

Speaking of Legacy: Toward an Ethos of Modesty at the International Criminal Tribunal for Rwanda

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SPEAKING OF LEGACY: TOWARD AN ETHOS OF MODESTY AT THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

*By Sara Kendall and Sarah M. H. Nouwen**

*Pour qu'un héritage soit réellement grand, il faut que la main du défunt ne se voie pas.*¹

I. INTRODUCTION

In 2014, a year of memorial ceremonies commemorating the twentieth anniversary of the Rwandan genocide, the International Criminal Tribunal for Rwanda (ICTR) marked its own twentieth year with the launch of a “legacy website.”² With the closing of the Tribunal scheduled for December 2015,³ the question of its legacy had become increasingly pressing. The website premiered a video that “celebrates the accomplishments of the ICTR” in a “visually compelling” style.⁴ Blurring the distinction between documentary account and film trailer, the video begins with iconic images of the African continent: a boy rolling a hoop down a dirt road; laborers ferrying wares; women in colorful dresses tending children. These scenes of daily life are interrupted by images of men wielding machetes and corpses, interspersed with the figure of the radio, reminding the viewer that the 1994 genocide was encouraged through broadcasts inciting Hutus to take up arms against their Tutsi neighbors. The video lists the Tribunal’s contributions to international criminal law, but also describes a much broader impact: “a record of legal reform in Rwanda, and outreach, education, legal training, and healing.” Young boys leap into a body of water to punctuate the final term, suggesting the hope of a new Rwanda. The narrator proclaims, “today in Rwanda, it’s safe to listen to the radio again: the sound is of a nation rebuilding.” The film’s final words reach beyond the Rwandan context, affirming that ours is “a world pushing forward despite great imperfection, each day closer to a time when international law offers justice to all people, everywhere.”

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¹ RENÉ CHAR, FEUILLETS D’HYPNOS 166 (Cid Corman, trans. 1973) (1948) (“For an inheritance to be really great, the hand of the defunct must not be seen.”).

² Press Release, ICTR, 20 Years Challenging Impunity—UN-ICTR Launches Legacy Website and New Tribute Video (Nov. 6, 2014), at <http://www.unmict.unict.org/en/news/20-years-challenging-impunity-%E2%80%93-un-ictr-launches-legacy-website-and-new-tribute-video>. The video is available at <http://unict.unmict.org/> [hereinafter ICTR Legacy Video].

³ Letter Dated 15 May 2015 from the President of the International Criminal Tribunal for Rwanda Addressed to the President of the Security Council, Report on the Completion Strategy of the International Criminal Tribunal for Rwanda as of 5 May 2015, UN Doc. S/2015/340, paras. 1, 5 (May 15, 2015).

⁴ ICTR, ICTR Legacy Project Proposals, at http://www.unmict.org/ictr-remembers/docs/legacy_projects.pdf.

The ICTR's legacy video highlights the Tribunal's own role in Rwanda. It foregrounds ICTR trials without noting the thousands of domestic criminal trials that took place under Rwanda's 1996 law governing the prosecution of genocide-related crimes⁵ or the prosecution of around 400,000 individuals through community-based *gacaca* courts.⁶ Furthering international criminal law's logics and presumptions, including the view that trials promote peace and security, the video also claims that the ICTR has also led to "healing" without mentioning the work of other actors, such as civil society organizations and the Rwandan state.⁷ Meanwhile, accounts of decreasing political freedom in Rwanda are conspicuously absent.⁸ Narrated in the dominant language of international criminal law, with the option of Kinyarwanda subtitles for those who can read them, the video appears oriented toward a global Anglophone audience. The ICTR sees its legacy extending well beyond Rwanda, in that the form of justice it represents will "become a standard for all, everywhere."⁹

This article questions some of the claims made within the field of international criminal law about the Tribunal's legacy. "Legacy" is not the same as "impact," which occurs continuously in the life of an institution. By contrast, the Tribunal's legacy can only properly begin in the wake of its closure. While the legacy of the ICTR continues to evolve, there are some claims about what it may become that can be addressed from the standpoint of the present.¹⁰ We contend that many of the claims about the ICTR's legacy are, however, a form of a phenomenon that we term "legacy talk." Whereas legacy planning involves ensuring that there will be something to leave behind, legacy talk seeks to consolidate a set of interpretations about the substance and value of what is left.

We begin by analyzing the concept of "legacy" in the context of international criminal tribunals (Part II), and by contrasting the ICTR's official mandate with dominant claims about the Tribunal's envisioned legacy (Part III). Against this background, we then discuss a range of legacies that the ICTR may potentially leave, some of which are more uncertain than others (Part IV). In light of the divergence between what is claimed and what can be supported, we

⁵ Recognizing the role of these trials in promoting accountability is not necessarily the same as praising them; much commentary has noted serious issues with the enforcement of fair trial rights and the application of the death penalty. See, e.g., Mark A. Drumbl, *Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials*, 29 COL. HUM. RTS. L. REV. 545 (1998).

⁶ Their contribution to reconciliation is a matter of scholarly debate. Compare Philip Clark, *After Genocide: Democracy in Rwanda, 20 Years On*, 20 JUNCTURE 308, 310 (2014) with Bert Ingelaere, "Does the Truth Pass Across the Fire Without Burning?" *Locating the Short Circuit in Rwanda's Gacaca Courts*, 47 J. MOD. AFR. STUD. 507 (2009) and Patrick Kanyangara, Bernard Rimé, Dario Paez & Vincent Yzerbyt, *Trust, Individual Guilt, Collective Guilt and Dispositions Toward Reconciliation Among Rwandan Survivors and Prisoners Before and After Their Participation in Postgenocide Gacaca Courts in Rwanda*, 2 J. SOC. & POL. PSYCHOL. 401 (2014).

⁷ On which, see, for example, Timothy Longman, Phuong Pham & Harvey M. Weinstein, *Connecting Justice to Human Experience: Attitudes Toward Accountability and Reconciliation in Rwanda*, in MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY 206 (Eric Stover & Harvey M. Weinstein eds., 2004); Timothy Longman & Théoneste Rutagengwa, *Memory, Identity, and Community in Rwanda*, in MY NEIGHBOR, MY ENEMY 162.

⁸ On which, see, for example, Filip Reyntjens, *Chronique Politique du Rwanda, 2014–2015*, in L'AFRIQUE DES GRANDS LACS: ANNUAIRE 2014–2015 251 (Filip Reyntjens, Stef Vandeginste & S. Marysse eds., 2015).

⁹ ICTR Press Release, *supra* note 2.

¹⁰ Not having conducted research in Rwanda, we do not contribute new empirical data. Rather, our aim is to reflect upon published knowledge on the legacy of the ICTR in Rwanda. The views of conflict-affected populations tend to feature at the margins of these narratives. This account cannot remedy that marginalization, which would require shifting from institutional points of departure and beginning from the views and circumstances of the Rwandan population rather than from the ICTR.

conclude with a call for an ethos of modesty, at the ICTR and within international criminal law more broadly (Part V).

II. LEGACY AS A “BID FOR IMMORTALITY”

Preparations for the closure of the Special Court for Sierra Leone and the tribunals for the former Yugoslavia (ICTY) and Rwanda have led to what Viviane Dittrich has characterized as a “legacy turn” within the field of international criminal law.¹¹ However, despite the emergence of a discourse regarding the legacy of international criminal tribunals, the term is rarely defined, or it is conveyed through other undefined concepts such as “the rule of law.” For example, the UN Office of the High Commissioner for Human Rights defines “legacy” as the “lasting impact on bolstering the rule of law in a particular society,” which is achieved “by conducting effective trials to contribute to ending impunity, while also strengthening domestic judicial capacity.”¹² This definition fails to recognize the spectrum of possible ways in which a tribunal can leave a legacy, limiting the potential conduits to effective trials and strengthening domestic judicial capacity. What if a tribunal has promoted the “rule of law” in some respects, but has undermined it in others?

The vagueness of the term notwithstanding, many tribunals have engaged in talking about their legacies. In doing so, they illustrate social theorist Zygmunt Bauman’s argument that the fact of mortality and the desire for immortality are visible not only at the level of the individual human psyche, but also within institutions.¹³ As institutional legators, international criminal tribunals make “bids for immortality,” in Bauman’s words, by engaging in efforts to “colonize” the future through recounting their life narratives,¹⁴ rendering their “lives” part of something larger than the self.

The grammar used in legacy conferences, reports, websites, and videos that set forth claims about the legacy of these tribunals reveals that legacy talk desires to influence interpretation and uptake through the grammatical closure of the future perfect tense: it states what the legator *will have been* once its activity has been completed, which requires transforming an imagined future into a seemingly descriptive claim from the standpoint of the present. It harbors an epistemological conceit by projecting an impossible knowledge of what is still to come. The future perfect *will have been* of legacy talk is accompanied by a grammatically imperfect unfolding of a legator’s value in the present. Legacy talk thus inhabits two grammatical senses: both the perfect (complete) future-oriented sense, as well as the imperfect (incomplete) ongoing action.¹⁵ In this way, legacy talk contains a tension between its desired closure through the future perfect and the indeterminacy of legacy itself. At every moment of its imperfect unfolding, the vision of the completed legacy is threatened by alternate possibilities despite the efforts of the legator to direct or plan its legacy.¹⁶

¹¹ Viviane E. Dittrich, *Legacies in the Making: Assessing the Institutionalized Legacy Endeavor of the Special Court for Sierra Leone*, in *THE SIERRA LEONE SPECIAL COURT AND ITS LEGACY: THE IMPACT FOR AFRICA AND INTERNATIONAL CRIMINAL LAW* 663 (Charles C. Jalloh ed., 2013).

¹² OFFICE OF THE UN HIGH COMM’R FOR HUMAN RIGHTS, *RULE OF LAW TOOLS FOR POSTCONFLICT STATES, MAXIMIZING THE LEGACY OF HYBRID COURTS*, at 4–5, UN Sales No. HR/PUB/08/2 (2008).

¹³ ZYGMUNT BAUMAN, *MORTALITY, IMMORTALITY AND OTHER LIFE STRATEGIES* 2 (1992).

¹⁴ *Id.*

¹⁵ Legal rhetorician Marianne Constable notes the “peculiar temporality” of speech acts such as legal decisions that *will* turn out *to have had* particular effects, such as the phenomenon of establishing legal precedent through judgments. See MARIANNE CONSTABLE, *OUR WORD IS OUR BOND: HOW LEGAL SPEECH ACTS* 73 (2014).

¹⁶ In her work on what she terms “revisionary practices,” such as truth commissions and international criminal trials, philosopher Jill Stauffer illustrates how the meaning of the past in the present changes over time. See JILL STAUFFER, *ETHICAL LONELINESS: THE INJUSTICE OF NOT BEING HEARD* 112 (2015).

Although “colonization of the future is bound to remain forever disconcertingly provisional and nondefinite—the future is, after all, the site of the selfsame uncertainty which has prompted the colonizing thrust in the first place”¹⁷—these practices increase as tribunal mandates draw to a close and the need to shape their legacies becomes more urgent. In the case of the ICTR, this began in 2003 when the Tribunal developed its first “completion strategy” in response to pressure from the Security Council.¹⁸ With the establishment in 2010 of an “International Residual Mechanism for Criminal Tribunals” tasked with carrying out “residual functions” of the ICTY and ICTR after trials ended,¹⁹ and with the final deadline becoming more tangible, attention to the ICTR’s legacy increased not only among policymakers and scholars, but also within the Tribunal itself.²⁰

III. ENVISIONING THE ICTR’S LEGACY: FROM THE SECURITY COUNCIL TO THE TRIBUNAL

The legacy of the ICTR can be approached in light of the institutional ambitions expressed by its constitutive power, the UN Security Council. Acting under Chapter VII of the UN Charter, and thus invoking the imperatives of international peace and security,²¹ the Security Council established the ICTR in November 1994 in response to the Rwandan genocide that had taken place between April 7 and mid-July of the same year.²² While stressing “the particular circumstances of Rwanda,” the Council in fact reaffirmed the powers it had used when creating the ICTY a year earlier by establishing another international criminal tribunal as a means to promote international peace and security.

Security Council Resolution 955 focused on the Tribunal’s expected contribution *to Rwanda*. The preamble sets forth the Council’s theory of change, declaring that it was:

[c]onvinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable th[e] aim [of putting an end to genocide and . . . systematic, widespread and flagrant violations of international humanitarian law] to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace.²³

Council Members may have had other reasons for establishing the Tribunal (for instance, to assuage the guilt of inaction during the genocide) and may have had doubts about the goals that

¹⁷ BAUMAN, *supra* note 13, at 54.

¹⁸ U.N. Secretary-General, Budget for the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in 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 for the Biennium 2004–2005, Annex, UN Doc. A/58/269 (Aug. 12, 2003).

¹⁹ S.C. Res. 1966 (Dec. 22, 2010).

²⁰ See also Nigel Eltringham, *A Legacy Deferred? The International Criminal Tribunal for Rwanda at 20 Years* (Apr. 29, 2014), available at <http://www.e-ir.info/2014/04/29/a-legacy-deferred-the-international-criminal-tribunal-for-rwanda-at-20-years/>.

²¹ U.N. Charter Art. 39.

²² S.C. Res. 955 (Nov. 8, 1994).

²³ *Id.* at pmbl.

the Tribunal was meant to serve,²⁴ but the resolution suggests that prosecution aids the disparate projects of ending international crimes and promoting national reconciliation as well as the restoration and maintenance of peace. The Council also highlighted “the need for international cooperation to strengthen the Courts and Judicial System of Rwanda,” but it did not support this by any decision in the operative part of its resolution.

The focus of the ICTR’s own legacy claims diverge remarkably from that of Resolution 955. For instance, an ICTR publication entitled *Learning from the International Criminal Tribunal for Rwanda: The Legacy* largely consists of a description of the Tribunal, biographies and pictures of judges and other senior officials, an enumeration of cases, trial days and visitors to the information center, and instances in which the ICTR was the “first” to do something in international criminal law.²⁵ National reconciliation and peace in Rwanda appear mainly in references to Resolution 955, not in the work of the Tribunal.

In its formal statements, reports, and legacy video, the ICTR portrayed its legacy as comprising, first, the investigations, prosecutions, and trials it has undertaken; second, its contribution to the field of international criminal law; and third, and subsidiarily, its contribution to Rwanda.²⁶ For the first category, the numbers are the narrative, rendering legacy more concrete through the sheer quantity of things seen and heard at trial and through the numbers of people circulating through the Arusha courtrooms: 20,000 evidence exhibits; 27,000 hours of testimony; ninety-three indictees; seventy-five trials; sixty-one convictions,²⁷ involving “one Prime Minister, four Ministers, one Prefect, five Bourgmestres and several others holding leadership positions during the events in 1994.”²⁸ Related to these enumerated achievements are the material bequests that the ICTR leaves behind, in the form of archives transferred from the Tribunal to the Arusha branch of the Residual Mechanism. The future of the archives is directly linked to a more metaphysical part of the Tribunal’s legacy: according to an ICTR President, “[a]mong the most basic and most important of the Tribunal’s achievements has been the accumulation of an indisputable historical record.”²⁹

Most prominent is the claim of having made substantial contributions to international criminal law, both through case law on substantive and procedural issues, and through being the first tribunal since Nuremberg and Tokyo to indict, arrest, and convict certain categories of people.³⁰ Moreover as “part of a broader strategy [that] the [ICTR Office of the Prosecutor] has undertaken to preserve

²⁴ For diverging expectations among Security Council members, see U.N. SCOR, 49th Sess., 3453d mtg., UN Doc. S/PV.3453 (Nov. 8, 1994).

²⁵ ICTR PRESS & PUBLIC AFFAIRS UNIT, *LEARNING FROM THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA: THE LEGACY* (2009).

²⁶ ICTR officials themselves have widely diverging views on the Tribunal’s mandate. See Nigel Eltringham, “When We Walk Out, What Was It All About?": Views on New Beginnings from Within the International Criminal Tribunal for Rwanda, 45 DEV. & CHANGE 543 (2014) and NICOLA PALMER, *COURTS IN CONFLICT: INTERPRETING THE LAYERS OF JUSTICE IN POST-GENOCIDE RWANDA* (2015).

²⁷ ICTR Legacy Video, *supra* note 2.

²⁸ *LEARNING FROM THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA*, *supra* note 25 at 39.

²⁹ Judge Dennis Byron’s Address to the UN General Assembly, ICTR NEWSLETTER, Oct. 2008, at 1, at <http://www.unmict.unict.org/sites/unict.org/files/news/newsletters/oct08.pdf>. Based on research conducted within the ICTR, however, Palmer asserts that Tribunal officials are divided over whether creating a historical record is part of the ICTR’s mandate and on whether the Tribunal has accomplished this. See PALMER, *supra* note 26, at 64–67.

³⁰ See ICTR, *ICTR Milestones*, at <http://www.unmict.unict.org/en/ictr-milestones>; ICTR Legacy Video, *supra* note 2; *LEARNING FROM THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA*, *supra* note 25; Dennis C. M. Byron, *Looking at Legacy and Looking Back on the Legacy Symposium*, 14 NEW ENG. J. INT’L & COMP. L. 319 (2008); Erik Mose, *Main Achievements of the ICTR*, 3 J. INT’L CRIM. JUST. 920 (2005).

the ICTR's legacy for future use,"³¹ the Tribunal has developed "best practices" manuals for other courts on subjects such as prosecuting sexual violence crimes and referring cases to national jurisdictions. It has also developed a directory of ex-ICTR staff to serve in future positions relating to the prosecution of international crimes. These contributions are presented as strengthening the field's ability to live on into the future after the closure of the ICTR.

Finally, and subsidiarily, the ICTR claims that it has contributed to developments in Rwanda. An ICTR press release notes that by referring cases to the Rwandan criminal courts, "the ICTR contributed to a host of legal reforms and infrastructure improvements at the national level that were necessary to secure the fair trial rights of the accused."³² The Tribunal's legacy video reiterates the Tribunal's contributions to outreach, education, and legal training, along with the more abstract claims of "healing" and its role in rebuilding the Rwandan nation.³³

IV. A RANGE OF POTENTIAL LEGACIES

The conviction with which the Tribunal makes its claims contrasts sharply with the ambiguity of what can be known about its legacy. This is inherent in the concept of legacy; legacies are assessed over time, and by various parties other than the legator. But even if we were to assess the Tribunal's prospective legacy by examining its impact to date and from the Tribunal's perspective, we would face the problem of causal inference. Experimental design is not possible when assessing the impact of an international criminal tribunal. There is no randomized control group, and no tribunal or state would serve as an ideal counterfactual: tribunals and the political contexts in which they operate are so diverse that factors unrelated to the involvement of the international tribunal could explain different outcomes. There are a number of confounding factors, such as third variables generating an empirical association between two variables (such as between the ICTR and developments in Rwanda) that are actually independent, and intervening variables. While it could be possible to identify intervening causal processes through the method of process tracing in the case of a relatively direct impact (for instance, of the ICTR upon the development of international criminal law), it is much more difficult to do so when assessing its impact on complex issues such as peace and reconciliation.

As opposed to demonstrable findings, many of the claims made about the ICTR's impact are either hypotheses, setting forth how the Tribunal *could have* an impact,³⁴ or assertions of hopes or normative opinions as to what its impact *should be*. There is a wealth of what might be termed "impact speculation," but relatively little empirical evidence to support it.³⁵ The Tribunal's contribution to Rwanda is mostly assessed from an aspirational standpoint, which

³¹ Press Release, ICTR, ICTR Prosecutor Releases Best Practices Manual on Referral of International Criminal Cases to National Jurisdictions (Feb. 11, 2015), at <http://www.unmict.unictr.org/en/news/ict-prosecutor-releases-best-practices-manual-referral-international-criminal-cases-national>.

³² *Id.*

³³ ICTR Legacy Video, *supra* note 2.

³⁴ See, e.g., Francois-Xavier Nsanzuwa, *The ICTR Contribution to National Reconciliation*, 3 J. INT'L CRIM. JUST. 944 (2005) (setting forth theories as to how the ICTR *may* contribute to reconciliation).

³⁵ See also David S. Koller, *The Faith of the International Criminal Lawyer*, 40 N.Y.U. J. INT'L L. & POL. 1019 (2008); Sarah M. H. Nouwen, *Justifying Justice*, in THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 327 (James Crawford & Martti Koskeniemi eds., 2012); Carsten Stahn, *Between "Faith" and "Facts": By What Standards Should We Assess International Criminal Justice?*, 25 LEIDEN J. INT'L L. 251 (2012).

draws upon what the Tribunal's founding documents claim or the repeated assertions by staff and proponents that congeal over time into standard narratives.

The research climate in Rwanda provides other epistemological challenges. There is no shortage of scholarship on Rwanda in general or on issues of transitional justice in particular. Relatively safe and accessible, post-genocide Rwanda has served as a laboratory for postconflict research. Yet scholars have noted the difficulty of carrying out work in a climate of fear for personal consequences, both for the researcher and for individuals participating in their research.³⁶ In response to the genocide, the ruling Rwandan Patriotic Front (RPF) has taken drastic measures to eliminate "genocide ideology" and to reeducate the population in what it means to be Rwandan. It attempts to set the dominant historical narrative, to determine what kinds of questions are worthy of being posed, and to shape answers to research questions.³⁷ Researchers have recounted how their permits were revoked on the ground that their research "was not the kind of research the government needed,"³⁸ others have been declared *personae non gratae*.³⁹

Finally, even if we were able to establish the Tribunal's impact, its reception would need to be understood in relation to the political context of contemporary Rwanda. A key feature of that context is that the government of the past twenty years has been dominated by the movement that not only ended the genocide, but that also won a war through a military victory. The political climate that follows from military victory generates ideas, perceptions, and resistance that are different from those following a negotiated settlement. All in all, Rwandans will receive any legacy in a context that may shape its meaning in a radically different way from the way that an international tribunal understands its own legacy.

While acknowledging these challenges, we can identify aspects of the potential legacy of the ICTR, beginning from those elements that are relatively clear and ending with those that remain relatively uncertain.

Contributions to the Development and Mainstreaming of International Criminal Law

Perhaps the least contested element of the ICTR's legacy is the fact that its case law has made significant contributions to doctrinal international criminal law and has demonstrated that individuals in certain positions can be held to account for grave crimes.⁴⁰ The

³⁶ See Bert Ingelaere, *Do We Understand Life after Genocide? Center and Periphery in the Construction of Knowledge in Post-genocide Rwanda*, 53 AFR. STUD. REV. 41 (2010); Longman & Rutagengwa, *supra* note 7, at 164.

³⁷ See Ingelaere, *supra* note 6, at 522; Ingelaere, *supra* note 36, at 52–54; JOHAN POTTIER, REIMAGINING RWANDA: CONFLICT, SURVIVAL AND DISINFORMATION IN THE LATE TWENTIETH CENTURY (2002); FILIP REYNTJENS, POLITICAL GOVERNANCE IN POST-GENOCIDE RWANDA 228–29 (2013).

³⁸ Susan Thomson, *Getting Close to Rwandans Since the Genocide: Studying Everyday Life in Highly Politicized Research Settings*, 53 AFR. STUD. REV. 19, 22–23 (2010). See also Susan Thomson, *Reeducation for Reconciliation: Participant Observations on Ingando*, in REMAKING RWANDA: STATE BUILDING AND HUMAN RIGHTS AFTER MASS VIOLENCE 331 (Scott Straus & Lars Waldorf eds., 2011).

³⁹ REYNTJENS, *supra* note 37, at xv, 125–26.

⁴⁰ See, e.g., LARISSA VAN DEN HERIK, THE CONTRIBUTION OF THE RWANDA TRIBUNAL TO THE DEVELOPMENT OF INTERNATIONAL LAW (2005); Hassan Bubacar Jallow, *The Contribution of the United Nations International Criminal Tribunal for Rwanda to the Development of International Criminal Law*, in AFTER GENOCIDE: TRANSITIONAL JUSTICE, POSTCONFLICT RECONSTRUCTION, AND RECONCILIATION IN RWANDA AND BEYOND 261 (Philip Clark & Zachary D. Kaufman eds., 2008).

ICTR legacy website claims that the Tribunal is responsible for many inaugural moments in the field: it was “the first” international tribunal to enter a judgment for genocide; to interpret the definition of genocide set out in the 1948 Genocide Convention; to define rape in international criminal law and to recognize it as a means of perpetrating genocide; and, since Nuremberg, to issue a judgment against a former head of state, among other things.⁴¹ An extensive body of literature has noted the importance of these and other “firsts” of the ICTR for the development of substantive and procedural international criminal law, including its influence on the Rome Statute of the International Criminal Court (ICC) and decisions concerning international crimes in national, internationalized, and other international courts.⁴²

The Tribunal has also promoted international criminal law as a professional field. As anthropologist Nigel Eltringham has argued, “there can be no doubt that a significant legacy of the ICTR is . . . the creation of a cadre of lawyers and judges who are equipped to populate international courtrooms in the future.”⁴³ In developing international criminal law as a profession and delivering a body of advocates ready to serve in international criminal tribunals, the ICTR, like the ICTY, has also disseminated international criminal tribunal-specific practices, contributing to the spread of this legal form. Mikkel Jarle Christensen has demonstrated how these professionals are involved in efforts to expand the role and influence of international criminal justice to ensure the ongoing relevance of their experience.⁴⁴

Finally, the ICTR, like the ICTY, has helped make individual criminal accountability a response to mass atrocity.⁴⁵ By linking criminal justice to the pursuit of peace in two locations, the Security Council emboldened a movement that sought the creation of a permanent international criminal court that could, in theory, exercise jurisdiction globally. The institutionalization of international criminal law has resulted in this particular conception of justice becoming more preeminent than alternative conceptions, such as restorative and distributive justice. The ICTR has thus contributed to the idea of international criminal law being the path towards “justice to all people, everywhere.”⁴⁶ According to some commentators, the development and preservation of that legacy requires that the application of international criminal law becomes a standard and universal response to mass atrocity.⁴⁷

⁴¹ See ICTR Milestones, *supra* note 30.

⁴² See sources cited at note 40, *supra*. See also, Payam Akhavan, *The Crime of Genocide in the ICTR Jurisprudence*, 3 J. INT'L CRIM. JUST. 989 (2005); Kelly D. Askin, *Gender Crimes Jurisprudence in the ICTR: Positive Developments*, 3 J. INT'L CRIM. JUST. 1007 (2005); and articles by John Cerone, Suzanne Chenault, and Catherine A. MacKinnon, in 14 NEW ENG. J. INT'L & COMP. L. 211 (2008).

⁴³ Eltringham, *supra* note 20.

⁴⁴ See Mikkel Jarle Christensen, *From Symbolic Surge to Closing Courts: The Transformation of International Criminal Justice and its Professional Practices*, 43 INT'L J. LAW, CRIME & JUST. 609 (2015).

⁴⁵ See also Morten Bergsmo & Philippa Webb, *Some Lessons for the International Criminal Court from the International Judicial Response to the Rwandan Genocide*, in AFTER GENOCIDE, *supra* note 40, at 351.

⁴⁶ ICTR Legacy Video, *supra* note 2.

⁴⁷ Leila N. Sadat, *The Contribution of the ICTR to the Rule of Law*, in PROMOTING ACCOUNTABILITY UNDER INTERNATIONAL LAW FOR GROSS HUMAN RIGHTS VIOLATIONS IN AFRICA: ESSAYS IN HONOUR OF PROSECUTOR HASSAN BUBACAR JALLOW 118, 129 (Charles C. Jalloh & Alhagi B. M. Marong eds., 2015) (also referring to a speech by Judge Meron to that effect).

Justice “Done,” “Not Done,” and Pending

By rendering judgment against seventy defendants, the ICTR has “done” a considerable amount of retributive justice.⁴⁸ The Tribunal promoted individual criminal responsibility for genocide, crimes against humanity, and war crimes in Rwanda and beyond, by holding people to account who might have otherwise escaped accountability.⁴⁹ From the perspective of promoting the rule of law, the fact that it has prosecuted senior members of the former government, including a prime minister, is particularly significant, as it demonstrates that even those once in the highest positions of power can be held legally accountable for their actions.

Nonetheless, the pro-accountability and anti-impunity message has been weakened by the fact that the ICTR has opened no cases against people with ties to the incumbent government for crimes allegedly committed by the RPF/Army during the 1994 conflict. According to the late Alison Des Forges, at least 25,000 to 30,000 people, including civilians, may have been killed by the RPF.⁵⁰ Des Forges argued that these killings were widespread and systematic rather than “unconnected crimes” carried out by individual soldiers, and that RPF commanders must have known about and at least tolerated these abuses. Carla Del Ponte, former prosecutor for the ICTR, investigated RPF members suspected of being involved in the June 1994 massacre of the archbishop of Kigali and others, yet the government of Rwanda refused to cooperate, and as a result there was insufficient evidence to bring indictments.⁵¹ While calling on states to assist investigations of the RPF, the Security Council then limited Del Ponte’s responsibilities to the ICTY, creating a new post for a prosecutor of the ICTR.⁵² The official rationale was efficiency and equal prosecutorial attention for the ICTR as for the ICTY. However, many commentators (as well as Del Ponte herself) claim that the Rwandan government’s successful diplomatic campaign opposing her efforts to bring charges against some RPF soldiers was a central reason for this change. The new prosecutor, Hassan Jallow, reported to the Security Council that he had reached an “understanding” with the Rwandan government to leave the prosecution of Rwandan army officers suspected of having been involved in the June 1994 massacre to the Rwandan Prosecutor General.⁵³ Victor Peskin refers to this as “Jallow’s ‘compromise,’”⁵⁴ in that it seemed to result in some degree of accountability, yet it also allowed the Rwandan government to avoid a high-profile international criminal prosecution of RPF suspects while acquitting two commanding officers and convicting two junior RPF officers and

⁴⁸ As of Mid-November 2015, the ICTR reported that it had indicted ninety-three individuals and concluded proceedings for seventy-eight accused (including four individuals whose cases were transferred to other jurisdictions, two instances in which the indictment was withdrawn, and two instances in which the accused died before judgment), with six individuals’ cases remaining on appeal. The Tribunal also transferred the cases of nine fugitives to other jurisdictions. ICTR, *ICTR Key Figures*, at <http://www.unmict.unict.org/sites/unict.org/files/publications/ict-key-figures-en.pdf>.

⁴⁹ See, e.g., Mose, *supra* note 30, at 933. See also *ICTR/Legacy – Rwanda Tribunal Has Blazed a Trail Despite Its Weaknesses, Says Expert*, HIRONDELLE NEWS, Dec. 31, 2013, at <http://www.hirondellenews.com/ict-rwanda/404-ict-institutional-news/34529-311213-ictlegacy-rwanda-tribunal-has-blazed-a-trail-despite-its-weaknesses-says-expert>.

⁵⁰ ALISON DES FORGES, “LEAVE NONE TO TELL THE STORY”: GENOCIDE IN RWANDA, 16, 734 (1999).

⁵¹ Carla Del Ponte with Chuck Sudetic, *MADAME PROSECUTOR: CONFRONTATIONS WITH HUMANITY’S WORST CRIMINALS AND THE CULTURE OF IMPUNITY*, A MEMOIR 229 (2009).

⁵² S.C. Res. 1503, paras. 8–9 (Aug. 28, 2003).

⁵³ Statement by Hassan B. Jallow, Prosecutor of the ICTR, to the UN Security Council, UN Doc. S/PV.5904, at 11 (Jun. 4, 2008).

⁵⁴ Victor Peskin, *Victor’s Justice Revisited: Rwandan Patriotic Front Crimes and the Prosecutorial Endgame at the ICTR*, in *REMAKING RWANDA*, *supra* note 38, at 180.

giving them relatively light sentences.⁵⁵ The ICTR has not brought any charges against members of the RPF, and the Residual Mechanism does not have jurisdiction to do so.

The reasons why the ICTR did not move against the RPF have been convincingly described.⁵⁶ Key among these is the Tribunal's extensive dependence upon the Rwandan government for cooperation, ranging from granting permission for its investigators to enter Rwanda to not blocking Rwandans from testifying before the ICTR.⁵⁷ Rather than fearing international condemnation or even sanctions for noncooperation, the Rwandan government has managed to maintain financial and political support by leveraging the West's guilt for its failures during the genocide.⁵⁸

These explanations, whether accepted or not, do not change the fact—noted by many scholars—that RPF impunity also forms part of the Tribunal's legacy.⁵⁹ Whereas the ICTR has contributed to building “the rule of law” in Rwanda by holding some individuals to account, it has not demonstrated that even those still in power are subject to law—perhaps the most important element of this concept. To the contrary, the ICTR's actions can be seen as legitimating RPF impunity at the international level.⁶⁰

Apart from the groups of people for whom justice was “done” and “not done,” there are at least two groups of people for whom justice is pending. Eight individuals indicted by the ICTR remain at large.⁶¹ Justice is also pending for the eleven individuals who have been acquitted by the ICTR or who have served their sentences but have not been relocated by the Tribunal.⁶² Here justice is pending in that the process of retributive justice is only partially implemented; the crucial part—that those acquitted or who have served their sentences can live freely—remains unfulfilled. The Tribunal has arrangements with third states to accept witnesses for resettlement and the convicted for incarceration, but few states have proved willing to accommodate former ICTR defendants who have been acquitted or have served their sentences. These individuals have often not felt safe to return to Rwanda because of an environment where ICTR acquittals are met with public demonstrations⁶³ and are treated as forms of “genocide

⁵⁵ See Leslie Haskell & Lars Waldorf, *The Impunity Gap of the International Criminal Tribunal for Rwanda: Causes and Consequences*, 34 HASTINGS INT'L & COMP. L. REV. 49 (2011). On whether Del Ponte had previously backed out of such a “deal” with the Rwandan government, see KINGSLEY C. MOGHALU, RWANDA'S GENOCIDE: THE POLITICS OF GLOBAL JUSTICE 145 (2005). For the denial of the existence of a deal, see DEL PONTE, *supra* note 51, at 231–34.

⁵⁶ See, e.g., MOGHALU, *supra* note 55, at 173; *ICTR/Legacy*, *supra* note 49.

⁵⁷ Peskin, *supra* note 54, at 176.

⁵⁸ See Eugenia Zorbas, *Aid Dependence and Policy Independence: Explaining the Rwandan Paradox*, in REMAKING RWANDA, *supra* note 38, at 104.

⁵⁹ See the open letter *Ensuring ICTR Prosecutions for RPF War Crimes* to the UN Secretary-General, President Barack Obama, and Prime Minister Gordon Brown, dated June 1, 2009, signed by fifty Rwanda scholars, available at <http://uk-africa.blogspot.com/2009/06/ensuring-ictr-prosecutions-for-rpf-war.html>.

⁶⁰ For a more optimistic reading, see the comments of Professor Guichaoua in *ICTR/Legacy*, *supra* note 49.

⁶¹ Responsibility for three of them has been handed over to the Residual Mechanism; Rwanda would try the other five. United Nations Mechanism for International Criminal Tribunals, Searching for the Fugitives, at <http://www.unmict.org/en/cases/searching-fugitives>.

⁶² Caroline Buisman & Kate Gibson, *Acquitted by Law, Prosecuted by Propaganda*, JUST. IN CONFLICT (Mar. 31, 2014), at <http://justiceinconflict.org/2014/03/31/acquitted-by-law-prosecuted-by-propaganda/>.

⁶³ See Filip Reyntjens, *Chronique Politique du Rwanda, 2012–2013*, in L'AFRIQUE DES GRANDS LACS: ANNUAIRE 2012–2013 287, 300 (Filip Reyntjens, Stef Vandeginste & M. Verpoorten eds., 2013).

denial.”⁶⁴ Some of them have remained in a UN safe house in Arusha for over a decade,⁶⁵ living the life of “virtual prisoner[s].”⁶⁶ The production of this liminal status—one in which people remain caught within the Tribunal’s symbolic and literal space, unable to return to their prior lives—may also become part of the ICTR’s legacy.

Thus far we have considered the extent to which the ICTR has been able to carry out retributive justice. Other forms of justice were not done by the ICTR because it was not given the mandate to pursue them. For instance, the United Nations did not provide the Tribunal with any mandate or funds for reparations to victims, not even for those who testified in ICTR proceedings.⁶⁷ Appeals from international NGOs and ICTR officials to the United Nations for more attention to victims have not received practical follow-up.⁶⁸ However, this absence in mandate and budget at the ICTR, as well as at the ICTY, did arguably foster proposals for proceedings for victims and a Victims Trust Fund as part of the Rome Statute for the ICC.⁶⁹ What are now considered omissions from the ICTR mandate may have informed a “best practices” legacy after all.⁷⁰

A Historical Record

It is virtually uncontested that the ICTR has left a historical record; it has kilometers and petabytes of material on Rwanda, particularly concerning the 1994 genocide.⁷¹ By 2006, it had acquired so much evidence about the genocide, including the guilty plea of a former Rwandan prime minister,⁷² that it decided that “the fact that genocide occurred in Rwanda in 1994” is

⁶⁴ See, e.g., Joseph Rwagatare, *ICTR Acquittals Shocking but Expected*, THE NEW TIMES, Feb. 11, 2013, at <http://www.newtimes.co.rw/section/article/2013-02-11/62785/>. See also Beth S. Lyons, *Acquitted but Still Not Free*, INTLAWGRRLS (May 19, 2014), at <http://ilg2.org/2014/05/19/acquitted-but-still-not-free/>.

⁶⁵ Address by Judge Vagn Joensen, President of the International Criminal Tribunal for Rwanda to the United Nations Security Council (Jun. 3, 2015), at <http://unictr.unmict.org/en/news/address-judge-vagn-joensen-president-international-criminal-tribunal-rwanda-united-nations>.

⁶⁶ Chine Labbé, Fumbuka Ng’wanakilala & Thomas Escrib, *Rwanda Court’s Forgotten Men Pose Challenge to International Justice*, REUTERS, Sept. 28, 2014, at <http://www.reuters.com/article/2014/09/28/uk-un-justice-insight-idUKKCN0HN0NI20140928>.

⁶⁷ On the role of NGO advocacy concerning victim compensation, see Emily Haslam, *Law, Civil Society and Contested Justice at the International Criminal Tribunal for Rwanda*, in PATHS TO INTERNATIONAL JUSTICE: SOCIAL AND LEGAL PERSPECTIVES 57 (Marie-Bénédicte Dembour & Tobias Kelly eds., 2007).

⁶⁸ See, e.g., Press Release, Office of the Prosecutor, Address to the Security Council by Carla Del Ponte, Prosecutor of the International Criminal Tribunals for the Former Yugoslavia and Rwanda (Nov. 24, 2000), at <http://www.icty.org/sid/7803>; Press Release, ICTR, ICTR President Calls for Compensation for Victims (Oct. 31, 2002), at <http://unictr.unmict.org/en/news/ict-president-calls-compensation-victims>. Note, however, that ICTR judges advocated against changing the ICTR statute to incorporate provisions for victims as in the ICC Statute. See Letter Dated 14 December 2000 from the Secretary-General Addressed to the President of the Security Council (annexing Letter dated 9 November 2000 from the President of the International Criminal Tribunal for Rwanda Addressed to the Secretary-General), UN Doc. S/2000/1198 (Dec. 15, 2000).

⁶⁹ See Kingsley C. Moghalu, *International Humanitarian Law from Nuremberg to Rome: The Weighty Precedents of the International Criminal Tribunal for Rwanda*, 14 PACE INT’L L. REV. 273, 302 (2002).

⁷⁰ Whether victim participation should in fact be included as a “best practice” in international criminal law remains to be seen. For an account of some of the challenges in “juridifying” victimhood as a category of legal identity, see Sara Kendall & Sarah Nouwen, *Representational Practices: The Gap Between Juridified and Abstract Victimhood*, 76 L. & CONTEMP. PROBS. 235 (2014).

⁷¹ Report on the Completion Strategy, *supra* note 3.

⁷² He later retracted this. See *Convicted Ex-Prime Minister Jean Kambanda Publishes Damning Portrait of Rwanda Tribunal*, HIRONDELLE NEWS (Aug. 7, 2013), at <http://www.hirondellenews.com/ict-rwanda/387-trials-ended/>

a fact of “common knowledge” of which trial chambers must take judicial notice.⁷³ According to the Tribunal, this “should now silence the ‘rejectionist’ camp which has been disputing the occurrence of genocide.”⁷⁴

Where there is contestation about the ICTR’s contribution, it concerns the value of its record. Historical accounts produced through international criminal trials are notoriously incomplete. As Richard Wilson has argued, “[b]ecause courts follow law’s own exceptional principles rather than those of historical inquiry, they can reduce complex histories to a defective legal template, and thereby distort history.”⁷⁵ They are products of a juridical framework that begins from the premise of determining the guilt or innocence of select individuals, not from the objective of developing a historical account of the events leading to a tribunal’s establishment. The ICTR’s limited temporal jurisdiction (1994) and its prosecutorial choices also impose boundaries on the comprehensiveness of the historical record.⁷⁶

The extent to which the Tribunal’s historical record will be accepted in Rwanda will be shaped by the political context within which it is received. Scholars have argued that in present-day Rwanda, the country’s official history is written by the government, with little space for critical engagement.⁷⁷ In this environment, RPF supporters are likely to follow the government’s evaluation of the ICTR record, which has involved praising convictions and criticizing acquittals. By contrast, RPF opponents are more likely to dismiss the Tribunal as a political instrument of the government,⁷⁸ and may therefore reject the authority of its historical record.

The ownership of the Tribunal’s physical records is also contested.⁷⁹ While an ICTR archivist has labelled the archives “a *global* treasure,”⁸⁰ the Rwandan government and genocide survivor organizations have argued that the archives should be kept in Rwanda,⁸¹ claiming the archives as “part of Rwanda’s history and legacy.”⁸² African civil society organizations, in turn,

kambanda-jean/34309-70813-convicted-ex-prime-minister-jean-kambanda-publishes-damning-portrait-of-rwanda-tribunal.

⁷³ Prosecutor v. Édouard Karemera, et al., Case No. ICTR-98-44-AR73(C), Appeal on Judgment, para. 35 (Jun. 16, 2006).

⁷⁴ Press Release, ICTR, ICTR Appeals Chamber Takes Judicial Notice of Genocide in Rwanda (Jun. 20, 2006), at <http://www.unmict.unict.org/en/news/ictr-appeals-chamber-takes-judicial-notice-genocide-rwanda>.

⁷⁵ See RICHARD ASHBY WILSON, WRITING HISTORY IN INTERNATIONAL CRIMINAL TRIALS 9 (2011).

⁷⁶ See MOGHALU, *supra* note 55, at 203–04; KLAUS BACHMANN & ALEKSANDER FATIC, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: TRANSITION WITHOUT JUSTICE? 242–43 (2015).

⁷⁷ POTTIER, *supra* note 37; Gérard Prunier, *Rwanda’s Ghosts Refuse to Be Buried*, BBC FOCUS, Apr. 8, 2009, at <http://news.bbc.co.uk/2/hi/africa/7981964.stm>.

⁷⁸ Haskell & Waldorf, *supra* note 55, at 79.

⁷⁹ On the role of archives more generally, see Kirsten Campbell, *The Laws of Memory: The ICTY, the Archive, and Transitional Justice*, 22 SOC. & LEGAL STUD. 247 (2013).

⁸⁰ Tom A. Adami, “Who Will Be Left to Tell the Tale?” *Recordkeeping and International Criminal Jurisprudence*, 7 ARCHIVAL SCI. 213, 217 (2007) (emphasis added; footnote omitted).

⁸¹ See Edmund Kagire, *Rwanda Presses for ICTR Records*, THE EAST AFRICAN, Dec. 20, 2014, at <http://www.theeastafrican.co.ke/news/Rwanda-presses-for-ICTR-records/-/2558/2563806/-/14sscne/-/index.html>; Edwin Musoni, *Experts On Why Rwanda Should Take Custody of ICTR Archives*, THE NEW TIMES, Feb. 10, 2015, at <http://www.newtimes.co.rw/section/article/2015-02-10/185831/>.

⁸² *Rwanda/UN – Kigali Reiterates Its Request to Shelter ICTR’s Archives*, HIRONDELLE NEWS, Oct. 21, 2009, at <http://www.hirondellenews.com/ictr-rwanda/410-rwanda-other-countries/23678-en-en-211009-rwandaun-kigali-reiterates-its-request-to-shelter-ictrs-archives1272912729>. See also Permanent Mission of Rwanda to the United Nations, Statement for the Consideration of the 20th Annual Report of the ICTR and ICTY by First Counselor, Sana Maboneza (Oct. 12, 2015), available at <http://rwandaun.org/site/2015/10/12/statement-for-the-consideration-of-the-20th-annual-report-of-the-ictr-and-icty-by-first-counselor-sana-maboneza/>.

have lobbied for keeping the archives in Africa as “part of African heritage.”⁸³ Tasked to advise the Security Council on the location of the ICTR and ICTY archives after their closure, the UN secretary-general observed that the archives are “tools for fostering reconciliation and memory”⁸⁴ and that they should be made accessible to conflict-affected populations.⁸⁵ Yet he concluded that neither the former Yugoslavia nor Rwanda appeared to fulfill the criteria for keeping the archives, particularly those related to security, preservation, and access.⁸⁶ Eventually the Security Council chose the Arusha branch of the Residual Mechanism as the location for the ICTR archives.⁸⁷ The future of the archives remains uncertain, especially if the Residual Mechanism closes down.

Reform of the Domestic Justice System

It has been widely claimed that the ICTR has shaped the Rwandan criminal justice system. The most cited effects are the abolition of the death penalty, and, for cases transferred from the ICTR, the nonapplication of the punishment of life imprisonment in solitary confinement, better witness protection programs, and improved prison conditions.⁸⁸ The incentive for change came from the conditionality attached to the ICTR’s transfer of cases to domestic jurisdictions,⁸⁹ and to similar conditions in proceedings in other states for extradition or deportation to Rwanda. Both the ICTR and extraditing or deporting states thus spurred the reform within Rwanda, with the latter at times amplifying the effect of ICTR conditionality by adopting the same or similar conditions, or by referring to the ICTR’s assessments of the adequacy of the Rwandan criminal justice system.⁹⁰

In the absence of an explicit legal basis for transferring cases to domestic justice systems, the Tribunal developed new procedures,⁹¹ which the Security Council implicitly endorsed when

⁸³ Communiqué of the Consultative Meeting on the Legacy, Residual Functions and Archives of the United Nations’ International Criminal Tribunal for Rwanda – UNICTR, Presented to the Advisory Committee on the Archives for the UN Tribunals for the Former Yugoslavia & Rwanda, Arusha, Tanzania, Aug. 16–17, 2008, *available at* <http://www.africafiles.org/printableversion.asp?id=18821>.

⁸⁴ 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, May 21, 2009, 46, para. 201, UN Doc. S/2009/258.

⁸⁵ *Id.*, para. 216.

⁸⁶ *Id.*

⁸⁷ S.C. Res. 1966 (Dec. 22, 2010) (annexing the Statute of the International Residual Mechanism for Criminal Tribunals, Arts. 3, 27, para. 2).

⁸⁸ See, e.g., INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, COMPLEMENTARITY IN ACTION: LESSONS LEARNED FROM THE ICTR PROSECUTOR’S REFERRAL OF INTERNATIONAL CRIMINAL CASES TO NATIONAL JURISDICTIONS FOR TRIAL 2–3 (2015), *at* http://unictr.unmict.org/sites/unictr.org/files/legal-library/150210_complementarity_in_action.pdf.

⁸⁹ Other states have also amended domestic law to facilitate referrals; for example, the Dutch Criminal Code was amended to this end. See *Wet van 8 December 2011 tot Wijziging van het Wetboek van Strafrecht, het Wetboek van Strafvordering, de Wet Internationale Misdrijven, de Wet Overlevering Inzake Oorlogsmisdrijven en de Uitleveringswet (verruiming mogelijkheden tot opsporing en vervolging van internationale misdrijven)*, *available at* <https://zoek.officielebekendmakingen.nl/stb-2011-605.html>, and the Explanatory Note to that legislation *available at* <https://zoek.officielebekendmakingen.nl/behandelddossier/32475/kst-32475-3?resultIndex=19&sorttype=1&sortorder=4>.

⁹⁰ See, e.g., Brown et al. v. Rwanda, [2009] EWHC 770, Judgment, Appeal Against Extradition.

⁹¹ Seventh Annual Report of the ICTR, for the Period from July 1, 2001 to June 30, 2002, July 2, 2002, para. 10, UN Doc. S/2002/733; Eighth Annual Report of the ICTR, for the period from July 1, 2002 to June 30, 2003, July 11, 2003, para. 6, UN Doc. S/2003/707.

it encouraged the ICTR “to transfer cases involving intermediate- and lower-rank accused to competent national jurisdictions, as appropriate, including Rwanda.”⁹² For suspects not yet indicted by the ICTR, the prosecutor could refer the files to domestic authorities at her or his discretion.⁹³ By contrast, referrals of cases of indicted suspects, so-called “Rule 11 *bis*” cases, were subject to conditions and judicial supervision.⁹⁴

In the first decision in a Rule 11 *bis* case, in 2006 the trial judges cited the Prosecution’s claim that transfer to Rwanda was not an option at that time because there was no guarantee of fair trial and the death penalty could be imposed.⁹⁵ Within a year, Rwanda abolished the death penalty for offenders transferred by the ICTR or extradited by other countries;⁹⁶ other offenders could still receive the death penalty. Four months later it abolished the death penalty entirely.⁹⁷ But the Trial Chambers still denied the first five cases in which the prosecutor requested a referral to Rwanda.⁹⁸

When in 2011 an ICTR Trial Chamber first agreed to the referral of a case to Rwanda, it noted the legal changes that Rwanda had made: life imprisonment with special conditions was no longer a potential penalty in transfer cases; immunity was extended to witnesses; and there were mechanisms in place for witnesses abroad to testify. The Chamber also observed that the Rwandan Victims and Witnesses Support Unit had been improved, and a Witness Protection Unit had been created. All seven subsequent requests by the prosecutor to refer cases to Rwanda were granted.

There are strong indications that Rwanda reformed its legal system in order to receive cases from the ICTR or to meet states’ conditions for extradition. This claim can especially be made about changes that apply exclusively to defendants whose cases were transferred by the ICTR or other states, such as excluding the penalty of life imprisonment in solitary confinement, extending immunity to witnesses regarding their testimony, and providing detention facilities that meet international standards. While these changes have been welcomed by many observers, they have also been criticized for creating a two-tiered legal system, with different penalties, procedures, and detention conditions depending on whether the case originated domestically or had been transferred by the ICTR or a state.⁹⁹ Only a few changes have been made with respect to the general legal order, most notably the abolition of the death penalty and the review

⁹² S.C. Res. 1503, *supra* note 52, at pmb1 (8th recital).

⁹³ By June 2010, the ICTR Prosecutor had transferred fifty-five such files to Rwanda. See COMPLEMENTARITY IN ACTION, *supra* note 88, at 7, n. 18.

⁹⁴ For the most recent version, see ICTR Rules of Procedure and Evidence, adopted on Jun. 29, 1996, last Amended May 13, 2015, rule 11 *bis* (A) and (B). The rule was first introduced in 2002, and substantially amended in 2004, 2005, and, to a lesser extent, 2011.

⁹⁵ Prosecutor v. Bagaragaza, Case No. ICTR-2005-86-R11bis, Decision on Prosecution’s Motion for Referral to the Kingdom of Norway, para. 7 (May 19, 2006).

⁹⁶ Organic Law n° 11/2007 of 16/03/2007 Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States, Arts. 21, 24, Official Gazette, Special Issue, Mar. 19, 2007.

⁹⁷ Organic Law n° 31/2007 of 25/07/2007 Relating to the Abolition of the Death Penalty, Arts. 2–3, Official Gazette, Special Issue, July 25, 2007.

⁹⁸ See the Rule 11 *bis* decisions by the Trial Chamber in the *Munyakazi*, *Kanyarukiga*, *Hategekimana*, *Gatete*, and *Kayishema* cases, each of which was upheld on appeal (decisions available at <http://unictr.unmict.org/en/cases>).

⁹⁹ COMPLEMENTARITY IN ACTION, *supra* note 88, at 26. See also AMNESTY INTERNATIONAL, RWANDA: SUSPECTS MUST NOT BE TRANSFERRED TO RWANDAN COURTS FOR TRIAL UNTIL IT IS DEMONSTRATED THAT TRIALS WILL COMPLY WITH INTERNATIONAL STANDARDS OF JUSTICE 5 (2007), at <https://www.amnesty.org/en/documents/afr47/013/2007/en/>.

of the genocide ideology law.¹⁰⁰ With these changes, it is harder to argue that conditionality imposed by the ICTR, or by extraditing states for that matter, was the only factor driving change, but it can be identified as an important factor.¹⁰¹

It was not the Tribunal's creation or existence per se that led to changes in the Rwandan legal system. There is little sign that any change occurred as a result of "norm infiltration"; namely, a modeling of norms and practices in the Rwandan justice system on those of the ICTR driven by the Rwandan government's conviction that it *should* do so. Rather, having adopted an absolute anti-impunity policy for those who committed genocide against the Tutsi, the RPF government has sought to receive cases that might otherwise go unprosecuted by the ICTR or extraditing states, and it was the conditionality attached to the transfer of such cases that incentivized Rwanda to adopt these changes.

Shifting the frame, the ICTR became interested in handing over cases only when it had to start implementing its completion strategy. It was then that it adopted Rule 11 *bis* and started to engage in "capacity building" of the Rwandan justice system. Once the ICTR became interested in referring cases to Rwanda, and in particular after the first round of applications for referrals had been denied, it began to encourage states and organizations funding development programs to invest more in Rwanda's justice system and to fund ICTR capacity-building initiatives.¹⁰²

It appears that the ICTR's impact on the Rwandan justice system largely stemmed from a confluence of interests: Rwanda's interest in prosecuting cases domestically, requiring it to fulfill the conditions imposed by the ICTR (and by states); and the ICTR's interest in having Rwanda take over several cases so that it could implement its own completion strategy.¹⁰³ Merely adopting a rule that provides for conditional referrals does not necessarily lead to domestic reform. At least two additional circumstances are required: a state must be interested in receiving cases (which is not a given, as the ICC experience of self-referrals suggests); and the international court concerned must have an incentive to hand over cases.¹⁰⁴

¹⁰⁰ COMPLEMENTARITY IN ACTION, *supra* note 88, at 26–27, mentions as other examples: revisions of the Penal Code and Code of Criminal Procedure; witness protection services provided by the Witnesses Protection Unit; and the possibility of trial by a bench of three judges (as opposed to a single judge).

¹⁰¹ With respect to the death penalty, Aimé Muyoboke Karimunda has shown how there were already strong abolitionist tendencies within Rwanda, including the RPF's program, but the ICTR's involvement helped to expedite the process. Aimé M. Karimunda, *The Death Penalty in Rwanda: Surrounding Politics and the ICTR's Battle for Abolition*, in THE POLITICS OF THE DEATH PENALTY IN COUNTRIES IN TRANSITION 128, 150 (Madoka Futamura & Nadia Bernaz eds., 2014). See also William A. Schabas, *African Perspectives on Abolition of the Death Penalty*, in THE INTERNATIONAL SOURCEBOOK ON CAPITAL PUNISHMENT 30, 47 (William A. Schabas ed., 1997).

¹⁰² See COMPLEMENTARITY IN ACTION, *supra* note 88, at 27–46. On the donor community's preference for technocratic justice initiatives in Rwanda's increasingly oppressive political environment, see Barbara Oomen, *Donor-Driven Justice and Its Discontents: The Case of Rwanda*, 36 DEV. & CHANGE 887 (2005).

¹⁰³ On dependence of the ICTR on Rwanda for implementation of the completion strategy, see also Cecile Aptel, *Closing the U.N. International Criminal Tribunal for Rwanda: Completion Strategy and Residual Issues*, 14 NEW ENG. J. INT'L & COMP. L. 169, 182 (2008); Inge Onsea, *The Legacy of the ICTR in Rwanda in the Context of the Completion Strategy: The Impact of Rule 11 bis*, in THE EFFECTIVENESS OF INTERNATIONAL CRIMINAL JUSTICE 173 (Cedric Ryngaert ed., 2009).

¹⁰⁴ The ICTR experience raises questions as to whether the ICC will be as concerned with its legacy as the ad hoc tribunals have been with theirs. The ICTR's attention to its legacy was prompted by the Security Council increasing the pressure to finish its cases and close down. Inherent in the idea of a *permanent* International Criminal Court is that it has no expiration date. While the ICC will leave a legacy in a particular country when it ends its proceedings in that situation, that end date will seldom be as final as with the closure of the ad hoc tribunals.

More difficult than identifying concrete legal reforms is ascertaining whether the ICTR has promoted the uptake of international norms or policies at the domestic level. For instance, it is incorrect to suggest that Rwanda's commitment to prosecuting genocide at the domestic level was inspired by the ICTR. If anything, the causal chain is the opposite: Rwanda wanted to prosecute those involved in the genocide, but because it initially did not have the capacity, or the enforcement jurisdiction in the case of suspects who had fled abroad, it asked the UN Security Council for an international tribunal.¹⁰⁵ Moreover, it cannot be demonstrated that Rwanda has become a stronger proponent of international criminal law as a result of the ICTR. At times it has supported international criminal justice beyond cooperating with the ICTR, as when it transferred Bosco Ntaganda to the ICC.¹⁰⁶ Yet it is one of the few African states to have refused to join the Rome Statute. In the words of the Rwandan Attorney General: "Rwanda simply doesn't see any added value in joining the Rome Statute."¹⁰⁷

Peace and Reconciliation?

While "contribut[ing] to the process of national reconciliation and to the restoration and maintenance of peace" was one of the two aims explicitly stated in the Security Council resolution creating the ICTR, there is little evidence that this will in fact form part of the Tribunal's legacy in Rwanda. Throughout the ICTR's lifespan the Security Council has continued to take decisions concerning the ICTR under Chapter VII of the UN Charter, and thus in the interest of "international peace and security," and it has commended the ICTR for its important work "in contributing to lasting peace and security."¹⁰⁸ The UN secretary-general has stated that "[t]he remarkable work of the International Criminal Tribunal for Rwanda has shown once again how justice is indispensable for sustainable peace."¹⁰⁹ However, as Nigel Eltringham has argued, statements like these merely reiterate the promises of the original Security Council resolution, rather than realistically assessing what has since occurred.¹¹⁰

Many of the claims concerning the Tribunal's promotion of peace, reconciliation, and the rule of law—often mentioned together—fail to explain how the Tribunal contributes to these aims. Some ICTR officials have suggested what they believe the causal mechanisms to be,¹¹¹

¹⁰⁵ As a nonpermanent member of the Council at the time, Rwanda eventually voted against the resolution establishing the Tribunal because it had several objections to its institutional design. See *The Situation Concerning Rwanda*, UN Doc. S/PV.3453, 14–16 (Nov. 8, 1994) (statement by Mr. Bakuramutsa).

¹⁰⁶ See Stephen A. Lamony, *Rwanda and the ICC: Playing Politics with Justice*, AFRICAN ARGUMENTS, Oct. 21, 2013, at <http://africanarguments.org/2013/10/21/rwanda-and-the-icc-playing-politics-with-justice-by-stephen-a-lamony/>.

¹⁰⁷ Robert Mugabe, *Rwanda Will Not Join Rome Statute—Justice Minister*, GREAT LAKES VOICE, Jul. 31, 2014, at <http://greatlakesvoice.com/rwanda-will-not-join-rome-statute-justice-minister/>.

¹⁰⁸ S.C. Res. 1503, *supra* note 52, at pmb1 (3d recital).

¹⁰⁹ Ban Ki-Moon, Remarks at the Commemoration of the 20th Anniversary of the Rwandan Genocide, Kigali (Apr. 7, 2014), at <http://www.un.org/sg/statements/index.asp?nid=7572>.

¹¹⁰ Eltringham, *supra* note 20.

¹¹¹ Other ICTR officials have rejected the claim that the ICTR has contributed to reconciliation. See PALMER, *supra* note 26, at 67–68. See also Bernard A. Muna, Former Deputy Prosecutor ICTR, *The Early Challenges of Conducting Investigations and Prosecutions Before International Criminal Tribunals*, Arusha (Nov. 25–27, 2004), at <http://ictr-archive09.library.cornell.edu/ENGLISH/colloquium04/muna.html> (former ICTR Deputy Prosecutor suggesting that the Tribunal could have contributed to reconciliation, had it not "failed to meet [the] challenge" of enhancing its credibility among the Rwandan people). Some defense lawyers suggest that the Tribunal has done

though usually with little elaboration of how they work in practice.¹¹² One theory is that “[t]he legacy of the ICTR’s work will benefit reconciliation because accountability leads to a trust in the rule of law, which assists the return to normalcy for the affected communities and nations.”¹¹³ Other ICTR officials have suggested that the Tribunal has fostered these aims by: removing key figures in the Rwandan leadership;¹¹⁴ accommodating confessions¹¹⁵ and guilty pleas;¹¹⁶ individualizing guilt;¹¹⁷ “giving a voice” to victims;¹¹⁸ or through outreach.¹¹⁹ The name of the ICTR’s outreach center in Kigali appears to illustrate the last theory: “Umusanzu mu Bwiyunge,” Kinyarwanda for “Contribution to Reconciliation.”

While some of these theories might reveal avenues through which the ICTR has contributed to peace and reconciliation, some causal mechanisms could also work to undermine reconciliation. With outreach, for example, it may be that information about the Tribunal’s work fosters greater openness to reconciliation,¹²⁰ but it could also have the opposite effect, as when people learn of the extent and intensity of crimes and the intentions behind them.¹²¹ Jean-Marie Kamatali has questioned whether the individualization of guilt contributes to reconciliation if it is clear that so many individuals whom the Tribunal leaves unpunished were involved in the commission of crimes for which others have been tried and punished.¹²² Kamatali points out that even if it could hold everyone to account as individuals, the ICTR has, at times, seemingly assigned collective guilt to “the Hutu,” “Interahamwe,” or the “local population.”¹²³ Whereas the Rwandan government’s official policy towards promoting reconciliation is to abandon the relevance of the ethnic categories of Hutu, Tutsi, and Twa, applying the crime of genocide as defined in international criminal law required the Tribunal to determine that the Tutsi *are* in fact an ethnic group in order to establish that genocide had been committed.¹²⁴ Claims that the ICTR has contributed to reconciliation through guilty pleas and by “giving victims a voice” have also been questioned. For example, how can confessions foster reconciliation if they are given in the victim’s absence? To what extent were victims able to express themselves other than as witnesses giving evidence, who were also subjected

the opposite, arguing that Hutus in the diaspora see the ICTR as a victor’s court. See Eltringham, *supra* note 26, 544.

¹¹² *But see* Timothy Gallimore, *The Legacy of the International Criminal Tribunal for Rwanda (ICTR) and Its Contributions to Reconciliation in Rwanda*, 14 NEW ENG. J. INT’L & COMP. L. 239, 251 (2008) (ICTR spokesperson describing “five major ways” through which the work of the Tribunal may be said to contribute to reconciliation).

¹¹³ Adami, *supra* note 80, at 214. This formulation suggests the ICTR’s *legacy* will contribute to reconciliation, rather than the Tribunal’s work as such.

¹¹⁴ See the interviews with ICTR officials in PALMER, *supra* note 26, at 68, and Nsanzuwera, *supra* note 34, at 948.

¹¹⁵ PALMER, *supra* note 26, at 68.

¹¹⁶ Møse, *supra* note 30, at 938; Gallimore, *supra* note 112, at 254.

¹¹⁷ Gallimore, *supra* note 112, at 255.

¹¹⁸ *Id.* at 239.

¹¹⁹ Erik Møse, *The ICTR’s Completion Strategy: Challenges and Possible Solutions*, 6 J. INT’L CRIM. JUST. 667, 678 (2008); Møse, *supra* note 30, at 938–39.

¹²⁰ See Alison des Forges & Timothy Longman, *Legal Responses to Genocide in Rwanda*, in MY NEIGHBOR, MY ENEMY, *supra* note 7, at 49, 56 (arguing that the ICTR’s limited outreach may have restricted its contributions to reconciliation).

¹²¹ See Jean-Marie Kamatali, *The Challenge of Linking International Criminal Justice and National Reconciliation: The Case of the ICTR*, 16 LEIDEN J. INT’L L. 115 (2003).

¹²² *Id.* at 118, 124–26.

¹²³ *Id.* at 122–24; see also Gallimore, *supra* note 112, at 256.

¹²⁴ Kamatali, *supra* note 121, at 121–22.

to the adversarial practice of cross-examination.¹²⁵ Others have emphasized the Tribunal's acceptance of impunity for the RPF as a factor that has seriously undermined its ability to contribute to reconciliation in Rwanda.¹²⁶ Perhaps because of these difficulties, some scholars have dismissed the idea that the ICTR has, could have, or should have contributed to reconciliation.¹²⁷

Whether arguing that the ICTR can or cannot promote peace and reconciliation, these positions are based on theoretical arguments rather than empirical evidence. There is little empirical evidence of reconciliation in Rwanda in the first place, and those attempting to assess reconciliation have noted that responses were compromised by the respondents' constraints in answering sensitive political questions.¹²⁸ Even less empirical research exists on the impact of the ICTR itself on peace and reconciliation in Rwanda.¹²⁹ There is rare and valuable empirical research into what Rwandans think about reconciliation, including the ICTR's contribution to it.¹³⁰ However, as the authors note, "[t]he stepwise logistic regression . . . finds little relationship between attitudes toward the various trials and openness to reconciliation."¹³¹ In other words, these *views* concerning the ICTR's contribution to reconciliation do not necessarily illustrate the Tribunal's *actual* impact on reconciliation.

The observation that we have little evidence of the ICTR's contribution to reconciliation or peace does not imply a criticism of the Tribunal. Whatever the aspirational considerations of the Security Council, the Tribunal has had to work within the parameters of the statute that it was given.¹³² If it had found that peace and reconciliation would be better served by, for instance, sending peacekeepers, providing reparations to victims or forgetting the past, its statute did not provide it with the mandate to do anything other than investigating and prosecuting certain international crimes.

In the absence of empirical data on the Tribunal's actual contribution to peace and reconciliation, international criminal justice pursued in the name of these objectives remains a form of what Kamatali calls "experimental justice."¹³³ At a minimum, one would expect a thorough review of the experiment. But as Harvey Weinstein and Laurel Fletcher have argued, "[d]espite this lack of data, the purported link between trials and reconciliation has solidified into articles of faith that guide policy decisions in the international arena."¹³⁴ Indeed, one legacy of the ICTR and the ICTY is that empirical evidence on their contribution to peace and reconciliation has arguably become *less* relevant, for they have successfully transformed "no peace without (criminal) justice" and "no reconciliation without (criminal) justice" from causal ideas into principled ideas. The former are ideas concerning cause and effect that require evidence; the

¹²⁵ *Id.* at 131–32.

¹²⁶ MOGHALU, *supra* note 55, at 207; Haskell & Waldorf, *supra* note 55, at 75–78.

¹²⁷ Sadat, *supra* note 47, 128.

¹²⁸ See Ian S. McIntosh, *A Creative Approach to Measuring Reconciliation in Rwanda*, 1 CONFLICT TRENDS 33 (2013).

¹²⁹ Kamatali, *supra* note 121, at 116.

¹³⁰ Longman, *Connecting Justice to Human Experience: Attitudes Toward Accountability and Reconciliation in Rwanda*, in MY NEIGHBOR, MY ENEMY, *supra* note 7, at 206.

¹³¹ *Id.* at 219.

¹³² See also MOGHALU, *supra* note 55, at 202; Gallimore, *supra* note 112, at 241.

¹³³ Kamatali, *supra* note 121, at 133.

¹³⁴ Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573, 600 (2002).

latter are ideas concerning notions of right and wrong, for which evidence is far less relevant.¹³⁵ In other words, the claims that the ICTR has contributed to peace and reconciliation may have left the legacy of an *idée fixe*: namely, that after situations of mass atrocity, criminal justice must be done in order to achieve these aims.

V. CONCLUSION: FROM LEGACY TALK TOWARD AN ETHOS OF MODESTY

The ambiguities around the ICTR's potential legacy contrast sharply with the certainty of assertions about what it will have been, including in made claims by the Tribunal itself. Many of the claims are dominated by enumerations, such as the number of cases and the number of visitors to ICTR information centers. Seemingly speaking for themselves, the numbers suggest a concreteness that conceals the uncertainty of the Tribunal's legacy. The quantification of legacy claims reflects what seems to be a more general preference for ascribing numerical values to categories whose meanings are not self-evident. Concepts such as peace and reconciliation that are harder to represent numerically are less prominent in these documents; they appear instead as principled ideas that do not require empirical backing.

The desire for certainty may also explain the shift away from the focus of the resolution that created the Tribunal, which emphasized contributing to Rwanda, toward globalizing international criminal law as a field that can be applied "to all people, everywhere." Establishing the contribution to international criminal law is easier than assessing the Tribunal's impact upon Rwanda.¹³⁶ But the explanation for this shift in focus is not only epistemological; it is also political. As the Tribunal's life story is being reworked, only success stories are emphasized. When the ICTR's legacy video concludes that the Tribunal has been "an important step in a global movement towards accountability, everywhere,"¹³⁷ it recounts its life story not as a limited institutional response to a horrific moment in history, but rather as part of a broader narrative in which the Tribunal has secured a place in the legal lineage of a global movement against impunity, a movement that is likely to exist long after the Tribunal will have departed. This reworking of the life story is not only, in Bauman's words, a "bid for immortality" by giving an account of accomplishments that endure beyond the span of material lives; it is also an attempt to identify with a legal and presumably apolitical global movement. By contrast, any impact in the domain of peace and reconciliation in Rwanda involves an association with a government whose legitimacy is increasingly questioned. The ICTR's legacy may perhaps influence Rwandan politics; far more certain, however, is that Rwandan politics influences the shape and interpretation of the ICTR's legacy in Rwanda.

The shift in emphasis from contributing to Rwanda toward the international legal order has been accompanied by a shift in focus on audience. Rather than directed to Rwandans, the Tribunal's legacy claims appear to be primarily oriented toward international criminal law's sites

¹³⁵ RESTRUCTURING WORLD POLITICS: TRANSNATIONAL SOCIAL MOVEMENTS, NETWORKS AND NORMS 14 (Sanjeev Khagram, James V. Riker & Kathryn Sikkink eds., 2002).

¹³⁶ See also PALMER, *supra* note 26, at 62.

¹³⁷ See ICTR Legacy Video, *supra* note 2.

of production in The Hague and elsewhere, and even more broadly toward global policymakers, who establish and fund international criminal tribunals and who may be persuaded that such tribunals will leave a meaningful legacy in postconflict societies.¹³⁸

Legacy talk also performs a role of memorialization. The legacy website, the directory of ex-ICTR staff, and the legacy documents operate as artifacts of what the institution performed over a twenty-year period.¹³⁹ Indeed, the Tribunal's President has suggested that even the records are as much about the Tribunal as about the genocide when he recounted to the UN General Assembly in October 2015: "[w]hile the ICTR may shortly close, the records generated over the past two decades provide not only an account of the Genocide, but also tell the story of the Tribunal."¹⁴⁰ The Tribunal's records recount both the Rwandan genocide and an institutional story of the ICTR itself, telling a particular narrative of the past that overstates the ICTR's postconflict role while marginalizing alternate narratives. In this way, the Tribunal participates in a practice akin to what Jens Meierhenrich has described as the Rwandan government's "centralization of memory," where official memorials have served to legitimate the state and its particular presentation of history.¹⁴¹ The memorialization practices undertaken through the ICTR's legacy website form part of the Tribunal's own legitimation strategy: as a way of justifying its cost, the long duration of its trials, and its extended lifespan.

Legacy talk also gives a sense of meaning to those involved in the enterprise. Some people who worked for the ICTR have dedicated years of their lives to the institution—years filled with distressing evidence on the one hand and monotonous procedures on the other, which often came, so professionals say, at personal cost.¹⁴² Now that the institution is closing its doors, they may ponder its larger meaning, summarized by one of Eltringham's Tribunal informants in the form of a question: "When we walk out, what was it all about?"¹⁴³ It is not just that they are part of the Tribunal's life story; the Tribunal also forms part of *their* potential legacy.

Discussing a tribunal's legacy may inspire more reflection upon its work in practice, but less focus on legacy talk—the bid for immortality—may be a productive development. There are many reasons for an ethos of modesty when evaluating the legacy of an international criminal tribunal. Apart from issues of temporality and epistemology discussed above, which pose challenges to ascertaining what a legacy will be, there is the risk that the practice of legacy talk degenerates into decontextualized assertions about institutional performance and value. It is perhaps tempting to celebrate an impressive list of jurisprudential innovations, the number of cases

¹³⁸ In this sense the Tribunal's mode of address that privileges outsiders over the Rwandan people appears to adopt an orientation that parallels other responses to the genocide, such as prominent public apologies from political leaders. See Nesam McMillan, *Regret, Remorse and the Work of Remembrance: Official Responses to the Rwandan Genocide*, 19 SOC. & LEGAL STUD. 85 (2010).

¹³⁹ Jens Meierhenrich, *Topographies of Remembering and Forgetting: The Transformation of Lieux de Mémoire in Rwanda*, in REMAKING RWANDA, *supra* note 38, at 283.

¹⁴⁰ Address to the 70th United Nations General Assembly: Twentieth Annual Report of the International Criminal Tribunal for Rwanda by Judge Vagn Joensen, President, Oct. 13, 2015, *available at* <http://unictr.unmict.org/en/news/address-70th-united-nations-general-assembly-twentieth-annual-report-international-criminal>.

¹⁴¹ Meierhenrich, *supra* note 139.

¹⁴² Nigel Eltringham, "A War Crimes Community?": *The Legacy of the International Criminal Tribunal for Rwanda Beyond Jurisprudence*, 14 NEW ENG. J. INT'L & COMP. L. 309, 312 (2008).

¹⁴³ See Eltringham, *supra* note 26. For a similar article concerning the legacy of the ICTY, see Frédéric Mégret, *The Legacy of the ICTY as Seen through Some of Its Actors and Observers*, 3 GOETTINGEN J. INT'L L. 1011, 1013 (2012).

tried, and the individuals who have contributed to the Tribunal's work. Yet there is a risk that by focusing on the institution and its accomplishments, events that should never become normalized—the “unimaginable atrocities” that provide the *raison d'être* of international criminal tribunals¹⁴⁴—become occasions for institutional self-aggrandizement. Legacy talk's focus on the institution and its contributions to international criminal law risks pushing the phenomenon of the genocide into the background.

Trials by international criminal tribunals alone cannot do justice to the enormity of mass atrocity or to the populations affected by it. Doing justice in that sense goes beyond an international tribunal's mandate. But the bare minimum of doing justice to genocide requires acknowledging the limits of the retributive legal form and an ethos of institutional modesty.

¹⁴⁴ Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 90, pmb1, 2d recital.