

“Who will be left to tell the tale?” Recordkeeping and international criminal jurisprudence

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Abstract The article sets out to pose the question ‘Is it possible for an archive to aid the process of reconciliation?’ Is the scale of a given event, in some cases, insurmountable in terms of reconciling the parties? The graphic nature of the archives and the issue of psychological impact of an archive on the archivist is explored. It is contended that through outreach and dissemination of the contents of the archive, it is possible to provide to the affected communities the information of what the international community has done in terms of judicial redress. Archives can also fulfil dual roles and this issue is touched upon in that the purpose and organization of the archive is changing from an active records center or a tool of repression to suit a future audience of researchers or to aid reconciliation.

Keywords Judicial archives · Archival outreach · Reconciliation · Genocide · United Nations · International criminal court · Rwanda · Audiovisual archives · Records continuum · Nuremberg and Tokyo tribunals

Where to from here—reconciliation, justice, peace?

Murder, rape, slavery, and torture have long been recognized as the worst types of crimes, and the international community has put tough measures in place to bring perpetrators to justice. When such offences are committed on a massive scale by one group of people against another, courts and the international community have been less consistent in their approach. The series of international tribunals and special courts established over the past decade to deal with genocide and other crimes against humanity have achieved mixed

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results (Bass 2000; Osiel 2000; Power 2003). Hopes are high for the Hague-based International Criminal Court, but there are doubts about, whether it can properly give justice to the people affected by conflicts just as the ad-hoc tribunals for the former Yugoslavia and Rwanda have been criticized.

Effectiveness of these institutions is difficult to quantify. What does ‘success’ in a new and developing system actually mean? An end product of ‘justice’ is not the only driving force of these institutions. Prosecutors should not imagine that punishing Mladic, Karadzic, Kabuga, Taylor and a myriad of others still on the run, will compensate affected peoples for the suffering, or erase the international community’s culpability for failing to prevent the Srebrenica, Darfur, Kibuye massacres in the first place. The dead will stay dead. Though it’s only a distant second-best to preventing atrocities, punishing perpetrators is still important. It acknowledges the suffering of the victims and in the long run could help deter future abuses by forcing the rogue leaders of the world to ask themselves if the abuses are worth it, given the increasing likelihood of ending up either dead or in jail somewhere down the line. Additionally, the creation of a system of precedents in the area of international criminal jurisprudence is another related aspect to the work being carried forward by the ad hoc and special courts. Of course one cannot forget the matter of reconciliation as vague and difficult to quantify as it is. The legacy of the ICTR’s work will benefit reconciliation because accountability leads to a trust in the rule of law, which assists the return to normalcy for the affected communities and nations.¹ Reconciliation is both a goal and a process, which includes the search for truth, justice, healing and forgiveness (Bloomfield et al. 2003). There appears to be little doubt in the professional literature that record-keeping does aid the reconciliation process and that repressive regimes do in fact have a habit of maintaining vast amounts of records which invariably end up in the archives of post-conflict governments or judicial organizations (Piggott and McKemmish 2002; Montgomery 2001; Chigas 2000). Reconciliation is difficult to achieve without prosecution of those responsible. The archival legacies of international criminal justice institutions are a critical aspect to the successful application of future humanitarian law as it relates to prosecution of criminal acts of an international scale but there is also a larger human element which is being addressed in the process (Peterson 2006).

Historical background²

The fact that the ICTR was created in 1995 and has direct links to the nascent institutions that came before it, including the ICTY in 1993, and the Nuremberg and Tokyo military tribunals in 1945–1946. Also, there is an indirect link to other less well-known attempts at national, quasi-international and international prosecution of mass crimes committed against either an enemy during armed conflict or against civilian populations. Prior to 1945 an individual had no standing in international law and could not conceivably be brought before a court (Drumbl 2005). Much genocide went virtually unnoticed until decades later

¹ Thanks to Martha Hunt for her suggestion to highlight the matter of reconciliation as well as many other suggestions for this article.

² Rather than go into the multitude of political, socio-ethnic, religious, colonial and economic reasons for the Rwandan genocide of 1994, this section refers to the external political developments that lead to the formation of the ICTR as an international judicial body. For the historical background to the Rwandan genocide in a more detailed and internal analytical way see for example (Gourevitch 1999). The ICTR judicial database on www.ictr.org has many publicly accessible expert witness reports such as ICTR-97–21-0731/2 Nyiramasuhuko et Ntahobali—Report by Serge Desouter (expert witness) filed 18/04/2005.

such as the Tasmanian aboriginal and Herero atrocities (Shipway 2005; Lundtofte 2003). In the national setting, after the American Civil War, Henry Wirz, commandant of the notorious Confederate prison of Andersonville, was hanged for mistreatment of Union prisoners.³

International war crimes trials, however, got off to a dismal start in 1918, after World War I (Bass 2000). The victorious Allies drew up a list of 3,000 alleged German war criminals. They soon thinned the list to 854 names. Of these, 45 were ordered to trial by a German court in Leipzig, 3 years after the war ended. The trials were a disaster. Most defendants did not bother to show up. The others were acquitted or received wrist-slap sentences (Persico 1994, p. 11).

The post-WWI Peace Treaty of Sèvres required the Ottoman government to hand over to the Allied Powers people accused of what was termed “massacres.” About 144 Ottoman officials were arrested and deported for trial by the British to the island of Malta. While the deportees were interned on Malta, the British appointed an Armenian scholar, Mr. Haig Khazarian, to conduct a thorough examination of documentary evidence in the Ottoman, British, and US Archives to substantiate the charges. Access to Ottoman records was unfettered as the British and French occupied and controlled Istanbul at the time. Khazarian’s corps of investigators revealed an utter lack of evidence demonstrating that Ottoman officials either sanctioned or encouraged killings of Armenians. At the conclusion of the investigation, the British Procurator General determined that it was “improbable that the charges would be capable of proof in a court of law,” exonerated and released all 144 detainees—after 2 years and 4 months of detention without trial (Akcem 2005).⁴

The fundamental influence on current international criminal justice of the Nuremberg and Tokyo Trials has been discussed widely and it is indisputable. The historical connection between ICTR and these post WWII trials has been narrated in several published works and can guide the work of information managers today (Adami and Khamis 2003; Adami et al. 2004; Adami and Hunt 2005; Adami 2003; Connelly-Hansen 2001). We can still learn much from the archives of these precursors to modern day criminal justice institutions. Dispersion of the record, amalgamation of the records of the complex judicial process, definition of and selective use of evidence and witness testimony are but four of the drivers in the management of information in these present day criminal justice institutions. These issues are elaborated further later in this article.

Records serving conflicting purposes

For the purposes of this article the ‘archives’ is the collection of records that have been generated in the course of the judicial proceedings of the ICTR. The work being undertaken in support of the judicial process is by definition a dynamic one owing to a sustained focus, albeit an uncommon one within the profession, on a largely international, interdisciplinary and victim-centered methodological approach. It has been said that, whereas “...lawyers are particularly interested in the minutiae of technical questions[,...]what matters to most people is a bigger question: is the emerging system of international criminal justice fulfilling its objectives?” (Sands 2003, p. 106). One can also apply the same question to the field of information management of these institutions. Are they fulfilling their intended objectives? Will the archival legacies of these institutions be of a

³ http://www.en.wikipedia.org/wiki/Henry_Wirz

⁴ See <http://www.turkey.org/politics/facts.htm>

caliber that will support future research and the process of reconciliation of the victims? Can one even apply sociological, anthropological, psychological, and social science methodologies to evaluate information systems that support judicial processes that are trying to come to grips with mass atrocity and the role of criminal justice in transcending systemic violence? One day someone will be able to evaluate the archival legacies of these judicial organs in just such a manner.

There is a gradual but nevertheless perceptible change almost on a daily basis of the collective archival fond of the ICTR. The ‘record’ as described in the records continuum model developed by Frank Upward and Sue McKemmish of Monash University, can be ebbing and flowing and perhaps also transfigured according to the various influences and uses attributed to them (McKemmish 2001). When a judicial record is filed with the Registry of the ICTR it becomes part of the judicial archives and by definition will be retained permanently.⁵ The ‘judicial archive’ of the ICTR consists of records from the parties such as Chambers (decisions, judgments, orders), Prosecutors Office and defence counsel (indictments, motions, responses, disclosures, exhibits), and *amicus curiae* (pleadings, exhibits).⁶ The verbatim transcripts of court proceedings also form part of the archives. The audiovisual collection is another large and important element of the archives. All these records are available in hardcopy (originals) and are digitised for access purposes. This core of the judicial archives will be enhanced by records from the Witness Protection, Defence Counsel Management, and Court Management Section as well as the Registrar’s and President’s Office.

The salient point here is that the archives of the ICTR contains many copies of the same document as they serve different, sometimes conflicting, purposes. A transcript of the Rwandan RTML ethnic hatred radiobroadcasts may be submitted as exculpatory material by one of the parties and then it may again appear as an exhibit for the opposite side. Also, the same transcripts may again appear in another case defending or refuting a different set of actions attributed to a different defendant. Records are used, re-used, interpreted, and re-interpreted according to a complex set of requirements of the prosecution and/or defense teams. The records can exist within the different vectors and dimensions of the continuum model thereby serving different purposes and attaining different values.

There is another fundamental issue surrounding information management in this international judicial environment and that is historical revisionism. On the issue of revisionism and the concept of minimization of the evidence, it has been said, “As every attorney knows, it is often easier to create doubt and win than it is to prove what actually took place” (Totten et al. 1997, p. xxi–xxii). The concept of burden of proof and evidential value of the ‘record’ should be the fundamental *raison d’être* of any recordkeeping program in this legal field. The Judicial Records and Archives Unit (with 21 staff) is part of the Registry of the ICTR thus giving it a degree of distance from the Parties and ensuring an unbiased approach to service delivery and neutrality. The Evidence and Information Unit of the Office of the Prosecutor of the ICTR is a totally independent entity from that of the official judicial archives and so it should be. The practices and systems that are used by them are also not connected in any way or form to that of the judicial archives. Amalgamation would not be possible or even practical. The purposes and resultant end-uses of these records are too varied to even contemplate such a development. Investigators go through a process of gathering physical evidence and then corroborating the evidence with testimony of

⁵ See <http://www.ictor.org> for a copy of the ICTR retention schedule for judicial records.

⁶ The vast majority of the Office of the Prosecutors evidence collection may never become part of the official judicial archive of the ICTR. It may be turned over to the Rwandan authorities to continue with any on-going investigation into the genocide post 2010.

witnesses. The judicial archives prime purpose in being is to ensure that the work of the investigators is preserved over time and that the court proceedings are fully documented and captured into recordkeeping systems that can be migrated and easily accessed but also with sufficient security features to ensure their integrity. Not all the work of the investigators will form part of the archival body of an international criminal justice organization.

The archives of the ICTR, as well as those of its sister organizations, need to be preserved overtime as a testament to the survivors of the worst possible crimes. “Accurate accounts of the genocide must establish in all their complexity the roles of the leaders, the followers, and the dissidents within Rwanda as well as the parts played by various international actors. This is essential both for assessing fairly the behavior of individuals and for creating strategies for the future. We must understand how local and international protest can resonate back and forth to create the swell of outrage that will prevent or halt future genocides. This work is one of the many that must come to establish the historical record, to lay the groundwork for justice for Rwandans and accountability for all others who failed to respond to the bonds of our common humanity. The story must be told.” (Human Rights Watch 1999). There are five main areas that are closely associated with human rights archives and they are broadly defined as historical accountability, retaining memory of the victims and survivors, support prosecution, document the extremes of repression and chronicling how the individual has power against the state (Montgomery 2004). The archival legacies of the Khmer Rouge bear testament to these points and further highlight this transfiguration from one function to another. It can be a tool of repression and then a tool in support of reconciliation (Chigas 2000; Ketelaar 2005).

It is envisaged that the ICTR and the ICTY at the end of 2010 will complete all trials and appeals procedures. Their completion strategies seek to address questions in respect of their legacies, including the archives. The key issues and concerns regarding the maintenance of the two Tribunals’ archives are similar, although each does have specific unique requirements.⁷

It has been said that it is ultimately courts that determine, whether records are telling the truth but that archivists should be part of the process in conjunction with the courts neither conceding nor abrogating their role in this regard (Harris 2000). This is one aspect of the transfiguration of the archive, at one time or another shifting, growing, taking on new meaning, enlightening, and ultimately becoming immutably fixed in temporal and physical location and composition. Only then perhaps at a later stage to be changed again for whatever the prevailing reasons dictate. It is transfigured from a mass of separate records into a body of information that points to a time and place that no longer exists except in the memories of those (un)fortunate to survive.

The Judicial Archives of the ICTR was in 2005 nominated for the UNESCO Jikji Memory of the World prize, In being so nominated and then becoming one of the seven short-listed collections, it is recognized that the archives of the ICTR presents a unique and invaluable collection of material on the 1994 Rwandan genocide. Its significance reaches beyond that of its day to day importance to the court proceedings. It becomes a global treasure transcending its original role and function.⁸

⁷ In 2007 the Registrars of ICTY and ICTR have commissioned an experts’ study to examine these requirements and to perform a comparative analysis of the key issues and concerns regarding the maintenance of the archives.

⁸ http://www.portal.unesco.org/ci/en/ev.php-URL_ID=18430&URL_DO=DO_TOPIC&URL_SECTION=201.html accessed 15 June 2007. The prize was awarded to the National Library of the Czech Republic.

Who will remain to tell the tale?

Little has been written on the effect of the archivist's work on his or her personal well-being. Milan Kundera talks of the concept of uncontrollable destructive emotionalism and the struggle of memory against forgetting [or oblivion].⁹ Such reductionist analysis and clinical and total separation from the content of an archive is impossible from my practical experience. Logic tells us that 'it's just a job' but on those inevitable 'bad and stressful' days it becomes more difficult than usual to draw a veil over the content and purpose of the archive. The photographic and video evidence is particularly harrowing. Nevertheless, it is work that needs to be done. The psychological impact of contact with these records is a reality. It is a reality that would not be part of the archival legacy but will definitely impact the quality, content, accessibility and possibly even the long-term preservation of the archives.

Accountability is a major component of the purpose of information management at the ICTR and no doubt the other permanent and ad-hoc courts (Hurley 2005). There is an ongoing debate that claims that the end result of these international criminal courts is rarely an accurate historical record of events (Osiel 2000). As for the applied international jurisprudence, the rationale, draws from a belief that prosecuting a small number of individuals (generally officials or leaders, but not necessarily so) serves a broad range of normative goals such as retribution, reconciliation, peace, and narrating history. On this latter point it remains unclear how well individual trials relate historical truths about collective violence. Nuremberg Chief Prosecutor Robert Jackson famously advised that criminal proceedings could be a mechanism to "establish incredible events by credible evidence," and thereby, authenticate a historical record. For the ad hoc and hybrid tribunals that currently motor the operation of international criminal law, only time will tell.

International criminal law has made great strides in conceptualizing the behavior it criminalizes (genocide, crimes against humanity, and war crimes), it has also attempted to develop independent approaches to determine the guilt of defendants, punish convicts, and narrate historical tragedies. In the wake of the Rwandan genocide, there has been considerable reliance on national and international trials to pursue a myriad of goals, including accountability, peace, reconciliation, and truth telling. The international proceedings held at the ICTR operationalize the premise of selective, individualized, retributive criminal justice that underpins international criminal law (Drumbl 2005). That is the reality as imperfect as some observers say it is. However, without a doubt the archive of at least the ICTR, if not the other ad hoc and special courts, is capable of delivering to its clients the judicial record whenever and wherever it is required. The staff of the archives unit of ICTR has been able to individually and collectively overcome personal differences that are clouded by race, gender, ethnicity, personal beliefs, limited professional skill and experience, deficient infrastructure of physical location in East Africa and fear of change to wholly support the organizational ethos of embracing innovation and the delivery of justice (Ngulube 2004, p. 25). The resultant judicial archive is now able to ensure its continued accessibility to support the remainder of the ICTR's mandate as well as future needs. The ICTR website (<http://www.ictor.org>) has a database that can be accessed by anyone with Internet access. It contains all public documents relating to the court proceedings. On a daily basis some 50–75 hits are recorded to this database. It is entirely identical to the internal judicial archive, which contains all the confidential material accessible to selected legal staff and maintained by the staff of the Judicial Records and Archives Unit.

⁹ Milan Kundera 'The Owners of the Keys'. Play first staged at the National Theatre in Prague, 1962.

Through the application of standards and automated systems it is possible to provide authentic, accurate, reliable, comprehensive compliant, and systematic records of ongoing and past cases to the prosecution, defense, and chambers. It is well understood that what constitutes admissible evidence in one situation will not satisfy another. We in the ICTR apply multiple layers of security to all the digitized records within the electronic record-keeping to ensure what is admitted into evidence and all subsequent judicial filings are immutable. Hard copy is then not needed for access except in rare circumstances. In this way the provenance of all the records is and cannot be disputed. Here we have the gathered testimonies of selected witnesses and the resultant judicial history of the Rwandan genocide since April 1994.

Moving images and touching stories

It is imperative that mention be made of the audiovisual collection of the ICTR archive. Given that the literacy rate in Rwanda is not particularly high and that Internet access is almost non-existent, the audiovisual archive takes on a far greater significance than would normally be the case. The audiovisual archive has the added advantage over the written record in that it can express the nuance of meaning (Hunt 2004). Most of us will acknowledge the irreplaceable role that recorded moving images and sound play in memory and history. In order to actually be able to see someone from the past, to hear him or her speak in his or her own voice, gives the viewer valuable insights that cannot be duplicated by the written word. The filmed proceedings of the trial at Nuremberg are still occasionally used today by scholars and historians, as well as being an educational tool for the general public (Douglas 1995). The work being done at the ICTR is of equal significance, and the video and audio recordings will play a very important role in the future. “The records in fact can speak to us from the past. They evoke memories unlike those of the written word” (Hunt 2004). For survivors to be able to see the accused in the courtroom is more evocative than reading the verbatim transcripts, if they can read one of the two official languages of the ICTR.

Normally format would not be a prime motivating issue for information managers in the intellectual and physical control of records but these records present a unique and invaluable sub-set of the main judicial archives of ICTR. There is a complex and drawn out process in place that ensures the protection of the identities of witnesses after they give testimony in court and before the audiovisual recordings are made public. This redaction is necessary even though it is time consuming and costly. The ICTR Outreach Center ‘Umusanzu mu Bwiyunge’ in Kigali¹⁰ is provided with copies of the audio and video recordings of the court sessions after they have been redacted.

¹⁰ The ICTR Information Center ‘Umusanzu mu Bwiyunge’ in Kigali (inaugurated in September 2000) provides a range of opportunities to increase public understanding of the ICTR’s work through briefings and films. The Center facilities are fully utilized by the Rwandan public, particularly students and researchers, who wish to get first-hand information about the Tribunal. Press conferences, briefings and films on the Tribunal are frequently held at the Center. In 2005/2006 on average, 80 persons a day have visited the Center in order to use its legal library, Internet facilities and the database of printed and audio-visual Tribunal material. Screenings of audio-visual documentaries on the Tribunal are held in various communes in Rwanda and in schools and prisons five days a month: 11th Annual Report ICTR on <http://www.ictor.org>, accessed 15 June 2007.

Conclusion

As part of the process of internationalized criminal justice, the ICTR has been attempting to address the issues of reconciliation, justice, and peace. In this context the judicial archives of the ICTR has an important role to play. The archives will be the tangible legacy of the judicial process. The judicial archives will be left to tell a tale, if not the whole tale, of the Rwandan genocide. It is a testimony of the international community as to its remorse, anger and guilt of the events of 1994 in Rwanda. Through the practical and measured application of sustainable technology, the ICTR can state that its archival legacy will be inclusive, accessible and manageable over time. Collaborative efforts underway will also ensure the wide dissemination of copies of the public archives of the ICTR within Africa.

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