1. The creation of the ICTR

Helen Hintjens

[...] the Tribunal's strengths are inextricably connected to its perceived failures.¹

Rwanda provides a cautionary tale against a 'one size fits all' approach to international criminal justice.²

One of the most searing and shameful images in the film footage taken during the genocide was of Western workers fleeing their embassies and taking their pets with them, while leaving behind their stricken and faithful Rwandan staff who were about to be butchered.³

1. INTRODUCTION

This chapter tries to place the International Criminal Tribunal for Rwanda (ICTR) back into the context of the period in which it was created, in the immediate aftermath of a major genocide, a genocide which the Western powers, the United Nations (UN) and the international community ignored until it was too late. This allowed the gruesome 'work' of killing to be done, so that most of the Tutsi population – and some of their Hutu and Twa defenders – were eliminated. As Uvin and Mironko put it, creating the ICTR: 'was necessary in the light of the total inaction of [the international] [...] community during the genocide, which was widely perceived as shameful'.⁴ The need to create the ICTR reflected the absence post-Nuremberg and post-Tokyo of any permanent international court able to hold individuals accountable for crimes of genocide, crimes against humanity and war crimes. According to Hassan B. Jallow, Chief Prosecutor of the ICTR from 2003: 'While Nuremberg

¹ Daniel Koosed, 'The Paradox of Impartiality: A Critical Defense of the International Criminal Tribunal for Rwanda' (2012) 19 *University of Miami International and Comparative Law Review* 243–91, 243.

² Jose E. Alvarez, 'Crimes of States/Crimes of Hate: Lessons from Rwanda' (1999) 24 *Yale Journal of International Law* 365–483, 370.

³ Leila Nadya Sadat, *The Legacy of the International Criminal Tribunal for Rwanda* (Occasional Papers, Whitney R. Harris World Law Institute, Washington University in St. Louis 2012) 14.

⁴ Peter Uvin and Charles Mironko, 'Western and Local Approaches to Justice in Rwanda' (2003) 9 *Global Governance* 219–31, 220.

constitutes a watershed in the evolution of international law with its establishment of the fundamental principle of individual criminal responsibility under international law, it has not left much else by way of precedent for the subsequent international criminal tribunals'.⁵ One ICTR former senior legal advisor, Mohammed Ayat, described the ICTR as the 'African Nuremberg', and the first chief prosecutor of the ICTR placed the roots of the Rwanda Tribunal (and of the ICTY, the International Criminal Tribunal for the former Yugoslavia) firmly in the Nuremberg and Tokyo Military Tribunals at the end of World War II.⁶ For Richard Goldberg, this: '[...] was the first time that international law recognized that there could be crimes which, because they shocked the conscience of humankind to such a degree, have an international effect, and therefore cannot be confined to national borders but must invoke international jurisdiction'.⁷

In this chapter, in addition to reviewing scholarly literature and opinions expressed by former judges, prosecutors and others professionally interested in the ICTR and in transitional justice, archived ICTR-related official documents and interviews were consulted as a resource. Case-related documents were obtained through a special website created to facilitate public access to indictments, judgements and sentences and appeals.⁸ Another important source was a series of videoed interviews with ICTR staff, recorded in 2008 by a team led by Professor Batya Friedman of the University of Washington. This 'Voices from the

⁵ Hassan Bubacar Jallow, Chief Prosecutor ICTR, International Criminal Justice: Developments and Reflections on the Future, talk to International Center for Ethics, Justice, and Public Life (30 November 2009). Available 3 August 2016 at http://www.brandeis.edu/ethics/pdfs/internationaljustice/Hassan_Jallow_Distinguished_Lecture_Brandeis_November_09.pdf.

⁶ For interview with Mohammed Ayat, see Voices from the Rwanda Tribunal website, Interview 15 October 2008, available 3 August 2016 at <http://www.tribunalvoices.org/voices/video/454>.

⁷ Justice Richard Goldstone, 'The United Nations' War Crimes Tribunals: An Assessment' (1996–97) 12 *Connecticut Journal of International Law* 227–40, 228.

⁸ This website, which is easily navigable, includes all publicly available documents needed for analysis of specific cases and can be found here: <http://www.unicttr.org/en/cases> (accessed 3 August 2016). More specifically, see: <http://www.unicttr.org/en/cases/key-figures-cases> and for full report: http://www.unicttr.org/sites/unicttr.org/files/file_attach/KeyFigures-ICTR-cases-141028_EN.pdf (accessed 3 August 2016).

Rwanda Tribunal' project was also consulted.⁹ A few of these filmed interviews have Kinyarwanda sub-titles, enhancing their accessibility for a Rwandan audience. Administrative and support staff are interviewed as well as legal staff and senior personnel, making this a unique resource for the historical record and for researchers on transitional justice in Rwanda in general.

Drawing in part on such material, this chapter traces the outlines of 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. Although it is also important to: 'consider exactly what type of "synergy" exists between international and national attempts to provide accountability for mass atrocities', this is not the main aim of this chapter.¹⁰ Instead, 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 1994.¹¹ Indeed, this may have been one of the core aims of establishing the institution, to ensure that genocide would 'Never Again' occur in Rwanda. We start with the ICTR's creation and proceed to consider some teething problems of the Tribunal's early years.

2. THE FIRST POST-NUREMBERG INTERNATIONAL TRIBUNALS

One innovation of both post-war military tribunals, Nuremberg and Tokyo, was to hold individual, named persons, rather than states, accountable for war crimes.¹² In 1993, Boutros Boutros-Ghali, then UN Secretary-General, noted two possible methods under international law

⁹ These interviews include senior officials, as well as those archiving, in media, outreach, security and witness protection, for example. These invaluable and accessible interviews can be listened to here: <http://www.tribunalvoices.org/voices/> (accessed 3 August 2016).

¹⁰ Alvarez 1999, *supra* note 2, 369.

¹¹ A point made by William Schabas, 'Post-Genocide Justice in Rwanda: a Spectrum of Opinions' in Phil Clark and Zachary Kaufmann (eds), *After Genocide: Transitional Justice, Post-Genocide Reconstruction and Reconciliation in Rwanda and Beyond* (Hurst & Co 2008) 221.

¹² Daniel D. Ntanda Nsereko, 'Genocidal Conflict inside Rwanda and the ICTR' (2001) 48 *International Law Review* 31–65.

for creating a special tribunal for trying crimes against humanity; through treaty and under Chapter VII of the UN Charter. Given what was seen as the exceptionally urgent need to secure prosecutions of war criminals and genocide leaders in former Yugoslavia and Rwanda, '[...] the Secretary-General advised the Security Council to bypass a more traditional treaty process and instead create [the ICTY and ICTR] [...] as an enforcement measure under Chapter VII'.¹³ The possibility of creating the ICTR in the first place was greatly assisted by the decision a year or so earlier, to create the first 'Special Tribunal' of the post-war era in this way, under Chapter VII through the Security Council. The ICTY and ICTR would both judge war crimes and crimes against humanity, especially genocide. The same exceptional quality was seen to characterise both situations, and as one source put it:

The creation of two *ad hoc* war crimes tribunals, the ICTY and ICTR [...] by the UN Security Council, the most credible enforcer of norms directed at sovereigns [...] [were] (e)stablished by Council fiat in reaction to two perceived 'exceptional' threats to the international peace [...] the two tribunals [are] as international in composition as the organization that created them [...] [and] granted the power to enforce international criminal law in the context of two geographically and temporally limited instances [including] those committed within Rwanda during 1994.¹⁴

Of course, had the permanent international criminal tribunal been created after Nuremberg, as explicitly provided for in Article VI of the 1948 Genocide Convention, the story of local, national and international justice, including in Rwanda, would have been quite different.

Is it fair to conclude, as Uvin and Mironko have argued, that the ICTR and the ICTY were both typically Western-inspired justice institutions, in which 'symbolic politics' of guilt and blame played a critical role?¹⁵ Is it perhaps for this reason that the much-anticipated sense of justice being done within Rwanda and former Yugoslavia, did not appear very evident? According to Ntanda Nsereko and Richard Karagyesa, former deputy prosecutor, at the start of its operations the ICTR was a kind of blind experiment, in which legal procedures were literally being cobbled

¹³ Laura Bingham, 'Strategy or Process – Closing the International Criminal Tribunals for the Former Yugoslavia and Rwanda' (2006) 24 *Berkeley Journal of International Law* 687–717, 692.

¹⁴ Alvarez 1999, *supra* note 2, 371.

¹⁵ Uvin and Mironko 2003, *supra* note 4, 220.

together and being (re)invented.¹⁶ ICTR staff were: '[...] as it were, navigating in uncharted waters [...] the Nuremberg and Tokyo [...] precedents were [...] of limited utility', when it came to operationalising special tribunals in the mid-1990s post-cold war context.¹⁷

The first step in the creation of the ICTR thus took place unintentionally, when on 25 May 1993: 'The Security Council had adopted a resolution to establish the ICTY'.¹⁸ In 1994, even before the genocide ended, on 1 July, the UN Security Council adopted Resolution 935 establishing a commission of experts to report back whether 'acts of genocide' and other crimes against humanity had taken place in Rwanda.¹⁹ Once '[...] the commission confirmed that genocide and systematic, widespread, and flagrant violations of international humanitarian law had indeed been committed in Rwanda, resulting in massive loss of life', this crystallised the decision to establish the ICTR.²⁰ The commission identified a 'concerted, planned, systematic and methodical' plan to eliminate the Tutsi population – a genocide plan; it also concluded that although the genocide was against the Tutsi: 'Individuals from both sides to the armed conflict have perpetrated serious breaches of international humanitarian law [...] [and] Individuals from both sides to the armed conflict have perpetrated crimes against humanity in Rwanda'.²¹ Although other options were considered, in the end the ICTR was 'tied' to the ICTY.²² Thus, for example, until 2003 the two institutions shared the chief prosecutor, and a joint Appeals Chamber,

¹⁶ Ntanda Nsereko 2001, *supra* note 12. Echoed in interview with Senior Trial Attorney William Egbe (30 October 2008) in Voices from the Rwanda Tribunal available 3 August 2016 at <http://www.tribunalvoices.org/voices/video/635>.

¹⁷ Ntanda Nsereko 2001, *supra* note 12, 61.

¹⁸ Sadat 2012, *supra* note 3, 4.

¹⁹ UN Doc. S/RES/935 (1994).

²⁰ Reported in Security Council document, Letter from the Secretary General to the President of the Security Council, S/1994/1125 (4 October 1994) available 3 August 2016 at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_1994_1125.pdf.

²¹ UN Doc. S/1994/1125; Ntanda Nsereko 2001, *supra* note 12, 39; Paul J. Magnarella, *Justice in Africa: Rwanda's Genocide, its Courts and the UN Criminal Tribunal* (Ashgate Publishing Ltd 2000) 44.

²² Zachary Kaufman, 'The United States' Role in Establishing the International Criminal Tribunal for Rwanda' in Phil Clark and Zachary Kaufman (eds), *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond* (Hurst & Co 2008) 229–60.

located in The Hague.²³ Security Council Resolution 955 of 8 November 1994 included an annex which specified the purposes of the ICTR.²⁴ The full title of the ICTR, the ‘International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994’, indicates its wide original mandate, going beyond crimes of genocide alone.

3. DIVIDED OPINIONS ON THE SIGNIFICANCE OF THE ICTR’S CREATION

Most legal commentators view the ICTR as central to national and international responses to the challenge of transitional justice following genocide.²⁵ Positions on the longer-term significance of the ICTR remain divided, but now that the Tribunal’s operations have formally ended and all residual tasks are transferred to the UN Mechanism for International Criminal Tribunals, or ‘Residual Mechanism’, it seems appropriate to reflect on why opinions on the early significance of the ICTR were so often divided.²⁶ How did this institution come to be such a significant feature of the transitional justice landscape internationally?²⁷ Most studies about the ICTR say surprisingly little about its origins and the early years, except to mention that there were difficulties and conflicts. One recent study obtained some formerly classified documents that show the role of the United States (US), and by drawing on official memoranda,

²³ *Ibid.*

²⁴ UN Doc. S/RES/955 (1994).

²⁵ Alison Des Forges and Timothy Longman, ‘Legal Responses to Genocide in Rwanda’ in Eric Stover and Harvey M. Weinstein (eds), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge University Press 2004) 49–65; Ntanda Nsereko 2001, *supra* note 12.

²⁶ ‘By establishing the Mechanism, the Council has helped to guarantee that the closure of the two pioneering *ad hoc* tribunals does not open the way for impunity to reign once more’, according to President Theodor Meron, United Nations Security Council, 7 June 2012 cited in the UNMICT website, available 3 August 2016 at <http://www.unmict.org/en/about>. For a recent study that assesses the past 20 years of the ICTR in relation to national courts in Rwanda and *gacaca*, see Nichola Piper, *Courts in Conflict: Interpreting the Layers of Justice in Post-genocide Rwanda* (Oxford University Press 2015).

²⁷ Bingham 2006, *supra* note 13.

this study was able to reveal behind-the-scenes negotiations not previously visible to researchers and the general public.²⁸ Internationally, there was consistent support for the Tribunal among most 'Western' countries. But inside Rwanda, the approach of government towards the ICTR fluctuated between 'sceptical engagement' and confrontation.²⁹

Many international legal commentators are impressed with the ICTR's achievements, and with how innovative legal principles were established through individual case judgements, for example in relation to sexual violence. Yet despite such achievements in legal terms, such notable 'achievements [...] remain[s] insignificant in Rwanda'.³⁰ Perhaps, just as: '[...] it is crucial to recognize the merits of international criminal tribunals, it is [also] fundamental to learn from and correct their failures in order to bring justice to communities affected by these crimes'.³¹ Those who are hostile to the ruling Rwandan Patriotic Front (RPF) in Rwanda, especially those in the diaspora and critical scholars, view the ICTR as biased in favour of the Rwandan government. They insist RPF war crimes should be tried, as well as crimes of genocide, and cite the now-infamous Gersony Report.³² Peter Erlinder, often seen as a genocide denier and defence lawyer at the ICTR of senior members of the genocidal former government, suggests the ICTR was a plaything of the regime in Kigali from 1994 onwards.³³ Studies starting from this perspective tend to focus on episodes of conflict and mismatched expectations between ICTR prosecutors, the UN Security Council and successive governments in Kigali.³⁴

For some more critical legal scholars, the Western countries that fund the ICTR are the main problem. For them, the ICTR is simply part of a much wider trend of dismantling locally-grounded solutions and replacing them with 'donor-driven' justice and 'tribunalization' of post-conflict

²⁸ Kaufman 2008, *supra* note 22.

²⁹ Des Forges and Longman 2004, *supra* note 25; Uvin and Mironko 2003, *supra* note 4, 220–21.

³⁰ Jean Marie Kamatali, 'From ICTR to ICC: Learning from the ICTR Experience in Bringing Justice to Rwandans' (2006) 12 *New England Journal of International and Comparative Law* 88–102, 90.

³¹ *Ibid.*, 90.

³² Uvin and Mironko 2003, *supra* note 4, 222.

³³ Lars Waldorf, 'Instrumentalizing Genocide: The RPF's Campaign against "Genocide Ideology"' in Scott Straus and Lars Waldorf (eds), *Remaking Rwanda: State Building and Human Rights after Mass Violence* (University Wisconsin Press 2011) 48–66, 58–9.

³⁴ Magnarella 2000, *supra* note 21; Kaufman 2008, *supra* note 22.

interventions.³⁵ One ‘blind spot’ of the ICTR that is discussed later in this chapter is international actors’ involvement in, and responsibility for, the genocide against Tutsi and killing of moderate Hutu and Twa. The root causes and also the proximate triggers of genocide in Rwanda in 1994 are traceable not only to local-level grievances and national initiatives for a ‘final solution’, but also the coincidence of economic collapse with falling coffee prices, structural adjustment reforms and militarization and military invasion by the RPA.³⁶ Weapons exporters from various countries, and French military advisors and trainers played their part in the militarization process and yet none have been prosecuted for such crimes. Specific cases from the first few years, including the landmark *Akayesu* and *Kambanda* cases, the latter involving the interim president confessing to genocide, and expressing remorse, showed that the Tribunal could make a difference to international law, if not always equally effectively for Rwandans.³⁷ As Magnarella put it:

Kambanda is the first person in history to accept responsibility for genocide before an international court. He did so fifty years after the UN adopted the Convention on the Prevention and Punishment of the Crime of Genocide (1948). His case is of monumental significance not only to Rwandans, but to all those concerned with this most dreadful of crimes.³⁸

In relation to the *Akayesu* case, on the other hand, feminist lawyers and international relations experts point to the profound importance legally of defining rape more widely than before.³⁹ Article 4e of the Appendix to Security Council Resolution 955, provided that those guilty of: ‘Outrages

³⁵ Barbara Oomen, ‘Donor-Driven Justice and its Discontents: The Case of Rwanda’ (2005) 36 *Development and Change* 887–910 and see also Samer N. Abboud and Benjamin J. Muller, ‘Geopolitics, Insecurity and Neocolonial Exceptionalism: A Critical Appraisal of the UN Special Tribunal for Lebanon’ (2013) 44 *Security Dialogue* 467–84.

³⁶ Uvin and Mironko 2003, *supra* note 4, see also Helen Hintjens, ‘Explaining the 1994 Genocide in Rwanda’ (1999) 37 *Journal of Modern African Studies* 241–86.

³⁷ *The Prosecutor v. Jean Kambanda* ICTR 97-23-S (Judgement and Sentence 4 September 1998).

³⁸ Paul J. Magnarella, ‘The U.N. Criminal Tribunal for Rwanda Concludes its First Case: A Monumental Step towards Truth’ (1998) 2 *African Studies Quarterly* 37–43, 37; Magnarella, *supra* note 21, 95–110.

³⁹ Sherrie L. Russell-Brown, ‘Rape as an Act of Genocide’ (2003) 21 *Berkeley Journal of International Law* 350–74; Patricia Viseur Sellers, ‘Gender Strategy is Not Luxury for International Courts’ (2009) 17 *American University Journal of Gender Social Policy & Law* 301–53; Janet Halley, ‘Rape at Rome:

upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault' would be prosecuted.⁴⁰ During the *Akayesu* case, rape started to be defined as a crime of genocide, and was broadened to include various forms of sexual violence besides sexual penetration.⁴¹

International relations experts are divided. Some see the ICTR's creation as mainly being to assuage Western guilt at having failed to act to prevent genocide in time, thus playing into the hands of the side that gained power.⁴² For some, the ICTR like other international tribunals can even be seen as a manifestation of the 'internationalization of [a state of] exception', through 'tribunalization'.⁴³ Others view the ICTR more optimistically as an integral part of a global transitional arrangement, a 'cascade of justice' sweeping the globe.⁴⁴

However politically sensitive the relationship between the ICTR and the government in Rwanda, from a legal point of view, the legacy of the ICTR is widely agreed to be ground-breaking, and for many: 'The influence of the tribunals on the development of international criminal law cannot [...] be [over]-estimated'.⁴⁵ International criminal lawyers and human rights organisations acknowledge that the ICTR and ICTY have 'created a jurisprudence that has both transformed international law and directly affected State behaviour'.⁴⁶ Some legal scholars view the ICTR and ICTY as evidence of the victory of 'legalists' over realists concerning international criminal accountability.⁴⁷ What is perhaps less clear is whether the ICTR has contributed to the originally stated aims of the UN Security Council Resolution 955, adopted on 8 November 1994, one aim

Feminist Interventions in the Criminalization of Sex-related Violence in Positive International Criminal Law' (2008) 30 *Michigan Journal of International Law* 1–134.

⁴⁰ UN Doc. S/RES/955 (1994).

⁴¹ *The Prosecutor v. Jean-Paul Akayesu* ICTR-96-4-T (Judgement, 2 September 1998).

⁴² Victor Peskin, 'Victor's Justice Revisited: Rwandan Patriotic Front Crimes and the Prosecutorial Endgame' 173–83 in Scott Straus and Lars Waldorf (eds) *Remaking Rwanda: State Building and Human Rights after Mass Violence* (University of Wisconsin Press 2011) and Uvin and Mironko, *supra* note 4.

⁴³ Abboud and Muller 2013, *supra* note 35, 477.

⁴⁴ Kathryn Sikkink and Hun Joon Kim, 'The Justice Cascade: The Origins and Effectiveness of Prosecutions of Human Rights Violations' (2013) 9 *Annual Review of Law and Social Science* 269–85.

⁴⁵ Ntanda Nsereko 2001, *supra* note 12, 55.

⁴⁶ Sadat 2012, *supra* note 3, 6–7.

⁴⁷ Alvarez 1999, *supra* note 2.

of which was to '[...] contribute to the process of national reconciliation and to the restoration and maintenance of peace'. Another general principle was: 'to strengthen the courts and judicial system of Rwanda'.⁴⁸ This begs the whole question of how one assesses something as complex as a reconciliation process, or the impact on Rwandans of the ICTR. One scholar of transitional justice refers to:

[...] a huge gap in our empirical knowledge with respect to what transitional justice may or may not do for reconciliation [...] [moreover] there is still much debate about the meaning of the term [i.e. reconciliation], and little empirical evidence of how different transitional justice mechanisms may affect achievement of this desired outcome.⁴⁹

Whether the ICTR has contributed to national reconciliation and to strengthening Rwanda's own legal institutions is open to dispute. As was mentioned earlier, the Rwanda's transitional government soon opposed the ICTR, despite having called for its creation. Inside Rwanda, the main goal was to end impunity and reassure victims and survivors alike that justice was being done. Yet a realistic view would be that for mutual understanding and reconciling victims with perpetrators, a lot more is needed than to prosecute individual cases, however senior those individuals may have been. In many ways, it seems that *gacaca* (the neo-traditional hearings that took place in 11,000 Rwandan communities between 2002 and 2012) was viewed as more relevant to local justice concerns inside Rwanda, a relevance the ICTR failed to achieve.⁵⁰

4. INAUSPICIOUS BEGINNINGS

Though not explicitly stated in the provisions that created it, it does appear that one main purpose of the ICTR was to make it impossible for future generations to imagine there was no genocide in Rwanda. Paul

⁴⁸ UN Doc. S/RES/955 (1994).

⁴⁹ Elin Skaar, 'Reconciliation in a Transitional Justice Perspective' (2012) 1 *Transitional Justice Review* 54–103, 54; also Jean Marie Kamatali, 'The Challenge of Linking International Criminal Justice and National Reconciliation: the Case of the ICTR' (2003) 16 *Leiden Journal of International Law* 115–33.

⁵⁰ In favour see Uvin and Mironko 2003, *supra* note 4 and Phil Clark, *The Gacaca Courts and Post-Genocide Justice and Reconciliation in Rwanda: Justice without Lawyers* (Cambridge University Press 2010); more critical is Bert Ingelaere, 'The Gacaca courts in Rwanda' in Luc Huyse and Mark Salter (eds), *Traditional Justice and Reconciliation after Violent Conflict Learning from African Experiences* (IDEA 2008) 25–59.

Kagame has stated that the ICTR was created 'to try genocide perpetrators'.⁵¹ The Tribunal's scope was originally to try: 'persons responsible for genocide *and other serious violations of international humanitarian law* committed in the territory of Rwanda and *Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring states*, between 1 January 1994 and 31 December 1994' (italics added). In the case of the ICTR, the court records not only served to find those indicted guilty or not guilty; they also provided undeniable evidence for the historical record of specific sets of atrocities committed during the genocide. This was also true during the Nuremberg trials, when one of the prosecutors, William Zeck, explained that, whilst he did not join the Nuremberg trials with the aim of creating an historical record, even so: 'we established a history and all the skinheads that can be collected [...] anywhere and all the naysayers have to face the history, the transcripts of the Nuremberg trials'.⁵² Karagyesa stresses this legacy of the ICTR, explaining: '[...] we've documented, judicially, what actually happened. I am sure you are aware of the denial of the Armenian genocide [...] we have puerile theories being peddled by defendants here, denying the genocide, but [...] we've documented the events that took place'.⁵³ Perhaps this can be seen as the main legacy of the ICTR for ordinary Rwandans, rather than reconciliation or reparative justice; the main achievement may be simple recognition.

Thus key events that took place in Rwanda between 6 April and mid-July 1994 are preserved in the legal records of the ICTR, including victims' testimony and expert witnesses' statements. Magnarella comments in the *Kambanda case* that: 'Kambanda's extensive confession concerning his government's intentional policy of genocide constitutes the foundation upon which later ICTR prosecutions have rested. Kambanda's confession also destroys the credibility, if it ever existed, of revisionist historians, who claim a genocide never took place' at all.⁵⁴ However, the ICTR is not a truth commission, but a criminal tribunal which has as its main task to investigate crimes that took place during a

⁵¹ Paul Kagame, 'Preface' in Phil Clark and Zachary Kaufman (eds), *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond* (Hurst 2008) xxiii.

⁵² William Zeck, interviewed in United States Holocaust Memorial Museum, for The Holocaust Encyclopaedia (1996), available 3 August 2016 at http://www.ushmm.org/wlc/en/media_oi.php?MediaId=5616.

⁵³ Richard Karagyesa, interviews 29 October 2008.

⁵⁴ Magnarella 1998, *supra* note 38, 42.

particularly violent period in Rwanda's history.⁵⁵ The investigatory and prosecutor processes can be very divisive, and such investigations have: 'often been viewed as obstacles to reconciliation and charged with "opening old wounds," generating political instability and interfering with forward looking political change'.⁵⁶

Perhaps for this reason, and to locate the Tribunal in a relatively peaceful and somewhat neutral space, the ICTR was established in Arusha, Tanzania, by early 1995. This was decided by Security Council Resolution 977 in February 1995.⁵⁷ According to Adama Dieng, had it been located inside Rwanda, this would have complicated the rendering of justice 'in serenity'.⁵⁸ Locating the ICTR in Arusha meant some schisms and biases were avoided, but the Tribunal's location in Tanzania also weakened any sense of national ownership among Rwandans and their leaders, over the Tribunal and its proceedings and case law.

From as early as late April 1994, as Kaufman shows, the US government was one of those who expressed their desire to see prosecutions for war crimes committed in Rwanda, and was considering various options from domestic prosecutions to the International Court of Justice (ICJ) and mentioning the possibility of a special tribunal.⁵⁹ Despite donors' commitment to creating a 'linked' special tribunal, the ICTR was a relatively neglected institution when it first began to operate. Located many thousands of miles away, outside the ambit of mainstream media attention and removed from the ICTY in The Hague, the ICTR when it started its operations had just one 'small courtroom and two trial chambers to address possible crimes involving the murder of hundreds of thousands'. It was reported that 'the first hearing of the Tribunal, presided over by Senegalese Judge Laïty Kama, took place in a small room with a leaky ceiling', with very little in the way of furniture, interpreting staff, security or even stationery.⁶⁰ At the first plenary session of the ICTR, which took place in The Hague in 1995, there were just six

⁵⁵ Bronwyn Anne Leebaw, 'The Irreconcilable Goals of Transitional Justice' (2008) 30 *Human Rights Quarterly* 95–118.

⁵⁶ *Ibid*, 97.

⁵⁷ UN Doc. S/RES/ 977 (1995), adopted on 22 February 1995, located the seat of the ICTR at Arusha.

⁵⁸ He also reports, in the same interview, that Kenya was approached to host the court, but refused, see Adama Dieng interviewed in Voices from the Rwanda Tribunal available 3 August 2016 at <http://www.tribunalvoices.org/voices/video/80>.

⁵⁹ Kaufman 2008, *supra* note 22, 234.

⁶⁰ Sadat 2012, *supra* note 3, 5.

trial judges and five appeal judges.⁶¹ Despite this situation, the ICTR started concluding cases more rapidly than the better funded ICTY. This may in part reflect additional moral pressure on the Tribunal to show it was serious, and so convince the Rwandan government to support its work.

The final obstacle to the ICTR's creation had been removed when the UN Security Council members agreed that genocide had taken place in Rwanda.⁶² By this time, however, it was too late to step in to limit killings, and: 'the United States looked like the dullest and most callous kid in the class'.⁶³ Moral pressure from experts like Alison des Forges heightened Western feelings of guilt and played a significant part in adding pressure to create the ICTR rapidly.⁶⁴ And once it was created, the fear of being accused of racism and double standards meant the ICTR was soon almost as well-funded and staffed as the ICTY already in place. As des Forges and Longman observe:

Even during the genocide, international actors began to talk of the need for justice, an idea that was fed by their sense of guilt [...] since the crimes in Rwanda were so much more blatant and grievous and large in scale than those committed in the former Yugoslavia, failure to create a mechanism comparable to the ICTY would almost certainly have led to accusations of racism.⁶⁵

As the report of a national conference on 'Genocide, Impunity and Accountability: Dialogue for a National and International Response', held in Kigali in December 1995, stated: 'The Conference notes that the international community's abandonment of Rwanda before and during the genocide [...] damaged the credibility and reputation of the international community'.⁶⁶ The desire to restore some credibility to their own image, may have led decision-makers in several Western 'democratic'

⁶¹ Magnarella 2000, *supra* note 21, 44.

⁶² Kaufman 2008, *supra* note 22.

⁶³ Michael Barnett, *Eyewitness to a Genocide: the United Nations and Rwanda* (Cornell University Press 2002), 139.

⁶⁴ Des Forges and Longman 2004, *supra* note 25. See also Kenneth Roth 'Alison Des Forges: Remembering a Human Rights Hero' in Scott Straus and Lars Waldorf (eds) *Remaking Rwanda: State Building and Human Rights after Mass Violence* (University of Wisconsin Press 2011) xxiii–xv.

⁶⁵ Des Forges and Longman 2004, *supra* note 25, 51.

⁶⁶ Office of the Prosecutor, *Genocide, Impunity and Accountability: Dialogue for a National and International Response* (Government of Rwanda 3–5 December 1995) 31.

countries to invest heavily both in the ICTR and in the post-genocide government in Rwanda.⁶⁷

5. THE ICTR: NEITHER FAILURE NOR SUCCESS

Despite a rather inauspicious start, by the end of its operations in 2012, the ICTR had '[...] rendered hundreds of decisions and 53 judgements, indicted 93 persons, completed trials of 72 persons, heard more than 3,500 witnesses'.⁶⁸ A basic, legal review of the situation of the ICTR in 2008 noted that it was lagging behind its intended schedule of prosecutions, and cited one reason for this, namely the: '[...] unwillingness of third party States to help apprehend [...] fugitives' that were still being sought.⁶⁹ Scharf cites Prosecutor Jallow, who stated that third party states should 'intensify cooperation with and render all necessary assistance to the ICTR' and should hand over those indicted to the Tribunal.⁷⁰ By 2015, of the 79 trials completed at the ICTR, 32 ended with prosecutions where the individuals were transferred to a third State to serve their sentences; six awaited transfer. Fourteen had already completed their sentences, and 14 had been acquitted or released. In total, only two of 93 indictments were withdrawn and two further people died before final judgements and sentencing on their cases. With monitoring by the Residual Mechanism in place, eight remaining cases were transferred to Rwanda, and two to France, for judgement.⁷¹ For some of the more complex cases, like the *Military I* case, the workload had proven almost overwhelming. Thus:

During the 408 trial days of this case, 242 witnesses were heard, 82 for the Prosecution and 160 for the Defence. Nearly 1,600 exhibits were tendered. The transcripts of the case amount to more than 30,000 pages, whereas the final submissions of the parties totalled approximately 4,500 pages. The amount of evidence in this case is nearly eight times the size of an average

⁶⁷ Kaufman 2008, *supra* note 22, 234–37.

⁶⁸ Sadat 2012, *supra* note 3, 6.

⁶⁹ Michael P. Scharf, 'Statute of the International Criminal Tribunal for Rwanda' (2008) UN Audiovisual Library of International Law, available 3 August 2016 at http://legal.un.org/avl/pdf/ha/ictr/ictr_e.pdf.

⁷⁰ Statement by Mr. Hassan B. Jallow, Prosecutor of the ICTR, to the Security Council on 4 June 2008 (S/PV.5904), p. 10, cited in Scharf, *supra* note 69, 4.

⁷¹ UN ICTR website 'The ICTR in Brief', available 3 August 2016 at <http://www.unictr.org/en/tribunal>.

single-accused case heard by the Tribunal. During the trial, the Chamber delivered about 300 written decisions. It pronounced its unanimous judgment on 18 December 2008.⁷²

The judgement and sentence document for this case alone, run to almost 600 pages. Marie-Lucienne Lambert, associate legal officer, assisting Chamber 1 judges on the *Military I* case, explains that she spent almost two years working on the judgement for this case.⁷³ The post-ICTR website created to facilitate public access to case documents provides access to all original indictment documents, judgements and sentences, and appeal documents, on a case-by-case basis.⁷⁴ Despite all these achievements, from the start there was a great deal of criticism of the ICTR from all sides of the political spectrum. Barbara Oomen sums up the main criticisms that the ICTR was too: '[...] slow, too bureaucratic, corrupt at times, too detached from Rwandan reality and above all too costly'.⁷⁵ Some of these criticisms are considered in later chapters of this book.

There were also periods of open confrontation between the Tribunal prosecutor and the Rwandan government. In 2002, for example: 'the Rwandan government imposed new travel restrictions on Rwandans, making it impossible for some witnesses to leave Rwanda in order to travel to Arusha to testify in court. As a result, the ICTR had to suspend three trials in June 2002 for lack of witnesses'.⁷⁶ Carla del Ponte had started to investigate war crimes committed by the RPF, and a stand-off resulted, which was only resolved in August 2003, when:

⁷² *The Prosecutor v. Théoneste Bagosora* ICTR-98-41-T (Judgement and sentence case, 18 December 2008) ('*Military I*').

⁷³ Interview with Marie-Lucienne Lambert, at Voices from the Rwanda Tribunal website, available 3 August 2016 at <http://www.tribunalvoices.org/voices/video/545>.

⁷⁴ The website is easily navigable and includes all the publicly available documents needed for analysis of the basis for indictments, judgements and appeals, and can be found at <http://www.unictr.org/en/cases> (accessed 3 August 2016).

⁷⁵ Oomen 2005, *supra* note 35, 896. See more specifically, ICTR Report (1997) Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994, 13 November 1997 (A/52/582-S/1997/868).

⁷⁶ Des Forges and Longman 2004, *supra* note 25, 55.

[...] the Security Council voted to divide the post of Chief Prosecutor, creating separate prosecutors for the ICTR and ICTY. While promoted as a means to improve the operations of the ICTR, some observers worried that it was more a means of appeasing the Rwandan government by removing the Chief Prosecutor, Carla Del Ponte at a time when she seemed to be moving toward issuing indictments against RPF officials.⁷⁷

This reinforced a belief, which started much earlier, that the ICTR was becoming the instrument of the government in Kigali. Some even suggested: ‘the ICTR, itself, has been used to “cover-up” the crimes of the RPF and the role of Security Council members who supported the RPF in 1994’.⁷⁸ Chief prosecutors like Richard Goldstone and Carla del Ponte were not able to push for further investigations into RPF war crimes, and their willingness to do so became a crucial influence on the mood and tenor of relations between ICTR staff, the Rwandan government and the Rwandan public. A more conciliatory approach was adopted by Prosecutor Jallow, who succeeded Carla del Ponte as the first prosecutor solely responsible for the ICTR. This did not mean ignoring evidence, as Jallow stated: ‘[...] of course we have evidence of violations of international criminal law, also by members of the Rwandan Patriotic Front [...] we have been investigating those offences [...] and we were able to identify one particular case that we were able to prosecute [...] this was the Kabgayi incident’.⁷⁹ As Jallow went on to explain, in the same interview, that case was handled in Rwanda’s domestic courts, and resulted in some prosecutions of perpetrators.

To confirm Oomen’s main points, almost from the start, the main complaints about the ICTR inside Rwanda and internationally were: (1) that the Tribunal was too slow; (2) that it was too far removed from Rwandan realities; (3) that it was too expensive; and (4) that it was ‘soft’ on leading genocide suspects. By the same token, ICTR was claimed not to be victim-centred enough when it came to providing reparations or taking survivors’ – especially women survivors – needs into account.

⁷⁷ *Ibid*, 56.

⁷⁸ Peter Erlinder, ‘Preventing the Falsification of History: An Unintended Consequence of ICTR Disclosure Requirements’ (2012) unpublished document, available 3 August 2016 at http://www.ictlegacydefenseperspective.org/papers/Peter_Erlinder_Preventing_the_Falsification_of_History.pdf, 4. See statement of Carla del Ponte in the ICTR archives, available 3 August 2016 at <http://ict-archive09.library.cornell.edu/ENGLISH/PRESSREL/2000/254.html>.

⁷⁹ Hassan Bubacar Jallow interviewed in *Voices from the Rwanda Tribunal* (2008) available 3 August 2016 at <http://www.tribunalvoices.org/voices/video/24>.

Referring mainly to the early years, this chapter will now briefly review some of these criticisms.

6. ASSESSING THE EARLY RECORD OF THE ICTR

During the early years 1995–2002, only eight cases were concluded at the ICTR. Moreover, some senior genocide organisers had to be released on procedural grounds, due to legal errors, including avoidable delays.⁸⁰ On occasion suspects facing trial were kept in prison for too long. In extraordinarily complex and multiple cases like the *Military I* and *Media* cases, hundreds of crimes of genocide by several individuals were being judged. The *Military I* trial judgement was among the longest in the history of the ICTR.⁸¹ The question, however, is what the problem was and whether it resulted from inefficiency on the part of Tribunal staff, or their extraordinarily complex case load.

Initially delays were worsened by distrust between the ICTR and the Rwandan government. In September 1994 the UN representative for Rwanda in the Security Council cast the only no vote when Resolution 955 was passed, despite the Rwandan government having requested the creation of the ICTR a few months earlier.⁸² After the ICTR was established in Arusha, in early 1995 Prosecutor Richard Goldstone had to wait till December that year for his first visit to Kigali to discuss cooperation with the Rwandan authorities.⁸³ This slow start was aggravated by tensions within Rwanda and distrust between the transitional government in Kigali and ICTR staff, a situation which reinforced a preference not to hire Rwandans for ICTR prosecution and investigation teams. Richard Karagyesa, who became deputy prosecutor in 2005, acknowledged that not hiring Rwandans may have complicated access to witnesses in Rwanda during the early years. The gathering of evidence

⁸⁰ Uvin and Mironko 2003, *supra* note 4; Ntanda Nsereko 2001, *supra* note 12.

⁸¹ *Bagosora* ICTR-98-41-T. As the final Judgement and Sentence of the *Military I* case stated: 'The Chamber notes in passing [...] the Rwamakuba and Kajelijeli cases, where the accused were detained without being brought before a judge for 167 and 211 days, respectively, for the most part without counsel'. Since the same document in para. 99, under Rule 40 bis (C) states that provisional detention of a suspect may not last longer than 90 days, even when a judge is involved (Rule 40 bis (G) and (H)), there was clearly a problem.

⁸² Peskin 2011, *supra* note 42, 176.

⁸³ Des Forges and Longman 2004, *supra* note 25; Koosed 2012, *supra* note 1.

proved very difficult, because of language barriers. Yet, when interviewed some years later, he still justified the decision not to hire Rwandans on these grounds:

Rwanda was peculiar. Extremely polarized. To give a semblance of justice, I think it was in the initial stages an imperative that Rwandans be excluded from the decision-making process [...] [now] [...] we have several Rwandan colleagues as prosecutors. We are even trying to get these cases transferred to Rwanda [...] [but in the early days of the ICTR] Rwanda was still relatively unstable.⁸⁴

The Rwandan government objected to the ICTR being located outside Rwanda, and wanted a much more direct role in the prosecution process. The Rwandan government's Office of the Prosecutor expressed dismay that donors were happy to fund ICTR and yet were hardly assisting with the massive task of reconstructing the judicial infrastructure within Rwanda.⁸⁵ There was more and more media attention being paid to the rising number of genocide suspects held in Rwanda's grossly overcrowded prisons, whilst in its early years most of the media attention directed at the ICTR was broadly positive and hopeful.⁸⁶

One reason ICTR staff soon came under considerable pressure to provide 'value for money', was that very early on, in 1996–97, 'gross mismanagement in almost all areas of the Tribunal' and 'numerous operational deficiencies of a substantial nature' were uncovered by auditors of the UN Office of Internal Oversight Investigation.⁸⁷ Shortly afterwards, more qualified and committed staff were recruited. Even so, even after a generation of new appointments, some believed that nepotism remained rife at the Tribunal. Inside Rwanda, it was suggested in 1995 that legal procedures should be adapted to the post-genocide context, so that 'special' rules of evidence would operate. It was suggested, for example, that: '[...] an Interahamwe [sic] [...] be considered guilty of genocide and the onus be on each individual Interahamwe to prove the contrary', which clearly was unacceptable as a guiding

⁸⁴ Karagyesa explains that the Rwandan case later converged with the Sierra Leone case, which had both national and international judges. Richard Karagyesa (2008) interview *Voices from the Rwanda Tribunal* (29 October 2008) available 3 August 2016 at <http://www.tribunalvoices.org/voices/video/138>.

⁸⁵ Office of the Prosecutor 1995, *supra* note 66.

⁸⁶ Des Forges and Longman 2004, *supra* note 25.

⁸⁷ Second Annual Report on the ICTR, S-97-868 (13 November 1997) paras. 53 and 54, available 3 August 2016 at <http://41.220.139.198/Portals/0/English/AnnualReports/a-52-582.pdf>.

principle for ICTR judges and lawyers.⁸⁸ For those viewed as guilty, the Rwandan government's preferred strategy was plea-bargaining to reduce sentences, or even exonerate individuals who confessed to genocide and sought forgiveness.

By 1998 or so, the ICTR budget started to expand rapidly, and gradually the Ministry of Justice in Kigali started to cooperate and to facilitate the work of ICTR investigators. Two years later, in 2000, an outreach office of the ICTR was established in Kigali. Cases started to speed up and international cooperation around extraditions and arrests improved. Any suggestion that the government of Rwanda should play a formal part in ICTR legal proceedings was rejected early on, however, on the grounds this would result in biases in decision-making and evidence, amounting to victors' justice.⁸⁹ According to one legal scholar, transitional justice processes can easily be marred by: '(s)ham trials by insincere regimes implicated in the very atrocities adjudicated or political show trials by successor regimes bent on vengeance instead of justice. [This would not] [...] likely [...] advance the rule of law at either the national or international levels.'⁹⁰

In the *Military I* case, the defence counsel argued that there had been unreasonable delays in the cases coming to justice. In the case of Colonel Bagosora, part of the *Military I* case, it was claimed there had been delays of several years. Paragraph 73 of the judgement and sentence, which eventually emerged in December 2008, states that:

The Defence teams claim that the right to trial without undue delay was violated ... In particular, seven months elapsed from [when] the Tribunal in August 1996 confirmed his Indictment and ordered his continued detention in Cameroon until he pleaded guilty before the Tribunal in March 1997 ... his trial was initially scheduled to start in March 1998, but postponed because the Prosecution initially requested the joinder of his case with 28 others, which failed, and then ultimately with Kabiligi, Ntabakuze and Nsengiyumva, which succeeded. *These efforts at joinder delayed the commencement of his trial for four years* (own emphasis).⁹¹

⁸⁸ Office of the Prosecutor 1995, *supra* note 66, 17.

⁸⁹ Kaufman 2008, *supra* note 22, 252–57; Peskin 2011, *supra* note 42.

⁹⁰ Alvarez 1999, *supra* note 2, 370.

⁹¹ This attempt to try 29 people was the so-called *Global* indictment that had been over-ruled, attempted in the first few years of the ICTR's operation, and 'meant to create a mega trial that would tackle the pyramidal structure of political authority during the genocide', see Don Webster 'The Uneasy Relationship between the ICTR and *Gacaca*' in Scott Straus and Lars Waldorf (eds) *Remaking Rwanda: State Building and Human Rights after Mass Violence*

To tackle such endemic delays, in 2003 the number of *ad litem* judges allowed to sit on specific ICTR cases was increased from four to nine. This may have been one way of acknowledging that the sheer pressure of work was proving overwhelming for existing staff of the ICTR, among them the judges.⁹²

Evidence suggests the failure of ICTR to contribute positively to reconciliation inside Rwanda as well.⁹³ As Innocent Kamanzi suggests, in future international criminal courts like the ICC would be strengthened by ‘much more involvement directly in the country where the people have suffered’.⁹⁴ According to Koosed, there was little attention to rehabilitation programs in the work of the ICTR at the start; legal processes were not adapted to the realities of the situation inside Rwanda, and this meant a great deal of *ad hoc* decision-making. Yet it needs to be acknowledged that:

[...] the ICTR’s efforts to transform Rwandan cultural understandings into standards of legal proof represent a unique use of jurisprudence itself to bridge the gap of geographic, cultural and legal distance between the ICTR judges and Rwandans themselves.⁹⁵

Claiming that donors control the ICTR’s agenda has been a recurring theme in Rwandan government’s criticism of the institution, from the start. This case has been argued in detail by several scholars.⁹⁶ As Paul Kagame has written: ‘The ICTR has spent more than \$1bn [billion] on the prosecution of only a handful of cases. Its physical detachment from Rwanda has prevented it from meaningfully engaging with the Rwandan people’.⁹⁷ Yet, following what appeared to be the undue influence of the Rwandan government over ICTR procedures and staffing decisions in

(University of Wisconsin Press 2011) 184–93, 186. <http://www.unictr.org/sites/unictr.org/files/case-documents/ict-98-41/trial-judgements/en/081218.pdf> (accessed 3 August 2016). *Bagosora* ICTR-98-41-T para. 73.

⁹² UN Doc. S/RES/ 1512 (2003), in Scharf, *supra* note 69, 2.

⁹³ Max Rettig, ‘The Sovu Trials: The Impact of Genocide Justice on One Community’ in Scott Straus and Lars Waldorf (eds) *Remaking Rwanda: State Building and Human Rights after Mass Violence* (University of Wisconsin Press 2011) 194–209.

⁹⁴ Innocent Kamanzi, interviewed as part of the Voices from the Tribunal Project, 16 October 2008, can be viewed at <http://www.tribunalvoices.org/voices/video/504> (accessed 3 August 2016).

⁹⁵ Koosed 2012, *supra* note 1, 283.

⁹⁶ See for example Oomen 2005, *supra* note 35; Uvin and Mironko, *supra* note 4.

⁹⁷ Kagame, *supra* note 51, xxv.

2003, a number of NGOs issued a joint statement, warning that ‘in attempting to improve the efficiency of the prosecutor’s office, the Security Council must ensure that changes do not undermine the independence and impartiality of the ICTR, including in prosecuting war crimes and crimes against humanity by members of the Rwandan Patriotic Army (RPA)’.⁹⁸ At the start, the ICTR was not properly supported professionally or financially, and the result was that: ‘Posts often took more than a year to fill, and many candidates were hired, even for posts of great responsibility, without ever being interviewed. Many prosecutors came from academia or human rights organizations with little or no experience with criminal prosecutions’.⁹⁹ Some new appointments were inspired by the process of justice that they witnessed. Thus, observing the case of Georges Rutaganda, former head of the *Inter-ahamwe* militia, Karagyesa, later acting chief of prosecutions, remembered: ‘I sat in the public gallery and watched, and my prosecutorial instincts came back, this is what I want to do.’¹⁰⁰

Right after the genocide the transitional government in Kigali had some legitimate concerns with securing overall control and political stability inside the national territory of Rwanda. The Rwandan government at times prevented witnesses from travelling to give evidence at the ICTR, and once even stopped the prosecutor from entering Rwanda, despite the Office of the Prosecutor being based in Kigali at that time.¹⁰¹ Such pressure from the Rwandan government was acknowledged by Louise Arbour, former chief prosecutor, who stated: ‘Whether we want it or not, we must come to terms with the fact that our ability to continue with our prosecution and investigations depend on the government of Rwanda. That is the reality that we face’.¹⁰²

Until at least 2000 or so, the Kigali government’s overall attitude could be described as: ‘[...] at best neutral or indifferent, and at worst hostile to the ICTR [...]’, and through a series of rear-guard actions, at one point

⁹⁸ Des Forges and Longman 2004, *supra* note 25.

⁹⁹ *Ibid.*, 52–53.

¹⁰⁰ Richard Karagyesa interviewed in Voices from the Rwanda Tribunal (29 October 2008) available 3 August 2016 at <http://www.tribunalvoices.org/voices/video/136>.

¹⁰¹ The Office of the Prosecutor of the ICTR was based in Kigali, and the Prosecutor would move back and forth, so that OTP staff were utterly reliant on the goodwill of the Rwandan government. See Catherine Cissé, ‘The End of a Culture of Impunity in Rwanda? Prosecution of Genocide and War Crimes before Rwandan Courts and the International Criminal Tribunal for Rwanda’ (1998) 1 *Yearbook of International Humanitarian Law* 161–88, 169.

¹⁰² Louise Arbour quoted in Ntanda Nsereko 2001, *supra* note 12, 49.

there arose, ‘a total cut-off of relations’, which in turn delayed the Tribunal, by making it almost impossible for witnesses and investigators to travel back and forth.¹⁰³ Such tensions were inherent in the ICTR’s mandate and in how it had to construct case evidence through the prism of Rwandan history and the central crime of genocide. As Koosed notes:

[...] these limitations and the imperative of institutional impartiality [...] make it structurally impossible for the ICTR to fulfil its legal mandate of prosecuting those most responsible for the Rwandan genocide without making significant political concessions to the governments of UN member states, most importantly Rwanda itself.¹⁰⁴

Even so, the efforts of the ICTR to bring senior officials of the genocide regime to justice may be better appreciated by ordinary Rwandans than is generally thought. Innocent Kamanzi, a Rwandan who worked as ICTR information officer, interviewed in 2008, explained:

When we project [films to ordinary Rwandans] in Kinyarwanda, which show how those former leaders go into the court in handcuffs and are facing justice, they find it hard to believe [...] it shifts something in their minds [...] and they know that nobody can come again and order them to kill others.¹⁰⁵

According to this relatively optimistic view, even if most ordinary Rwandans were not easily persuaded that the ICTR was working on their behalf during the early years, outreach work by Rwandans was now starting to persuade them that the Tribunal was there for them. As Kamanzi further explains:

In 1997–98 I was the first Rwandan journalist to be based in the ICTR to report on proceedings there [...] and set up the desk of ORINFOR Rwanda [the Office of Information] [...] I did not think that [justice] was possible [...] [I believed] that unfortunately such people could not face justice [...] when I arrived at the ICTR I realised international justice was very, very important [and can be the ...] sole means of ensuring that [those responsible in senior positions are] punished.¹⁰⁶

Such trials have helped popularise the idea that ‘nobody is above the law’, at least where crimes of genocide are concerned. And in the last analysis, by transferring case files to Kigali, by training judges and other

¹⁰³ Uvin and Mironko 2003, *supra* note 4, 221.

¹⁰⁴ Koosed 2012, *supra* note 1, 245–6.

¹⁰⁵ Innocent Kamanzi, *supra* note 94.

¹⁰⁶ *Ibid.*

justice sector officials inside Rwanda, and by being in constant touch with government, the ICTR does seem to have fulfilled one of its original aims, namely to strengthen the justice system inside Rwanda. In some ways, the controversy raging for several years about where and how ICTR proceedings should be archived (they are most likely to remain in The Hague, with digital copies of selected documents in Kigali) highlights the significance of the Tribunal as a historical record-forming institution. The lasting significance of the ICTR as a record of historical memory is not something necessarily made explicit by those who supported its creation in the first place.¹⁰⁷

Yet it is ironic that as: '[...] leaders preached a firm commitment to the fight against impunity', of leading genocide suspects, the same leaders resisted: '[...] any probe into their own criminal responsibility at the [ICTR]'.¹⁰⁸ Such impunity has tended to counter the encouraging example for ordinary Rwandans of senior figures being prosecuted for their crimes. ICTR outreach activities have also tried to convince Rwandans that leaders who commit crimes will be held accountable, and that they will not 'get away with it'. The outcome can be that whilst justice is viewed as partial in the short-term, in the longer term, efforts to end impunity are likely to continue to focus on those not yet indicted. Restorative justice has become the new yardstick by which the ICTR,

¹⁰⁷ This debate started around 2006 and continued until 2014, when it was decided to keep the documents in The Hague. This, in spite of the fact that in 2009, in the view of the Secretary General, 'when there is no longer a substantial number of confidential documents in each of the archives, the United Nations should consider, while retaining ownership, transferring their physical custody to a country of the former Yugoslavia and Rwanda, respectively', Report of the Secretary-General on the administrative and budgetary aspects of the options for possible locations for the archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the seat of the residual mechanism(s) for the Tribunals dated 21 May 2009, paras. 216 and 186 of the report as well as para. 246 where it is recommended 'Some would argue that the decision to. In particular, it will be important that the choice of location takes fully into account the need for a demonstrable sense of African "ownership" of residual functions flowing from ICTR [...]'; see Gershom Otachi Bw'Omanwa, 'Tribunal Archives: Issues of Concern to the Defence and the Accused', paper presented during the Conference on the Legacy of the ICTR at the Hague', 13–16 November 2009, available 3 August 2016 at http://www.heritagetpirdefense.org/papers/Gershom_Otachi_BwOmanwa_Tribunal_archives_issues_of_concern_to_the_defence_and_the_accused.pdf.

¹⁰⁸ Aloys Habimana 'The Dancing is Still the Same' in Scott Straus and Lars Waldorf (eds) *Remaking Rwanda: State Building and Human Rights after Mass Violence* (University of Wisconsin Press 2011) 354–6, 355.

national courts and neo-traditional *gacaca* ‘hearings on the grass’ are judged in terms of political and legal legitimacy.¹⁰⁹

The ICTR can be seen as a pioneering effort to incorporate victims’ frames of reference into international law-making. Those who gave evidence in Arusha conveyed their own narrative and understanding of the genocide, helping to construct the combined narrative of genocide that has come to form a basis for assessing the guilt or innocence of the accused. For all its later weight and significance, as Richard Karagyesa explains: ‘We basically started from scratch [...] investigators did not know the elements of the crimes they were investigating [...] we had to operate through interpreters with no system of quality assurance [...] There were very many difficulties involved in investigating and putting a case together’.¹¹⁰ One staff member interviewed in 2008 also notes the emotional exhaustion of the work: ‘Nothing prepares you for the work here, the sheer scale of the atrocities, their gruesome nature. Never in a lifetime would you normally experience this. It takes its toll emotionally’.¹¹¹ Sacrifices made by judges and other staff involve: ‘prolonged separation from family; disruption of domestic professional life and career opportunities; and the significant burden of adjudicating atrocities on the scale of genocide’.¹¹² Koosed – who interned and like Eltringham conducted extensive interviews with ICTR staff – has suggested that accusations of partiality are part and parcel of the ‘paradox of impartiality’. In his view, it was: ‘[...] structurally impossible for the ICTR to fulfil its legal mandate of prosecuting those most responsible for the Rwandan genocide without making significant political concessions to the governments of UN member states, most importantly Rwanda itself’.¹¹³

Stringent requirements of judges’ impartiality was one way the ICTR tried to avoid accusations of bias, accusations which may have arisen from wildly unrealistic expectations of what it could achieve on what was

¹⁰⁹ Clark 2010, *supra* note 50.

¹¹⁰ Richard Karagyesa explains this problem of language, insecurity near the Congolese border, and the huge task of investigators, who could not quality-control their interview translations, during the early stages of investigations, in an interview for the Voices from the Tribunal project, 29 October 2008, available 3 August 2016 at <http://www.tribunalvoices.org/voices/video/139>.

¹¹¹ Nigel Eltringham ‘A War Crimes Community? The Legacy of the International Criminal Tribunal for Rwanda: Beyond Jurisprudence’ (2008) 14 *New England Journal of International and Comparative Law* 309–18, 318.

¹¹² Eltringham 2008, *supra* note 111, cited in Koosed 2012, *supra* note 1, 291ff.

¹¹³ Koosed 2012, *supra* note 1, 245–6.

initially a shoestring budget.¹¹⁴ ‘Virtually none of the tribunal’s staff, at least in the early years, knew anything about the history and culture of Rwanda’.¹¹⁵ And as Koosed mentions, because: ‘the ICTR considers the creation of a unified and comprehensive history of the genocide and its causes to be part of its mandate, Rwandan history itself creates unique problems for the ICTR’.¹¹⁶ To strengthen the position of the chief prosecutor, some reforms were carried out in 2003, and judgements somewhat speeded up. Thus in the *Military I* case, for example, the final judgement and sentence document reports that: ‘[...] the Chamber notes [...] a significant reduction in the Prosecution’s witness list from 225 anticipated witnesses to the 80 witnesses which were ultimately called.’¹¹⁷ And, perhaps surprisingly, for the trial of these four military officers: ‘(d)uring the Defence case, 160 witnesses were heard in the course of 201 trial days’, precisely twice as many as for the prosecution.¹¹⁸ In their final judgement, judges Erik Møse, Jai Ram Reddy and Sergei Alekseevich Egorov agreed that a certain lack of specificity in charges was the corollary of the massive scale of the crimes involved. According to the judgement of *Military I* case:

At its core, this case is, and has always been, about the alleged role of the Accused as senior military leaders who were involved in planning and preparations of the genocide and then used their authority to unleash the violence which occurred after the death of President Habyarimana. The Indictments clearly plead this role [...] The specific massacres and crimes, whether specifically pleaded in the Indictments or cured through timely, clear and consistent information, remain largely undisputed. The identity of many of the principal perpetrators are also not for the most part in dispute. Knowledge of the crimes has flowed mainly from their open and notorious or wide-spread and systematic nature [...] [and they noted] the organised nature of the attacks.¹¹⁹

The judges then reiterated that there was no disadvantage arising from bias in the chamber, and that indeed: ‘careful consideration of the Defence conduct during the course of trial and in their final submissions plainly reflects that they have mastered the case’, and been able to bring forward all kinds of points of argument against the indictment and

¹¹⁴ *Ibid*, 247.

¹¹⁵ Des Forges and Longman 2004, *supra* note 25, 52.

¹¹⁶ Koosed 2012, *supra* note 1, 246.

¹¹⁷ *Bagosora* ICTR-98-41-T, para. 83.

¹¹⁸ *Ibid*, para. 83.

¹¹⁹ *Ibid*, para. 125.

prosecution.¹²⁰ In terms of bias, the sheer pressure of work may have been a factor, as most senior staff had ‘hardly any time to reflect [...]’, and were kept extremely busy in meeting deadlines in the work of completing trials and ending the work of the ICTR.¹²¹

Concluding their review of the ICTR, national courts and *gacaca*, Peter Uvin and Charles Mironko conclude that the ICTR, like the ICTY has been a massive international experiment with justice, adding ‘One can only hope the experiment will work – foremost for Rwandans, who so desperately need to return to normalcy and community, but also for donors, who will be sorely tempted to choose a safer path if this effort were to fail’.¹²² A less sanguine view is that: ‘Rwandan participation in ICTR proceedings has essentially been limited to serving as witnesses and defendants, rendering the vast majority of victims completely uninvolved in the ICTR’s work; a small number of Rwandans are given the opportunity to watch, and an even smaller number the opportunity to participate’.¹²³

7. ICTR AND LEGAL INNOVATION

In many ways, the first Chief Prosecutor Goldstone set the agenda when he suggested from the start that: ‘insufficient attention had been paid over the years [...] to gender-related crime’.¹²⁴ As he stressed, whatever the time taken, the ICTY and ICTR were to make historic strides in this respect, by bringing sexual violence and gender violence to the forefront of international humanitarian law (the law of war). This set ‘an important precedent in respect to gender-related crimes because it is the first time that systematic mass rape is ever being charged and prosecuted as a war crime’.¹²⁵ Explaining the relatively few prosecutions after Akayesu for rape as a crime of genocide, Richard Karagyesa points to the silence around a culturally taboo issue.¹²⁶ Sadat suggests that the ICTR has been an excellent training ground for a whole generation of international

¹²⁰ *Ibid*, para. 126.

¹²¹ Richard Karagyesa, interview on 29 October 2008, Voices from the Rwanda Tribunal, available 3 August 2016 at <http://www.tribunalvoices.org/voices/video/137>.

¹²² Uvin and Mironko 2003, *supra* note 4, 232.

¹²³ Koosed 2012, *supra* note 1, 285.

¹²⁴ Goldstone 1996–1997, *supra* note 7, 231.

¹²⁵ *Ibid*, 231.

¹²⁶ Richard Karagyesa, Interview Voices from the Rwanda Tribunal (29 October 2008) available 3 August 2016 at <http://www.tribunalvoices.org/voices/video/138>.

criminal lawyers and judges, now also far more familiar with the Rwandan context than they once had been.¹²⁷ Karagyesa reports, for example, that ICTR expertise in handling sexual violence evidence meant that some years later, the team responsible for handling sexual assault cases, went to investigate sexual violence in Darfur, providing logistical support for teams of lawyers working there.¹²⁸

Fatou Bensouda, as chief prosecutor of the International Criminal Court in The Hague since 2012, 'began her international criminal law career in [the ICTR] [...] from 2000 to 2004 as Legal Advisor and Trial Attorney, then Senior Legal Advisor and Head of the Legal Advisory Unit'.¹²⁹ Robert Petit, a Canadian who worked at the ICTR, went on to head the Extraordinary Court trying the Khmer Rouge in Cambodia.¹³⁰

Only one non-Rwandan, Georges Ruggiu, a Belgian citizen, was ever indicted for his role working with *Radio-Television Libre des Mille Collines* (RTLM), within the *Media* case.¹³¹ This is so even though ICTR statutes provide for prosecutions of non-Rwandans who committed genocide or crimes against humanity during 1994: Yet the: '[...] principles found in the judgments of this Tribunal must also be made to apply not only to Africans who may have transgressed them, or who may do so in the future, but to individuals living in rich and powerful states', including France, Belgium, the Vatican City, the UK and the US, among others.¹³² Here too, as with the war crimes of the RPF that remain unpunished, '[...] as much as justice needs to be done, it also needs to be seen to be done'.¹³³ Thus for instance, there have been no investigations, let alone indictments or prosecutions, of any French military or diplomatic leaders, responsible for troops that cooperated with the regime in Kigali at the time of the genocide. French troops deployed in Rwanda in this period [i.e. prior to 1994, but also after April 1994], while not directly involved in combat, freed Rwandan troops for frontline duties, provided logistical support, organized artillery positioning and ammunition supplies, ensured radio communications, and even undertook the interrogation of detained suspects.¹³⁴ Their commander is, surely, potentially prosecutable, as also suggested in a report by the Rwandan

¹²⁷ Sadat 2012, *supra* note 3.

¹²⁸ Karagyesa *supra* note 126.

¹²⁹ Sadat 2012, *supra* note 3, 9.

¹³⁰ *Ibid*, 9.

¹³¹ Ntanda Nsereko 2001, *supra* note 12, 41.

¹³² Sadat 2012, *supra* note 3, 18.

¹³³ Habimana 2011, *supra* note 108, 355.

¹³⁴ Alvarez 1999, *supra* note 2, 389.

government some years ago. No French commanders or other non-Rwandan military are currently being indicted for crimes against humanity, complicity with genocide or genocide. Elsewhere, the Western powers can be viewed as admitting their guilt, through taking the step of rapidly creating the ICTR in the first place.¹³⁵

8. CONCLUDING THOUGHTS

There is little doubt about the value of the ICTR as a rich training ground, where new precedents are set for international criminal accountability, and the use of law to combat genocide. The legal importance of the Tribunal may have outstripped its perceived political relevance for Rwandans themselves, and the high cost and long-term commitment to the Tribunal makes sense given that there was no 'roadmap' to follow. Indeed, being based on law from all kinds of different traditions, negotiated among judges with differing nationalities, languages and backgrounds: 'The ICTR context', which is unique, '[...] requires practitioners to reflect upon and articulate professional doxa [i.e. sets of arguments] that would be assumed in domestic jurisdictions', but cannot be taken for granted at international level.¹³⁶

As Koosed comments, 'If one takes the view that the ICTR's creation was motivated by a degree of collective guilt for the international community's inaction during the Rwandan genocide, taking judicial notice of the genocide's irrefutability represents an implicit admission that action should have been taken'.¹³⁷ When one side is viewed as a clear perpetrator and the other as almost entirely victims or potential victims, this means an over-simplification that echoes the ideology of the genocide, and is its mirror image. Rather, there are those who were responsible for overseeing and leading the genocide, and there are those who can testify, the witnesses, that this is what happened. Whilst it has been noted that, '[...] criminal trials – and especially those of local perpetrators – [can] often divide[d] small multi-ethnic communities by causing further suspicion and fear',¹³⁸ the ICTR has not operated at this micro-level of relationships within the community. Instead, that has been

¹³⁵ Ntanda Nsereko 2001, *supra* note 12.

¹³⁶ Eltringham 2008, *supra* note 112, 316.

¹³⁷ Koosed 2012, *supra* note 1, 284.

¹³⁸ Eric Stover and Harvey M. Weinstein (eds), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge University Press 2004) 323.

the function of *gacaca*, which as was suggested earlier, has at least exposed the evidence of crimes of genocide at local level, even if it has not always resulted in reconciliation among Rwandans on the hills.¹³⁹

As feminist scholars of transitional justice also remind us, the problem of law not matching with the daily realities of those on the ground has generated: '[...] growing feminist unease about the gap between ostensible feminist gains in international law and the actual impact of international law on women's daily lives'.¹⁴⁰ More widely, the same gap between legal evaluations of the ICTR and its evaluation on the ground, applies to most Rwandans.

For Rwandans, the purpose of the ICTR may not be that obvious. However, by trying senior ranking individuals, the Tribunal has managed to avoid what Richard Goldstone called: '[...] a collective guilt syndrome [...] laying guilt upon a whole people, ethnic group or nation because of the misdeeds and manipulation of perpetrators [...]'¹⁴¹ Individual accountability has been a significant mark of ending impunity, ensuring that ICTR staff contribute to doing justice in practice, as well as in the law.

In conclusion, it does seem that the original goals of the ICTR, and especially holding key figures responsible for the genocide accountable, have been largely – though not entirely – achieved. Although some key figures remain at large, ultimately, '[...] the best defence of the ICTR's work lies in the fact that almost the entire interim government of the Rwandan genocide era has been placed on trial', and most are serving prison sentences.¹⁴² This sense of relief is echoed by Roland Amousouga, spokesman for the court, who suggests: 'Thanks to the work of this Tribunal we have taken out of the main traffic, obstacles to peace and reconciliation, through the people who were the main target of the Prosecutor. When they were still [out there] Rwandans were not sleeping'.¹⁴³

¹³⁹ Rettig 2011, *supra* note 93.

¹⁴⁰ Catherine O'Rourke, *Gender Politics in Transitional Justice* (Routledge 2013) 4.

¹⁴¹ Goldstone 1996–1997, *supra* note 7, 229.

¹⁴² Koosed 2012, *supra* note 1, 290.

¹⁴³ Interview of Roland Amoussouga 30 October 2008 in Voices from the Rwanda Tribunal, available 3 August 2016 at <http://www.tribunalvoices.org/voices/video/315>.