

**THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR RWANDA AS THEATER:
THE SOCIAL NEGOTIATION OF THE MORAL AUTHORITY OF INTERNATIONAL LAW**

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ABSTRACT

The international criminal courts (“ICCs”)—the *ad hoc* International Criminal Tribunals for the Former Yugoslavia and for Rwanda, the recently-established permanent International Criminal Court, and hybrid “internationalized” tribunals such as the Special Court for Sierra Leone—are the international community’s attempt to address the worst of the criminal manifestations of racism, nationalism, and large-scale xenophobia. Based on five months of ethnographic research at the International Criminal Tribunal for Rwanda (“ICTR”), analyzed using Erving Goffman’s dramaturgical framework, this article examines the means through which moral authority is constructed and communicated by the ICTR. Specifically, the article advances the argument that the ICCs seek to personify the *Generalized Other*; that they claim to embody the universal authority and morality of the “international community.” The Generalized Other is an organized and generalized attitude with reference to which individuals define their conduct. The Generalized Other and institutions help socialize people in different parts of

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society to have the same responses, interests, and moral beliefs and conceptions of selves needed for understanding and synchronizing with others. It is through interactions—immediate and mediated—with Generalized Others that the self arises and is negotiated; that stigmatization of individuals and groups occur; that social concepts are defined; and that psychological citizenship manifests. Therefore, the interplay between inclusion and exclusion, hegemony and diversity in institutions that have the potential not only to communicate for, but also to embody and personify the “international Generalized Other,” as well as the very existence of such social institutions, is of great social significance.

The analysis of the ethnographic data traces the three dimensions of jurisdiction—geographical jurisdiction (space), temporal jurisdiction (time), and subject-matter jurisdiction (story)—which are also the three dimensions of theater and of reality. In describing the negotiation of each dimension, the article explores the philosophical notion that law *qua* law claims legitimate and supreme authority and the sociological notion that courts, including ICCs, are among the most significant institutions to perform, dramaturgically speaking, such claims by explaining that, more specifically, courts try to fashion themselves as the embodiment of a truly universal Generalized Other proclaiming the universal morality of the “international community.” In contrast to that projected unity, a close decoding of the face-to-face interactions, the performances, which give rise to the abstraction “the ICTR” demonstrates that the negotiated reality that is “the ICTR” (and by implication, ICCs generally) is an emergent of and, at least to a degree, a reflection of cultural and gender differences and diversity. Whether or not one concludes that the ICTR’s projection is successful, the attempt has profound implications for the formation of the self and citizenship of individuals in the international sphere.

I. INTRODUCTION

“[T]he court is a place where the totem’s distilled voice is regularly heard directly.”¹

The international criminal courts (“ICCs”)—the *ad hoc* International Criminal Tribunals for the Former Yugoslavia and for Rwanda (“ICTY”² and “ICTR,”³ respectively; “ICTs” collectively), the recently-established permanent International Criminal Court, and hybrid “internationalized” tribunals such as the Special Court for Sierra Leone—are the international community’s attempt to address the worst of the criminal manifestations of racism, nationalism, and large-scale xenophobia. The ICCs, all established at the conclusion of the Cold War and the re-arrangement of the international political order that followed, have evolved from the post-

¹ Lior Barshack, *The Totemic Authority of the Court*, 11 LAW & CRITIQUE 301, 305 (2000). Using Durkheim’s and Freud’s account of Totemism, Barshack understands Totemism as the concrete representation of the separate identity of the group which reveres it. The totem is the ultimate source of all sacredness and it largely replaces collective consciousness. Since the collective consciousness and the law are sacred, their sacredness derives from their identification with totemic authority. The totemic function is performed by a sacred icon, an object, symbol, or myth, through which the group represents itself to itself. Judges are such icons. *Id.* See also Lior Barshack, *Notes on the Clerical Body of the Law*, 24 CARDOZO L. REV. 1151, 1154 (2003) [hereinafter *Clerical Body of the Law*].

² International Criminal Tribunal for Yugoslavia, <http://www.un.org/icty/legaldoc-e/index-t.htm> [hereinafter ICTY Statute]. The ICTY was created under S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

³ International Criminal Tribunal for Rwanda, <http://69.94.11.53/default.htm> [hereinafter ICTR Statute]. The ICTR was established through Resolution 955 under Chapter VII of the Charter of the United Nations. S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994). Annexed to the resolution is the Statute of the International Tribunal for Rwanda [hereinafter “ICTR Statute”]. A comprehensive discussion of the ICTR can be found throughout 3 J. INT’L. CRIM. JUST. 799 (2005), as the entire edition is dedicated to a review of the ICTR.

WWII experiment in internationalizing justice: the military tribunals that conducted the Nuremberg and the Tokyo trials. The Cold War and the paralysis of the Security Council that characterized it prevented the creation of additional international criminal institutions.

The ICTR was established in 1994, in the aftermath of the genocide in Rwanda. It was established by the United Nations, by means of a Security Council Resolution in which the Security Council exercised the power granted to it by Chapter VII of the U.N. Charter to take action with respect to threats to the peace, breach of the peace or acts of aggression. The ICTR's stated purpose is "to contribute to the process of national reconciliation in Rwanda and to the maintenance of peace in the region."⁴ In order to achieve this purpose it was endowed by the Security Council with jurisdiction over the crime of genocide, crimes against humanity, and violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II.⁵ As of March 2005, the ICTR has handed down seventeen judgments involving twenty-three accused. Among these judgments is the first-ever judgment on the crime of genocide by an international court and a guilty verdict against a former head-of-state, Jean Kambanda. The ICTR and its twin tribunal, the ICTY, were the precursors of the permanent International Criminal Court which was established in light of the relative success of the ICTs. Pending before the International Criminal Court currently are three cases, all of them involving African nations: Uganda, the Democratic Republic of the Congo, and Sudan.

Based on five months of ethnographic research at the ICTR, this article examines the means through which moral authority is constructed in and communicated by the ICTR. Specifically, the article advances the argument *that the ICTR (and by extension, the ICCs) seeks to personify the Generalized Other (see below) of the "international community."* Namely, *that the ICCs claim to embody the authority and morality of an "international community" through which the abrogation of sovereignty is justified.* Throughout the analysis, I describe an attempt, a claim, to personify, the Generalized Other, leaving it for the reader to decide whether, ultimately, the attempt is successful.

Following a discussion of methodology, Part 2 of the article consists of an analysis of the ethnographic data.⁶ The analysis traces the three dimensions of jurisdiction: temporal jurisdiction (time), geographical jurisdiction (space), and subject-matter jurisdiction (story). The article explores the ways in which cohesion is projected, followed by a discussion of ruptures in that projection which may point to underlying dissonance in the "unified" voice of the international community.

Part 3 then highlights some of the social implications of the ICCs' attempt to position themselves as the ultimate manifestation of an international Generalized Other: It is through interactions—immediate and mediated—with Generalized Others that the Self arises and is

⁴ *Id.*

⁵ ICTR Statute, arts. 1-4.

⁶ The ethnographic research underlying this article consisted of five months of field research. First, a one-month research trip to Rwanda, which focused on the interactions between the ICTR and the Rwandese polity and with the Rwandese legal mechanisms of transitional justice. The data collected in this phase was used primarily as background in the context of the operations of the ICTR. Second, a four-month stay at the ICTR in Arusha, Tanzania, as legal researcher and intern-clerk in chambers. The main methods used were: (1) formal and informal interviews; (2) recording dramaturgical details such as settings and other physical devices that make up the organizational symbolism of the ICTR; (3) utilizing participant observations (which, in Arusha, took the form of observations as a participant-observer); and (4) viewing edited and unedited footage of trials. For a comprehensive discussion of the field work, the methodology, and the methodological literature, see Maya Steinitz, *Law as Communication: A Concept of International Law* app. 1 (Sept. 2005) (unpublished J.S.D. thesis, New York University School of Law) (on file with author).

negotiated; that stigmatization of individuals and groups occur; that social concepts are defined; and that social citizenship manifests. Therefore, the interplay between inclusion and exclusion, hegemony and diversity in institutions that have the potential not only to communicate for, but also to embody and personify the “international Generalized Other,” as well as the very existence of such social institutions, is of great social significance.

Methodological Note

The data collected at the ICTR was analyzed using Erving Goffman’s theory and methodology called “dramaturgy,”⁷ a role theory from a social-psychology tradition called “Symbolic Interactionism.”⁸ Symbolic Interactionism, like all of social psychology, is “an attempt to understand and explain how the thought, feeling, and behavior of individuals are influenced by the actual, imagined, or implied presence of others.”⁹ Those “others” include specific others (such as parents, friends or, in our case, other participants in courtroom interactions) but also “Generalized Others.” The Generalized Other is an organized and generalized (across a given set of individual and institutional actors) attitude with reference to which individuals define their conduct. “It is the Generalized Other and institutions that help socialize people in different parts of society to have the same responses, shared interests, and common organization of selves needed for understanding and synchronizing with others.”¹⁰ It is, in other words, the abstract community.¹¹

“Taking the role of the other” is the unique human ability to enter into each other’s perspectives, and—importantly for a discussion of law (especially ontologically-challenged international law)—into the perspective of the Generalized Other:

Each individual has to take also the attitude of the community, the generalized attitude. One of the greatest advances in the development of the community

⁷ The foundational text of dramaturgy is ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959) and canonical articulations of the methodology entailed by this symbolic interactionist account can be found in HAROLD GARFINKEL, *STUDIES IN ETHNOMETHODOLOGY* (1967) and PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* (1966). A contemporary application of dramaturgy to law can be found in PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* (1998).

⁸ For general information regarding symbolic interactionism, see JOHN D. BALDWIN, *GEORGE HERBERT MEAD: A UNIFYING THEORY FOR SOCIOLOGY* (1986); GEORGE CRONK, *THE PHILOSOPHICAL ANTHROPOLOGY OF GEORGE HERBERT MEAD* (1987); HANS JOAS, *G. H. MEAD: A CONTEMPORARY RE-EXAMINATION OF HIS THOUGHT* (R. Meyer trans., MIT Press 1980); DAVID L. MILLER, *GEORGE HERBERT MEAD: SELF, LANGUAGE, AND THE WORLD* (1973).

⁹ Gordon W. Allport, *The Historical Background of Social Psychology*, in 1 *HANDBOOK OF SOCIAL PSYCHOLOGY* 24 n.31 (Gardner Lindzey & Elliot Aronson eds., 3d ed. 1985) [hereinafter *HANDBOOK OF SOCIAL PSYCHOLOGY*]. See also Edward E. Jones, *Major Developments in Social Psychology During the Past Five Decades*, in *HANDBOOK OF SOCIAL PSYCHOLOGY* at 47.

¹⁰ JOAS, *supra* note 8, at 112. The Generalized Other is a term of art, first coined and defined by the forefather of symbolic interactionism, George Herbert Mead. See GEORGE HERBERT MEAD, *MIND, SELF, AND SOCIETY: FROM THE STANDPOINT OF A SOCIAL BEHAVIORIST* 211 (1962). Compare the interactionist view articulated in this quote with the legal-philosophical argument advanced by Raz, whose theory frames the argument herein, according to whom:

[I]t is an essential part of the function of law in society to mark the point at which a private view of members of the society, or of influential section or powerful groups in it, ceases to be their private view and become [i.e. lays a claim to be] a view binding on all members notwithstanding their disagreement with it.

JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 50 (1979) [hereinafter RAZ, *AUTHORITY OF LAW*].

¹¹ MEAD, *supra* note 8, at 195.

arises when this reaction of the community on the individual takes on what we call an institutional form. What we mean by that is that the whole community acts towards the individual under certain circumstances in an identical way. It makes no difference, over against a person who is stealing your property, whether it is Tom, Dick, or Harry. There is an identical response on the part of the whole community under these conditions. We call that the formation of the institution.¹²

It is emphasized, therefore, that while superficially the substance of a dramaturgical analysis is face-to-face behavior, ultimately the interest is always the self in society, “the situated self” to use Goffman’s own terminology. Dramaturgy stresses that selves reside in roles, even though it seems as if face-to-face interactions are completely spontaneous and in flux.¹³ An individual can, for example, play the role of a parent to certain “others,” the role of a war criminal to different “others,” and the role of a national hero for yet different sets of “others” in different settings and through different types of encounters. The role performed dictates the elements and means of the performance and vice versa. This dramaturgical framework of symbolic interactionism invites us to read the symbolism of courtroom drama as performances played among specific present and absentee others but also with judges as the arguable personification of the Generalized Other.

This article is part of a larger project in which use is made of the explanatory power of dramaturgical analyses of international courts and tribunals in order to study questions in general and international legal theory (such as: what are the social functions of law, what is the concept of law and what are the substantive and methodological relationships between the phenomenology of law and the philosophy of law). The dramaturgical account of interactions (role performances) at the ICTR offered herein builds upon a previous article which provided a dramaturgical analysis of the Milošević trial at the ICTY.¹⁴ That article made use of the same premises and methodology, according to which social encounters consist of projected claims to an acceptable individual or institutional self and of confirmation or rejection of such claims—an iterative process through which such social entities emerge. In that article I showed that studying a set of performances within a legal institution—the encounters that comprise the Milošević case at the ICTY, in that case—offers a perspective on the jurisprudential question of *how international law (and law generally) claims legitimacy, authority and supremacy*.¹⁵

¹² *Id.* at 167. In light of the above, consider the following assertion of the first President of the International Criminal Tribunal for the Former Yugoslavia (ICTY) that the trials are a “clear statement of the will of the international community to break with the past by punishing those who have deviated from acceptable standards of human behavior. In delivering punishment, *the international community’s* purpose is not so much retribution as *stigmatization of the deviant behaviour.*” Antonio Cassese, *On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 EUR. J. INT’L L. 2, 7 (1998) (emphasis added).

¹³ JASON DITTON, *THE VIEW FROM GOFFMAN* 2, 39 (1980).

¹⁴ Maya Steinitz, *The Milošević Trial—Live!: An Iconical Analysis of International Law’s Claim of Legitimate Authority*, 3 J. INT’L CRIM. JUST. 103 (2005) [hereinafter *The Milošević Trial—Live!*]. Both articles are, in turn, part of a larger project in which a dramaturgical analysis of the ICTs serves as a basis for an examination of issues in analytic legal philosophy: the relationship between the phenomenology of law and its concept and the social-psychological dimensions of methodologies used and advocated for by legal philosophers. See Steinitz, *supra* note 6.

¹⁵ Steinitz, *The Milošević Trial—Live!*, *supra* note 14, at 106. The latter builds upon the legal philosopher Joseph Raz’s theory of law according to whom whatever else law *qua* law is, it “either claims that it possesses legitimate authority or is held to possess it, or both.” JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW & POLITICS* 199 (1994).

“Courtroom interactions,” I argued, “are not only metaphorically theatrical, as are all human interactions, but *in addition* they actually *are* theater.”¹⁶

Courts, I noted, are the institutions in which a continual conversation between the individual and the social structure *about the past* takes place. Particularly, societies’ founding events, their Mythical Beginnings and their constitutional moments are dramatically reenacted in courts, allowing a wide range of societies’ members to participate, as audience, in the reenactments of the Mythical Beginning.¹⁷ This is particularly true of courts entrusted with transitional justice trials, in which actual foundational violence is reenacted and invoked. Some view this process as lending actually moral authority and legitimacy to the courts. I, however, invited the reader to view it as a means of claiming, successfully or unsuccessfully, legitimate authority.

Finally, that article showed that the Milošević trial can be understood as a symbol of a battle between two claims of supreme sovereignty—sovereignty of the “international community,” as personified by the Tribunal (especially by the presiding Judge May), and State sovereignty, as personified by Milošević. By internationalizing the transitional justice trials, and especially by trying defendants who personify the state, the Tribunal *usurps* the process of transitional justice.

In this article I further advance and elaborate on the philosophical notion that law *qua* law claims legitimate and supreme authority and on the sociological notion that courts, including international criminal courts, are among the most significant institutions to perform, in the dramaturgical sense of the word, such claims by explaining that, more specifically, courts try to fashion themselves as the embodiment of a truly universal (across *all possible* sets of individual and institutional actors) Generalized Other proclaiming the universal morality of the international community.

II. AN INSTITUTIONAL CLAIM: “WE, THE GENERALIZED OTHER”

Society and law exist nowhere else than in the human mind They are products of, and in the consciousness of, actual human beings. But a society generates a social consciousness, a public mind, which is distinct from the private mind, distinct from the consciousness of actual human individuals. Social consciousness flows from and to individual consciousness, forming part of the self-consciousness of each society-member The psychology of the public mind is a manifestation of the psychology of the private mind. The constitution of a society and the personality of a human person are both the product of human consciousness. Social psychology is a form, but a modified form, of personal

¹⁶ Steinitz, *The Milošević Trial—Live!*, *supra* note 14, at 107 (citing MILNER S. BALL, THE PROMISE OF AMERICAN LAW: A THEOLOGICAL, HUMANISTIC VIEW OF LEGAL PROCESS 48 (1982) for the notions of trial as comprising a “small play” and a “large play.”) The “small play” is the walled-in interaction; the “large play” is the general, public, image of the trial.

¹⁷ Steinitz, *The Milošević Trial—Live!*, *supra* note 14, at 107 (building upon: (1) Eric A. Feldman, *The Sirens’ Song: Discourse and Space in the Court of Justice*, in 1 THEORY & CRITIQUE 143, 156-58 (1991), for the notion of courts as *loci* of the continual social conversation about the past (with the idea of the social conversation itself being based generally on the classic symbolic interactionist text, BERGER & LUCKMANN, *supra* note 7); (2) Ball’s account of courts as reenacting and allowing participation in the Mythical Beginning, BALL, *supra* note 16; and (3) the scholarship of Bruce Ackerman, who coined the term “constitutional moment.” Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L. J. 453, 489 (1989)).

*psychology. But social consciousness functions independently from the private consciousness of every society-member, and is retained in forms (the theories, structures and systems of self-constituting society) which are an “other” in relation to the “self” of the self-constituting of any particular society-member The public mind is society’s private mind. The public mind of international society is the private mind of the human species.*¹⁸

A. The Construction of Time, Space, Story

In this section, I will build upon the argument that courts, especially criminal courts, serve as a theater in which social reality is constructed. Moreover, they attempt to construct the authoritative narrative of reality and, in the process, *attempt to fashion themselves as the voice of an abstract community—the international community—i.e. the embodiment of a universal Generalized Other whose directives should, as such, be viewed, internalized, and acted upon as authoritative proclamations of a universal morality.* One of the unique qualities of negotiating reality through courts is that they presume quite literally to reconstruct, truthfully, events (reality); to establish what really happened. Courts *authorize* what really happened by *authoring* it through dramatic, public reenactment of the real.

Theatrics can be broken down to three fundamental, connected elements: time, space, and story. In their role as directors of the trial-drama the judges construct the time, space, and story of the small play and thus control it on the small- and large-play levels. Since a precondition of the full exploitation of the potential power of courts to negotiate social reality, to exercise their authority, and to generate a perception of legitimacy, is stringent control of courtroom interaction it is not surprising to find that these three elements correspond in the world of law to the three dimensions of jurisdiction: temporal jurisdiction (time), geographical jurisdiction (space), and subject-matter jurisdiction (story) while the general concept of jurisdiction is legalese for a court’s *authority*. In addition to being the three components of theater and of trial, space, time, and story (narrative) are the components of (social) reality.

The following sections examine the ICTR’s management of these three dimensions of interaction and narrative in its attempt to constitute and situate itself as the embodiment of the Generalized Other of the so-called international community. The ICTR’s control and manipulation of its own internal dimensions of time, space, and story (through control of, e.g., the working days and hours; length of trials; the physical construction of the courthouse; and judges’ role as directors setting the playbill) is a subtle but powerful reinforcement of its authority to similarly manipulate the time, space, and story elements of the meta-narrative. The following analysis of the former should, therefore, be viewed as a reflection of the latter.

1. “THE WITNESS OF PRESENCE.”¹⁹ THE CONSTRUCTION OF TIME

The most straightforward of the dramaturgical dimensions of the court-controlled reality is the dimension of time. Time frames constrain narratives. They imply a beginning, middle, and end and, in the case of trials, also explicate what those in fact are. For example, the jurisdiction of the ICTR spans from January 1, 1994 to December 31, 1994 framing the story such that it cannot include events preceding or following these dates. For example, the temporal

¹⁸ Philip Allott, *The Concept of International Law*, 10 EUR. J. INT’L L. 31, 33 (1999).

¹⁹ PETER GOODRICH, *LANGUAGES OF LAW: FROM LOGICS OF MEMORY TO NOMADIC MASKS* 210 (1990).

jurisdiction implies that the conflict ended at the end of 1994. (In contrast, the jurisdiction of the ICTY extends from 1991 and is uncapped, implying the conflict is a never-ending story.)²⁰ It also precludes reenactment of historical processes that predated January 1, 1994 such as those dating back to Belgian and German colonial rule. Since this temporal jurisdiction limits the factors that the prosecutors need to prove and that the defense needs to refute, this is macro-time control which constrains the micro-time element, namely the allocation of courtroom time to the different parts and aspects of the trial.

It is also an example of how control of time translates into control of story. An alternative narrative could be one that does not begin on January 1, 1994 and end on December 31, 1994 and in which two communities are not characterized in black and white terms. Rather, an alternative narrative could be one that tells of German and Belgian Colonial havoc that met with a native, centuries-old Tutsi monarchy, resulting in decades of post-colonial fragmentation, displacement and social unrest; a narrative that addresses one of the biggest questions of Rwandese pre-genocide politics—the idea of Tutsi and Hutu “ethnicities”—rather than one which contributes and reinforces the ethnic speak.²¹

Nevertheless, the ICTR has been notoriously slow in its operation. This oft-noted failure to control time manifests first and foremost in the failure to control the lengths of trials (which at times span years) in contravention of the rights of the accused to a speedy trial and translates, on the dramaturgical level, into an arguable failure to convincingly carry out the performance expected of *courts* (or at least, of legitimate courts). Rather, these are perceived as signals of either an institution failing to live up to its claims to be a court or, more charitably, a fledgling institution on its way to possible future success. The measures taken by the ICTR in order to address the unusually slow operation of the court, including the replacement of the Chief Prosecutor, appointment of *ad litem* judges, and an increase of the budget, betray an understanding of the underlying connection between the inability to carry out a court-like performance and the viability and persuasiveness of meta-performance of an institutional front of a court.²²

As mentioned before there is also a metaphysical aspect of time which is predominantly upheld by courts, especially transitional justice courts: the Mythical Beginning. By providing a social forum in which the Mythical Beginning, or constitutional moment, is re-lived the Tribunal manufactures and preserves its own authority and, more precisely, it is this function that enables the Tribunal to claim legitimacy in playing out its authoritative role, the role of the supreme manifestation of the relevant community (here: the international community).²³ All this is reflected in the concrete, in the mundane, aspects of courtroom interaction, in judges’ control of the internal dimension of time in the form of scheduling, approval or denial of motions for extensions, management of lengths of testimonies, examinations and cross-examinations, and even of singular utterances.²⁴

²⁰ Compare ICTR Statute, art. 1, with ICTY Statute, art. 1. Interestingly, since the Statutes themselves were enacted by the Security Council, the Security Council lurks in the background as the ultimate source of authority.

²¹ See PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* (1998).

²² See Eric Husketh, *Pole Pole: Hastening Justice at the UNICTR*, 3 *NW. J. INT’L HUM. RTS.* 8 (2005); See Erik Mose, *Main Achievements of the ICTR*, 3 *J. INT’L CRIM. JUST.* 920 (2005) (detailing the unusual obstacles faced by the Tribunal, especially in its early years).

²³ BALL, *supra* note 16, at 16–22; see also Steinitz, *The Milošević Trial—Live!*, *supra* note 14.

²⁴ Steinitz, *The Milošević Trial—Live!*, *supra* note 14. See, e.g., Prosecutor v. Rwamakuba, Case No. IT-98-44-T, Decision on Reconsideration of the Scheduling Order for the Next Trial Session (Sept. 13, 2005), and Prosecutor v.

2. “THE GENEVA OF AFRICA.”²⁵ THE CONSTRUCTION OF SPACE

A less readily manipulable dramaturgical dimension of reality construction is that of space. The example of the construction of physical and metaphysical space by the ICTR provides a good example of the Tribunal’s manipulation of this dimension. The physical space of the courthouse and the courtrooms, in which depictions of the genocidal events are dramatically enacted, the space that walls in the interactions between the various participants has been, in the case of the ICTR, constructed quite literally by the Tribunal.

Having decided, at the request of the Rwandese government, to establish a Tribunal identical to the one established at The Hague to adjudicate crimes committed in the Former Yugoslavia, the Security Council further decided, contrary to the wishes of the Rwandese government, to locate the Tribunal outside of Rwanda in order to allow for a greater degree of judicial independence. The Security Council also decided, however, that the Tribunal would nonetheless be located in Africa as a signal of its African disposition and its role in African politics.²⁶ Once that decision was made, Arusha a decrepit town in Northern Tanzania, as different from Geneva as only, well, Arusha could possibly be—was an easy choice. Quite mundanely, Arusha is close to the Rwandese border and it had an existing structure that could easily be converted into a courthouse—the Arusha International Conference Center (“AICC”). It is also a symbolic site: “It is the same city, and the same facility in which the Arusha peace talks took place in 1993 between the various Rwandese factions,” explained an official at the Public Relations section.²⁷

An administrative staff member had an alternative explanation. She believed that the decision to establish the Rwandan Tribunal in an underdeveloped town was purposefully designed “in order to sabotage the *African Court*” by locating it in an environment in which it is bound to fail, “so that the same people who had interests in not stopping the genocide would be able to feel they are doing something for the Rwandese cause without actually doing anything.”²⁸ Either way, Arusha was designated and, in consultation with the prospective judges, the AICC was refurbished, remodeled, and brought up to par with Western standards, complete with all that was perceived as necessary to accommodate an “international court of law.” With the new interior design came new, unofficial, and unwritten codes of conduct regulating behavior within the confines of the AICC. (For example, an unspoken understanding is that if a judge approaches the elevators everyone else must give way and refrain from using the elevator—the unspoken understanding that a sphere of “untouchability” emanates from the corporeal person of the judge to her immediate surroundings.)

Karemera, Case No. ICTR-98-44-AR73.7, Decision on Édouard Karemera’s Request for Extension of Time to Respond to the Prosecution’s Interlocutory Appeal (June 30, 2006).

²⁵ This aphorism was coined by Bill Clinton in September 2000 when visiting the ICTR, and is now inscribed on the gates and other paraphernalia of the Arusha International Conference Center.

²⁶ Though no one would call The Hague—the seat of the ICTY—“the field,” some employees use the U.N. terminology of “the field” to describe Arusha and the ICTR. The Appeals Chamber, the higher authority, is located at The Hague as well. A hierarchy between the two judicial organs of the ad hoc Tribunal system, with the Appeals Chamber at the top and “the field” at the bottom, is thus, physically and ideologically, established through geography and professional jargon.

²⁷ Anonymous Interview with ICTR Public Relations Section official (Sept. 2003) (on file with author).

²⁸ Anonymous Interview with ICTR administrative staff member (Aug. 2003) (on file with author).

Dramaturgically speaking, removing the court to a different country broadens the “awe-inspiring gap.” People who never left their villages are transported in U.N. aircrafts to a different country to give testimony. Once there, they are placed center stage, in a fish-bowl environment; a glass partition between them and the public gallery where an audience of strangers sits watching them attentively as video cameras are directed at them. Their trepidation and intimidated demeanor fit nicely with the desired hierarchical effect and general sense of “awe” pursued.

[T]he maintenance of social distance, provide[s] a way in which awe can be generated and sustained in the audience—a way . . . in which the audience can be held in a state of mystification in regard to the performer . . . This can hardly be except where there is no immediate contact between leader and follower, and partly explains why authority, especially if it covers intrinsic personal weakness, has always the tendency to surround itself with forms and artificial mystery, whose object is to . . . give the imagination a chance to idealize.²⁹

Arusha, Tanzania is, therefore, the outermost, non-sacred physical location of the performances that are the ICTR. Next in the ascending order of sacredness, by virtue of its instrumentality and proximity to “the Chamber,” is the area immediately surrounding the AICC. Roads surrounding the Tribunal and leading to it from the upscale neighborhoods were constructed by quick entrepreneurs for the benefit of the Tribunal’s employees and were, with time, brought up to par with Western standards, in a manner uncharacteristic of Tanzanian roads, by the Tanzanian government with the encouragement of the Tribunal. Even the highway connecting Arusha to Nairobi, Kenya, the regional hub, was upgraded in time to accommodate Arusha’s newfound status as Tanzania’s fastest developing city. The spillover of the walled-in interaction to the city at large gave rise to a new set of interactions between its residents with the Tribunal, thus pushing the boundaries of discourse politically as well as dramaturgically.

The ascending order of material, tangible grandeur is brought to its peak with the design of the state-of-the-art courtrooms and judges’ offices which together comprise “the Chamber”—the Holiest of Holies at the heart of the concentric spheres of sacredness. It is, simply, “the ritualized internal spacing of the courts, of the judicial world secreted in the heart of the city and wrapped in an archaic and sacral atmosphere of special functions and the silent unraveling of other times.”³⁰ “The Chamber” is both an emergent, a reified “entity” with which participants interact, as well as a space. As a space it is a hybrid of front region (the courtroom) and back regions (the judges’ offices, meeting rooms, and other places of segregated congregation). Uncharacteristic of front/back region differentiation, however, both regions are similarly lavish, dictating role-distant interactions with the persons of the judges at all times. And indeed, the speech patterns and speech hierarchy (“if I may make a comment here, your honor”³¹) of the front region are preserved in the back region of “the Chamber.” These unspoken codes of conduct take the form of received knowledge into which the novice is socialized rather than initiated. The judges (the personification of “the Chamber”) emerge from the back region of “the Chamber,” control the play and make proclamations in its front region and then recede into the back region until it is time for the next instance of revelation.

²⁹ GOFFMAN, *supra* note 8, at 67–68 (internal quotation marks omitted).

³⁰ GOODRICH, *supra* note 19, at 189-190.

³¹ Observation of a conversation between a senior legal officer and a judge at chambers (Aug. 2003).

It is true generally of the architecture and interior design of Western courthouses and courtrooms, which the ICTs imitate, that they follow certain patterns; patterns which are familiar codes of authority to the Western observer whose decoding capacity unconsciously recognizes the tacit underlying assumptions of authority conveyed.³² Commentators on the design of Western courtrooms agree that courtrooms are theatrical spaces “that evoke[] expectation of the uncommon. The rooms are singular and have been described in hyperbolic religious terms. Their design is enhanced by costuming and ceremony that create the effect of a dramatic aura.”³³ In terms of their semiotics, courthouses, as do all buildings, store information, hierarchically arrange communicational relations, and construct and constitute expressive “enunciative modalities” which determine both what can and what should be said within a particular form as well as the context and conditions of its reception and appropriation.³⁴ The architecture and design choices are mechanisms designed to achieve control of knowledge production. Both legal text and legal performance are invisibly linked to legal space. In fact, law *is* space and discourse:

There is a bond between the verdict and the courtroom, between the place of justice and the legal argument. In the courthouse space and discourse are complementary; together they create a strategy of separating and isolating the knowledge of the judges from the knowledge of the defendants and from the knowledge of the third class – those who are not yet either judges or judged.³⁵

The scenic aspects of front, the setting, which involve furniture, decor, physical layout, and other background items which supply the scenery and stage props for human action played out before, within, or upon it, serve to facilitate the projecting of a definition of the situation which, in turn, has a certain moral character,³⁶ such as the normative claim to be a supreme and legitimate legal-moral authority.

The actual construction of the physical setting is not the only judicial-spatial construction though. The delineation of space determined by the geographic jurisdiction set out in the Statute creates an almost –metaphysical space in which the foundational events narrated took place. The space governed by the Statute of the ICTR, for example, includes the territory of Rwanda and the

³² Both Tribunals were designed essentially from scratch and the judges, who orchestrated the design, as well as the Security Council that oversaw it, could have chosen either a multicultural design for both, which would have communicated that this institution services a variety of cultures and considers the “international community” as its primary audience, or a Western design for the ICTY and a Rwandese one for the ICTR which would have signaled that the respective national audiences are understood to be the primary audience. As is, one may suspect that, consciously or unconsciously it is the West that is actually the primary audience of concern to those who chose to so design the Tribunals.

³³ BALL, *supra* note 16, at 44. Ball notes that:

Theatrical effects are such dominant factors in the physical identification of a courtroom that their absence may raise doubts about whether a court that lacks a properly theatrical aspect is really a court at all. For example, the absence of courtlike features from the place in which a prisoner was convicted for contempt of court was instrumental in overturning that conviction in *Thompson v. Stahl*.

Id.

³⁴ GOODRICH, *supra* note 19, at 189.

³⁵ Feldman, *supra* note 17, at 166–167.

³⁶ GOFFMAN, *supra* note 8, at 23–24.

territory of neighboring states³⁷ as imagined by judges sitting in Arusha, Tanzania, years after the fact. An image of Rwanda of 1994, its *prefectures* and *communes*, and at times the neighboring Congo, Burundi, Tanzania, and Uganda, are redrawn through testimonies of witnesses and accuseds and by prosecutorial exhibits and briefs—story tied to space. Other localities in which related events took place, such as the locales where the “international community’s” and the United Nations’ policies of non-intervention in the genocide or of active withdrawal were crafted, are excluded from the jurisdiction and imagination of the Tribunal. “Rwanda and the territory of the neighboring states,” as the locale of the genocide, is suspended in a disjunctive space and inevitably ties the story to this space. Accordingly, “[t]he situation, external structure and internal design of [the Tribunal] signify the degree of distance from everyday and the mundane concerns of public space”³⁸ in favor of the “unraveling of other times.”

Thus, space is tied to time, but also to story.

3. “THE PROSECUTOR VERSUS . . . :” THE CONSTRUCTION OF STORY

The dramaturgical dimension of storytelling is the one most often commented upon in relation to courts. Like all courts, the Tribunal narrates the events that comprise the relevant facts of each case. Narrative, in turn, is “the fundamental form of cultural phenomena.”³⁹ “[W]e dream in narrative, day-dream in narrative, remember, anticipate, hope, despair, believe, doubt, plan, revise, criticize, construct, gossip, learn, hate, and love by narrative.”⁴⁰ What it is that we think about, understand, conceptualize, and interpret are narratives; narratives of others as well as our own, narratives that are private and those that are political, narratives that are institutional and those that are idiosyncratic.

Courts of law, the ICTs included, are among the most forceful sites at which these fundamental forms of cultural phenomena are authored and disseminated. They fulfill a godlike function: They *create* reality through words. They do this by way of telling stories of events as they “really” happened, stories of how a community’s history evolved, how it is currently structured, what its values are, and what its genesis was. In the process, they create a sense of, a *perception* of, their own legitimacy and authority. This social license, given or taken, to choose one competing narrative of a crime and its context over another is the great, and unique, prerogative of judges.⁴¹

The internal story (the small play) is framed by the Statute of the Tribunal. Once time and space are established and delineated, by means of geographic and temporal jurisdiction, the

³⁷ ICTR Statute, art. 7.

³⁸ GOODRICH, *supra* note 19, at 189-90.

³⁹ Barshack, *Clerical Body of the Law*, *supra* note 1, at 1153.

⁴⁰ Ian Parker, *The Real McKee*, THE NEW YORKER 82, 94 (Oct. 20, 2003) (quoting the critic Barbara Hardy).

⁴¹ Other social institutions that create narrative either do not claim to be reconstructing the truth (e.g., literature, film) or, if they do, they neither claim supremacy over all other narrative-creating institutions (e.g., academia, journalism) nor *directly* alter the destinies of their subjects-objects.

While courts of law claim to author and authorize reality, some have argued that rules and practices of procedure and evidence operate to circumvent this aim, to skew the truth constructed, in favor of other aims which the legal system endorses:

The great virtue of legal proceedings is that their evidentiary rules confer legitimacy on otherwise contestable facts. . . . The truth that matters to people [in war-crimes trials] is not factual truth but moral truth; not a narrative that tells what happened but a narrative that explains why it happened and who is responsible.

Michael Ignatieff, *The Elusive Goal of War Trials*, HARPER’S MAGAZINE 15 (Mar. 1997).

confines of the authorized story—the storytelling itself—can take place, subject-matter jurisdiction being the legal construct that captures the courts’ storytelling function. The ICTs’ subject-matter jurisdiction covers the crimes of genocide, crimes against humanity, grave breaches of the Geneva Conventions, and violations of the laws or customs of war.⁴²

Within that framework, characters are cast, a conflict is reductively captured, simplified, and used to evoke an emotional climax (usually through testimonies), and finally a dramatic, cathartic resolution (the verdict) is reached. The title characters are set up as adversaries in the title of the play, and in the title the outline of the story is already present. The accuser is never an individual, but rather an abstracted representative of some imagined (or asserted) community: “The Prosecutor v. [Defendant].”⁴³ Suspense is created and the audience is drawn in to see “who’s done it” and who wins.

Dramaturgically, a few elements conspire to achieve the same result, as will be discussed below.⁴⁴ The overwhelming majority of the ICTs’ cases end with a guilty verdict. Namely, unlike the historical events that end in a tragic ending of death, shattered lives and traumas that get transmitted over generations, the dramatic reenactment by the court ends with a relatively “happy end,” in which the villains are punished and the victims vindicated, thus reestablishing the moral order (as is characteristic of the morality play genre).

In their dual role as actors in, and directors of, the play, the judges impose upon those present on stage, and those whose presence on stage is sought, a one-dimensional role that they may or may not wish to assume. Like a theater’s playbill, a court order starts with the title, the casting, and the framing of the performance teams (chamber, prosecution, defense):⁴⁵

⁴² See ICTR Statute, arts. 2–4; ICTY Statute, arts. 2–5 (designating the noted subjects as within the subject matter jurisdiction of the ICT of Rwanda and the ICT of the former Yugoslavia, respectively).

⁴³ Compare “*The State v. [Defendant]*” or “*The People v. [Defendant]*,” which evoke the moral authority of a polity, with “*the Prosecutor v. [Defendant]*,” which, in the Continental-based relationship between prosecution and bench, represents the Tribunal itself.

⁴⁴ Compare this to the *Gacaca* setting, for example. The *Gacaca* is a modified, regulated and centralized version of a traditional Rwandese form of local dispute resolution carried out in the villages through mass-participation of all who are willing to participate. *Gacaca* proceedings take place outdoors, preferably under a tree (which is also the popular symbol of the process) with the community members, including the arbitrators, sitting on the ground and with whoever is speaking standing up, at the center. The contrast highlights the *choices* underlying the design of the courtroom settings, the management of courtroom interactions and the legal contents.

⁴⁵ See Prosecutor v. Akayesu, Case. No. ICTR-96-4-T, Order to Authorize Photographing and Video-Recording During Proceedings (Feb. 25, 1998), where the first page of the court’s order indicates the judges’ names, the title of the case, and the names of the parties’ lawyers. See also, ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 59, 61 (1963) (discussing the way in which graphic design, like architecture, interior design, etc., are all “prestige symbols”—signs that convey social information). And in this case too, the ICTs imitate the tried and true Westerns symbols: “[C]ourts generally will utilize a standard template and follow a common editing policy. The template includes such details as margin justification, paragraph format, line spacing, setting for British spelling, styles for headings, titles and subtitles, use of italics and bold type, headers and footers, and page numbering.” ICTR, STYLE GUIDE FOR CHAMBERS 4 (2002).

**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

OR: FR

Before:

Judge Laïty Kama, Presiding Judge
Judge Lennart Aspegren
Judge Navanethem Pillay

Registry:

Lars Plum

Order of: 25 February 1998

**THE PROSECUTOR
VERSUS
JEAN-PAUL AKAYESU**

Case No.: ICTR-96-4-T

**ORDER TO AUTHORIZE PHOTOGRAPHING AND VIDEO-RECORDING DURING
PROCEEDINGS**

The Prosecutor:

Mr. Pierre-Richard Prosper
Mr. James Stewart
Mr. Luc Cotp

Counsel for the Accused

Mr. Nicolas Tiangaye

Case No.: ICTR-96-4-T

Particularly forceful is the power to *name*. (Here, it is the power to name Jean-Paul Akayesu, a former mayor, the “Accused.”) This power changes the balance of power in the real world.⁴⁶ Whether the accused accept the moral claims and the conception of self implied by this status or not, they must incorporate it into their deliberations and modify their behavior based on the others’ (as well as, in this case, the Generalized Other’s) definition of them. They cannot participate in the public sphere as leaders and political players, as arrest warrants are pending against them. Their behavior, others’ conceptions of them and therefore their self-conceptions are all altered through this act of naming. De facto authority has been, even if partially, achieved.

A similar imposition of role occurs in respect to other participants in the encounter-drama. Witnesses are usually referred to not by their names, or by their pseudonyms when protected, but simply as “Witness” (for example, “Can you tell the Court, witness, how . . .” or “Witness, can you explain to their lordships . . .”).⁴⁷ This enables the judges to interact with those they now can perceive as one-dimensional characters.

All this contrasts with the complete autonomy retained by those playing the role of judges to self-define their own individual and collective roles as “judges” and as “the Chamber:” “Sitting as Trial Chamber II, composed of Judge William H. Sekule, Presiding, Judge Asoka de Zoysa Gunawardana, and Judge Arlette Ramarason (the “Chamber”).”⁴⁸ The reification of William Sekule, Asoka de Zoysa Gunawardana, and Arlette Ramarason as “the Chamber,” and the maintenance of the fiction that it is this abstract identity that conducts the proceedings and hands down decisions and judgments, is created and upheld in a myriad of ways. For example, while during the proceedings themselves, it is individual judges who present questions to the witnesses, written judgments tend to use language such as “in response to a question from *the bench* . . .”

Consider the example of the *Kajelijeli* case in which the court-authors authorized the story of events that took place in Mukingo and Nkuli *Communes* over the span of a week describing, characterizing and classifying:

[T]he Chamber finds that, between 7 and 14 of April 1994, killings of members of the Tutsi group occurred on a mass scale in Mukingo *commune*, Nkuli *commune* and at the Ruhengeri Court of Appeal in Kigombe *commune*. These attacks were carried out by groups of attackers and were directed against a large number of victims on the basis of their Tutsi ethnicity. . . . Entire families and neighbourhoods were eliminated.⁴⁹

The Tribunal further tells the story of the protagonist—accused, Juvenal Kajelijeli—who:

⁴⁶ Judge Cassese describes issuing an arrest warrant against Karadžić and Mladić, the political leader of the Bosnian Serbs during the war in Bosnia and his military commander, naming them as accuseds, imposing upon them the role of potential defendants, and effectively turning them into fugitives, as the high point of his tenure as president of the ICTY. Antonio Cassese, Judge, ICTY, Presentation at the New York University School of Law (Mar. 2, 2004).

⁴⁷ Prosecutor v. Gacumbitsi, Case No. ICTR 2001-64, Testimony of Patrick Keane (July 28, 2003). The terminology used by attorneys when addressing a judge during proceedings, e.g. “lordship” (by a Briton) or “your honor” (by a Nigerian), varies depending on the attorney’s native legal system, creating another reminder of the national diversity of participants.

⁴⁸ Prosecutor v. Bizimungu, Mugenzi, Bicamumpaka & Mugiraneza, Case No. ICTR 99-50-I, Decision on Prosper Mugiraneza’s Motion to Require the Registrar to Allow Access to a Witness (Oct. 2, 2003).

⁴⁹ Prosecutor v. Kajelijeli, Case No. ICTR 98-44A-T, Judgment and Sentence, ¶ 686 (Dec. 1, 2003).

directed attacks against neighbourhoods and places of shelter and refuge where Tutsis were grouped in large numbers. Hundreds of Tutsis within Mukingo, Nkuli and Kigombe *communes* in Ruhengeri prefecture were exterminated as a direct result of the Accused's participation by ordering and supervising, or, in the case of the attack upon the Ruhengeri Court of Appeal, by aiding, these attacks.⁵⁰ But in the process of creating a narrative of the events that took place in this particular "case," the Tribunal also selects and cements a larger narrative about the politics and history of the 1994 genocide in Rwanda, usually not only a partial one but also a simplistic one: "The Chamber will not embark on a discussion of the historical and political background, or the origin of the Rwandan conflict" write the adjudicators of *Kajelijeli*.⁵¹ Instead:

The Chamber took judicial notice of the fact that: Between 6 April 1994 and 17 July 1994, citizens native to Rwanda were severally identified according to the following ethnic classifications: Tutsi, Hutu and Twa. Accordingly, it has been established for the purposes of this case that the Tutsi in Rwanda were an ethnic group.⁵²

As is the case with any other medium and site of power, the mediation function is not neutral. Different stakeholders with different political and ideological agendas pull in different directions.⁵³ For example, in the *Kajelijeli* quotes above, with the stroke of a pen, the controversial ethnic framework and conceptions (there exist two distinct groups that correspond to two ethnicities, Hutu and Tutsi) are accepted and preserved. As a consequence of adopting this pre-existing conceptual framework, the elements that the prosecution needs to establish (and those that it need not) are determined.

Finally, while consciously telling the story of *Kajelijeli*'s crimes in Mukingo from April 7th through April 14th and vicariously telling the story of Tutsi victimhood at the hands of Hutu supremacists in 1994, what largely escapes the self-consciousness of the judges-authors is that they are also engaged in another level of narration: the narration of the story of the Mythical Beginning of a community, discussed above.

In addition to conflict and characters, the construction-control of narrative includes the audience and the plot. The concept of audience, dramaturgically understood, embodies the "communication" element of interaction as each participant is simultaneously a performer and an audience member; the audience component brings in the dynamic, interactive, and therefore inter-subjective element of the communication process. The audience's role is to uphold the definition of the situation by reflecting it back to the performers. Taking a step back and looking at the general analysis with respect to the theoretical (philosophical) framework, observing and describing the audience relationship helps, more than any other part of the analysis, to demystify the "claim" element in Raz's philosophical argument that law claims to have, or is perceived as

⁵⁰ *Id.* at ¶ 904.

⁵¹ *Id.* at ¶ 61.

⁵² *Id.* at ¶ 241-42.

⁵³ See, e.g., Lawrence Douglas, *The Holocaust, History, and Legal Memory*, in *LAW AND HISTORY: CURRENT LEGAL ISSUES* 408 (Andrew Lewis & Michael Lobban eds., 2004) ("The prosecution [at the Eichmann trial] often instrumentally twisted these [collective] memories to create tales of heroic memory that would serve Zionist ideals and political goals.").

having, legitimate authority⁵⁴ and to integrate both the claim and the perceptions of legitimate authority as two parts of the same process.

Courtroom performances, as well as the judgments and decisions that are the “end-product” texts of the adjudication process, are multi-coded texts consisting of a few overlapping discourses that communicate to, and are upheld by, various audiences. Some examples include detailed factual findings that are usually targeted towards the parties and their counsel and, to a lesser degree, to the Appeals Chamber; the legal analysis which speaks, by and large, to legal and other professionals (media, academia); and the general finding of guilt or innocence and the sentencing that are the primary message sent to the general public, especially the Rwandese.

One way of thinking of the various audiences and discourses is as an inner circle and an outer circle. The inner circle is composed of audiences that are also direct participants in the proceedings: the parties, primarily the accused, the parties’ counsels, victims, witnesses, and, though not participants, but still within this close circle, the judges comprising the Appeals Chamber. Linguistic choices between formulas such as “the Chamber finds that the Prosecution has not produced evidence to prove that . . .” as opposed to “the Chamber finds that . . . was not proven beyond a reasonable doubt,” while both leading to the same practical and legal conclusion, which is the rejection of a prosecutorial allegation, are aimed towards communicating to the relevant party-counsel wherein *exactly* lay their deficiency. Similarly, the choice between formulas such as “the Chamber finds that Witness X is not a credible witness and therefore does not accept her account” and “the Chamber finds that Witness X did not provide sufficient evidence on the issue of . . .,” while both indicate the rejection of a witness’s account, is similarly a code understood by the parties’ counsels, but also intended to communicate fairly with a witness by not, for example, claiming that a witness is not credible where it is sufficient to reject the testimony on other grounds (this is particularly a concern of sensitivity towards witnesses who are survivors). The need to be specific and detailed stems from the desire to prevent appeals and, should appeals ensue nonetheless, the desire not to have a decision, or part thereof, overturned, that is, the desire to retain authority.

Of course, the members of the professional groups mentioned, the lawyers and the judges, are educated and socialized so that they have the relevant decoding capacity and the ability to distinguish between the subtle messages of the various formulas. Non-professionals (victims, witnesses, accuseds) may not be able to decode all the nuances and may rely on the colloquial understanding of the linguistic formulations (translated once or even twice into their mother tongue) or have them explained by the counsels.

There are also the outer circles of audiences, the audiences of the “large play” of the entire trial. These audiences are largely “virtual” audiences, in the sense that they are not in direct contact with the participants of the trial. The indirectness of the interaction, however, does not necessarily diminish its impact on the performers. While not physically present, they are dramaturgically present; their presence is implied. All performers are acutely cognizant of devices such as cameras directed at them, the spectators in the public gallery, and the journalists in a press-center secluded from the courtroom, on a different floor, watching the trial in real-time on monitors, and, at times, live television, radio or the internet broadcasts.

The larger, mediated audiences include the Rwandese public and the “international community” (present and future)—international lawyers, academics, journalists, potential or actual war criminals in other existing or future conflicts:

⁵⁴ RAZ, AUTHORITY OF LAW, *supra* note 10, at 50.

The Tribunal's work sends a strong message to Africa's leaders and warlords. By delivering the first-ever verdicts in relation to genocide by an international court, the ICTR is providing an example to be followed in other parts of the world where these kinds of crimes have also been committed.⁵⁵

The judges are actively thinking of these various audiences, perhaps better characterized as “interpretive communities” and that are simultaneously imagined and real, when producing their oral and written utterances, documents, and performances. The judges tailor their decisions and texts through an internal “dialogue” with these implied others whose actual or anticipated viewpoint they have internalized. Otherwise stated, they incorporate the viewpoints of these others into their own. For example, a legal officer stated quite bluntly in respect to such a document that he does not care about “some New York law professor sitting and reading this judgment in New York,” but rather about a Rwandese who may read the document someday.⁵⁶

This quote is representative of the fact that the work of the ICCs, in this case the ICTR, is characterized by a deliberate, active effort to foster a meaningful discourse with the audience they are supposed to serve; here, the Rwandese audience. This effort by court officials, from the president of the ICTR to the Press and Information Unit,⁵⁷ seems to be motivated by both a sincere belief that, in essence, the court's purpose is to provide a service to the people of Rwanda and by a defensive response to criticism launched against the international courts' detachment and aloofness, stemming from the fact that it is an ‘international’ and not a Rwandese court and that it is not located in Rwanda and therefore any interaction with Rwandan society has to be actively initiated and maintained.

In other words, it is a testimony to the effects of the reciprocal interactions between the performers and the large audiences which, though not direct, are at least as significant as the interaction with the immediate audiences. More than any other variable, it is this aspect that is the focus of attacks by yet another group of mediated audiences—various critics (politicians, academics, Rwandese civil society) of the international courts' [il]legitimacy. Therefore, it is these attempts that are, in terms of action (as opposed to argumentation and rhetoric), at the forefront of the courts' attempt to establish the real and perceived legitimacy on a more

⁵⁵ ICTR, Commemorative Website to Mark Ten Years Since the Genocide in Rwanda, <http://69.94.11.53/commemoration/faq/faq-3.asp> (emphasis added). Consider also:

I think if any lesson is to be learned from the experience of this Tribunal – *and I hope the International Criminal Court will learn it* – [it] is that there will have to be a limit to the evidence that is led in cases of this kind involving mass violations of international human rights law. You may indict as much as you wish, but there will have to be a limit to the evidence that is actually led in court. Otherwise, courts will not finish. *The prestige of tribunals of this kind will be at risk, because we will not get through the work.*

Prosecutor v. Milošević, Case No. IT-02-54, Trial Transcript, 5936 (May 30, 2002) (Robinson, J.) (emphasis added).

⁵⁶ Anonymous Interview with ICTR legal officer (Aug. 2003) (on file with author).

⁵⁷ The chief of the Press and Information Unit defined the unit's job as: “[T]o try and sell the Tribunal, that's our job.” Interview with ICTR Press and Information Unit Chief (Jul. 2003) (on file with author). Of course, the very fact that the ICTs *have* a unit in charge of their relations with the public and that, for example, there are facilities arranged by the tribunals to function as press centers, is a telling departure from domestic practice in which courts try to maintain [the appearance of] complete detachment from the media (e.g., *sub judice* laws). Here, while still trying to maintain the fiction that journalistic coverage, and criticism in general, does not affect the judges, there is simultaneously a concerted effort to maintain a dialogue between the institution as such and the various factions of Rwandese society, particularly those parts that represent or are associated with the survivors (the Tutsi minority), i.e., the Rwandese government and victims' associations such as AVEGA and IBUKA. Of course, the judges themselves maintain ritual separation from all of these, employing agents to conduct such interactions.

immediate level, without which the officials know that the ICCs, and the larger social experiment of which they are a part, would be impossible.

Other examples of the institutional efforts to generate legitimacy by way of external “dialogue” with audiences, namely representatives of the victims, interaction with whom holds the promise of bestowing legitimacy, include efforts such as delegations of officials from the ICTR (the spokesperson, the registrar) to Kigali, Rwanda, to talk to government officials and members of the “civil society” and the administration of various outreach programs, such as internship programs with Kigali University. The Tribunal also cooperates, to a degree, with non-governmental organizations (NGOs), such as the media NGO Internews, which produces newsreels about the various trials and screens them in villages throughout Rwanda. The Tribunal maintains an office in Kigali which includes access to a library with the judgments and literature produced by the Tribunal in Kinyarwanda (the Rwandan language). At some point, the Chief Prosecutor attempted, unsuccessfully, to initiate a “virtual courtroom” that would have enabled conducting part of the proceedings in Kigali. A more successful initiative was live broadcasting of judgments on the Rwandese radio, which is not only the most efficient means of mass-communication, but also a symbolic one given the crucial role that radio played before and during the genocide.⁵⁸

**B. *Progressive Jurisprudence and its Discontents:
The “Battle of Sovereignties” v. the “Battle of the Sexes”***

No dramaturgical account is complete without content-analysis of text, in addition to context, which means in this instance a look at the ICTR’s attempts to authoritatively shape contents of fundamental socio-legal concepts, imbue them with meaning while, collaterally,⁵⁹ communicating its own position as the authoritative voice of the Generalized Other on matters of morality.

In order to construct an effective story such as that of a conflict leading to an emotional climax and the establishment of a revised moral order,⁶⁰ it is necessary to mold the events into categories known as crimes. Control of authoritative delimitation of these categories is a function of the Generalized Other. Crimes are not given categories, they are socially negotiated categories. Thereafter, facts, actions, and what lawyers call “theories of the case” (interpretations of the facts and the actions) are discussed in relation to such categories. To use the most glaring example, the killing of approximately 800,000 Tutsi and moderate Hutu must be

⁵⁸ See Prosecutor v. Ngeze et al., Case No. ICTR-99-52-T, Judgment and Sentence (Dec. 3, 2003) (relating the trial of defendants who used mass media to encourage genocide); LOUISE M. BOURGALT, *MASS MEDIA IN SUB-SAHARAN AFRICA* (1995) (on the oral nature of communication in African societies that enables faster circulation of information than in primarily literate societies in the West); Mary Kimani, *Role of Radio Télévision Libre des Mille Collines (RTLM) in the 1994 Rwandan Genocide* (2002) (unpublished M.A. thesis) (on file with author). While the knee-jerk reaction of many Westerners to the idea of effective dissemination of information from the Tribunal to large audiences, particularly to the Rwandese—and even more so to the idea of *interactions* between the Tribunal and the Rwandese “constituency”—is a *prima facie* dismissal, the reality seems to be one of a hyper-discourse rather than of under-discourse. In a tiny Rwanda governed by a highly centralized government that is trying to “re-educate” the masses, both the international trials and the local *Gacaca* process are highly visible.

⁵⁹ The philosopher of education, and close friend of Herbert Mead, John Dewey, argued that “perhaps the greatest of all pedagogical fallacies is the notion that a person learns only what he is studying at the time . . . the most important thing one learns is always something about how one learns.” JOHN DEWEY, *EXPERIENCE AND EDUCATION* 48 (1963).

⁶⁰ RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 67 (2000).

conceptualized as “genocide,” a fuzzy concept when used colloquially or politically and a scarcely defined legal concept.⁶¹ Other examples of concept-construction by the ICTs include such quintessential concepts of international humanitarian law—the branch of law entrusted with regulating the most fundamental norms of social co-existence on the international level—as crimes against humanity, war crimes, slavery, sovereignty, the international community and ethnic cleansing.

Most of these concepts do not emerge, of course, *de novo* through the international legal discourse mediated by the courts, though some, like the concept of “crimes against *humanity*,” which was used for the first time by the Allied prosecutors in the Nuremberg trials, do. Concepts like rape have been around for millennia, concepts like state sovereignty have been around for centuries, concepts like “genocide” and “crimes against humanity” emerged during the “big bang” of humanitarian law, in the wake of WWII, and concepts like “ethnic cleansing” have been used in other discourses for some time but made their *legal* debut through the ICTs.⁶² Either way, these concepts, like all concepts, exist and are in constant flux.

Concepts, including legal concepts, are delineated by judges. Legal discourse and criminal trials provide powerful fora in which the evolution of legal concepts, the social negotiation of their meaning, occurs. This has been stated in stronger terms, arguing more generally that the categories that divide social structures and institute interpersonal separation are juridical:

[Social] structures embed their members in a network of normative categories and boundaries through which individual identities are defined. These categories and boundaries comprise social strata, different spheres of life (e.g., family, civil society, state), classificatory kinship categories, a clear distinction between structure’s inside and outside – between us and them – and a distinction between transcendence and immanence, the Sacred and the human.⁶³

⁶¹ Both the word “genocide” and the concept of “crimes against humanity” were coined in the aftermath of WWII and in the context of the Nuremberg and Tokyo trials. *See* Douglas, *supra* note 53, at 408. On the evolution of the crime of genocide, which was never adjudicated in an international court prior to the cases of *Akayesu* and *Kambanda*, see, respectively, Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998); Prosecutor v. Jean Kambanda, Case No. ICTR-97-23-S, Judgment (Sept. 4, 1998). On the Americans’, Europeans’, and the U.N.’s reluctance to find the carnage occurring in Rwanda to be genocide, see, generally, GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* (Picador 1998).

⁶² *See, e.g.*, Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT’L L. 424 (1993). The Nazi atrocities led to “the evolution of the concepts of crimes against peace, crimes against humanity and the crime of genocide.” *Id.* at 424; *see also* MICHAEL P. SCHARF, *BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG* (1997) (evaluating the concept of “ethnic cleansing”); James R. McHenry III, *The Prosecution of Rape Under International Law: Justice that Is Long Overdue*, 35 VAND. J. TRANSNAT’L L. 1269, 1277 (2002) (discussing the first appearance of the concept of “crimes against humanity”). *But see* MARK OSIEL, *MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW* 61 (1997) (“In prosecuting Eichmann, Ben-Gurion wanted, above all else, to retell the story told at Nuremberg in an entirely different way. *This retelling would conceive the offence as a ‘crime against the Jewish people,’ rather than against ‘humanity’ – the latter concept an invention of the secular Enlightenment.*”) (emphasis added) (based on Pnina Lahav, *The Eichmann Trial, the Jewish Question, and the American-Jewish Intelligentsia*, 72 B.U. L. REV. 555, 559–61 (1992)).

⁶³ Barshack, *Clerical Body of the Law*, *supra* note 1, at 1152. Compare this with Raz’s account of the interrelationships between concepts, authority, and law:

Criminal legal concepts are of particular importance since attempts to prevent and punish crimes, criminal law that is, is a *primary* function of a *sovereign*. Exercising the criminal function, which involves, inter alia, the dynamic interpretation of concepts of criminal law, means regulating the most basic of social interactions. As an example, let us consider the Tribunal's manipulations of a concept central to the regulation of the usage of individual and collective power structures: Rape. In addition to being a central concept in its own right, taken as a "regular" crime and as a crime of war, it also sets the scene for a discussion of gender-related judicial role disruptions.

The following paragraphs will focus on content-analysis of the evolution of the concept of rape followed by an analysis of "contrarian performances"—performances that transgress accepted codes of conduct—of individual judges acting out gendered roles. The contrarian performances will demonstrate that, despite the crucial need to perform in unison a cohesive front in order to create a reification and deification of "the Chamber" which, in turn, is the entity that can claim to voice the morality of the Generalized Other, judges were willing to forgo that front and act in their individual capacities in the roles of "man" or "woman" when issues of women's human rights were at stake. The "battle of the sexes," in other words, has interfered with the cohesion of "the Chamber" team performance in the "battle of the sovereigns"—the attempt to assert that the ICTs are the supreme and authoritative manifestation of the Generalized Other of the international community.

1. SUBJECTIFYING WOMEN⁶⁴

At the ICTR, in one of the more dramatic twists in the plot of the Tribunals, the concept of "crimes against humanity" was radically redefined to include crimes against women. Historically, the authors of international law resisted the idea of finding systematic mass rapes such as those that occurred in Rwanda as falling under the concept of a "crime against humanity" because of the authors' reluctance to define the concept of "human" such that it included "woman":

What is done to women is either too specific to women to be seen as human or too generic to human beings to be seen as specific to women. Atrocities committed against women are either too human to fit the notion of female or too female to fit

The philosophical explanation of authority is not an attempt to state the meaning of a word. It is a discussion of a concept which is deeply embedded in the philosophical and political traditions of our culture. The concept serves as an integral part of the net to another. There is no, nor has there ever been, complete agreement on all aspects of the concept's places and its connection with other concepts. But there is, as part of our common culture, a good measure of agreement between any two people on many, though frequently not the same, points. Accounts of "authority" attempt a double task. They are part of an attempt to make explicit elements of our common traditions, a highly prized activity in a culture which values self-awareness. At the same time such accounts take a position in the traditional debate about the precise connections between that and other concepts, they are partisan accounts furthering the cause of certain strands in the common tradition, by developing and producing new or newly recast arguments in their favor

JOSEPH RAZ, *AUTHORITY (READINGS IN SOCIAL AND POLITICAL THEORY)* 137 (Joseph Raz ed., 1990). The discussion herein is a concrete example of the interconnectedness of legal concepts, as discussed by Raz.

⁶⁴ By the term "subjectification" of women I mean to describe the opposite of what feminist scholars refer to as "objectification." That is, I mean to show the treatment of women as subjects, not as objects.

the notion of human. “Human” and “female” are mutually exclusive by definition; you cannot be a woman and a human being at the same time.⁶⁵

In *Prosecutor v. Akayesu*⁶⁶ the ICTR broke new ground in international law by defining “rape” as an act of genocide. The ICTR was quickly followed by the ICTY, in *Prosecutor v. Kunarac*,⁶⁷ which both defined wartime rape campaigns of the sort that were widespread in Bosnia as both a “crime against humanity” and a “war crime” and expanded the definition of “slavery” as a “crime against humanity” to include sexual slavery.⁶⁸ In *Kunarac*, the ICTR’s twin Tribunal did not stop at expanding the concepts of “war crime” and “crime against humanity” to include rape, but also adopted an expansive definition of the concept of “rape” itself into customary international law:

The Chamber must define rape, as there is no commonly accepted definition of this term in international law. While rape has been defined in certain national jurisdictions as non-consensual intercourse, variations on the act of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual. The Chamber considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances, which are coercive. Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.⁶⁹

This expansion of the contours of the concept of “rape” is based, among other things, on a definition first discussed in *Prosecutor v. Furundzija*.⁷⁰ In that case, having concluded that “no definition of rape can be found in international law,”⁷¹ the judges conducted a wide-scale comparative research of the definition of rape in diverse jurisdictions world-wide based on a principle determination that when international criminal law lacks specificity, “international courts must draw upon the general concepts and legal institutions common to all the major legal systems of the world.”⁷²

The ICTR held in *Akayesu* that in order to formulate a definition of rape in international law one should start from the assumption that “the central elements of the crime of rape cannot

⁶⁵ See Catharine A. MacKinnon, *Rape, Genocide, and Women’s Human Rights*, 17 HARV. WOMEN’S L.J. 5, 6 (1994). On the evolution of the definitions of “crime against humanity” and of “war crimes” to include rape, which is as much a reconceptualization of the term rape as it is of the phrase crimes against humanity, see Meron, *supra* note 62, at 425.

⁶⁶ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998).

⁶⁷ *Prosecutor v. Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgment (Feb. 22, 2001).

⁶⁸ See McHenry, *supra* note 62, at 1273–74 (“[T]he expansion closed holes in the international legal conceptualization of rape and enslavement, torture, war crimes, genocide, and crimes against humanity . . .”).

⁶⁹ *Prosecutor v. Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgment, ¶¶ 596–98 (Feb. 22, 2001) (emphasis added).

⁷⁰ *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, ¶¶ 174–88, (Dec. 10, 1998). Paragraphs 176 and 185 are particularly relevant.

⁷¹ *Id.* at ¶ 175.

⁷² *Id.* at ¶ 178.

be captured in a mechanical description of objects or body parts.”⁷³ According to the Tribunal, in international law it is more useful to focus “on the conceptual framework of State sanctioned violence.”⁷⁴ It then went on to state that:

Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.⁷⁵

Concluding from this survey of national legislation that there is a lack of uniformity among the nations in respect to some of the central elements of the crime of rape (e.g., its application to male victims, the inclusion of forced oral penetration), the judges reverted to what they deemed the “essence” of the whole corpus of international humanitarian and human rights law: “the protection of the human dignity of every person, whatever his or her gender,”⁷⁶ the concept of human dignity seen as the principle permeating the whole body of international law and as favoring broadening the definition of the concept “rape.”⁷⁷ In short, the Tribunals veered away from the historical course of the development of the concept of “humanity” under international law so as to include women. It then followed that the laws of war should protect women as well as men.

Some critics argue that the effect of the *Akayesu* and *Kunarac* decisions is to embed in the concept of “woman” the property of victimhood. The international criminal prosecution of rape, goes the argument, reifies women as a weaker sex in need of special protection as is consistent with the historical course of the concept “woman” in international law. (The Geneva Conventions, for example, mention women only in connection with rape.)⁷⁸

But while, arguably, the most important and immediate “subjectification” is that of victims-witnesses,⁷⁹ it is interesting to note other aspects of the subjectification of women by the Tribunals. In an ongoing case before the ICTR the first woman ever to be tried for genocide is also charged, *inter alia*, with responsibility for rape as a crime against humanity. In a bitter irony, the accused, Pauline Nyiramasuhuko, is the former Minister of Family and Women’s Development in the Rwandese Interim Government of 1994 and is alleged to have ordered, aided and abetted her subordinates in carrying out the massacre and rape of Tutsi women and girls during the genocide.⁸⁰ In other words, the willingness to review and extend the scope of

⁷³ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998) at ¶ 139.

⁷⁴ *Id.* at ¶ 156.

⁷⁵ Prosecutor v. Furundzija, Case No. IT-95-17/1-T, at ¶ 176.

⁷⁶ *Id.* at ¶ 76

⁷⁷ *Id.* at 183-84. The court then declared what the “objective” elements of rape are. *Id.* at ¶ 185.

⁷⁸ See McHenry, *supra* note 62, at 6.

⁷⁹ Hugo Vezzetti, *El Juicio: Un Ritual de la Memoria Colectiva*, 7 PUNTO DE VISTA 3, 5 (1985) (“[T]he victims, as witnesses, appeal not only to the judges but implicitly to the community at large. Each victim, finally rescued from oblivion, seeks recognition of the essential humanity that was denied [her.]”) (quoted in OSIEL, *supra* note 63, at 30).

⁸⁰ Prosecutor v. Nyiramasuhuko et al., Case No. ICTR-98-42-T, Indictment, 42 (Aug. 10, 1999) (delineating a rape charge in count 7 of the indictment).

concepts such as “genocide” and “rape” extends to an expansion of the subjectification of women necessary in order to view women as victimizers as well as victims and as perpetrators of the rape of other women at that.

While doctrine at the ICTR was momentarily progressive in relation to the use of sexual violence in wars, a reaction surfaced shortly. The reaction manifested in legal texts and in the performances described below, with chambers dominated by male judges refusing to follow the *Akayesu* ruling handed down by Chamber I, and is largely attributed, on the issue of rape, to Judge Pillay, a female South African judge.⁸¹ The backlash towards the progressive jurisprudence highlights the question of objectifying or subjectifying women through the construction of one of the elements of story—that of legal doctrine. Legal doctrine defines the limits of the narrative through the lens of genre conventions.⁸² Looking at legal doctrine on this issue transitions us from a discussion of the claim of legitimate authority—the performance of an institutional self that attempts to be the manifestation of an international Generalized Other—to the disruptions and challenges to that claim. And, more specifically, to the competition between the agenda of asserting supreme sovereignty through the ICTs as against national courts and the agenda of maintaining legal institutions as tools of asserting male supremacy. The gender-role disruptions undermine the cohesiveness of the voice purporting to be that of the international Generalized Other. Since a cohesive projection of the institutional self as the international Generalized Other is necessary to assert supremacy in the battle of the sovereigns, any disruption of that cohesive projection is the deliberate choice to give more importance to some battle (here, gender) other than sovereignty.

2. JUDICIAL COMMUNICATION OUT OF CHARACTER

As previously stated, as part of the reciprocal nature of social relations and social reality, in order for a performance to succeed, for a self (private or institutional) to be maintained and reinforced, and for the moral claims attached thereto to be accepted, the audience must exercise dramaturgical loyalty and discipline. For that to happen an audience must be predisposed to believe the projected self, as is the case when the role performed reflects an already-established self or, as in theater, when the audience is willing to suspend disbelief in the interest of undergoing the emotional process that is inherent in the role of an audience. Alternatively, the performance must be particularly convincing. What happens when neither is the case can be gleaned from an encounter that occurred at the ICTR on October 31, 2001.

During the testimony of a rape victim in the *Nyiramasuhuko* trial, the judges burst out laughing. Accounts of this communication out of character, which emphasized Judge Maqutu’s

⁸¹ Anonymous Interview with an ICTR legal officer (Oct. 2003) (on file with author). The perception of a gendered split was pointed out to me by a legal officer interviewee who, like others, also discussed the perceived linkage between the split in the jurisprudence of rape and both contrarian judicial performances described below.

⁸² I am grateful to Nathan Miller for providing me with the following analogy: In storytelling terms, if a protagonist walks through a perfectly round metal tunnel searching for survivors, it is an adventure story if the metal tunnel is a missile silo but a science fiction story if the tunnel is the hallway of a spaceship. Building an analogy from that, legal doctrine plays the same role as genre conventions—it determines what kind of story is unfolding. If doctrine says rape is a crime against humanity, we are telling an international-criminal-legal story. If doctrine defines rape as a matter of family honor or otherwise a private-sphere matter, then we are told an extra-legal story, a morality play, perhaps. If rape constitutes a civil or criminal offense against the father or the husband, then a property-law story is told.

hearty laugh, rapidly spread through the news media and through the grapevine.⁸³ The resulting folklore that spread was that a (male) judge laughed at rape victims who came to testify.

The mediated audiences, particularly Tutsi Rwandese, were unforgiving, refusing to accommodate the disruption, namely, refusing to entertain the fostered impression. The response of the small, well-organized Tutsi community and of its government was a refusal to cooperate with the Tribunal—including a refusal to send witnesses to testify—essentially bringing work in Arusha to a grinding halt.⁸⁴ The blow sustained by the Tribunal extended beyond an additional dent to its already-fragile image as a legitimate and supreme authority to its actual ability to function.

The dynamics of the “conversation” between the Tutsi community—the ultimate (perhaps the only) community-audience that could validate the legitimacy of the Tribunal—and the Tribunal shattered any notion of the Tribunal as the “more equal” actor bringing its moral or other superiority and authority to the discussion.⁸⁵ The strength of the Tutsi community’s reaction, and the resonance it found in the international media and academic circles, indeed pointed to an unequal relationship—but one in which a national group rather than a supranational entity held the superior position, amounting to a role-reversal. The Tutsi forcefully communicated to the large audience watching the performance of the ICTs their (the Tutsis’) role as the superior partner which bestows on or denies moral authority to the Tribunal, itself a mere accountable branch of the international civil service.

In terms of its symbolism, one could say that the projection of a communal body onto the court⁸⁶ (which would result in a suspension of disbelief) was unsuccessful. The judges did not achieve the social distance necessary to create an awe-inspiring gap, to obtain a sacred, omnipotent status; they were not perceived as the manifestation of the absent, of the sacred. They were not, in other words, perceived as the authoritative voice of a community’s morality, at least not that of a relevant community.

The official Tribunal’s response came in the form of a written statement by the President of the ICTR, Judge Pillay:

It is . . . clear from the audio-visual record that the reactions from the bench described as inappropriate in the article were responses to defence counsel’s

⁸³ See Thierry Cruvellier & Franck Petit, *Diplomatie judiciaire: Témoin non protégé*, 98 BILLETS D’AFRIQUE 2001, available at <http://www.survie-france.org/IMG/doc/doc-114.doc>. The encounter, like all open proceedings, was captured on videotape and made its way into one of Internews’ newsreels (on file with author). It was described, or alluded to, in various conversations even though those took place a couple of years after the fact. For example, in an interview with a rape counselor who works with Tutsi rape victims the encounter was relayed thus: “You know, the judges at the international court laugh at victims who testify!” Anonymous interview with a rape counselor (June 2003) (on file with the author). And a legal officer, who was not present at the session itself, attested to the public portrayal of the encounter: “The other judges laughed too,” she said, “but because of the angle of the camera the image that circulated was of Maqutu with a big smile at the front of the frame.” Anonymous interview with an ICTR legal officer (Oct. 2003) (on file with author).

I use the particular term “communication out of character” to describe the encounter because it seems, from the footage and from accounts of various interviewees, that the judges’ laughter was a response to the courtroom persona and style of one of the attorneys rather than a response to the witness. They were reacting in a non-judicial capacity, abandoning their role and the solemnity it dictates, acting, ironically, in contempt of court. On “communications out of character,” see GOFFMAN, *supra* note 8, at 169.

⁸⁴ Anonymous interview with an ICTR legal officer (Aug. 2003) (on file with author).

⁸⁵ See RICHARD SENNETT, *AUTHORITY* 10–19 (1980) for a discussion of authority as a relationship between the unequal.

⁸⁶ See Barshack, *Clerical Body of the Law*, *supra* note 1, at 1155.

questions and arose in the course of dialogue with defence counsel. *Those who sit as judges know that they perform their task under the gaze of many observers.* If and when they are criticized in the press and in public, they do not have the luxury of reply and refutation. *They may not enter the arena of public debate about their conduct of an ongoing trial* It would not be appropriate for one judge, including the President of the Tribunal, to discuss the conduct of other judges in their handling of an ongoing trial. Nearly all matters are *sub judice* and comment, if any, from within the Tribunal must await the conclusion of the proceedings.⁸⁷

By the very nature of the performance of a trial in a court of law, the individual judges may not act in their personal capacities and respond as individuals. It was that kind of communication that caused the disruption in the first place and the only defensive strategy available to those in the role of judge is to “perform silence,” to refrain from engaging in the meta-conversation that takes place off-stage, outside the courtroom, in order to reestablish the segregation of “the Chamber” from everyday interactions with the media and audiences. Thus, “the Tribunal” tries to undo the profanation of the front region by closing ranks among the team members in the hope of reestablishing the projected image—the dramaturgical function of the *sub judice* doctrine. It was up to the head of the hierarchy, the President, the matriarch, to do what she could as the voice of the institution to save-face by making a single, unilateral, proclamation and then withdraw from further communication about the disruption in the hope that the audience would, at least at that stage, come back on board and allow the performance to continue.

That did not happen however and, eventually, the matter was resolved by way of an unusual non-reelection of Judge Maqutu by the U.N. General Assembly, mid-trial, providing another mega-disruption to the trial performance, an enduring reminder of “the Chamber’s” all-too-human nature.

The fostered impression of a legitimate court of law was, apparently, so fragile to begin with that it did not withstand the disruptive encounter. The curtain separating the front stage from the back stage was drawn open and the authorizing and legitimizing crutches of the Tribunal, the Security Council (lending the authority of its Chapter VII mandate) and the Tutsi (lending the legitimacy of victimhood), were revealed.

3. JUDICIAL ROLE DISRUPTION

Defining—in addition to applying—juridical concepts, especially ones as controversial as rape as a war crime, strains the limits of the ICTs’ ability to claim authority. In the *Kajelijeli* case, the presentation of a unified personal front of “the Chamber” fell apart when, at the verdict, Judge Arlette Ramarosan exercised her independent, individual agency and dissented from the majority opinion of Judges Maqutu and Sekule on the issues of the definition of “rape” and of “superior responsibility” in respect to rape committed by subordinates. The presentation of the object (“the Chamber”) was disrupted by a non-conforming performance by a subject (Ramarosan) through dissonant utterances that unmasked the persona of “Chamber”: “The

⁸⁷ Press Release, Statement of Judge Pillay, President of the Tribunal, ICTR/INFO-9-3-07.EN (Dec. 14, 2001), <http://69.94.11.53/ENGLISH/PRESSREL/2001/9-3-07.htm> (emphasis added).

Chamber is not convinced, by a majority, Judge Ramaroson dissenting, that⁸⁸ Dissonant in that the supposedly-singular “Chamber” is split, in this sentence, to a majority (men) and a minority (woman).

A disruption of this sort, which reveals cracks in the reality sponsored by the performance team “the Chamber,” carried out by a team-member, is an irregular event—particularly in the context of the highly-regulated environment which is a court. The disruption reveals regression in the process of subjectifying women, a process that could potentially increase the legitimacy of the Tribunals. It thus ruptures the projected image of a legitimate authority.⁸⁹

Judge Maqutu’s role disruption, described above, and Judge Ramaroson’s deviation from the team performance, which followed in chronological order and was fueled, *inter alia*, by the regressive jurisprudence following *Kunarac*, are not unrelated. In both, gender issues present themselves as a fault-line in which the battle of the sovereigns and the battle of sexes become competing agendas. This dissonance reveals, perhaps, that the universal morality purportedly embodied in the person of the judges and the entity that is the ICTR does not exist, at least with respect to gender roles.

III. THE DRAMATURGY OF THE ICTR—CONCLUDING REMARKS

*In the beginning was the Word, and the Word was with God, and the Word was God. The Word was with God in the beginning. All things were created by him, and apart from him not one thing was created that has been created. In him was life, and the life was the light of mankind. And the light shines on in the darkness, but the darkness has not mastered it.*⁹⁰

In the body of the article, I have provided an analysis of the ICTR through the lens of symbolic interactionism, a social psychology theory focusing on intersubjectivity, and invited the reader to draw her own conclusions about the success of the Tribunal’s attempt to speak in the voice of the Generalized Other. In the following section I will outline some of what I think is at stake in the ICCs’ success or failure. The ramifications include the existence and legitimacy of the “international community,” the ability of individuals to form and maintain a Self in relationship to an international (rather than national or local) community, and a conception of international citizenship.

As previously discussed, courts are a theater in which the authority of the Mythical Beginning is communicated through story tied to place and time. In this case, the ICTs are the medium through which the architects, proponents and performers of the Tribunals attempt to construct a reality of an “international community” telling the story of its beginning. What makes this instance of beginning-telling particularly interesting is that it is not at all clear that an

⁸⁸ Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-I, Judgment and Sentence, 149, 682 (Dec. 1, 2003). The ICTs generally follow the Continental practice in which no dissent is allowed in criminal trials. In addition, Judge Ramaroson is from a jurisdiction which follows Continental law. Hence, the dissent is highly irregular.

⁸⁹ Trial chambers II and III declined to follow the progressive *Akayesu* and *Kunarac* rulings, as is evidenced by the *Kajelijeli* case and in Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment (May 15, 2003), which adopted a regressive definition of rape. See, respectively, Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998); Prosecutor v. Jean Kambanda, Case No. ICTR-97-23-S, Judgment (Sept. 4, 1998); Prosecutor v. Kajelijeli, Case No. ICTR 98-44A-T, Judgment (Dec. 1, 2003).

⁹⁰ *John* 1:1 (King James). On creation myths generally, see MARIE-LOUISE VON FRANZ, CREATION MYTHS (1972).

“international community” in fact exists in any robust sense. The ICCs are, therefore, attempting a kind of auto-genesis. The ruptures in the performances and the deficit of audience dramaturgical loyalty signify the mixed results of the attempt.

Some of the social effects of this drama have already been stated. First, by upholding the social conversation about the Beginning, the ICTs create the Beginning and, therefore, the community (or at least, attempt to do so). Second, they facilitate participation in the Beginning by generating a sense of their own legitimacy. Third, as the consequence of the first two, the courts preserve their authority. But there is another dimension to this grand narrative authored by the ICTs. As in the biblical Genesis, so it is in the court-manufactured genesis, the story of the Creation in the Beginning is, even more than a story about *creation*, a story about an *Almighty*, the author. The collateral “moral of the story” is that courts *are* the embodiment of the Almighty; that which breathes life into, or destroys in its breath, realities. While the text is the story of the community, the subtext is the story of the court. The medium is the message.⁹¹

As mentioned above, of particular relevance to the discussion of the ICTs is the social psychological concept of the Generalized Other. The Generalized Other is an organized and generalized attitude with reference to which the individual defines her own conduct. It is, in other words, the abstract community.⁹² The Tribunals claim to be the voice of the Generalized Other and strive to fulfill the function of authoritatively defining key criminal legal concepts of humanitarian law, namely of human co-existence, such as “ethnic cleansing,” “rape,” “international conflict,” and “sovereignty.” Common responses (of reprehension) and organized attitudes towards acts defined as falling under these concepts, are necessary for the creation of a cohesive international society (the “international community”),⁹³ the “international community” being the community on behalf of which the prosecutors prosecute, the Tribunal adjudicates, and the governance *apparati* govern. There is, however, a bootstrapping element to this exercise, as common responses and organized attitudes towards acts defined as falling under these concepts are a *pre-condition* for the creation of a cohesive international society (the “international community”),⁹⁴ the very community on behalf of which the prosecutors claim to prosecute and the Tribunal seeks to adjudicate.

If the ICTs are successful in speaking as the voice of the international Generalized Other, then the patterned interactions that are the ICTR lend credibility to claims that the international community exists. Note, though, that generally when the “international community” is discussed it is discussed in terms of a sovereign or, if individuals are considered, the focus is on their standing or status in the international legal regime. But there is a lot more to be said if the issue is approached from a symbolic interactionist perspective. Because according to this perspective, community—*any* community—is intimately tied to the formation of self and the related ideas of citizenship and stigma. Hence the existence (or not) of an international community has profound implications for *who we are* and *what it means for us to be citizens* in the international sphere.

By framing the foregoing analysis of the interactions within the ICTR with the suggestion to regard the ICCs (the judges) as the voice of the Generalized Other, I am suggesting a perspective which entails applying this interactionist account of inter-subjectivity—of the construction of self, of institutions, and of social reality—as a whole to our understanding of the

⁹¹ See MARSHALL McLuhan & QUENTIN FIORE, *THE MEDIUM IS THE MESSAGE: AN INVENTORY OF EFFECTS* (1967) (alluding to McLuhan’s communication theory).

⁹² MEAD, *supra* note 8, at 195.

⁹³ *Id.* at 167.

⁹⁴ *Id.*

social function of courts. Following are a few cursory remarks and examples aimed at illustrating the potential upshots of such a theoretical stance. These remarks and examples focus on the formation of self, stigmatization, and citizenship.

In the symbolic interactionist tradition, the self is understood as a social emergent. In fact, both self and institutions, such as courts, can be explained by using the rules governing the dialectical interaction between self and society. The fundamental principle of the interactionist view is Mead's "principle of sociality," according to which individuals exist in a world that is socially and symbolically constructed ("negotiated reality"). But more importantly, the principle highlights the "profoundly social character of consciousness and of the psychical."⁹⁵ "The self," Mead famously argued, "is essentially a social process."⁹⁶ It is a social emergent, which emerges by means of "symbolic interaction." Symbolic interaction is a social interaction which takes place via shared symbols such as gestures, words, definitions, rituals, and more.⁹⁷ The self reflects the structure of role models, games, rules, Generalized Others, and—most important for our purposes—institutions in the individual's social world.⁹⁸ Self-consciousness is the result of a process in which the individual takes the attitude of these others towards oneself and attempts to view oneself from their standpoint.

Therefore, as an example, the depiction of women and the roles assigned to them in the utterances of a voice purporting to be that of the international Generalized Other affects the dynamics of women's formation of self. In the preceding discussion regarding the subjectification of women, the discussion illustrated how—through affecting the closely-knit net of the concepts of "war crimes," "crimes against humanity," "torture," "rape," "human," and "human dignity"—the Tribunals are agents not only of shaping normative-judicial categories but also of the broader process of the formation of subjectivity itself. In the above example, women are recognized, conceptualized, as "humans" and, as such, are subject to the same protection afforded to men under the law of war – they are "subjectified."

As we have seen, the ICTs are a medium that allow members of a given community to participate in the proceedings and, therefore, in the story of the beginning, the function that creates an impression of authority and legitimacy. A minimal degree of participation, at least participation in the interactionist sense of taking the attitudes of others who are affected by one's actions into consideration, is essential to the citizenship of an individual in her community. This is the *psychological* meaning of citizenship. Psychologically, it is taking the role of the other, the internalization of the attitudes of others and the values upon which these attitudes are based, through which one obtains a full conception of the self. Politically, the ability of an individual to participate in the reciprocal interaction with the Generalized Other, an interaction in which the normativity arises and is shaped, *is citizenship*. "[T]he capacity to take the role of the other in greater degree by more and more people would seem to move in the direction of the democratic ideal What applies to individuals here applies to nations."⁹⁹

⁹⁵ JOAS, *supra* note 8, at 98.

⁹⁶ MEAD, *supra* note 8, at 334.

The self, as that which can be an object to itself, is essentially a social structure, and it arises in social experience. After a self has arisen, it in a certain sense provides for itself its social experiences, and so we can conceive of an absolutely solitary self. But it is impossible to conceive of a self arising outside of a social experience.

Id. at 160.

⁹⁷ CRONK, *supra* note 8, at 139.

⁹⁸ BALDWIN, *supra* note 8, at 112.

⁹⁹ MEAD, *supra* note 8, at xxxiv; *see also id.* at 326.

Formation of self and psychological citizenship converge in the application of the interactionist account to the question of stigmatization. Stigma management, a central function of the Tribunal, is “the stereotyping or ‘profiling’ of our normative expectations regarding conduct and character.”¹⁰⁰ It is a socialization process through which the stigmatized person, or group, learns and incorporates the stand-point (e.g., values) of the “normal” and the consequences of possessing it. Stigma itself is the situation of an individual, such as a criminal defendant, or a community who is disqualified from full social acceptance—“a blemished person, ritually polluted.”¹⁰¹ Stigmatization may serve positive social functions—like deterrence in relation to crimes of racism and sexism which is the core function of the ICTs and is achieved not only through the criminal sanction but also through dramaturgical means such as the naming process discussed above.

However, one must be cautious of other, less obvious, social means of collateral stigmatization. As also discussed, signs convey social information. Consider the example of attire at the ICTR. Attires are signs. Some signs, such as judges’ attire, are designed solely for the purpose of conveying social information. Attire can function as a prestige symbol, which non-“normals” must adopt in order to “pass.” One can understand practices such as extensive use of non-Western, particularly African, garb worn only in the back-regions of the Tribunal, contrasted with the exclusive usage of Western attire in the front region (accuseds and attorneys in Western suits and judges and lawyers in archaic Western gowns), as a process of stigma management which exemplifies subliminal stigmatization processes.

Quite radically, we are told that: “The stigma process seems to have a general social function—that of enlisting support for society [here: the ‘international community’] among those who aren’t supported by it”¹⁰² In other words, stigmatization is “a means of formal social control; the stigmatization of those in certain racial, religious and ethnic groups has apparently functioned as a means of removing these minorities from various avenues of competition.”¹⁰³ This is the shadow-side of the stigmatization that occurs at the ICTs.

By requiring to adjust the performance in the way that dress codes, official and unofficial, dictated, limited participation rights are granted. Mostly however, requiring such adjustments means that “normals will not have to admit to themselves how limited their tactfulness and tolerance is; and it means that normals can remain relatively uncontaminated by intimate contact with the stigmatized and relatively unthreatened in their identity beliefs.”¹⁰⁴ The damaging social effect of this process runs deep. It leads to a phantom acceptance of the values and practices advanced and therefore provides the base for a phantom normalcy:

So deeply, then, must he be caught up in the attitude to the self that is defined as normal in our society, so thoroughly must he be a part of this definition, that he can perform this self in a faultless manner to an edgy audience that is half-watching him in terms of another show. . . . [A]nd in truth he will have accepted a

¹⁰⁰ GOFFMAN, *supra* note 8, at 68, 45. Goffman contrasts the “stigmatized” with the “normals.” He also discusses “passing”—the management of undisclosed discrediting information about self—and its psychological effects. *Id.* at 58. Goffman contemplates the possibility of a deviant community that could come to perform for society at large some of the same functions performed by an in-group deviant for his group. *Id.* at 172.

¹⁰¹ *Id.* at 9.

¹⁰² *Id.* at 164.

¹⁰³ *Id.* at 165.

¹⁰⁴ *Id.* at 146–7.

self to himself; but this self is, as it necessarily must be, a resident alien, a voice of the group that speaks for and through him.¹⁰⁵

Hopefully, these fleeting remarks about the formation of self, stigmatization of individuals and collectives, and psychological citizenship highlight the potentially rich contribution that an interactionist view of international legal institutions can bring about. For whether or not the ICCs speak with the voice of the international Generalized Other, we should be prompted by their mere attempt to think about what the success of such an enterprise would mean for individuals as selves and as citizens in an internationalized world.

¹⁰⁵ *Id.* at 148–49 (discussing phantom acceptance and phantom normalcy).