future international criminal tribunals and courts in respecting fair trial rights. According to Buisman, it is evident that, generally, the Tribunal took its responsibility to ensure the fairness of the proceedings seriously. Many aspects of the trials and many accused persons received a fair trial despite significant failures on the part of the prosecution to respect fair trial rights, in particular in terms of disclosure. Such failures would, for the most part, be remedied in one way or another by the judges. The greatest challenge was the Tribunal's dependence on state cooperation, particularly Rwanda but also other states. It appears that undesirable compromises were made; and the Tribunal failed to adequately address the defence concerns about pressure put on witnesses, either to testify against, or not to testify for, the accused. This has been one of the main deficits in guaranteeing a fair trial. Buisman states that although international criminal justice is bound to be compromised because of its dependency on state cooperation, international courts and tribunals should not lose their independence, but stand strong against political pressure. In the short run this may have serious repercussions resulting in inefficient operations, but in the long run states will respect, and take more seriously an international tribunal which takes decisions because they are considered to be right, not because of outside pressure.

Chapter 13, by Rosette Muzigo-Morrison, deals with the rights of the victims. This chapter evaluates the contribution made by the ICTR to the development of the law/jurisprudence on the rights of victims of genocide, violations of international human rights and violations of international humanitarian law. It challenges the myth that the ICTR was established for 'the sole purpose' of prosecution of perpetrators of genocide and other transgressions of international humanitarian law, and makes the case that the Tribunal is not only a criminal court but it is equally a 'human rights' court, before which victims' rights ought to have been and were indeed substantively enforced. The chapter furthers how unprecedentedly the Tribunal translated basic principles of justice for victims of crime and abuse of power to practical protocols and procedures that have, with time, evolved into basic practices for enforcing victims' rights before international criminal tribunals. Regrettably, the Tribunal's statute does not include victims' substantive rights in the definition of the Tribunal's mandate – except to the extent that they would be 'protected' and their 'welfare/privacy' ensured, particularly if

they were witnesses. It is argued that, notwithstanding this limitation, the Tribunal may be credited for developing protocols and procedures that have over time evolved into critical victims' rights in international criminal justice systems (for example, victim participation and reparation regimes at the ICC). Moreover, the Tribunals' outreach programs in Rwanda have sought to redress the plight of victims.

In the final chapter of Part III, Mark A. Drumbl shares his take on the issues of sentencing and penalties. The chapter proceeds through four steps. First, it summarizes the governing legal texts – namely, the ICTR Statute, the ICTR Rules of Procedure and Evidence, and also the relevant UNMICT instruments – in terms of how they address sentencing and penalties. Second, this chapter reviews sentencing practice and enforcement of sentences. Third, this chapter considers sentencing jurisprudence, in other words, the factors to which judges turn in assessing the gravity of the offence, on the one hand, and individualizing factors, on the other, which are commonly referred to as aggravating and mitigating circumstances. Fourth, and finally, this chapter touches upon the ICTR's penological aspirations. This latter step explores the ability of custodial sentences to attain their retributive and deterrent goals; and also notes how other aspirations, including reparative and restorative objectives, have been side-lined owing to the ICTR's focus on incarceration notwithstanding the fact that these other objectives may be favoured by victim populations. Drumbl states that, for the most part, punishment and sentencing remain afterthoughts within the instrumentalization of international criminal law. This neglect is disappointing insofar as victims care deeply about what ultimately happens to persons convicted of international crimes. Sentencing may also fulfil important narrative functions. Sentencing can also serve as a venue to individuate differentiations among perpetrators, in particular within the context of group crimes, and thereby inject granularity into the attribution of responsibility. Hence, in addition to unpacking the ICTR's approach to sentencing and penalty, this chapter also hopes to contribute to the broader literature on punishment for persons convicted of grievous *jus cogens* offences and, thereby, attend to an underserved area of the law-in-practice. Prior to the ICTR's work, and that of the ICTY, virtually no thought had been given over to sentencing perpetrators of international crimes tried by international institutions. In this regard, simply by coming into existence and having to identify and apply rationales to justify imposing different degrees of punishment on different individuals, the ICTR's work has established some basic parameters, points of reference and guidelines.

Although achievements and lessons learned feature throughout the chapters included in this volume, Part IV ('Achievements and Lessons

Learned') gives some specific attention to the topics of the ICTR's elaboration of the core international crimes of genocide, crimes against humanity and war crimes and modes of liability, and the contribution of the ICTR for Rwandans specifically. In Chapter 15, Justice Hassan Bubacar Jallow discusses the first topic. Jallow contends that, notwithstanding some controversial positions the ICTR has taken, for instance, with respect to the group victims of genocide, and which positions have been rejected by other international courts, it may be fair to submit that the ICTR may be credited with pioneering the construction and elaboration of core international crimes, especially the crime of genocide. In many instances, the ICTR did not have any precedents on which to draw, and the drafting history of its Statute is virtually non-existent with respect to the elements of the core crimes. Moreover, the drafting history of such relevant treaties, such as the Genocide Convention, while somewhat detailed, does not clearly address every single issue confronted by the ICTR. The ICTR has broken many new grounds in its construction and elaboration of the core crimes, and its positions have generally been adopted by other international courts – and it must also be stated that in many instances, there has been 'cross-fertilization' across the different international courts. The Tribunal may also be given credit for its elaboration of modes of liability, and in applying them to novel situations. The so-called 'commission through the instrumentality of others' and culpability through the third form of JCE, are particularly worthy of note. These efforts may be credited for enriching the corpus of international criminal law.

In the very last chapter in this volume, Chapter 16 on the ICTR's contributions for Rwandans, Francois-Xavier Nsanzuwera asks the question whether the ICTR has accomplished the mission assigned to it by the UN Security Council. Nsanzuwera states that it is difficult to make a quantitative evaluation of the contribution of the Tribunal to Rwandans. Despite many criticisms, the Tribunal's contributions to Rwanda include the fight against impunity, national reconciliation, strengthening the rule of law, and the construction of the genocide story. Furthermore, the Tribunal has left behind another important legacy: thousands of documents comprising the archives of the Tribunal, which contain the most important legacy of the genocide of Tutsis and the killings of Hutu opposed to genocide. In Nsanzuwera's view, the most important indicator in terms of what the Tribunal achieved for the population of Rwanda is the image that will remain in the minds of hundreds of genocide survivors who came from different parts of Rwanda to testify before this Tribunal. Together with these witnesses the Tribunal wrote the genocide story of Rwanda.

In conclusion we can thus say that the ICTR has managed to achieve a lot. First and foremost, it prosecuted 73 people, many of whom were political and military leaders. Despite the fact that eight suspects are still at large, it has thus been able to prosecute many of those who can be considered the main architects of the genocide and hold them responsible for their crimes. It thus effectively made ensure that the genocide in Rwanda was not met with impunity. The second major achievement is that, by meticulously conducting these trials, the ICTR has established a convincing record of the genocide which it is now impossible to deny. This record is important in acknowledging the crimes and atrocities committed and the suffering of the victims and survivors. This also played an important role in re-establishing law and order. A third important achievement is that – together with its twin tribunal the ICTY – the ICTR has extensively contributed to the development of international criminal law and has provided important case law on many issues such as, most prominently, genocide and sexual violence but also in relation to many other issues. A fourth important contribution is that the Tribunal has translated the basic principles of justice for the victims into practical protocols and procedures that have with time evolved into basic practices for enforcing victims' rights before international criminal tribunals.

Next to the achievements there have also been setbacks. For example, not all suspects have been apprehended. This might hopefully, however, still happen when states take their cooperation obligations more seriously. In not all of the cases was the totality of the victimization addressed, or charges were dropped, which impacted on the victims and survivors. Some trials lasted far too long and sometimes fair trial rights may be held to have been violated. Being in uncharted waters, the Tribunal had a difficult start which impacted on its early achievements. However, with time and more experience, the quality of the ICTR's work improved over the years. It can further be said that despite the Tribunal's strength in prosecuting the most responsible, victims' rights were close to non-existent (for example, participation and reparation), which left victims at times wondering about the goals of the ICTR. Although the Tribunal may have translated the basic principles of justice for the victims into practical protocols and procedures that have with time evolved into basic practices for enforcing victims' rights before other international criminal tribunals, the victims in Rwanda obviously did not gain from this. As becomes furthermore clear from reading this book some have criticized the Tribunal's lack of prosecution of the Rwandan Patriotic Front (RPF) for the crimes it allegedly committed, while others have not.

Overall, however, we do believe that the ICTR has achieved much, in particular in elaborating international criminal law, and in this book we aim to describe its legacy both in its achievements as well as its failures, as these can both be translated into lessons to be learned. Many authors in this volume have indeed expressed their wish for the international community to take on the lessons learned. Although the final word on the ICTR's legacy may not yet be set in stone, some valuable lessons can be found within this volume.