

SYMPOSIUM ON THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA: BROADENING THE DEBATE

INTERNATIONAL CRIMINAL LAW AS A SPOTLIGHT AND BLACK HOLES AS CONSTITUENTS OF LEGACY

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This contribution engages with Sara Kendall's and Sarah Nouwen's article on the legacy of the International Criminal Tribunal for Rwanda (ICTR) and their call for an ethos of institutional modesty.¹ I much support the nuanced approach that underlies their call and I see it as a prerequisite to properly and adequately appreciate the ICTR's past existence and operation. I would even be open to moving one step further in the direction of an ethos of sobriety. Rather than seizing the momentum to celebrate accomplishments and highlight milestones, legacy-talk and legacy-construction of international criminal tribunals should entail a form of reckoning. Indeed, as suggested by Kendall and Nouwen, the "justices not done" and the "justices pending" must be part and parcel of the ICTR's legacy-constructions so as to offer a fair balance and to capture the ICTR's overall performance, explicitly accounting for results as well as omissions.²

Since the reach of international criminal tribunals is legally, politically, and practically limited, omissions, or black holes, are unavoidable. A better acknowledgement of such omissions may have general educative value. In this spirit, the moment of legacy-building could constitute an opportunity to emancipate from international criminal tribunals' straightjackets and an opening to move beyond the dominant spotlight that international criminal law (ICL) offers. In a temporal sense, legacy-talk and thinking seem to be tied to the end-point of an international criminal tribunal's physical existence, and as Kendall and Nouwen put it, in case of the ICTR the bids for immortality increased steadily as the signposts of closure came nearer.³ Yet, instead of succumbing to this tendency to "colonize the future,"⁴ the need for legacy could also be transformed into a chance to move beyond ICL's spotlight and to enter a space that allows for engagement with narratives, questions, facts, and responsibilities that hitherto received less limelight as they could not be squeezed into the strictures and language of ICL.

Building on Kendall's and Nouwen's fascinating exploration of the ICTR's legacy and particularly the *talk about* legacy, this contribution furthers the argument in favor of modesty and suggests ways to think about

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Originally published online 23 November 2016.

¹ Sara Kendall and Sarah Nouwen, *Speaking of Legacy: Toward and Ethos of Modesty at the International Criminal Tribunal for Rwanda*, 110 AJIL 212 (2016).

² *Id.* at 220-222.

³ *Id.* at 214-215.

⁴ *Id.*

legacy, and particularly the ICTR's legacy, in a more balanced manner. Using the metaphor of ICL as a spotlight, it submits that black holes are also constituents of legacy and should be treated as such.

International Criminal Law as a Spotlight

International criminal law acts as a spotlight in several ways. It is at its core concerned with the application of norms that belong to the corpus of *jus cogens*.⁵ The entire area of law thus attracts significant attention through the power of the concepts that it uses. This power determines the *intensity* of the spotlight. Given this intensity and power of attraction, framing a situation as an international crime or calling for an International Criminal Court-referral has become a mainstream response to any type of contemporary crisis. The language and lenses of ICL are nowadays also increasingly used by actors other than courts. Human rights rapporteurs, commissions of inquiry, and NGOs use ICL labels to alert the international community of wrongdoing and to shed light on situations of gross human rights violations.⁶

By definition, ICL tells a compelling story. It exposes, and it does so in a dualistic manner that appeals to the human psyche which is equally conditioned to categorize in good versus evil. An act either constitutes an international crime, or it does not; and a person either carries criminal responsibility or not. More than any other type of legal process, ICL processes offer a very selective picture of what transpired, as several scholars have already observed on different occasions.⁷ Indeed, ICL singles out concrete acts and attaches individual criminal responsibility thereby reducing broader situations to the criminal responsibility of specified individuals. It thus filters realities through the use of precise definitions and categories of responsibility including concomitant rules of interpretation guiding their application, as well as through the use of the highest evidentiary standards and other strict rules of procedure. Shaped by this register of ICL, the mandates of international criminal tribunals and the extent of their jurisdiction determine the *scope* of ICL's spotlight. Facts and entities that cannot find a place within this architecture of ICL remain outside the spotlight.

Already at the moment of the ICTR's establishment back in 1994, Security Council discussions demonstrated a recognition of ICL's spotlight-potential. Precisely for such "spotlight-reasons," the new Rwandan government at the time contested the ICTR's proposed jurisdiction as also set out by Matheson and Scheffer in their contribution to AJIL's Legacy-symposium.⁸ Discontent with the inclusion of war crimes in the ICTR's substantive jurisdiction and the extension of the temporal jurisdiction beyond the end of the genocide to the entire year of 1994, Rwanda ultimately even voted against the establishment of the Tribunal. In a spirit similar to Rwanda's, i.e., with a view to escaping scrutiny, France opposed backdating the temporal jurisdiction to 1 October 1990, the date of the original Rwandan Patriotic Front (RPF) invasion.⁹ Situated in the region, but not directly implicated, Kenya criticized the substantive jurisdiction as being incomplete. It argued in favor of more holistic investigations that would also examine the downing of the aircraft killing the

⁵ Genocide, crimes against humanity, and the basic rules of international humanitarian law are explicitly mentioned as examples of peremptory norms in the International Law Commission's Commentaries to the Articles on State Responsibilities, Int'l Law Comm'n, *Report on the Fifty-third session*, commentary to Article 26, para. 5 and commentary to Article 40, paras. 3-5, UN Doc. A/56/10 (2001).

⁶ Larissa van den Herik & Catherine Harwood, *Commissions of Inquiry and the Charm of International Criminal Law: Between Transactional and Authoritative Approaches*, in THE TRANSFORMATION OF HUMAN RIGHTS FACT-FINDING 233-254 (Philip Alston and Sarah Knuckey eds., 2016).

⁷ Martti Koskenniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK UN Y.B. 1, 11-19 (2002); Harmen van der Wilt, *Srebrenica: On Joint Criminal Enterprise, Aiding and Abetting and Command Responsibility*, 62 NETH. INT'L L. REV. 229-241 (2015); Antony Anguie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE J. INT'L L. 77-103 (2003).

⁸ Michael J. Matheson & David Scheffer, *The Creation of the Tribunals*, 110 AJIL 173 (2016).

⁹ Daniel D. Ntanda Nsereko, *Genocidal Conflict in Rwanda and the ICTR*, 48 NETH. INT'L L. REV., 31, 42 (2001).

Presidents of Rwanda and Burundi as well as the invasion of Rwanda prior to that.¹⁰ These discussions that took place over twenty years ago reflect a political sense and keen awareness that setting the jurisdiction of an *ad hoc* tribunal is an exercise with great spotlight-ramifications.

The ICTR's Black Holes

Immediately after its establishment, the ICTR started to prosecute individuals for genocide as it was tasked to do. Over a lifespan of more than twenty years, this endeavor resulted in the key figures as meticulously detailed on the ICTR/Mechanism for International Criminal Tribunal's (MICT) legacy website.¹¹ Crucial acts and events that were ultimately not prosecuted at the ICTR include the following: the ICTR did not adjudicate the RPF's October 1990-invasion, it did not investigate and prosecute the downing of President Habyarimana's airplane, and it did not prosecute any RPF members for alleged crimes against humanity and war crimes. Those black holes have different origins. Pre-1994 events were kept out of the spotlight from the start by the drafters of the Statute, as set out above, and the ICTR Trial and Appeals Chambers confirmed this temporal boundary on several occasions, *inter alia* in the *Media* case.¹² This black hole was thus predetermined by the ICTR's mandate combined with judicial interpretive choices and confirmations. It was equally not envisioned by the drafters to bring the downing of the plane within the ICTR's substantive jurisdiction. It has been suggested that the Prosecutor could have investigated and prosecuted this nonetheless as a war crime, and while this would indeed have required some creative thinking,¹³ it is well known that innovative constructions were not entirely absent in the early years of the *ad hoc* tribunals. Hence, the suggestion was not without any merit. Yet here again, ICTR actors—this time the Prosecutor—confirmed the drafters' focus. The statutory exclusions did not pre-empt the defense to litigate on these matters but to no avail.¹⁴ As regards the allegation of crimes against humanity and war crimes committed by the RPF, those fell squarely within the jurisdiction but remained equally unaddressed for other reasons, as also explained by Kendall and Nouwen in their article.¹⁵

Beyond black holes that result from architectural design and prosecutorial or judicial choice, the ICL paradigm as such also has the tendency to leave counterfactuals in the shadow. In the context of Rwanda, these counterfactuals regard questions such as: What if the RPF had pursued its political aspirations to return in a less violent manner back in 1990? What if the RPF had worked together with the MDR, the moderate party of Twagiramungu, to implement the 1993 Arusha Peace Agreements? Instead, the RPF's decision to attack in October 1990 and its decision to break the cease-fire in February 1993 definitely contributed to an escalating scene.¹⁶ In his book *From War to Genocide*, former ICTR expert witness and Rwanda scholar, André Guichaoua

¹⁰ Permanent Representative of Kenya to the United Nations, Letter Dated 11 October 1995 addressed to the President of the Security Council, UN Doc. S/1995/861 (Oct. 11, 1995).

¹¹ The Mechanism for International Criminal Tribunals (MICT) was established by the Security Council on 22 December 2010 to carry out a number of essential functions of the ICTR and the International Criminal Tribunal for the former Yugoslavia (ICTY), after the completion of their respective mandates.

¹² Prosecutor v. Nahimana, Case No. ICTR-99-52-A, Appeal Judgment, para. 317 (Nov. 28, 2007) (further references given in the judgment).

¹³ A. Odora-Obote, The Kagame-Power Lobby's dishonest attack on BBC documentary on Rwanda: A rejoinder, PAMBAZUKA NEWS (Nov. 28 2014).

¹⁴ The ICTR President labeled this a "politicization of the defence strategy" in ICTR, Fifth annual report, UN Doc. A/55/435 and S/2000/927, para. 142 (Oct. 2, 2000).

¹⁵ Kendall and Nouwen, *supra* note 1, at 220-221.

¹⁶ ORGANIZATION OF AFRICAN UNITY INTERNATIONAL PANEL OF EMINENT PERSONALITIES, RWANDA: THE PREVENTABLE GENOCIDE para. 6.1 (May 29, 2000).

describes the bipolarization strategies that extremist RPF-factions (as well as extremist Hutu-factions) engaged in to delay and obstruct the implementation of the Arusha Peace Agreements.¹⁷ The RPF's actions in the period between 1990 and 1994 cannot all be easily captured in ICL terms and rubrics and there is no point in stretching international criminal responsibility to breaking point. But by offering such a dominant spotlight, ICL-institutions tend to steal the limelight of other types of responsibilities, including moral and political responsibilities, that also deserve international attention.

Hence, the ICTR offered a *narrow* spotlight as a result of its predetermined mandate combined with prosecutorial and judicial choice, whereas ICL more generally offers a *dominant* spotlight in the sense that it focuses exclusively on certain acts that carry a specific type of responsibility thereby ignoring acts that may in fact have been crucial for the turn of events. Black holes are thus to some extent the inevitable outcome of a choice by others to establish an international criminal tribunal and the point therefore is not to blame only the ICTR for not doing something it was never supposed or able to do. The main argument here is rather that there may be merit in the ICTR raising awareness of its own limits, and more broadly of the limits of ICL, and the moment of closure and legacy construction seems the right moment to do so.

Legacy-Construction as an Opportunity to Emancipate from ICL's Straightjacket

ICL, and by implication, international criminal tribunals are thus capable of telling only a limited story. They may contribute to a historical record, as the ICTR did by unequivocally establishing genocide, but certain acts, events, and contexts that are crucial to understand the complexities of what happened in Rwanda are left out of the equation as they do not fit ICL's straightjacket or a tribunal's jurisdictional strictures. But jurisdiction does not necessarily need to act as a blueprint for legacy. While ICL zeroes in, legacy-construction may be the moment to zoom out and to overcome the binary approach that ICL brings in so many ways. Legacy as the moment to open up to stories that the ICTR could not tell.

Framing legacy as an opportunity to create awareness of the ICTR's narrow spotlight and possibly to move into a space beyond ICL may be particularly important in the context of Rwanda, given its current political climate. Various scholars have exposed how the single genocide narrative (*pensée unique*) has by now become state ideology and how any account or narrative that deviates therefrom is branded as genocide denial or revisionism.¹⁸ Yet, there are still many untold stories and underground narratives that do not deny the genocide as such but that just relate to different pieces of the puzzle. Those stories deserve to be told as well. The closure of the ICTR does not signify the endpoint of history. In fact, ICTR Trial Chamber I underscored as much in the *Military I* case when it found that conspiracy had not been proven beyond reasonable doubt as regards the accused in that case. It held:

Other or newly discovered information, subsequent trials or history may demonstrate a conspiracy involving the Accused prior to 6 April to commit genocide. This Chamber's task, however, is narrowed by exacting standards of proof and procedure, the specific evidence on the record before it and its primary focus on the actions of the four Accused in this trial. In reaching its finding on conspiracy, the Chamber has considered the totality of the evidence, but a firm foundation cannot be constructed from fractured bricks.¹⁹

¹⁷ ANDRÉ GUICHAOUA, *FROM WAR TO GENOCIDE: CRIMINAL POLITICS IN RWANDA, 1990–1994* ch. 5 (2015).

¹⁸ Luc Reydams, *NGO Justice: African Rights as Pseudo-Prosecutor of the Rwandan Genocide*, 38 HUM. RTS. Q. 547 (2016), Alex de Waal, *Writing Human Rights and Getting it Wrong*, BOS. REV. (June 6, 2016), Filip Reyntjens, *(Re-)imagining a reluctant post-genocide society: the Rwanda Patriotic Front's ideology and practice*, 18 J. GENOCIDE RES. 61 (2016).

¹⁹ *Prosecutor v. Bagosora*, Case No. ICTR-98-41-T, Judgment and Sentence, para. 2112 (Dec. 18, 2008).

Even if the Chamber's finding on a lack of conspiracy may well be correct and does therefore not need to be overturned by historians or other scholars, the statement more generally demarcates ICL's boundaries and there is merit in echoing such a finding at the MICT-website by way of legacy-message.

Concluding Thoughts on Legacy

In their analysis, Kendall and Nouwen identify a range of potential legacies, including the ICTR's imprint on the historical record and more tenuously a potential contribution to peace and reconciliation.²⁰ Perhaps the two are less separate than their treatment in distinct subsections suggests. A reconciled, peaceful, and sustainable society presupposes a certain shared reading of historical events,²¹ and at the very least an environment that allows questions about recent history to be posed. This does not seem to be the case for Rwanda today.²²

In its afterlife and through its legacy website, the ICTR/MICT is right to accentuate its conclusions about the genocide that occurred thereby ensuring that it is never forgotten. Yet, in addition to enumerating results, legacy constructions can, and should, also embrace black holes. In this sense it might be worthwhile if the ICTR/MICT's legacy website better recognized ICL's limits and if it were to acknowledge that there are stories which the ICTR, being an international criminal tribunal, was incapable of telling. But indeed, that kind of legacy-telling does presuppose an ethos of institutional modesty (which is perhaps not such a modest call).

²⁰ Kendall and Nouwen, *supra* note 1, at 222-224 and 227-230.

²¹ See also, MARK J. OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW (1997).

²² See, e.g., Magnus Taylor, Debating Rwanda under the RPF: gap between “believers’ and “unbelievers’ remains wide, AFR. ARGUMENTS (Oct. 8, 2013). On the politics of memory, also on the part of those still denying the genocide, see GUICHAOUA, *supra* note 17.