# Book Review: *The Archival Politics of International Courts*, Henry Alexander Redwood, Cambridge University Press, 2021

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BOOK REVIEW


## ABSTRACT

The archive of international criminal tribunals is a topic that is insufficiently researched and published. *The Archival Politic of International Courts* by Henry Alexander Redwood seeks to close this gap by examining the process of archiving and preserving the records of international tribunals. The author delves into the records of the International Criminal Tribunal for Rwanda (ICTR) to analyze the vital role that archives play in understanding the formation of community, especially through the lens of the victims and witnesses and their role in the trial process. Redwood is critical of the ICTR's ability to remain neutral in creating the archive. He addresses the political tensions and power dynamics that exist in adjudicating international criminal cases outside of the country where the crimes were committed. The book does not offer lessons learned or best practices to practitioners with issues triggered by the archives. The author does not tackle the challenges of managing the archive from the perspective of the tribunal stakeholders. However, the historical critique he provides, as well as the link between international tribunals and colonial archives are academically interesting; they spawn questions about neutrality, which may in turn prove to be useful to the designers and planners of international judicial institutions and adjudicators of cases. Redwood's book is meticulously researched and thought provoking and forces the readers to stop and reevaluate their own thinking about the impact of international tribunals and the vital role the archive plays in the functioning of the courts, especially with respect to accountability.



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## REVIEW

The United Nations established two *ad hoc* international criminal tribunals: the International Criminal Tribunal for the former Yugoslavia (ICTY)[1] and the International Criminal Tribunal for Rwanda (ICTR)[2] ("*Ad hoc* Tribunals"). These judicial institutions were mandated by the United Nations Security Council to hold accountable individuals charged with committing the most atrocious criminal acts against humanity. Originally created as United Nations (UN) institutions, the *Ad hoc* Tribunals proved over time to be a costly commitment. The UN continued to be involved in transitional justice and rule of law, but it later supported the creation of hybrid tribunals, which were independent of the UN and relied primarily on voluntary funding from UN Member States. Unlike the *Ad hoc* Tribunals, hybrid tribunals were funded by assessed member states' payments. The hybrid tribunals included the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Tribunal for Lebanon (STL). These courts were unique in that they were created upon the request of the respective governments and brought with them a host of new challenges, one of which pertained to the handling of their often-voluminous archives, a topic rarely discussed in depth in discussions pertaining to international criminal law. In fact, although many studies address a variety of topics in the international criminal law domain, including the operations of the tribunals, very little has been published on the complex issues relating to international tribunal archives. Over time, questions and issues relating to the archives of international tribunals spurred a plethora of research avenues where more analysis could and should be done. A recent work, *The Archival Politics of International Courts* by Henry Alexander Redwood, attempts to do just that; the author draws on the vast resources available at the international courts, especially the ICTR's primary sources, in conducting his research. The book applies an interdisciplinary approach to offer a critical review of official records produced by the institution, challenging the neutrality of how knowledge is produced by international tribunals.

The *Ad hoc* Tribunals were created to function as neutral, independent courts, separate from any national system or authority. They emerged as the testing grounds for the international justice system to apply international criminal law for the first time since the post-World War II Nuremberg Trials for the purpose of developing a body of jurisprudence and closing the impunity gap. Through the sentencing practice, the judges stated that "retribution and deterrence are the main purposes to be considered."[3] The goal was to show that there is no impunity and the law needed to be strengthened "as well as to create trust in and respect for the developing system of international criminal justice."[4] In 1998, with the creation of the permanent International Criminal Court (ICC), 120 States signed a treaty known as the Rome Statute. These State Parties recognized that "grave crimes threaten the peace, security and well-being of the world…", and they committed to "put an end to impunity for the purposes of these crimes" and to "guarantee lasting respect for the enforcement of international justice."[5]

1 UNSC Resolution 808 of 22 February 1993, S/RES/808, and 827 of 25 May 1993, S/RES/827.

2 UNSC Resolution 955, S/RES/955, 8 November 1994.

3 *Prosecutor v. Kurpreskic*, Case No. IT-95-16-T, Trial Judgement, 11 January 2000, para 848.

4 *Ibid*, para 848.

5 Preamble, Rome Statute, 17 July 1998.

How would such an institution build public trust in a complex and emerging system? For the international criminal justice system to have substantial impact, not only within the countries where the crimes were committed, but also globally, the interests of transparency dictated that the public must be given multiple avenues of access. The public could attend court proceedings in person, tune into hearings broadcast through television and eventually online platforms, and, in time, review court records and documents accessible online through databases. The tribunals' records, which included a large volume of audio-visual recordings, transcripts, exhibits (evidence), court filings, and more, ultimately became the cornerstone to building that trust with the public. However, the court records also sparked frustration among some public-sector representative groups as the international criminal justice framework exposed itself to critical review and criticism. Its efforts were deemed insufficient to address the conflict it sought to engage with through its decisions and judgments.

When the ICTY was created in the early 1990s as a temporary institution to ensure accountability for the grossest violations of international criminal law, insufficient attention was paid to (i) the importance of custody and preservation of the archival record that would become the tribunal's legacy once operations ceased, and (ii) the volume of records it would collect, produce and constitute the official archive in the pre-digitization era when paper records comprised the official record. Large volumes of evidence were collected, packaged, and physically transported away from the locations where the crimes were committed. Such evidence included orders and reports produced by the warring parties, intercepted communications, minutes of meetings, as well as audio-video recordings of events and incidents during the armed conflicts. Each item collected by the Office of the Prosecutor (the main investigative body of these institutions), received an individual registration number. During the many trials held before the *Ad hoc* Tribunals, a substantial portion of this evidence was admitted by the trial chambers, comprising the evidence that the judges would rely upon in rendering case judgments. Once admitted, case evidence was stamped by the court, stored, or sealed if the judges classified the item as confidential, and preserved to ensure its status as part of the official court record. The public record would become the legacy of these once novel institutions. They made history, and the corpus of the records they produced would comprise the official adjudicative memory of the atrocities committed. Today, any researcher can consult the *Ad hoc* Tribunals' online Court Records and sift through thousands of items of evidence, as well as the transcripts of hearings.

Redwood's study offers little practical value to tribunal judges, managers, and administrators to tackle the challenges of managing the archive from the perspective of Tribunal stakeholders. The book offers no lessons learned or best practices. Instead, the book applies an interdisciplinary critique by beginning with a historical description of the meaning of archive, relying on ancient Greece to set the stage for how the word "archive" emerged in history. The reader learns that it was associated with "the work of the archons (the magistrates) and the archon's house, which was known as the *arkeion* (the archive)."[6] The author also informs us that throughout history, the archive helped form a shared identity for both the present and past; a process further stimulated by the rise of nationalism. The use of archives is associated with colonialism and the intellectuals who argued their importance for

6 Henry Alexander Redwood, *The Archival Politics of International* Courts (Cambridge University Press 2021) p. 3.

expanding the colonies. The author provides several references where archives are seen as an imagined space, but with limitations, which "means that the archive can never capture the complete vision of a community it desires."[7] Finally, referring to the archives of the international tribunals, he argues that as "liberal international institutions that seek to regulate norms and actions within the international community" they represent a "hegemonic archive".[8]

The historical arguments, as well as the link between international tribunals and colonial archives, are academically interesting; they evoke questions about neutrality, which may in turn prove to be useful to the designers and planners of international judicial institutions and adjudicators of cases. The author chooses to focus his study on the ICTR; however, the tribunals are modelled to resemble each other with some nuances in the law. He acknowledges that the rules regarding archives established at the *Ad hoc* Tribunals continue to be adhered to at the ICC.[9]

The author competently analyzes the archives of international tribunals, predominantly focusing on the ICTR records. He tackles some of the harshest criticisms faced by international courts, one of which charges they are "delivering uneven, and even a form of 'victor's' justice",[10] highlighting the limitation of delivering justice from a distance and imbalance in the geographical representation of the cases. Here, the author references the scholars who criticize the ICC's case selection and investigations focusing on the Global South. He delves into the question of the voice and identity emerging from the colonial archive and the underlying debate taking place within post-colonial studies. How are the archives organized to bring meaning to a society is rooted in Michel Foucault's reference to "rules of formation".[11] The way statements and records are made within the regulatory framework is critical to understand the role of the participants in a trial process, such as victims, witnesses, and perpetrators. The participants engage in the discourse that is being formed and the knowledge that is being produced at the international tribunals.[12] Overall, the author's analysis is engaging and thought provoking.

The book is divided into seven chapters. Each chapter is methodically researched and well referenced. The author visited the ICTR, reviewed the archives, and read the trial transcripts. He also conducted interviews with professionals connected to the different organs of the ICTR, including counsel representing the accused. The author's use of primary sources is an essential part of what makes this book important for the developing discourse of international criminal justice. The chapters are immersed with information, triggering the reader to pause and reconsider the more traditional understanding of what constituted the international tribunal archives from an institutional perspective.

In his first chapter, Redwood sets out the methodology he relied upon and states that the book builds upon Kirsten Campbell's analysis of the ICTY archive where she analyzes the "link between law, knowledge and governance."[13] More specifically, he

7 Redwood, p. 5.

8 *Ibid*, p. 7.

9 *Ibid*, p. 29.

10 *Ibid*, p.13.

11 *Ibid*, p. 19.

12 *Ibid*, p. 20.

13 *Ibid*, p. 22.

focuses on how Campbell shows that "the archive's records, and hence the memory of the violence, are constructed rather than founded and are therefore politically charged."[14] The author builds his discussion with the production and reproduction of the records themselves and relies on post-colonial concerns about the ownership rights involved in creating the archive and its impact on the international community. He states that the "association between legal archives and the international community is a new and important contribution of [the] book."[15] He refers to scholars who have predominately considered the archive created at the international tribunals as a "repository of a neutral account of the past, which is seen as contributing towards peace and reconciliation."[16] He aims to push forward the analysis "beyond the black letter law" and attempt to try and shed light on "how law is brought to life and with what consequence."[17] Focusing on three cases at the ICTR[18] allows the author to provide an in-depth analysis, while covering the lifespan of the Tribunal. He concentrates on the way the records of witness testimonies were produced, claiming that the witness statements "remain, arguably, the most important record within the archive."[19]

In his second chapter, Redwood walks us through the horrific events of the war in Rwanda and the violence that led to a shift of understanding of the conflict, ultimately terming it to be a genocide. The author informs us that the term "genocide" was first used in passing on 20 April 1994 by the UN Security Council in referencing the Genocide Convention and the killings taking place in Rwanda.[20] He analyzes the way violence was framed, which allowed for strategic action to be taken to bring peace in Rwanda and create the ICTR. The book outlines the initial intention for the creation of the *Ad hoc* Tribunals. He references Madeleine Albright, the US Permanent Representative to the UN in 1994, highlighting that the tribunal "will establish the historical record before the guilty can reinvent the truth."[21] The goal of reconciliation or producing the historical record was not included in UN Security Council Resolutions establishing the *Ad hoc* Tribunals. Over the 21-year operational life of the ICTR, 93 persons were indicted, 62 defendants were found guilty of crimes, and 14 were acquitted.[22] Redwood focuses on three ICTR cases.[23] Based on the in-depth analysis of the archive, he strongly asserts that "the record that the archive produced is unquestionably both an extensive and significant record of the violence in Rwanda."[24]

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14 *Ibid*, p. 22.

15 *Ibid*, p. 23.

16 *Ibid*, p. 23.

17 *Ibid*, p. 23.

18 *Prosecutor* v. *Jean-Paul Akayesu* (Case no. ICTR-96-44), the first case at the ICTR; *Prosecutor* v. *Andre Ntagerura et al., (Cyangugu)* (Case no. ICTR-96-10); and *Prosecutor* v. *Jean Baptiste Gatete* (Case NO. ICTR-00-61).

19 Redwood, p. 24.

20 *Ibid*, p. 37.

21 *Ibid*, p. 42; See also "The ICTR in Brief" at https://unictr.irmct.org/en/tribunal.

22 Redwood, p. 44.

23 *Prosecutor* v. *Jean-Paul Akayesu* (Case no. ICTR-96-44), the first case at the ICTR; *Prosecutor* v. *Andre Ntagerura et al., (Cyangugu)* (Case no. ICTR-96-10); and *Prosecutor* v. *Jean Baptiste Gatete* (Case NO. ICTR-00-61).

24 Redwood, p. 51.

The third chapter focuses on the legal framework giving the tribunal its authority and identifying the critical actors in the process that emerged through the records. The book focuses on how the law defined the victim and at times excluded victims whose evidence may not have been covered by the law. The fourth chapter builds on the previous chapter's description of how the law shapes the archive. This chapter highlights the evolution of the "rules of the archive" over the ICTR's lifespan. The author tells us that the archives were a "highly contested space where different actors brought different versions of justice and community to bear and tried to restructure the archive's rules accordingly."[25] Redwood relies on transcripts of the trials to emphasize the power struggle between the witness testifying and the lawyer.[26] He argues that the witnesses struggled to have their voice heard and their story told while the lawyer's goal was to limit the statement to what was essential for proving the legal point. He adds that the "archive's rules" symbolized these evolving power relations, referring to the entire legal framework as "archive's rules", which might be confusing to the readers. Indeed, the ICTR's judges were required to follow more complex rules of procedure and evidence. Nevertheless, the book makes the point that witnesses' accounts did not always fit neatly into the rules of procedure, triggering the defence to argue breaches of fair-trial standards.

The fifth chapter begins with the fundamental question of what and who the archive was for. Who will ultimately become the legal custodian of the judicial archive is an important question. Is it the United Nations' responsibility to make that determination as a result of the UN resolutions establishing the institutions? Redwood analyzes the record and finds that the trial practices shifted over time, thus altering the content and purpose of the archive.[27] There was a reframing of the trial to be more streamlined and efficient. The role of the judge became more active, as at times, they led the questioning of witnesses. This raised the ongoing argument that civil law practices should be more integrated and prevalent at international tribunals.[28] Redwood offers two reasons for this shift in practice: 1) substantive and procedural law became more settled, allowing judges to control the proceedings; and 2) intervention of external actors, such as the UN Security Council and Rwandan government.[29] As the tribunal gained experience and developed its jurisprudence, international law became more defined, enabling the judges to rely increasingly on precedent.

The sixth chapter is innovative in exploring how the ICTR's practices project onto the "international community", which Redwood says symbolizes a "liberal world order". The book links this to the concept of "individualism, progress, equality and neutrality, and the universalism".[30] International tribunals were built upon the following *inter alia* basic principles that allowed them to govern effectively in the new, developing space; they were mandated to hold individuals accountable, ensure accused were presumed innocent, and ensure the court remained neutral, independent, and impartial in administering the cases, but these are seen as "liberal tools of governance".[31] Throughout the book, Redwood critiques the position that a

25 *Ibid*, p. 82.

26 *Ibid*, p. 87.

27 *Ibid*, p. 115.

28 *Ibid*, p. 119.

29 *Ibid*, p. 122.

30 *Ibid*, p. 138.

31 *Ibid*, p. 138.

case is decided by assessing the evidence in a rational and technical application of the law. He raises in this chapter the influence of gender and how it "undercut the archive's claims to neutrality and impartiality."[32] The archive is examined by asking i) how gender helped construct the archives objects; and ii) how gender affected how evidence was collected and processed for the archive.[33] Redwood does an impressive job walking the reader through the initial investigations into genocide and the pattern that emerged into "gender-sensitive jurisprudence", with sexual violence playing an integral part of the genocide.[34] Judges relied upon translators and interpreters to accurately render the majority of the evidence. Redwood argues that "the tribunal's decisions…[were] never based on wholly complete accounts of the witnesses' experience, nor were they based on what might be considered a culturally situated understanding of the genocide." Reminding us of the power imbalance, he argues that the judges made the witnesses adapt their way of testifying.[35] Redwood criticizes the ICTR's efforts at outreach and legacy, stating that they were "directed at informing rather engaging with the Rwandan population."[36] He refers to Vivienne Jabri's description of the ICTR outreach and legacy policy, stating that "undirected pastoral oversight is an important technique of colonial governance."[37]

The book's seventh chapter concludes with a focus on the newly established Residual Mechanism, which was created after the ICTR completed its mandate,[38] and its relationship to the archive. The author criticizes the rhetoric that emerged following the closure of the ICTR, not acknowledging the shift in approach in administering the cases. As an example, he refers to the judges taking more control of the proceedings. He focuses on the physical and digital archives, highlighting the challenges faced with the creation of the new facility. The new archive is transformed, representing "a re-entrenchment of the subordination of Rwanda's interests to those of the UN and the tribunal, as the rejection of Rwanda's demands."[39]

The book is extremely interesting and full of depth. The shortfall of relying on the post-colonial discourse and linking it continuously throughout the book to the tribunal's records is that the author skims over the fundamentals of what allows a judicial institution to function or govern independently, in a neutral manner and in a host state, such as Tanzania. He applies international relations, archival science, and post-colonial anthropology, but his insights neglect to address the law of international organizations. How do these organizations function outside the national system? What are the limitations in how they collect records, considering international organizations are not states but are parasitic and rely upon states to function? The organization's premises and records are inviolable, intended to be protected from outside interference, allowing them to function independently.

32 *Ibid*, p. 162.

33 *Ibid*, p. 145.

34 *Ibid*, p. 148.

35 *Ibid*, p. 157.

36 *Ibid*, p. 160.

37 *Ibid*, p. 160.

38 The ICTR's mandated was completed on 16 November 2016. The newly established institution was mandated to deal with the residual functions of the ICTY and ICTY after both the *Ad hoc* Tribunals closed. They share a Prosecutor and Registrar.

39 Redwood, p. 175.

The book provides historical context of where the term "archive" originates; however, the author does not provide the international tribunal's definitions to key terms, such as "archive" or "record". The author draws on administrative documents of the UN, but he does not refer to its archival policy upon which the *Ad hoc* Tribunals relied, especially in developing an understanding of what constitutes a record or its retention and destruction policy. He references the UN's position that "the records are of primarily legal and bureaucratic value."[40] If the author's intention was to only focus on the judicial case records, then it would have been essential for him to define what constituted the record for the purpose of the case. He loosely informs us that "trial case files" contain "pre-trial statements (only rarely available), indictments, trial transcripts (of both the trial and appeals hearings), trial exhibits, correspondence, motions, decisions and judgments (of both the trial and appeals hearings)."[41] The archives of judicial institutions extend beyond the judicial record book. In fact, the judges may produce their own historical records through their decision making and judgment rendering, which form part of the court filings, but the court is not the creator. The court is the neutral custodian of the exhibit tendered and admitted into the case file. The exhibits include a variety of different types of records. An exhibit, such as a witness statement, can be generated by the party in the proceedings, but it can also originate from a sovereign state, not a colonial power, and is provided through cross-border requests for assistance. For example, the internal government memorandum that proves linkage to an order issued by a senior member of the government to destroy a village is one that neither the court nor the prosecution creates. The records of an international court are multi-faceted and can be in the custody of different entities of the court during different stages of the proceedings. As such, if the goal is to go beyond the black letter law, it is important to describe the regulatory and administrative frameworks within which the institutions operate and are constrained instead of simply adopting the position that the often-prejudicial agenda with which the colonial powers operated continues to be applied by the new judicial institutions evolving and interpreting a developing body of law.

From a practitioner's perspective, judicial records produced and relied upon at international tribunals have a different historical value. They pose multi-faceted layers of challenges that may not necessarily be posed by criminal case files archived at national courthouses or records centers. Practitioners who are the custodians of the judicial record at international tribunals are required to ask multiple questions. They need to know what constitutes the official court record. What is the access policy for the official record? Who should have access to it? What is the retention and destruction policy? Who is the permanent legal custodian of the judicial record? What are the preservation and security provisions for ensuring permanent custody of more sensitive judicial records? Will those provisions adversely affect their accessibility for legacy and transparency considerations? The starting point is well defined in accordance with the legal framework within which the court operates and the UN and/or tribunal administrative issuances.

What would have enhanced the value of Redwood's work is a concise summary of the variances between the common and civil law system in producing and managing official archives. Overall, he treats law as one system, emphasizing that "law is not, and cannot be, interpreted simply as the application of rules, but is a reflection, and

40 *Ibid*, p. 174.

41 *Ibid*, p. 24.

enforcement, of a particular perspective."[42] Understanding the different legal systems and how they interact and blend at the international tribunals would have helped to better set the stage as to why certain decisions were made with regard to the judicial rulings on evidence admissibility. Redwood stops short of identifying the shift at the ICTR with judges taking more control of the courtroom as anchored in civil law systems. The tribunal methodology used to present evidence was influenced by the adversarial system with case adjudication relying neither on juries nor assessors, but only judicial bench trials. The decisions are then taken by professional judges. For example, the author correctly states that the ICTR relied heavily on witness testimony. However, at the ICTR, witness testimony triggered issues around credibility. There were allegations of witnesses giving false testimony and that purported eyewitness facts were not directly witnessed, but relied rather on second-hand reports shared by someone else. These are important distinctions for judges when determining evidentiary admissibility, triggering a higher level of caution and more acute standards of acceptance when assessing hearsay evidence.

Exhibits were not included in the case file in whole or totality. Each chamber was required to evaluate the evidence within the guidance provided by the rules of procedure and evidence. The evidence must be reliable; if the evidence is not reliable, it has no probative value and thus is inadmissible. The proceedings were driven by the parties, not the chamber. The chamber's role was to resolve the opposing views, which were heard through examination and cross-examination, as well as oral argument, while ensuring safeguards were in place and international fair trial standards were being protected. International trials must respect the rights of the accused, and judges must ensure a fair assessment of the evidence. The author states that "[t]he principle of a fair trial was a central organizing concept within the archive and was mobilized particularly by the defence as they contested the scope and nature of the prosecution's case."[43] The principle of fair trial is not an "organizing concept", but rather a fundamental principle to which judges must adhere. More specifically, although rooted in common law systems, the presumption of innocence is a human right enshrined in international human rights law since post-World War II, such as in the International Covenant on Civil and Political Rights. In international criminal law, the statutes state that the accused is presumed innocent until proven guilty before the tribunal. The burden is on the prosecutor to prove the guilt of the accused, not on the defence. The defence's role in the proceedings is to ensure the accused's rights are asserted and protected. In addition, the independence and impartiality of a judge is an important fair trial principle that should not be diluted. Court adjudication must be rooted in these principles to gain the trust of the affected community.

Redwood's book is not optimistic about the results of international criminal justice; neither, however, does he "condemn the value of international courts."[44] Redwood's preference is that the international tribunals align their liberal claims to the needs of the community. He affirms that the international tribunals, including the ICC, pose for themselves in the context of their governance role the fundamental question: "what type of community". He believes that the issues that emerged from his analysis of the ICTR archive could be addressed. However, by advocating this approach he tasks courts of law on the international level to expand the scope and substance of their

42 *Ibid*, p. 14.

43 *Ibid*, p. 56.

44 *Ibid*, p. 162.

adjudicative role to assess and factor into their deliberations the much broader and amorphous "needs" of the community. Thereby, he advocates for vastly expanding their already challenging mandate and to actively intrude their role into social policy determinations that are the traditional province of the executive and legislative functions of government. Such considerations are best left to other non-judicial governance models of post-conflict intervention that should be guided by the law.

## COMPETING INTERESTS

The author has no competing interests to declare.

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