

## Foreword

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FOREWORD

EVIDENCE AND PROOF AT THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR RWANDA

The International Criminal Tribunal for Rwanda (ICTR) has almost completed its mandate. At the time of writing, just one Appeals Chamber judgment remained to be issued. Thereafter, the ICTR's functions will be transferred to the Mechanism for the International Criminal Tribunals (MICT), which will try any fugitives, should they be apprehended, and will supervise sentences and any outstanding issues from the ICTR's activities.<sup>1</sup> In its twenty years of operation, the ICTR has sentenced 61 individuals, including high-profile politicians, media figures, and community leaders, for genocide, crimes against humanity and war crimes committed in the territory of Rwanda and neighbouring States, between 1 January 1994 and 31 December 1994. A further 14 individuals have been acquitted.

Attempting to establish the truth of what happened before, during and after the 100 horrific days in April 1994 when close to one million people were killed is an unthinkable large task. Unlike the Nuremberg tribunal, the ICTR was not aided by a complete set of records and documentary evidence to enable it to reach its decisions. Instead, it has relied principally on oral witness testimony to establish the events on which it adjudges, and this evidential context undoubtedly poses challenges for the Tribunal.

This series of articles examines some of those challenges and some of the achievements of the ICTR in the realm of fact-finding in greater detail. The symposium begins with a broad assessment of ICTR practice by Yvonne McDermott, who attempts to extract some general principles from the ICTR's approach to evidence and proof, based on its entire case record. She concludes that practice is somewhat inconsistent between differently constituted Chambers of the Tribunal. Different approaches to the evaluation of evidence can be extracted from different judgments, and there are issues surrounding both the quality and the quantity of evidence before the ICTR. McDermott draws some conclusions from this practice for the conduct of international criminal trials before the ICC and other international criminal tribunals.

In their article, Terence Anderson and William Twining introduce a graphical method for the analysis of evidence in trials, known as Wigmorean analysis. Anderson and Twining's earlier work<sup>2</sup> pioneered the method after it had fallen into obscurity for more than half a century. By today, universities in the United Kingdom, United States of America, Australia, New Zealand, Mexico and China offer full or partial courses

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<sup>1</sup> Including the revocation of any transfers to domestic jurisdictions, where required. See e.g. *Prosecutor v. Uwinkindi*, (Decision on Additional Request for Revocation of an Order Referring a Case to the Republic of Rwanda) MICT-12-25 (5 June 2015).

<sup>2</sup> T. Anderson and W. Twining, *Analysis of Evidence: How to Do Things with Facts based on Wigmore's Science of Judicial Proof* (Chicago: Little, Brown & Co., 1991); reprinted as T. Anderson, D. Schum and W. Twining, *Analysis of Evidence* (2<sup>nd</sup> edn., Cambridge: Cambridge University Press, 2005).

that teach students the basics of ‘Modified Wigmorean Analysis’.<sup>3</sup> In their article, Anderson and Twining conduct a Modified Wigmorean Analysis of the evidence in the *Muvunyi* case relating to one key fact – namely, what date an alleged meeting took place. The authors argue that their microscopic analysis of the evidence on this fact casts doubt over the conviction of the accused for allegedly inciting genocide at that meeting.

Nancy Combs also builds upon her previously published research in her piece. In an earlier work,<sup>4</sup> Combs uncovered major inconsistencies between witnesses’ pre-trial statements and their testimony in court. With a particular focus on the ICTR, her article in this symposium recaps on some of her book’s main findings and updates them with references to new cases. Combs uncovers an emerging trend towards recognition of inconsistencies in the ICTR’s judgments.

Oliver Windridge’s article discusses the ICTR’s approach to inferential reasoning. Given that the ICTR can base a conviction on circumstantial evidence only where guilt is the ‘only reasonable inference’ that can be drawn from that evidence, Windridge attempts to unpack the circumstances in which an inference is the ‘only reasonable’ one that may be drawn. Windridge uncovers a largely hidden layer of what he dubs ‘intermediate inferences’ that lie between evidence and ultimate conclusions. He argues that the ICTR could benefit from articulating and exploring those intermediate inferences further.

The majority of the papers in this symposium issue were presented at a conference at Bangor University, UK in 2014. We would like to thank the authors and all of those present for their contributions, feedback, and lively discussion. Special thanks are owed to the British Academy, for a Quantitative Skills Acquisition Award that enabled Yvonne McDermott’s research into this area. We would also like to extend a particular word of thanks to *Criminal Law Forum*’s managing editor, Joe Powderly, for his enthusiasm for, and organisation of, this symposium. Together with its sister symposium, published in volume 13, issue 3, of the *Journal of International Criminal Justice* in July 2015, this symposium should be seen as marking a new and exciting direction for international criminal law scholarship. We hope that these papers will spark a debate on the nature of fact-finding in the context of international criminal trials; the means in which the evidential hurdles faced by the tribunals can be overcome, and the legacy of the ICTR and its contemporaries in the areas of evidence and proof.

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<sup>3</sup> P. Roberts, ‘The Priority of Procedure and the Neglect of Evidence and Proof: Facing Facts in International Criminal Law’ (2013) 13 *Journal of International Criminal Justice* 479, 494.

<sup>4</sup> N. Combs, *Fact-finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge: Cambridge University Press, 2010).