Humanity

Archives of Knowledge: Power, Ownership and Contestation at the ICTR's Archive

Henry Redwood

July 5, 2017

Archives are sites of power, contestation, and control. The very term archive derives from the ancient Greek word *arkeion*, which referred to the magistrates (*archons*) house where official records were kept and protected. The magistrate drew their power through protecting, controlling and interpreting these records in order to create and administer law, placing at a very early moment in history a clear link between archive, governance, law and power.[1] *Who controls the archive*, and to what ends, then, is of crucial importance. This post explores this question in relation to the archives of the International Criminal Tribunal for Rwanda (ICTR).

The ICTR's Archive

The ICTR's archive, based in Arusha, Tanzania, contains a staggering 4 km of documents.[2] Sitting at the heart of the archive lies the testimony of the witnesses, who formed the main evidence base at the ICTR, given throughout the tribunal's history; this totals 26000 hours of testimony, produced by 3200 witnesses across 6000 trial days.[3] In addition to this, 1000s of exhibits have been entered into the archive, along with the countless records of motions, correspondence, decisions, strategic reports and other administrative documents. The archive is not only a considerable record of violence that engulfed Rwanda in 1994, when in just 100 days nearly 1 million victims were killed. It is also a record of the tribunal as an institution created by the United Nations Security Council (UNSC) on 8 November 1994 in order to bring peace and security to the Great Lakes region and the international system by offering the chance of truth, justice and reconciliation.[4] Perhaps unsurprisingly, then, as the ICTR was drawing to a close, the archive was increasingly presented as a key part of its legacy.

As this happened, however, the archive also became a site of controversy. This began in 2005 when the UN was deciding where the archive should be located and what its purpose would be after the ICTR closed. Both Rwanda and the UN claimed the right to decide the fate of the archive.[5] Each saw the archive as performing a different role; Rwanda saw it as a site of history and memory that could assist the country reconcile with its past, and the UN saw it as a site of law and institutional memory that was needed by the Residual Mechanism (MICT) for it to finish the ICTR's left over work once the ICTR had closed.[6] Whilst settled in favour of the UN, this matter did not end here as Rwanda continued to claim ownership of the archive, and gradually the UN began to acknowledge that as a secondary function the archive *did* contain historical and memorial value that could at some point in the future usurp its legal and institutional function.[7]

As such who ultimately owns the archive and what function it serves remains unclear at present. This post explores the contents of the archive, in order to begin to assess these questions of ownership and strategic function of the ICTR's archive and the tribunal more generally. First it looks at the founding moment of the tribunal in order to determine what the tribunal was created for, and also who were the key stakeholders in the institution. Next I will explore the processes through which the content of the archive was produced, highlighting in particular the role of the witness, before considering how the functionality of the archive changed overtime due to the UNSC's intervention and how this effected the archive.

The Archive's Strategic Function

The tribunal had a number of different stakeholders, each of which would come to try to shape the archive in a particular manner. First was Rwanda which (whilst ultimately voting against the creation of the ICTR) initially requested an international tribunal to help render justice in the aftermath of the genocide.[8] The tribunal here would offer "justice" to the victims and help reconcile Rwandan society by prosecuting individuals, removing the need for revenge and separating the innocent and the guilty, preventing the imposition of collective guilt. It would also act as a site of history and memory as it would afford victims a space to tell their story, and in doing so uncover the "truth," which would protect against revisionism and produce the basis of a new collective memory, and hence identity.[9] The tribunal would also serve the needs of the "international community" (or more specifically the UNSC) as it reaffirmed its humanity and cleansed itself of the guilt it had suffered as a result of not doing more to stop the genocide in the first place.[10] It would also, along with the ICTY, assist the international community and the legal community in the development of international criminal law, and perhaps most importantly in the *institutionalisation* of international criminal law, giving it a more solid existence.[11] In many ways, as would become more so overtime, the enactment of international criminal law was also (tautologically) *for law itself.* During the first weeks of the violence, the UNSC refused to recognise what was happening as genocide, and instead repeatedly described the violence in Rwanda as being "chaotic" and "tribal"— and hence something that it could was beyond the "international community's" responsibility. This changed, however, once the UN (on April 30, 1994) identified the violence legally as representing genocide, and hence an infringement of international law.[12] With this the problem became a *legal* problem, which rendered the need for a *legal* solution.

Overall, then, the tribunal, and its archive, was presented as a site of law, history, memory, reconciliation and politics, acting in the service of tribunal's legal actors, the international community and the UNSC, the victims and Rwanda. However, beneath this rhetorical swell of hope and optimism lay, as Rwanda's ultimate rejection of the tribunal showed, a number of tensions between these different stakeholders and goals. Little thought was, it seemed, really given to how, or if, these multiple goals could be pursued simultaneously. As such, whilst we are left with the *promises of justice*, how it would work, who it would work for, and to what ends, remained unclear. In order to understand this, we need to go beneath the rhetoric and to instead look at the *practice* of the tribunal, which will help determine who controlled the process of justice, to what ends, which will in turn elucidate what resides in the archive, why and, finally, the question of *whose* archive.

Constructing the Archive

The archive was formed and shaped as a result of the interactions between the many players (as described above) who had a stake in it. How these stakeholders intervened in the construction of the archive, and what motivated this, would fundamentally influence the way the archive was constructed. Throughout the trials the witness remained the main source of evidence and as such their role in the construction of the archive was particularly important. The question is, then, and how was this testimony shaped and constrained as a result of interactions with the other stakeholders?

The most influential of these constraints was the result of the interventions of the legal agents (prosecution, defence and judges) that encouraged the witnesses' testimony to unfold in ways that would satisfy the legal needs of the process. This way of proceeding is often seen by transitional justice scholars, like Dembour and Haslem, as resulting in the "silencing" of the witnesses, as it often appeared that these witnesses had particular narratives forced upon them in the courtroom and were prohibited from telling *their story*.[13] As such, whilst largely produced *by them* this would imply that the archive remained in many respects *distanced* from the witnesses themselves.

These legal constraints meant that the witnesses' testimonies, like most other records and narratives constructed by the tribunal, had to relate to the crimes that the accused had allegedly committed, as charged in the indictment; crimes that were limited by the statute, and therefore temporally, geographically and substantively restricted.[14] These legal structures influenced the content and subjects of each of the witnesses' testimony which had to remain within these boundaries. The legal agents worked away at the witnesses' narratives further still as they forced them to unfold in ways that would capture a *legally comprehensible* story of the crime, which because of law's epistemological needs had to describe a purposeful, guilty, perpetrator working consciously and deliberately towards committing a crime against the passive, and therefore innocent, victim.[15] This idea suggests that witnesses lost their ability to speak as they, and their narratives and experiences, became interchangeable within this grid of intelligibility.[16]

Within the thousands of pages of transcripts held in the archive there are undoubtedly many examples of moments where narrow and restricted understandings of the violence (as an established crime in law) were mobilised, which forced witnesses' experiences to serve legal ends. This appears especially so when contents of the archive were being solely constructed by the legal agents—particularly within the judgements.[17] Alongside these moments, however, was evidence that the idea of the witnesses' passivity in relation to how the archive was constructed needs to be re-evaluated.

It is often forgotten that before witnesses got to the courtroom they played an important role in the pre-trial stages of each case as their pre-trial testimony assisted the prosecution to generate the narrative structures and arguments drawn on at trial. When this stage is considered, this makes the witnesses' in-trial testimony a performance of a script that has been (to greater or lesser extents) *co-produced*, and hence problematizes the notion that legal narratives are forced

onto the witnesses in court.[18] While having to remain within the parameters of the tribunal's jurisdiction—which undoubtedly limited what could be testified to—it was first and foremost through the voices of the witnesses that the prosecution began to construct their cases against the accused.[19]

Close examination of the trial transcripts also shows the witnesses' ability to intervene, re-shape and re-frame the trial's *and the law's* understanding of violence, as well as their ability to retain a sense of the specificity of the trauma inflicted, which significantly effected how the archive was constructed. During the *Akayesu* trial, Witness J's and Witness H's unplanned testimony that they had witnessed rape or had been raped themselves led the prosecution to alter the indictment to include allegations of sexual violence.[20] This, after five other witnesses testified on this matter, resulted in the judge's ground-breaking decision that rape constituted an act of genocide. The judges' final definition of rape *relied* on these witnesses' experience to push for a more "progressive" interpretation of the law, noting that rape could not "be captured in a mechanical description of objects and body parts" and instead found that it was "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."[21] This testimony was also partly responsible for the creation of the sexual violence investigation team, which, in theory, drew greater attention to the prominence of sexual violence during the genocide. Combined, this (although not unproblematically) challenged the discourse"s previous exclusion of women as subjects and objects with which international criminal justice was specifically concerned.[22]

Much of this testimony also contained far more information and "richness" than is often thought, questioning the claim that law abstracts violence to the point where it becomes deontological in nature.[23] Testimony often breached the temporal and geographical restrictions placed upon the narratives, and even blurred the binary of the victim/ perpetrator.[24] The specificity of the violence was also strongly captured as the personal, intimate, and locally situated nature of the violence was emphasised. Witness NN, for example, spoke of how the person that raped her told her just before the assault took place that whilst she had rejected him before the war she now couldn't.[25] In other instances these same local dynamics could lead to survival. Witness PP noted how the persons that came to kill her stopped when an Interahamwe recognised her as someone that had been kind to him in the past because she had given him a sandwich.[26] What these, and any other similar examples show, is that the witnesses could retain a degree of control over the *meaning* of the genocide within the courtroom and the archive.

Whilst this section has demonstrated that the witnesses were able to push back against the narrow legal needs of the courtroom, this discussion still revolves around the reductionist idea that the legal agents' needs and interests (and also methodology) are *necessarily* incompatible with the witnesses," and are only ever narrowly focused on the legal case at hand.[27] The following section will explore both where the legal agent's priorities exceeded the legal matters at hands, but also how and why these priorities changed over time and the effects that this had on the archive.

Shifting Priorities

During the early trials, like *Akayesu*, it seemed that greater attention was paid to the witnesses' role within the proceedings. At *Akayesu*, witnesses appeared (when compared to later trials) to be offered more space to testify and to tell their story.[28] This approach to the trials was also captured in prosecution team's decision to deliver the verdict directly to the community that had been effected by Akayesu, to ensure they understood what had happened (something that was not, as far as I am aware, repeated).[29] The tribunal, and particularly the OTP, also appeared to pursue its extra-judicial goals with greater rigour as they, for instance, tried to construct an account of the violence that captured the full extent and horror of the genocide. This was reflected in the prosecution's indictment strategy that tried to demonstrate the different types of actors (from pop-stars to government officials) involved in the genocide and the geographical spread of the violence.[30] That the tribunal was interested in more than just administering law in these early years was also shown by the (more than legally questionable) decision in *Akayesu* to allow the prosecution to amend their indictment to include rape charges despite the fact that their case had all but come to a close.

Overtime, however, as pressure mounted from the outside, priorities changed. The UN's initial exaltation of the tribunal as a tool that could bring peace to the world quickly dissipated as the ICTR's trials became renowned for their slow pace and immense cost.[31] In response, from the late 1990s onwards, the UN launched a number of reviews into the tribunal's practice, and in 2003 the UNSC ordered the ICTR (along with the ICTY) to draw up a competition strategy to enhance the efficiency of the trial process so as to ensure that the trials would come to an end as quickly as possible.[32]

These interventions had a significant impact on the trials themselves, both in terms of their contents and the roles that the different actors were afforded. The prosecution's cases became more focused and streamlined, as they reduced the scope of the cases and the number of charges led.[33] A former member of the prosecution noted that after this moment the OTP stopped trying to produce "fluffy history" and began focusing more on just the legal case at hand. The role of the witnesses was also to change, as the legal agents, particularly the judges, were to exert greater control over witness participation, as they responded to a criticism levelled in a UN report (co-authored by the soon to be ICTR prosecutor, Hassan Jallow) that:

> There appears to be a disposition to tolerate this procedure, *particularly in the case of testimony by victims*, the thought being that allowing them to tell their stories in their own way has a salutary cathartic psychological benefit. In addition, some judges may be *needlessly sensitive* to the potential for criticism if they intervene actively to exercise greater control over the proceedings. [*Emphasis added*][34]

Judges increasingly directly intervened to control testimony and reduce witness lists, limiting the very possibility of witness participation. Interestingly, justifications for these processes drew on distinctly non-legal arguments, as judges cited the need to be "economical" (both judicially and financially) as a reason why witness lists had to be reduced, or testimony had to be curbed.[35]This meant that fewer, and arguably "thinner" records were to be produced for archives in later trials,

and the witnesses were to perform a far less prominent (though still significant) role. With this, I would argue that the very meaning of what constituted "justice" within the tribunal changed.

Conclusion

The answer to the question "whose archive?" has been necessarily provisional in nature, and has missed out some important factors, including the inner wrangling between the different organs of the tribunal and, perhaps more glaringly, Rwanda's successful interventions in the prosecution's cases. Rwanda's use of witness boycotts, for instance, prevented the OTP from finalising its indictments against the RPF which were ultimately withdrawn to bring an end to the boycott so that the tribunal could remain open (without witnesses there were no trials). However, it is clear from even the brief analysis here that the answer cannot ever be a straightforward one. In part, the answer depends on what part of the archive is being considered, as the witnesses during the trial stage and during earlier trials had much greater say over the contents of the archive then they did during the judgements or during later trials. It is perhaps important, then, to question the whole concept of a singular archive, and rather consider it as multiple archives, or *multiple archival moments* and for this to be born in mind by anyone using the archive in the future.

Yet, the control that the legal and political agents exerted over the archive, and their ability to alter the tribunal's strategic function, suggests that they were in control throughout, and that the tribunal and its archive served first and foremost, their interests. As time went on it appeared that the tribunal had perhaps lost sight of those that it was created to assist. At the ICTR's legacy conference, held in November 2014 to mark the tribunal's 20th anniversary, there was little mention of Rwanda or the victims, with the focus falling instead on the courts contribution to jurisprudence and the tribunal's improvements in efficient trial management. As the courts concerns became more focused over time it seemed that the tribunal became more introvert in nature as it focused on fine-tuning its legal practices, and surviving amidst the ever more hostile environment that surrounded it, in the end seemingly existing largely *for itself*. This helps to explain the decision not to pursue the RPF cases mentioned above, which whilst questionable from every other perspective (and despite the negative impact this could have had on Rwandan society) meant that the tribunal could at least *survive*.[36] For the UNSC, the archive(s) symbolically demonstrated the international communities' resolve to make "Never Again" a reality, offering a supply of symbolic capital even in the midst ensuing violence and authoritarianism elsewhere (including within Rwanda and its neighbouring countries). Whilst the question of ownership needs further answers, then, what this analysis does show is a need to go beneath the rhetoric that surrounds these institutions, to determine what these justice mechanisms are for, and who they serve.

Henry Redwood is an ESRC-funded PhD candidate in the War Studies department at King's College London, working under the supervision of Dr Rachel Kerr and Professor James Gow. His current research draws on critical theory to explore the nature and production of truth at international criminal trials, through a case study of the International Criminal Tribunal for Rwanda. This project builds on previous research that focused on the creation of histories and "collective memories" at the "Holocaust trials." He has recently started working on a new AHRC project "Art & Reconciliation: Conflict, Community and Culture" exploring reconciliation projects in the Western Balkans (http://bit.ly/2pcw1tL) He holds a BA and MA in History from the University of Bristol.

Notes

[1] Jacques Derrida, "Archive Fever: A Freudian Impression," *Diacritics*, 25:2 (1995): 9-10. This relationship was perhaps nowhere more apparent that during Colonialism and the birth of the modern nation state. See Richard Brown and Beth Davis-Brown, "The Making of Memory: the Politics of the Archive, Libraries and Museums in the Construction of National Consciousness," *History of Human Sciences*, 11: 4 (1998), 18-20; and Ann Stoler, "Colonial Archives and the Arts of Governance," *Archival Science* 2, no. 1 (2002): 87-109.

[2] Tom Adami, "Judicial Record Management/ Archiving," presented at *20 Years of Challenging Impunity: International Symposium on the Legacy of the ICTR*, November 6, 2014.

[3] United Nations Security Council (*here after* UNSC), S/PV.6678, 07.12.2011, 8; UNSC, S/2015/884, November 17, 2015, 5.

[4] See Richard Goldstone, "Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals," *Journal of International Law and Politics* 28 (1995): 485-504

[5] See UNSC, S/PV.5453, June 7, 2006, 32

[6] UNSC, S/2009/258, May 21, 2009, 14. The MICT is beyond the scope of this post. However, the UN created this to continue the left-over functions of the ICTR and ICTY after they both closed. The MICT is one organisation for both tribunals, each with their own branch.

[7] Ibid.

[8] Underpinning this dispute were two competing conceptions of justice at play. Whilst Rwanda agreed that the UN could deliver neutral and impartial justice, they equally felt that this "distanced justice" would not meet with *Rwanda's* expectations of justice. Geographically the tribunal was seen as too removed from Rwanda (which was precisely one of the UN's rational for the tribunal); the temporality of the crimes would fail to capture *their* historic suffering and *their* struggle (which was seen as excessive to the tribunal's mandate); and the lack of a death sentence meant that that justice delivered internationally would not be of equal strength compared with that delivered locally. UNSC, S/PV.3453, 08/11/1994, 14-16.

[9] Goldstone, "Justice as a Tool for Peace-Making," 485-504; Payam Akhavan, "Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda," *Duke J. Comp. & Int'l L.* 7 (1996): 340-341.

[10] UNGA, A/51/PV.78, 10/12/1996, 18.

[11] UNSC, S/PV.3453, 08/11/1994, 7-8.

[12] UNSC, S/PV.3377, 30/04/1994, 14.

[13] Marie-Bénédicte Dembour and Emily Haslem, "Silencing Hearings? Victim-Witnesses at War Crime Trials," *European Journal of International Law* 15, no. 1 (2004): 163-165.

[14] Maya Steinitz, "The International Criminal Tribunal for Rwanda as Theatre: The Social Negotiation of the Moral Authority of International Law," *Journal of International Law and Policy* 5 (2007): 7-15.

[15] Tim Kelsall, Culture *under Cross-Examination: International Justice and the Special Court for Sierra Leone* (Cambridge: 2009), 9. See, for instance, the tribunals final narrative about Akayesu's role in the genocide, which overlooks Akayesu's defence of the Taba commune from the genocide for nearly two weeks at the start, a narrative that doesn't well fit within the courts Manichean world. See, Akayesu, *Trial Judgement*, ICTR-96-4-0459/1, September 2, 1998, para 192.

[16] Katherine Franke, "Gendered Subjects of Transitional Justice," *Journal of Gender and Law* 15, no. 3 (2006): 819-822.

[17] A good example of this was during *Cyangugu* where the court found that an attack against a group of Tutsis at the military camp could not constitute genocide because they were, it was alleged, genuinely perceived as being members of the RPF. As such this was, and contrary to the witnesses' experiences, reframed as a crime against humanity, and was as such detached from the genocide. Cyangugu, *Trial Judgement,* ICTR-99-46-05991, February 25, 2004, 109 and 182-4.

[18] Nigel Eltringham, "'We are Not a Truth Commission': Fragmented Narratives and the Historical Record at the International Criminal Tribunal for Rwanda," *Journal of Genocide Research* 11, no. 1 (2009): 61.

[19] Interview with Upendra Begal, (Arusha, Tanzania: June 2015).

[20] Akayesu, *Redacted Transcript*, CONTRA001186, January 27, 1997, 101-102; Akayesu, *Redacted Transcript*, CONTRA001195, March 6, 1997, 106-107.

[21] Akayesu, *Trial Judgement*, ICTR-96-4-0459/1, 2/9/1998, 148-149, 167 See also UNSC, S/2015/884, November 17, 2015, 7 and 16.

[22] Catherine MacKinnon, 'Crimes of War, Crimes of Peace," *UCLA Women's Law Journal* 4 (1993), 59-86.

[23] Joseph Fink, "Deontological Retributivism and the Legal Practice of International Jurisprudence: The Case of the International Criminal Tribunal for Rwanda," *Journal of African Law* 49:2 (2005): 101-131.

[24] See Nahimana et al, *Judgement*, 338-339; Cyangugu*, Redacted Transcript,* TRA000750/01, June 6, 2001, 82-86; UNGA, A/59/183-S/2004/601, July 27, 2004. 10-11; Cyangugu, *Redacted Transcript,* TRA000438/1, February 21, 2001, 9.

[25] Akayesu, *Redacted Transcript*, CONTRA001227, November 3, 1997, 20.

[26] Akayesu, *Redacted Transcript*, CONTRA001205, November 4,1997, 141. See also Gatete, *Redacted Transcript*, TRA005458, October 22, 2009, 8.

[27] See Eltringham, 'We are not a Truth Commission," 55-79.

[28] See the testimony of Witness NN. CONTRA001227, November 3, 1997.

[29] See also UNSC, S/2001/863, 14/09/2001, 16.

[30] A list of the OTP's indictments can be found: http://unictr.unmict.org/en/cases (last accessed May 5, 2017).

[31] See UNSC, S/PV.4429, November 27, 2001, 7.

[32] UNGA, A/51/789, 6.02.1997; and UNSC, S/RES/1503, August 28, 2003, 2.

[33] UNSC, S/PV.4999, June 29, 2004, 18-19. For instance, see the progression of the Gatete indictment: Gatete, *Amended Indictment,* ICTR-00-61-0036/1, May 10, 2005; Gatete, *Prosecutors Submission Complying with Decision on Defence Motion Concerning Defects in the Indictment*, ICTR-00-61-0074/1, July 7, 2009; Gatete, *Decision: Defects in the Prosecution Pre-Trial Brief*, ICTR-00-61-0100, October 2, 2009.

[34] UNGA, A/54/634, November 22,1999, 29.

[35] Cyangugu, *Trial Transcript*, TRA001601/2, March 28, 2002, 7.

[36] Tellingly, unlike with the ICTY, the UNSC placed no political pressure on Kigali to cooperate.