But, while RtoP has been formally endorsed both regionally and internationally, it has yet to "cascade" as a norm, let alone become internalised by most states. This suggests that Evans' assessment of what is preventing international action in cases of humanitarian catastrophe may be missing the mark. Significant ambiguity remains, regarding both the moment at which the responsibility for civilians becomes internationalised and the appropriate agent for carrying out that international responsibility. These divisive issues, combined with the fatigue and military overstretch of those who have been strong advocates of RtoP, mean that we are not yet in a position to promise "no more Rwandas".

18

SOME LESSONS FOR THE INTERNATIONAL CRIMINAL COURT FROM THE INTERNATIONAL JUDICIAL RESPONSE TO THE RWANDAN GENOCIDE

Morten Bergsmo and Philippa Webb

Introduction

As Ocampo observes in his Foreword, the establishment of a permanent international criminal court is closely connected to the tragedy of the Rwandan genocide. It may be strange to think that the confused and inadequate international responses to the death of some 800,000 Rwandan Tutsi and moderate Hutu could one day contribute to the founding of the International Criminal Court (ICC), but this is what has occurred. As Kaufman details in chapter 12, the UN Security Council (UNSC)'s decision to establish the UN International Criminal Tribunal for Rwanda (ICTR) in November 1994 came only 18 months after the adoption of the resolution creating the UN International Criminal Tribunal for the former Yugoslavia (ICTY). From the post-World War II trials until the early 1990s, there were no international criminal tribunals. The founding of the ICTR therefore signalled the emergence of an international criminal justice system, rather than being an isolated jurisdictional experiment. The hybrid international criminal jurisdictions in Kosovo, East Timor and Sierra Leone quickly followed. The Iraqi High Tribunal and the Cambodian Extraordinary Chambers arrived a short time later.[1]

The ICTR has clearly had an impact on the way the international community thinks about achieving peace and justice in the wake of mass atrocities. As

1 See also R. P. Alford, "The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance," *American Society of International Law Proceedings*, 94 (2000), 160 ("Depending on one's count, more than fifty international courts and tribunals are now in existence, with more than thirty of these established in the past twenty years").

Jallow and Ngoga note in chapters 13 and 16, respectively, the ICTR's establishment and operation have helped define the contemporary understanding of international criminal justice and reinforced the notion of individual criminal responsibility, even for leaders. This chapter will consider some of the ways in which the ICC has been influenced by the international judicial response to the Rwandan genocide—from the emphasis on the role of international justice in preventing crimes to the institutional and legal lessons learned and applied in this fledgling international organisation.

A renewed commitment to prevention and deterrence

The delayed and inadequate response of the international community to the systematic slaughter of approximately 800,000 Rwandans was inexcusable. As the UN Independent Inquiry on the Genocide in Rwanda found, "The international community did not prevent the genocide, nor did it stop the killing once the genocide had begun."[2] This catastrophic failure of political will still looms large more than fourteen years later. Its repercussions can be observed in numerous places, such as the appointment of a UN Special Adviser on the Prevention of Genocide; the World Summit's declaration, discussed further in the previous chapter by Welsh, that every state has the "responsibility to protect" its populations; and the readiness of some governments and organisations to describe events in the Darfur region of Sudan, as "genocide".

This renewed expressed commitment to prevention and deterrence can also be observed in the language of the Preamble of the Rome Statute, which was adopted in Rome on 17 July 1998 and entered into force on 1 July 2002. The Preamble enshrines the fundamental values that underpin the ICC, the world's first permanent international criminal tribunal, and guide all of its work. The Preamble commits States Parties to preventing, punishing, and ultimately deterring the most serious crimes of concern to the international community as a whole. Paragraph 1 of the Preamble establishes the context by acknowledging that there is a consciousness that the "delicate mosaic of our shared heritage" may be shattered at any time, as it was from April to July 1994. Paragraph 2 provides that the Court is established in the shadow of "unimaginable atrocities," such as the Rwandan genocide. Paragraph 3 recognises that such atrocities are not just "ordinary crimes", with which society has learned to live, but "such grave crimes" that they endanger the "peace, security and well-being of the world."[3] As Otto Triffterer, a leading authority on international criminal

2 "Report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda" (1999) UN Doc S/1999/1257, 3.

3 O. Triffterer, "Preamble - Paragraph 3: Recognition of protected values" in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Nomos

law, argues, this formula refers to both the basic, inherent values of the community of nations and those values "which belong to *national* legal orders, but need *supplementary* protection by the *international* legal order to counter the threat of abuse of State power."[4] This makes clear that attacks by states on their own populations cannot be considered merely internal affairs, but invoke the concern of the international community as a whole.

Paragraph 4 of the Preamble of the ICC Statute is central to understanding the strengthened commitment to achieving accountability for crimes such as the Rwandan genocide. It provides that "the most serious crimes of concern to the international community as a whole must not go unpunished, and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation."[5] This paragraph affirms the objective of punishing the most serious crimes, acknowledging the necessity of indirect enforcement at the national level. The experience of the ICTR, with its current track record of 35 judgements, clearly shows that even among "the most serious crimes of concern to the international community as a whole" not all crimes committed can, in practice, be prosecuted by the ICC.[6] It is therefore necessary to engage national jurisdictions and to adopt a co-operative approach to ensure effective prosecution.

The apparent objective of punishment described in paragraph 4 of the Preamble is logically developed in paragraph 5, which addresses the real objective of prevention by enforcement: "Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."[7] The prosecution of international crimes fulfils the repressive function of criminal law. The ICC also aims to fulfil the more important second function: prevention. The sheer number of victims and perpetrators of the Rwandan genocide alone reminds us that crime prevention or deterrence is generally held to be the more effective method of protecting legal values in practice. Needless to say, it would have been better for the genocide never to have taken place than for its perpetrators to be effectively prosecuted after the event. The ICC aims to contribute to the prevention of such crimes by building awareness and showing potential criminals that the perpetrators of the "most serious crimes of concern to the international community as a whole" will no longer enjoy immunity from effective enforcement mechanisms.

Baden-Baden, 1999), 9.

4 Ibid., emphasis in original.

5 Preamble of the Rome Statute, paragraph 4.

6 O. Triffterer, "Preamble – Paragraph 4: Affirmation of aims to be achieved" in Triffterer (ed.), *Commentary on the Rome Statute*, 11.

7 Preamble of the Rome Statute, paragraph 5.

The irrelevance of suspects' official capacity in Article 27 is a clear manifestation of the determination to put an end to impunity.[8] The ICTR has led the way in this respect. The 35 persons who have received judgements to date at the ICTR include one prime minister, four government ministers, two *préfets* and five *bourgmestres*, as well as media and military leaders.[9] The guilty plea and subsequent conviction of Jean Kambanda, former Prime Minister of Rwanda, marked the first time that a head of government had been convicted for the crime of genocide.

The ICC is only one aspect of what appears to be a renewed commitment to prevention and deterrence, and it cannot put an end to atrocities such as the Rwandan genocide on its own. Many take the view that the ICC should be integrated with other mechanisms such as national investigations and prosecutions, fact-finding missions, public education, decisive UNSC action, and civil proceedings focused on redress for victims, to replace a culture of impunity with a culture of accountability.[10] This is a reasonable hope, although it remains to be seen how effective the ICC's contribution will be.

Some institutional lessons learned: organising for effectiveness, flexibility and speed

Important institutional lessons have been learned from the international judicial response to the Rwandan genocide, and the subsequent experiences of the ICTR.

A standing court. The problem of the slow international judicial response to Rwanda was an important rationale for creating a standing court. International inaction, conflict and confusion characterised the Rwandan genocide and its aftermath. Although the UNSC resolution establishing the ICTR was passed in November 1994, the Tribunal had no courtrooms, offices, prison, legal officers, or secretaries until September 1995. Judges were not regarded as having officially taken office until 19 June 1996, and it was not until September 1996 that they were able to take up residence in Arusha.[11] The first indictment was confirmed in a hotel room.[12] These delays were not unique to the ICTR. Making the ICTY an operational UN criminal justice mandate in 1993 to 1996 was very difficult indeed, with particular challenges in areas such as recruitment, investigative missions, witness protection, and court management.[13] The accumulation of such experiences, with the difficult establishment and activation of internationalised criminal jurisdictions, gave significant weight to the arguments for a permanent Court that would be prepared at short notice to analyse, investigate, and prosecute international crimes.

Unlike the *ad hoc* Tribunals, the ICC was established as a permanent court with prospective jurisdiction running from 1 July 2002. It can potentially address crimes committed anywhere in the world. In contrast to the hybrid courts in places like Sierra Leone and East Timor, the ICC is an independent international organisation with international staff based in The Hague. It has a standing administrative and operational capacity to deal with new allegations of crimes within its jurisdiction.

Professional, highly qualified staff. During the establishment of the ICTR, the necessary professional group of international judges, lawyers, and administrators with expertise in international criminal law and justice barely existed. In addition, it was almost impossible to recruit Rwandan lawyers, because virtually all of them had been killed or had fled the country. By comparison, the ICC was in an enviable situation when it was being established, in that many professionals with experience from internationalised criminal jurisdictions after 1993 were prepared to join the ICC during the first few years of its existence. The ICC aspires to maintain a core staff of highly qualified professionals, equipped with innovative legal tools and effective training. This approach aims at keeping human resource costs low and encouraging better communication and swifter action.

External networks. Over time, the human and financial resources of the ICTR and the ICTY have dramatically increased. This has attracted some criticism, for example by Ngoga in chapter 16, and arguably precipitated the strict monitoring by the UNSC of the so-called completion strategy of the Tribunals. The ICC is trying to learn from this experience by maintaining a small, flexible office, and by relying on extensive external networks of support, rather than bringing that expertise in-house. The ICC tries to build bridges with states, civil society, multilateral institutions, academics, and the private sector. It is hoped that this approach may enable the Court to benefit from skills, ideas, and perspectives from around the world without significantly expanding its budget or staff. This is an objective over which both the Court and the public can easily monitor actual achievements.

8 O. Triffterer, "Preamble - Paragraph 5: Prevention by Enforcement" in Triffterer (ed.), *Commentary on the Rome Statute*, 12.

9 E. Møse, "Main Achievements of the ICTR", *Journal of International Criminal Justice*, 3 (2005), 932.

10 P. Kirsch, "Introduction" in Triffterer (ed.), *Commentary on the Rome Statute*, xxviii.

11 Møse, "Main Achievements of the ICTR", 922.

12 *Kayishema et al (Decision)* ICTR-95-I (28 November 1995), Review of indictment by Judge Navanethem Pillay. Referred to in E. Møse, "Main Achievements of the ICTR", 922.

13 The co-author, Morten Bergsmo, was the first lawyer in the staff of the ICTY Office of the Prosecutor, commencing service in May 1994.

The difference is clear when one compares figures from the ICTR and ICC. For 2008-9, the UN General Assembly decided to appropriate to the ICTR a total net budget of US$280,386,800, and authorised 1,032 posts.[14] In the case of the ICC, the Assembly of States Parties approved a budget of €90,382,000 (or around US$131 million) for 2008, and, as of October 2004, there were 679 posts.[15] As more cases go to trial, the ICC will inevitably need significantly increased resources. It remains to be seen how the policy of using external networks wherever possible will affect this increase. A comparison of the ratios in the ICC and the ICTR/ICTY of the overall number of staff and those working full time on cases could be indicative.

Contingency Fund. The delays in setting up the ICTR and the ICTY can be traced in part to the insufficient funds available in the first years of operation. It appears that the ICC States Parties have learned from this start-up difficulty. The ICC Assembly of States Parties has approved the establishment of a Contingency Fund in the amount of €10,000,000. With these resources, the Court can meet costs associated with unforeseen complications, following, for example, a decision by the Prosecutor in mid-budget to commence an investigation in response to fresh allegations of crimes in a new situation, or unavoidable expenses for developments in existing situations that could not be accurately estimated at the time of the adoption of the budget. The Fund could also be used for costs associated with an unforeseen meeting of the Assembly of States Parties itself.

Addressing the impunity gap. The challenge of achieving accountability for mass atrocities is epitomised in the situation in Rwanda. The death of some 800,000 people within 100 days involved thousands upon thousands of perpetrators. At the same time, Rwandans have insisted upon criminal prosecution for all alleged offenders. For nine years after 1994, more than 100,000 people were in detention in Rwanda. Despite the provisional release of 25,000 prisoners in 2003, the International Committee for the Red Cross (ICRC) estimated that 89,000 were still detained as of January 2005.[16] National trials began in 1996, and approximately 10,000 suspects have been tried.[17] For its part, the ICTR had rendered judgements in respect of 33 accused, with six acquittals

14 "General Information – Budget and Staff," ICTR official website, http://www.ictr.org.

15 Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Sixth session, The Hague,30 November to 14 December 2007 (International Criminal Court publication), Part III, 74.

16 W. A. Schabas, "Genocide Trials and *Gacaca* Courts", *Journal of International Criminal Justice*, 3 (2005), 880.

17 Ibid., 888.

so far. Trials involving an additional 29 suspects are in progress, and seven people are awaiting trial.[18]

The combination of the potential global reach of the ICC, the expanded range of crimes that come under its Statute, and its resource constraints means that the ICC must be selective in taking on cases. To this end, the ICC Office of the Prosecutor (OTP) has taken a policy decision to focus its efforts:

> The Court is an institution with limited resources. The Office will function with a two-tiered approach to combat impunity. On the one hand it will initiate prosecutions of the leaders who bear most responsibility for the crimes. On the other hand it will encourage national prosecutions, where possible, for the lower-ranking perpetrators, or work with the international community to ensure that the offenders are brought to justice by some other means.[19]

The risk is that focusing on those who bear the greatest responsibility may leave an "impunity gap" unless national authorities, the international community, and the Court work together to ensure that other perpetrators are brought to justice, in a way that corresponds to reasonable expectations. To this end, co-operation between the ICC and other actors will be crucial. There should be international assistance for strengthening or rebuilding the national criminal justice systems in states where serious crimes have been committed. As Warren and Cole argue in chapter 14, widespread sharing of knowledge, tools and methodologies for cost-effective and fair documentation, investigation, and prosecution of international crimes will be of great significance.

Legal lessons learned: empowerment through preparedness

When the ICTR and the ICTY began operating, they lacked the systems or tools to analyse, investigate, and prosecute the core international crimes committed in Rwanda and the former Yugoslavia. Nuremberg happened in another era, and there were no comparable or model programmes of national trials to copy. Work processes, models and tools had to be developed from scratch. Procedural and substantive commentaries on international criminal law did not exist. A visitor to the ICTR in 1998 found that the Tribunal's library "consisted of two small wheeled trolleys piled with a random assortment of donated international legal reference books."[20]

This lack of preparedness made the initial task of building the credibility of the ICTR and the ICTY very difficult. As Ngoga observes in chapter 16, while

18 See "Status of Detainees Cases" at http://www.ictr.org (updated 2 March 2008).

19 "Paper on some policy issues before the Office of the Prosecutor," September 2003, http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf, (4 November 2005), 3.

20 S. Power, "Rwanda: The Two Faces of Justice," *The New York Review of Books*, 50, 1 (16 January 2003).

staff and budgets grew, progress was at times described as sluggish, while ICTR and ICTY principals failed to adequately explain the dimensions of the challenge at hand. Understanding these challenges, however, the states that negotiated and set up the ICC provided in its first budget for the development and maintenance of networked legal tools and services, by the Legal Advisory Section (LAS) of the Office of the Prosecutor (OTP). The tools and services were meant to serve several purposes:

1. To empower staff to find for themselves, through a computer network, answers to most legal questions they encounter, in work on core international crimes. This increases the autonomy and efficiency of existing staff, thus reducing the need for growth in human resources, and avoiding strain on the Court's budget;

2. To avoid duplication of legal research and drafting exercises within the Court, and its Organs and participants. Legal issues tend to return or appear in multiple contexts, albeit with slight differences of nuance. Responding to them can consume much time and many resources. Ensuring efficient availability of the relevant legal information on earlier work is important;

3. To increase the quality of legal submissions and other legal drafting in relation to both procedural and substantive aspects of the practice of international criminal law. The quality of submissions and decisions is decisive for their weight and capacity to serve as precedents, which again has an essential impact on the efficiency of work processes in an international jurisdiction.

The Legal Tools Project. Since 2003, the LAS of the OTP has developed a range of electronic and web-based legal tools and services, collectively known as the *Legal Tools Project*. The Project provides more than ten collections and databases of legal information, three commentaries and two applications. It offers a complete collection of resources relevant to the theory and practice of international criminal law and justice, and brings modern technologies to the investigation and prosecution of core international crimes. By 2008, the Legal Tools Project amounted to some ten gigabytes of legal information. As a whole, it represents the most important single research resource in international criminal law.[21]

Among the key components of the Legal Tools Project are the following:

- The *Elements Commentary*: A doctrinal, electronic commentary on each element of the crimes and legal requirements of the modes of liability in the ICC Statute. It draws on all main sources of international criminal law, and gives users direct access to important sources on the substantive law of the ICC Statute. The Commentary incorporates and takes fully into account the influence of the ICTR jurisprudence regarding, for example, the interpretation of the crime of genocide, the

21 Information about the *Legal Tools* can be found at the website of the ICC (http://www.icc-cpi.int).

affirmation of rape as an international crime, and the prosecution of incitement to commit genocide.

- The *Means of Proof Document*: A service that provides a detailed compilation of commentary and international criminal jurisprudence, from sources including the ICTR, on the type or category of facts which can constitute potential evidence for the existence or satisfaction of the specific legal requirement of an international crime or mode of liability. By 2008, the *Document* amounted to more than 6,000 A4 pages of text.

- The *Proceedings Commentary*: A detailed commentary on criminal law proceedings as contained in the ICC Statute, the Rules of Procedure and Evidence, and the Regulations of the Court. It provides a far-reaching analysis of key legal issues of international criminal procedure and evidence.

- The *ICC "Preparatory Works" Database*: A database that contains more than 9,000 official and unofficial documents, related to the negotiation and drafting of the ICC Statute, the Rules of Procedure and Evidence, and the Elements of Crimes, issued by states, NGOs, academic institutions, the UN, and other international organisations between December 1989 and September 2002.

- Selected documents from international criminal jurisdictions: The collection includes the primary law, indictments, judgements and other selected decisions of international and allied military tribunals sitting in Nuremberg and Tokyo, the ICTY, the ICTR, UN Mission for Kosovo (UNMIK) courts and tribunals, the Special Court for Sierra Leone, the East Timor Panels for Serious Crimes, the Iraqi High Tribunal and the Cambodian Extraordinary Chambers.

- Selected documents from national criminal jurisdictions: The collection includes national instruments implementing the ICC Statute and the most relevant decisions issued by domestic courts and tribunals concerning genocide, crimes against humanity, and war crimes.

- The *Legal Tools Project* also includes selected international treaties, decisions of regional and international human rights bodies, internet websites with relevant legal information, and academic works relevant to the research and practice of international criminal law, as well as public international law, international human rights law, and international humanitarian law.

The Case Matrix. An important component of the *Legal Tools Project* is the *Case Matrix*, a unique, law-driven case management application representing a significant innovation in how to approach the analysis, investigation, and prosecution of international crimes. It is tailor-made for core international crimes cases. The *Case Matrix* incorporates some of the legal tools described above, such as the *Elements Commentary* and the *Means of Proof Document*. The *Matrix* provides a database service to organise and present the potential evidence in a case, in a manner that can be customised to different users such as pros-

ecutors, judges, defence counsel and victims' counsel. This gives a "snapshot" overview of the status of a case at any stage of the work processes. The emphasis on this feature is a direct result of the observation, which Warren and Cole also make in chapter 14, that it is difficult to develop and preserve proper overview of information and potential evidence in large core international crimes cases, which may lead to lengthy and costly proceedings, as can be seen in several internationalised criminal jurisdictions.

The *Case Matrix* application has been introduced both within and outside the ICC. It has been translated into Bahasa Indonesia and Arabic to facilitate the work of the Indonesian Prosecutor General's directorate for international crimes cases and the Iraqi High Tribunal. It has also been translated into Khmer for the Cambodian Extraordinary Chambers. A French version also exists. There are other national expressions of interest in the *Matrix*, notably from Canada, Denmark, Germany, Italy, Norway, Serbia and Montenegro.

The intention of the ICC is to make the *Legal Tools Project*, including the *Case Matrix*, common property or public goods. In early 2006, the legal tools were gradually made available to the public on the website of the ICC, making the ICC the host of the most comprehensive virtual international criminal law library. The website should become the focal point for practitioners and scholars of international criminal law around the globe.

The public release of the *Legal Tools* serves several purposes. First, it is hoped that the *Legal Tools* will play a role in harmonising the development of substantive international criminal law. Second, the *Tools* have the potential to help rationalise the work processes linked to the analysis, investigation, prosecution, and adjudication of core international crimes cases by domestic and other internationalised user-institutions. Finally, by sharing tools and methodologies developed within the Court with national criminal justice systems, the ICC contributes to local competence building.

Conclusion

The ICC is preparing organisationally and legally to respond faster and more effectively to atrocities like the Rwandan genocide, and ultimately, to contribute to preventing such tragedies from occurring in the first place. By 2008, the Court had received three state referrals from Uganda, the Democratic Republic of Congo (DRC) and the Central African Republic. The ICC had also received one UNSC referral regarding Darfur, whose situation some states initially—and, given the ICC's aforementioned strengths over the ICTR, unwisely—suggested referring to the ICTR.[22]

22 Z. D. Kaufman, "Justice in Jeopardy: Accountability for the Darfur Atrocities" *Criminal Law Forum*, 16, 4 (April 2006), 343-60.

The Rwandan genocide has influenced the establishment and management of the ICC in conceptual and practical terms. From the drafting of the ICC Statute to the investigative approach to events in Uganda and the DRC—particularly the ICC's focus on investigating the most serious crimes committed by high-ranking military leaders in these countries, as the ICTR has sought to do in the Rwandan context—the ICC has been trying to apply lessons learned since those hundred catastrophic days in 1994. The *ICC Legal Tools*, in particular, are a significant illustration of this learning process. The *Tools* provide practitioners of international criminal law with a unique combination of collections, databases, commentaries and applications to work rationally and in a cost-effective manner. They constitute an important contribution to the activities of users such as national criminal justice systems, and NGOs concerned with documenting and reporting gross human rights violations which may amount to core international crimes. Thus, the ICC seeks to hasten the evolution of international criminal law, a process that reached a critical phase in the operation of the ICTR in the aftermath of the Rwandan genocide.