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ORIGINAL ARTICLE

INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS: INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

New histories and new laws: Crimes against humanity at the International Criminal Tribunal for Rwanda

Amanda Alexander

Australian Catholic University, Napier St, North Sydney, NSW 2060, Australia
Email: Amanda.Alexander@acu.edu.au

Abstract
This article looks at the development of the concept of crimes against humanity at the International Criminal Tribunal for Rwanda (ICTR). It contends that the ICTR's interpretation of crimes against humanity is generally seen by international lawyers as a commendable, but unsurprising, step in the historical development of this category. In much the same way, the ICTR's historical account is considered to be a standard attempt by a war crimes court to relate a liberal history of crimes against humanity in a way that upholds civilized values. Yet, although the historical and legal work of the ICTR appear unexceptional, this article will argue that they do demonstrate a particular conceptual approach towards warfare, history, humanity, and the nature of international law. Moreover, this is a conceptual approach that is quite different to that taken by the International Military Tribunal at Nuremberg. The article suggests that these differences, and the invisibility of the change, are due to the ICTR's reliance on familiar narrative tropes. These narratives were established through poststructuralist theory but could be expressed in a variety of more or (often) less theoretical forms. By exploring the influence of these narratives on the Tribunal, it is possible to examine some of the ways in which conceptual change is facilitated and knowledge is created in international law. In particular, it shows how theories that are often considered marginal to international law have had a significant impact on some of the central provisions of international humanitarian law.

Keywords: history of international law; International Criminal Tribunal for Rwanda; international humanitarian law; postcolonialism; war crimes trials

1. Introduction

The juridification and prosecution of crimes against humanity is an important element in the shift in international law from an emphasis on state sovereignty to humanity and from the laws of armed conflict to an international humanitarian law.[1] The prosecution of crimes against humanity diminishes the immunity of the state;[2] it brings the laws of war and human rights law closer together;[3] it makes civilians protected subjects of international law; and it enables international law to talk about their suffering.

The importance of crimes against humanity in the current conceptualization of international humanitarian law makes it worth examining how this category appeared in international law and

[1]See, e.g., R. Teitel, *Humanity's Law* (2011); D. Kennedy, *The Dark Sides of Virtue* (2004); A. Alexander, 'A Short History of International Humanitarian Law', (2015) 26 EJIL 109.

[2]D. Luban, 'A Theory of Crimes against Humanity', (2004) 29 YJIL 85, at 95; L. Douglas, *The Memory of Judgment* (2001), 48.

[3]T. Meron, 'The Humanization of Humanitarian Law', (2000) 94 AJIL 239, at 265; J. Davids, 'From Crimes against Humanity to Human Rights Crimes', (2012) 18 *New England Journal of International and Comparative Law* 225, at 232.

the way it became institutionalized. There is an accepted history of crimes against humanity in international law. It relates that, after a long prehistory, crimes against humanity were prosecuted for the first time at the Nuremberg trials.[4] Regrettably, the new category was artificially limited at Nuremberg – crimes against humanity had to be linked to crimes against peace to be noted by the court.[5] The result was a distortion of the legal category and a 'tortured' history,[6] which failed to fully acknowledge and record the experiences of victims.[7]

Some 50 years later, this history continues, the ICTR corrected many of these errors in the *Akayesu* case. Crimes against humanity were placed at the centre of the trial, freed from the artificial limitations of Nuremberg.[8] The ICTR developed the range of crimes that fell within the category and redefined the groups that could be the subjects of such crimes.[9] As such, the ICTR was able to give a more comprehensive account of the genocide in Rwanda while making significant improvements to international humanitarian law.[10]

In a companion piece to this article, I examined how the introduction of crimes against humanity at Nuremberg took place.[11] I suggested that the presentation of crimes against humanity as a secondary crime was not a mistake. Rather, it reflected a strong idea, current at the time, that aggressive war was the worst crime – the source of all other war crimes. This belief, I argued, was shaped by an anti-imperialist narrative that drew on Marxist theory, but was accepted by a variety of lawyers, politicians and intellectuals. Adherents to this narrative described imperialism as an economic institution and deplored its depredations primarily in economic terms. The strength of this narrative meant that the drafters of the London Charter felt more confident changing the laws around recourse to war than the laws concerned with the protection of civilians. This decision, together with the influence of the anti-imperial narrative, allowed the International Military Tribunal (IMT) to present the history of the Nazi regime as the history of an imperialist power and its crimes as the crimes of economic imperialism.

This idea of imperialism as a predominantly economic crime seems misguided to contemporary eyes, and the denunciation of aggressive war before crimes against people appears an odd decision. Yet, the apparent peculiarity of these choices at Nuremberg makes it easier to link the prevailing narratives to the work of the court. In contrast, the work of the ICTR still seems generally appropriate, its historical account mostly acceptable, and its description of crimes against humanity essentially commendable. Nevertheless, in this article, I will argue that the historical account and legal pronouncements produced by the ICTR are as much a product of prevailing theoretical and historical narratives as those of the IMT. The history that the ICTR told was shaped by a set of particular narrative tropes and assumptions that prevailed in the 1990s across a range of disciplines. At this

[4]See, e.g., N. Geras, *Crimes against Humanity: Birth of a Concept* (2011), at 4; M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (2011), 86, at 95; J. Cerone, 'The Jurisprudential Contributions of the ICTR to the Legal Definition of Crimes against Humanity - The Evolution of the Nexus Requirement', (2008) 14 *New England Journal of International and Comparative Law* 191, at 191; M. Badar, 'From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes against Humanity', (2004) 5 *San Diego International Law Journal* 73, at 77.

[5]M. Lippman, 'Crimes Against Humanity', (1997) 17 *Boston College Third World Law Journal* 171, at 172, 201.

[6]Douglas, *supra* note 2, at 77.

[7]Ibid., at 56, 64; L. Stonebridge, *The Judicial Imagination* (2011), 25; M. Osiel, 'Ever Again: Legal Remembrance of Administrative Massacre', (1995) 144 *UPaLRev* 463, at 533.

[8]L. Sadat, 'Crimes Against Humanity in the Modern Age', (2013) 107 AJIL 334, at 347; G. Mettraux, 'Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda', (2002) 43 *HarvIntlLJ* 237, at 241.

[9]P. Magnarella, 'Some Milestones and Achievements at the International Criminal Tribunal for Rwanda', (1997) 11 *FlaJIntlL* 517, at 531.

[10]P. Akhavan, 'Contributions of the International Criminal Tribunals for the Former Yugoslavia and Rwanda to Development of Definitions of Crimes against Humanity and Genocide', (2000) 94 ASIL 279, at 279.

[11]A. Alexander, 'Lenin at Nuremberg: Anti-Imperialism and the Juridification of Crimes against Humanity', in A. Orford (ed.), *Revolutions in International Law* (forthcoming).

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time, however, the predominant approach drew on a poststructuralist understanding of history, war and law – even when this view was not clearly articulated or overtly theorized.

This poststructuralist narrative can be seen at work in the literature that responded to the Rwandan genocide and described the 'new wars' of the 1990s. These works suggested that the identities of civilian groups were constructed and that wars were being fought to destroy these constructed identities. The horrors of war lay in this deliberate destruction – which could be understood in a physical or a metaphysical sense. Critical legal work, especially by postcolonial and feminist scholars, shared this understanding. These international lawyers noted that law was an important instrument in the construction of such identities. At the same time, however, they hoped that it might be possible to change international law in a way that would redefine its subjects and provisions, acknowledging new voices and comprehending new experiences. For postcolonial theorists, this poststructuralist approach underpinned a very different form of anticolonialism to the one that prevailed at Nuremberg. For feminist scholars it underpinned a practical programme to change the law around rape and bring the experiences of women within the ambit of international law. The accomplishments of this programme meant that many international lawyers, even those without theoretical or feminist commitments, became familiar with elements of the poststructuralist narrative.

The influence of this narratives can be seen in the direction of the *Akayesu* trial and the ICTR's historical account of the Rwandan genocide. This historical account, in turn, upheld the Tribunal's new interpretations of crimes against humanity, protected ethnic groups and sexual violence. Although these changes were seen as a correction of Nuremberg's mistakes, they can be better understood as the result of the shift from Nuremberg's anti-imperial narratives to the poststructuralist narratives at the ICTR.

By exploring the influence of external theoretical tropes on the work of these two tribunals, it is possible to examine some of the ways in which conceptual change is facilitated and knowledge is created in international law. It also provides another way of dealing with the perennial question of how history is written in international courts and the relationship of those histories with the laws that are produced. The fact that these laws and legal histories are both influenced by and support anti-colonial theories is particularly interesting given the established vision of international law as a Western enterprise,[12] telling Enlightenment histories and shaped by liberal commitments.[13] This monolithic vision of the law has, it should be acknowledged, been complicated in recent years by works which have recovered the influence of 'peripheral' states and international lawyers on international law.[14] While this article differs from these works in its emphasis on theory, it also disrupts the accepted vision of sources of international law by showing the role of these apparently marginal theories on the shifting aims and understanding of international law.

2. The enlightened history of war crimes trials

Ever since Robert Jackson described the IMT at Nuremberg as the representative of civilization,[15] it has widely been accepted that war crimes trials are intended to serve and demonstrate the enlightened values associated with Western civilization, such as legality, rationality and humanity. As was stated in *Akayesu*, the prosecution of war criminals is considered part of the creation of 'a more humane society, where the rule of law is elevated over force'.[16] Their process is intended

[12]See, e.g., F. Mégret, 'From "Savages" to "Unlawful Combatants": A Postcolonial Look at International Law's "Other"', in A. Orford (ed.), *International Law and its Others* (2006); C. Nielsen, 'From Nuremberg to the Hague: The Civilizing Mission of International Criminal Law', (2008) 14 *Auckland University Law Review* 81.

[13]See, e.g., Osiel, *supra* note 7; Nielsen, *supra* note 12.

[14]See, e.g., A. Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842–1933* (2014); B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (2003); M. Craven, *The Decolonization of International Law* (2007).

[15]R. Jackson, *The Case against the Nazi War Criminals: Opening Statement for the United States of America* (1946), at 89.

[16]*Prosecutor v. Akayesu*, Redacted Transcript, Case No. ICTR-96-4-T, T.Ch. I., 9 January 1997, at 23.

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to demonstrate civilized, liberal values in the aftermath of war and horror,[17] and they are expected to relate a narrative about the importance of these values.

The production of a historical account by war crimes tribunal is considered an essential part of this pedagogical role. A court's history can provide, as the American government argued at the London Conference, an authentic record of crimes and criminality.[18] Such an authentic history can dispel the propaganda, irrational beliefs and the misrepresentations that accompany atrocities. Indeed, Madeleine Albright, as US Ambassador to the UN, said that the primary goal of the ICTR should be the establishment of a true historical record, so that the guilty would not be able to reinvent the truth.[19] A court, proponents of trials argue, is best fit for this task as it can deliver a clear, public and 'black and white'[20] verdict rather than the 'contingent, subjective, qualified, and tentative knowledge' produced by historians'.[21] As Richard Goldstone, the first prosecutor at the International Criminal Tribunal for former Yugoslavia (ICTY) and ICTR said, public exposure of the truth in the court was 'the only effective way of ensuring that history is recorded more accurately and more faithfully than would otherwise have been the case'.[22]

In this way, members and observers of war crimes tribunals situate both the history they produce and the history of law they belong to within enlightened, liberal narratives. This is undeniably one trope that runs through the trials, and it is certainly the standard against which the trials are measured. When war crimes trials are criticized, it can be for serving these aims too carefully. Nielsen, for example, has described the role of war crimes courts in relating western narratives as exclusionary and 'imperialistic'.[23] Alternatively, it may be for falling short of these aims. Some have suggested that the limitations of the legal process,[24] and the intrusion of politics,[25] can lead to inadequate and misleading histories rather than the authentic history that is sought.

Akayesu, like other war crimes trials, has been both praised and criticized in terms of its adherence to these values. At first, it was commended for creating an 'important historical record'.[26] It had corrected both Rwandan propaganda and the representation of the genocide in the international media as an ahistorical, atavistic struggle.[27] It had improved on the limitations of the history written by the IMT by recognizing the experiences of victims.[28] As the years passed, however, some criticism did begin to emerge that the history was not as comprehensive as could

[17]See, e.g., S. Chesterman, 'Never Again . . . and Again: Law, Order, and the Gender of War Crimes in Bosnia and Beyond', (1997) 22 YJIL 299, at 322; M. Osiel, *Mass Atrocity, Collective Memory and the Law* (1997), at 38; M. C. Bassiouni, 'Searching for Peace and Achieving Justice: The Need for Accountability', (1996) 59 *Law and Contemporary Problems* 9, at 27.

[18]R. H. Minear, *Victor's Justice: The Tokyo War Crimes Trials* (1972), at 126.

[19]T. Howland and W. Calathes, 'The UN's International Criminal Tribunal: Is it Justice or Jingoism for Rwanda?', (1998) 39 *Virginia Journal of International Law* 135, at 144.

[20]R. E. Schiller, 'The Strawhorsemen of the Apocalypse: Relativism and the Historian as Expert Witness', (1998) 49 *Hastings Law Journal* 117.

[21]N. Eltringham, 'Illuminating the Broader Context: Anthropological and Historical Knowledge at the International Criminal Tribunal for Rwanda', (2013) 19 *Journal of the Royal Anthropological Institute* 338, at 341–2.

[22]R. J. Goldstone, 'Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals', (1996) 28 NYJILP 485, at 489.

[23]Nielsen, *supra* note 12, at 89.

[24]See, e.g., H. Arendt, *Eichmann in Jerusalem* (1994), 19; A. Finkielkraut, *Remembering in Vain: The Klaus Barbie Trial and Crimes against Humanity* (1992), at 321; Stonebridge, *supra* note 7, at 19.

[25]D. Buss, 'Expert Witnesses and International War Crimes Trials: Making Sense of Large-Scale Violence in Rwanda', in D. Zarkov and M. Glasius (eds.), *Narratives of Justice in and out of the Courtroom* (2014), 25.

[26]J. E. Alvarez, 'Lessons from the Akayesu Judgment', (1999) 5 *ILSAJIntl&CompL* 359, at 360; Magnarella, *supra* note 9, at 518.

[27]Buss, *supra* note 25, at 28.

[28]Douglas, *supra* note 2, at 79.

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have been desired. Critics commented that the trials had ignored the role of the Rwandan Patriotic Front (RPF), which later gained control of Rwanda, during the 1994 war.[29] This distortion was attributed to the political influence of the Rwandan government.[30] I will argue, however, that neither these achievements nor shortcomings can be understood if *Akayesu* is only measured against the presumed liberal aims and narratives of war crimes trials. The history *Akayesu* told, the history it did not tell, and the crimes this history underpinned, were not just informed by liberal, Western values and the narrative of Enlightenment. Rather, they were underpinned by other narratives that, in turn, had been shaped by poststructuralist and postcolonial theory.

3. History in the *Akayesu* trial

The ICTR claimed that, 'in order to understand the events alleged in the Indictment', it was necessary to speak about 'the history of Rwanda, beginning from the pre-colonial period up to 1994'.[31] As such, the Tribunal placed a lot of emphasis on establishing a history of Rwanda in the first two cases it heard: *Akayesu* and the *Kayishema and Ruzindana* case. To write this history, the Tribunal relied heavily on the testimony of expert and local witnesses since, as the ICTR explained, the Rwandan government was 'unlike the leaders of Nazi Germany, who meticulously documented their acts during World War II'.[32] In the *Akayesu* case, the prosecution called Alison Des Forges, an American historian and human rights activist, to give an account of Rwandan history. The *Kayishema and Ruzindana* case, which was heard by a different panel at the same time, used another expert witness, André Guichaoua, Professor of Sociology and Economics at the University of Lille, to establish the historical background.[33]

Des Forges' testimony was the longest in the *Akayesu* case. It took eight days and generated over 1,300 pages of transcript. Des Forges began her history in the pre-colonial period and then explained Rwanda's colonial experience in detail. The prosecution explained that it to ask Des Forges to relate this long view of history because 'as most tragedies in Africa, this tragedy in Rwanda has also its basis on [sic] colonialism and, therefore, we will discuss the colonial legacy which has contributed to the tragedy in Rwanda'.[34]

Des Forges supports this statement by demonstrating that colonialism had contributed to the genocide by the creation of the ethnic groups of Hutu and Tutsi. Indeed, she is quoted in the *Akayesu* judgment as saying that the Rwandan reality 'was shaped by the colonial experience which imposed a categorisation which ... was not completely appropriate to the scene'.[35] Des Forges and Guichaoua explained that, prior to colonization, the terms 'Hutu' and 'Tutsi' had not referred to racial groups and had not been static categories.[36] Nevertheless, the European colonists had seen these groups through the prism of their racial theories and had divided Rwanda into the 'superior' Hamitic Tutsi, who had allegedly come from Abyssinia, and the 'inferior' Bantu Hutus.[37] Des Forges and Guichaoua argue that there was no scientific basis for this hypothesis.[38] Rather, Des Forges comments:

[29] R. Wilson, *Writing History in International Criminal Trials* (2011), at 46. See also K. Moghalu, *Rwanda's Genocide: The Politics of Global Justice* (2005), at 6.

[30] Ibid.

[31] *Prosecutor v. Akayesu*, Judgement, Case No. ICTR-96-4-T, T.Ch. I., 2 September 1998, at para. 78.

[32] *Prosecutor v. Kayishema and Ruzindana*, Judgement, Case No. ICTR-95-1-T, T.Ch. II., 21 May 1999, at para. 65.

[33] Ibid., at para. 34.

[34] *Prosecutor v. Akayesu*, Redacted Transcript, Case No. ICTR-96-4-T, T.Ch. I., 11 February 1997, at 6.

[35] *Akayesu* Judgment, *supra* note 31, at para. 172.

[36] *Prosecutor v. Akayesu*, Redacted Transcript, Case No. ICTR-96-4-T, T.Ch. I., 11 February 1997, at 31.

[37] Ibid., at 37–8.

[38] *Prosecutor v. Kayishema and Ruzindana*, Judgement, Case No. ICTR-95-1-T, T.Ch. II., 21 May 1999, at para. 36.

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> I believe instead it was an implementation of the Europeans' own racism. They looked at Tutsi, and they saw people who looked more like themselves, and they assumed that because of that, those people were superior in intelligence and had the right to rule.[39]

Once, however, this posited racial division became part of the Belgian administrative policy, the witnesses explain, it created a reality of racial division and hatred.[40] The Belgian colonial administration introduced identity cards, which sealed Rwandans into their racial group, ending the flexibility that had previously characterized movement between the groups. Moreover, as the court said in *Kayishema*, this card was used 'from its inception ... to facilitate discrimination against one group or another in Rwanda'.[41] It was used to identify Tutsis during the genocide and, as such, became one of the dominant motifs in accounts of the genocide; it was mentioned frequently in the trial.[42]

The insistence that these ethnic groups were essentially created by a colonial administration led Judge Aspegren to question Des Forges further about what she meant by an ethnic group. Des Forges answered:

> Academic experts refer to ethnic groups meaning people who identify themselves as a unit and who signify that identification through their language and culture. In other words, people who speak the same language, worship the same God or gods, experience a common sense of a shared historical past could be qualified as an ethnic group. But, this is a term whose usage evolves and is evolving.[43]

Judge Aspegren then asked whether the Tutsi and Hutu could be regarded as separate ethnic groups, since they shared a language and religion. Des Forges agreed that this was a difficult point, but stated that the primary criterion for belonging to an ethnic group is the sense of belonging to that ethnic group. This was a sense, she said, which can shift over time.[44] Thus, by creating these racist myths about the origins of the Rwandan people, the West had set the scene for a genocide.

Moreover, the witnesses brought before the court suggested that Western states could be held responsible for the genocide not only because of the colonial past, but because of their inaction during the genocide. The prosecution and the defence agree that the United Nations was aware of what was going to happen in Rwanda, but did not act to prevent the genocide nor to stop it once it had begun.[45] Des Forges suggested that this inaction resulted in the widening of the genocide.[46]

The failure of the international community to act is central to the defence narrative in *Akayesu*. The defence asked how Akayesu, with ten policemen, could be expected to stop the genocide when the United Nations Assistance Mission for Rwanda (UNAMIR) had not saved anyone. To emphasize this point, the defence called Major-General Dallaire, the former force Commander of UNAMIR, as a witness, eliciting from him a condemnation of the international community. Dallaire explained that UNAMIR was limited in its capacity to act, because of legal guidelines, lack of equipment, and lack of support.[47] By the time the war broke out, Dallaire states, it was

[39]*Prosecutor v. Akayesu*, Redacted Transcript, Case No. ICTR-96-4-T, T.Ch. I., 11 February 1997, at 50.
[40]Ibid., at 35.
[41]*Kayishema and Ruzindana*, *supra* note 38, at para. 34. *Prosecutor v. Akayesu*, Redacted Transcript, Case No. ICTR-96-4-T, T.Ch. I., 12 February 1997, at 9.
[42]*Akayesu* Judgment, *supra* note 31, at para. 116.
[43]*Prosecutor v. Akayesu*, Redacted Transcript, Case No. ICTR-96-4-T, T.Ch. I., 11 February 1997, at 32–3.
[44]Ibid., at 33–4.
[45]*Prosecutor v. Akayesu*, Redacted Transcript, Case No. ICTR-96-4-T, T. Ch. I., 19 March 1998, at 35.
[46]*Prosecutor v. Akayesu*, Redacted Transcript, Case No. ICTR-96-4-T, T. Ch. I., 23 May 1997, at 22–3.
[47]*Prosecutor v. Akayesu*, Redacted Transcript, Case No. ICTR-96-4-T, T. Ch. I., 25 February 1998, at 13.

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not even able to protect itself.[48] Instead of reinforcing the troops, as Dallaire requested when the war began, the UN evacuated the vast majority and drew up a new mandate for UNAMIR 2.[49] Dallaire described the implementation of this mandate as an exercise in 'inconceivable frustration'.[50] He said that even when he pleaded with UN headquarters to be allowed to 'neutralise' radio RTLM, the 'killer radio' that was promoting the massacres he was refused because of the need to respect state sovereignty.[51]

Dallaire points out that it did not have to be that way. If his troops had been reinforced and he had been given a Chapter VII mandate he could have stopped the crimes against humanity. But the UN member states were simply not prepared to put their soldiers at risk. Dallaire points to the USA, which had recently lost 18 soldiers in Somalia, as an example.[52] Dallaire stated that all the member states of the UN had been left with blood on their hands:[53]

> It seems – it seems to be unimaginable that every day in the media we see people being massacred and yet fold your arms, remain unperturbed, remain isolated without wanting to come to aid, to their assistance.
>
> In my opinion, it has always been very easy to accuse the United Nations of not having intervened, but the United Nations are not a sovereign country. The United Nations are we, all of us, and if the United Nations did not intervene this means by extension all of us failed, that all of us for almost, that all of us have a responsibility for the genocide that continued in Rwanda for almost four months.[54]

The defence uses this narrative to argue that the international community was responsible for what happened in Rwanda. Only three years earlier, the defence points out, it was prepared to intervene in Kuwait, but it would not protect black Africans.[55] The defence goes on to address the victims of the genocide, saying:

> What did you suffer most from? Did you suffer most from the very limited aid of Jean Paul Akayesu in saving your life or did you suffer most from the withdrawal of the international community that abandoned you to your sad fate?[56]

The Judges did not allow this argument to excuse Akayesu of guilt, but they also described the withdrawal of the international forces.[57] Moreover, both the *Akayesu* and *Kayishema* cases emphasized the racist, colonial creation of ethnic identity by the Belgian administration in the 1930s.[58] In this way the ICTR established a historical narrative about the failings of Western civilization that led to the construction, and enabled the destruction, of racial identities. Despite some later attempts to shift the focus of the court, this narrative largely endured in the Tribunal and in the international legal community.

[48] Ibid., at 160–1.
[49] Ibid., at 166.
[50] Ibid., at 166.
[51] Ibid., at 154.
[52] Ibid., at 179.
[53] Ibid., at 197.
[54] Ibid.
[55] *Prosecutor v. Akayesu*, Redacted Transcript, Case No. ICTR-96-4-T, T.Ch. I., 26 February 1998, at 73–5.
[56] Ibid., at 79.
[57] *Akayesu* Judgment, *supra* note 31, at paras. 105–8.
[58] Ibid., at paras. 81–3; *Kayishema and Ruzindana*, *supra* note 38, at para. 35.

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4. Postcolonial history and postmodern wars

The ICTR put a lot of effort into writing a comprehensive, authentic history of Rwanda. Yet, the history outlined above is not a purely objective, unfettered account. Rather, it shows the influence of postcolonial and poststructuralist theories. These theories had developed certain precepts about knowledge and subjectivity, which then informed a range of theoretical and even atheoretical accounts of history, war, and law.

The postcolonial work that influenced historiography generally, and the ICTR's history in particular, drew on poststructuralist theories that emphasized the role of discourses in constructing knowledge and shaping subjectivity. Young argues that even these poststructuralist sources came from the 'South' and express disillusionment with Enlightenment.[59] At any rate, the critique of Western knowledge and imperial power was clearly stated in Said's *Orientalism*, which explored the way in which the West had discursively produced the East. This work had a significant impact on scholarship,[60] leading to the development of a body of literature that emphasized the role of discourse in the construction of colonial identities and the management of the colonial world.[61] These works saw imperial power as an epistemological system rather than the material phenomenon emphasized by Marxist writers.[62]

Postcolonial writers, confronting epistemological hegemony, sought ways to unsettle such established knowledge, to recover erased experiences, to rewrite histories. In doing so, they had to confront the difficulty of finding alternatives to Western knowledge, and a voice for the 'other', especially for the female colonial subject. As Spivak wrote, 'the subaltern as female is even more deeply in shadow'.[63]

These concerns also informed African historiography. Western epistemology, Mudimbe[64] and later, Mbmebe, argued, had invented Africa as an 'other', an imaginary signification that formed the West's image of itself.[65] Africa had been presented as the 'land of childhood', in Hegel's words,[66] ahistorical and timeless.[67] This denial of African history is blamed for the erasure and reconstruction of African knowledge and subjectivity. 'European imperialism in Africa' Mazrui writes, 'played havoc with the African initiating new forms of amnesia, nostalgia, memories'.[68] The recovery of African histories and voices thus became an important theoretical and political goal.

The influence of postcolonial and anti-colonial sentiments can be seen in the literature that emerged in response to the Rwandan genocide,[69] even when it was not ostensibly theoretical. Prunier's book begins with a quote from Frantz Fanon – 'The last battle of the colonised against the coloniser will often be the fight of the colonised against each other.'[70] Moreover, this literature stresses that the racial identities of Hutu and Tutsi were constructed by the colonial administration, underpinned by the Western production of knowledge. Prunier gives a detailed description

[59]R. Young, *Postcolonialism: A Historical Introduction* (2001), 412–13. See also B. Bush, *Imperialism and Postcolonialism* (2006), 52.

[60]D. Kennedy, 'Imperial History and Post-Colonial Theory', (1996) *The Journal of Imperial and Commonwealth History* 345, at 346; S. Burney, 'Orientalism: The Making of the Other', (2012) 417 *Counterpoints* 23, at 23.

[61]Ibid.; Bush, *supra* note 59, at 57.

[62]Kennedy, *supra* note 60, at 347.

[63]G. C. Spivak, 'Can the Subaltern Speak?', in C. Nelson and L. Grossberg (eds.), *Marxism and the Interpretation of Culture* (1988), at 83.

[64]V. Mudimbe, *The Invention of Africa: Gnosis, Philosophy, and the Order of Knowledge* (1988), at 20.

[65]A. Mbembe, *On the Postcolony* (2001), at 9.

[66]H. Schmidt, 'The Future of Africa's Past: Observations on the Discipline', (2007) 34 *History in Africa* 453; Hegel, *The Philosophy of History* (1956), 91.

[67]Bush, *supra* note 59, at 163.

[68]A. Mazrui, 'Edward Said, Africa, and Cultural Criticism', (2005) 36 *Research in African Literatures* 68, at 69, 77.

[69]E.g., G. Prunier, *The Rwanda Crisis: History of a Genocide* (1995); A. Destexhe, *Rwanda and Genocide in the Twentieth Century* (1995); C. Taylor, *Sacrifice as Terror: The Rwandan Genocide of 1994* (1999).

[70]Prunier, *supra* note 69, at xi.

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of the historical debates surrounding the emergence of Rwandan identities, but he describes the use of 'pseudo-scientific' European literature to turn the Hutu and Tutsi into races as a dangerous social bomb.[71] Destexhe also argues that 'the massacres in Rwanda are not the result of a deep-rooted and ancient hatred between two ethnic groups. In fact, the Hutu and Tutsi cannot even correctly be described as ethnic groups'.[72] He says, 'Belgium is responsible for having largely created the political antagonism between the Hutus and Tutsis and then transforming it into a racial problem which sowed the seeds of the present tragedy.'[73] Thus, Western power and knowledge, understood in poststructuralist and postcolonial terms created the crisis, which was carried out for cultural rather than material purposes:

> In the last resort, we can say that Tutsi and Hutu have killed each other more to upbraid a certain vision they have of themselves, of the others and of their place in the world than because of material interests.[74]

This postcolonial understanding of the Rwandan crisis was ultimately crystallized in the literature about 'new wars' or 'postmodern' wars that emerged towards the end of the 1990s. The 'new war' literature pronounced the emergence of a new paradigm of post-Cold War warfare.[75] It described a shift from old wars, which had been fought between soldiers in battles for ideologies, to 'new wars' that were deliberately and horrifically waged against civilians, especially women,[76] for the purpose of destroying an identity.[77] Although this literature did not engage in overt theory, the targeted identities were understood, in a poststructuralist manner, to be constructions[78] or reinventions.[79] Rwanda, together with Yugoslavia, was considered to be an archetypal example of the new war.[80]

There may be many benefits and truths in this paradigm of war, which was built on then decoupled from poststructuralist and postcolonial insight, but it should be appreciated that it *is* particular paradigm that defines, directs, and reinterprets understanding. For example, it has been suggested that the description of the 'new wars' against civilian identities is limited by the way it avoids analysis of the political purposes of warfare.[81] Moreover, even the foundational belief that civilians had become the principal targets and casualties of new wars, in a way that was different to traditional warfare, has been shown to be a production of the paradigm, rather than a verifiable empirical calculation.[82]

The effect of these narratives can also be seen by comparing the Rwandan historiography of the genocide with work that predated the 1990s and the criticism that emerged later. The explanations of the 1994 genocide cited historical research by Filip Reyntjens, Jean-Pierre Chretien, and in particular, Catharine Newbury's 1988 book *The Cohesion of Oppression*.[83] In *The Cohesion of Oppression*, Newbury stated that '[e]thnicity in Africa is not primordial. It is a historical, socially

[71]Ibid., at 9.
[72]Destexhe, *supra* note 69, at 36.
[73]Ibid., at 71.
[74]Prunier, *supra* note 69, at 40.
[75]M. Kaldor, *New and Old Wars: Organized Violence in a Global Era* (1999), 19–20; H. Münkler, *The New Wars* (2005).
[76]Münkler, ibid., at 84–5.
[77]Kaldor, *supra* note 75, at 6.
[78]M. Berdal, 'The "New Wars" Thesis Revisited', in H. Strachan and S. Scheipers (eds.), *The Changing Character of War* (2011), 109, at 116–17. See Kaldor, *supra* note 75, at 81.
[79]Kaldor, ibid., at 7.
[80]A. Roberts, 'Lives and Statistics: Are 90% of War Victims Civilians?', (2010) 52 *Survival* 115, at 126; Kaldor, *supra* note 75, at 33.
[81]Berdal, *supra* note 78, at 116.
[82]Roberts, *supra* note 80, at 128; Berdal, *supra* note 78, at 114–15.
[83]C. Newbury, *The Cohesion of Oppression* (1988).

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constructed category that can experience significant change'.[84] Her monograph, however, provided a complex account of this construction. She explored the way these changes in identity were linked to broader social, political and economic changes. She was particularly interested in examining the role that rural and local populations play in changing these categories – not just local or foreign elites.[85]

Later, in response to the literature about the 1994 genocide, Reyntjens argued that the claim that ethnic identity in Rwanda was created by the colonists was too simplistic:[86]

> Contrary to what has been claimed by some, these groups are no "inventions" of the colonial administration: they existed before colonial days, and as a result of patrilineal transmission of identity, every Rwandan knew whether he or she was Hutu, Tutsi or Twa.[87]

David Newbury argued that 'it is clear from the historical record that violence in Rwanda did not begin with the colonial or postcolonial era, and was not a product exclusively of colonial social manipulation'.[88] He described the idea that 'colonial administrative structures dictated in every way the thoughts, activities, and aspirations of Rwandans'[89] as a 'myth that ignores African voices, denies African agency, and removes African participation from any of the transformations in Rwandan society over three generations of experience'.[90]

As the years passed, even the historians who were involved with the ICTR made some attempts to complicate the understanding of the events of 1994.[91] Des Forges and Guichaoua later criticized the Tribunal for failing to prosecute the war crimes committed by the invading RPF.[92] It was this growing criticism that led to Wilson's misgivings about the impartiality of the trial. For Wilson, this left the Tribunal open to claims of victor's justice and suggested it had not told a full account.[93] For the historians, however, the failure was slightly different – it was an intellectual and theoretical failure. By refusing to engage with the political context, the Tribunal had reduced the genocide to a story about ethnicity that failed to fully represent the events of 1994.[94]

Thus, although much of the literature written in response to the genocide in Rwanda had referred to an older and more complex historiography, this literature and the court cases of the 1990s were not able to reproduce this complexity; the subtleties the historians described before and after this period were diminished in a postcolonial account of the colonial creation and destruction of an ethnic identity. As Guichaoua put it, the ICTR had 'fulfilled the mission entrusted to it within its particular domain, that is, framing the perceptions of the war around its most dramatic feature: the genocide of the civilian Tutsi population'.[95] In this way, the Tribunal both echoed and cemented a certain understanding of history, war, and law.

[84]Ibid., at 212.

[85]Ibid., at 14–16.

[86]D. Newbury and C. Newbury, 'Bringing the Peasants Back In: Agrarian Themes in the Construction and Corrosion of Statist Historiography in Rwanda', (2000) 105 *The American Historical Review* 832, at 840.

[87]F. Reyntjens, 'Rwanda: Genocide and Beyond', (1996) 9 *Journal of Refugee Studies* 240, at 243.

[88]D. Newbury, 'Canonical Conventions in Rwanda: Four Myths of Recent Historiography in Central Africa', (2012) 39 *History in Africa* 41, at 59.

[89]Ibid.

[90]Ibid.

[91]See, e.g., Reyntjens, *supra* note 87.

[92]E. Jessee, *Negotiating Genocide in Rwanda* (2017), at 253; A. Guichaoua, *From War to Genocide: Criminal Politics in Rwanda 1990-1994* (2015), at 336.

[93]Wilson, *supra* note 29, at 46.

[94]Guichaoua, *supra* note 92, at 336.

[95]Ibid., at 322

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5. New laws and the newstream

The history that the Tribunal created was seen as an achievement in itself, but its real purpose, as the Tribunal pointed out, was to underpin its legal work: a proper acknowledgement, interpretation and prosecution of crimes against humanity, genocide and sexual violence. The way that the Tribunal described and dealt with these crimes was widely seen as appropriate and obvious – a correction of earlier deficiencies in the law. Yet, as much as this work may be seen as an advance, it was not an axiomatic development. It was dependent on the Tribunal's history, which, as has been shown, was reliant on theoretical tropes. Moreover, it was facilitated by the spread of the same poststructuralist narratives within the international legal community.

The postcolonial observation that law was one of the discursive mechanisms that shaped the identities of the colonized and legitimized imperial oppression[96] came as no surprise to many legal theorists; critical legal studies had already disseminated a poststructuralist approach to law, which paid particular attention to the role of law in creating identities and reproducing inequality.[97] In the 1990s, some feminist and postcolonial international lawyers began using this approach to deconstruct international law. At the time, Deborah Cass linked these feminist and postcolonial approaches together as part of a movement in international law which she called the 'Newstream'.[98]

The international lawyers who subscribed to this approach agreed with postcolonial scholarship that the 'Occident creates the savage other as part of its own self-creation and self-presentation'.[99] They examined the particular way in which international and colonial law represented its subjects.[100] Their work also began to describe the way that international law, as well as the 'other', was shaped by the colonial encounter and complicit in the imperial project.[101] Anghie stated:

> The vocabulary of international law, far from being neutral, or abstract, is mired in this history of subordinating and extinguishing alien cultures.[102]

As was mentioned above, international criminal law and international humanitarian law have more recently been subjected to the same critique.[103]

At the same time, some feminist international lawyers were using similar poststructuralist methods and frameworks to examine the marginalization of women in international law.[104] Gardam, for example, argued that international law had constructed combatants as male and civilians as female.[105] The law then privileged and protected male combatants,[106] while endangering and disregarding female civilians.[107] 'Women', Gardam stated 'are regarded as lesser or the "other" in this system, their lives are of less value'.[108] Or, as Brooks stated, they 'slip between the cracks of international law'.[109] This could be demonstrated, in particular, by the failure of the law to regulate

[96]See, e.g., E. Darian-Smith, 'Postcolonialism: A Brief Introduction', (1996) 5 *Social & Legal Studies* 291, at 300; J. Hiddleston, *Understanding Postcolonialism* (2014), at 173.

[97]P. Fitzpatrick, 'Passions out of Place: Law, Incommensurability and Resistance', (1995) VI *Law and Critique* 95, at 105.

[98]D. Cass, 'Navigating the Newstream: Recent Critical Scholarship in International Law', (1996) 65 *NordicJIL* 341.

[99]Fitzpatrick, *supra* note 97, at 105.

[100]See, e.g., A. Riles, 'The View from the International Plane: Perspective and Scale in the Architecture of Colonial International Law', (1995) VI *Law and Critique* 39–54.

[101]A. Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law', (1999) 40 HILJ 1, at 67.

[102]A. Anghie, 'Francisco De Vitoria and the Colonial of International Law', (1996) 5 *Social & Legal Studies* 321, at 333.

[103]Nielsen, *supra* note 12; Mégret, *supra* note 12.

[104]J. Kalajdzic, 'Rape, Representation and Rights: Permeating International Law with the Voices of Women', (1996) 21 *Queens Law Journal* 457, at 460.

[105]J. Gardam, 'The Law of Armed Conflict: A Gendered Regime', (1993) 25 *StudTransnatlLegalPoly* 171, at 182 and 190.

[106]J. Gardam, 'Gender and Non-combatant Immunity', (1993) 3 *TransnatlL&ContempProbs* 345, at 349.

[107]Ibid.

[108]Gardam, *supra* note 105, at 175.

[109]R. Brooks, 'Feminism and International Law: An Opportunity for Transformation', (2002) 14 YJLF 345, at 349.

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rape and aerial bombardment,[110] the means by which war was waged against civilians. And since war was now increasingly waged against civilians, Gardam noted, this lack of protection was particularly dangerous.[111]

As the war in Yugoslavia showed the urgency of this claim, feminist international lawyers responded with a political and theoretical campaign to redress the epistemological and cultural shortcomings of international law.[112] In doing so, they employed various poststructuralist techniques and narratives. They worked to bring the voices of women into international law and to redescribe the crime of rape as a serious offence.[113] Academics and activists used the testimonies of women, collected in Yugoslavia,[114] to show that rape fulfilled the requirements of a grave breach of international law because it wilfully caused 'great suffering or serious injury to body or health'.[115] Moreover, they argued, the distressing accounts of widespread and systematic rape suggested that rape should be considered a crime against humanity.[116]

Many feminist theorists also argued that the sexual violence in Yugoslavia amounted to genocide.[117] Mackinnon, like other observers of the 'new wars', argued that the aim of the violence in Yugoslavia was the destruction of civilians. Rape was a strategy in this destruction. It was an instrument of the war, and the war was just an instrument of the genocide.[118]

Although this was controversial among some feminists and, as others noted, 'at first sight rape does not appear to fall within this definition',[119] this argument became increasingly familiar and unremarkable. The purpose of rape in Bosnia, observers argued, was to force women to have children of another ethnicity and to prevent them from bearing children of their own ethnicity.[120] The women were thus 'in a sense, vessels through which the dilution, disappearance, and destruction of their own ethnic group occurred'.[121] Some writers supplemented these carefully drawn links between rape and genocide with broader statements that rape destroyed a people physically, psychologically, and spiritually.[122] One writer cited a comment that rape had long been used as a form of genocide because it 'produces a sense of inadequacy on the part of the collective heart of the race, a sense of helplessness, a sense of worthlessness'.[123]

Once feminist lawyers had shown in this way that rape could satisfy the requirements for crimes against humanity or genocide, they argued that rape was already prohibited as such by

[110]Gardam, *supra* note 106, at 350.

[111]Ibid., at 353.

[112]P. V. Sellers, 'The Cultural Value of Sexual Violence', (1990) 93 *ASIL Proceedings* 312, at 323.

[113]See, e.g., P. V. Sellers, 'Arriving at Rwanda: Extension of Sexual Assault Prosecution Under the Statutes of the Ad Hoc International Criminal Tribunals', (1996) 90 *ASIL Proceedings* 605; C. Chinkin, 'Rape and Sexual Abuse of Women in International Law', (1994) 5 EJIL 326, at 331–2; R. Copelon 'Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law', (1994) 5 *Hastings Women's Law Journal* 243, at 246; J. Halley, 'Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law', (2008–2009) 30 *Michigan Journal of International Law* 1.

[114]C. Enloe, 'Have the Bosnian Rapes Opened a New Era of Feminist Consciousness?', in A. Stiglmayer (ed.), *Mass Rape: the War Against Women in Bosnia Herzegovina* (1994), at 222.

[115]See, e.g., H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000), at 315.

[116]See, e.g., Chinkin, *supra* note 113, at 333.

[117]Some feminists objected to this conflation of rape with genocide, insisting that rape be seen as a crime against women rather than a nation; their argument was unsuccessful. See, e.g., Copelon, *supra* note 113, at 246.

[118]C. A. MacKinnon, 'Rape, Genocide, and Women's Human Rights', (1994) 17 *HarvWomen'sLJ* 5, at 8.

[119]Chinkin, *supra* note 113, at 333.

[120]Ibid.

[121]S. L. Russell-Brown, 'Rape as an Act of Genocide', (2003) 21 *BerkeleyJIntlL* 350, at 355.

[122]E. A. Kohn, 'Rape as a Weapon of War: Women's Human Rights during the Dissolution of Yugoslavia', (1994) 24 *Golden Gate U. L. Rev.* 199, at 204.

[123]D. Aydelott, 'Mass Rape during War: Prosecuting Bosnian Rapists under International Law', (1993) 7 *Emory International Law Review* 585, at 602: citing statement of Dr. Stanley Ducharme, Boston University Medical Center in *Nightline: Rape as a Weapon of War Against Bosnian Muslims* (ABC television broadcast, 14 January 1993).

customary international law.[124] They also campaigned successfully to have rape explicitly included as a crime against humanity in the statutes for the ICTR, ICTY and the International Criminal Court.[125] This change in the law demonstrated, to a wide legal audience, one of the other precepts of Newstream law – the idea that law, as a cultural construction, could be reconstituted to introduce new perspectives and understandings.[126]

Thus, the extent and success of the feminist movement, together with academic work, meant that many members of the international legal community were exposed to narratives and assumptions about law, war and history that had initially been derived from poststructuralist precepts. Law, in this paradigm, was complicit in creating identities that were then marginalized or destroyed in wars that were fought for the purpose of destroying such identities. Yet law was itself was understood to be a construction, something that could be reimagined and remade.

6. Crimes against humanity

This particular understanding of law, war and history can be seen in the ICTR's jurisprudence, especially its consideration of crimes against humanity. The Tribunal's focus on crimes against humanity as autonomous crimes, its depiction of the victims of crimes against humanity, and its inclusion of sexual violence in this category have all been seen as major achievements. Yet, at the same time, the novelty of these developments is downplayed by presenting them as straightforward corrections of earlier legal and historical errors. In fact, the ICTR's jurisprudence was so convincing that, as one commentator pointed out, it soon became hard to remember that there had ever been questions about whether rape was a war crime or whether crimes against humanity could happen outside warfare.[127] I would suggest, however, that the ICTR's contributions to international humanitarian law were persuasive not because they were so straightforward, but because they chimed with the prevalent theoretical and narrative tropes described above.

6.1 Autonomous crimes

Crimes against humanity dominated the Tribunal's indictments, constituting nearly eighty-five percent of the total counts brought against all accused at the ICTR.[128] Sadat described the ICTR as 'both qualitatively and quantitatively a "crimes against humanity court", particularly if one regards genocide as an acute form of crimes against humanity'.[129] Sadat, however, explains away the significance of this focus on crimes against humanity by attributing it to the fact that most of the accused were not traditional combatants and it was not possible to frame a link between the acts of the accused and the armed conflict.[130] In this way, she suggests that the ICTR's focus on crimes against humanity was an obvious result of the sort of conflict and atrocities it was dealing with.

[124]T. Meron, 'Rape as a Crime Under International Humanitarian Law', (1993) 87 AJIL 424, at 427; Chinkin, *supra* note 113, at 333.

[125]Halley, *supra* note 113, at 12–13; G. Nelaeva, 'The Impact of Transnational Advocacy Networks on the Prosecution of Wartime Rape and Sexual Violence: The Case of the ICTR', (2010) 85 *International Social Science Review* 3, at 7; J. Green et al., 'Affecting the Rules for the Prosection of Rape and Other Gender-Based Violence Before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique', (1994) HWLJ 171, at 173–5.

[126]Cass, *supra* note 98, ascribes this understanding to the movement, at 345 and 370. See comments to this effect in A. Anghie and B. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflict', (2004) 36 *Studies in Transnational Legal Policy* 185, at 186; H. Charlesworth, 'Feminist Critiques of International Law and their Critics', (1995) 13 *Third World Legal Studies* 1, at 1; C. Chinkin, 'Feminist Interventions Into International Law', (1997) 19 *Adelaide Law Review* 13, at 13.

[127]D. Robinson and G. MacNeil, 'The Tribunals and the Renaissance of International Law: Three Themes', (2016) 110 AJIL 191, at 192–3.

[128]Sadat, *supra* note 8, at 347.

[129]Ibid.

[130]Ibid.

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It should, however, be remembered that not all the defendants in the Nuremberg trials were combatants and the prosecution worked hard, and sometimes awkwardly, to forge a connection between the war effort and crimes against humanity. It did this by emphasizing the economic and military benefits of crimes against humanity. The fact that ICTR was not compelled to make such connections, which now seem so clumsy, was partly because its statute, unlike those of previous international courts, did not require a nexus between crimes against humanity and war. This change to the law was regarded by commentators as a laudable recognition of the autonomy, even the primacy, of crimes against humanity. It meant that crimes against humanity could now be seen as mass human rights abuses rather than 'just' a type of war crime.[131]

As such, both the Tribunal's new statute and the postulated customs of law, allowed the Tribunal to view crimes against humanity as autonomous crimes. The Tribunal was not forced to make connections to the war. Yet neither this legal licence, nor any obvious confluence of events, can explain the Tribunal's description of crimes against humanity. For the Tribunal's emphasis on the autonomy of crimes against humanity seemed to go beyond this authorization – the Tribunal actually seemed to highlight the lack of any connection to the war as a distinctive and particularly disturbing feature of these crimes. The Tribunal felt it necessary to dispel the belief that the 'tragic events which took place in Rwanda were only part of the war between the Rwandan Armed Forces (the RAF) and the Rwandan Patriotic Front (RPF)'.[132] Rather, the crimes were particularly serious because they had no connection with the war – they were an independent attempt to destroy a people. When considering the genocide in Rwanda, the Court stated that the war between the Rwandan Armed Forces and the RPF was an 'economic, social and political conflict' but the genocide was not part of this conflict.[133] It happened alongside the conflict,[134] carried out mostly by civilians against civilians *only* because of their ethnicity;[135] it served no useful military end. The Court concluded:

> In conclusion, it should be stressed that although the genocide against the Tutsi occurred concomitantly with the above-mentioned conflict, it was, evidently, fundamentally different from the conflict.[136]

This emphasis on crimes against humanity as autonomous crimes that were both pointless (in terms of the war) and the point of the violence fits with postcolonial and feminist emphasis on the danger of constructed identities and the narrative about new wars as wars against a civilian population simply because of their identity. Crimes against humanity were, for the ICTR, the main atrocity of a war against civilians, and more serious than other crimes[137] because they had no point other than to oppress and attack an identity. Thus, the focus on crimes against humanity at the ICTR was not only due to events and to the structure of its statute, but to these established understandings of wars against civilians and identities that were repeated in the Tribunal's history.

6.2 Victim identities

In making its findings, the Tribunal also expanded the understanding of identities that could be the subject of crimes against humanity. Having presented a postcolonial history of Rwanda, in

[131]Davids, *supra* note 3, at 226; Lippman, *supra* note 5, at 269; T. Meron, 'The Continuing Role of Custom in the Formation of International Humanitarian Law', (1996) 90 AJIL 238, at 242; T. Meron, 'International Criminalization of Internal Atrocities', (1995) 89 AJIL 554, at 557.

[132]*Akayesu* Judgment, *supra* note 31, at para. 126.

[133]Ibid., at para. 99.

[134]Ibid., at para. 127.

[135]Ibid., at para. 129.

[136]Ibid., at para. 128.

[137]M. Frulli, 'Are Crimes against Humanity more Serious than War Crimes?', (2001) 12 EJIL 329, at 345.

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which ethnicity was constructed through colonial interests, the Tribunal was faced with a problem when applying the Genocide Convention and, to a lesser extent, crimes against humanity. The Genocide Convention was drafted to only protect national, ethnical, racial or religious groups. The drafters had deliberately excluded social and political groups. Was a constructed group a protected group? It might, Amann said, not look like it to those familiar with the history of the Genocide Convention.[138] The judges, however, were comfortable with following Alison Des Forges, and viewing ethnicity as a subjective construct:

> 172. As the expert witness, Alison Desforges, summarised
>
> "The primary criterion for [defining] an ethnic group is the sense of belonging to that ethnic group. It is a sense which can shift over time. In other words, the group, the definition of the group to which one feels allied may change over time. But, if you fix any given moment in time, and you say, how does this population divide itself, then you will see which ethnic groups are in existence in the minds of the participants at that time. The Rwandans currently, and for the last generation at least, have defined themselves in terms of these three ethnic groups. In addition, reality is an interplay between the actual conditions and peoples' subjective perception of those conditions . . . "

In this way, the court accepted that the colonial construction of ethnicity had created an ethnic group. When discussing crimes against humanity, the court simply referred back to its discussion of the issue in regard to genocide.[139] Commentators generally applauded the ICTR's 'subjective' or 'malleable'[140] understanding of ethnicity, pointing out its influence on national and international courts.[141]

6.3 Sexual violence

In addition to expanding the understanding of protected groups, the *Akayesu* case also expanded the range of offences that could constitute crimes against humanity and genocide. For the first time in international criminal law, it described sexual violence as a crime against humanity and genocide.[142] With this description, the ICTR realized many of the goals of the 'newstream', poststructuralist lawyers – both feminist and postcolonial. It introduced new voices; it acknowledged unseen experiences; it changed the conceptualization of law and war.

Sexual violence had been listed as a crime against humanity in the ICTY and ICTR statutes, largely as a result of the feminist work described above. The first two Chief Prosecutors of the ICTY, Richard Goldstone and Louise Arbour, both announced their intention of using the ICTY as a forum for acknowledging and prosecuting sexual violence.[143] In fact, Goldstone said

[138]D. M. Amann, 'Prosecutor v Akayesu. Case ICTR-96-4-T.International Criminal Tribunal for Rwanda, September 2, 1998', (1999) 93 AJIL 195, at 198.

[139]*Akayesu* Judgment, *supra* note 31, at para. 583.

[140]Alvarez, *supra* note 26, at 360; Magnarella, *supra* note 9, at 531.

[141]Robinson and MacNeil, *supra* note 127, at 193–4. Wilson, *supra* note 29, at 177, shows that this approach influenced later cases and textbooks. I should acknowledge that Wilson, ibid., at 173–83, argues that the subjective approach to ethnicity co-existed in the ICTR with a desire for objective proof of ethnicity or a preference for showing that the Tutsi were a stable and permanent group. However, unlike Wilson, I do not see this as a tension in the case law or an example of limited legal reasoning, but rather as a demonstration of pseudo-poststructuralist method, which is able to see identity as subjective and constructed while referring to artefacts that confirm this identity. The very fact that Wilson's deconstruction considers this to be problematic, shows how much the meaning of the case law depends on theoretical tropes and approaches.

[142]K. E. Carson, 'Reconsidering the Theoretical Accuracy and Prosecutorial Effectiveness of International Tribunals' ad hoc Approaches to Conceptualizing Crimes of Sexual Violence as War Crimes, Crimes against Humanity, and Acts of Genocide', (2011–12) 39 *FordhamUrbLJ* 1249, at 1269.

[143]J. Gardam and M. Jarvis, *Women, Armed Conflict and International Law* (2001), at 217.

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he was alerted by human rights organizations to the prevalence and seriousness of rape in Yugoslavia and, as a result, he did his best to put policies and people in place so as to investigate and prosecute sexual violence.[144] Nevertheless, the first cases heard in the ICTR concentrated on other crimes.[145] The *Akayesu* case was concerned with massacres and the murder of intellectuals – in particular a university teacher, Pierre Ntereye. The *Kayishema and Ruzindana* case examined massacres in churches and communal buildings. It may be that the investigators had not looked for, or disregarded evidence of rape. Sexual violence was only introduced into the trial when Witness J gave the following testimony, towards what was meant to be the end of the *Akayesu* trial:

> Q: So, from your hiding where did you go next?
> A: After that I went to Kabgaye.
> Q: Did anybody go with you?
> A: I was with my daughter, who had been raped.
> Q: When was she raped?
> A: They raped her when they had come to kill my father.
> Q: How many men did rape your daughter?
> A: Three men.
> Q. Was this question ever put to you by the investigators of the Tribunal?
> A. No, they did not ask me this question.[146]

Witness J's evidence of sexual violence changed the direction of trial. The prosecution brought a motion to alter Akayesu's indictment to include charges of rape and sexual violence, arguing that the testimony of Witnesses J and H had inspired it to 'refocus' its investigation and find evidence 'not previously available'.[147]

Five new witnesses were brought before the court. The trial shifted its focus from the fate of the intellectual, Ntereye, to the experiences of his wife, Alexia. Witness PP was called to give evidence of how Alexia was raped and beaten to death.[148] The prosecution used this evidence and the evidence of other witnesses, who described their wish to be killed after being raped, to show that rape constituted serious bodily or mental harm and that it was, therefore, genocide. It argued:

> [T]hese women were actually reduced, disintegrated, or destroyed in their emotional will or desire to live, the desire to want to contribute, so to speak, to society. These women, after these attacks really became immaterial, a non-factor to the attackers and to the people there.[149]

Despite the defence's objections that rape 'was not until a few moments ago considered a crime against humanity',[150] the judges upheld the prosecution argument. They stated that there was no commonly accepted definition of rape in international law and set out to establish one. The result was a broad definition, that stated that rape is a form of aggression that, like torture 'cannot be captured in a mechanical description of objects and body parts'.[151] It was a crime that violates

[144]R. Goldstone, 'Prosecuting Rape as a War Crime', (2002) 34 *Case W. Res. J. Int'l L.* 277, at 280.
[145]Nelaeva, *supra* note 125, at 7.
[146]*Prosecutor v. Akayesu*, Redacted Transcript, Case No. ICTR-96-4-T, T.Ch. I., 27 January 1997, at 101–2.
[147]Ibid., at 8.
[148]*Akayesu* Judgment, *supra* note 31, at paras. 22–5.
[149]*Prosecutor v. Akayesu*, Redacted Transcript, Case No. ICTR-96-4-T, T.Ch. I., 23 March 1998, at 15–16.
[150]Ibid., at 144.
[151]*Akayesu* Judgment, *supra* note 31, at para. 597.

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personal dignity and that often furthers specific purposes like 'intimidation, degradation, humiliation'.[152] Sexual violence, the judges stated, inflicted both bodily and mental harm.[153]

This understanding of rape and sexual violence as physical and psychological violence helped the Tribunal to establish sexual violence as a crime against humanity and genocide, while supporting the Tribunal's understanding of war, crimes against humanity, and identity. The court held that that sexual violence could be genocide if it was committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Destruction, for the court, entailed both physical destruction and a more subjective understanding of destruction as 'destruction of the spirit, of the will to live, and of life itself'.[154] The psychological damage of sexual violence was understood as an integral part of this type of destruction.[155] In this way, the Tribunal echoed the broader statements made by feminist theorists about the subjective, psychological damage done by sexual violence, which, in the literature on Yugoslavia, had been added to a more specific analysis of how the reproductive effects of sexual violence could be genocidal. The ICTR did not rely on those kinds of details, but supporters of the Tribunal's decisions appreciated that absence. They were pleased that the court had described sexual violence in a way that had not focused on the reproductive impact on the community, but had looked to a socially constructed view of identity as the value intended to be protected by the concept of genocide.[156]

As such, the way that the ICTR prosecuted and defined sexual violence exemplified many of the goals of postcolonial historians and critical lawyers, while displaying the influence of their poststructuralist narratives and assumptions on the court. Witness J's evidence was noted by the Tribunal because of the work done by feminist lawyers to make the experiences of women legally and historically noteworthy. Moreover, by telling the stories of Witness J and Alexia, the ICTR achieved one of the most fundamental aims of both postcolonial and feminist lawyers and historians: the recovery and inclusion of marginalized voices and experiences. Finally, by describing sexual violence as a weapon in a war aimed at destroying the identity of a civilian population, the Tribunal was able to reconstitute international criminal law to reflect the particular narrative of law, war and humanity that had been expressed in poststructuralist theory, the 'new wars' literature, and the 'newstream' accounts of international law.

7. Conclusion

It may seem that I have spent a lot of words describing something obvious. The ICTR prosecuted crimes against humanity and genocide. It was able, in *Akayesu*, to finally 'see' sexual violence and to recognize it as genocide and a crime against humanity. It also found itself able to tell the stories of victims, of Africans and women, whose stories had been obscured by law and history. None of this is remarkable – or rather it is remarkable and unremarkable. After all, these do just seem to be the stories that an international court should be telling and the judgments it should be making.

And yet, if we look at back at the Nuremberg Trials, we can see that this is not the only way of explaining history and interpreting law. That court saw aggressive war as a worse crime than crimes against humanity and spoliation as more concerning than erasure. Even if that account is seen as mistaken, and the ICTR's account is seen as an obvious improvement, then it is still worth understanding how the shift took place. I have suggested here that the change in the understanding of law and history is due to theoretical work done outside and within law. By the 1990s a body of literature, encompassing several disciplines, had worked to show that identities were

[152]Ibid.

[153]Ibid., at para. 731.

[154]I. De Roca, 'Ten Years and Counting: The Development of International Law at the ICTR', (2005–6) 12 *New England Journal of International and Comparative Law* 69, at 74. *Akayesu* Judgment, *supra* note 31, at para. 732.

[155]*Akayesu* Judgment, *supra* note 31, at para. 731.

[156]J. M. H. Short, 'Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court', (2002–3) 8 *MichJRace&L* 503, at 520.

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created, that their creation had important ramifications, and that war was now aimed at destroying those identities. These propositions, once established theoretically, could be detached from the work that supported them and stand on their own as framework for explaining the world.

It was this framework, not just the particular events in Rwanda, that shaped the Tribunal's understanding of the history and crimes it was dealing with. It allowed the Tribunal to write a history that was not so different to those being produced by historians at the time, a history that had some *gravitas* because of this similarity, and a history that reinforced and contributed to these narratives. The Tribunal's historical account and the acceptance of these ideas within legal thought facilitated the technical changes it made to the law, to the definition of ethnic identity, and the interpretation of sexual violence. Most importantly, it made the changes appear obvious, ethical and necessary.

These changes were important not just for the *Akayesu* decision and the ICTR, but for the broader conceptualization of the nature and purpose of international humanitarian law. They supported an understanding that the role of international humanitarian law was to protect civilians in wars that were primarily aimed at their destruction. They also demonstrated a method for reconceptualizing the provisions of law to serve this purpose. In this way, they played an important role in the shift towards humanitarianism in international law that I and others have explored elsewhere.

The movement towards humanitarianism in international law can be, and often is, placed in a teleological history of international humanitarian law, a history of progress, of Enlightenment values, of international justice. The Tribunal itself, along with other courts, places itself in this narrative of progress and tells this story of law alongside its history of events. My account, however, would suggest that this change is less a straightforward development and more of a shift in theoretical tropes. It is also interesting to note that this theory, which has supported the re-conceptualization of law and its autobiography of its progress, has a strong anti-Enlightenment, anti-colonial aspect. This is especially interesting considering the existence of a different, yet still anti-colonial, narrative underlying the Nuremberg trials. The existence of these narratives in the canon of international criminal law shows that they are not just marginal, critical theories attacking an orthodox account of law. Rather they appear to be pivotal to the development of international law. These critical narratives, these stories about the failings of Western thought and practice, have helped to shape international law's description of its own teleology, its subjects, its jurisdiction, and its core humanitarian concepts, such as crimes against humanity.

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