
The International Criminal Tribunal for Rwanda and Post- Genocide Justice 25 Years On

Patryk I. Labuda*

Gerald Gahima, ***Transitional Justice in Rwanda: Accountability for Atrocity***. Abingdon: Routledge, 2013. Pp. 422. £88. ISBN: 9780415522786.

Charity Wibabara, ***Gacaca Courts versus the International Criminal Tribunal for Rwanda and National Courts: Lessons to Learn from the Rwandan Justice Approaches to Genocide***. Baden-Baden: Nomos, 2014. Pp. 298. €79. ISBN: 9783848712472.

Nicola Palmer, ***Courts in Conflict: Interpreting the Layers of Justice in Post-Genocide Rwanda***. Oxford: Oxford University Press, 2015. Pp. 238. £71. ISBN: 9780199398195.

Anne-Marie de Brouwer and Alette Smeulers (eds), ***The Elgar Companion to the International Criminal Tribunal for Rwanda***. Cheltenham: Edward Elgar Publishing Limited, 2017. Pp. 544. £160. ISBN: 9781784711696.

Abstract

2019 marked the 25th anniversary of the Rwandan genocide and of the establishment of the International Criminal Tribunal for Rwanda (ICTR). After prosecuting 73 people, including high-ranking politicians and military leaders, the Rwanda Tribunal closed its doors in 2015. Together with its sister tribunal, the International Criminal Tribunal for the former Yugoslavia, the ICTR is considered one of the first-generation ad hoc tribunals mandated to bring justice to countries emerging from conflict. This review essay examines four books to take stock of the scholarly debate on the ICTR's performance. After analysing the Tribunal's achievements and shortcomings, it explains that scholarly assessments of the ICTR rely on

* Visiting Fellow, Amsterdam Center for International Law, University of Amsterdam, The Netherlands. Email: patryk.labuda@graduateinstitute.ch. The author wishes to thank Mark Drumbl and Christian Tams for their comments on an earlier draft. The author's research was supported by the Swiss National Science Foundation (Grant P2GEP1-181487).

two different analytical lenses – a national and/or international perspective – to make claims about the roles of international criminal tribunals. The essay then discusses the ICTR’s interactions with other post-genocide justice mechanisms in Rwanda and the compatibility of concurrent judicial responses to mass violence. In conclusion, it suggests that evolving interpretations of the ICTR’s performance reflect prevailing ideas about the goals and limitations of international criminal tribunals.

1 Introduction

2019 marked the 25th anniversary of the Rwandan genocide and of the establishment of the International Criminal Tribunal for Rwanda (ICTR). Created formally by the UN Security Council on 8 November 1994, the Rwanda Tribunal opened its doors in 1995. It shut down in December 2015, after prosecuting 73 people, including many high-ranking politicians and military leaders. By then, the International Residual Mechanism for Criminal Tribunals, established by the UN Security Council in December 2010, had taken over the ICTR’s functions. At the time of writing, six fugitives remain at large.¹ Together with its sister tribunal, the International Criminal Tribunal for the former Yugoslavia (ICTY), which ceased operations in December 2017, the ICTR is one of the first-generation ad hoc tribunals mandated to bring justice to countries emerging from conflict.

The 25th anniversary of the Rwandan genocide is an opportune moment to take stock of the scholarly debate around the ICTR’s achievements, shortcomings and contributions to justice in Rwanda and beyond. The carnage that unfolded in Rwanda between April and July 1994, killing between 500,000 and 1 million Tutsi and moderate Hutu, has been analysed from various perspectives. In particular, there is a vast literature on the history and politics of the genocide.² Mandated to bring peace and reconciliation to Rwanda, the ICTR operated against the backdrop of large geo-political shifts, chief among them the country’s emergence as a regional leader and a poster child for (contested) development in Africa.³ Rwanda’s drift towards authoritarianism under Paul Kagame’s Rwandan Patriotic Front (RPF) raises difficult questions about

¹ See International Residual Mechanism for International Tribunals, ‘Searching for the Fugitives’, available at www.irmct.org/en/cases/searching-fugitives (last visited 1 July 2020). After several years of inactivity, in May 2020 the MICT announced the arrest of one senior fugitive (Félicien Kabuga) and confirmed the death of another (Augustin Bizimana). See Office of the Prosecutor, Press Release, ‘Mechanism Fugitive Félicien Kabuga Arrested Today’, 16 May 2020, available at www.irmct.org/en/news/20-05-22-mechanism-fugitive-felicien-kabuga-arrested-today. Office of the Prosecutor, Press Release, ‘Mechanism Prosecutor Serge Brammertz Confirms the Death of Fugitive Augustin Bizimana’, 22 May 2020, available at: <https://www.irmct.org/en/news/20-06-08-mechanism-prosecutor-serge-brammertz-confirms-death-fugitive-augustin-bizimana>.

² See Thomson, ‘Genocide in Rwanda’, *Oxford Bibliographies* (last modified 27 February 2019), available at www.oxfordbibliographies.com/view/document/obo-9780199846733/obo-9780199846733-0032.xml.

³ See generally F. Reyntjens, *Political Governance in Post-Genocide Rwanda* (2013); S. Straus and L. Waldorf (eds), *Remaking Rwanda: State Building and Human Rights After Mass Violence* (2011).

the international community's post-genocide policies, including the ICTR's performance. For this and other reasons, the events of 1994 and their effects remain politically sensitive and divisive.

Post-genocide Rwanda has been the object of intense study by international lawyers and transitional justice scholars.⁴ The ICTR was instrumental in the revival of international criminal justice in the 1990s, which culminated in the adoption of the Rome Statute of the International Criminal Court (ICC) in 1998.⁵ At the time, the ICC had few precedents to consider besides the post-World War II Nuremberg and Tokyo tribunals. Inevitably, the ICTR (along with the ICTY) served as an early source of inspiration and – as the two sister tribunals began to encounter challenges – a cautionary tale about the limitations of international criminal tribunals.

This review essay examines four books in an effort to take stock of the scholarly debate on the ICTR's performance. After analysing some of the Tribunal's achievements and shortcomings, it explains that assessments of the ICTR rely on two different analytical lenses – a national and/or an international perspective – to formulate claims about the role of international criminal tribunals. The essay then discusses the ICTR's interactions with other post-genocide justice mechanisms in Rwanda and the compatibility of concurrent judicial responses to mass violence. The review essay concludes by noting that evolving interpretations of the ICTR's performance reflect prevailing ideas about the goals and limitations of international criminal tribunals.

2 Setting the Scene

The four books under review all grapple with the judicial aftermath of the genocide. The *Elgar Companion to the ICTR*, as the title suggests, treats the Rwanda Tribunal as a standalone object of study, whereas Gerald Gahima, Charity Wibabara and Nicola Palmer examine the ICTR in relation to Rwanda's two other post-genocide justice mechanisms: (i) the so-called *gacaca* process, a community-based dispute resolution mechanism re-purposed for genocide crimes, operating from 2001 to 2012, and (ii) prosecutions in national courts, which started in late 1996 and continue to this day, on a more limited scale.

Before turning to the points of agreement and divergence emerging from these four studies, a few words about each book by way of summary. Gahima's *Transitional Justice in Rwanda* is a comprehensive and, at times, personal reckoning with Rwanda's efforts to do justice in the aftermath of atrocity. A former deputy Minister of Justice and Prosecutor General of Rwanda, Gahima helped formulate the RPF's accountability policies in the second half of the 1990s and early 2000s, before being forced into exile (Gahima, at xlii–xliii). His monograph, initially a doctoral dissertation at the Irish

⁴ Lemarchand, 'Rwanda: State of Research', *Mass Violence and Resistance – Research Network* (25 June 2018), available at www.sciencespo.fr/mass-violence-war-massacre-resistance/en/document/rwanda-state-research.html.

⁵ Rome Statute of the International Criminal Court, UN Doc. 32/A/CONF 183/9, 17 July 1998, 37 ILM 999 ('Rome Statute').

Centre for Human Rights in Galway, carefully analyses whether prosecutions before the ICTR, national courts, foreign courts, and *gacaca* achieved their aims. Gahima's analysis is informed by a wider transitional justice agenda, which encompasses not just accountability, truth-seeking and reconciliation but also aspirational goals, such as development, governance and peacebuilding. In assessing Rwanda's still on-going transition from the 1994 genocide, Gahima concludes that too much emphasis on *criminal* accountability in response to atrocities committed by large numbers of ordinary citizens may entrench social divisions and lead to instability instead of promoting sustainable peace.

There are interesting parallels between Gahima and Wibabara, another Rwandan scholar-cum-practitioner who tries to make sense of the different judicial responses to the genocide. Wibabara, whose monograph is based on a doctoral dissertation at the University of the Western Cape in South Africa, subsequently became a prosecutor in Rwanda. Like Gahima, Wibabara analyses the ICTR, domestic prosecutions and *gacaca* in successive chapters. Yet her focus is different. Instead of analysing questions about the success or failure of Rwanda's post-genocide transition, Wibabara builds on the strengths and weaknesses of the ICTR, national courts and *gacaca* to examine how concurrently operating transitional justice mechanisms should 'optimally' regulate their relationships,

Palmer is also interested in these relationships, or what she calls 'points of interaction' and 'points of contact', between Rwanda's concurrent 'layers' of post-genocide justice. *Courts in Conflict*, which is based on Palmer's doctoral dissertation at Oxford University, is a rich interdisciplinary study of how different stakeholders (judges, lawyers, defendants, citizens, etc.) inside and outside Rwanda's three post-genocide courts understand their own and each others' work, and how divergent views of the three courts' respective functions prevent a holistic response to mass atrocities. Integrating insights from law, anthropology, sociology, politics and history, Palmer uses empirical methods and interpretive tools to explore how best to coordinate interactions among international, national and local justice processes.

The *Elgar Companion to the ICTR* is part of a new series launched by Elgar publishers, which will include further volumes on, inter alia, the ICC. Edited by Anne-Marie de Brouwer and Alette Smeulers – two academics based in the Netherlands, with an impressive record of research on the Rwandan genocide – the book consists of 16 chapters subdivided into four thematic areas: the ICTR's establishment and key facts, its substantive law, procedural law and main achievements. Leading scholars have contributed chapters: for instance Payam Akhavan, Kai Ambos, Nancy Combs, Mark Drumbl, Barbora Hola and Valerie Oosterveld. There are also contributions from practitioners, including Hassan Bubacar Jallow, a former ICTR chief prosecutor; Caroline Buisman, former defence counsel; and François-Xavier Nsanzuwera, a Rwandan attorney who worked in pre-genocide Rwanda, is a genocide survivor himself and was subsequently an ICTR legal officer for many years. The book covers a lot of ground in nearly 500 pages, and the editors ensure gender parity (10 women and nine men) and almost equal representation between Rwandan and international scholars.

3 Achievements and Shortcomings of Post-Genocide Justice

To take stock of post-genocide justice 25 years after the establishment of the ICTR, this review essay briefly examines the scholarly debate about the Tribunal's achievements and shortcomings. Given the manifold controversies (almost from the moment of its establishment) over the ICTR's performance, it is not surprising that all four books under review discuss, to various degrees, the Tribunal's contributions to post-genocide justice. However, they assess the ICTR from very different methodological, disciplinary and analytical angles.

The *Elgar Companion* deals with the ICTR on its own terms, and despite the editors' goal to integrate perspectives from criminology, sociology, victimology and history (*Elgar Companion*, at 1), the chapters – most of which are written by lawyers – focus on black-letter law and procedure. Wibabara compares the ICTR to *gacaca* and domestic courts, but she too concentrates on the three post-genocide courts' jurisprudence to make inferences about their achievements and shortcomings.

These two more legalistic approaches can be contrasted with Gahima and Palmer's transitional justice frames. Engaging with the legal, political and social dimensions of post-genocide justice, Gahima relies mainly on legal sources, but his monograph broadens the discussion by analysing how the three post-genocide courts impacted various Rwandan stakeholders. Crucially, Gahima explores not only the Tribunal's relations with the Rwandan government (relatively well covered by other scholars),⁶ but also its impact on victims, the domestic political opposition and the general public, topics which international lawyers frequently overlook.

Adopting an 'interpretive' and 'reflexive' approach, Palmer relies on interviews to compare how different groups of people understand the goals, achievements and shortcomings of post-genocide justice in Rwanda. In doing so, *Courts in Conflict* analyses the performance of the three post-genocide courts against the (evolving) perceptions of participants, rather than (static) pre-defined goals (e.g. in Security Council mandates). Instead of asking whether the ICTR *objectively* contributed to reconciliation because the 1994 ICTR Statute mentions this goal, Palmer invites different stakeholders (ICTR staff, Rwandan magistrates, *gacaca* participants and ordinary Rwandans) to explain what they *subjectively* think the Tribunal's accomplishments and shortcomings are. By connecting her analysis of perceptions of justice to on-going debates in transitional justice scholarship, Palmer challenges existing assessments of the ICTR's performance and also how scholars should analyse such questions in the first place.

Given their different methodological and analytical perspectives, it may come as a surprise that the four books essentially agree on the ICTR's core achievements. Three achievements stand out, though not necessarily in this order: (i) the development of international criminal law; (ii) removing and delegitimizing the Hutu masterminds

⁶ See V. Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (2008); Ryngaert, 'State Cooperation with the International Criminal Tribunal for Rwanda', in J. D. Meernik, T. Ingadóttir and D. L. Rothe (eds), *The Realities of International Criminal Justice* (2013) 125.

(political and military leaders) of the genocide; and (iii) creating a historical record, in particular by reducing the scope for genocide denial.

The *Elgar Companion* focuses on the first achievement. Different authors examine the ICTR's jurisprudential and procedural landmarks in excellent chapters on genocide (Akhavan), sexual violence (de Brouwer and Usta Kaitesi) and modes of liability (Ambos and Stefanie Bock), complemented by reviews of the evidentiary system (Combs), rights of the defence (Buisman) and rights of victims (Rosette Muzigo-Morrison). Wibabara's monograph also has a chapter on the ICTR which discusses many of the same prominent cases – *Akayesu*, *Bagosora* or *Kayishema* – as the *Elgar Companion*.

The second achievement is widely acknowledged as well. Gahima, Wibabara and several *Elgar Companion* authors emphasize that the ICTR succeeded in arresting and trying high-level Hutu perpetrators, which prevented their return to Rwanda and allowed a transition to take place. For instance, Gahima, who is otherwise critical of some of the ICTR's prosecutorial decisions, writes that '[i]n apprehending and bringing to justice some of the leaders of the insurgent groups . . . the tribunal delegitimized and weakened these groups politically and militarily and may thus have contributed to ensuring peace and stability in Rwanda in the short term' (Gahima, at 124). It is noteworthy that, despite failing to arrest one senior fugitive and several mid-ranking suspects to this day, the ICTR's track record in securing the custody of indictees is viewed favourably, which may be an unexpected side effect of the ICC's struggles to enforce arrest warrants.⁷

Palmer does not attempt to ascertain what the ICTR objectively accomplished, but her interviews (conducted in 2008, 2010 and 2012) point to the same two contributions: the development of case law and the removal of key perpetrators. Palmer quotes former ICTR Presidents, Prosecutors, defence counsel and other Tribunal employees to make this point. Her interviews at the ICTR also reveal two other, more contested contributions to post-genocide justice: creating a historical record and encouraging reconciliation (she notes that interviewees were more divided on whether the ICTR should be expected to perform these two tasks at all).

Gahima is less hesitant about this last point in his monograph. He underscores that the ICTR established a historical record that is far less contested by Rwandans today than it ever would have been had purely national mechanisms attempted to resolve questions of historical and judicial interpretation. Gahima, Wibabara and some *Elgar Companion* authors all point to the Appeals Chamber's 2006 judicial notice of the genocide against the Tutsi minority as crucial in consolidating a shared narrative of the genocide.⁸ While the four books mention several other sub-themes and ancillary

⁷ This is noteworthy since the ICTY has no outstanding arrest warrants. On the ICC and challenges of state cooperation and arresting fugitives, see contributions by B. van Schaack, R. Dicker, C. Ryngaert, T. Parker and N. Banteka, in R. H. Steinberg (ed.), *Contemporary Issues Facing the International Criminal Court* (2016), at 382–464; O. Bekou and D. Birkett (eds), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (2016). Hillebrecht and Straus, 'Who Pursues the Perpetrators?: State Cooperation with the ICC', 39 *Human Rights Quarterly* (HRQ) (2017) 162.

⁸ Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, *Prosecutor v. Karemera, Ngirumpatse and Nzirorera* (ICTR-98-44-AR73 (C)), Appeals Chamber, 16 June 2006. The Appeals Chamber took judicial notice of the fact that '[b]etween 6 April 1994 and 17 July 1994, there was a

benefits, for instance the ICTR's contribution to ending impunity and its deterrent effect, it seems that these secondary achievements – to the extent they exist – remain more contentious and are only indirectly attributable to the ICTR.

Analysis of the ICTR's weaknesses reveals a greater diversity of topics. Gahima skillfully analyses the Tribunal's numerous challenges from its early years of operation (Helen Hintjens's chapter in the *Elgar Companion* also provides a useful overview), noting in particular the ICTR Prosecutor's slow progress in locating and arresting genocide suspects, delays in bringing people to trial once apprehended, violations of defendants' fair trial rights, abuse of the Tribunal's legal aid scheme, lack of sensitivity towards victims, poor investigations, weak evidence collection practices and financial mismanagement. Moving beyond the Tribunal's early missteps, criticisms mentioned in the four books include prolonged trials and appeals proceedings, non-cooperation from states in the region and insufficient victim participation and reparations before the ICTR.

None of these shortcomings will be unfamiliar to transitional justice and international criminal law experts. Interestingly, however, some assessments of the ICTR's performance change over time. For instance, in his chapter for the *Elgar Companion*, Alex Odora-Obote, a former legal advisor to the ICTR Prosecutor, acknowledges various investigative shortcomings in the ICTR's early years of operation, but he explains that most of these challenges had been satisfactorily overcome by the time of the Tribunal's closure. Palmer confirms that at the time of her interviews at the ICTR between 2008 and 2012, judges, prosecutors and lawyers viewed flawed investigative practices as a relic of the 1990s (which they were still grappling with in some cases, however).

One aspect of the ICTR's performance remains especially contentious: its failure to prosecute alleged RPF crimes. Although the three monographs and a few *Elgar Companion* chapters (Hintjens, Felix Mukwiza Ndahinda and Odora-Obote) address this issue to varying degrees, serious divergences remain on how to classify RPF abuses – as potential war crimes or mere 'revenge killings' (as the RPF-led Rwandan government argues) – and whether the ICTR could and should have done more to investigate these allegations.

At one end of the spectrum, Wibabara suggests that military tribunals in Rwanda have already provided accountability for RPF crimes, which implies also that the ICTR needed not assert jurisdiction. However, Wibabara provides no footnote to substantiate this point (Wibabara, at 214), a curious omission in a book that lists at least two sources for most claims. In the same vein, Odora-Obote, who was likely involved in

genocide in Rwanda against the Tutsi ethnic group', arguing that '[t]he fact of the Rwandan genocide is a part of world history, a fact as certain as any other, a classic instance of a "fact of common knowledge"' (*ibid.* ¶¶ 33 and 35). For critical analyses of this decision's impact on defendants' rights, see Shannon, 'Passing the Poisoned Chalice: Judicial Notice of Genocide by the ICTR', 19 *Revue Québécoise de Droit International* (2006) 95; Heller, 'Prosecutor v. Karemera, Ngirumpatse, & Nzirorera. Case No. ICTR-98-44-AR73(C). Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice', 101 *American Journal of International Law (AJIL)* (2007) 157.

some key processes that he describes, appears to agree with the decision of the last Prosecutor, Hassan Jallow, not to pursue allegations against the RPF. Citing Jallow's correspondence with Human Rights Watch, Odora-Obote suggests that the ICTR could only focus on those bearing the greatest responsibility before affirming that, in fact, the Tribunal selected perpetrators from 'every level of the hierarchy' from 'political parties and the military establishment' (at 255).⁹ There is no attempt to explain whether the RPF were not considered among those bearing greatest responsibility, or how such an interpretation of responsibility can be squared with the ICTR's prosecutions of low-level *génocidaires*. It is hard to escape the conclusion that Jallow's rationale for not pursuing alleged RPF crimes, as described by Odora-Obote, is incoherent, though it remains unclear whether this was Odora-Obote's aim. Jallow's chapter in the *Elgar Companion* provides no further insights into the RPF investigations, and his other scholarly writing has avoided the topic.¹⁰

Gahima is at the other end of the spectrum in this debate. For him, the lack of accountability for RPF crimes is not only one of the ICTR's greatest failings; it is a primary cause for the lack of reconciliation among Rwandans. Gahima devotes an entire chapter to this subject and challenges some prevailing interpretations of the ICTR's actions. Notably, he argues – contra Carla del Ponte, a former chief Prosecutor¹¹ – that none of the prosecutors made a serious effort to investigate alleged RPF crimes. Gahima also disagrees with Del Ponte's claim that the Prosecutors had no choice but to cooperate with the Rwandan government to effectively investigate allegations against the RPF. Gahima concludes that '[t]he declarations of the successive prosecutors expressing intentions to investigate crimes allegedly committed by the [RPF] would appear to have been merely intended to appease or pacify those in the international community who still advocated for holding members of the [RPF] accountable . . .' (Gahima, at 112). It is noteworthy, however, that, despite condemning the ICTR for failing to pursue the RPF, Gahima concludes that victor's justice, as flawed as it is, is still better than no justice.

Academic debate over alleged RPF crimes has intensified in recent years, driven in part by the publication in 2018 of Judi Rever's *In Praise of Blood*.¹² Drawing on interviews with exiled RPF defectors and confidential ICTR documents, Rever argues that the RPF's crimes against Hutus meet the threshold of genocide and, in so doing, she revives the highly controversial double-genocide thesis that is used to minimize

⁹ Roth, 'Letter to the ICTR Chief Prosecutor Hassan Jallow in Response to His Letter on the Prosecution of RPF Crimes', *Human Rights Watch* (14 August 2009), available at www.hrw.org/news/2009/08/14/letter-ict-r-chief-prosecutor-hassan-jallow-response-his-letter-prosecution-rpf.

¹⁰ Jallow, 'Prosecuting International Crimes in Africa: Lessons from Rwanda and Reflections on the Future', 40 *Africa Development* (2015) 177. See also Jallow, 'Prosecutorial Discretion and International Criminal Justice', 3 *Journal of International Criminal Justice (J. Int'l Crim. Justice)* (2005) 145.

¹¹ C. Del Ponte, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity: A Memoir* (2009).

¹² J. Rever, *In Praise of Blood: The Crimes of the Rwandan Patriotic Front* (2018). Controversy erupted the previous year over Filip Reyntjens's *Que sais-je (Que sais-je is a famous French series of short encyclopedic resumes on various topics)*. See F. Reyntjens, *Le génocide des Tutsi au Rwanda* (2017).

the genocide against the Tutsi.¹³ Rever's book has triggered responses and, at times scathing, rebuttals in the press and in academic journals.¹⁴

Notwithstanding the often heated rhetoric accompanying these exchanges, it is beyond doubt that a number of legitimate questions over the RPF's actions lack satisfactory answers in the literature. Unresolved issues include the number and types of casualties attributable to the RPF in 1994¹⁵ and after 1997 in the DRC¹⁶ as well as the RPF's alleged responsibility for shooting down President Habyarimana's plane on 6 April 1994.¹⁷ So long as the RPF remains in power, it is difficult to assess the Rwandan military justice system's record of prosecuting RPF abuses, which is frequently noted by scholars but usually relies on self-reported cases attributable to a few RPF-generated sources from the late 1990s and early 2000s.¹⁸ In light of Gahima's critique, it would also be important to know more about Carla del Ponte's special investigation into RPF abuses, how the Rwandan authorities obstructed the ICTR's work and why Prosecutor Jallow decided to effectively abandon the special investigation. It is likely no coincidence that Palmer's monograph, based on embedded research in Rwanda, has little to say about allegations against the RPF, underscoring just how sensitive this topic remains among ordinary Rwandans and judicial officials.¹⁹

¹³ On the double-genocide theory, see Straus, 'The Limits of a Genocide Lens: Violence Against Rwandans in the 1990s', 21 *Journal of Genocide Research (J. Genocide Res.)* (2019) 504.

¹⁴ Dupaquier, 'Génocide des Tutsi du Rwanda: le négationnisme comme best seller', *Afrikarabia* (1 May 2018), available at <http://afrikarabia.com/wordpress/genocide-des-tutsi-du-rwanda-le-negationnisme-comme-best-seller/>; Straus, *supra* note 13; Caplan, 'Rethinking the Rwandan Narrative for the 25th Anniversary', 12 *Genocide Studies International* (2018) 152. On Reyntjens, see also 'Rwanda: Le "Que-sais-je" qui fait basculer l'Histoire', *Le Monde* (25 September 2017), available at www.lemonde.fr/idees/article/2017/09/25/rwanda-le-que-sais-je-qui-fait-basculer-l-histoire_5190733_3232.html and Reyntjens, 'Le difficile débat sur le Rwanda en France', *Mediapart* (11 October 2017), available at <https://blogs.mediapart.fr/fatimad/blog/111017/le-difficile-debat-sur-le-rwanda-en-france>.

¹⁵ Meierhenrich, 'How Many Victims Were There in the Rwandan Genocide? A Statistical Debate', 22 *J. Genocide Res.* (2020) 72.

¹⁶ Office of the High Commissioner for Human Rights, *Rapport du Projet Mapping concernant les violations les plus graves des droits de l'homme et du droit international humanitaire commises entre mars 1993 et juin 2003 sur le territoire de la République Démocratique du Congo* (1 August 2010). See also Guichaoua, 'Counting the Rwandan Victims of War and Genocide: Concluding Reflections', 22 *J. Genocide Res.* (2020) 125.

¹⁷ Reydams, 'Politics or Pragmatism? The International Criminal Tribunal for Rwanda and the Burying of the Investigation into the Assassination of President Juvénal Habyarimana', 40 *HRQ* (2018), 989. See also 'The Spanish Indictment of High-Ranking Rwandan Officials', 6 *J. Int'l Crim. Justice* (2008) 1003. The question of responsibility for shooting down the plane must not be conflated with the distinct and uncontroversial fact of Hutu responsibility for the 1994 genocide.

¹⁸ On military trials, see Waldorf, "'A Mere Pretense of Justice": Complementarity, Sham Trials, and Victor's Justice at the Rwanda Tribunal', 33 *Fordham International Law Journal (Fordham Int'l L.J.)* (2011) 1221; Adjovi, 'L'affaire Gumisiriza Devant La Justice Militaire Rwandaise', 18 *African Yearbook of International Law/Annuaire africain de droit international* (2010) 451.

¹⁹ Palmer addresses the role of the RPF in chapter 1, 'The Rwandan Social Context', but her interviews shed little light on how Rwandans feel about the lack of accountability for RPF crimes.

4 Internationalist and Rwanda-Centric Perspectives on the ICTR

Analysing the ICTR's performance as a shortlist of achievements and weaknesses carries the risk of reducing complex phenomena and long-term processes to easily digestible highlights. Although this kind of retrospective stock-taking is, to some extent, unavoidable in scholarship on an international criminal tribunal that has ceased operation, it is worth pausing on one achievement commonly lauded in these four books (i.e. the development of international criminal law) and one common weakness (i.e. the ICTR's lack of impact in Rwanda) to draw out an implicit assumption underpinning most scholarship on international criminal tribunals: is their intended audience ultimately the international community (the 'internationalist' approach)?²⁰ Or is it the societies that have experienced mass atrocity, in this case Rwanda (the 'Rwanda-centric' approach)?

The 'internationalist' approach is evident in the *Elgar Companion*, where at least half the chapters focus on the ICTR's jurisprudential legacy for the discipline of international criminal law. Most of the contributors trace how ICTR judges interpreted statutory definitions and rules, how this relates to the Rome Statute and what landmark cases remain relevant for other international criminal tribunals, in particular the ICC. As a Rwandan, Wibabara pays slightly more attention to how the three post-genocide courts impacted Rwanda, but international standards (fair-trial rights and international criminal doctrine) nevertheless serve as a benchmark against which she assesses the performance of all three.

Gahima's monograph moves beyond this strictly 'internationalist' approach to international criminal justice. In reviewing the ICTR's performance, Gahima makes an important remark at the outset: 'The tribunal was primarily established to serve the people of Rwanda' (Gahima, at 80). Gahima knows that this claim is, in some ways, factually problematic. He acknowledges the well-documented criticisms that, in fact, the international community created the Tribunal as a token gesture for its failure to prevent the genocide (Gahima, at 83). But his focus on Rwanda explains why Gahima barely mentions the ICTR's case law, and then only to affirm – without analysing any specific cases – that it can be viewed as an accomplishment (Gahima, at 126, 276–277). The absence of 'seminal cases' and 'jurisprudential landmarks' in Gahima's monograph speaks to a very different, Rwanda-centric understanding of the ICTR's core functions.

Palmer's analysis of the three post-genocide courts' different understandings of their respective roles illuminates the divide between 'internationalist' and 'Rwanda-centric' perspectives on international criminal justice. Relying on different stakeholders' *subjective* understandings of post-genocide justice, Palmer explains that judges and lawyers at the ICTR rationalized their work first and foremost as developing a body of substantive case law, which she contrasts with (i) Rwandan judges, prosecutors and

²⁰ I do not propose to examine what is meant by the fraught concept of 'international community'. See A. Paulus, 'International Community', in *Max Planck Encyclopedia of Public International Law*.

attorneys, who understood their work on genocide cases primarily as promoting legal reform and developing national capacity, and (ii) personnel from the *gacaca* system who understood themselves to be providing a fuller factual account of what happened in 1994. In drawing out these divergent conceptions of post-genocide justice, Palmer implies also that international and national actors rationalize their work through the lens of deeply embedded assumptions about who their – international or national – audiences are.²¹

Echoing this divide, a recurring criticism in international criminal justice scholarship has been the ICTR's 'limited impact' in Rwanda. For instance, Wibabara includes a sub-section entitled 'Limited Impact on Rwanda', and Hintjens's chapter in the *Elgar Companion* notes the ICTR's remoteness from Rwandans. Though Palmer's interviewees at the ICTR do not use this exact phrase, she demonstrates that few ICTR staff rationalized their work in terms of the Tribunal's role or impact in Rwanda. In particular, Palmer notes that very few ICTR interviewees felt that the Tribunal had contributed to reconciliation in Rwanda (Palmer, at 64–67).

Upon closer inspection, criticisms of the ICTR's 'lack of impact in Rwanda' encompass various challenges, for instance the Tribunal's flawed handling of reparations for Rwandan victims, insufficient victim participation in international proceedings, the ICTR's limited contribution to national reconciliation and its disputed impact on the domestic rule of law. However, it is worth noting the irony of analysing the ICTR in terms of its impact (or lack thereof) in Rwanda. Framing the question in this manner implicitly takes for granted an 'internationalist' perspective on the goals of international criminal tribunals. Put differently, only if the international community is somehow the primary audience for international tribunals can one *generically* think of Rwanda and Rwandans as being neglected by the ICTR. In reality, such scholarly generalizations about 'lack of domestic impact' appear to reflect the rather limited research on Rwandan perceptions of the Arusha-based tribunal.

It remains to be seen how future scholarship will build on Palmer's skilful use of interdisciplinary tools to bridge 'internationalist', 'national' and 'local' perspectives on international criminal tribunals. There is a risk that 'internationalist' approaches to international criminal justice will become even more dominant in ICC scholarship. Given that the ICC has quasi-universalist aspirations and operates simultaneously in dozens of countries, it will arguably be more difficult for scholars to rigorously assess the Court's impact at the national level and how different constituencies understand the contributions and shortcomings of international criminal interventions.²²

²¹ Along these lines, Kendall and Nouwen observe that the ICTR has constructed narratives about its legacy for the international order and Rwanda, see Kendall and Nouwen, 'Speaking of Legacy: Toward an Ethos of Modesty at the International Criminal Tribunal for Rwanda', 110 *AJIL* (2016) 212, at 230–231. See also *infra* note 42.

²² That being said, a growing body of scholarship examines the ICC's impact in specific countries. Only a few studies attempt to explore the ICC's performance generally, see e.g. K. M. Clarke, *Fictions of Justice: The International Criminal Court and the Challenges of Legal Pluralism in Sub-Saharan Africa* (2009); P. Clark, *Distant Justice. The Impact of the International Criminal Court on African Politics* (2018).

5 The Promise and Pitfalls of Concurrent Accountability Mechanisms

Three transitional justice mechanisms – the ICTR, national courts and *gacaca* – operated concurrently in the aftermath of the 1994 genocide. This makes Rwanda an important case study for how different courts intersect with one another, what kinds of relationships emerge between them and what benefits and drawbacks each mechanism brings to the pursuit of justice. The four books under review examine these themes to varying degrees.

Understandably, the *Elgar Companion*, which focuses on the ICTR, has less to say about the two other post-genocide mechanisms. Yet it may still come as a surprise to readers that national trials and *gacaca* are mentioned only a handful of times in two chapters (Drumbl and Nsanzuwera). Given the Companion's jurisprudential focus, one might have expected a critical analysis of the ICTR's Rule 11*bis* case law, which created tension between the Tribunal and Rwandan authorities in the mid- to late 2000s.²³ It is worth recalling that Rule 11*bis* was adopted after the Security Council mandated a Completion Strategy for the ICTR in 2003–2004, which required the Tribunal, and especially its newly appointed Prosecutor, Hassan Jallow, to refer indictments against mid- and low-level suspects back to national jurisdictions, including to Rwanda.²⁴ Despite the Tribunal's consultations with Rwandan authorities on improving domestic fair trial standards, chambers rejected a first round of case referrals in 2008.²⁵ Only after Rwanda made further changes to its criminal law and procedure did the ICTR's judges approve a second round of case referrals, beginning with *Uwinkindi* in 2011.²⁶ Only Nsanzuwera's chapter in the *Elgar Companion* discusses the Rule 11*bis* cases, and rather briefly at that. A second, expanded edition would benefit from additional chapters not just on Rule 11*bis* and domestic trials in Rwanda, but also on *gacaca*.

The three other monographs compare, to varying degrees, the ICTR, national courts and *gacaca*. Wibabara uses international human rights law to examine disparities and paradoxes in punishments and fair trial guarantees before the three jurisdictions. For instance, Wibabara describes the paradox of the ICTR's more lenient sentencing rules and the absence of the death penalty (noted also in Gahima's analysis of the drafting of the ICTR Statute in 1994, at 85–86), which meant that high-ranking *génocidaires*

²³ Rule 11*bis*, ICTR Rules of Procedures and Evidence [Referral of the Indictment to another Court]. Adopted 6 July 2002, amended 23/24 April 2004, amended 21 May 2005, amended 1 April 2011.

²⁴ Jallow, *supra* note 10. See also Horowitz, 'How International Courts Shape Domestic Justice: Lessons from Rwanda and Sierra Leone', 46 *Israel Law Review* (2013) 339.

²⁵ See Canter, "'For These Reasons, the Chamber Denies the Prosecutor's Request for Referral": The False Hope of Rule 11 Bis', 32 *Fordham Int'l L.J.* (2008) 1614, at 11.

²⁶ Decision on Prosecutor's Request for Referral to the Republic of Rwanda, *Uwinkindi* (ICTR-2001-75-R11*bis*), Referral Chamber, 28 June 2011. On Rule 11*bis* at the ICTR, see Marong and Jalloh, 'Transfer of Cases under the Jurisprudence of the ICTR and Lessons Learnt for the ICC', in C.C. Jalloh and A.B.M. Marong (eds), *Promoting Accountability under International Law for Gross Human Rights Violations in Africa: Essays in Honour of Prosecutor Hassan Bubacar Jallow* (2015) 409.

actually received less severe judgments by virtue of being tried in Arusha. Wibabara explains that this inequality of treatment persists in Rwanda since domestic reforms implemented pursuant to the ICTR's Rule 11*bis* case law mandate less harsh punishments for genocide suspects extradited from abroad than for ordinary *génocidaires* apprehended in Rwanda.

Towards the end of her monograph, Wibabara embraces the idea that international criminal tribunals should complement rather than supersede national trials (Wibabara, at 260). Citing the ICC's jurisdictional framework, she notes briefly that complementarity is the 'optimal relationship' between concurrently operating courts.²⁷ But Wibabara does not explain how complementarity could have been operationalized in Rwanda, nor does she examine the ICTR's jurisdictional relationship to Rwandan courts known as primacy.²⁸ This is a curious omission on Wibabara's part, since it was primacy – the counterpoint to complementarity – which allowed the ICTR to assert jurisdiction over genocide masterminds irrespective of Rwanda's actions, and its willingness or ability to prosecute the same people. For instance, Gahima explains in his monograph that primacy 'caused friction' between the Tribunal and Rwanda in the 1990s, depriving the national justice system of high-profile cases that he, then serving in the government, wanted to prosecute domestically (Gahima, at 105).

Wibabara acknowledges the ICTR's crucial role in trying genocide masterminds, which makes her stated preference for complementarity difficult to understand. In fact, upon closer inspection, in embracing complementarity over primacy, Wibabara seems to express approval not for the ICC's jurisdictional framework but for the general idea that crimes should be handled by multiple, concurrently operating accountability mechanisms, rather than a single court with a mandate to try all crimes. Complementarity, in the sense of concurrent courts 'complementing each other' or working 'alongside each other', is a common extra-legal understanding of the term.²⁹ This generalist conceptualization of complementarity appears also to be Wibabara's policy preference, since – after discussing the benefits and drawbacks of the ICTR, national courts and *gacaca* – Wibabara concludes that recourse to three concurrent mechanisms was the 'realistic way' to provide justice (Wibabara, at 259).

Gahima does not discuss the jurisdictional relationship between the three post-genocide courts in terms of primacy or complementarity (the latter term does not appear in the book). He agrees that, as a matter of legal principle, national courts should investigate and prosecute serious violations, but goes on to argue that the experience of the ICTR demonstrates that international courts have certain advantages over national courts (Gahima, at 291). Although Gahima does not expressly embrace primacy as a jurisdictional framework, he acknowledges that the ICTR was

²⁷ On complementarity, see Nouwen and Lewis, 'Jurisdictional Arrangements and International Criminal Procedure', in G. Sluiter et al. (eds), *International Criminal Procedure. Rules and Principles* (2013) 116.

²⁸ On primacy, see Nouwen and Lewis, *supra* note 27.

²⁹ On broader iterations of complementarity, see C. Stahn, *A Critical Introduction to International Criminal Law* (2019), at 222–224. See also S. M. H. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (2013).

able to remove key perpetrators more effectively than Rwandan domestic courts, since most foreign jurisdictions would not have extradited genocide suspects to Rwanda in the years after 1994 (this only changed after the Rule 11*bis* decisions more than 15 years later).

Gahima does not theorize relations between the different courts, but his analysis is illuminating in that he captures the historical contingency of Rwanda's concurrent post-genocide processes. As an active participant in many of the events he describes, Gahima is well placed to explain the origins of national trials and *gacaca* and how each mechanism emerged, at least in part, in reaction to the shortcomings of the other. Gahima's discussion of trials before Rwandan courts in the 1990s is particularly informative, since this is a topic that has received relatively little attention in international criminal justice scholarship. To be sure, some of Gahima's interpretations of domestic prosecutions, which he personally supervised, are bound to be controversial, for instance his claim that trials in Rwanda 'gradually became widely regarded as being generally fair' (Gahima, at 142).³⁰ But his descriptions of the challenges faced by the Rwandan justice system, including the prolonged detention of tens of thousands of suspects, explain why the government turned to *gacaca* as an alternative to mass incarceration and mass prosecutions in domestic courts.

Palmer's views on the relationships between the ICTR, national courts and *gacaca* are complex. As explained above, *Courts in Conflict* reveals that stakeholders in the three post-genocide courts rationalized and justified their work differently. For ICTR judges and lawyers, the Tribunal served primarily to strengthen the international legal order by producing international criminal case law. Rwandan judges and lawyers understood themselves to be reforming the Rwandan legal system and improving domestic expertise. *Gacaca* interlocutors felt that *gacaca* contributed primarily to a better understanding of the genocide by revealing the truth of what happened (for instance, where the bodies of missing genocide victims lay). Most importantly, each court evaluated the two others on the basis of its own conception of what mattered. For instance, *gacaca* interviewees criticized the Rwandan courts' inability to uncover the truth, while people in the Rwandan courts criticized *gacaca* for not meeting domestic legal standards of due process.

After comparing the views of different stakeholders, Palmer concludes that, although the three post-genocide courts were compatible in law, they unnecessarily competed with each other in practice. Put differently, while nothing in the legal instruments of the ICTR, national courts and *gacaca* prevented them from working together, mutually incompatible understandings of their core functions reduced actual cooperation. Building on this insight, *Courts in Conflict* argues that, in order to avoid conflict and promote cooperation between different layers of transitional justice, policymakers should promote a sustained and equal dialogue between concurrently operating justice mechanisms, to prevent misunderstandings from emerging in the first place.

³⁰ For more critical assessments of national trials in the 1990s, see Human Rights Watch, *Law and Reality. Progress in Judicial Reform in Rwanda* (2008).

There is much to agree with in Palmer's analysis, but it is worth unpacking her core arguments. To begin with, Palmer contends that different understandings of the courts' objectives undermined their *legitimacy* at what she calls 'points of informal contact'. Relying on interviews with prisoners and ordinary Rwandans participating in *gacaca*, Palmer argues that competition among the three post-genocide courts undermined their general acceptance inside Rwanda, since interviewees tended to criticize one post-genocide court in terms of the actions of the others. Crucially, Palmer also suggests that most ordinary Rwandans evaluated all three courts in terms of their ability to discover the truth. In so doing, she makes a broader point about what she believes mattered most in Rwanda's complex multi-layered transitional justice process. As Palmer explains, the legitimacy of a system of concurrent courts will ultimately be assessed against the needs and interests of a country's people and, in Rwanda specifically, this meant the desire of Rwandans to know 'how and why the violence occurred' (Palmer, at 181–183).

In doing so, Palmer provides a robust defence of *gacaca's* legitimacy among Rwandans, and knowingly wades into a heated scholarly debate over the merits and demerits of *gacaca* as a transitional justice mechanism. This review essay is not the place to revisit the academic controversy surrounding *gacaca*,³¹ suffice to note that Palmer's positive view of *gacaca* can be contrasted with Gahima's highly critical treatment of the same topic (Gahima, ch. 6). Palmer's take-away, based on her *gacaca* interviews, is that Rwandans viewed the ICTR and national courts favourably only when their proceedings helped uncover the truth about the genocide. One wonders, however, if in interpreting her interviews Palmer pays sufficient attention to the historical evolution and contingency of Rwanda's three concurrent transitional justice processes. It may well be that the *gacaca* participants whom Palmer interviewed between 2009 and 2012 placed greatest emphasis on truth seeking. But presumably it was easier for them to focus on still unknown aspects of the genocide, knowing that the genocide masterminds had already been put on trial, thanks primarily to the ICTR.³² While this observation does not detract from Palmer's empirical findings, it does prompt the question whether the ICTR and *gacaca* were, in fact, in conflict with one another, as Palmer suggests throughout her monograph.

Palmer extends her critique of how the three courts interacted to what she calls 'formal points of contact'. Arguing that misunderstandings prevented cooperation

³¹ Both Palmer and Gahima engage with the literature on *gacaca*, including: P. Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda Justice without Lawyers* (2010); P. C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation* (2012); L. Waldorf, 'Mass Justice for Mass Atrocity: Transitional Justice and Illiberal Peace-Building in Rwanda' (2013) (PhD Thesis, on file at National University Ireland, Galway); Corey, 'Retributive Justice: The Gacaca Courts in Rwanda', 103 *African Affairs* (2004) 73; Thomson and Nagy, 'Law, Power and Justice: What Legalism Fails to Address in the Functioning of Rwanda's Gacaca Courts', 5 *International Journal of Transitional Justice* (2011) 11; Longman, 'An Assessment of Rwanda's Gacaca Courts', 21 *Peace Review* (2009) 304. For additional literature from the last four years, see below in 36.

³² Palmer briefly addresses the perception of *gacaca* participants that the ICTR failed to 'ensure accountability of the most senior accused to the affected community', but does not distinguish this from the genocide masterminds (Palmer, at 152–153).

in genocide prosecutions, she criticizes the lack of information sharing between the courts, noting for instance how the ICTR's negative views of *gacaca* prevented it from engaging with *gacaca* constructively. Based on Palmer's calculations, as many as 70% of trial chamber decisions referred to *gacaca* proceedings (Palmer, at 2, 85–87), yet she points out that the ICTR proved reluctant to, for instance, use *gacaca*-generated documents to corroborate the deaths of specific individuals.³³

Palmer's other example of a missed opportunity for cooperation are the Rule 11*bis* transfers. She argues that the ICTR imposed its own preconceptions of what post-genocide justice should resemble (i.e. international criminal law standards), and that this explains the Tribunal's (misguided) refusal to send cases back for trial to Rwanda in 2008. Drawing on her interviews, Palmer points out that Rwandan judges failed to understand the ICTR's Rule 11*bis* case law because they had expected the Tribunal to examine the case referrals in light of Rwanda's enhanced domestic capacity, rather than international criminal law standards. At various points in the book, Palmer suggests that the Rule 11*bis* rejections should be viewed as a misunderstanding that could have been prevented if the ICTR and Rwandan courts had not had different 'legal cultures'. In other words, if only the Tribunal and Rwandan judges and lawyers had shared the same objectives, this instance of conflict could and should have been prevented.

But there is a different interpretation of these events that Palmer never acknowledges. Is it not plausible to argue that temporary conflict in the first round of (failed) referrals enabled greater cooperation over the long term, resulting in the second round of (successful) referrals? Palmer is surely correct that when she conducted her interviews with Rwandan judicial officials in 2008 and 2009, many expressed frustration with the ICTR. Indeed, Rwanda had invested considerable time and resources into legal reform to enable the Rule 11*bis* transfers. But missing from Palmer's story is how Rwanda continued to build its capacity even after the first round of failed referrals, which eventually led to a series of successful Rule 11*bis* transfers, after most of her interviews had been finalized. Do the 2011 *Uwinkindi* case and other referrals to Rwanda still mean that the ICTR's insistence on international standards was a mistake? How do we make sense of the Tribunal's second round of referrals? Would Rwandan interviewees still view the 2008 rejections in the same negative light today? It would have been useful to hear Palmer's views on this, as the second round of referrals arguably nuances her negative assessment of relations between the ICTR and Rwandan national courts.

In the end, whether one agrees or not with Palmer on the Rule 11*bis* process, her analysis of the three post-genocide courts raises legitimate questions about how different transitional justice mechanisms should work together in other contexts. Noting the growing likelihood of concurrent courts operating in the same conflict environment,³⁴ Palmer rejects the (simplistic) suggestion that *more* courts necessarily mean

³³ Palmer notes that '[o]ut of the seventy-four cases tried by the ICTR, fifty-two have referred to the *gacaca* courts. More strikingly, since the nation-wide implementation of *gacaca* in 2005, forty-seven out of forty-nine ICTR cases have discussed evidence gathered by the *gacaca* courts' (at 83).

³⁴ There is growing evidence for concurrent transitional justice mechanisms, for example, in Sudan, Kenya, the Democratic Republic of Congo and the Central African Republic. See van Schaack, 'The Building Blocks of Hybrid Justice', 44 *Denver Journal of International Law and Policy* (2016) 101.

more justice. Instead, she argues for greater complementarity between courts (like Wibabara, Palmer understands complementarity to mean the generalist ideal of concurrent courts working harmoniously together and complementing each other, rather than the Rome Statute's admissibility framework, which expressly anticipates the possibility of conflictual admissibility findings when a state is 'unable' or 'unwilling' to genuinely prosecute cases domestically).³⁵ Building on the Rwandan experience, Palmer expresses concern that uncoordinated responses to mass crimes, where concurrently operating courts lack a shared understanding of their objectives, will inevitably undermine the pursuit of justice in other countries.

However, here too there is a different reading of Palmer's empirical material. In advocating greater cooperation and dialogue between concurrent courts, Palmer arguably understates the synergies arising from different, and even conflicting, mandates, objectives and audiences. Did the ICTR, national courts and *gacaca* really have to share the same objectives and approach their tasks in the same way for them to be effective and legitimate? Or was it precisely the diversity of their approaches that contributed to a more holistic response in Rwanda? Another way to think about concurrent courts is that the different goals and strengths of the ICTR, national courts and *gacaca* may have, in the end, produced a more comprehensive judicial reckoning with the 1994 genocide. Palmer's call for greater 'complementarity' in transitional justice is well taken, but the debate over how concurrent courts can best respond to mass crimes is likely to continue.³⁶

6 Looking to the Future

The 25th anniversary of the Rwandan genocide provides an opportunity to assess Rwanda's experiment with post-genocide justice, including the role of the ICTR. It is also a good time to reflect on the future of scholarship in this area. Over the course of its 20 years of existence, the ICTR has received comparatively less attention – scholarly and otherwise – than its sister tribunal, the ICTY. Since the mid-2000s, international criminal law and transitional justice scholars have migrated, *en masse*, to

³⁵ Like Wibabara, Palmer does not analyse the ICTR's jurisdictional framework: primacy. Adopting a broad, extra-legal reading of complementarity, she subsumes the ICTR under the label of complementarity (even though the ICTR's jurisdiction remained grounded in primacy until the very end, see Nouwen, *supra* note 29). For instance, Palmer notes that '[i]n written law, the ICTR, the national courts, and *gacaca* are meant to be complementary, with each court seeking to establish accountability for the crimes committed during the Rwandan genocide' (at 54). Elsewhere, Palmer mentions that 'the legal cultures of transitional justice institutions are influenced by the active drive for self-legitimation, impacting the courts' ability to complement one another' (at 17). It is worth acknowledging that the ICTR itself has endorsed this generalist notion of complementarity: see, e.g., International Criminal Tribunal for Rwanda, Office of the Prosecutor, 'Complementarity in Action: Lessons Learned from the ICTR Prosecutor's Referral of International Criminal Cases to National Jurisdictions for Trial' (February 2015), available at https://unictr.irmct.org/sites/unictr.org/files/legal-library/150210_complementarity_in_action.pdf.

³⁶ I explore these issues in P. I. Labuda, *International Criminal Tribunals and Domestic Accountability. In the Court's Shadow* (forthcoming 2021).

ICC-centric areas of inquiry. Naturally, this trend has accelerated after the ICTR's closure in 2015, with fewer and fewer books, articles and book chapters examining the ICTR's performance.³⁷

While the shift towards ICC scholarship is bound to continue, it is worth emphasizing that some aspects of the ICTR's performance are in need of re-assessment or remain poorly understood. Scholarship in the last 15 years has focused on the *gacaca* courts,³⁸ yet there is still no holistic study of the ICTR's impact in Rwanda comparable to the ICTY's role in the former Yugoslavia.³⁹ Likewise, scholarship on domestic genocide trials before Rwandan courts, especially from the 1990s, mentions the same few books and articles written in the late 1990s and early 2000s.⁴⁰ Though Rwandan courts still prosecute genocide suspects extradited from abroad or referred back from the ICTR, these on-going trials receive little scholarly attention.⁴¹ A complete blind spot remains the Rwandan military justice system's (self-reported) trials of RPF crimes, though – as noted above – research in this area presents its own set of risks and challenges.⁴²

Evaluations of the ICTR and its relations to national trials and *gacaca* are bound to change over time. Just like today's understandings of Nuremberg and Tokyo differ considerably from the immediate post-World War II period, Rwanda's experiment with post-genocide justice will be re-assessed in light of domestic and international developments. This can already be seen in how attitudes have shifted since the mid-1990s. Whereas the Rwandan government and international actors then consistently criticized the ICTR for a wide range of shortcomings, a brief look at the Tribunal's legacy website and various testimonials by Rwandan and international staff suggest that, if nothing else, the mood around the ICTR and its performance has changed.⁴³

³⁷ An important book on the ICTR (published after this essay was completed) is N. Eltringham, *Genocide Never Sleeps. Living Law at the International Criminal Tribunal for Rwanda* (2019). Longman has two illuminating chapters on Rwanda's post-genocide courts, including the ICTR in T. Longman, *Memory and Justice in Post-Genocide Rwanda* (2017), chapters 4 and 8.

³⁸ See sources cited *supra* note 31. More recent literature includes T. Ngarambe, *Practical Challenges in Customary Law Translation: The Case of Rwanda's Gacaca Law* (2015); B. Ingelaere, *Inside Rwanda's Gacaca Courts: Seeking Justice after Genocide* (2016); A. Chakravarty, *Investing in Authoritarian Rule: Punishment and Patronage in Rwanda's Gacaca Courts for Genocide Crimes* (2016); K. Doughty, *Remediation in Rwanda: Grassroots Legal Forums* (2016); T. Longman, *Memory and Justice in Post-Genocide Rwanda* (2017); P. Sullo, *Beyond Genocide: Transitional Justice and 'Gacaca' Courts in Rwanda: The Search for Truth, Justice and Reconciliation* (2018).

³⁹ D. Orentlicher, *Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia* (2018) (reviewed by Milanovic, 29 *EJIL* (2018), 1437); J. N. Clark, *International Trials and Reconciliation: Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia* (2014).

⁴⁰ See, e.g., P. J. Magnarella, *Justice in Africa: Rwanda's Genocide, Its Courts, and the UN Criminal Tribunal* (2000); Schabas, 'Justice, Democracy, and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems', 7 *Criminal Law Forum* (1996) 523.

⁴¹ On on-going extraditions to Rwanda, see E. S. Ruvugiro, 'Rwanda: Suspect Transfers Signal New Stage in Genocide Trials', *JusticeInfo* (25 March 2019), available at www.justiceinfo.net/en/tribunals/national-tribunals/40703-rwanda-suspect-transfers-signal-new-stage-in-genocide-trials.html.

⁴² See, e.g., Straus, *supra* note 13, at 505: 'Scholarly accounts of the violence against Rwandan Hutu populations are also thin. Gaining permission to investigate these other crimes in Rwanda is virtually impossible. Further, within Rwanda, speaking out about these other crimes can be dangerous.'

⁴³ Voices of the Tribunal, International Criminal Tribunal for Rwanda <https://voicesofthetribunal.org> (last visited 1 January 2020).

To be sure, some of this is attributable to the UN's skilful public relations. In deconstructing self-professed claims to legacy, Kendall and Nouwen show that the ICTR's 'legacy talk' aims to 'consolidate a set of interpretations about the substance and value' of what the Tribunal left behind.⁴⁴ Given the similarities between the achievements in the ICTR's own legacy materials and in the four books under review, it may well be that the UN has, to some extent, successfully crafted an accepted narrative of its performance.⁴⁵ Nevertheless, Gahima's tracing of historical events and Palmer's interviews with international and Rwandan stakeholders strongly suggest that the ICTR is now viewed in a more nuanced way and, on the whole, less critically than in the 1990s and 2000s. It is not hard to imagine that, as memories fade and the ICC's problems take centre stage, the ICTR (and ICTY) will be assessed even more positively. Twenty-five years after the 1994 genocide, these four books provide an invaluable snapshot of how post-genocide justice in Rwanda is understood today, but scholarly debates on the ICTR's performance are sure to continue.

⁴⁴ Kendall and Nouwen, *supra* note 21, at 213.

⁴⁵ On the ICTR's own legacy materials, see *ibid.*, at 216–217. As explained by Kendall and Nouwen, '[i]n its formal statements, reports, and legacy video, the ICTR portrayed its legacy as comprising, first, the investigations, prosecutions, and trials it has undertaken; second, its contribution to the field of international criminal law; and third, and subsidiarily, its contribution to Rwanda' (*ibid.* at 216). Compare this list of achievements to those discussed in part 3 of this review essay.