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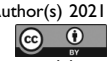
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Shifting Accounts of Justice: The Legalisation and Politicisation of International Criminal Justice

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Abstract
In December 2015, the International Criminal Tribunal for Rwanda delivered its final verdict in *Butare*, bringing the International Criminal Tribunal for Rwanda to a close after 21-years. Despite the important role that the tribunal played in confirming international criminal justice as a key transitional justice mechanism, and tool of international peace and security, there has been little retrospective analysis of the court's history. This article draws on a Bourdieusian field analysis to address the absence and makes two contributions. First, it demonstrates that over the International Criminal Tribunal for Rwanda's history the tribunal's conception of justice shifted from a weak form of restorative justice to a more traditional form of retributive justice. Second, it reveals that this shift was the result of a 'settling' on the law and, more importantly, UN Security Council interventions. This legalisation and politicisation of trial practice saw a shift in the field from prioritising moral authority to legal and delegated authority.

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Introduction

In December 2015, the International Criminal Tribunal for Rwanda's (ICTR) appeals chamber delivered the final verdict in *Prosecutor versus Nyamirashoko* et al., which brought the ICTR's 21-year existence to a close.[1] The tribunal, along with the International Criminal Tribunal for the Former Yugoslavia (ICTY), significantly contributed towards the solidification and institutionalisation of international criminal justice (ICJ) (Drumbl, 2005; Hagan et al., 2006; Mégret, 2016), introducing ICJ as a main stay of the international system and a key transitional justice mechanism (ICTR, 1994). Despite this, however, there has been little retrospective analysis as to what the ICTR's history can tell us about how the field of ICJ changed during this important moment in its development, why it took the course it did and what this reveals about the function and purpose of ICJ within the international community.[2]

To address these questions, this article joins a number of scholars who have drawn on Bourdieu's concept of a 'field' to explain the functioning of ICJ (Dezalay, 1986; Dixon and Tenove, 2013; Hagan and Levi, 2005; Madsen, 2018; Mégret, 2016). Whilst each of these studies, discussed further below, offer important insights into the generation of ICJ as a distinct field of practice, this article directly examines how and why ICJ as a field evolved as it did and the political consequence of a shifting approach to justice. This resonates with Eltringham (2019) and Hinton (2012 and 2019), who demonstrate how courts function first and foremost as spaces of social interaction, where the norms and rules of the court are constituted by the performances of different agents (see also Clarke, 2016, 2019). In this article, we build upon these ideas by thinking about how such performances changed overtime and with what particular effect.

This contribution is important for two reasons. First, it offers an insight into what these courts have tried to achieve and how this has changed overtime. This is significant both for the legitimacy of these institutions and for understanding what can be expected of international courts as responses to violence. Second, in placing these institutions within a wider field of practice that extends beyond the court itself, it examines how practices and decisions made 'outside' reverberate 'within' the walls of international courtrooms (Hagan et al., 2006). This challenges the idea that law and politics are two different domains, which remains a persistent view in the study of ICJ. Even studies that explore the political nature of these institutions tend to emphasise the court's ability to maintain an essentially legal sphere of action within the courtrooms themselves (Bassiouni, 2005; Moghalu, 2005). Indeed, scholarship attentive to the political nature of ICJ has tended to focus on the relationship *between* international courts and third parties (Clark, 2018; Kerr, 2004; Rodman, 2014), rather than on the political nature of the law itself (e.g. Kelsall, 2010 and Otto, 2009). In this respect, this article builds on the work of scholars such as Hagan and Levi (2005), Peskin (2008) and Palmer (2015) who show clearly how the interrelation between the court and the 'outside world' shapes practice

within the court (Hagan et al., 2006). This approach highlights the salience of some long-standing ideas from Critical Legal Studies for international law about the porous nature of the courtroom walls and of the inevitable politics of law (Fish, 1993; Kennedy, 1997), and follows Chris Reus–Smit's (2004) call to see international law as both constitutive of and constituted by politics.

The paper proceeds in five sections. The first introduces our methods. The second turns to Bourdieu's field analysis and how it relates to ICJ. The third explores how trial practice evolved at the ICTR. It argues that with time the court's initially broad mandate, underpinned by a weak form of restorative justice, was replaced by a more traditional understanding of retributive justice. The fourth and fifth sections detail why this happened, turning first to the 'legalisation', and second the 'politicisation', of the trial process.

Methods

For an in depth understanding of trial practice, we focus our analysis on three ICTR trials: Jean Paul Akayesu, Bourgmestre of the Taba Commune (1998); *Cyangugu*, consisting of Emmanuel Bagambiki – Prefet of Cyangugu Prefecture; Samuel Imanishimwe – Commander of the Cyangugu military camp; and Andre Ntagerura – Minister for Transport and Communication (2003); and Jean-Baptiste Gatete, director within the civil service and former Bourgmestre of the Murambi commune (2011). From a methodological perspective, these trials were selected because they cover: prosecutions spread over the tribunal's history; relatively similar subject matter (making it possible to identify the (dis)similarities with which these subjects were treated); and instances of prosecutorial success (*Akayesu* and *Gatete*) and failure (*Cyangugu*). Whilst not representative of all ICTR trials, the selection offers a way to systematically analyse how ICJ was practiced at the ICTR and how this changed over time. Our trial analysis is supplemented throughout by ICTR judgements, UN and ICTR administrative records, and our own quantitative analysis of trial data available from the ICTR online archives (Goozee, 2020).

To analysis this vast amount of data, NVIVO software was used. Whilst described in greater detail elsewhere (Redwood, 2021), NVIVO helped code the data drawing on an archaeological methodology (Foucault, 1972). This offers a means through which to systematically analysis the rules that underpin how knowledge is produced and how these rules change, by searching for the regularity through which statements are made within a discourse, as divided into four different categories of statements: objects (in relation to international courts this would include, for example, perpetrators), subjects (e.g. prosecutors), concepts (e.g. genocide) and strategies (e.g. the determination of guilt). What was included in these categories initially emerged from our analysis of the literature on international courts. However, these subsequently evolved and expanded iteratively as the analysis progressed.

We also drew upon 22 semi-structured interviews conducted between 2015-9, which were focused on the ICTR's shifting approach to trial practice, with former ICTR employees, including two Registrars, a Prosecutor, a Head of Appeals, and two Presidents. A snowballing method was used to select interviewees, but we additionally secured a spread of actors from across the different sections of the tribunal (and so

within our sample included members of the prosecution (11), defence (1), registry (6) and chambers (4). Access was facilitated as one of the authors worked as a legal intern at the Office of the Prosecutor (OTP) for some of this time, which additionally means that the participants were skewed towards the prosecution. As such, there is no claim that this is sample is representative of all that have worked at the tribunal.

Any issues that this might cause is mitigated by two further points. First, the interviews were triangulated using data produced by other publicly accessible interviews with tribunal staff, such as the 'Voice from the Rwanda Tribunal' project (Friedman et al., 2008). Second, the interviews were read deductively against findings from the main analysis of the archival records to substantiate those findings. In this respect, one of the authors also conducted descriptive statistical analysis on three aspects of ICTR trials records – trial length, number of charges and number of witnesses – to further verify our analysis (Goozee, 2020). As such, while relying heavily on our analysis of the archival material, the following analysis emerges from the cross referencing between these different data sets.

One final point can be made in terms our approach. Our analysis was concerned with understanding how different agents inside and outside the tribunal influenced the way in which the trials were pursued, and ultimately what vision of justice emerged. This, then, meant moving beyond the commonplace interest in the prosecution (though they feature prominently in the analysis as, for the most part, it was the prosecution that set the parameters of each case at the ICTR) to examine other agents' impact including judges, defence, registry, witnesses, the UN Security Council and General Assembly, diplomats and human rights activists. Inspired by Bourdieu, discussed below, the analysis is interested in how these agents interacted with and contested each other to determine the way in which law was practiced at the ICTR.

Bourdieu and ICJ

Fields are limited domains of practice, populated by different agents fulfilling different roles. Within a field, all agents broadly agree to abide by a set of rules about how each should function and the field's broader purpose (Bourdieu, 1995). These rules, norms, and assumptions – often unspoken – form a field's *Habitus* (Bourdieu, 1987). A variety of different forms of capital are available to these different agents, but these are unevenly valued, and unevenly distributed between the agents, meaning that a hierarchy of agents is produced (Bourdieu, 1987 and1995). As Hagan and Levi argue, examining the interrelation between different agents – pursuing different strategies to advance or defend their position – is crucial to understanding how a field operates (2005: 1501). Bourdieu argues that agents compete to acquire capital, but also to change the ascribed value of different types of capital within the field, which determines their position in the hierarchy (Bourdieu, 1995; Mégret, 2016). This results in both a change in the value of the different forms of capital and also a shift in practices within the field. Thus, as a result of competing interests, the way a field functions, and even the purpose of that field, is likely to change over time.

Several scholars have applied Bourdieu to ICJ, particularly to understand how the ICJ (re-)emerged as a field in the 1990s. Dixon and Tenove argue that ICJ is created

through the overlapping of the three global fields of diplomacy, criminal justice and human rights advocacy, and that ICJ's agents are drawn from these three fields (2013: 393-4 and 412). Each of these groups of agents rely on different forms of authority (analogous to Bourdieu's term 'capital'), which are replicated in their own field and within ICJ: delegated, legal, moral, and expert (Dixon and Tenove, 2013: 403-4). Diplomatic agents rely largely on delegated authority; legal agents on legal and moral authority; human rights agents on moral authority; and all agents employ expert authority (Dixon and Tenove, 2013: 408-9; see also Mégret, 2016). Crucially, this renders international courts as sites where competing interests collide, and where, following Bourdieu, this competition results in shifts in practice within the field (Eltringham, 2014: 543-5).

Hagan and Levi have similarly examined how ICJ is made real through prosecutorial and judicial action (2005). They argue that the force of law comes not from legal texts themselves, but the way the text is brought into being and contested. It is the process through which law is made as law that is key to understanding its authority (*Ibid*: 1502). They emphasise the importance of both how ICJ creatively adapts to the reality that it seeks to control, and also the repetitive nature of the application of law, which gives the field the appearance of a timeless, objective, application of rules (Dezalay,1986:100-5; see also Eltringham, 2019: 56-84).

What unites these accounts is a belief that Bourdieusian analysis can explicate how the field of ICJ has emerged as a legitimate part of international governance. Yet, what is less present in these works is an understanding of how ICJ practice changes overtime. Understanding this, as the following argues, requires both analysing the effects of competition between different agents (Dezalay, 1986: 104; Madsen, 2018: 199) and how conditions outside of the courtroom influence what happens inside (Hagan et al., 2006: 587; See also Madsen, 2018: 203). Doing so, this article demonstrates how the understanding of justice underpinning the field shifted from one focused on achieving a number of extra-judicial goals to one fixated on speed and efficiency. Drawing in particular on Dixon and Tenove's outline of ICJ as the interlinking of criminal law, human rights law and diplomacy, we argue that the shift resulted from alterations to the value of different forms of authority within the field, as increasingly legal, delegated, and to a degree expert, authority superseded the initial prominence of moral authority.

Shifting Accounts of Justice

At the ICTR's outset, Richard Goldstone, the ICTR and ICTY's first Prosecutor, highlighted several extra-judicial goals that the ICTR would pursue (Goldstone, 1995). Like truth commissions, trials could offer a space where: a new and authoritative account could be created; victims, as witnesses, could come to terms with the past; international law developed; and that this combined could make a significant contribution to the rebuilding and reconciliation of Rwanda and the international community (Goldstone, 1995; ICTR, 1994). With this, the retributive model of justice that traditionally underpins criminal justice was augmented to include some of the traits more often associated with restorative justice (McEvoy, 2007; Pena and Carayon, 2013: 518-23). Whilst Pena and Carayon (2013) argue that the ICTR, along with the ICTY, failed to achieve this more

expansive vision, this section demonstrates that a quasi-restorative justice did initially influence ICTR trial practice. Indeed, some of the normative changes that Pena and Carayon (2013), and Findlay and Henham (2005), call for – expanding conditions of admissibility, emphasising the contextual nature of the crimes, and including victims in establishing the boundaries of the case – were aspects of ICTR's early courtroom practice.

ICTR trial practice initially reflected a concern with achieving the extrajudicial goals outlined by Goldstone, and there was broad agreement amongst the different agents involved in the trials to this effect. First, it is apparent that there was a drive to construct a 'just truth'. As Madeleine Albright, US Ambassador to the UN in 1994, declared, the tribunal 'will establish the historical record before the guilty can reinvent the truth' (Washington Post, 1994). This was elaborated on by Goldstone (2001: 120-1) who argued:

> This link between peace and justice, between the work of the Criminal Tribunals and stability in Yugoslavia and Rwanda is, jurisprudentially speaking, extremely interesting… National criminal law function primarily to punish perpetrators for violating societal norms encapsulated in the common law and in statutes, and thereby provide satisfaction to the parties most directly injured by the crime. … On the international level, however, the crucial link between criminal prosecution and the preservation of peace and stability shifts the focus away from pure retribution, to notions of restoring the rule of law and justly establishing the truth, thereby preventing denials and revisionism…

The OTP's indictment strategy also reflected this concern with a just truth, and this as such captured the breadth and full extent of the violence in Rwanda. Accordingly, a wide range of accused were indicted – including: government ministers, bourgmestres, préfets, priests, businesspersons, journalists, singers, doctors, military personnel, gendarmes, local militia, conselliers, and other local persons of significance (Moghalu, 2005: 84; ICTR, 2009a: 2) – and each of Rwanda's seven prefectures were covered. The OTP believed that there was *one* genocide and that it was their duty to demonstrate this within the tribunal's record. Arbour, on becoming Prosecutor in 1997, pursued this narrative through a 'mega trial' that attempted, ultimately unsuccessfully, to indict 29 persons (Adeogun-Phillips, 2008; Egbe, 2008). This attempt to capture a broad array of crimes and tell the story of the genocide was replicated in Karemera et al. (*Government 1*), which utilised the position of the accused as leaders in the genocidal conspiracy to tell a full account the genocide (Anonymous, 2015), and show the genocide as an orchestrated government policy.

This didactic approach also had consequences for the victim witnesses' role in the trials. A close analysis of the *Akayesu* trial transcripts, for instance, brings doubt to transitional justice scholars' claim that courts inevitably silence witnesses, as law extracts what is of legal value from witnesses (e.g. Dembour and Haslam, 2004: 163-5). Rather, witnesses played a significant role in shaping ICTR trials by *co-constructing* the court's account of violence and, more broadly, influencing how trials were approached. This included the witnesses' role during the pre-trial phase, as the prosecution relied almost completely on witness testimony to construct their cases (Eltringham,

2009: 65-7; ICTR, 2000: 94-6). But the influence also continued into the trials as the witnesses contested and reshaped the trials' accounts whilst on the stand. For instance, despite defence objections, witnesses regularly succeeded in expanding the scope of both their pre-trial statements and the indictment as they testified (two instruments that should have constrained their accounts). This could result in significant shifts in a trial's narrative framework, demonstrated by the impact of Witness H and Witness J's testimony as to their witnessing of sexual violence in *Akayesu* (ICTR, 1997a; 1997b). This testimony sat uneasily within the courtroom at the point it was given due to absence of sexual violence charges in the indictment. This meant that the defence had not been pre–warned of the witnesses' incriminating testimony, undermining their right to a fair trial. However, the testimony along with an *amicus curie brief* from a human rights organisation (ICTR, 1997c), led the prosecution to introduce six new counts relating to sexual violence in an amended indictment (ICTR, 1997d; Moore, 2016).

The judges accepted the new indictment despite that the prosecution's case had all but closed. Five new witnesses were subsequently heard, which ultimately led to the ruling that rape could be considered an act of genocide. The judges' decision here reflected their approach to the trial process, and specifically witnesses, during *Akayesu*, which, like the OTP, suggested a concern with doing more than simply delivering verdicts. For not only was the acceptance of the amended indictment at that late stage of the trial legally questionable, but this decision was particularly pushed for by Judge Pillay who was concerned that the tribunal adequately prosecuted gender-based violence, something that was also being pushed for by human rights groups outside of the tribunal (Appeals Judge, 2016; ICTR, 1997c).[3] This suggests a coming together of the interest of agents from different positions from within the field to determine the way in which trials were approached in the ICTR's early years.

The judges' more expansive approach was seen elsewhere too, as they drew on the witnesses' experience to define and shape the law. In *Akayesu*, for example, the judges drew on the witnesses' testimony relating to sexual violence to offer a particularly broad definition of that crime, which held 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' (ICTR, 1998a: 204-1, 274-6). Witness testimony also influenced the judges' decision that in the context of genocide a lack of consent from the victims of sexual violence should be presumed given the inherently coercive nature of the surrounding environment (ICTR, 1998a: 275), and that rape could constitute an act of genocide (ICTR, 1998a: 282 and 290).[4] This approach was further reflected in the judges' reasoning that emphasised the need to take into consideration the specificity of the witnesses' experiences when determining their credibility. This meant being aware of their cultural background, and also the witnesses' traumatic experiences during the genocide (ICTR, 1998a: 42-4 and 76-7). By taking these factors into consideration the very practices of the court appeared to be shaped around the witnesses' experiences. This reflects what Martinez and Danner (2005: 132-7) have observed as the intrusion of a more human rights inspired methodology into international criminal law in the early 1990s, whereby the emphasis was on expansionist interpretations of the law to protect the rights and interests of the victims

and the wider affected community. This suggests, in turn, that at this time, moral authority carried considerable weight within the field.

Overtime, however, the tribunal's approach changed. First, capturing a 'just truth' became less of a priority.[5] In *Gatete*, one of the ICTR's last trials, the OTP dropped fourteen of nineteen specific allegations lodged against Gatete in the amended indictment, including any reference to Gatete's significant contribution to the preparation of the genocide (ICTR, 2011: 8-9; 2004a: 3; 2009a: 7; 2003a: 6). Indeed, the prosecution prosecuted *Gatete* in a manner that appeared driven by a concern with making it as quick and efficient as possible, rather than with ensuring a holistic account of the violence was produced. A former member of the OTP noted that overtime OTP strategy became more focused on the legal outputs and stopped trying to construct 'fluffy histories' (Anonymous, 2, 2015). This change was also reflected in a shift in discourse within the chambers. The judges in one decision noted:

> During its early history, it was valuable for the purpose of the historical record for Trial Chambers to gather evidence documenting the overall course of the genocide and to enter findings of fact on the basis of that evidence […]. At this stage, the tribunal need not demand further documentation […] (ICTR, 2006a: 14).

These findings are mirrored in a quantitative analysis of the ICTR trials, which suggest that whilst in 1995 the average number of charges listed on the first indictment was 8.5, by 2008 it had fallen to 3.8.[6] Hassan Jallow, the Prosecutor from 2003, noted in this respect:

> […] we decided that the indictments themselves had to be much more focused, much shorter, much leaner because the old indictments we had here were quite big, I mean very lengthy documents and we thought we should try and have what we call "lean and mean" indictments rather than big ones. Try and focus on less crimes in respect of an accused […]. If you had, if you could proceed on three counts you, you, you did that[…].

This change effected how witnesses were treated, as they were increasingly instrumentalized; particularly noticeable when it came to the legal agents questioning style. Compared with *Akayesu*, in *Gatete* witnesses were asked shorter and more targeted questions (ICTR, 2009b: 14–30). In *Gatete,* the prosecution even interjected during their own witnesses' testimony to bring it to order (ICTR, 2009b: 15. See also ICTR, 2009c: 81). As Redwood (2021, 157-161) argues, with time the needs of victims were jettisoned, also evident in the harm that participating in trials could cause witnesses – with a number of witnesses killed as a result of working with the tribunal – and the failure of ICTR outreach projects to meaningfully engage with victims' needs.

The judges' role also changed in this respect and by *Gatete* their questioning had become more combative. At some points, the *Gatete* bench questioned the witnesses in a manner that blurred the line between the judges and the prosecution and defence. For example:

> Judge Muthoga: Yes. I'm asking you – look this side, Mr Witness. I'm asking you to tell me, did you actually look out to see if Mr Gatete was there or not, amongst those 50 of you?
>
> The Witness: As I was getting ready to strike him with a hammer, I had the time to look around me to see the people who were present or those who were not present. Gatete was not there.
>
> Judge Muthoga: So Gatete is one of the people you expected to be there but was not there? (ICTR, 2010a: 76).

These interventions were particularly intrusive during the defence's case, which led to a degree of friction between the defence and the judges (ICTR, 2010b: 50). After the judges intervened once more, *Gatete's* defence counsel, Ms Poulain, argued:

> Ms Poulain: And it is an open question which requires eventually a long answer. I'm very sorry, President, but it's *our* evidence.
>
> Madam President: *No*. They are – not necessary – detailed answer. We don't need all these details. If he's a good administrator, say he's a good administrator, if he wants it to be said that he was a good leader and administrator and good – a good leader or authority in the commune. But he should not go on giving us each and everything.
>
> Ms Poulain: Well, I think it gives more weight to the evidence than a simple affirmation. I am sorry (ICTR, 2010b: 50, emphasis added).

The judges also started to order the counsels to reduce the number of witnesses called to speed up the trials (e.g. TRA001998/1, 44; Meron, 2004: 523). During *Cyangugu* the Presiding judge pleaded with the defence to reduce the witness lists.

> Judge Ostrovsky is looking at the list in *which you are drowning us with witnesses, and we don't wish to be drowned*. So take us seriously about reducing this list substantially, substantially (ICTR, 2002a: 7, emphasis added).[7]

This trend is also born out statistically, as the average number of prosecution witnesses per trial decreased from 52.8 to 20.3 over the ICTR's lifetime,[8] and the average length of trials decreased from 211.68 to only 48.9 days.[9] Returning to a comparison between *Akayesu* and *Gatete*, in *Akayesu* the prosecution spread its charges over 15 counts and called 28 witnesses over 31 trial days (ICTR, 1998: para 24). Yet, in *Gatete*, a relatively similar defendant to Akayesu, the prosecution called just 22 witnesses over 12 days to speak to 7 counts (ICTR, 2011: 1). The 2009 trial of Yussuf Munyakazi took a mere 19 trial days, with the prosecution only calling 11 Witnesses heard across 7 trial days (ICTR, 201°c; Goozee, 2020).

This mirrors Langer's (2005: 890) findings that overtime there was a shift from an adversarial to managerial model of judging, and others who argued that there was an assertion of inquisitorial or civil law forms of judicial control as the ad hoc tribunals

progressed, explored further below (Findlay, 2013: 49). Moreover, these changes also represent a shift in the ICTR's conception of justice. What began as a broad approach to trials that looked to do more than simply establish the accused's guilt, which represented a weak form of restorative justice, underpinned by the increased value of moral authority within the field, evolved into a more limited focus on efficient trials and reflected a more classically retributive model of justice. The following looks at why this shift occurred, turning to the legalisation and politicisation of justice at the ICTR. This demonstrates that whilst the value of moral authority decreased overtime, legal, delegate, and to a degree, expert authority increased in prominence within the field.

Legalisation

The field of ICJ, like any field, is concerned with creating a space of relative autonomous practice and authority (Bourdieu, 1987). Several scholars contend that ICJ has generated authority through the mobilisation of legalism as the dominant frame through which its actions are interpreted (Czarnetsky and Rychlak, 2003; Hagan et al., 2006; McEvoy, 2007). For McEvoy (2007: 417), legalism – defined by Shklar (1986, 1) as 'the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules' – has 'seductive' qualities, particularly in transitional contexts. More specifically, Hagan et al. (2006) assert that the ICTY and ICTR were initially legitimised based on principles of liberal legalism (2006), and they drew on certain features from this legal model (such as individual criminal responsibility) to enhance their authority. They (2006: 587) argue in this respect that scholars can 'conceive of these transnational institutions as bodies that "actualize schemas" – such as legal liberalism [*sic*] – and as "resources" through which these schemas are instantiated, justified, and reproduced'.

Yet with so much of ICJ's substantive and procedural law undetermined at the ICTR and ICTY's outset, it is also the case that a degree of creativity was required as the emergent field of ICJ looked to establish itself as a coherent and timeless set of rules. Thus, a blend of creativity and repetition was required to establish ICJ's legitimacy (Hagan and Levi, 2005: 1503; Hagan et al., 2006: 587). This section examines this interrelationship between creativity and repetition at the ICTR and argues that overtime the ICTR's legal framework became more stable, consistent and predictable. This builds on Hagan et al.'s (2006) exploration of how the broader legal framework underpinning the ICTY adapted with time and examines how ICTR trial practice evolved and with what effect.

At *Akayesu* (1996), the ICTR's first trial, there was little to go on in terms of legal precedent. This was restricted to the jurisprudence created at *Nuremberg*, the ICTY's rules of procedure and evidence (RPE) which formed the basis of the ICTR's RPE, and relevant municipal law. Many aspects of the tribunal's statute were explored for the first time within the early judgements, producing, in some cases, completely new legal definitions (ICTR Judge, 2015). As one former ICTR trial attorney noted: 'The law is being developed as we speak. We are the ones who are developing the law. We create the jurisprudence' (Adeogun-Phillips, 2008: 7). This type of creative intervention is central to understanding how law evolves and maintains a sense of legitimacy (Byrne, 2010: 244; Meron, 2004: 521; Dezalay,1986).

Over time, however, the law settled (Senior Appeals Attorney, 2015). The repetitive citation of the law 'as it is' through precedent, as Bourdieu reminds us, is key to establishing law's authority (Bourdieu, 1987). This gives law both a timeless quality, but also renders the judges' rulings as an application of the law as it really is, rather than a political decision. This gives judicial rulings a symbolic power that places it beyond, or outside, of politics (Madsen, 2018: 190), and reflects what Graubart (2010) saw as the deepening of the legalisation of ICJ at the ICTR.

The repetition and solidification of law also had implications for trial practice. This influenced how the parties' presented evidence, as it became clearer what was needed to establish the occurrence of a crime. Two things are notable when comparing *Akayesu* and *Gatete* in this respect. First, compared to *Gatete,* the *Akayesu* closing arguments and judgement paid greater attention to interpretations of law (ICTR, 1998a: 123–159, 240–1, 274–6; ICTR, 1998b: 4-46; ICTR, 2010d). This suggested that certain interpretations of law had become widely accepted by *Gatete*. Second, as suggested above, in *Gatete* the witnesses were questioned in a more direct manner, as the legal agents exerted greater control over the proceedings, when compared to *Akayesu*. This suggests that the legal agents had a greater understanding of what was needed to establish the defendant's guilt and so could ask the witnesses more direct questions (Byrne, 2010: 283-4).[10]

There was also a notable shift in procedural law at the ICTR which provided legal agents, but particularly the judges, with greater control over the trials. A key moment in this respect was the judge's intervention over the prosecution's indictment policy during *Cyangugu*.

The prosecution encountered numerous problems with their indictment from the outset of *Cyangugu*, as each of the defendants' preliminary motions challenged it for its lack of specificity (e.g. ICTR, 1997e: 5-11; ICTR, 1998d: 4). Whilst the prosecution addressed most of these issues, the question of the indictment returned in the judgement, where the judges ruled that the indictment was impermissibly vague, and so could not be cured through post–indictment disclosure (ICTR, 2004b: 15-20; ICTR, 2006b: 21, 25, 41). This ruling signalled the judges warning to the prosecution that they would no longer tolerate the OTP's indictment strategy, which had relied on vague indictments that could be altered by new evidence found either through on–going investigations or the witnesses' in–court testimony (ICTR, 2004b: 18-20).[11]

This warning, along with similar decisions in *Semanza*[12] influenced subsequent OTP indictment practice (Appeals Attorney, 2015). Not only did the OTP move towards using more exacting and narrowly focused indictments, but they also introduced an indictment committee tasked with ensuring that the indictments were watertight, reflected the current jurisprudence, and that the evidence to be led in court matched the charges in the indictment (Appeals Attorney 2, 2015).

An additional consequence of these changes was that there was a shift in power in the courtroom away from the witnesses and towards the legal agents. This new stance differed from the prosecution's initial indictment practice, which allowed the witnesses to take a greater role in how the indictments and trials were formulated, and early trial practice, where the prosecution 'modell[ed] their prosecutions as they went….', which had afforded witnesses a certain amount of space to influence the court's account (Appeals Attorney, 2, 2015). Rather, witnesses were increasingly used in a more utilitarian

manner. This was also reflected in the increasingly interventionist approach adopted by the court's legal agents, which worked to limit and interrupt the witnesses' testimonies, as the court's concern became far more oriented towards producing orderly and efficient trials (Byrne, 2010: 270).[13] This was particularly marked in the judges' approach to the trials, which, as aforementioned, has been variously described as changing to a more 'managerial' (Langer, 836-7), civil law (Meron, 2004); or inquisitorial form of trial management (Combs, 2012). Uniting these accounts is the sense that increasingly the judges took a more interventionist approach to the trials (Byrne, 2010: 296-7; Meron, 2004: 522).

This shift in trial practice was also driven by personnel change. There was a step–change in trial efficiency as the result of the appointment of Adam Dieng as registrar in 2001, Hassan Jallow as prosecutor and Erik Møse as President in 2003 (Mégret, 2016). These agents focused their energies on pursuing more streamlined and efficient trials. Some key changes to trial practice introduced included the creation of trial committees, to ensure that the trials were on track, and informal use of status conferences, where issues between the defence and the prosecution could be settled without resorting to more time–consuming litigation (UNSC, 2003a: 15; UNSC, 2004: 12). Similar changes were seen in each of the tribunal's organs and unifying this was a concerted attempt to produce more efficient proceedings, and to place greater power with the judges to enable them to control proceedings. This was also reflected in the judges' continued revisions of the RPE (UNSC, 2003a: 12, 14; UNGA, 1998: 4).

This section has argued that part of the reason behind the shift in practice at the ICTR, was as a result of legal agents, and particularly the judges, gaining increasing control over the trial process. As Langer (2005: 853) argues, these types of shifts often result from 'competition about which agents and institutions will have more power and responsibilities within this international jurisdiction'. In this instance, this clash resulted in a shift in the significance of different types of authority within the field and can be explained as the result of the legal agents' drawing more effectively on their legal and expert authority. As the field established itself as a legitimate form of criminal justice, this also meant that the legal agents could pay less attention to the role and needs of the witnesses and victims, and, as others have argued, human rights organisations which had influenced the ad hoc tribunals' approach at the outset (Hagan et al., 2006: 602). This, then, saw a correlative diminishing in the value of moral authority within the field.

There was, however, another and more significant driving force behind these changes. This was the consequence of the UNSC's intervention, which heighted the value of delegated authority, and enforced a series of changes in how trials were approached.

Politicisation

Several scholars reflect on the essentially political nature of ICJ and its institutions (Czarnetsky and Rychlak, 2003; Graubart, 2010; Mégret, 2002). Yet, of interest in this section is Hagan et al.'s (2006: 590) claim that when analysing international courts '[t]he challenge is to theoretically understand the alignment and realignment of external interests and ideologies with court leadership and internal court operations.' Hagan et al. (2006: 603 and 607) demonstrate, in this respect, how US pressure on the ICTY fractured

the tribunal's legal liberal framework and, saw the imposition of ad hoc legalism and then an attempt at legal exceptionalism (see also Graubart, 2010: 419-20). Building on these ideas, this section argues that the UN's enforcement of a completion strategy played a significant role in the shift in the ICTR's trial practice, heightening the value of delegated authority within the field.

The first decade of the ICTR, and ICTY, saw a marked change in the tribunals' relationship with other UN organs (particularly the UNSC). The ad hoc tribunals were initially seen as a new tool of international peace and security, made particularly attractive as they seemed like a relatively 'economic' and risk-free response to violence and instability (UNSC, 1995). This good will towards the tribunals – and particularly the ICTR – was, however, relatively short-lived, as, to critics, the trials proved to be costly, slow and inefficient (see UNGA, 1996: 7; UNSC, 2001:23). In response, and as a result of a series of other reputational issues, a number of UN organs (particularly the UNSC, UNGA and the Fifth Committee – the subsection of the UN charged with overseeing UN finances) intervened to bring about change. Consequently, in the late 1990s and early 2000s, numerous highly critical reports were published (UNGA, 1997a; UNGA, 2002a; UNGA, 1997b: 2-3, 15-16). These reports focused on how the tribunal could be better managed, with a view to economising the tribunal's practices in terms of both time and resources (UNGA, 1999: 9).

What was notable about these reports was that their suggestions went beyond overcoming clearly bad practice and focused more broadly on changing the way that the tribunal prosecuted the crimes falling within its jurisdiction. For instance, they stated that the judges needed to exert greater control over the trials to make them shorter and more efficient (UNGA, 1999: 18–38). The reports also suggested that the OTP should: cut down the scope of the charges being pursued; focus solely on the senior figures in the genocide; and make greater use of plea agreements and judicial notice (UNGA, 2002a: 2, 11; UNGA, 1999: 28–30).[14] There were also suggestions that specifically called for the tribunal to change its approach to witnesses. Judges were to: exert more control over how witnesses were examined; reduce the number of witnesses called; and make greater use of Rule 92 *bis*, which allowed written statements to be submitted instead of in–court testimony (UNSC, 2003a:11; UNGA, 2002a: 4, 10; Langer, 2005: 870 and 886). One report produced in 1999 and co–written by Hassan Jallow before he became the ICTR's prosecutor, stated:

> Some [witness answers] seem to be evoked by vague, multiple or compound questions and the relative infrequency of objections to them. 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 (UNGA, 1999: 29, emphasis added).

These reports coincided with the period in the late 1990s and early 2000s when the judges' approach to the trials, in particular, shifted to gain greater control over how these proceeded, as the judges, with greater energy, began to curb both the number of

witnesses and the length of their testimony (UNSC, 2001: 8; Anonymous 2, 2015). The language that underpinned some judicial decisions showed the impact of this concern with efficiency and costs (see ICTR, 2002b: 104-5). One ruling that ordered a reduction in witnesses stated:

> It's no point us having witnesses that are not advancing the issues very much. *Great expense* is involved in bringing these witnesses to the tribunal. *Our budget has been seriously cut* and so the *issue of economy* has to be taken into consideration as well. *We can't just bring witnesses here for the sake of bringing them.* (ICTR, 2002a:7, emphasis added).

This 'efficiency drive' accelerated in 2002 when an increasingly dissatisfied UNSC ordered the tribunal, along with the ICTY, to formulate a 'completion strategy' to quickly bring the tribunals to a close (UNGA, 2002b). The strategy was finalised in 2003, and dictated that the OTP finish investigations by 2004, with trials in the first instance concluded by 2008 and appeals by 2010 (UNSC, 2003b: 2). To this end, one of the first changes was the creation of separate prosecutor posts for the ICTR and the ICTY. Hassan Jallow was appointed as ICTR Prosecutor, who, as the above statement suggests, was already concerned with making the OTP's approach more efficient (UNGA, 1999:9; UNSC, 2003b:2). The prosecution subsequently created a new OTP policy that would streamline their prosecutions along the lines suggested in these reports (Senior Member of ICTR Office of the Prosecutor, 2015; UNSC, 2003a: 6,18; UNSC, 2004: 18-19; UNGA, 2002c: 15).

The efficiency drive also contributed to a shift away from using trials as vehicles through which broad histories of the genocide were consciously constructed. The final case to clearly do this was the aforementioned *Government 1*(Anonymous, 2, 2015). This resulted in two major outcomes. The first was that the appeals chamber took judicial notice of the genocide, which meant it was no longer legally necessary to present a wider picture of the genocide at a national level at subsequent trials (ICTR, 2006a: 13-15). Second, this attempt at a mega–history resulted in an enormous amount of disclosure (as this increased what might be considered relevant exculpatory evidence), which placed the OTP under considerable strain at a point where the OTP was trying to improve its trial efficiency (Anonymous, 2, 2015). This meant that the goal of consciously producing just truth came into conflict with the goal of efficient trials.

The efficiency and economy of the trials, then, came to define the ICTR's approach to 'justice'. Several agents actively contested and condemned this reductive approach. Robinson, defence council in *Government 1*, for example, submitted a motion that called for President Byron (the Presiding judge in the case) to be barred from deciding on another motion as Robinson feared that his obligation to the completion strategy and efficiency as the then ICTR President would influence his decision to the detriment of the rights of the accused (Defence Council, 2016). Judge Hunt, whilst participating in an interlocutory appeal in *Butare*, argued that the tribunal's focus on efficiency had overridden all other considerations, including the rights of the defendant, which in that instance led him to submit a dissenting opinion (UNSC, 2015: 25). Similarly, at the closing of the tribunal the New Zealand delegate to the UNSC noted that '[a] budget–driven mentality seems to have distorted the conversation about the role and performance

of the tribunals' (UNSC, 2015: 26). These were, however, very much dissident voices, and by the end of the tribunal's existence each of the organs seemed committed to the pursuit of lean and efficient justice.

This section has argued that diplomatic agents' innovative intervention (Hagan and Levi, 2005: 1503) led the ICTR to change practice, shifted the field's rules and in the process created a new interpretation of what the field's primary purpose and function was. This, as discussed further below, saw the value of delegated authority increase, as legal agents increasingly advanced their position by pursuing the new principle of efficient, and speedy, justice that the UN demanded.

Conclusion

This article has made two main arguments. First, we established that the tribunal's approach to trials shifted over the course of its history, from a quasi-restorative understanding of justice to a more strictly retributive model. This saw the extrajudicial goals embedded in the tribunal's initial approach pushed to the periphery as attention focused on trial efficiency, and with this a shift in the power-dynamics in the courtroom away from the witnesses towards the legal agents. Second, we argued that this was the result of both legal agents within the courtroom working to gain greater control over the trials and, more importantly, because of the interests of diplomatic agents outside the courtroom.

This article reaffirms the value of utilising Bourdieu's concept of a field to analysis ICJ and attend to the complex web of agents, both inside and outside the courtroom, which influence practice and shape how this evolves over time. This enabled our close analysis of ICTR trial practice as a key contributor to the emergent field of ICJ in the 1990s. As argued, overtime there was a re–valuation of the different types of authority within the field. In the tribunal's early years, moral authority carried the greatest value. This was in part due to the tribunal's difficulty in creating an international criminal court from scratch with little precedent (limiting access to legal or expert authority) and also due to the rise of a human rights 'victim-centred' discourse and moral authority within the field (Pena and Carayon, 2013: 519). These factors produced a set of rules whereby authority was acquired in part by pursuing a broader strategy that focused on the moral duty of the court as a response to the genocide and provided a greater role for the victims at the trials. The effects of this were best seen with the decision to allow the prosecution to amend the *Akayesu* indictment after the testimonies of Witness H and Witness J, even though the prosecution's case had all but ended – a move pushed for by a human rights organisation and Judge Pillay, who was particularly attentive to the question of gender justice. As Danner and Martinez (2005: 132-7) argue, the ICTR's early years witnessed an intrusion of human rights methodologies which led to more progressive interpretations of law.

As the tribunal progressed, legal, delegated, and to an extent expert, authority superseded moral authority due to the coming together of two different groups of agents within the field. First, and most important, was the intervention of diplomatic agents. As noted above, the UNSC increasingly wanted the ICTR to close as quickly as possible. Second, and connected, there was a solidifying of the law and increasingly the presence of legal

agents with greater access to legal and expert authority. Such agents included Erik Møse, but perhaps most important here was the appointment of Hassan Jallow as the first prosecutor to serve the ICTR exclusively. Both legal and diplomatic agents successfully pushed for more efficient trials. For the tribunal's legal agents, this meant both acquiring greater amounts of legal and expert authority – as the trials came to resemble a more coherent and familiar form of legal practice – but also satisfying the UNSC's demands for efficiency, and so drawing more effectively on delegated authority also.

As such, the article also offers two, somewhat contradictory, reflections about the role of ICJ in the international system. On the one hand, the findings about the ICTR's approach to justice in its final years aligns with a now familiar critique: advocates of international courts continue to overpromise on what trials can achieve and problematically claim to speak for victims as a source of legitimacy (Clarke, 2019). Yet, on the other, it has highlighted the performative nature of ICJ. This has important implications for the future: Namely, that a reductionist vision of justice, which we would argue is also visible at the ICC (e.g. Pena and Carayon, 2013) need not necessarily persist It is possible, then, to perform ICJ differently.

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Notes

1. The ICTR was replaced with the Residual Mechanism for the International Criminal tribunal's, which continued the residual work of the court.
2. Since the ICTR closed, only three books have been published: Redwood, 2021; Eltringham, 2020; Magnarella, 2018.
3. Hagan et al explore similar dynamics in the early stages of the ICTY (2006).
4. Overtime, these more progressive interpretations of sexual violence jurisprudence were replaced with more conservative readings (Redwood, 2020).
5. A number of interviewees also noted that the indictments shifted over time, from including a broad (and sometimes chaotic) spread of charges to being more tightly focused. ICTR Senior Appeals Attorney 2 (2015).
6. Similarly, in cases which included second and third indictments, the number of charges also reduced. This is based on trial data available at: https://unictr.irmct.org/en/cases accessed 05/01/2021.

7. Moreover, as argued elsewhere, some of the other practice which appeared to show a level of sensitivity towards the witnesses' experiences were relatively short-lived or superficial (Redwood, 2020).
8. Interestingly, defence witnesses do not demonstrate the same trend, maintaining a consistent average between 45 and 50. This average is also brought up considerably by the number of defence witnesses used in the larger trials, for example 160 defence witnesses were presented during the trial of *Bagosora et al*. (Military I) Available at: https://unictr.irmct.org/en/cases/ictr-98-41 Accessed 5th January 2021.
9. Similarly, this average is skewed by larger, multi-defendant trials.
10. For an example of the directness of questioning, see ICTR, 2009b: 14–30.
11. Judge Dolenc went further and argued whole of the indictment should have been thrown out (ICTR, 2004b; see also ICTR, 2006b: 131).
12. The *Cyangugu* Appeals Chamber reinforced this message as they overturned the finding that Imanishimwe was responsible for genocide, because the prosecution had failed to properly plead this allegation in the indictment. ICTR, 2006c: 13, 37. 13 and 37.
13. Byrne (2010, 248-303) conversely argues that whilst the substantive jurisprudence became more settled over the course of both ad hoc tribunals, there was greater ambiguity, and therefore flexibility, in how procedural rules were applied. However, it is notable that her data set finishes in 2002 – the cusp of when this article argues the significant changes occurred.
14. This again prioritised speed and efficiency over other potential goals. Pleas, for instance, produce a particularly narrow historical record, since most of the cases and alleged crimes are discarded to get a confession.

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