INTRODUCTION: JUDGING THE CRIME OF CRIMES

Between 7 April and mid-July 1994 an estimated 937,000 Rwandans (according to a 2001 census the vast majority of whom were Tutsi), were murdered in massacres committed by militia, the gendarmerie and elements of the army, often with the participation of the local population (see Des Forges, 1999; Eltringham, 2004; IRIN, 2001). On 13 April 1994, Claude Dusaidi, the representative at the United Nations (UN) of the Rwandan Patriotic Front (the predominantly Tutsi rebel group that had entered into a power-sharing agreement with the government in August 1993), wrote to the President of the UN Security Council stating that a 'crime of genocide' had been committed against Rwandans in the presence of UN peacekeepers (UNAMIR[1]) and that the Security Council should establish a war crimes tribunal (Carlsson *et al.*, 1999: 68). As de facto custodian of the term genocide, the UN was, however, slow to designate the events as such (see Melvern, 2000). Only in his report of 31 May 1994, did the UN Secretary-General declare genocide had been committed (United Nations, 1994b, UN Doc. S/1994/1125: para 36). In a letter to the President of the UN Security Council on 28 September 1994, the post-genocide Rwandan government requested that an international tribunal be established (United Nations, 1994c, UN Doc. S/1994/1115) a suggestion supported by a UN Commission of Experts on 4 October 1994 (United Nations, 1994b: paras 133–42)[2]; the

[1] United Nations Assistance Mission for Rwanda, established 5 October 1993 by Security Council Resolution 872 (1993), UN Doc. S/RES/872.
[2] The Commission of Experts initially suggested that the ICTR be subsumed into the ICTY.

President of Rwanda on 6 October (United Nations, 1994a, UN Doc. A/49/PV.2: 5) and, on 13 October 1994, by the Special Rapporteur of the Commission on Human Rights on the situation of human rights in Rwanda (Degni-Ségui, 1994: 19). This resulted in a UN Security Council Resolution on 8 November 1994 (United Nations, 1994e, UN Doc. S/RES/955 (1994)), initially sponsored by the United States and New Zealand creating the 'International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994' (see Chapter 1).

From 1996 to 2014, the ICTR's offices and four courtrooms were located in two rented wings of the Arusha International Conference Centre in Tanzania. The ICTR consisted of three principal organs: the Office of the Prosecutor (which investigated allegations; issued indictments and prosecuted the case in court); the Registry (administration); and three 'Trial Chambers' composed of 16 permanent and nine *ad litem* ('for the case') judges. There was no jury; the three judges who sat in each trial assessed the evidence and issued a judgment. The ICTR had jurisdiction over any person accused of committing the following in Rwanda in 1994 (and if Rwandan in neighbouring territories): genocide (as defined by the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide)[3]; crimes against humanity (a widespread or systematic attack on a civilian population)[4] and 'war crimes' (Article 3 common to the 1949 Geneva Conventions)[5]. Trials

[3] Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group. 3. The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide (United Nations, 1994e: Art. 2).

[4] The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation; (e) Imprisonment; (f) Torture; (g) Rape; (h) Persecutions on political, racial and religious grounds; (i) Other inhumane acts (United Nations, 1994e: Art. 3).

[5] These violations shall include, but shall not be limited to: (a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) Collective punishments; (c) Taking

began in 1996 and lasted an average of four years (one lasted nine years) (GADH, 2009a: 76).

The Office of the Prosecutor indicted 93 persons, of whom 62 were convicted and 14 acquitted. A further ten indictees were referred to national jurisdictions, two died prior to or during trial, two indictments were withdrawn before trial and three remain fugitives. The ICTR was the subject of sustained criticism during its operation regarding the selection of the accused; cost ($1.5 billion); and length of trials (see International Crisis Group, 2003; Peskin, 2008: 151–234).

In 2009 the UN Security Council (United Nations, 2009b, UN Doc. S/RES/1901 (2009)) called on the ICTR to complete its work by the end of 2012. On 20 December 2012, the judges passed the final sentence (apart from appeals) on Augustin Ngirabatware (Minister of Planning during the genocide) to 35 years' imprisonment for genocide and crimes against humanity. Two years earlier, the UN Security Council had created the Mechanism for International Criminal Tribunals (MICT) tasked with continuing the 'jurisdiction, rights and obligations and essential functions' of the ICTR and the International Criminal Tribunal for the Former Yugoslavia (ICTY, established in 1993) including the tracking and prosecution of remaining fugitives, appeals proceedings, retrials, trials for contempt of court and false testimony, judgment review, protection of witnesses and victims, the enforcement of sentences and assistance to national jurisdictions (United Nations, 2010, UN Doc. S/RES/1966 (2010)). The MICT is also responsible for the preservation and management of the ICTR archives which contain the transcripts of witness testimony, audio-visual recordings and documents entered as evidence. The UN Security Council (United Nations, 2010) chose Arusha as the site for storing the physical archive, in spite of the Rwandan government's insistence it should be transferred to Rwanda (Hirondelle News, 2009).

THE 'INNER WORKINGS' OF LAW

With the future of the ICTR's archives secure under the MICT, much of which is available online (http://jrad.unmict.org/), the story of the

of hostages; (d) Acts of terrorism; (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; (f) Pillage; (g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples; (h) Threats to commit any of the foregoing acts (United Nations, 1994e: Art. 4).

ICTR's creation and operation would appear to be secure and publicly available. And yet, what the archives contain is only part of the story:

> documents that have been produced in such profusion are there for all men to read. What alone is missing is the emotion, the colour, the movement that characterizes these days. . . . how shall that be captured, and when captured, how shall it be recorded?
>
> (Hyde, 1964: 504).

This diary entry, written by Norman Birkett, the British Alternate Judge, during the Trial of the Major War Criminals before the International Military Tribunal (the Nuremberg Trials 1945–6) suggests that trial archives, including those of the ICTR, fail to capture and preserve an account of the environment experienced by participants; an account, it can be argued, that is necessary if one is to assess such trials in relation to the claims made by advocates of criminal prosecution in the aftermath of mass atrocity crimes. While firsthand accounts of the Nuremberg Trials (see Gaskin, 1990; Neave, 1978; Stave *et al.*, 1998; Taylor, 1992) go some way to capturing what Birkett considered to be lacking from archives, few studies have 'sought to get inside the inner workings' of contemporary international tribunals, as John Hagan (2003: 3) notes in his path-breaking study of the Office of the Prosecutor at the ICTY.

The need to consider the 'inner workings' of law has been a longstanding concern of anthropologists in the context of domestic courts. John Conley and William O'Barr (2005: 2) have argued for a need to see law's power not as a distant abstraction confined to textual rules, but as something that manifests itself in the 'thousands of mini-dramas enacted every day in lawyer's offices, police stations and courthouses'. Rather than attending to 'inner workings', scholarly literature on contemporary international tribunals (the ICTR, the ICTY) has been dominated by the analysis of the expanding case law and precedents that have emerged from these institutions in relation to a variety of issues including command responsibility, judicial notice of genocide, rape and sexual violence and the 'right to counsel'.[6] The same trend has

[6] Command responsibility (Williamson, 2002); concurrent jurisdiction (Morris, 1997); crimes against humanity (Cerone, 2008; Mettraux, 2002); disclosure of evidence (Nahamya and Diarra, 2002); hate speech (Davidson, 2004; Gordon, 2004; Obote-Odora, 2004); international humanitarian law (Boed, 2002); judicial notice of genocide (Mamiya, 2007; Shannon, 2006); prosecutorial strategy (Obote-Odora, 2001; van den Herik, 2005); provisional release (Rearick, 2003); rape and sexual violence (Askin, 1999; Chenault, 2008; Green, 2002; Haffajee, 2006; Haddad, 2011; Obote-Odora, 2005; MacKinnon, 2006; McDougall, 2006; Nelaeva, 2010;

been apparent in literature on other transitional justice institutions. Writing on the South African Truth and Reconciliation Commission (SATRC), Lars Buur (2003b: 67, note 68) notes that much of the academic commentary on the commission contained 'no information about its everyday aspects . . . as if the everyday work is just a neutral medium for information gathering and processing, a means to an end'.

This omission of 'everyday aspects' has been rectified to some extent as regards the ICTY in the aforementioned work by John Hagan (2003), by Pierre Hazan (2004) and in a series of articles by an ICTY judge, Patricia Wald, (2000; 2001a; 2001b; 2002; 2004a; 2004b; 2006). Regarding the ICTR, Rosemary Byrne (2010: 247–8) drew on trial observation to move beyond 'traditional legal analysis focused on the formal rules, decisions and judgments' to explore the 'hidden art of international criminal trial practice' (see Chapter 3). These works correspond to what Kieran McEvoy (2007: 414) describes as 'thick' writings on transitional justice that 'reflect critically on the actions, motivations, consequences, philosophical assumptions or power relations which inform legal actors and shape legal institutions' in contrast to 'thin' writings that 'tend to emphasize the formal or instrumental aspects of a legal system'. McEvoy (2007: 412–13) argues that the predominance of 'thin' writings means that the literature on transitional justice has become 'over dominated by a narrow legalistic lens which impedes both scholarship and praxis' (see also Lundy and McGovern, 2008: 275). Combined with a lack of 'on the ground' research, this has resulted in a 'very simplistic sense of what makes international law hang together' (Meierhenrich 2013: 9; see also Wilson 2007: 366).

Other authors have made similar observations regarding the need for 'thicker' accounts. In her discussion of the mobile personnel who moved from one international criminal tribunal to another, Elena Baylis (2008: 364) notes that although scholars have concerned themselves with the 'analysis of processes, norms, and institutions', there has been 'little examination of the people involved and the roles they play'. Likewise, Jenia Iontcheva Turner (2008: 543, note 555) notes that writing which has considered defence lawyers practising in

Oosterveld, 2005; Van Schaak, 2009; Wood, 2004); rules of evidence (Dixon, 1997); sentencing (Hola *et al.*, 2011; Keller, 2001; Sloane, 2007; Szoke-Burke, 2012); the crime of genocide (Akhavan, 2005; Aptel, 2002; Eboe-Osuji, 2005; Greenfield, 2008; Gunawaradana, 2000; Zorzi Giustiniani, 2008; Obote-Odora, 2002; Schabas, 2000); the protection of witnesses (Pozen, 2005; Sluiter, 2005); transfer and extradition (Bohlander, 2006; Jalloh *et al.*, 2007; Mujuzi, 2010; Melman, 2011); and 'right to counsel' (Niang, 2002; Wladimiroff, 1999).

international tribunals has focused 'on the rules governing the conduct of attorneys and not on the perspectives of attorneys themselves'. Regarding the importance of understanding such perspectives, Richard Wilson (2011: 14) documents, in his study of whether international trials can generate valid historical narratives, 'why prosecutors, defence counsel, and their respective expert witnesses argue about the past; what their motivations are; and what they hope to achieve' (see Chapter 5). In a similar vein, Jonneke Koomen (2013: 255–6 262) has noted that there has been lack of exploration of the 'social lives of these institutions' and argues that there is a need to direct attention to an institution's 'everyday tasks, routines, and cultural practices', and to the fact that while international justice 'masquerades in the language of the universal', it is 'always made possible through local encounters'. It is the local, 'social encounter' that has gone 'largely unaddressed' in literature on international criminal trials as Tim Kelsall (2009: 18) observes in his study of trials at the Special Court for Sierra Leone (SCSL, established 2002). In this way, while international criminal justice is fuelled by 'aspirations to fulfil universal dreams and schemes', there is a need to appreciate that it can only be enacted in the 'sticky materiality of practical encounters' (Tsing, 2005: 1).

Commenting on the aforementioned 'thin' legal literature on international tribunals, Jens Meierhenrich (2013) observes that such accounts are 'so preoccupied with the technical minutiae of prosecution and adjudication … that the structured action of individual agency is not noticed, let alone studied'. Meierhenrich promotes 'practice theory' as one way of rectifying such omissions. In place of a unified 'practice theory', Meierhenrich (2013: 13) quotes Davide Nicolini's (2013: 3) summary of features common to different 'practice' theorists:

> [it] foregrounds the importance of activity, performance, and work in the creation and perpetuation of all aspects of social life. Practice approaches are fundamentally processual and tend to see the world as an ongoing routinized and recurrent accomplishment. . . . institutions, and organizations are all kept in existence through the recurrent performance of material activities, and to a large extent they only exist as long as those activities are performed.

While the book does not apply 'practice theory' systematically throughout, it seeks to fulfil Meierhenrich's requirement 'to get readers to understand, first and foremost, the particularity of practices' in 'a specific time, place, and concrete historical context' by paying close

attention to the 'doings and sayings of practitioners' (Meierhenrich 2013: 56–7). In this way, this book builds on the call by Hagan, McEvoy, Meierhenrich, Baylis, Byrne, Turner, Koomen, Kelsall and Wilson to explore the 'actions, motivations, consequences, philosophical assumptions [and] power relations' (McEvoy, 2007: 414) at play within institutions such as the ICTR through the 'people involved and the roles they play' (Baylis, 2008: 364).

Such an approach resonates with the 'legal realism' movement prominent in the United States in the 1930s and 1940s. Although an eclectic movement with a contested legacy (see Schauer, 2013: 749, note 742), it is best summarized by Karl Llewellyn's (1930: 447–8) distinction between 'paper rules' and 'real rules' where the former is 'what the books say "the law" is' and the latter being what actually happens in court (see Pound, 1910). Such a distinction challenged 'legal formalism', the assumption that law (statute and precedent) can be mechanically applied to 'fact' and also challenged the claim that the practice of law is a 'closed' system insulated from social and political bias. In contrast to 'legal formalism', Llewellyn detected a gap between rules and practice and demonstrated that 'legal doctrine ordinarily does not determine legal outcomes without the substantial influence of nonlegal supplements' (Schauer, 2013: 754). A central 'nonlegal supplement' identified by the legal realists was judicial discretion in which judges apply an 'unwritten real rule' (Schauer, 2013: 769).

Not only does this book resonate with elements of 'classic' Legal Realism it also reflects the New Legal Realism (NLR) that has emerged in the last ten years (see Nourse and Shaffer, 2010) with its focus on the transnational flow of legal ideas and personnel and exploration of 'international law, human rights law, and transitional justice' (Merry, 2006a). The gap between 'paper' and 'unwritten rules' is explored in Chapter 3, where I consider a whole set of 'unwritten' habitual assumptions that inform the operation of the courtroom drawing on Pierre Bourdieu's (1987: 831, 820) discussion of the 'written and unwritten laws' of the judicial field and Peter Zoettl's (2016) ethnography of Portuguese and German criminal trials. Zoettl (2016: 5–7) demonstrates that although every moment of the trial is scripted, not all of that script is codified as written, public rules. Standing and sitting and the bodily postures required of defendants by judges are, for example, part of a 'hidden' script, one that only becomes apparent 'when something goes wrong' (Zoettl, 2016: 4). There is, therefore, both a codified, public script (such as the ICTR's Rules of Procedure and Evidence - the

RPE or RPEs) and a hidden script which only becomes apparent when it is infringed. Given that the legal practitioners at the ICTR were drawn from a variety of legal jurisdictions there was frequent infringement of the 'hidden script' increasing the visibility of habitual, 'unwritten rules'.

The importance of 'unwritten rules' in the courtroom challenges the privileging of the 'written word' in the practice of law. In their ethnography of UK barristers, John Morison and Philip Leith (1992: 3) note that those who teach law seem to consider it as only having life in 'the gradations of the printed word: case notes, legislation, law reports'. Such a tendency is apparent in Bruno Latour's (2004: 101, 196) study of the French *Conseil d'État* which demonstrates how the law subordinates the 'real world' to a 'close-edited diagram' (Geertz, 1983: 173) by reducing 'the world to paper' so that texts 'replace the external world, which is in itself unintelligible'. While, as Richard Wilson (2007: 363–4) warns, Latour was concerned with the very particular practices of French administrative law, it can still be argued that legal practitioners tend to privilege texts because they are considered to represent 'stability, dispassionate fairness, fidelity to truth without prejudice, the blindness of the law' in contrast to the theatricality of the courtroom with its 'artifice, emotion, deception, seductive appearances, the instability of truth' (Stone Peters 2008: 199) (see Chapter 2).

The tendency to textualize the world was apparent at the ICTR where the transcript of witness testimony provided by stenographers was immediately available on lawyer's and judges' laptops via 'LiveNote', a transcript management software (see Chapter 2). This transcript was then used by judges' Assistant Legal Officers (ALOs) to produce 'witness summaries' for each witness which were used by judges in the drafting of the judgement. By applying the law (a text) to evidence (rendered as a text in two stages) another text was produced (the judgement). Like Latour's (2004: 102) *conseillers*, ICTR judges were not so much triers of 'fact' (in an external world), but triers of distilled texts. Given the privileging of text in ICTR trials (speech instantaneously turned into text via LiveNote), it is not surprising that scholarship on the ICTR has tended to concentrate on analysing residual texts (judgments and transcripts) rather than the working lives of the lawyers and judges who produced those texts or the environment in which they operated.

This is an unfortunate tendency for, as Morison and Leith (1992: vii) argue, the domination of this 'text based view of the law' obscures the

reality of the practice of law and that if 'only one percent of the time spent in textual analysis [was] spent on analysing law in practice, we would have a completely different view of the nature of the law'. They suggest, for example, that it is a mistake to envisage the UK barrister's daily routine as one of 'scholarship and oratory', where, in reality, it is 'extra-legal' knowledge that is paramount (whether that be knowledge of the judge's temperament, the reputation of the opposition, the barrister's relationship with the solicitor etc.) (Morison and Leith, 1992: 17). They suggest that a more accurate portrayal of the barrister is as a 'fully social individual who must satisfy all sorts of competing demands' (Morison and Leith, 1992: 19). Elena Baylis (2008: 377), writing specifically on international criminal tribunals, concurs, suggesting that while relevant knowledge for international lawyers and judges is assumed to be restricted to 'a limited set of authoritative legal documents and texts' (a position exemplified by the legal scholarship on the ICTR), other forms of knowledge, including forms of bureaucratic organization and personal networks of practitioners are, in reality, more pertinent. This includes 'relational skills: a sense of cosmopolitan flexibility and cultural flexibility . . . to work successfully with a diverse set of international co-workers from numerous legal backgrounds' (Baylis, 2015: 273) (see Chapter 3). Such skills are, however, rarely discussed in accounts of international criminal justice (see Mégret, 2016: para 45).

The domination of the 'text based view of the law' also obscures much that happens in the courtroom despite the profuse production of documents therein (see Hyde, 1964: 504). Transcripts, for example, are only a residue of a process and omit not only important elements of talk, including 'emphasis, intonation, volume, and pauses' (Eades, 1996: 217), but also 'gestures, hesitations, clothing, tone of voice, laughter, irony' (Clifford 1988: 290). The importance of such 'extratextual and subtextual language' (Martin 2006: 10–11) is apparent in anthropologist Alexander Hinton's (2016) account of the trial (2009–10) of 'Duch' (Kaing Guek Eav) by the Extraordinary Chambers in the Courts of Cambodia (ECCC) for war crimes and crimes against humanity committed at the S-21 ('Tuol Sleng') detention centre between 1975 and 1979. Having observed much of Duch's trial, Hinton takes care to record the mannerisms of the defendant, lawyers, judges and observers, the way they spoke and moved. Such details are not cosmetic, but central to Hinton's (2016: 67) main concern, asking whether the simplistic question of whether Duch was a 'man or

monster' was at odds with the different *personae* Duch displayed in the course of the trial 'the man, teacher, lawyer, judge, defendant, victim, perpetrator, repentant, monster and so forth'. Hinton (2016: 56–8), for example, describes Duch delivering a prepared statement at the start of the trial:

> Duch the teacher rose from his seat, ready with a reprimand. Gazing toward the prosecutors, as if lecturing students who had gotten the facts wrong . . . Putting on his glasses, Duch began reading from a prepared statement. . . . His voice quivered slightly as he said [the number of those killed under Khmer Rouge rule]. Then he paused and glanced over at the civil parties [representing victims] before expressing 'my regret and my deepest sorrow' . . . After taking a deep breath, Duch acknowledged his 'legal responsibility' for the crimes committed at S-21 . . . his voice became increasingly soft, his arms barely moving. Having completed his statement, Duch set down his glasses and clasped his hands. Glancing alternatively between the judges and civil parties, he said that he wanted to express 'the remorse I have felt all my life' . . . His voice sounding more confident, like the teacher who had first chided the prosecution.

Hinton (2016: 58) notes that having watched this performance, many observers wondered which Duch was authentic: the confident, former maths teacher reprimanding the prosecution, or the contrite defendant on the verge of tears? Such wonder in the minds of observers, was not simply a response to the words used by Duch (recorded in the transcript), but in the manner in which he had spoken those words. Relying on the transcript would not, therefore, communicate a key aspect of that moment in Duch's trial (see Chapter 2).

For Morison and Leith (1992: vii), an account of the 'non-textual nature of law' which would take such issues into account (both inside and outside the courtroom) would not only be more accurate, but, they argue, lawyers, academics and the public would benefit if we 'move from accepting ideologically based pictures of law, to seeing law as a necessarily flawed human process'. The legal scholar Bernard J. Hibbitts (1995: 52) gives an indication of what such an alternative account of law would consider:

> We must not overlook unwritten forms of expression and experience that shape our understanding and appreciation of law in practice . . . Even in a society saturated by the written word, law lives in the speech of lawyers and clients, in the gestures of attorneys and witnesses, and in the multi-sensory 'performances' of persons party to wills, marriages and