

CURTAIN CALL AT CLOSING: THE MULTI-DIMENSIONAL LEGACY OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

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ABSTRACT

The mandate of the International Criminal Tribunal for Rwanda (ICTR) to prosecute those most responsible for the 1994 Rwandan genocide is drawing to a close after nearly two decades. This Comment analyzes the substantive, structural, memorial, and symbolic inheritance that the ICTR bequeaths to international criminal law. This unique area of international law is not only judge-made, but also developed through the norms and conventions of states, alongside the rich participation of non-governmental actors and international policy-making agencies that define what norms become law. Given this reality, the multi-dimensional legacy of the Tribunal is fundamentally important in determining the forward movement of an area of law where such extra-legal influences are indeterminately determinative. This Comment argues that, for all of the Tribunal's flaws, and despite being originally set forth as a very specific type of criminal justice mechanism with a limited mandate and narrow jurisdiction, the ICTR has managed to further the field of international human rights through its perhaps unexpected contributions to memory, imagination, and hope at the heart of human rights.

1. INTRODUCTION

Between 500,000 and 1,000,000 people in Rwanda were killed in the short span of approximately 100 days between April 6 and mid-July of 1994 in one of the most brutally efficient and horrific massacres in history.¹ On November 8, 1994, the International

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Criminal Tribunal for Rwanda (ICTR) was created by Security Council Resolution 955 under Chapter VII² of the United Nations Charter for the “sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law”³ in the belief that establishment of the Tribunal and its prosecutions would “contribute to the process of national reconciliation and to the restoration and maintenance of peace.”⁴ Thus, from its very founding, the ICTR was mandated to selectively prosecute those most responsible for the Rwandan genocide in the hope that these prosecutions would promote restorative justice to victims in Rwanda and reconciliation between Tutsis and Hutus in communities fractured by violence and bloodshed. The Security Council, in Resolution 1503, laid out the Completion strategy of both the ICTR and its sister Tribunal, the International Criminal Tribunal for Yugoslavia (ICTY), calling on both Tribunals to complete all trial activities by 2008 and all work by 2010, which was later extended to 2011.⁵ With Resolution 1966 in December 2010, the Security Council also provided for the creation of a residual Mechanism that would continue the jurisdiction and manage the rights, obligations, and essential functions of the Tribunals.⁶ Nearly two decades since its inception, after completing seventy-five cases, seventeen of which are

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¹ The history and unfolding events of the Rwandan genocide are widely documented. See, e.g., ALISON DES FORGES, *LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA* (1999); PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* (1998); GÉRARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* (1995); ROMÉO DALLAIRE, *SHAKE HANDS WITH THE DEVIL: THE FAILURE OF HUMANITY IN RWANDA* (2003).

² See U.N. Charter arts. 39-51 (regarding the Security Council’s enforcement powers).

³ S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994).

⁴ *Id.* at 1.

⁵ S.C. Res. 1503, ¶ 7, U.N. Doc. S/RES/1503 (Aug. 28, 2003); S.C. Res. 1534, ¶ 3, U.N. Doc. S/RES/1534 (Mar. 26, 2004); S.C. Res. 1966, ¶ 13, U.N. Doc. S/RES/1966 (Dec. 22, 2010).

⁶ S.C. Res. 1966, *supra* note 5.

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pending appeal and twelve of which are acquittals,⁷ nine accused still at large, and after referring two accused to France⁸ and eight to Rwanda,⁹ the Tribunal is *finally* closed. The Arusha branch of the ICTR's residual Mechanism began operations officially on July 1, 2012; its opening marked the formal transfer of the Tribunal's outstanding work and the official and symbolic closure of the ICTR's doors.¹⁰ The ICTR is the first of the ad hoc Tribunals to close,¹¹ heralding the end of the era of ad hoc courts. This era has

⁷ Of the completed cases, nine were guilty pleas and seventeen cases are on appeal. See *Status of Cases*, INT'L CRIM. TRIB. FOR RWANDA, <http://www.unictr.org/Cases/StatusofCases/tabid/204/Default.aspx> (last visited Jan. 22, 2013).

⁸ Prosecutor v. Bucyibaruta, Case No. ICTR-2005-85-I, Decision on the Prosecutor's Request for Referral of Laurent Bucyibaruta's Indictment to France (Nov. 20, 2007); Prosecutor v. Munyeshyaka, Case No. ICTR-2005-87-I, Decision on the Prosecutor's Request for the Referral of Wenceslas Munyeshyaka's Indictment to France (Nov. 20, 2007).

⁹ Prosecutor v. Ndimbati, Case No. ICTR-95-1F-R11bis, Decision on the Prosecutor's Request for the Referral of the Case of Aloys Ndimbati to Rwanda (June 25, 2012); Prosecutor v. Ryandikayo, Case No. ICTR-95-1E-R11bis, Decision on the Prosecutor's Request for Referral of the case to the Republic of Rwanda (June 20, 2012); Prosecutor v. Munyagishari, Case No. ICTR-5-89-R11bis, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (June 6, 2012); Prosecutor v. Ntaganzwa, Case No. ICTR-96-9-R11bis, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (May 8, 2012); Prosecutor v. Sikubwabo, Case No. ICTR-95-1D-R11bis, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (Mar. 26, 2012); Prosecutor v. Kayishema, Case No. ICTR-01-67-R11bis, Decision on the Prosecutor's Request for Referral to the Republic of Rwanda (Feb. 22, 2012); Prosecutor v. Uwinkindi, Case No. ICTR-2001-75-R11bis, Decision on the Prosecutor's Request for Referral to the Republic of Rwanda (June 28, 2011); Prosecutor v. Munyarugarama, Case No. MICT-12-09-AR14, Decision on Appeal against the Referral of Phénéas Munyarugarama's Case to Rwanda and Prosecution Motion to Strike (Oct. 5, 2012). See also *infra* note 28. Rwanda abolished the death penalty in 2007 because the ICTR otherwise refused to transfer genocide suspect detainees to Rwanda's jurisdiction under Rule 11bis of the Tribunal's Completion Strategy that allows for transfer of cases to national jurisdictions. *Rwanda Abolishes Death Penalty*, AMNESTY INT'L (Aug. 2, 2007), <http://www.amnesty.org/en/news-and-updates/good-news/rwanda-abolishes-death-penalty-20070802>.

¹⁰ Judge Khalida Rachid Khan, President of the ICTR, Address to the United Nations Sec. Council: Six Monthly Report on the Completion Strategy of the ICTR (Dec. 7, 2011); Press Release, ICTR, Mechanism for International Criminal Tribunals (MICT) begins work in Arusha, ICTR/INFO-9-2-725.EN, (July 2, 2012), *available at* <http://www.unictr.org/tabid/155/Default.aspx?id=1298>.

¹¹ This includes the International Criminal Tribunal for Yugoslavia (ICTY) mandated to close in 2013, the Special Court for Sierra Leone (SCSL) targeted to complete appellate proceedings in the case of Charles Taylor in late 2013 and close soon afterwards, the Special Tribunal for Lebanon (STL) with targeted closure in 2015, and the Extraordinary Chambers in the Courts of Cambodia (ECCC) to close at an unspecified time. See *infra* note 139 (noting the completion of the ICTY's

arguably also passed with the creation of the permanent standing International Criminal Court (ICC) that has the jurisdiction to prosecute genocide, crimes against humanity, and war crimes within the territory of its signatory states.¹²

As the work of the ICTR has wound down and now, with a record of nearly two decades behind it, the Tribunal is ripe for an assessment of its legacy.¹³ Indeed, the Tribunal itself has been

mandate and the transfer of its residual obligations and functions to the Mechanism on July 13, 2013); Statement by the President of the Security Council, U.N. Doc. S/PRST/2012/21 (Oct. 9, 2012); see Ban Ki-Moon, Letter dated Feb. 16, 2012 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2012/101 (Feb. 17, 2012) (extending the mandate of the Tribunal for three years, from March 1, 2012 to March 1, 2015); see Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, as amended, Reach Kram No. NS/RKM/1004/006, art 47 (Oct. 27, 2004) (Cambodia), available at http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf (explaining that "the Extraordinary Chambers in the courts of Cambodia shall automatically dissolve following the definitive conclusion of these proceedings").

¹² Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 arts. 5–8. At the first Review Conference of the Rome Statute of the ICC held in Kampala, Uganda, on June 11, 2010, amendments to the Statute were adopted that define the crime of aggression and set forth the conditions under which the Court will exercise jurisdiction with respect to this crime. However, the Court cannot exercise jurisdiction over crimes of aggression any earlier than January 1, 2017, with at least ratification of the Amendment by 30 states and activation of the jurisdiction by consensus action or a two-thirds vote. Review Conference of the Rome Statute, Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, U.N. Doc. RC/Res.6, Annex I (June 11, 2010).

¹³ See Leila Nadya Sadat, Henry H. Oberschelp Professor of Law, Washington Univ. Sch. of Law, Lecture at the International Criminal Tribunal for Rwanda: The Legacy of the International Criminal Tribunal for Rwanda (July 3, 2012) (arguing that the Tribunal's lack of indictment of Rwandan Patriotic Front (RPF) members is not a "fatal flaw" in its legacy, but that its residual Mechanism now needs to undertake legacy work); Gabrielle McIntyre, *The International Residual Mechanism and the Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 3 GOETTINGEN J. INT'L L. 923 (2011) (arguing that the U.N. Security Council has enabled the Judges of the residual Mechanism with the necessary tools to conduct proceedings of the highest standards); Adama Dieng, *Capacity-Building Efforts of the ICTR: A Different Kind of Legacy*, 9 NW. J. INT'L HUM. RTS. 403 (2011) (arguing that the ICTR has a different, lesser-known legacy in its capacity-building efforts and dissemination of public information to Rwandans); Catharine A. MacKinnon, *The ICTR's Legacy on Sexual Violence*, 14 NEW ENG. J. INT'L. & COMP. L. 211 (2008) (stating that the Tribunal's legacy includes substantive law, law of criminal responsibility, and the process of expanding world attention under international law on violations of sexual violence); 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 (2008) (determining that the Tri-

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concerned with the question of how it will be remembered and judged.¹⁴ Assessments of its legacy cannot be free of the rubric of the original intent encompassed within its chartering mandate – to prosecute those most responsible for the genocide, to promote reconciliation, and to deter future crimes. All the same, its legacy must also reflect the Tribunal’s immeasurable and perhaps intangible influence that will nevertheless have important repercussions for transitional justice and the culture of norms respecting human rights. In this sense, assessing the Tribunal’s legacy is a much more expansive endeavor than simply assessing its contributions or its failures, about which there is much scholarship and criticism.¹⁵

This Comment argues that the ICTR’s legacy is multi-dimensional. The ‘substantive’ legacy that the ICTR leaves is the landmark international criminal and humanitarian case law generated over the past two decades, which has been the traditional focus of the overwhelming majority of analyses of the Tribunal’s work and laudable contributions. However, to only address its contributions that are most obviously related to its function and *raison d’être* would be neglectful of the other important, and perhaps unforeseen and unanticipated, contributions that the Tribunal may have made. That is, the Tribunal’s legacy would not be complete without a discussion of other processes that the Tribunal has generated or set in motion.

bunal’s legacy also includes the personal and professional experiences of its practitioners).

¹⁴ See Judge Dennis Byron, President of the ICTR, Address to the United Nations Security Council: Six Monthly Report on the Completion Strategy of the ICTR (Dec. 6, 2010) (“As our Tribunal, in its current form, draws to a close, we should all redouble our efforts to ensure its lasting legacy as a beacon for international justice.”).

¹⁵ See Luc Reydam, *Let’s Be Friends: The United States, Post-Genocide Rwanda, and Victor’s Justice in Arusha* (Working Paper, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2197823 (arguing that the Tribunal was doomed from the start as a court of ‘victor’s justice,’ in part because of support from the United States for the RPF and Paul Kagame); Lars Waldorf, “A Mere Pretense of Justice”: Complementarity, Sham Trials, and Victor’s Justice at the Rwanda Tribunal, 33 *FORDHAM INT’L L.J.* 1221 (2010) (arguing that the ICTR Prosecutor’s failure to prosecute RPF crimes is a harbinger for how “complementarity” will play out at the ICC); Peter Erlinder, *The U.N. Security Council Ad Hoc Rwanda Tribunal: International Justice or Juridically-Constructed “Victor’s Impunity”?* 4 *DEPAUL J. SOC. JUST.* 131 (2010) (“The ICTR’s one-sided prosecution threatens the legitimacy of the ICTR and calls into question all of its findings . . .”).

This Comment argues that the Tribunal's legacy encompasses not only its substantive, but also what can be categorized as its structural, memorial, and symbolic heritage. The 'structural' legacy of the ICTR is the functional institutional heritage of a particular type of ad hoc, time-bound international criminal court structure and the unique residual Mechanism set up to manage the rights, obligations, and essential functions of the Tribunal.¹⁶ The structure of the Tribunal has had a direct impact on the judicial creativity and rich 'laboratory' of international law that has been generated by the Tribunal. The 'memorial' legacy of the ICTR consists of the narratives generated through trials and in interviews of witnesses and victims, which add to the historical record and understanding of the genocide, which in turn, arguably, give voice to the memory and remembrance at the heart of collective responsibility. Finally, 'symbolic' legacy is what the presence of the ICTR for the past two decades has meant in the public imagination: a representation of the ideals of international justice, accountability, and the reach of the rule of law to all corners of the world over perpetrators of egregious crimes against humanity in order to end their impunity. It also encompasses the significance of what it means for an ad hoc court to close and for its symbolism to be extinguished. This Comment argues that altogether, the multi-dimensional legacy of the Tribunal is fundamentally important in determining the forward movement of an area of international law where such extra-legal influences are indeterminately determinative in generating a culture of norms fundamental to the respect and protection of human rights.¹⁷

To be fair, not all of the Tribunal's legacy is necessarily positive; to argue so would be to disregard the Tribunal's shortcomings.¹⁸ Part 2 of this Comment describes the political and *realpolitik* constraints on the Tribunal's operations that have haunted the Tribunal since its inception. These political constraints on the functioning of the Tribunal have contributed to the mixed

¹⁶ S.C. Res. 1966, *supra* note 5.

¹⁷ Though it is important not to conflate human rights and international humanitarian law (the "law of war" or "law of armed conflict"), humanitarian law is increasingly reflecting the influence of the human rights field through a "growing convergence . . . the blurring of thresholds of applicability, and the expansion of both systems . . ." Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 240-42, 266-73 (2000).

¹⁸ *Id.*

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reviews of its impact and will ultimately influence the final assessment of its legacy. This Comment also lays out the definition with which to analyze 'legacy' and argues that this definition must include the enduring influence of the Tribunal's work and processes on the ideals, conceptions, and instrumentalities of justice and human rights. Part 3 of this Comment will give an overview of the major substantive legacy of the Tribunal in the area of international criminal law, where the ICTR's jurisprudence has been generally recognized as most innovative and where it has changed the definitions of key legal concepts such as 'genocide,' 'crimes against humanity,' and 'sexual violence.' Part 4 of this Comment will analyze the structural legacy of the Tribunal by focusing on the effects of the Tribunal's unique, time-bound lifespan on judicial creativity, and discuss the mechanisms that it has employed to bring its mandate to a close. This Part also considers the lessons that this process holds for the closure of other international criminal tribunals. Part 5 will analyze the memorial legacy of the Tribunal by describing the Tribunal's contributions to the generation of a record of the genocide that is necessary to collective memory and responsibility. Finally, Part 6 will focus on the symbolic legacy of the Tribunal by analyzing the contributions of the Tribunal to public imagination through its performance of justice and what it has stood for in nearly two decades. This Comment ends with concluding thoughts on the still evolving legacy of the Tribunal as its merits continue to be contested and mediated in the years ahead.

2. THE FRACTIOUS BIRTH OF THE ICTR AND *REALPOLITIK* IMPLICATIONS FOR ITS INSTITUTIONAL 'LEGACY'

What is a "legacy"? In the context of international tribunals, one scholar has noted that:

Legacy can be defined as a . . . *lasting impact, most notably on bolstering the rule of law* in a particular society by conducting effective trials while also strengthening domestic capacity to do so. It includes the extent to which a court has had a "*demonstration effect*" by modeling best practices in handling the individual cases and compiling a historical record of the conflict. *Legacy should also lay the groundwork for future efforts to prevent a recurrence of crimes* by offering precedents for legal reform, building faith in judicial processes, and

promoting greater civic engagement on issues of accountability and justice.¹⁹

Similarly, the 2008 UN High Commissioner's Report on maximizing the legacy of hybrid courts also defines 'legacy' as a "lasting impact on bolstering the rule of law in a particular society, by conducting effective trials to contribute to ending impunity, while also strengthening domestic judicial capacity. The aim is for this impact to continue even after the work of the . . . court is complete."²⁰ The Report continues to assert that the need for tribunals to leave a legacy is "now firmly accepted as part of United Nations policy," citing the Secretary General's 2004 statement that "it is essential that, from the moment any future international or hybrid tribunal is established, consideration be given, as a priority, to the ultimate exit strategy and intended legacy in the country concerned."²¹ These definitions of the legacy of international tribunals focus narrowly on the *legal* legacy generated by their legal processes, that is, the impact that effective trials will have on domestic judicial and legal institutions, and whether they can deter impunity worldwide. However, in focusing only on the legal, these definitions of legacy miss the rich and varied influences that the tribunal can leave in other areas that also fundamentally affect the pursuit of justice and human rights.

Professors King and Meernik, in assessing the work of the ICTY, have developed the following four-pronged framework for describing the core missions in the ICTY's mandate "to bring to justice those responsible for serious violations" of international humanitarian law: (1) developing the Tribunal's functional and institutional capacities; (2) interpreting, applying, and developing international humanitarian and criminal law; (3) attending to and interacting with the various stakeholders who have vested interests; (4) promoting deterrence and fostering peace-building to

¹⁹ Caitlin Reiger, *Where to from Here for International Tribunals? Considering Legacy and Residual Issues*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, Sept. 2009, at 1, available at <http://ictj.org/publication/where-here-international-tribunals> (italics added).

²⁰ OFFICE OF THE U.N. HIGH COMM'R FOR HUM. RTS., RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES: MAXIMIZING THE LEGACY OF HYBRID COURTS, at 4-5, U.N. Doc. HR/PUB/08/2, UN Sales No. E.08.XIV.2 (2008).

²¹ *Id.* (citing to UN Security Council, Report of the Secretary-General, The Rule of Law and Transitional Justice in Post-Conflict Societies, U.N. Doc. S/2004/616, ¶ 46).

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prevent future aggression and conflict.”²² Their goal in developing this framework was to delineate a “more explicit conceptualization and methodology for assessing the Tribunal’s impact” given its mandate.²³ This framework is also applicable to the ICTR as it was charged with the same mandate, but with the addition of promoting national reconciliation in Rwanda that can be categorized under the third prong of the framework as attending to various stakeholders. King and Meernik’s framework is a starting point for this Comment’s assessment of the Tribunal’s legacy, which encompasses all of the factors within the framework.

Here, it is important to delineate the difference between impact and legacy. The former addresses a temporally bound consequence of the Tribunal’s work within demarcated sectors of influence, while the latter refers to a temporal and context-independent conception of influence and perception that may be less directly associated with the sectors with which law and justice are traditionally associated. Ultimately, legacy is a more expansive assessment of institutional influence than impact. In this Comment, ‘legacy’ will be defined as *the enduring influence of the Tribunal’s work and processes on the ideals, conceptions, and instrumentalities of justice and human rights*.

In assessing the ICTR’s legacy, it is important to situate the Tribunal within the constraints of international and regional politics and acknowledge the reality of these constraints on its functioning during its operations and on its final legacy.²⁴ First, while the idea of setting up an international criminal tribunal to prosecute high-ranking genocide suspects first came at the request of Rwanda,²⁵ it later withdrew its support for the creation of the Tribunal over major disputes regarding three issues: the temporal jurisdiction that the Tribunal would have; its proposed location outside of Rwanda; and the lack of a death penalty for the worst offenders of the genocide under the international law of the Tribunal when, paradoxically, lower-level offenders were subject

²² Kimi L. King & James D. Meernik, *Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia: Balancing International and Local Interests While Doing Justice*, in *THE LEGACY OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 7, 8 (Bert Swart et al. eds., 2011).

²³ *Id.* at 11.

²⁴ See generally Reiger, *supra* note 19.

²⁵ VICTOR PESKIN, *INTERNATIONAL JUSTICE IN RWANDA AND THE BALKANS: VIRTUAL TRIALS AND THE STRUGGLE FOR STATE COOPERATION* 158 (2008).

to the death penalty in Rwandan courts under its penal code.²⁶ The ICTR's narrow temporal and geographical jurisdiction is the 1994 calendar year (January 1 to December 31) for crimes committed within the territory of Rwanda and crimes committed in neighboring countries by Rwandan citizens.²⁷ Specifically, this limited temporal jurisdiction was the result of the Security Council member states' tense negotiations with Rwanda. During these negotiations, Rwanda pushed hard (i) to advance the start date of the Tribunal's temporal jurisdiction in order to cover those responsible for organizing the genocide during a "long period of [prior] planning"²⁸ and (ii) to limit the boundaries of this temporal jurisdiction, thus making it impossible for the Tribunal to prosecute atrocities by the Rwandan Patriotic Front (RPF) and post-genocide revenge killings against Hutu *génocidaires* and civilians.²⁹ Since the genocide, the RPF has dominated Rwanda's government under the leadership of Paul Kagame, who became Vice President and Minister of Defense immediately after the genocide and then President in March 2000.³⁰ At the Security Council meeting concerning the establishment of the Tribunal, the Rwandan representative lodged his country's strong opposition to locating the Tribunal outside of Rwanda, noting that the location of the Tribunal was essential

²⁶ Rwanda's death penalty sentence originates in Organic Law No. 08/1996 of August 31, 1996, on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since October 1, 1990 (Rwanda), *available at* <http://www.unhcr.org/refworld/docid/3ae6b4f64.htm>, was later repealed under Organic Law No. 31/2007 of July 25, 2007, relating to the Abolition of the Death Penalty (Rwanda). See Victor Peskin, *Conflicts of Justice - An Analysis of the Role of the International Criminal Tribunal for Rwanda*, 6 INT'L PEACEKEEPING 128, 132 (2000) ("[T]he death penalty lies at the heart of what it means to deliver justice for victims and survivors of the genocide.").

²⁷ Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, art. 7, U.N. Doc. S/RES/955 (Nov. 8, 1994).

²⁸ U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/PV.3453 (Nov. 8, 1994), in VIRGINIA MORRIS & MICHAEL P. SCHARF, 2 THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 298, 308 (1998) (including a speech of the Rwandan delegate to the United Nations following a vote to create the ICTR).

²⁹ PESKIN, *supra* note 25, at 162 ("[T]he tribunal's narrow temporal mandate compromised the court's capacity to deter and prosecute post-1994 atrocities committed by both the RPF and the exiled *génocidaires*.").

³⁰ *Biography*, PAULKAGAME.COM, http://www.paulkagame.com/2010/index.php?option=com_content&view=article&id=48&Itemid=54&lang=en (last visited Jan. 23, 2012).

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to teach the Rwandese people a lesson, to fight against the impunity to which it had become accustomed . . . and to promote national reconciliation. It therefore seems clear that the seat of the International Tribunal should be set in Rwanda; it will have to deal with Rwandese suspects, responsible for crimes committed in Rwanda against the Rwandese.³¹

The representative argued that the lack of capital punishment for those who “devised, planned and organized the genocide” was “not conducive to national reconciliation in Rwanda.”³² By a quirk of fate, Rwanda sat as a non-permanent member of the Security Council during deliberations and it ultimately cast the sole dissenting vote in the Security Council against the establishment of the Tribunal.³³

Rwanda’s opposition to the Tribunal, both initially and later, underscores the politics of war crimes tribunals and the state cooperation that is vital to the functioning of an international criminal court with no inherent powers.³⁴ The Tribunal’s dependence on state cooperation was exacerbated by its structural arrangement whereby the movement of its witnesses and investigators was directly dependent on a state with, at times, radically diverging interests. For example, on the morning of June 7, 2002, a group of witnesses testifying for alleged Hutu *génocidaires* arrived on the tarmac at Kigali International Airport for a two-hour flight to the courtrooms of the ICTR in Arusha, Tanzania—only to find that Rwanda had deliberately instituted travel restrictions that blocked them from leaving the country.³⁵ As one commentator noted, “[t]he wheels of international justice ground to an abrupt halt until August, when the Rwandan government finally allowed witnesses to travel to the tribunal.”³⁶ Against the backdrop of Rwanda’s obstruction of the Tribunal’s legal processes was then-ICTR Chief Prosecutor Carla Del Ponte’s decision in December

³¹ U.N. Doc. S/PV.3453, *supra* note 28, at 308.

³² *Id.*

³³ *Id.* at 299.

³⁴ See PESKIN, *supra* note 25, at 7 (describing the “soft power” [of tribunals] as “the capacity to affect change in the behavior of external actors by a multiplicity of strategies that do not depend on actual enforcement” and the vulnerability of tribunals as a result of the lack of enforcement powers).

³⁵ *Id.* at 3.

³⁶ *Id.*

2000 to expand ICTR investigations into RPF atrocities,³⁷ followed by her outspoken criticism of Rwanda's non-compliance with her request,³⁸ and finally her warning that she would issue indictments against RPF soldiers by the end of 2002.³⁹ Ultimately, no indictments were ever made against RPF soldiers by Del Ponte or her successors, in part because of the recognition that to do so would likely impair the Tribunal's ability to carry out its work.⁴⁰ The Tribunal's failure to prosecute Tutsi RPF atrocities committed by the then-rebel force of the current Rwandan President Paul Kagame, and to instead focus only on Hutu perpetrators of the genocide, has unfortunately tainted the Tribunal's work with aspersions that it renders only "victor's justice."⁴¹

The Rwandan government's animosity and strategically obstructionist policy toward the Tribunal, the Tribunal's limited temporal jurisdiction, and its distant location from the people for whom justice was supposed to be garnered—compounded later by the Tribunal's limited outreach to inform Rwandans of its activities⁴²—would foreshadow some of the major problems and critiques that have persistently dogged the Tribunal.⁴³ Views of

³⁷ *Id.* at 207.

³⁸ *See id.* at 208 (noting that this first public criticism "marked the beginning of an escalating confrontation with [Rwanda's] government").

³⁹ *Id.* at 207–31 (addressing the Security Council on Oct. 30, 2002, to "thwart Rwanda's counter-shaming campaign against the tribunal").

⁴⁰ *See id.* at 228 ("[ICTR Prosecutor Hassan] Jallow's current sidestepping of the RPF issue may be a strategic gambit designed to forestall conflict with the Rwanda government and secure its ongoing cooperation."). In 2009, Jallow announced that he would not indict RPF soldiers for the reported killings of 30,000 Hutus in 1994. U.N. SCOR, 64th Sess., 6134th mtg. at 33, U.N. Doc. S/PV.6134 (June 4, 2009). *See also* Letter from Human Rights Watch to ICTR Chief Prosecutor Hassan Jallow (Aug. 14, 2009), available at <http://www.hrw.org/news/2009/08/14/letter-ictr-chief-prosecutor-hassan-jallow-response-his-letter-prosecution-rpf-crime> (requesting that the ICTR Chief Prosecutor prosecute RPF crimes committed in 1994 in order to "stand against impunity and to ensure accountability for these crimes").

⁴¹ 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, 51 (2011).

⁴² *But see* Adama Dieng, *Capacity-Building Efforts of the ICTR: A Different Kind of Legacy*, 9 NW. J. INT'L HUM. RTS. 403, 405 (2011) (describing the Tribunal's "capacity-building legacy that consists of workshops, trainings, and the dissemination of public information" which has an impact on the daily lives of Rwandans).

⁴³ *See generally* Waldorf, *supra* note 15 (detailing the problems of complementary national trials with international tribunals, namely that the national proceedings are shams and international justice is inherently political); Haskell & Wal-

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the Tribunal within Rwanda at different times have ranged from indifference or apathy, since trials are “remote from most ordinary people, both geographically and socially,” to opinions that the Tribunal is a “blatantly biased and evil institution” that “maintains an oppressive regime and silences the violence of which the Hutu were victims.”⁴⁴ Moreover, the reconciliation at the heart of the ICTR’s mandate may not have come to pass as many Rwandans choose the strategy of deliberate forgetting rather than reconciling,⁴⁵ perhaps partly because the formal and impersonal nature of structured trials may fail to address specific public health needs generated by mass violence.⁴⁶ As one scholar has argued, “[b]y denying the legitimacy and social authority of ‘local determinations’ with their critical and constructive potential, international criminal jurisprudence often sacrifices the possibility of reconciliation for the normative framework entailed by

dorf, *supra* note 41 (discussing the negative consequences of the ICTR’s failure to prosecute RPF atrocities such as leaving a “legacy of ‘victor’s justice,’” painting an “inaccurate and incomplete picture” of Rwanda in 1994, and setting a “bad precedent for international justice”).

⁴⁴ Peter Uvin & Charles Mironko, *Western and Local Approaches to Justice in Rwanda*, 9 GLOBAL GOVERNANCE 219, 222, 225 (2003). See also Timothy Longman et al., *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) (conducting a 2002 study of over 2000 Rwandans in four communes, which found “[s]trong support for the idea that the ICTR should be held in Rwanda and the evidence that people feel ill-informed about the ICTR may indicate that people support *gacaca* because it is closer to them and therefore more transparent. A substantial portion of people also responded that they were not informed about the [ICTR] Rwandan trials . . .”).

⁴⁵ See, e.g., Susanne Buckley-Zistel, *Remembering to Forget: Chosen Amnesia as a Strategy for Local Coexistence in Post-Genocide Rwanda*, 76 AFRICA 131, 131 (2006) (arguing that the lack of post-conflict social transformation has led to chosen amnesia as a deliberate form of coexistence for Hutus and Tutsis in Rwanda, but that this coping mechanism “bears the danger of not challenging the social cleavages that rendered the genocide possible in the first place, and so obstructing their transformation in the future”). But see HUM. RTS. WATCH, RWANDA: JUSTICE COMPROMISES: THE LEGACY OF RWANDA’S COMMUNITY-BASED GACACA COURTS 95-98 (2011), [available at http://www.hrw.org/sites/default/files/reports/rwanda0511webwcover_0.pdf](http://www.hrw.org/sites/default/files/reports/rwanda0511webwcover_0.pdf) (pointing to some Rwandans who use *gacaca* trials in order to advance revenge motives and settle old scores that may or may not be genocide-related).

⁴⁶ See, e.g., U.N. Doc. S/PV.3453, *supra* note 28, at 302 (including a speech, directly following voting on the Resolution that created the ICTR, by the Czech Republic’s representative to the United Nations declaring that “[j]ustice is one thing; reconciliation, however, is another. The Tribunal might become a vehicle of justice, but it is hardly designed as a vehicle of reconciliation”).

retribution.”⁴⁷ Where the ICTR has attempted to support domestic initiatives at building the capacity of Rwandan courts and its legal system, this attempt has also arguably been met with resistance and opposition, and seen limited returns.⁴⁸ It is not surprising that in a different, but problematic parallel process to the trials of the ICTR, Rwanda’s domestic *gacaca* (Kinyarwanda for “grass”) courts modeled on traditional local community customs to resolve conflicts, are more immediately relevant to Rwandans.⁴⁹ This is perhaps because the Rwandan Government expressly aimed to encourage community participation and to “make ordinary Rwandans the main actors in the process of dispensing justice and fostering reconciliation” where they are not at the ICTR.⁵⁰ It is also likely that the sheer number of cases—1.2 million—that have been tried since 2005 in more than 12,000 community-based courts involving countless participants, make the *gacaca* process far more relevant to Rwandans than the distant trials at the ICTR.⁵¹ Ultimately, the history of the ICTR has been marred by tensions between its competing stakeholders: the international community and Rwandans.⁵²

Specifically, within the framework that King and Meernik conceptualized are two sets of constituencies broadly identified: international and local, under each of which are multiple sets of stakeholders to whom the Tribunal is responsible.⁵³ Here, the international community is broadly defined as major state powers, national governments, intergovernmental organizations, and

⁴⁷ Jason Benjamin Fink, *Deontological Retributivism and the Legal Practice of International Jurisprudence: The Case of the International Criminal Tribunal for Rwanda*, 49 J. AFR. L. 101, 102 (2005). See also MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 26 (1998) (discussing the lexicon of potential responses to collective violence, and specifically, the failure of trials to facilitate reconciliation since “[r]econciliation is not a goal of criminal trials except in the most abstract sense”).

⁴⁸ See Dieng, *supra* note 42. See also S.C. Res. 1503, *supra* note 5 (calling “on the international community to assist national jurisdictions, as part of the completion strategy, in improving their capacity to prosecute cases transferred from the ICTY and the ICTR . . .”).

⁴⁹ See HUM. RTS. WATCH, *supra* note 45 (stating the achievements and failures of the *gacaca* courts and “the use of *gacaca* to settle personal and political scores, corruption, and procedural irregularities”).

⁵⁰ *Id.* at 2.

⁵¹ *Id.* at 1.

⁵² *Id.*

⁵³ See King & Meernik, *supra* note 22, at 7, 11–14.

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nongovernmental organizations, whose members are principally concerned with the interpretation of international humanitarian laws, and the effectiveness and efficiency while doing so.⁵⁴ The local constituency are those who were “victims, villains, or bystanders in the atrocities committed,” and for whom “interests are more intensely personal” and complicated by often conflicting goals, especially across ethnic groups where conflict was divided along those lines.⁵⁵ King and Meernik argue that institutional, political, and practical constraints, coupled with limits on its powers, mean that, in reality, the ICTY is not able to respond to its constituents in the former Yugoslavia.⁵⁶

Similarly, the bifurcation of ‘constituencies’ is also appropriate in the case of the ICTR that—perhaps more starkly than the ICTY vis-à-vis the former Yugoslavia—has straddled the divide between its international character and efforts at helping Rwandans in the process of recovering, rehabilitation, restoration, or the combination thereof. Also, similarly, the ICTR has arguably not achieved its broad and vaguely stated goals for its local constituency because of institutional, political, and practical limitations. This Comment focuses mainly on the ICTR’s legacy to the international community, in recognition that the Tribunal as a vehicle for reconciliation and social mending may have been impracticable from the start, hindered by regional politics and international *realpolitik*; perhaps this had always existed as a secondary goal assumed to be the natural by-product of punishing perpetrators, and of doing justice. Moreover, as King and Meernik argue, where local and international interests conflict, “the preponderance of influence tends to reside with actors and interests at the international level” because the ICTY (and ICTR) are subject to the oversight of the UN, a relationship similar to that of principal-agent.⁵⁷ The Tribunal’s likely failure to address the needs of one important group of its ‘stakeholders,’ Rwandans, is acknowledged here.

However, this Comment argues that the Tribunal’s impact has been profound despite its shortcomings, and also outside of its contributions to substantive international law. This impact, such

⁵⁴ *Id.*

⁵⁵ *Id.* at 12.

⁵⁶ *See generally id.*

⁵⁷ *Id.* at 13-14.

as deterrence, norms building, strengthening the rule of law, and respect for human rights, is not discrete and measurable, nor can its causality necessarily be traced and isolated.⁵⁸ However, this impact, where it lasts and continues to influence future institutions as well as legal, social, and political norms, becomes a *legacy*. This Comment suggests that the ICTR's contributions in the following areas will become its multiple legacies.

3. SUBSTANTIVE LEGACY OF INNOVATIONS IN INTERNATIONAL CRIMINAL JURISPRUDENCE

The substantive legacy of the ICTR is comprised of its major contributions to the development of international criminal law jurisprudence. This contribution is one area of the Tribunal's legacy about which a voluminous amount of literature has been generated.⁵⁹ This Part of the Comment will focus on the Tribunal's most significant, precedent-setting contributions.

At the very outset, it is important to note that, as a formal matter, the ICTR's ability to make these substantive and creative contributions originated in its use of the category—'general principles of law'—a well-known source of international law, in crafting legal doctrine.⁶⁰ While these general principles are thought to represent a subsidiary source of law, the ICTR, much like other international criminal tribunals, has needed to use it in order to fill gaps and generate clear principles from unclear rules and statements of law.⁶¹ In so doing, it departed from the practices

⁵⁸ See THEODOR MERON, *THE MAKING OF INTERNATIONAL CRIMINAL JUSTICE: THE VIEW FROM THE BENCH* 150 (2011) ("It is very difficult to establish a direct causal link between the verdicts of international criminal tribunals and increased respect for international humanitarian law. Nonetheless, I believe there is a correlation between the founding and work of the various international criminal tribunals in the 1990s and early 2000s and the increased attention given to international humanitarian law by armed forces.").

⁵⁹ See, e.g., *JUDICIAL CREATIVITY AT THE INTERNATIONAL CRIMINAL TRIBUNALS* (Shane Darcy & Joseph Powderly eds., 2010) [hereinafter *JUDICIAL CREATIVITY*] (documenting many of these contributions in individual essays); NICHOLAS A. JONES, *THE COURTS OF GENOCIDE: POLITICS AND THE RULE OF LAW IN RWANDA AND ARUSHA* 132-55 (2010) (detailing the jurisprudential contributions of the ICTR); Erik Møse, *Main Achievements of the ICTR*, 3 J. INT'L CRIM. JUST. 920, 920 (2005) (describing the principal achievements of the ICTR).

⁶⁰ Fabian O. Raimondo, *General Principles of Law, Judicial Creativity, and the Development of International Criminal Law*, in *JUDICIAL CREATIVITY* 45, *supra* note 59, at 45.

⁶¹ *Id.* at 46.

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of other non-*ad hoc* tribunals.⁶² Of the ICTR's substantive contributions, three in particular deserve special mention and analysis: (i) its construction of the crime of 'genocide'; (ii) its contribution to the jurisprudence of sexual violence; and (iii) its expansion of the crime of incitement.

3.1. *The Meaning and Definition of 'Genocide'*

Article 2(2) of the ICTR statute defines the crime of genocide.⁶³ One of the unique features of the definition is its insistence on establishing a special intent, or a "dolus specialis."⁶⁴ It is this requirement that takes the act of killing from being an ordinary crime to an international one.⁶⁵ The ICTR's case of *Prosecutor v. Akayesu*⁶⁶ in 1998 was the first conviction for genocide by an international court.⁶⁷ Jean-Paul Akayesu was charged with genocide, crimes against humanity, and violations of Article 3 of the Geneva Conventions for his role as the *bourgmestre* of Taba commune, where at least 2000 Tutsis were killed and numerous women were subject to multiple acts of sexual violence.⁶⁸ Akayesu, as mayor of the commune, executed executive functions, exercised exclusive control over the communal police and gendarmes at the disposition of the commune, and held responsibility for the execution of laws and the administration of justice.⁶⁹ In the Judgment, the Tribunal paid special attention to the problems inherent in proving genocide and, recognizing this issue, established that the special intent for genocide did not require only direct evidence, but "can be inferred from a certain number of presumptions of fact," and "the general context of the perpetration of other . . . acts directed against that same group."⁷⁰ This ruling marked a major advance in the jurisprudence of genocide by

⁶² *Id.*

⁶³ Statute of the International Criminal Tribunal for Rwanda, *supra* note 27, art. 2(2).

⁶⁴ Payam Akhavan, *The Crime of Genocide in the ICTR Jurisprudence*, 3 J. INT'L CRIM. JUST. 989, 992 (2005).

⁶⁵ *Id.* at 992-93.

⁶⁶ *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment (Sept. 2, 1998).

⁶⁷ JONES, *supra* note 59, at 138.

⁶⁸ *Akayesu*, *supra* note 66, § 1.2 Indictment.

⁶⁹ *Id.* § 1.2, ¶ 4.

⁷⁰ *Id.* ¶ 523.

providing prosecutors and tribunals with a workable mechanism for satisfying the special intent component of the definition.

A second contribution of the *Akayesu* judgment was in its understanding of who constituted a 'group' for the crime of genocide.⁷¹ The definition of genocide requires establishing that certain actions were committed against "a national, ethnical, racial or religious group."⁷² Since the Tutsi were ethnically and linguistically identical to the Hutu in Rwanda, they were incapable of meeting the express requirements of the definition.⁷³ The ICTR in *Akayesu* viewed the definition's categories as non-exhaustive and concluded that the crime could apply to any group that was "stable and permanent."⁷⁴ In so doing, it effectively put to rest the threshold question of whether genocide had been committed in Rwanda as a matter of international law.

Emboldened by this interpretation, later panels of the ICTR have adopted similarly creative and purposive approaches to interpreting a "group" in the definition of genocide, with the understanding that failing to do so would result in a fundamental miscarriage of justice.⁷⁵

3.2. *The Jurisprudence of Sexual Violence*

Arguably, the ICTR's biggest substantive contribution lies in its contribution to the understanding of sexual violence when actively employed during a conflict.⁷⁶ During the course of the Rwandan

⁷¹ Akhavan, *supra* note 64, at 999.

⁷² Statute of the International Criminal Tribunal for Rwanda, *supra* note 27, art. 2(2).

⁷³ Akhavan, *supra* note 64, at 1000-1.

⁷⁴ See *Akayesu*, *supra* note 66, ¶ 701. The Chamber also noted that there were "a number of objective indicators of the group as a group with a distinct identity" including, reference by the Rwandan Constitution and Civil Code in force at the time, the Arusha Accords, customary rules, self-identity and subjective perception. *Id.* ¶ 170.

⁷⁵ See, e.g., *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR 95-1-T, Judgment, ¶ 98 (May 21, 1999) (adopting expansive definitions of ethnic, racial, and religious groups); see also *Prosecutor v. Rutaganda*, Case No. ICTR 96-3-T, Judgment, ¶ 376 (Dec. 6, 1999) (concluding that the Tutsi group is "characterized by its stability and permanence" and thus constitutes a distinct group protected by the Genocide Convention).

⁷⁶ See Catharine A. MacKinnon, *The ICTR's Legacy on Sexual Violence*, 14 NEW ENG. J. INT'L & COMP. L. 211 (2008) (discussing the accomplishments and shortfalls of the ICTR's treatment of sexual violence); Rebecca L. Haffajee, *Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise*

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genocide, rape was systematically committed on a massive scale, where between 250,000 and 500,000 rapes were estimated to have been perpetrated; “rape was the rule and its absence the exception,” U.N. Special Rapporteur René Degni-Ségui concluded in his Report on the Situation of Human Rights in Rwanda.⁷⁷ *Akayesu* is also the same watershed case for the redefinition of the crime of sexual violence in conflict. Specifically, in the Taba commune where Jean-Paul Akayesu was *bourgmestre*, hundreds of displaced civilians were taken hostage by local militia and/or communal police and often subjected to multiple incidences of sexual violence, sometimes by multiple assailants and frequently accompanied by torture and death.⁷⁸ Originally, charges of sexual violence and rape were not part of the indictment against Akayesu despite overwhelming evidence of such, but on questioning by Judge Navanethem Pillay of South Africa, the only female judge at the ICTR at the time, rape became front and center at the trial and garnered the encouragement of women’s groups. The trial was suspended and delayed in order for the Prosecutor to amend the indictment to include charges of sexual violence.⁷⁹

In its final judgment, the Tribunal noted that “rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts.”⁸⁰ The Tribunal instead defined the crime of rape as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive” and defined sexual violence as “any act of a sexual nature which is committed on a person under

Theory, 29 HARV. J.L. & GENDER 201, 202 (2006) (arguing for the “targeted use of [joint criminal enterprise] theory in effectively prosecuting crimes of rape and sexual violence at the ICTR”).

⁷⁷ See Special Rapporteur of the Commission on Human Rights, *Rep. on the Situation of Human Rights in Rwanda*, ¶ 16, U.N. Doc. E/CN.4/1996/68 (Jan. 29 1996) (by René Degni-Ségui) (noting that “[r]ape was systematic” during the massacres).

⁷⁸ See *Akayesu*, *supra* note 66, § 1.2, (charging Jean Paul Akayesu with being responsible, as *bourgmestre* (mayor), for the killing of 2,000 Tutsis in Taba).

⁷⁹ See *When Rape Becomes Genocide*, N.Y. TIMES, Sept. 5, 1998, at A10 (“[In making rape part of Mr. Akayesu’s [sic] genocide conviction, the decision also advances the world’s legal treatment of rape and sexual violence.”); see also *Prosecutor v. Akayesu*, Case No. ICTR 96-4-I, Amended Indictment, ¶ 12B (Jan. 1, 1996) (charging that Jean Paul Akayesu knew that acts of sexual violence were being committed).

⁸⁰ See *Akayesu*, *supra* note 66, ¶ 687.

circumstances which are coercive.”⁸¹ Here, the Tribunal effectively dispensed with the need to show the absence of *consent* independently, making it perhaps the most groundbreaking advance in gender jurisprudence worldwide⁸² given how meaningless consent is in circumstances of conflict.⁸³ The Tribunal further noted that “[s]exual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact,” explicitly referring to the incident where Akayesu ordered militia to undress a female student and made her perform gymnastics in a public courtyard, as constituting an act of sexual violence.⁸⁴ Here, the Tribunal made clear that “coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances.”⁸⁵ This broad definition of coercion is not only reflective of the reality that consent is meaningless in the circumstances of extreme inequality, such as those acts of a sexual nature with a nexus to armed conflict, genocide, and campaigns of crimes against humanity, but also “portentously” suggests that contexts of inequality are located along a continuum of settings that may not yet be “recognized as systematic, widespread, or group-based.”⁸⁶ In addition to expanding the definitions of the crimes of sexual violence and rape, the Tribunal in *Akayesu* also became the first to recognize that acts of sexual violence when committed in

⁸¹ *Id.* ¶ 598.

⁸² See Kelly D. Askin, *A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003*, 3 HUMAN RIGHTS BRIEF 16, 17 (2004) (reflecting that the *Akayesu* case was groundbreaking because it explicitly recognized rape “as an instrument of genocide and a crime against humanity” for the first time in history).

⁸³ See ANNE-MARIE L.M. DE BROUWER, SUPRANATIONAL CRIMINAL PROSECUTION OF SEXUAL VIOLENCE: THE ICC AND THE PRACTICE OF THE ICTY AND THE ICTR 455 (2005) (discussing how “with regard to the definition of rape, the ICC EoC [Elements of Crimes] do not focus on the issue of non-consent, but rather on force, threat of force, coercion or a coercive environment”); MacKinnon, *supra* note 76, at 212 (noting that the Tribunal’s greatest substantive accomplishment was its definition of rape and acknowledgment that “consent is meaningless”).

⁸⁴ See *Akayesu*, *supra* note 66, ¶ 688.

⁸⁵ *Id.*

⁸⁶ MacKinnon, *supra* note 76, at 212–13.

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furtherance of genocide could *themselves* amount to acts of genocide.⁸⁷

The decisions in several subsequent cases, including *Prosecutor v. Semanza*, *Prosecutor v. Kajelijeli*, and *Prosecutor v. Kamuhanda*, all described only the physical elements of the act of rape as set out in *Kunarac*, and seemed to shift their analyses away from the conceptual definition established in *Akayesu*.⁸⁸ However, the Tribunal in the case of *Prosecutor v. Muhimana* reiterated its definition of rape used in *Akayesu* and found the accused guilty of rape as a crime against humanity.⁸⁹ The significance of the Tribunal's efforts in the area of criminalizing sexual violence are borne out in the fact that the ICC treaty came to abandon the idea of consent in its own definitions of rape and enforced prostitution, and instead absorbed the definition created by the ICTR wherein the element of consent is irrelevant and absent.⁹⁰

More recently, in June 2011, in the case of the *Prosecutor v. Nyiramasuhuko*, the Tribunal convicted a woman for the first time in the history of international criminal law⁹¹ for genocide, crimes against humanity, and for the instigation of rape as a crime against humanity.⁹² That women do participate in and perpetrate horrific acts of sexual violence during conflict is well-documented. However, that they are held *responsible* for their participation or

⁸⁷ See *Akayesu*, *supra* note 66, ¶¶ 674–75.

⁸⁸ *Prosecutor v. Semanza*, Case No. ICTR 97-20-T, Judgment and Sentence, ¶ 506 (May 15, 2003); *Prosecutor v. Kajelijeli*, Case No. ICTR 98-44A-T, Judgment and Sentence, ¶ 912 (Dec. 1, 2003); *Prosecutor v. Kamuhanda*, Case No. ICTR 99-54A-T, Judgment and Sentence, ¶ 707 (Jan. 22, 2004).

⁸⁹ See *Prosecutor v. Muhimana*, Case No. ICTR 95-1B-T, Judgment and Sentence, ¶¶ 501, 563 (Apr. 28, 2005) (“[A]n accused incurs criminal liability if he causes serious bodily or mental harm to members of the group.”).

⁹⁰ See MacKinnon, *supra* note 76, at 212 n.4 (describing that “taking advantage of a coercive environment” is a form of force recognized in the ICC definitions of rape and enforced prostitution as crimes against humanity).

⁹¹ Nyiramasuhuko was the first woman convicted by an international tribunal, but Biljana Plavšić, a former President of *Republika Srpska* and a professor at the University of Sarajevo, had entered into a plea bargain with the ICTY on December 16, 2002 to one count of crimes against humanity for her part in targeting Bosnian Muslims, Bosnian Croats, and other non-Serb populations of thirty-seven municipalities in Bosnia and Herzegovina. See *generally* *Prosecutor v. Plavšić*, Case No. IT-00-39&40/1-S, Sentencing Judgment (Feb. 27, 2003) (describing her crimes and sentencing).

⁹² *Prosecutor v. Nyiramasuhuko*, Case No. ICTR 98-42-T, Judgment and Sentence, ¶ 6200 (June 24, 2011) (finding Nyiramasuhuko guilty on seven counts of the Indictment).

incitement of sexual violence is more rare. This lack of conviction is likely because women have seldom held such positions of control and authority as did Pauline Nyiramasuhuko, who was appointed, ironically, as the Minister of Family and Women's Development in the Interim Government of Rwanda.⁹³ This ICTR decision again symbolizes the Tribunal's breaking of new grounds in judicial decision-making in the area of sexual violence, demonstrating that no one—man *or* woman—is immune from judgment. As noted legal scholar of sexual violence and gender crimes, Professor Catharine MacKinnon poignantly observes:

No shortfall can overshadow the ICTR's biggest accomplishment, one it shares with the survivors of sexual atrocities: expanded world attention under international law to these violations And it has been in the ICTR, not in the ICTY, that it has truly begun This legacy, among many others, can never be erased.⁹⁴

3.3. *The Crime of Incitement*

The third major advance that the ICTR made in the jurisprudence of international criminal law is in the case of *Prosecutor v. Nahimana*, also known as the *Media Case*.⁹⁵ The case involved the prosecution of three individuals, two of which were actively involved in operating the infamous *Milles Colline* radio station in Rwanda that broadcasted messages relating to the extermination of Tutsis and identified specific targets for violence.⁹⁶ The defendants were convicted for the crimes of direct and public incitement to commit the crime of genocide, and for persecution as a crime against humanity.⁹⁷ In developing these crimes, the ICTR drew liberally from the international law on hate speech.⁹⁸ It recognized the media to have caused the acts of genocide directly, and was able to attribute these actions to the

⁹³ *Id.* ¶ 244.

⁹⁴ MacKinnon, *supra* note 76, at 220.

⁹⁵ See *Muhimana*, *supra* note 89.

⁹⁶ *Id.* ¶¶ 8, 9.

⁹⁷ *Id.* ¶¶ 1105–08.

⁹⁸ *Id.* ¶ 980. For a first-hand account by the Author of the opinion discussing the motivation behind the Tribunal's approach, see Navanethem Pillay, *Freedom of Speech and Incitement to Criminal Activity: A Delicate Balance*, 14 NEW ENG. J. INT'L & COMP. L. 203, 208–09 (2008).

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defendants.⁹⁹ In so doing, the Tribunal likened the media to the “bullets” in a gun that were loaded with messages of ethnic hatred and violence.¹⁰⁰ The defendants were found to be directly guilty, and their words were not treated as mere instrumentalities, but rather as deeds in and of themselves designed to kill.¹⁰¹

The Tribunal’s logic behind its opinion and expansion of the law is well-captured by its observation that “[t]he power of the media to create and destroy fundamental human values comes with great responsibility. Those who control such media are accountable for its consequences.”¹⁰² On appeal, the Tribunal’s Appeals Chamber confirmed the lower court’s approach to the crime in large measure.¹⁰³ While some have since questioned the legitimacy of the Tribunal’s approach and claimed that its jurisprudence applied a new crime to the defendants retroactively,¹⁰⁴ others have considered it an important mechanism to hold individuals in control of mass media accountable for their actions. The significance of the decision is in its signaling that “hate speech can constitute international law’s most heinous crimes” independently.¹⁰⁵

* * *

Though the Tribunal is associated with other substantive contributions—such as its decisions on the “nexus” requirement for crimes against humanity¹⁰⁶ and its procedural rules on trying

⁹⁹ Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Judgment and Sentence, ¶¶ 952–53 (Dec. 3, 2003).

¹⁰⁰ See *id.* ¶ 953 (finding three media executives guilty, *inter alia*, of genocide, direct and public incitement to genocide and conspiracy to commit genocide).

¹⁰¹ *Id.* ¶ 974–75.

¹⁰² *Id.* ¶ 945.

¹⁰³ Nahimana v. Prosecutor, Case No. ICTR-99-52-A, Appeals Chamber Judgment, ¶ 775 (Nov. 28, 2007).

¹⁰⁴ See, e.g., Diane F. Orentlicher, *Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v. Nahimana*, 12 NEW ENG. J. INT’L & COMP. L. 17, 17–33 (2005) (describing the opinion as troubling, unpersuasive, and raising issues of retroactive justice).

¹⁰⁵ *International Law – Genocide – U.N. Tribunal Finds That Mass Media Hate Speech Constitutes Genocide, Incitement to Genocide, and Crimes against Humanity – Prosecutor v. Nahimana, Barayagwiza, and Ngeze (Media Case)*, 117 HARV. L. REV. 2769, 2769 (2004).

¹⁰⁶ See John Cerone, *The Jurisprudential Contributions of the ICTR to the Legal Definition of Crimes Against Humanity – The Evolution of the Nexus Requirement*, 14 NEW ENG. J. INT’L & COMP. L. 191, 191 (2008) (arguing that among the ICTR’s most significant contributions to the jurisprudential development of international criminal law is the “evolution of the notion of Crimes Against Humanity and the nec-

multiple accused at one trial¹⁰⁷—the above-mentioned are significant in terms of the Tribunal's contributions to the jurisprudence of international criminal law. Indeed, their significance is borne out by the immense impact that they have had and by most predictions will continue to have in the future development of international criminal law.

4. STRUCTURAL LEGACY OF A TRANSIENT TRIBUNAL

The Tribunal was set up intentionally as an *ad hoc* tribunal with a finite life span. This time-bound structure is unique in the functioning of a court because “in ordinary contexts, courts are not temporary” and their permanence is the very basis of their legitimacy and source of authority.¹⁰⁸ However, the ICTR did not have permanence as the basis for its legitimacy and source of authority. Instead, the Tribunal had only the variable financial support of the Security Council and the dubious weight of moral authority at the time.¹⁰⁹ This Section argues that the explicit *bounded temporality* of the ICTR fostered an environment ripe for judges to engage in creative lawmaking, because they readily recognized the fleeting nature of their opportunity to use the events of the genocide to contribute to the development of the general body of international criminal law. With limited time, and nothing to lose, so to speak, they were freed to transcend the traditional barriers to judicial lawmaking such as: deferring to law made by other agencies, limiting themselves to explicitly prescribed sources of law, and limiting decisions to the narrow facts at hand—and were thereby able to enlarge the very boundaries of international criminal law.

essary link between individual crimes and the broader attack that raises such crimes to the level of international regulation”).

¹⁰⁷ See, e.g., Prosecutor v. Nahimana, Case No. ICTR-99-52T, Judgment and Sentence, ¶ 953 (Dec. 3, 2003).

¹⁰⁸ See Reiger, *supra* note 19, at 1. See also Guido Acquaviva, *Was a Residual Mechanism for International Criminal Tribunals Really Necessary?*, 9 J. INT'L CRIM. JUST. 789, 790-91 (2011) (“[T]he elaboration of the so-called ‘completion strategies’ of both ad hoc Tribunals, should have probably led to profound reflections on the special nature of courts of law endowed with a limited temporal jurisdiction from the outset.”).

¹⁰⁹ See HANS KÖCHLER, *GLOBAL JUSTICE OR GLOBAL REVENGE?: INTERNATIONAL CRIMINAL JUSTICE AT THE CROSSROADS* 166-71 (2003) (arguing that the ICTY and ICTR fell short of the basic separation of powers necessary for fairness and impartiality in functioning because of the Security Council's extensive role in its creation).

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The very idea of international criminal justice is in tension with the bedrock principle of state sovereignty because the former purports to have direct applicability to individuals in states who are in turn subject to those states' exclusive sovereignty.¹¹⁰ Antonio Cassese, former President of the ICTY and first President of the Special Tribunal for Lebanon, made an apt observation in noting that international law is an edifice built on the volcano of state sovereignty.¹¹¹ Judge Cassese argues that international law should endeavor to "build devices to withstand the seismic activity of states: to prevent or diminish their pernicious effect" in "demolish[ing] the very bricks and mortar from which the Law of Nations is built."¹¹² Furthermore, he cautions that "the [T]ribunal must always contend with the violent eruptions of state sovereignty: the effect of states' lack of cooperation is like lava burning away the foundations of the institution."¹¹³ In particular, Judge Cassese was referring to the ICTR and ICTY's lack of enforcement powers and their need to rely entirely on the cooperation of states for executing their orders.¹¹⁴ However, this general warning principle explains just as well the tensions between the expansion of international criminal law, which, to be truly universal, must limit state sovereignty. At its heart, international criminal law tests the very validity of international law by trumping or limiting state sovereignty.¹¹⁵

At its inception, the ICTR was restricted by the Security Council in the sources that it could look to when deciding cases; it was allowed to apply customary international law and international treaties binding on Rwanda at the time of the genocide.¹¹⁶ This limit—largely analogous to, but less restrictive than what the Security Council also placed on the ICTY¹¹⁷—

¹¹⁰ See ANTONIO CASSESE, *THE HUMAN DIMENSION OF INTERNATIONAL LAW: SELECTED PAPERS* 424–25 (2008) (discussing the difficulties of enforcing international human rights law owing to state sovereignty).

¹¹¹ *Id.* at 425 (quoting German legal scholar Theodor Niemeyer).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 425–26.

¹¹⁵ Winston P. Nagan, *International Criminal Law and the Ad Hoc Tribunal for Former Yugoslavia*, 6 *DUKE J. COMP. & INT'L L.* 127, 128 (1996).

¹¹⁶ Mia Swart, *Judicial Lawmaking at the ad hoc Tribunals: The Creative Use of the Sources of International Law and "Adventurous Interpretation,"* 70 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 459, 461 (2010).

¹¹⁷ *Id.*

originated implicitly in the Security Council's principle of restricted delegation of powers, limiting the role of judges and courts to avoid having them "legislate" the law, and instead merely interpreting and applying it, or *iudicis est ius dicere sed non dare*.¹¹⁸ Despite this general principle, judicial lawmaking in the international context is often inevitable. When confronted with a situation where there is no clear pre-existing rule, judges routinely make new rules or modify existing law to formulate a new rule.¹¹⁹ Moreover, judges are tasked with deciding actual cases, and when faced with inadequate or insufficient law, find themselves forced to develop the law in order to meet their mandate of reaching a decision.¹²⁰ This process proved to be fundamentally true of the ICTR and its jurisprudence. In the aforementioned *Akayesu* case, for example, the Tribunal based its decision almost entirely on a "conceptual approach" in the face of few (or no) legitimately recognized sources of international law upon which to reason through its decision.¹²¹ Arguably, part of the reason why the ICTR was willing and able to do this originated in the judges' recognition that their time to curb the 'volcano' of state sovereignty and impunity to *jus cogens* was limited because the Tribunal was an impermanent structure. The ICTR was perhaps also emboldened by the understanding that its decisions and law-making, though otherwise a significant incursion upon the sovereignty of states, was unlikely to be seen by the most powerful state actors (i.e., the permanent members of the Security Council) as a direct transgression on their sovereignty. These powerful state actors likely saw themselves as far removed—and as a practical matter immune—from the ICTR's new jurisprudence because of the particular context within which it was being developed.¹²² The

¹¹⁸ *Id.* See also Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631, 640–41 (2005) (exploring three kinds of judicial lawmaking: explicit delegation, implicit delegation, and non-consensual).

¹¹⁹ See Ginsburg, note 118, at 641.

¹²⁰ Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 469–70 (2004).

¹²¹ Swart, *supra* note 116, at 476.

¹²² Various scholars have argued that the (generous) funding of the Tribunals by the Security Council, relative to other international courts and tribunals, suggest that powerful permanent states of the Security Council do not perceive these Tribunals as a threat to their interests. See, e.g., Ginsburg, *supra* note 118, at 666–67; Eric Posner & John Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 1, 68 (2005) (discussing the difference between the ICC, which is independent of the United Nations Security Council, and the ICTR, which was cre-

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salience of the context thus also animated the court to take the creative risks that it did. On the other hand, the body of international criminal law called for the development of highly specific rules and principles, which the ICTR judges had an unprecedented opportunity to advance through the context of the cases they were deciding.

The closure of the ICTR and other *ad hoc* courts such as the ICTY also gives rise to the structural challenges of managing ongoing legal and moral obligations to those whose interests continue long after the Tribunal's close—the so-called 'residual' responsibilities and affirmative duties.¹²³ At the outset, it was not immediately clear that a 'residual' mechanism would be the natural vehicle by which the Tribunals would transfer and wrap up their work. The two options before the Security Council may logically have been either to refer all cases—even ongoing ones—to their national jurisdictions of Rwanda or Yugoslavia, or to leave the Tribunals 'standing' with their structures intact and make appropriate adjustments to their budget and administration.¹²⁴ However, the Security Council instead selected the option of creating a historically innovative 'residual' structure.¹²⁵ This decision is perhaps due in part to perceived Tribunal legacy contributions to the development of the international rule of law, as a result of which, the international community had become 'accustomed' to the Tribunal's continuing presence. The Tribunal therefore could not "simply shut down from one day to the next," and yet, this consideration had to be weighed against the need to

ated by the Security Council). Moreover, that the Tribunals have limited subject matter and temporal jurisdictions whose targets are individuals in failed or weak states, would suggest that the Tribunals' decisions were not threatening to powerful state actors. Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U. L. REV. 777, 780 (2006) ("ICT [International Criminal Tribunal] prosecutions will be directed almost exclusively at individuals engaged in civil conflict within weak or failing states.").

¹²³ See Reiger, *supra* note 19, at 1. See Thomas Wayde Pittman, *The Road to the Establishment of the International Residual Mechanism for Criminal Tribunals: From Completion to Continuation*, 9 J. INT'L CRIM. JUST. 797, 805 (2011) (describing the limited expected lifespan of the Tribunal and arguing that the meaning of its legacy will include its residual function connotations).

¹²⁴ Guido Acquaviva, *Was a Residual Mechanism for International Criminal Tribunals Really Necessary?*, 9 J. INT'L CRIM. JUST. 789, 793–95 (2011).

¹²⁵ Neither the Nuremberg International Military Tribunal (IMT) nor the US Nuremberg Military Tribunals (NMT) had established a separate structure for its 'residual' work. *Id.* at 791–93.

economize on Tribunal costs.¹²⁶ Therefore, the solution the Security Council created was a “small, temporary and efficient structure, whose functions and size will diminish over time, with a small number of staff commensurate with its reduced functions.”¹²⁷

In December 2008, the Secretary General identified several core functions such a residual structure for the ICTR and ICTY would have to fulfill: trying fugitives and contempt cases, protecting witnesses, reviewing judgments, enforcing sentences, assisting and referring cases to national jurisdictions, and housing and maintaining archives.¹²⁸ In light of the Mechanism’s *essential* functions, its name—‘residual’ Mechanism—is somewhat misleading.¹²⁹ The articulation and adoption of a completion strategy by the ICTR was a necessary step in concluding its mandate. However, the specific *provisions* incorporated into the Completion Strategy have subjected the Tribunal to criticism, leaving some scholars to argue that the process of justice has been superseded by the need for judicial economy.¹³⁰

The formulation of the residual Mechanism was officially established a decade into the Tribunal’s existence, in Security Council Resolution 1503 of 2003. This Resolution incorporated the two strategies articulated by then-ICTR President Claude Jorda, focusing on the most senior level perpetrators while concurrently strengthening local judges and courts.¹³¹ A year later, in March 2004, the Security Council, in adopting Resolution 1534, provided for a review of caseloads with “a view to determining which cases should be proceeded with and which should be transferred to

¹²⁶ *Id.* at 795.

¹²⁷ S.C. Res. 1966, *supra* note 5, ¶ 7.

¹²⁸ *Id.* at 3. See Catherine Denis, *Critical Overview of the ‘Residual Functions’ of the Mechanism and its Date of Commencement (including Transitional Arrangements)*, 9 J. INT’L CRIM. JUST. 819 (2011) (assessing in-depth the eight functions of the residual Mechanism, including trial of fugitives; trial of contempt cases; protection of witnesses; review of judgments; referral of cases to national jurisdictions; enforcement of sentences; assistance to national authorities and management of the Tribunal’s archives).

¹²⁹ Ruth Frolich, *Introductory Note to the UN Security Council Resolution 1966: International Residual Mechanism for the ICTY and ICTY*, 50 I.L.M. 323, 323 (2011).

¹³⁰ Laura Bingham, *Strategy or Process? Closing the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 24 BERKELEY J. INT’L L. 687, 689 (2006).

¹³¹ Daryl A. Mundis, *The Judicial Effects of the “Completion Strategies” on the Ad Hoc International Criminal Tribunals*, 99 AM. J. INT’L L. 142, 143 (2005); S.C. Res. 1503, U.N. Doc. S/RES/1503, ¶ 7 (Aug. 28, 2003).

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competent national jurisdictions.”¹³² This Security Council Resolution also stipulated a deadline for the Tribunal’s work, along with half-yearly mandatory reporting requirements “setting out the progress made towards implementation of the Completion Strategy of the Tribunal, explaining what measures have been taken and what measures remain to be taken.”¹³³ This stringent focus on deadlines has led one concerned observer to critique that the *ad hoc* Tribunal Completion Strategies

reflect a lack of value for the host of implicit social and political functions not enumerated in the [promulgating] Statutes. By setting these functions aside in favor of a strategic model that invites equating closure with docket clearing, the various authors of the Completion Strategies risk wagering the legacy of the Tribunals on the ability to meet deadlines.¹³⁴

The national referral strategy embodied in the Security Council Resolutions was realized in June 2011, when the ICTR transferred its first case, that of Jean-Bosco Uwinkindi, to Rwanda after the panel of judges decided that the Government of Rwanda was “prepared to receive its first referral.”¹³⁵ Eventually, the legitimacy

¹³² S.C. Res. 1534, *supra* note 5, ¶ 4.

¹³³ *Id.* ¶ 6.

¹³⁴ Bingham, *supra* note 130.

¹³⁵ Uwinkindi’s transfer occurred despite amici briefs submitted by Human Rights Watch, the International Association of Democratic Lawyers, and the International Criminal Defence Attorneys Association who all raised concerns indicating that witness intimidation by the Government of Rwanda was widespread and prevalent, and infringed on defendants’ rights to a fair trial. Uwinkindi’s trial in Rwanda has not started as of the publication of this Comment. His lead defense counsel has raised concerns over the lack of governmental funding and legal aid to mount his defense, including expenses for the hiring of investigative personnel and identifying and presenting potential witnesses. The ICTR has, in total, transferred eight cases to Rwanda, with the last on June 28, 2012. In this last decision, the Referral Chamber “expresse[d] its solemn hope that the Republic of Rwanda, in accepting referrals from this Tribunal, will actualise in practice the commitments it has made about its good faith, capacity and willingness to enforce the highest standards of international justice in the referred cases.” Munyarugarama, Case No. ICTR-02-79-R11*bis*, Referral Proceedings Pursuant To Rule 11 *Bis*, ¶ 69 (June 28, 2012). See Press Release, ICTR, Case of Jean Uwinkindi Referred for Trial to the Republic of Rwanda, ICTR/INFO-9-2-6811.EN (June 28, 2011), available at <http://www.unict.org/tabid/155/Default.aspx?id=1216>; Prosecutor v. Jean Uwinkindi, Case No. ICTR-2001-71-R11*bis*, Decision on Prosecutor’s Request for Referral to the Republic of Rwanda (June 28, 2011); *Uwinkindi Trial Postponed on Constitutional Challenge*, HIRONDELLE NEWS AGENCY (Jan. 18, 2013),

of the process by which Uwinkindi's trial, and that of others, is conducted by the government of Rwanda will, by extension, reflect on the Tribunal's ability to secure the highest standard of international due process and fairness for all of those who have appeared before it, and thereby indirectly impact its legacy.

Finally, Security Council Resolution 1966 in December 2010 officially established the Mechanism for International Criminal Tribunals (MICT) with two branches.¹³⁶ The Arusha Branch of the Tribunal's residual Mechanism officially began its work in July 2012.¹³⁷ The Mechanism is self-described as a "new small, temporary and efficient body, tasked with continuing the 'jurisdiction, rights and obligations and essential functions' of the ICTR and the ICTY; and maintaining the legacy of both institutions."¹³⁸ So far, the Arusha branch has been designated as fully functional and has begun issuing orders and decisions.¹³⁹ The management of the remaining issues of the Tribunal's functions by the innovative and untested structure of the Mechanism will impact its legacy as demonstrative of how it ended its work, and

<http://www.hirondellenews.org/ictr-rwanda/409-rwanda-justice/34038-180113-rwandajustice-uwinkindi-trial-postponed-on-constitutional-challenge>; *Kigali Denies Lack of Funds for Uwinkindi Defence*, HIRONDELLE NEWS AGENCY (Sept. 16, 2012), <http://www.hirondellenews.org/ictr-rwanda/current-cases/uwinkindi-jean-bosco/33799-160912-rwandaictr-kigali-denies-lack-of-funds-for-uwinkindi-defence>; Press Release, ICTR, Munyarugarama Case Transferred to Rwanda, ICTR/INFO-9-2-724.EN (June 28, 2012), available at <http://www.unict.org/tabid/155/Default.aspx?id=1294>; *Uwinkindi Transfer to be "Robustly Monitored," says ICTR*, HIRONDELLE NEWS AGENCY (Apr. 21, 2012), <http://www.hirondellenews.org/ictr-rwanda/342-current-cases/uwinkindi-jean-bosco/33069-210412-ictr-rwanda-uwinkindi-transfer-to-be-robustly-monitored-says-ictr>.

¹³⁶ S.C. Res. 1966, *supra* note 5, ¶ 6; Frolich, *supra* note 129.

¹³⁷ See S.C. Res. 1966, *supra* note 5; U.N. MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS, <http://www.unmict.org> (last visited Jan. 23, 2013). The Hague Branch of the Mechanism will take on the functions of the ICTY on July 1, 2013.

¹³⁸ U.N. MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS, *supra* note 137.

¹³⁹ Judge Theodor Meron, President of the Mechanism for Int'l Criminal Tribunals & President of the Int'l Criminal Tribunal for the Former Yugoslavia, Remarks to the U.N. Sec. Council (Dec. 5, 2012), available at http://www.unmict.org/files/statements/121205_president_meron_ny_sc_en.pdf; Letter from the President of the Int'l Residual Mechanism for Criminal Tribunals to the President of the Sec. Council (Nov. 16, 2012), http://www.unmict.org/files/documents/progress_reports/121116_progress_report_en.pdf (describing the commencement of operations at Arusha branch including functions and plans for new permanent premises of the Arusha branch).

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whether, in the last leg of the process, it did so in a manner that consolidates its contributions. As one scholar notes, “[t]he legacy and judicial integrity of the time-limited international and hybrid criminal tribunals depend on these residual functions being addressed effectively.”¹⁴⁰ This area of the Tribunal’s structural legacy will continue to unfold in the years ahead.

5. MEMORIAL LEGACY: TOWARDS A RE-IMAGINED COLLECTIVE NARRATIVE

Collective memory consists “of the stories a society tells about momentous events in its history, the events that most profoundly affect the lives of its members and most arouse their passions for long periods.”¹⁴¹ This category of events includes genocides as well as the legal proceedings arising from such an event.¹⁴² Professor Martha Minow, in writing about remembering the past in order to prevent atrocities in the future, notes:

It is here—in resisting narratives of collective guilt and producing a different sort of collective memory—that international criminal trials . . . can be of value. The task is to help the society—and the watching world—not merely recall but also re-member, that is, to reconstitute a community of humanity against which there can be crimes (hence, “crimes against humanity”), and within which victims and survivors can be reclaimed as worthy members.¹⁴³

As another scholar also notes:

As an aim for criminal law, the cultivation of collective memory resembles deterrence in that it is directed toward the future, where enhanced solidarity is sought. But like retribution, it looks to the past, to provide the narrative content of what is to be shared in memory.¹⁴⁴

¹⁴⁰ Valerie Oosterveld, *International Law and the Closure of the International and Hybrid Criminal Tribunals*, 104 AM. SOC’Y INT’L L. PROC. 37, 37 (2010).

¹⁴¹ Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463, 475 (1995).

¹⁴² *Id.*

¹⁴³ Martha Minow, *The Work of Re-Membering: After Genocide and Mass Atrocity*, 23 FORDHAM INT’L L.J. 429, 430 (1999).

¹⁴⁴ Osiel, *supra* note 141, at 474.

Trials are necessarily an imperfect vehicle for creating narratives—they are adversarial and often elicit constructed and rehearsed narratives.¹⁴⁵ Specific to the ICTR, they are also biased in their selection of witnesses and subjects in that only those most responsible for the genocide will appear before the court.¹⁴⁶ Anthropologist Nigel Eltringham argues, after viewing courtroom proceedings at the Tribunal and interviewing defense and prosecution counsels and judges at the ICTR, that witnesses and defendants are subjected to “coercive, enticed remembering,” a project where “the lawyer, judge, Truth Commissioner and historian are all artisans of memory, imposing ‘temporal causal sequencing [that] makes sense of action.’”¹⁴⁷ His critique of the historical record generated by courts, and the Tribunal in particular, is of the law’s revision of the record through judicial review, thereby potentially “re-configur[ing]” how history is read in the future.¹⁴⁸ He also critiques the sheer volume of material generated by the Tribunal and questions how it will be accessible to future “consumers.”¹⁴⁹

Minow acknowledges that the use of trials to help society remember may render tribunals vulnerable to the charge of deliberate myth-making to “the point of rendering the distinction between truth and falsity problematic,” but she credits Professor Mark Osiel with the defense that such lengths are nevertheless justified.¹⁵⁰ According to Osiel, writing history and influencing collective memory is necessary.¹⁵¹ He argues that the “process of ideological construction need not be illegitimate, nor necessarily accomplished by sleight of hand. In aspiring to infuse liberal memory, judges may justifiably construe *the record of administrative massacre to tell a compelling story vindicating the preeminent liberal*

¹⁴⁵ Bingham, *supra* note 130, at 700.

¹⁴⁶ See Minow, *supra* note 143, at 431 (“[T]rial forces those individuals selected for prosecution to serve as central, larger-than-life characters, who stand in for all the numerous others who could not be found, or who could not feasibly be tried if the nation is to go on to any future.”).

¹⁴⁷ Nigel Eltringham, “*We are not a Truth Commission*”: *Fragmented Narratives and the Historical Record at the International Criminal Tribunal for Rwanda*, 11 J. GENOCIDE RES. 55, 60 (2009).

¹⁴⁸ *Id.* at 69.

¹⁴⁹ *Id.* at 73.

¹⁵⁰ Minow, *supra* note 143, at 46.

¹⁵¹ See generally Osiel, *supra* note 141, at 463.

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virtue: respect for the moral rights of individuals.”¹⁵² Whether the historical record generated by the Tribunal is incomplete, or too voluminous, it is now a record for the annals of history. Journalist Philip Gourevitch, in his interviews with Rwandans in the immediate days after the genocide, pointed out that he “felt that these stories were offered to [him] the way that shipwrecked people, neither drowned nor saved, send messages in bottles: in the hope that, even if the legends they carry can do the teller no good, they may at some other time be of use to somebody, somewhere else.”¹⁵³

An important part of the Tribunal’s memorial legacy is its archives, which are sometimes said to be the physical manifestation of society’s collective memory, subject to responsible storage and collection for its future interpreters and narrators.¹⁵⁴ The Security Council and ICTR itself recognize the existence of such a legacy in the Tribunal’s archives.¹⁵⁵ Indeed, the ICTR’s Mechanism spends much of its time strategizing over how to best preserve the records, where they should be located, and how and to whom access should be granted.¹⁵⁶ The Tribunal’s record-keeping is innovative and has broken new ground in techniques for management, despite its initial logistical hiccups.¹⁵⁷

The records of the ICTR hold the nearly 900,000 pages of transcripts and audio and video recordings of more than 6,000 trial days, more than 10,000 interlocutory decisions, and the judgments

¹⁵² *Id.* at 647 (emphasis added).

¹⁵³ GOUREVITCH, *supra* note 1, at 183.

¹⁵⁴ Kenneth E. Foote, *To Remember and Forget: Archives, Memory, and Culture*, 53 AMER. ARCHIVIST 378, 378 (1990).

¹⁵⁵ Press Release, General Assembly, Budget Committee Takes Up Proposed 2010-2011 Financing for International Criminal Tribunals for Rwanda, Former Yugoslavia, U.N. Press Release GA/AB/3936 (Dec. 10, 2009) (noting that the physical archive will “facilitate ongoing and future prosecutions [and] serve as a historic record”).

¹⁵⁶ See, e.g., Tom A. Adami & Martha Hunt, *Genocidal Archives: The African Context – Genocide in Rwanda*, 26 J. SOC’Y OF ARCHIVISTS 105 (2005); Timothy Galimore, *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 (2008); Tom A. Adami, *The Management of International Criminal Justice Records: The Case of Rwandan Tribunal*, 13 AFR. J. LIBR. 1 (2003); Tom A. Adami, “Who will be left to tell the tale?” *Recordkeeping and International Criminal Jurisprudence*, 7 ARCHIVAL SCI. 213 (2007).

¹⁵⁷ Adami, “Who will be left to tell the tale?,” *supra* note 156.

of all the accused.¹⁵⁸ This collection includes the records of the Chambers, the Office of the Prosecutor, and the Registry, under which include the records of the ICTR detention facility in Arusha and the highly sensitive records of the Witnesses and Victims Support Section (WVSS), Gender Advisory Unit, and related ICTR Kigali medical unit. All of these require special protection in their retention.¹⁵⁹ However, despite Security Council Resolution 1966 stipulating that the archives of the ICTR (and ICTY) remain the property of the United Nations and be “inviolable wherever located,” their final site of location has not yet been determined.¹⁶⁰ Security Council Resolution 1966 is to be reviewed in 2014, and in this interim period, the residual Mechanism is responsible for and has assumed the management of the archives.¹⁶¹ Alarming, Rwanda’s bid for custody of the ICTR archives has recently gained momentum with support of the East African Community (EAC).¹⁶² In October 2012, the EAC Secretary General, Dr. Richard Sezibera, sent a letter to the United Nations supporting Rwanda’s hosting of the archives.¹⁶³ “It would not be fair for the documents of the Genocide that happened in Rwanda to be hosted in Arusha,” EAC Minister Monique Mukaruliza noted in a December 2012 Press Conference in Nairobi.¹⁶⁴

The fight for control of the ICTR’s archives is, in some ways, a “battle to control the future.”¹⁶⁵ As historians Joan M. Schwartz

¹⁵⁸ Address to the United Nations Sec. Council, *supra* note 10.

¹⁵⁹ Trudy Huskamp Peterson, *Temporary Courts, Permanent Records* (Woodrow Wilson Ctr. for Scholars, Hist. & Pub. Pol’y Prog. Occasional Paper, 2008), available at http://www.wilsoncenter.org/sites/default/files/TCPR_Peterson_HAPPOPO2.pdf.

¹⁶⁰ S.C. Res. 1966, *supra* note 5, Art. 27.1, ¶ 1.

¹⁶¹ U.N. Security Council to Decide Fate of Rwanda Tribunal Archives’ Fate, *says Official*, HIRONDELLE NEWS AGENCY (Sept. 5, 2012), <http://www.hirondellenews.org/ictr-rwanda/404-ictr-institutional-news/33682-050912-unmict-un-security-council-to-decide-final-destination-of-ictr-archives>.

¹⁶² Rodrigue Rwirahira, *Push for Custody of ICTR Archives Gathers Momentum*, THE EAST AFRICAN (Dec. 7, 2012, 7:56 PM), <http://www.theeastafrican.co.ke/Rwanda/News/Push-for-custody-of-ICTR-archives-gathers-momentum/-/1433218/1639028/-/oliptuz/-/index.html>.

¹⁶³ Letter from the Secretary-General [East African Community] to the President of the Security Council (Oct. 18, 2002), http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2012_779.pdf.

¹⁶⁴ Eric Kabeera, *EAC Backs Rwanda to Host ICTR Archives*, THE SUNDAY TIMES Dec. 2, 2012, <http://www.newtimes.co.rw/news/index.php?i=15194&a=13081>.

¹⁶⁵ *ICTR Archives: The Battle to Control the Future*, YOUTUBE, <http://www.youtube.com/watch?v=AZhWihjMPMs> (last visited Apr. 5, 2013).

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and Terry Cook have argued, “[t]hrough archives, the past is controlled. Certain stories are privileged and others marginalized.”¹⁶⁶ Schwartz and Cook equate archives with collective memory and the human identity.¹⁶⁷ Archives as records exercise power over the “shape and direction of historical scholarship, collective memory, and national identity.”¹⁶⁸ Archives become institutions when they wield power over the administrative, legal, and fiscal accountability of governments and engage in powerful public policy debates.¹⁶⁹ Control of the ICTR archives equates to symbolic and physical control of the past and a roadmap for the future. As early as March 2010, an Expert Group Meeting had recognized the vital importance of securing the Tribunal’s archives. Its final report noted the “need to retain an accessible archive which will notably assist to prevent historical revisionism in the affected regions and therefore avoid fuelling future conflict.”¹⁷⁰ In fact, this report devoted a specific section to the special considerations involving the ICTR archives, which are “essential to the long-term memory or memorialization of the conflict.”¹⁷¹

Since the late 1990’s, Rwanda has embarked on a national reconciliation program that protects the singular narrative of Rwandan genocide history as disseminated by its victorious RPF-dominated government.¹⁷² This skewed narrative discounts the participation of the RPF in atrocities committed during the genocide and their violations of international humanitarian law. It purports to erase differences in ethnic identities as an essential element of institutionalizing the hegemonic power aspirations of a

¹⁶⁶ Joan M. Schwartz & Terry Cook, *Archives, Records, and Power: The Making of Modern Memory*, 2 ARCHIVAL SCI. 1, 1-2 (2002).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 2.

¹⁶⁹ *Id.* at 1-2.

¹⁷⁰ FINAL REPORT OF THE EXPERT GROUP MEETING ON “CLOSING THE INTERNATIONAL AND HYBRID CRIMINAL TRIBUNALS: MECHANISMS TO ADDRESS RESIDUAL ISSUES” 1, 2 (2010).

¹⁷¹ *Id.* at 5.

¹⁷² JENNIFER MELVIN, BEYOND THE VENEER OF RECONCILIATION: HUMAN RIGHTS AND DEMOCRACY IN RWANDA (2012). See also RWANDA NATIONAL UNITY AND RECONCILIATION COMMISSION, <http://www.nurc.gov.rw> (last visited Apr. 5, 2013); Chi Mgbako, *Ingando Solidarity Camps: Reconciliation and Political Indoctrination in Post-Genocide Rwanda*, 18 HARV. HUM. RTS. J. 201 (2005).

minority Tutsi elite.¹⁷³ It is perpetuated through the indoctrination of hundreds of thousands of Rwandans in mandatory live-in solidarity education camps (*ingandos*), civic education camps, and preserved by *gacaca* courts.¹⁷⁴ The Rwandan national reconciliation program is only part of the dictatorship government's overall strategy of deliberate and skillful manipulation of its historical narrative to suit current regime interests.¹⁷⁵ The ICTR's archives, as the (albeit imperfect) records for the continuing construction of universal collective memory narratives of accountability and responsibility, should not be held hostage to a regime that has tried—and thus far with success—to extinguish inconvenient truths of the crimes it committed against humanity under the shadow of the genocide.

6. SYMBOLIC LEGACY

While defining 'symbolism' is not an easy task, Professor Barry O'Neill identifies three categories of symbols prevalent in international relations, of which two are relevant here: 'message' symbols and 'value' symbols.¹⁷⁶ Message symbols are communicative acts by which the sender intends for the receiver to follow a sequence of logic to arrive at a belief or action.¹⁷⁷ Value symbols are defined by the strong attitudes generated by the ideas they represent, and "unite [] various ideas under one cognitive entity."¹⁷⁸ It is one where "the symbol *itself* comes to be valued by the group."¹⁷⁹ The categories of symbolism are not exclusive, and sometimes the same event will involve several symbols, for example, where the "emotional power of value symbols promotes their use as message symbols" ¹⁸⁰ This Part argues that the

¹⁷³ MELVIN, *supra* note 172, at 3-4; Filip Reyntjens, *Constructing the Truth, Dealing with Dissent, Domesticating the World: Governance in Post-Genocide Rwanda*, 110 AFR. AFF. 1, 30-31 (2011).

¹⁷⁴ *Id.*

¹⁷⁵ Reyntjens, *supra* note 173, at 26-34.

¹⁷⁶ BARRY O'NEILL, HONOR, SYMBOLS, AND WAR 3-8 (1999).

¹⁷⁷ *Id.* at 6-7.

¹⁷⁸ *Id.* at 7. O'Neill uses the example of a national flag which "represents its country in the geographical sense, as well as its history, culture, and institutions." *Id.*

¹⁷⁹ *Id.* (emphasis added).

¹⁸⁰ *Id.*

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ICTR has evolved from focusing on message symbolism to emphasizing value symbolism.

Message symbolism of the law is in many ways similar to the 'expressive function' of the law. Professor Cass Sunstein defines this 'expressive function' as "making statements" that may be designed to change social norms, rather than controlling behavior directly.¹⁸¹ Specifically, he notes that the expressive function of the law can be understood in two different ways: first, as a "statement" about the propriety or impropriety of certain acts or behavior, employed to shape social norms that ultimately influence judgment and behavior; and second, as a function of interest and commitment to integrity.¹⁸² The latter refers to the social meaning of conduct and embodies the idea that "[t]he expressive dimension of action can [itself] be an important reason for action."¹⁸³ Criminal law, he notes, "is a prime arena for the expressive function of law."¹⁸⁴

Here, arguably, the 'legal' establishment of the Tribunal by the Security Council was an expressive function of international law meant to communicate a message and serve as a symbol.¹⁸⁵ During Security Council deliberations leading to the establishment of the ICTR, various Members had voiced reasons for the creation of an international tribunal, including that "the establishment of the Tribunal is a *clear message* that the international community is not prepared to leave unpunished the grave crimes committed in Rwanda."¹⁸⁶ The messaging function communicated by the establishment of the Tribunal under the legally binding force of Chapter VII was unequivocal: perpetrators of the genocide will be brought to justice under the mantle of a universal moral authority, wherever in the world they may be shrouded.

¹⁸¹ Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024-25 (1996).

¹⁸² *Id.* at 2025-27.

¹⁸³ *Id.* at 2027.

¹⁸⁴ *Id.* at 2044.

¹⁸⁵ For a discussion of whether the Security Council makes international law, see Tono Eitel, *The UN Security Council and its Future Contribution in the Field of International Law*, 4 MAX PLANCK U.N.Y.B. 53, 60-61 (2000) (arguing that the Security Council makes "Council Law" through the part of their Resolutions that claim binding force, and that "Council Law" should be in the same class as "Treaty Law" and "Court Law").

¹⁸⁶ U.N. Doc. S/PV.3453, *supra* note 28 (providing a statement of the Argentinian delegate) (emphasis added).

[O]ne aim of the Tribunals at the time of creation involved not the reality but the *image* of a tribunal—the semaphoric weight of the institution in the abstract. . . . [T]he Tribunals themselves, at the time of creation, validated international rules proscribing genocide with a seat of judicial process. In this way, because the rules preceded the Tribunals, creating fora for judicial reckoning had the important effect of stamping international rules with authority.¹⁸⁷

The unanimity needed to symbolically communicate the international and universal character of the condemnation may be one reason that delegates during the Security Council deliberations were so concerned about Rwanda's refusal to ratify the Resolution,¹⁸⁸ and might also help to explain why every member of the Security Council went on to ratify the Resolution, except for China, which abstained.¹⁸⁹ As the representative from the United Kingdom stated, "My Government regrets that Rwanda felt compelled to vote against the draft resolution . . . [b]ut it was essential to maintain in the statute and in the resolution the international character of the Tribunal" ¹⁹⁰ Symbolic too was the deliberate location of the Tribunal on the African continent and in Arusha, Tanzania—where the Peace Accords of 1993 were signed between the RPF and the then-government of Rwanda—as the hope for peace and international commitment to justice in that small and remote corner of East Africa.¹⁹¹

Over time, the Tribunal's symbolism has taken on a larger life. Given the body of substantive criminal and humanitarian law the Tribunal has generated, the Tribunal's performance and rendition of justice, the interpretive narratives it generated, and ultimately its very presence as an active international criminal court prosecuting

¹⁸⁷ Bingham, *supra* note 130, at 690–91.

¹⁸⁸ Mr. Keating, delegate from New Zealand, noted that "[o]rdinary people the world over will not understand if the Government of Rwanda turns its back on the efforts of the United Nations to ensure that the trial and punishment of the perpetrators of genocide take place." U.N. Doc. S/PV.3453, *supra* note 28, at 301.

¹⁸⁹ *Id.* at 305 (statement of Chinese delegate discussing China's reasons for abstaining from voting).

¹⁹⁰ *Id.* at 301–02 (statement of the delegate from the United Kingdom).

¹⁹¹ THIERRY CRUVELLIER, COURT OF REMORSE: INSIDE THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 7 (Chari Voss trans., 2010) (2006) ("The link between Nuremberg and Arusha cannot be easily denied, except perhaps in the symbolism. . . . Arusha was a symbol of peace, and the UN tribunal was an attempt to restore it in the eyes of its creators.")

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those most responsible for the 1994 atrocities in Rwanda, the Tribunal is far more than the sum of its parts.¹⁹² The ideas and ideals the Tribunal represents have generated strong attitudes and emotions, and it may now be valued as symbols of much more:

It is this symbolic function of the Tribunals, so apparent in the rhetoric of their creation, that is most threatened by the prospect of their permanent closure. In other words, not only will the Tribunals no longer be “out there,” they also face the difficult task of closing without unraveling or distorting their role as a “symbolic validation” of the international community’s commitment to bringing war criminals to justice.¹⁹³

Perhaps the ICTR will best be remembered as, and best symbolizes, the moral response of this generation tested after having once vowed “never again.”¹⁹⁴

7. CONCLUSION

For nearly two decades, the ICTR has held a grip on the public imagination as the physical manifestation of the international search for justice and accountability after one of history’s worst atrocities. Its work in a remote corner of East Africa in the shadow of Mount Meru has not gone unnoticed: to Rwandans, this search for justice may have been fraught with tension as the ICTR seemed to fail in garnering justice for those victims of RPF atrocities in a society that has become more divided and politicized since the genocide. To the international community, this search for justice came at a high price, after long trials of patience over the obstacles

¹⁹² See, e.g., Derrick Alan Everett, *Public Narratives + Reparations in Rwanda: On the Potential of Film as Promoter of International Human Rights + Reconciliation*, 7 NW. J. INT’L HUM. RTS. 103, 127 (2009) (arguing that in the movie *Sometimes in April* “[s]uch an image of the actual ICTR courts can be profoundly positive for those who have lost faith in justice, because it shows a functioning international legal justice system in which accused genocidaires [sic] suffer from the ramifications of their actions”).

¹⁹³ Bingham, *supra* note 130, at 691 (internal citation omitted).

¹⁹⁴ See David Rieff, *The Persistence of Genocide*, 165 POL’Y REV. 29, 29 (2011), available at <http://www.hoover.org/publications/policy-review/article/64261> (noting that the phrase “Never Again” has become a “kind of shorthand for the remembrance of the Shoah [Holocaust],” and because of the continued persistence of genocide, currently also for “any great crime against humanity that could not be prevented”).

created both by Rwanda and by the Tribunal's own shortcomings in anticipating the organizational needs of a vast international justice organ with little prior precedent to emulate.

It is possible, as some commentators have argued, that the Tribunal was set up to salvage the international community's guilt at standing by while one of history's worst atrocities unfolded, that is, as a self-serving moral salvo.¹⁹⁵ It is a fact that through most of its lifespan, the enormous cost—often crudely calculated as the cost spent by the international community per conviction—has accumulated to more than an estimated \$1.4 billion to the international community,¹⁹⁶ and that it overran its substantial budget multiple times.¹⁹⁷ It is also the case that the Tribunal has struggled with very public staffing and management issues for the first several years of its existence.¹⁹⁸ In short, justice at the Tribunal may have been expensive and time-consuming.¹⁹⁹ International tribunals like the ICTR “are not cheap and the beginning models may not be the best,” but they hold the promise that international humanitarian norms may be strengthened and rendered enforceable.²⁰⁰ Despite these realities and shortcomings, this Comment has argued that the Tribunal's impact has been profound.

The Tribunal's legacy to international criminal and humanitarian law, both central to the protection of contemporary international human rights, is undeniable, and may not even be fully appreciated as central to our current understanding. Less

¹⁹⁵ U.N. Doc. S/PV.3453, *supra* note 28, at 308.

¹⁹⁶ *International Justice: In the Dock, but for What?*, ECONOMIST, Nov. 25, 2010, available at http://www.economist.com/node/17572645?story_id=17572645. See also, David Wippman, *The Costs of International Justice*, 100 AM. J. INT'L L. 861 (2006) (comparing the costs of criminal prosecutions at the ICTY and the ICTR to those in the United States). Wippman notes that “[t]he perception that international criminal trials are costly and slow is accurate but misleading. On average, ICTY trials do cost much more than an average criminal trial in the United States. But the reasons relate principally to the inherent complexity of the cases being tried, the dependence of the Tribunal on international cooperation, and the costs implicit in its international nature (including translation and travel).” *Id.* at 880.

¹⁹⁷ See Wippman, *supra* note 196 (describing the costs of ICTR trials).

¹⁹⁸ See YVES BEIGBEDER, INTERNATIONAL JUSTICE AGAINST IMPUNITY: PROGRESS AND NEW CHALLENGES 99–100 (2005) (describing the ICTR's initial staffing and logistical problems).

¹⁹⁹ Patricia M. Wald, *Punishment of War Crimes by International Tribunals*, 69 SOC. RES. 1119, 1122–23 (2002).

²⁰⁰ *Id.* at 1134.

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recognized are the Tribunal's multiple other legacies in the precedential value of its structure, in its poignant memorial function, and in its indeterminable symbolic value. The Tribunal's structural legacy is one in the making, as its residual Mechanism comes to fulfill the Tribunal's concluding processes in the years ahead. The Tribunal's memorial function has since shaped a collective narrative of the genocide that acknowledges guilt, but moves beyond it to vindicate the triumph of a universal search for justice, whose legacy continues to evolve as the Tribunal's voluminous record is preserved for future historians. Finally, the Tribunal's symbolic legacy may be one of its most enduring features: it has come, over the course of its life, to epitomize justice and the fight against the impunity of those who would commit the most egregious crimes against humanity; and it has garnered the hope that its end may have been replaced with something more enduring in the continuing struggle to protect human rights around the world.