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## **THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA**

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# Chapter Nine

## The International Criminal Tribunal for Rwanda

Robert D. Sloane\*

### A. Introduction

Between April 6, 1994, when an unknown agent shot down the plane carrying Rwanda's former President Juvenal Habyarimana, and early July 1994, when the Rwanda Patriotic Front (RPF) commanded by General Paul Kagame, now Rwanda's president, consolidated its hold on power, the "Hutu Power" movement, *Interahamwe*, and interim government of Rwanda systematically raped, maimed, and massacred somewhere between 500,000 and 800,000 Tutsi and moderate Hutu.<sup>1</sup> It was "the most unambiguous case of genocide since the [Holocaust]."<sup>2</sup> Throughout the genocide, the United Nations did little except to extend and adjust the mandate of the U.N. Assistance Mission in Rwanda (UNAMIR), which had been established the previous year to monitor implementation of the Arusha Accords of August 4, 1993,<sup>3</sup> and (belatedly) to impose a general arms embargo on Rwanda.<sup>4</sup> Only the military success of the RPF put an end to the genocide.<sup>5</sup> Kofi Annan, who had

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<sup>1</sup> See Alison Des Forges, *Leave None to Tell the Story: Genocide in Rwanda* (New York: Human Rights Watch, 1999), pp. 1, 6, 15–16; I. Carlsson, "The UN Inadequacies," 4 *J. Int'l Crim. Just.* 837 (2005), p. 841.

<sup>2</sup> Philip Gourevitch, *We Wish to Inform You That Tomorrow We Will be Killed with our Families* (New York: Farrar, Straus and Giroux 1999), p. 170.

<sup>3</sup> See des Forges, *Leave None to Tell the Story*, *op. cit.*, pp. 123–25; see, e.g., S.C. Res. 918, U.N. Doc. S/RES/918 (May 17, 1994).

<sup>4</sup> S.C. Res. 918, U.N. Doc. S/RES/918 (May 17, 1994); see generally Roméo Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (New York: Carroll & Graf Publishers, 2003).

<sup>5</sup> Des Forges, *Leave None to Tell the Story*, *op. cit.*, p. 13.

been Chief of Peacekeeping Operations at the time and served as Secretary-General from 1997 to 2006, acknowledged both that he personally “could have done more” and that the international community bore guilt for “sins of omission.”<sup>6</sup>

### B. *Establishment of the ICTR*<sup>7</sup>

On July 1, 1994, in the midst of the genocide’s final days, the U.N. Security Council asked the Secretary-General to establish an expert commission to investigate the numerous reports of systematic, widespread violations of international human rights and humanitarian law in Rwanda.<sup>8</sup> On November 8, 1994, the Security Council, stressing the commission’s findings and other credible evidence, and “convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of humanitarian law would...contribute to the process of national reconciliation and to the restoration and maintenance of peace,” passed Resolution 955, establishing the ICTR to prosecute “persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda...between 1 January 1994 and 31 December 1994.”<sup>9</sup> The Council annexed the ICTR’s statute to this resolution, defining the scope of its jurisdiction and the Tribunal’s general structure.<sup>10</sup>

By establishing the ICTR – like the institutionally-related *ad hoc* international criminal Tribunal for the former Yugoslavia (ICTY), which had been created about eighteen months earlier<sup>11</sup> – through an exercise of its Chapter VII powers, the Security Council effectively required all U.N. member States to cooperate with the ICTR.<sup>12</sup> Based on considerations of efficiency, safety, justice, economy, and fairness, the Council later decided to establish the Court’s seat in Arusha, Tanzania, rather than Kigali or elsewhere in

<sup>6</sup> “UN Chief’s Rwanda Genocide Regret,” *BBC News*, Mar. 26, 2004.

<sup>7</sup> The website of the Tribunal is: <http://www.unictr.org/>.

<sup>8</sup> S.C. Res. 935, U.N. Doc. S/RES/935 (July 1, 1994).

<sup>9</sup> S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994).

<sup>10</sup> Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, Between Jan. 1, 1994 and Dec. 31, 1994. S.C. Res. 955, Annex, U.N. Doc. S/RES/955 (1994) (hereinafter ICTR Statute).

<sup>11</sup> S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

<sup>12</sup> See U.N. Charter Arts. 25, 39, 41, 48–49.

Rwanda.<sup>13</sup> This may well have been prudent and appropriate for the reasons stated by the Council. But it has led to a relatively widespread, negative perception among Rwandans, many of whom see the ICTR as remote, foreign, and insufficiently responsive to the interests of the victims. Contributing to this perception, the ICTR decided from the outset to focus its limited resources on the major architects of the genocide rather than the literally thousands, if not hundreds of thousands, of rank-and-file perpetrators. The latter would be tried by Rwanda's national courts or, as matters developed, by the traditional Rwandan dispute-resolution process known as *gacaca*.<sup>14</sup> Because the ICTR's statute, consistent with contemporary international human rights standards, does not authorize the death penalty, many perceived a "perverse disparity" in the fact that

the elites who orchestrated the genocide [would] escape a potential death sentence and... serve their sentences in facilities that conform to modern international human rights standards, while the (presumably less culpable) rank and file [would] languish for years in overcrowded jails, awaiting trial in Rwanda's severely backlogged national system – only to then face death or imprisonment in Rwandan prisons that fall far short of those standards.<sup>15</sup>

In fact, Rwanda, which coincidentally held one of the rotating, non-permanent seats on the Security Council at the time, voted against the ICTR's creation in large part because, unlike Rwanda's national courts, the ICTR would not be authorized to impose the death penalty.<sup>16</sup>

### C. Organization of the ICTR

The ICTR, like the ICTY, consists of three organs: (1) the Chambers, (2) the Office of the Prosecutor, and (3) the Registry.<sup>17</sup>

<sup>13</sup> S.C. Res. 977, U.N. Doc. S/RES/977 (Feb. 22, 1995); see also S.C. Res. 955, ¶ 6, U.N. Doc. S/RES/955 (Nov. 8, 1994).

<sup>14</sup> See William A. Schabas, "Genocide Trials and *Gacaca* Courts," 3 *J. Int'l Crim. Just.* 87 (2005).

<sup>15</sup> Robert D. Sloane, "Sentencing for the 'Crime of Crimes': The Evolving 'Common Law' of the International Criminal Tribunal for Rwanda," 5 *J. Int'l Crim. Just.* 713 (2007), pp. 719–20; see also William A. Schabas, "Sentencing By International Tribunals: A Human Rights Approach," 7 *Duke J. Comp. & Int'l L.* 461 (1997), p. 508; Madeline Morris, "The Trials of Concurrent Jurisdiction: The Case of Rwanda," 7 *Duke J. Comp. & Int'l L.* 349 (1997), p. 364; see generally Jens David Ohlin, "Applying the Death Penalty to Crimes of Genocide," 99 *Am. J. Int'l L.* 747 (2005).

<sup>16</sup> *Routledge Handbook of International Criminal Law* (William A. Schabas & Nadia Bernaz eds., New York: Routledge, 2011), p. 58.

<sup>17</sup> ICTR Statute Art. 10.

### 1. *Chambers*

The ICTR has three Trial Chambers. Each consists of a presiding judge and two other judges.<sup>18</sup> The General Assembly elects the judges for four-year renewable terms.<sup>19</sup> It elected the ICTR's first judges on May 25, 1995.<sup>20</sup> While the Tribunal initially consisted of two Trial Chambers and six judges, the size of its docket led the Security Council to add an additional Trial Chamber in 1998. Today, the ICTR has nine permanent judges. Eighteen *ad litem* judges, authorized by the Security Council in 2003,<sup>21</sup> assist the nine permanent judges. Unlike their elected brethren, the *ad litem* judges are appointed by the Secretary-General. In the interest of a consistent jurisprudence, the ICTR shares its Appeals Chamber, which sits in The Hague, with the ICTY. Trial Chambers, in contrast, sit at the Tribunal's official seat in Arusha, Tanzania.<sup>22</sup>

### 2. *The Office of the Prosecutor*

The Office of the Prosecutor bears responsibility for investigating allegations, charging the defendants, and prosecuting them to verdict and, if necessary, on appeal. Indictments must be confirmed by one of the Trial Chamber judges based on a judicial finding that the Prosecutor has made out "a prima facie case."<sup>23</sup> Initially, the ICTR and the ICTY shared not only an Appeals Chamber, but a Prosecutor, in the interest of a common prosecutorial policy among the two *ad hoc* Tribunals. But based on both the ICTR's docket and a perception "that the ICTR was the 'poor cousin' of the ICTY,"<sup>24</sup> the Security Council modified this state of affairs in 2003, and the ICTR now has its own full-time designated Prosecutor.<sup>25</sup>

### 3. *The Registry*

The Registrar is appointed for a four-year, renewable term by the Secretary-General in consultation with the ICTR's President.<sup>26</sup> The Registry's staff

<sup>18</sup> ICTR Statute Art. 11(a).

<sup>19</sup> ICTR Statute Art. 12.

<sup>20</sup> See G.A. Res. 51/399, ¶ 7, U.N. Doc. A/RES/51/399 (Sep. 24, 1996).

<sup>21</sup> S.C. Res. 1431, U.N. Doc. A/RES/1431 (2002).

<sup>22</sup> ICTR Statute Art. 12(2).

<sup>23</sup> ICTR Statute Art. 18.

<sup>24</sup> Robert Cryer, et al., *An Introduction to International Criminal Law and Procedure* (New York: Cambridge University Press, 2007), p. 113.

<sup>25</sup> S.C. Res. 1503, U.N. Doc. A/RES/1503 (Aug. 28, 2003).

<sup>26</sup> ICTR Statute Art. 16.

provide administrative support to the other two organs,<sup>27</sup> including, for example, protection of witnesses, “administration of the free legal aid system, and the management of the UN Detention facility in Arusha.”<sup>28</sup> The Registry also serves as a liaison to the press.

#### D. Jurisdiction

The ICTR has subject matter jurisdiction (jurisdiction *ratione materiae*) over genocide, crimes against humanity, and war crimes, which, in the context of the Rwandan genocide and related civil war, include only violations of Common Article 3 to the Geneva Conventions of 1949 or of Additional Protocol II of 1977.<sup>29</sup> Rwanda is a party to both treaties. The ICTR’s temporal jurisdiction (jurisdiction *ratione temporis*), as set forth in Resolution 955, covers only the one-year period in which the genocide took place, that is, crimes within the subject matter jurisdiction of the ICTR perpetrated between January 1, 1994, and December 31, 1994.<sup>30</sup> The Tribunal’s personal jurisdiction (jurisdiction *ratione personae*), finally, extends to any person who allegedly committed one of the statutorily enumerated crimes in Rwanda, as well as to all Rwandan citizens who allegedly committed such crimes in the territory of neighbouring States, in 1994.<sup>31</sup> The ICTR enjoys *primacy* in relation to national court proceedings, meaning that while it exercises concurrent jurisdiction with national courts, given the prohibition on double jeopardy, or *ne bis in idem*, as that principle is known in international law,<sup>32</sup> the ICTR may “[a]t any stage of the procedure . . . formally request national courts to defer to its competence.”<sup>33</sup> Because the Security Council established the ICTR pursuant to its Chapter VII powers, member States are legally obliged to comply with any such request.

<sup>27</sup> Cryer et al., *An Introduction to International Criminal Law and Procedure*, *op. cit.*, pp. 104, 113.

<sup>28</sup> *The Oxford Companion to International Criminal Justice* (Antonio Cassese ed.) (New York: Oxford University Press, 2009), p. 355.

<sup>29</sup> See, e.g., Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War Art. 3, Aug. 12, 1949, 75 U.N.T.S. 287 (hereinafter Common Article 3); and Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 (hereinafter Additional Protocol II).

<sup>30</sup> S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994).

<sup>31</sup> *Id.* Art. 1.

<sup>32</sup> *Id.* Art. 9.

<sup>33</sup> *Id.* Art. 8.

In relation to the enumerated crimes set forth in Articles 2 through 4 of the Statute, viz., genocide, crimes against humanity, and war crimes, individual criminal responsibility under international law may be incurred by any defendant who “planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation or execution of a crime.”<sup>34</sup> Article 6 also (1) vitiates any head of State or other immunity that might otherwise attach under customary international law to particular governmental officials; (2) provides for superior (command) responsibility based on a finding that the defendant “knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof”; and (3) makes clear that a subordinate’s plea that he “acted pursuant to an order of... a superior shall not relieve him of criminal responsibility,” though it may be taken into account at sentencing.<sup>35</sup>

#### E. *Procedural Overview*

Article 14 of the ICTR Statute provides that “[t]he judges of the [ICTR] shall adopt... the rules of procedure and evidence for the conduct” of all phases of the trial proceedings, up to and including appeals. Pursuant to that authority, in 1995, the ICTR adopted Rules of Procedure and Evidence (RPE), which it has amended periodically.<sup>36</sup> The Statute, as augmented by both the RPE and procedural case law, establishes the contours of the ICTR’s trial process.

Proceedings begin when the Prosecutor decides to investigate allegations received from any of a variety of sources, including governments, intergovernmental organizations, U.N. organs, and non-governmental organizations (NGOs).<sup>37</sup> The Prosecutor’s staff may question witnesses, victims, and suspects, collect evidence, and seek documentary evidence or other assistance from States.<sup>38</sup> During the investigation, suspects enjoy the right to counsel.<sup>39</sup> If the Prosecutor finds a “sufficient basis to proceed,” then he prepares an indictment concisely stating the facts and allegations, which he transmits to the Trial Chamber for confirmation.<sup>40</sup> Once the indictment has been

<sup>34</sup> *Id.* Art. 6(1).

<sup>35</sup> *Id.* Art. 6(3).

<sup>36</sup> *Id.* Art. 14; see also *Oxford Companion to International Criminal Justice*, *op. cit.*, pp. 355, 495–97.

<sup>37</sup> ICTR Statute Art. 17(1).

<sup>38</sup> *Id.* Art. 17(2).

<sup>39</sup> *Id.* Art. 17(3); see also RPE Rule 42.

<sup>40</sup> ICTR Statute Art. 17(4).

confirmed (and assuming custody of the accused), the formal trial process begins. Articles 19 and 20 of the ICTR Statute guarantee fundamental due process rights to accused persons, including the right to a “fair and expeditious” trial, to be informed of the nature of the charges, and to equality before the law.<sup>41</sup> The ICTR Statute also provides that the any hearings “shall be public,” subject to exceptions for good cause as set forth in the RPE.

Under the RPE, the accused enjoys the right to use his or her own language, though the official languages of the Tribunal are French and English.<sup>42</sup> Once transferred to the Tribunal’s custody, the accused must be brought before the Trial Chamber “without delay” to be charged formally, and at that time, he will be asked to plead guilty or not guilty to each charge in the indictment. In the former case, the Trial Chamber must satisfy itself that the plea of the accused is “informed,” “voluntary,” and “unequivocal,” as well as supported by “sufficient facts [establishing] the crime and the participation of the accused in it.”<sup>43</sup> At all times, the accused enjoys the right to be represented by counsel.

If the accused pleads not guilty, the trial process, based on a mixed adversarial-inquisitorial model, continues to a discovery phase. The Prosecutor must disclose the existence of exculpatory evidence “as soon as practicable,”<sup>44</sup> while the defense must notify the Prosecutor of any intent to rely on an alibi or other special defense, including “diminished or lack of mental responsibility.”<sup>45</sup> Defense counsel also has a reciprocal disclosure obligation to make available to the Prosecutor “any books, documents, photographs” or other evidence that it intends to introduce at trial. Each party must apprise the other if new evidence or information emerges.<sup>46</sup>

At the request of either party or *proprio motu*, a judge or the Trial Chamber may issue any orders, such as subpoenas, summonses, warrants, and transfer orders, which may be required for the conduct of the trial. The RPE set forth a variety of preliminary, *in limine*, and other pretrial motions that may be made, including objections to the Tribunal’s jurisdiction or alleged defects in the indictment, and applications for severance in the event of joined proceedings.<sup>47</sup> Pretrial motions will be heard and decided by a judge of the Trial

<sup>41</sup> See ICTR Statute Arts. 19–20.

<sup>42</sup> RPE Rule 3.

<sup>43</sup> *Id.* Rule 62.

<sup>44</sup> *Id.* Rule 68; see also *id.* Rule 67(A)(i).

<sup>45</sup> *Id.* Rule 67(A)(ii).

<sup>46</sup> *Id.* Rule 67.

<sup>47</sup> See *id.* Rule 72.

Chamber; there is no right to an interlocutory appeal from decisions on such motions.<sup>48</sup>

The Trial Chamber “shall” hold a pretrial conference before trial begins, at which it (or one of its judges) may request, *inter alia*, a pretrial brief, admissions or a statement of other undisputed matters, a list of the witnesses the Prosecutor intends to call, a summary of the facts to which those witnesses will testify, and a list of exhibits.<sup>49</sup> The Trial Chamber also “may” hold a comparable conference before the defense presents its case.<sup>50</sup> Rule 74 vests the Trial Chambers with discretion to receive and consider submissions from *amicus curiae*.<sup>51</sup> Proceedings, in general, will be held in public, except as required for “public order or morality,” “[s]afety, security, or non-disclosure of the identity of a victim or witness,” or under the catch-all rubric of “protection of the interests of justice.”<sup>52</sup>

The trial proceedings generally follow the model of an adversarial criminal trial. After opening statements, each party presents its case (unless the defense chooses to decline to put on an affirmative defense), putting on evidence and examining witnesses in the order specified by the RPE.<sup>53</sup> Each witness is subject to examination, cross-examination, and re-examination, as well as to judicial questioning,<sup>54</sup> after which the parties present their closing arguments.<sup>55</sup>

The Trial Chamber deliberates in private, and a conviction requires that a majority of the three judges be “satisfied that guilt has been proved beyond reasonable doubt.”<sup>56</sup> While the RPE initially provided for a distinct sentencing phase, it “abandoned sentencing hearings early in its existence based on considerations of expedience and cost.”<sup>57</sup> Today, a conviction must be accompanied by the determination of sentence as to each count,<sup>58</sup> while in the event of acquittal, the accused must be released forthwith.<sup>59</sup> The Tribunal’s judgments “shall be pronounced in public,” accompanied, if applicable, by “[s]eparate or dissenting opinions.”<sup>60</sup>

<sup>48</sup> *Id.* Rule 73(B).

<sup>49</sup> *Id.* Rule 73*bis*.

<sup>50</sup> *Id.* Rule 73*ter*.

<sup>51</sup> *Id.* Rule 74.

<sup>52</sup> *Id.* Rule 79.

<sup>53</sup> *Id.* Rule 85.

<sup>54</sup> *Id.* Rule 85(B).

<sup>55</sup> *Id.* Rule 86.

<sup>56</sup> *Id.* Rule 87.

<sup>57</sup> Sloane, “Sentencing for the ‘Crime of Crimes,’” *op. cit.*, p. 734.

<sup>58</sup> RPE Rule 87.

<sup>59</sup> *Id.* Rule 99.

<sup>60</sup> *Id.* Rule 88.

The Tribunal may sentence the accused to incarceration for a term of either life or years for each count, taking into account aggravating and mitigating circumstances, as well as “[t]he general practice regarding prison sentences in the courts of Rwanda,”<sup>61</sup> and it will also indicate whether distinct sentences shall be served separately or concurrently.<sup>62</sup> Sentences shall be served in Rwanda or any other “State designated by the Tribunal from a list” of States willing to accept convicts from the ICTR.<sup>63</sup> Orders of restitution and victim compensation may also be issued.<sup>64</sup> Finally, within thirty days of judgment, either party may file a notice of appeal.<sup>65</sup>

#### F. Completion Strategy and Rule 11bis

In 2000, the ICTY proposed a completion strategy, whereby it would finish all pending investigations and issue any other indictments by December 2004, complete all trials by December 2008, and finish all appeals by December 2010.<sup>66</sup> The Security Council approved the plan and encouraged the ICTR to develop one based on similar principles. The ICTR’s President (and Judge) Eric Mose, who prepared the strategy, submitted it to the Security Council in 2003,<sup>67</sup> and the Security Council officially adopted the strategy by Resolution 1534 on March 26, 2004.<sup>68</sup> The Council urged the Tribunal to concentrate its indictments on the highest-level defendants and to transfer lower-level perpetrators to national jurisdictions pursuant to Rule 11bis of the Tribunal’s rules of procedure.<sup>69</sup>

Under Rule 11bis, the Prosecutor may refer a case to any State with a basis to exercise jurisdiction (including universal jurisdiction) provided only that the Tribunal can “satisfy itself that the accused will receive a fair trial” and that the death penalty will not be imposed.<sup>70</sup> The ICTR added this transfer process to the RPE as one way to help clear its backlog of cases, which, it seems clear, will not be completed by 2013, the date by which the ICTR is

<sup>61</sup> *Id.* Rule 101.

<sup>62</sup> *Id.* Rule 101(C).

<sup>63</sup> *Id.* Rule 103(A).

<sup>64</sup> *Id.* Rules 105–06.

<sup>65</sup> *Id.* 107; *see generally id.* Pt. VII.

<sup>66</sup> C. Aptel, “Closing the U.N. International Criminal Tribunal for Rwanda: Completion Strategy and Residual Issues,” 14 *New Eng. J. Int’l & Comp. L.* 169 (2008), p. 171.

<sup>67</sup> *Id.*

<sup>68</sup> S.C. Res. 1534, U.N. Doc. S/RES/1534 (Mar. 26, 2004).

<sup>69</sup> *Id.* ¶ 5.

<sup>70</sup> RPE Rule 11bis.

supposed to wrap up its work. When the Prosecutor requests a transfer, the Tribunal holds a hearing to decide whether the transfer is acceptable. It considers, among other issues, (1) whether the defendant will receive a fair trial, (2) the general competence of the proposed national jurisdiction's judiciary, including "whether it has a legal framework which criminalizes the alleged conduct of the accused and provides an adequate penalty structure,"<sup>71</sup> (3) the rights of the defendant, including the presumption of innocence, the right to a speedy trial, the right to counsel, and the existence *vel non* of an adequate witness and victim protection program, and (4) that the death penalty will not be imposed.<sup>72</sup>

Rwanda has tried to align its national court system with these requirements, including by passing a "transfer law" to create extra guarantees and procedures applying only to the ICTR-transferred cases.<sup>73</sup> Before 2007, however, the ICTR would not transfer cases to Rwanda's national judicial system because Rwanda retained the option of capital punishment. After Rwanda abolished the death penalty in July 2007, several transfer requests were immediately submitted, but the ICTR held that the possibility of prolonged life imprisonment in isolation, too, should preclude a transfer.<sup>74</sup> Concerns have also been raised about insufficient witness protection – despite the existence of such a program.<sup>75</sup> Transfers have, however, been approved to the court systems of France and the Netherlands.<sup>76</sup>

Still, it seems clear at the date of this writing that the completion targets remain unrealistic. The Security Council has authorized successive extensions. According to the ICTR's latest report on its completion strategy to the Security Council, all but one trial-level case would be completed by the end of 2011 and all appeals by 2013. But the President of the ICTR, Judge Dennis

<sup>71</sup> Prosecutor v. Hategekimana, Case No. ICTR-00-55B-R11bis, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis, ¶ 4 (Dec. 4, 2008).

<sup>72</sup> Jesse Melman, "The Possibility of Transfer(?): A Comprehensive Approach to the International Criminal Tribunal for Rwanda's Rule 11bis to Permit Transfer to Rwandan Domestic Courts," 79 *Fordham L. Rev.* 1271 (2010), pp. 1290–92.

<sup>73</sup> Law No. 11/2007 of Mar. 16, 2007, Official Gazette of the Republic of Rwanda, Mar. 19, 2007.

<sup>74</sup> Hategekimana, *op. cit.*, ¶¶ 31–38.

<sup>75</sup> *Id.* ¶¶ 26–30.

<sup>76</sup> Prosecutor v. Munyeshyaka, Case No. ICTR-2005-87-I, Decision on the Prosecutor's Request for the Referral of Wenceslas Munyeshyaka's Indictment to France (Nov. 20, 2007); Prosecutor v. Bucyibaruta, Case No. ICTR-2005-85-I, Decision on Prosecutor's Request for Referral of Laurent Bucyibaruta's Indictment to France (Nov. 20, 2007); Prosecutor v. Bagaragaza, Case No. ICTR-2005-86-11bis, Decision on Prosecutor's Request for Referral of the Indictment to the Kingdom of the Netherlands, PP 9–12 (Apr. 13, 2007).

Byron, has warned that “depending upon the staffing situation . . . we cannot exclude further delays in judgment delivery.”<sup>77</sup>

### G. Significant Case Law

As noted, the ICTR decided very early on to focus on the high-level orchestrators of the genocide rather than rank-and-file perpetrators. This tendency became even more pronounced in recent years, given pressure from the Security Council to wind up the ICTR’s work and consequent encouragement to focus only on high-level cases, while transferring the others to competent national courts.<sup>78</sup> In part for that reason, much of its case law deals with important issues of first impression. The following brief survey can only begin to scratch the surface.

#### 1. *Akayesu*<sup>79</sup>

Jean-Paul Akayesu served as the bourgmestre of the Taba commune from April 1993 through June 1994. In that capacity, he controlled the police and bore responsibility for executing the commune’s laws, subject to the prefect’s supervisory authority.<sup>80</sup> The *Akayesu* decision is significant for at least three reasons. First, it marked the ICTR’s first conviction for genocide. Second, it resolved for the ICTR, albeit controversially, one of the most puzzling legal issues in the definition of genocide: whether victims constitute a distinct ethnic group (or other protected, enumerated group) only if they constitute, in some sense, an *objectively* existing ethnic group or, in contrast, if it suffices that the persecutor *subjectively* perceives the victims as members of a particular ethnic group. Third, in *Akayesu*, the ICTR recognized for the first time that rape could be a modality, or component, of genocide, as well as a crime against humanity. The first of these points requires little elaboration, except to note that *Akayesu* also marked the first conviction for genocide by any international tribunal, not just the ICTR, since World War II.

<sup>77</sup> Judge Dennis Byron, Address to the United Nations Security Council: Report on the Completion Strategy of the ICTR, (Dec. 6, 2010), <http://www.unictr.org/> (last visited Mar. 22, 2011).

<sup>78</sup> S.C. Res. 1534, U.N. Doc. S/RES/1534 ¶¶ 5–6 (Mar. 26, 2004).

<sup>79</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Sep. 2, 1998).

<sup>80</sup> *Id.* ¶¶ 3–4.

a. *Subjective Standard*

The ICTR Statute, which reproduces the definition of genocide in the Genocide Convention verbatim,<sup>81</sup> defines the crime as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members in a group;
- (b) Causing serious bodily harm or mental harm to members in a group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group; [and]
- (e) Forcibly transferring children of the group to another group.”

The ICTR convicted *Akayesu* of genocide and crimes against humanity, including, in particular, acts of extermination, murder, torture, and rape.<sup>82</sup> During the genocide, more than 2000 Tutsis in Taba were killed by the Hutu *génocidaires*. *Akayesu* did nothing to prevent the killings;<sup>83</sup> to the contrary, he facilitated and encouraged them.

At first blush, he would seem clearly to be guilty of genocide under the ICTR Statute. Yet the crime’s definition presupposes a unique mental state: the *specific intent*, or *dolus specialis*, to destroy one of the enumerated protected groups *as such*.<sup>84</sup> The ICTR defined an “ethnic group” in the judgment as “a group whose members share a common language or culture.”<sup>85</sup> By the application of that definition, the Tutsi, the relevant ethnic group in the Rwandan genocide, and the Hutu, the *génocidaires*, do not belong to distinct ethnic groups.<sup>86</sup> They share the same language, *Kinyarwanda*, and general cultural traditions. In fact, the distinction between Hutu and Tutsi had originally been based on family lineage, not ethnicity, and individuals could be reclassified based on their socioeconomic status or marriage.<sup>87</sup>

The Trial Chamber, however, decided that it would be appropriate to look to the Genocide Convention’s *travaux préparatoires* (drafting history) and, purportedly on this basis, concluded that “any group, similar to the four [enumerated] groups in terms of its stability and permanence, should also be

<sup>81</sup> Convention on the Prevention and Punishment of the Crime of Genocide Art. 2, Dec. 9, 1948, 78 U.N.T.S. 277.

<sup>82</sup> *Akayesu*, *op cit.*, ¶ 8.

<sup>83</sup> *Id.* ¶ 12.

<sup>84</sup> *See id.* ¶¶ 517–18.

<sup>85</sup> *Id.* ¶ 513.

<sup>86</sup> *Id.* ¶ 513.

<sup>87</sup> *Id.* ¶ 81.

included [in the definition of genocide].”<sup>88</sup> It reasoned that, by 1994, Rwandans deemed the Tutsi a distinct “ethnic” group, as reflected, for example, in the official classifications on their identity cards. Witnesses also readily identified themselves before the Tribunal as being a member of one or the other ethnic group. The Tutsis therefore constituted a “stable and permanent group,” all of which, according to the Trial Chamber, fall within the scope of the definition of genocide.<sup>89</sup> As Payam Akhavan, among others, subsequently pointed out, this reasoning is deeply problematic, in part because “[t]here is no support whatsoever for the proposition that the drafters of the Convention intended anything but an exhaustive listing of the protected groups.”<sup>90</sup>

Later cases thus took slightly different, and less problematic, approaches. In *Prosecutor v. Kayishema*,<sup>91</sup> the Trial Chamber fit the Tutsis into the ethnic group category by defining “ethnic group” very broadly, viz., as a group “whose members share a common language and culture; or, a group which distinguishes itself, as such (self identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others).”<sup>92</sup> In *Prosecutor v. Rutaganda*, the Trial Chamber took yet another approach, stressing that the identity of the enumerated groups depended, in part, on context and should be construed, “in essence, [as] a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction. In some instances, the victim may perceive himself/herself as belonging to the said group.”<sup>93</sup> But consistent with the *travaux*, the *Rutaganda* court excluded political and economic groups from the ambit of the Genocide Convention’s definition. It described the latter as “‘mobile groups’ which one joins though individual, political commitment,” affirming the general conclusion that ethnic groups should be *relatively* stable and permanent.<sup>94</sup> While the ICTR ultimately rejected the sheer breadth of the *Akayesu* Trial Chamber’s standard, it retained the fundamental principle that the self- or other-identification of an ethnic group may suffice to satisfy Article 2’s requirement in this regard – even if anthropologists, for example, would not describe two groups as distinct ethnic

<sup>88</sup> *Id.*, at ¶ 701.

<sup>89</sup> *Id.*, at ¶ 702.

<sup>90</sup> Payam Akhavan, “*The Crime of Genocide in the ICTR Jurisprudence*,” 3 *J. Int’l Crim. Just.* 989 (2005), p. 1001.

<sup>91</sup> *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-T, Judgment (May 21, 1999).

<sup>92</sup> *Id.* ¶ 98; see also Akhavan, “*The Crime of Genocide in the ICTR Jurisprudence*,” *op. cit.*, p. 1001.

<sup>93</sup> *Prosecutor v. Rutaganda*, Case No. ICTR 96–3, Judgment, ¶ 56 (Dec. 6, 1999).

<sup>94</sup> *Id.* ¶ 57.

groups in a purely scientific, objective sense (as is true in the case of the Hutu and Tutsi).

b. *Rape as a Modality of Genocide*

*Akayesu* also merits special attention because it marked the first conviction for rape as a crime against humanity and the first case in which the ICTR conceptualized rape as a potential component or modality of genocide.<sup>95</sup> While rape is a crime against humanity under the ICTR Statute,<sup>96</sup> classifying it as a modality of genocide remains significant, both expressively and because it may be more likely to trigger early intervention on the part of other States in future circumstances of mass atrocity.<sup>97</sup> The Trial Chamber found, in particular, that “rape and sexual violence” could be methods of inflicting “serious bodily and mental harm” within the meaning of Article 2 of the Genocide Convention (and the ICTR Statute) and therefore could “constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such.”<sup>98</sup>

Reaching this conclusion required the Trial Chamber first to define rape, for until then, it had not been defined for purposes of international criminal law. Finding that the crime “cannot be captured in a mechanical description of objects and body parts,” the Chamber instead analogized rape roughly to the definition of torture in the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>99</sup> which similarly “does not catalogue specific acts in its definition of torture, focusing rather on the conceptual frame work of State sanctioned violence.”<sup>100</sup> It then defined rape broadly as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”<sup>101</sup> To be a modality of perpetrating crimes against humanity, of course, it must also be (1) part of a widespread or systematic attack; (2) on a civilian population; (3) on certain

<sup>95</sup> Stephanie K. Wood, “A Woman Scorned for the ‘Least Condemned’ War Crime: Precedent and Problems with Prosecuting Rape as a Serious War Crime in the International Criminal Tribunal for Rwanda,” 13 *Colum. J. Gender & L.* 274, 277 (2004).

<sup>96</sup> ICTR Statute Art. 3(g).

<sup>97</sup> Alexandra A. Miller, “From the International Criminal Tribunal for Rwanda to the International Criminal Court: Expanding the Definition of Genocide to Include Rape,” 108 *Penn St. L. Rev.* 349, 362 (2003).

<sup>98</sup> Prosecutor v. *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 731 (Sep. 2, 1998).

<sup>99</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Art. 1(1), G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51), at 197, U.N. Doc. A/39/51 (1984); see *Akayesu*, *op. cit.*, ¶¶ 596–97.

<sup>100</sup> *Akayesu*, *op. cit.*, ¶ 597.

<sup>101</sup> *Id.* ¶ 598.

catalogued discriminatory grounds, namely: national, ethnic, political, racial, or religious grounds.”<sup>102</sup> The ICTR also noted that 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.”<sup>103</sup>

The definition’s use of general terms like “physical invasion” and its acknowledgement that sexual assaults do not require direct physical force make it relatively progressive.<sup>104</sup> Indeed, both the ICTY and the ICC elected to define rape more narrowly.<sup>105</sup> But the *Akayesu* definition may well have influenced national and international standards for prosecuting sexual violence. It has been cited by the International Court of Justice (ICJ), the European Court of Human Rights (ECHR), and the Inter-American Commission on Human Rights (IACHR), as well as in the U.S. Joint Services Law of War Manual.<sup>106</sup>

Press coverage of the ICTR credited the recognition of rape as the highest level of crime to the pressure that human rights and women’s organizations placed on the Prosecutor. A 1998 *New York Times* article quoted human rights expert Felice Gaer as saying that the “Tribunals were literally forced to pay attention to a series of petitions and pressures from women’s organizations demanding that rape be recognized.”<sup>107</sup> The *Akayesu* decision noted the “interest shown” by NGOs as “indicative of public concern over the historical exclusion of rape and other forms of sexual violence from the investigation and prosecution of war crimes.”<sup>108</sup>

## 2. *Kayishema & Ruzindana*<sup>109</sup>

Because the ICTR, unlike the ICTY, dealt exclusively with the law of armed conflict, or international humanitarian law (IHL), in an *internal conflict*, the international war crimes jurisprudence developed by the ICTY has not always, or even often, answered some of the same difficult questions of first impression regarding IHL that the ICTR has faced. In *Prosecutor v. Kayishema*, the Trial Chamber established the background or circumstantial

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> Wood, “A Woman Scorned for the ‘Least Condemned’ War Crime: Precedent and Problems with Prosecuting Rape as a Serious War Crime in the International Criminal Tribunal for Rwanda,” *op. cit.*, p. 295.

<sup>105</sup> *Id.*, p. 296.

<sup>106</sup> *Id.*, p. 293.

<sup>107</sup> Barbara Crossette, *Violation; An Old Scourge of War Becomes Its Latest Crime*, *N.Y. Times*, June 14, 1998, p. 2.

<sup>108</sup> *Akayesu*, *op. cit.*, ¶ 417.

<sup>109</sup> *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-A (June 1, 2001).

elements – sometimes referred to as the *chapeau*, which must be established in addition to whatever *actus reus* and *mens rea* may be required – that must be proved beyond a reasonable doubt in order to establish a violation of Common Article 3 of the Geneva Conventions of 1949 or of provisions of Additional Protocol II: *first*, the existence of an armed conflict “not of an international character” at the time of the violation; *second*, a “link between the accused and the armed forces” of one party to the relevant conflict; *third*, that the crimes were committed *ratione personae* and *ratione loci*, that is, over victims qualifying as civilians or the civilian population relative to the relevant armed conflict and within the place (here, Rwanda) in which the conflict occurs; and *fourth*, a nexus between the crime and the conflict.<sup>110</sup>

a. *Non-International Armed Conflict*

The ICTR defined a non-international armed conflict broadly as one “between [a High Contracting Party’s] armed forces and dissident armed forces or other organised armed groups,”<sup>111</sup> in contradistinction to “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature,” which fall below the “minimum threshold.”<sup>112</sup>

It should be noted in this regard that although it makes little difference in the case of the genocide in Rwanda, it is not at all clear that the threshold for Common Article 3’s application is identical to that established by Additional Protocol II; most international lawyers agree that the former’s scope exceeds the latter’s. For although Additional Protocol II indeed says that it “develops and supplements Article 3 common to the Geneva Conventions,”<sup>113</sup> as the ICTR noted in *Kayishema & Ruzindana*,<sup>114</sup> Common Article 3’s text requires only an “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties,” while Additional Protocol II adds that the conflict must be “between [the High Contracting Party’s] armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”<sup>115</sup> The latter criterion does not qualify Common Article 3, which, as the U.S. Supreme Court ultimately held, bringing its jurisprudence into line with the prevailing interpretation

<sup>110</sup> *Kayishema & Ruzindana*, *op. cit.*, ¶ 169.

<sup>111</sup> *Id.* ¶ 170.

<sup>112</sup> *Id.* ¶ 171.

<sup>113</sup> Additional Protocol II Art. 1(1).

<sup>114</sup> *Kayishema & Ruzindana*, *op. cit.*, ¶ 170.

<sup>115</sup> Additional Protocol II Art. 1(1).

of Common Article 3 as expressed by, among others, the International Committee of the Red Cross (ICRC), “[t]he term ‘conflict not of an international character’ is used here in contradistinction to a conflict between nations” – not, as the United States had argued in *Hamdan v. Rumsfeld*, exclusively to civil wars.<sup>116</sup>

b. *Link Between the Accused and the Armed Forces*

The ICTR further concluded that if the defendants do not *belong* to the armed forces of one of the parties to the conflict, the Prosecutor must at a minimum establish “a link between them and the armed forces.”<sup>117</sup> Consequently, quoting *Akayesu*, the Tribunal said that Additional Protocol II extends to “individuals who were legitimately mandated and expected as public officials or agents or persons otherwise holding public authority or *de facto* representing the Government to support or fulfil the war efforts.”<sup>118</sup> The upshot is that civilians, and not only members of an armed force, may be liable for violations of Common Article 3 and Additional Protocol II.<sup>119</sup>

c. *Ratione Personae and Ratione Loci*

The Tribunal noted that in addition to personal jurisdiction over the defendants, Common Article 3 and Additional Protocol II raise the question of the necessary status of the victims. Here, the Trial Chamber concluded that, “for the purpose of protection of victims of armed conflict,” and consistent with the ICRC’s views, the words “civilian” and “civilian population” in these treaties must be defined in the negative, that is, as all persons “who are *not* members of the armed forces.”<sup>120</sup> In a similar vein, while neither Common Article 3 nor Additional Protocol II contains a clear provision on “applicability *ratione loci*,” the language of Common Article 3 referring to the enumerated acts in that provision being prohibited “at any time and in any place whatsoever”<sup>121</sup> makes clear that the relevant war crimes need not take place in “the actual theatre of operations.”<sup>122</sup>

d. *Nexus Requirement*

Finally, the Tribunal held that a *nexus* must be established between the crimes and the relevant armed conflict. To prove a *nexus*, there must be a

<sup>116</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 630–31 (2006).

<sup>117</sup> *Kayishema & Ruzindana*, *op. cit.*, ¶ 175.

<sup>118</sup> *Id.* (internal quotation marks omitted).

<sup>119</sup> *Id.* ¶ 176.

<sup>120</sup> *Id.* ¶¶ 179–80 (internal quotation marks omitted).

<sup>121</sup> *E.g.*, GCIV Art. 3.

<sup>122</sup> *Kayishema & Ruzindana*, *op. cit.*, ¶ 182.

“direct link” between the offenses and the conflict.<sup>123</sup> Establishing the requisite nexus requires evidence, a factual showing, rather than the application of an abstract test, and therefore “it is for the Trial Chamber, on a case-by-case basis, to adjudge on the facts submitted as to whether a nexus existed.”<sup>124</sup> In *Kayishema & Ruzindana*, the allegations were found to show “only that the armed conflict had been used as a pretext to unleash an official policy of genocide” but not to constitute evidence of a “direct link between the alleged crimes and the armed conflict.”<sup>125</sup>

In the context of the Rwandan genocide, the Prosecution has not found this standard readily met in all cases. It failed, for example, to establish a nexus in *Akayesu*: providing some support to government forces in Taba did not suffice to render Akayesu’s crimes sufficiently related to the civil war.<sup>126</sup> In the 2003 appeal of Georges Rutaganda, the Tribunal clarified that the focus of the nexus analysis must be on the specific actions of the accused, not the abstract link between the genocide and the armed conflict overall.<sup>127</sup> Consequently, the Trial Chamber stressed that while “[g]enocide against the Tutsis and the conflict between the RAF and the RPF are undeniably linked, the Prosecutor cannot merely rely on a finding of genocide and consider that, as such, serious violations of Common Article 3 and Additional Protocol II are thereby automatically established.”<sup>128</sup> The Appeals Chamber, however, found a sufficient link between Rutaganda’s actions and the armed conflict in Rwanda. “Given the activities of the *Interahamwe* and the position of authority held by Rutaganda, its second vice president, a close link was established between his culpable acts and the armed conflict.”<sup>129</sup> The Tribunal therefore reversed the Trial Chamber on this point, marking the first conviction for war crimes at the ICTR.<sup>130</sup>

<sup>123</sup> *Id.* ¶ 185. *Accord* Prosecutor v. Zejnil Delalic, et al., Case No. IT-96-21-T, ¶ 193 (Nov. 16, 1998); Prosecutor v. Dusko Tadić, Case No. IT-94-1-T, ¶ 533 (May 7, 1997).

<sup>124</sup> *Kayishema & Ruzindana*, *op. cit.*, ¶ 188.

<sup>125</sup> *Id.* ¶ 603.

<sup>126</sup> *Akayesu*, *op. cit.*, ¶¶ 642–43.

<sup>127</sup> Jamie Williamson, “The Jurisprudence of the International Criminal Tribunal for Rwanda on War Crimes,” 12 *New Eng. J. Int’l & Comp. L.* 51 (2005), p. 64.

<sup>128</sup> Prosecutor v. Rutaganda, Case No. ICTR 96-3-T, Judgment & Sentence, ¶ 443 (Dec. 6, 1999).

<sup>129</sup> Williamson, “The Jurisprudence of the International Criminal Tribunal for Rwanda on War Crimes,” *op. cit.*, p. 64 (2005).

<sup>130</sup> *Id.*, p. 65.

3. *Nahimana, Barayagwiza, & Ngeze*<sup>131</sup>

No overview of the ICTR's significant case law, however brief, would be complete without some remarks on *Prosecutor v. Nahimana, Barayagwiza & Ngeze*, also known as *The Media Case*. It involved three media executives, Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze, whose involvement with print and broadcast media led to their convictions for, inter alia, direct and public incitement to genocide.<sup>132</sup> The Trial Chamber broke new legal ground in classifying mass hate speech as itself genocidal.<sup>133</sup> The hate speech at issue arose from the defendants' connection to two principal media: *Kangura*, a widely read newspaper, which had, before and during the genocide, portrayed the Tutsi as "hypocrites, thieves, and killers" and Tutsi women as over-sexualized;<sup>134</sup> and *Radio Télévision Libre des Mille Collines* (RTLM), or "radio machete" as some referred to it, for the broadcasts not only promoted hatred of the Tutsi, but encouraged listeners to injure and kill them – going so far as to direct the killing of particular people.<sup>135</sup>

All three defendants were convicted by the Trial Chamber under Article 6(1) of the ICTR Statute because they employed media as, in effect, a weapon – and with an intent to kill.<sup>136</sup> The defendants also instilled hatred in the population, coordinated their efforts with one another, and persecuted Tutsi.<sup>137</sup> The Trial Chamber, perhaps most significantly as a precedential matter, held members of the media responsible, not only for the content of what they published, but for its consequences: "Successful incitement to genocide being genocide, the purveyors of genocidal journalism and hate radio were convicted of deploying speech as a lethal weapon, as guilty of genocide as if they had personally wielded the machetes."<sup>138</sup>

The Appeals Chamber softened some of the more progressive statements of the Trial Chamber.<sup>139</sup> In particular, while the Trial Chamber had allowed expression occurring before the genocide to be taken into account as

<sup>131</sup> *Prosecutor v. Nahimana, Barayagwiza & Ngeze*, Case No. ICTR-99-52-A (Nov. 27, 2007) (hereinafter *Nahimana, et al.*, AC) *Prosecutor v. Nahimana, Barayagwiza & Ngeze*, Case No. ICTR-99-52-A (Dec. 3, 2003) (hereinafter *Nahimana, et al.* TC).

<sup>132</sup> *Nahimana et al.* AC, *op. cit.*, ¶ 6.

<sup>133</sup> See *Nahimana et al.* TC, *op. cit.*, ¶¶ 965–69, 974–75, 977A.

<sup>134</sup> *Id.* ¶ 172.

<sup>135</sup> *Id.* ¶¶ 487–88.

<sup>136</sup> *Id.* ¶¶ 974, 975, 977A.

<sup>137</sup> Catherine MacKinnon, "Prosecutor v. Nahimana, Barayagwiza, and Ngeze," 98 *Am. J. Int'l L.* 325 (2004) p. 328.

<sup>138</sup> *Id.*, pp. 328–29.

<sup>139</sup> See generally David J. Bederman, "Prosecutor v. Nahimana, Barayagwiza, and Ngeze," 103 *Am. J. Int'l L.* 97 (2004).

continuing conduct if it caused criminal acts that fell within the Tribunal's temporal jurisdiction, the Appeals Chamber found the connection "tenuous" and reasoned that the longer the interval between the expression and the result, the more difficult it becomes to infer causation.<sup>140</sup> In a similar vein, the Appeals Chamber found that recycled media, e.g., newspapers published earlier or broadcasts in prior years that were read or heard later and arguably incited genocide, could, at most, constitute indirect incitement to genocide.<sup>141</sup>

This view led the Appeals Chamber to set aside the most serious charges against Barayagwiza, a lawyer and cofounder of the RTLM – for, according to the Chamber, he did not exercise sufficient control over broadcasts during the actual weeks of the genocide. In contrast, the Appeals Chamber had no difficulty sustaining his conviction for direct words and actions at the time insofar as they incited genocide.<sup>142</sup> The Appeals Chamber also clarified that while hate speech is not, *ipso facto*, persecution, the encouragement of or calls for violence, combined with hate speech by the RTLM, were serious enough to constitute a crime against humanity and also could be characterized as acts of persecution as well as incitement of others to persecute.<sup>143</sup>

#### 4. *Baglishema*<sup>144</sup>

*Prosecutor v. Baglishema* bears mentioning because it marked the ICTR's first acquittal, which a unanimous Appeals Chamber sustained. Like Akayesu, Baglishema had been a local official at the time of the genocide. The Prosecutor indicted him on a theory of command responsibility for his alleged failure to "prevent, suppress, or punish crimes committed by subordinates."<sup>145</sup> Even though the weight of the evidence against Bagilishema arguably could be equated roughly with the evidence in the case against Kayishema,<sup>146</sup> the Trial Chamber found it insufficient to sustain a conviction.<sup>147</sup> The Rwandan government said that it was shocked by the acquittal of such a high-level defendant.<sup>148</sup> Carla Del Ponte, the ICTR's Prosecutor at the time, replied that

<sup>140</sup> *Nahimana, et al. AC, op. cit.*, ¶ 513.

<sup>141</sup> *Id.* ¶ 410.

<sup>142</sup> MacKinnon, "Prosecutor v. Nahimana, Barayagwiza, and Ngeze," *op. cit.*, p. 99.

<sup>143</sup> *Id.* ¶ 988.

<sup>144</sup> *Prosecutor v. Baglishema*, Case No. ICTR-95-1A-T (June 7, 2001).

<sup>145</sup> *Id.* ¶ 37.

<sup>146</sup> Sean Libby, "(D)effective Control: Problems Arising From the Application of Non-Military Command Responsibility by the International Criminal Tribunal for Rwanda," 23 *Emory Int'l L.R.* 201 (2009), p. 225.

<sup>147</sup> *Bagilishema, op. cit.*, ¶ 683.

<sup>148</sup> "Rwanda Shocked at Arusha Acquittal," *BBC News*, June 7, 2001.

while the evidence had been sound and substantial, it had been poorly presented, and she later declined to renew the contract of the senior trial attorney in charge of the case.<sup>149</sup> Following his release, several European States refused to grant him asylum, although France ultimately accepted him into its territory.<sup>150</sup>

## H. Conclusion

The ICTR has come under heavy criticism from multiple fronts. Its budget, arguably, is far out of proportion to the progress made by the Tribunal over (at the time of this writing) a period of nearly seventeen years.<sup>151</sup> Many see it as a “fig leaf” covering the international community’s shameful failure to intervene at the time of the genocide. And still others criticize the Court’s imposition of international due process and human rights standards on the people of Rwanda, who arguably should be the ones to determine the modality of transitional justice for a tragedy of such monumental proportions that took place against them in their own country.

On the other hand, as this brief introduction suggests, the ICTR has established a number of critical precedents in the realm of international criminal law, both substantive and procedural, and however imperfectly, has to some extent vindicated the idea that there should be no amnesty for the perpetrators of genocide.

As of March 9, 2011:

- the trials of fifty-two defendants have been completed, eight of whom were acquitted;
- the trials of twenty-one defendants continue;
- ten cases are on appeal;
- one defendant, Jean Bosco Uwinkindi, is still awaiting trial;
- two cases have been transferred to France for trial; and
- ten of the accused are still at large.<sup>152</sup>

<sup>149</sup> “European Countries Refuse to take Acquitted Ex-Mayor,” *Hirondelle News Agency*, July 17, 2001.

<sup>150</sup> “France Confirms it Will Take Acquitted Rwandan Mayor,” *Hirondelle News Agency*, Sep. 20, 2001.

<sup>151</sup> See Mahnoush A. Arsanjani & W. Michael Reisman, “The Law-in-Action of the International Criminal Court,” 99 *Am. J. Int’l L.* 385 (2005), p. 402.

<sup>152</sup> *Status of Cases*, International Criminal Tribunal for Rwanda, Mar. 9, 2011, <http://www.unictr.org/> (last visited Mar. 9, 2011).

Above all, perhaps, together with the ICTY, the ICTR galvanized support for the creation of the permanent International Criminal Court. Whether the latter's aspirations, as set forth in the Preamble to the Rome Statute, e.g., "to put an end to impunity" and to ensure "that the most serious crimes of concern to the international community as a whole...not go unpunished,"<sup>153</sup> will be realized remains to be seen.

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<sup>153</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, June 15–July 17, 1998, Rome Statute of the International Criminal Court pmb., U.N. Doc. A/CONF.183/9\* (July 17, 1998), 37 I.L.M. 999 (1998).