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INTERNATIONAL HUMANITARIAN LAW FROM NUREMBERG TO ROME: THE WEIGHTY PRECEDENTS OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

Kingsley Chiedu Moghalu*

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I. INTRODUCTION: FROM NUREMBERG TO ARUSHA

Accountability for violations of humanitarian law has come a long way since Peter von Hagenbach, governor of the Austrian town of Breisach in 1474, was put on trial following a revolt for what today would be described as crimes against humanity. More than five centuries ago, in what is considered the first war crimes trial in recorded Western history, the prosecutor indicted the accused as having "[t]rampled under foot the laws of God and man."¹ Von Hagenbach, who acted under the instructions of his master, Charles of Burgardy, in seeking to subjugate Breisach, was accused of engaging with his thugs in acts of extreme brutality: murder, rape, and pillage among others. "No conceivable evil," wrote a contemporary historian, "was beyond him."² The accused's defense of superior orders did not avail him, and a court of twenty-eight judges found von Hagenbach guilty and sentenced him to death.

Between then and now, other attempts were made by groups of States to enforce humanitarian law in the 20th century. One attempt failed but three others succeeded. The failed attempt was a design by the Allies in World War I to prosecute Kaiser Wilhelm II of Germany and twenty-one other suspects after the war for war crimes in an international tribunal. The attempt was thwarted when the Kaiser took refuge in the Netherlands.³

Accountability for violations of humanitarian law took root only after World War II, when the International Military Tribunal at Nuremberg⁴ and the International Military Tribunal for the Far East were established by the Allied Powers to prosecute German and Japanese war criminals. The next major advance

¹ GEORGE SCHWARZENBERGER, *INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS*, 465 no.10 (1968) (quoting JOHN KNEBEL CAPELLANI, *BASIL DIARY 1473-1476*).

² *Id.*

³ See Jules Deschenes, *Toward International Criminal Justice*, in ROGER S. CLARK AND MADELEINE SANN, *THE PROSECUTION OF INTERNATIONAL CRIMES* 32 (1996).

⁴ See London Charter of the International Military Tribunal at Nuremberg, Aug. 8, 1945. The London Charter was signed by France, United Kingdom of Great Britain, and the Union of Socialist Soviet Republics. It subsequently won the support of 19 other governments. The charter for the International Military Tribunal for the Far East was subsequently issued by United States General Douglas McArthur.

in international humanitarian law was the establishment, by the United Nations Security Council in May 1993,⁵ of the International Criminal Tribunal for the Former Yugoslavia (ICTY) at the Hague, Netherlands, followed eighteen months later by the establishment of the International Criminal Tribunal for Rwanda (ICTR)⁶ at Arusha, Tanzania.

The Nuremberg and Tokyo trials were the first modern application of international humanitarian law on a significant scale, i.e., multiple trials of individuals. It is thus not surprising that Nuremberg and the two United Nations international criminal tribunals are discussed in one breath as if the two sets of processes are one unbroken line of continuity. This is far from being the case; while the two processes were established to exact accountability for heinous crimes, there are very fundamental and important differences between the post World War II trials and the contemporary United Nations tribunals. It is necessary to understand these differences in order to fully appreciate the contribution of the ICTR to the promotion and observance of international humanitarian law.⁷

First, the very nature of the two sets of tribunals is different: the Nuremberg and Tokyo Tribunals were established by the victorious powers of World War II. The Rwanda and Yugoslavia Tribunals, by contrast, are the first international criminal tribunals to be established by the international community, independently of the victorious powers of a conflict. The UN ad hoc tribunals were created by an international organization reflecting the political will of a broad section of the international community.⁸

⁵ See S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993) [hereinafter ICTY Statute].

⁶ See S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute].

⁷ See Kingsley Chiedu Moghalu, *The Criminal Tribunal for Rwanda and the Development of an Effective International Criminal Law – Legal Political and Policy Dimensions*, in HUMANITÄRES VÖLKERRECHT, NOMOS VERLAJSGESELLSCHAFT 437, 438 (Jana Hasse, et al. eds. 2001).

⁸ See generally PAUL J. MAGNARELLA, JUSTICE IN AFRICA: RWANDA'S GENOCIDE, ITS COURTS, AND THE UN CRIMINAL TRIBUNAL 111-13 (2000). While the Nuremberg trials have been criticized by some historians as "victors' justice," the two United Nations Tribunals have not totally escaped this charge either, with accused persons and their political sympathizers occasionally charging that the Rwanda and Yugoslavia Tribunals are a dynamic of their defeat in the conflicts in Rwanda and the former Yugoslavia. In the case of Rwanda, the Rwandan government that

Second, the Nuremberg and Tokyo prosecutions were for crimes committed in classic international wars between countries. In a fundamental contribution to the development of international humanitarian law, the ICTR is the first international criminal tribunal with a mandate to adjudicate violations of humanitarian law committed in a non-international armed conflict, i.e., a civil war. This is a major advance not only because it strengthens the norm of individual criminal responsibility for "universal" crimes such as genocide, crimes against humanity, and war crimes, regardless of the context in which the crimes were committed, but also because, in practice, most of the conflicts that have occurred in Africa have been civil wars.

Third, while the Nuremberg Charter labeled certain organizations of the then German State "criminal organizations,"⁹ the UN Tribunals have restricted themselves to the individual culpability of the accused persons. At the ICTR, for example, some of the individuals whom it has convicted were active members of, instructed or acted in collusion with, the *Interhamwe* ("those who work together") militia, a youth wing of the ruling political party at the time they actively executed the genocide.¹⁰

came to power following its military defeat of the previous government requested the establishment of an international tribunal to try the perpetrators of the genocide, which, by common acknowledgment worldwide, had indeed occurred. However, the Rwandan government itself subsequently voted against the creation of the ICTR because, among other reasons, its Statute did not provide for the death penalty. By going ahead to establish the Tribunal over Rwanda's objections, the Security Council established early on a political dynamic of the Tribunal's independence from the State that requested the Tribunal's creation, in addition to the ICTR's *de jure*, legal independence. To charges that the Tribunal has so far prosecuted only accused persons from one side of the conflict that resulted in the genocide, and other serious violations of humanitarian law, the prosecutor has made clear, including to the present Government of Rwanda, which is an outgrowth of the military victorious Rwanda Patriotic Front, that she intends to indict members of the RPF against whom evidence of violations of humanitarian law are established. In the case of the Yugoslavia Tribunal, many Serbs, in particular their political leadership, have accused the Tribunal of anti-Serb bias as a result of their military defeat at the hands of the forces of the North Atlantic Treaty Organization in 1995 in Bosnia and in 1999 in Kosovo. However, it is closer to the truth that these groups, steeped in the propaganda of demagogues, lay a doubtful claim to victimhood when what is really happening is a process of establishing the *individual* criminal responsibility of their erstwhile leaders.

⁹ The London Charter did not define the term "criminal organizations."

¹⁰ See Prosecutor v. Georges Andersen Rutaganda, Case No. ICTR-96-3-T, Judgment and Sentence by Trial Chamber I (Dec. 6, 1999). See also Prosecutor v.

Fourth, the Nuremberg and Tokyo tribunals had the power to hand out, and did hand out in several of their judgments, the death penalty. However, the maximum punishment in the statutes of the Arusha and Hague Tribunals is life imprisonment, reflecting a movement away from the death penalty in the evolution of international human rights standards.

Fifth, the Nuremberg Tribunal had no appellate jurisdictions while the UN Tribunals have an Appeals Chamber.

Finally, the two sets of international tribunals have different sets of competencies. The Nuremberg Tribunal's competence covered crimes against peace, war crimes and crimes against humanity. The ICTR's *rationae materiae* deals with genocide, crimes against humanity and serious violations of Article 3 Common to the Geneva Convention of August 12, 1949, for the Protection of War Victims and Additional Protocol II thereto of June 8, 1977.¹¹

II. THE JURISPRUDENCE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

In its Resolution 955 (1994), the Security Council decided to establish the ICTR "for the sole purpose of prosecuting 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 [neighboring] States, between 1 January 1994 and 31 December 1994."

The preamble of the Resolution also stated the *raison d'être* of the International Tribunal as follows:

The Security Council,

... Expressing once again its grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda, . . .

Determined to put an end to such crimes and to take effective measures to bring to justice the persons responsible for them,

Omar Serushago, Case No. ICTR-98-39-1, Judgment and Sentence by Trial Chamber I (Feb. 5, 1999).

¹¹ See ICTR Statute, arts. 2-4.

Convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for genocide and the above-mentioned violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace,

Believing that the establishment of an international tribunal for the prosecution of persons responsible for the above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed.
...¹²

Thus, the main objectives of the ICTR appear to be those of accountability, deterrence and to contribute to national reconciliation and the maintenance of peace. It is against these objectives that the jurisprudence of the International Tribunal should be assessed.

The Tribunal's trial chambers have so far handed down nine judgments — eight convictions and one acquittal. Twenty-one accused persons are currently on trial in eight cases, with other trials expected to open in the coming months. There are fifty-two persons detained under the authority of the Tribunal at the United Nations Detention Facility at Arusha as of September 10, 2002, including those on trial but excluding convicted persons.¹³

A. *Genocide*

On September 2, 1998, the ICTR in *Prosecutor v. Jean-Paul Akayesu*¹⁴ delivered the first-ever judgment for the crime of genocide by an international court. The Tribunal's Trial Chamber had to address the question of whether the widespread and horrendous massacres that took place in Rwanda in 1994 constituted genocide.¹⁵ In a contemporary sense, this is important because the word genocide is emotive and is a label frequently and loosely attached to widespread killings.

¹² *Id.*, pmble.

¹³ For information on detainees, see http://www.internews.org/activities/ICTR-reports/ICTRUNprison_12_00htm.

¹⁴ Case No. ICTR 96-4-T, Judgment by Trial Chamber I (Sept. 2, 1998).

¹⁵ *See id.*

Article 2 of the Statute of the ICTR provides a definition of genocide, which exactly replicates that in the Convention on the Prevention and Punishment of the Crimes of Genocide, adopted by the United Nations General Assembly on December 9, 1948 (Genocide Convention). According to Article 2(2) of the ICTR Statute:

Genocide means 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 of the group;
- (b) Causing serious bodily or mental harm to members of the 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;
- (e) Forcibly transferring children of the group to another group.¹⁶

Trial Chamber I found that, contrary to popular belief, the crime of genocide does not require the actual extermination of a group in its entirety, but is committed once any of the acts mentioned above are committed with the intent to destroy the group in whole or in part.¹⁷ It also found that genocide is unique among crimes because of its embodiment of a special intent or *dolus specialis*, and this special intent lies in the intent to destroy — wholly or partially — a national, ethnic, racial or religious group.¹⁸

The *Akayesu* judgment established a far-reaching precedent by interpreting for the first time how to apply the definition of the crime of genocide in the Genocide Convention — albeit based on the definition in the ICTR Statute — to a practical situation. The Chamber found Akayesu, former mayor of the Rwandan town of Taba, guilty on nine counts of genocide and crimes against humanity.¹⁹ He was found not guilty of six violations of Article 3 Common to Geneva Conventions.²⁰

¹⁶ ICTR Statute, art. 2(2)

¹⁷ See *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment by Trial Chamber I, para. 497 (Sept. 2, 1998).

¹⁸ See *id.* para. 498.

¹⁹ See *id.* sec. 8.

²⁰ See *id.*

Akayesu was subsequently sentenced to life imprisonment on October 2, 2000, and the ICTR Appeals Chamber dismissed his appeal against conviction and sentence on June 1, 2001.²¹

Trial Chamber I adopted the reasoning that because the special intent to commit genocide was to be found in the intent to destroy — wholly or partially — a national, ethnic, racial or religious group, the precise meaning of these social categories needed to be defined. Relying on the *travaux préparatoires* (preparatory work) of the Genocide Convention, the ICTR judges found that a common criterion in these four groups protected by the Convention was that membership in such groups would not normally be challenged by members belonging to it automatically, by birth, in a continuous and often irremediable manner.²²

Based on the *Nottebohm*²³ decision rendered by the International Court of Justice, the ICTR held that a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties; an ethnic group is generally defined as a group whose members share a common language or culture; the conventional definition of racial group is based on the hereditary physical traits often identified with geographical region, irrespective of linguistic, cultural, national or religious factors; and the religious group is one whose members share the same religion, denomination or mode of worship.²⁴

The application of these legal definitions to the situation in Rwanda was complicated by the fact that the Tutsi population did not fit neatly into any of the above definitions, as they did not have a language or culture of their own different from the rest of the Rwandan population. Generations of intermarriage had wiped out any hereditary physical traits that formerly distinguished Tutsi from Hutu, as had a system of classification based on ownership of cattle.²⁵ Thus, the absurd conclusion that could have been drawn from this situation is that the Tutsi

²¹ See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Judgment by the Appeals Chamber (June 1, 2001).

²² See *id.* para. 511.

²³ *Nottebohm*, International Court of Justice (1995).

²⁴ See *id.* paras. 512-15.

²⁵ See MAGNARELLA, *supra* note 8, at 98.

are not a protected group under the Genocide Convention, and so genocide, as legally defined by the Convention and the ICTR Statute, had not occurred in Rwanda.²⁶

In a demonstration of innovative legal reasoning, the ICTR's Trial Chamber I asked itself "whether it would be impossible to punish the physical destruction of a group as such under the Genocide Convention, if the said group, although stable and membership is by birth, does not meet the definition of any one of the four groups expressly protected by the Genocide Convention."²⁷ The judges answered in the negative. In their view, it was "important to respect the intention of the drafters of the Genocide Convention, which according to the *travaux préparatoires*, was patently to ensure the protection of any stable and permanent group."²⁸

The Chamber held that the Tutsi were a stable and permanent group for the purpose of the Genocide Convention, basing this conclusion on the clear identification of the Tutsi as an "ethnic" group in official classifications of Rwandan society, perpetuated by, among other ways, ethnic classifications of all Rwandans in their national identity cards before 1994.²⁹ This addition of stable and permanent groups, whose membership is largely determined by birth, to the rubric of the four protected groups in the Geneva Convention, will influence future cases involving the crime of genocide.³⁰

The judgment of Trial Chamber I of the ICTR in *Akayesu* (and the eight other judgments of the Tribunal, which have all adjudicated, *inter alia*, the crime of genocide) has provided a universal precedent to other jurisdictions such as the ICTY and the International Criminal Court. In this context, it is pertinent to note that the ICTY handed down its very first conviction for the crime of genocide on August 2, 2001, in the case of *Radislav Krstic*.³¹ Hitherto, that Tribunal had handled mostly cases of

²⁶ *See id.*

²⁷ *Id.* (quoting Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment by Trial Chamber I (Sept. 2, 1998)).

²⁸ Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment by Trial Chamber I, para. 516 (Sept. 2, 1998).

²⁹ *See id.* para. 170

³⁰ *See* MAGNARELLA, *supra* note 8, at 99.

³¹ *See* Prosecutor v. Krstic, Case No. IT-98-33-T, Trial Chamber (Aug. 2, 2001).

war crimes (Grave Breaches of the Geneva Conventions of 1949 and Violations of the Laws or Customs of War) and crimes against humanity, and there had been considerable debate over whether the events in the former Yugoslavia or parts thereof constituted genocide or were simply extreme cases of ethnic cleansing. Applying the relevant tests to determine the occurrence of genocide or otherwise, as had been done in several cases by the Rwanda Tribunal, the Yugoslavia Tribunal in its judgment in this case, concluded that "by deciding to kill all men of fighting age, a decision was taken to make it impossible for the Muslim people of Srebrenica to survive. Stated otherwise, what was ethnic cleansing became genocide."³²

B. *Rape and Sexual Violence*

The ICTR has similarly blazed a trail in international humanitarian law in the area of sexual crimes against women. The *Akayesu* case was again the setting for this development. As in most armed conflicts, civil or international, the Rwandan conflict had, as a significant characteristic, the systematic raping of women, in this case mostly women of Tutsi origin. In addressing the acts of rape, the judges of the ICTR sought to show the circumstances in which this sordid act of sexual violence is a component of the crimes within the competence of the Tribunal. Rape, which, in and of itself is a crime in most, if not all, national jurisdictions, comes alive in the jurisprudence of the ICTR as an intrinsic aspect of genocide and crimes against humanity.³³

In *Akayesu*, the prosecutor's original indictment of the accused, confirmed on February 16, 1997, did not contain specific charges of sexual crimes. However, the testimony of two witnesses in the course of the trial contained graphic references to sexual violence against Tutsi women during the genocide — often accompanied by degrading language against the victims — and some of which, in the *Akayesu* case, allegedly occurred in

³² Marlise Simons, *General Guilty in Srebrenica Genocide*, N.Y. TIMES, Aug. 3, 2001, at A1.

³³ No accused person in the ICTR has yet been convicted of rape as a violation of Article 3 Common to the Geneva Conventions, or even of any other aspect of that crime itself, although some accused persons and convicts have been charged with rape under this rubric.

the location of Akayesu's office at the Bureau Communal.³⁴ As a result of these testimonies, the prosecutor conducted further investigations and amended the indictment during the trial on June 17, 1997, specifically charging Akayesu, *inter alia*, with rape as a crime against humanity in Count 13 of the indictment and rape as a violation of Article 3 Common to the Geneva Conventions in Count 15.³⁵ Various non-governmental organizations had also been pressing for greater attention to sexual crimes in prosecutions at the ICTR, including by way of an *amicus curiae* brief.³⁶

In its judgment, Trial Chamber I explained its acceptance of the amendment as follows:

On June 17, the indictment was amended to include allegations of sexual violence and additional charges against the accused under Article 3(g), Article 3(i) and Article 4(2)(e) of the ICTR Statute. In introducing the amendment, the Prosecution stated that the testimony of Witness H motivated them to renew their investigations of sexual violence in connection with events, which took place at the Bureau Communal. The Prosecution stated that the evidence previously available was not sufficient to link the Accused with acts of sexual violence and acknowledged that factors to explain this lack of evidence might include the shame that accompanies acts of sexual violence as well as insensitivity in the investigation of sexual violence. The Chamber understands that the amendment of the indictment resulted from the spontaneous testimony of sexual violence of witness J and H during the course of this trial and the subsequent investigation of the prosecution, rather than from public pressure. Nevertheless the Chamber takes note of the interest shown in this issue by non-governmental organizations, which it considers indicative of public concern over the historical exclusion of rape and other forms of sexual violence from the investigation and prosecution of war crimes. The investigation and presentation of evidence relating to sexual violence is in the interest of justice.³⁷

³⁴ See *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment by Trial Chamber I, para. 691 (Sept. 2, 1998).

³⁵ See *Prosecutor v. Akayesu*, ICTR 96-4-1, Amended Indictment (June 17, 1997).

³⁶ See *Amicus Curiae Brief*, *Prosecutor v. Akayesu*, available at <http://www.essex.ac.uk/armedcon/Issues/text2000/ictr/001.htm>.

³⁷ *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment by Trial Chamber I, para. 417 (Sept. 2, 1998).

In its judgment, the Trial Chamber found Akayesu guilty of crimes against humanity (rape) as charged in count 13 of the indictment.³⁸ This verdict revolutionized the jurisprudence on sexual violence crimes in international humanitarian law in three ways. First, the *Akayesu* judgment was the first time an individual had been convicted of rape as a specific crime under the rubric of crimes against humanity by an international tribunal. The importance of this advance is brought into sharper perspective by the fact that there was no mention of rape in the Nuremberg Charter. While there was reference to rape in the judgment of the International Military Tribunal for the Far East because evidence was presented of atrocities committed upon women in Nanking, the Philippines and other locations, rape and sexual violence were not charged as specific crimes, rather they were lumped together as crimes against humanity — inhumane treatment. As one commentator and practitioner of international law so aptly put it:

This situation resulted in a blur. Rape was lost in the barbarous mass of the overall crimes. It became a passing reference in a tale of horror. In the end, no one knew whether rape in time of conflict could be prosecuted as a separate, substantive crime standing on its own merits in international law . . . but today, we find ourselves in an enormously stronger position to investigate, document and prosecute rape and other forms of sexual violence. . . . And it all started quietly within the International Criminal Tribunal for Rwanda.³⁹

Second, the *Akayesu* judgment provided a definition of rape as a crime under international law for the first time in legal history. In paragraphs 596-98 of the judgment, the Chamber stated:

The Chamber must define rape, as there is no commonly accepted definition of this term in international law. While rape has been defined in certain national jurisdictions as non-consensual intercourse, variations on the act of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual. The Chamber considers that

³⁸ See *id.* para. 696.

³⁹ David Scheffer, Rape as a War Crime, Remarks at Fordham University, New York, (Oct. 29, 1999), *transcript available at* www.converge.org.nz/pma.rape.htm.

rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects or body parts. . . . The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence, which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.

This groundbreaking definition of rape has been cited in subsequent cases in the ICTR and the ICTY at The Hague in the latter Tribunal's judgments in the *Furundzija*,⁴⁰ *Celebici*⁴¹ and *Kunarac*⁴² cases. But is the definition so revolutionary as to be ahead of its time? It is not, although some experts in international criminal law are inclined to that view, and expressed opinions in this vein in informal discussions during meetings of the Preparatory Committee on the Establishment of the International Criminal Court in New York. Had there been any problem with this definition, the Tribunal's Appeals Chamber might have addressed the matter in its judgment on appeal in *Akayesu*. To the extent it did not, this brilliant postulation of international humanitarian law must stand for what it is: a revolution in legal thinking. In this context, note should be taken of the arguably more conservative approach of ICTY jurisprudence, which has so far examined rape mostly from a national jurisdiction perspective that is anchored in body parts.⁴³ However, a close reading of the jurisprudence of the Yugoslavia Tribunal reveals an elasticity in adopting national definitions of rape that encompass parts of the Rwanda Tribunal's definition in *Akayesu*.⁴⁴ This would appear to give credence to the holding

⁴⁰ Prosecutor v. Furundzija, Case No. IT-95-17/I-T, Judgment (Dec. 10, 1998).

⁴¹ Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment (Nov. 16, 1998).

⁴² Prosecutor v. Kunarac, Case No. IT-96-23/2, Judgment (Feb. 22, 2001).

⁴³ See Prosecutor v. Furundzija, Case No. IT-95-17/I-T, Judgment, para. 177 (Dec. 10, 1998). The ICTY's Trial Chamber II reviewed national laws on rape "to arrive at an accurate definition of rape based on the criminal law principle of specificity." *Id.*

⁴⁴ In *Furundzija*, the ICTY judges concluded that most legal systems consider rape as "the forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus." *Id.*, para. 181. However, *Furundzija* acknowledged a significant discrepancy between various national definitions of rape when it held that "the forced penetration of the mouth by the male sexual organ constitutes a most humiliating and degrading attack upon human dignity" and thus ought to be included in the definition of rape *Id.*, para. 183.

of the ICTR's Trial Chamber I, that its definition of rape is more helpful in international law. In any event, it is correct to say that the two types of definitions simply reflect two different approaches to rape in international criminal law.

The third and perhaps most important manner in which the sexual violence aspect of the *Akayesu* judgment advanced international humanitarian law was by ruling that rape was a constituent form of genocide and thus a genocidal crime.⁴⁵ As noted earlier, Trial Chamber I found that rape was systematically used as a weapon in the campaign to destroy the Tutsi by violating Tutsi women precisely because they were of Tutsi ethnicity.⁴⁶ Many were killed in the process of these rapes, the clear intent of which was to kill or inflict mental or bodily harm as part of the process of destroying an ethnic group in whole or in part.⁴⁷

Concluding that the special intent unique to genocide accompanied and motivated these rapes, the Chamber ruled:

In light of all the evidence before it, the Chamber is satisfied that the acts of rape and sexual violence described above were committed solely against Tutsi women, many of whom were subjected to the most public humiliation, mutilated and raped several times, often in public, in the Bureau Communal premises or in other public places, and often by more than one assailant. These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and the destruction of the Tutsi group as a whole.⁴⁸

It is noteworthy that in the indictment against *Akayesu*, rape was not specifically charged as an act of genocide. Yet, based on the overwhelming evidence in that case, the bench of Chamber I followed the proof of facts to their logical, ultimate conclusion in their decision: rape as genocide. As another expert has described the judgment — correctly — “the *Akayesu*

⁴⁵ See Betty Murungi, *Prosecuting Gender Crimes at the International Criminal Tribunal for Rwanda*, at <http://www.ichrdd.ca/english/commdoc/publications/.../prosecutingGenderCrimesICTR.htm>.

⁴⁶ See MAGNARELLA, *supra* note 8, at 102.

⁴⁷ See *id.* at 103.

⁴⁸ Prosecutor v. *Akayesu*, Case No. ICTR 96-4-T, Judgment by Trial Chamber I, para. 121 (Sept. 2, 1998).

decision is overwhelming in its holdings and dicta concerning sexual violence.”⁴⁹ Following *Akayesu*, there have been other cases before the ICTR in which charges of rape were proffered against accused persons.⁵⁰

However, women were not only victims in the Rwandan genocide; some are alleged perpetrators too. The ICTR has also made history by becoming not only the first international criminal tribunal to indict a woman but also the first to charge a woman with rape. In *Prosecutor v. Pauline Nyiramasuhuko and Arsene Shalom Ntahobali*, the first accused, Rwanda’s Minister of Women and Family Affairs in 1994, was arrested in Kenya in 1997, and was originally indicted jointly with her son, Arsene Shalom, on charges of genocide, crime against humanity and serious violations of Article 3 Common to the Geneva Conventions. Her indictment was amended in 1999 to include charges of rape as a crime against humanity under the principle of superior responsibility.⁵¹ The indictment had been amended earlier to include rape as a crime against humanity against Mr. Ntahobali.⁵²

These developments in the trials before the ICTR demonstrate the Tribunal’s achievement of providing a road map for the prosecution and adjudication of sexual crimes in international humanitarian law. In so doing, the Tribunal has lifted sexual crimes against women from the status of mere offenses against honor⁵³ and that of a spoil of war to their rightful place in the code of conduct in conflict situations.

C. *Shattering the Concept of “Sovereign Impunity”*

All through contemporary history, the international law doctrine of sovereign immunity, by which a sovereign is immune from legal process for official acts committed in his or her capacity as head of state, has been mixed with the practice of

⁴⁹ Betty Murungi, *Prosecuting Gender Crimes at the International Criminal Tribunal for Rwanda*, AFR. LEGAL AID Q. J. (forthcoming July - August 2001).

⁵⁰ See, e.g., *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20; *Prosecutor v. Pauline Nyiramasuhuko & Arsene Shalom Ntahobali*, Case No. ICTR-97-21; and *Prosecutor v. Juvenal Kajelijeli*, Case No. ICTR-98-44.

⁵¹ See Joe Lauria, *Rape Added to Rwandan Woman’s UN charges*, BOSTON GLOBE, Aug. 13, 1999, at 6A.

⁵² See *id.*

⁵³ See Murungi, *supra* note 49.

'sovereign impunity,' in which leaders who have directed and participated in the most heinous crimes — usually for political reasons or "reasons of state" — have been beyond the reach of the law.

As indicated by the preambular paragraphs of Security Council Resolution 955 of 1994, one of the main objectives of the ICTR is to deter the culture of impunity by confronting it with accountability.⁵⁴ Indeed, part of the explanation for how more than 500,000 people could have been killed in a period of three months in Rwanda in 1994 lies in the fact that, for the past forty years, there have been cyclical waves of mass killings. These killings were orchestrated by political leaders in the Great Lakes region of Africa, in particular Rwanda and Burundi, with no one held accountable in a judicial process.⁵⁵ It is no surprise, then, that occasional mass killing along ethnic lines had become something of a favored solution in the internal political power struggles in the region.

Ensuring accountability for impunity has also been the objective behind the establishment of other international criminal tribunals such as the ICTY, the Special Court for Sierra Leone,⁵⁶ the proposed tribunal for Cambodia and the permanent International Criminal Court.⁵⁷

It is commonly agreed, both as a matter of policy in governments and by practitioners of international law, that one of the most effective ways to ensure the promotion and observance of international humanitarian law is to bring the political and military leaders who, in virtually every case of mass atrocities in war and peace, have been the planners, instigators and com-

⁵⁴ See ICTR Statute, pmbl.

⁵⁵ Between 1959 and 1964, hundreds of thousand of Rwandan Tutsi were killed in Rwanda following the "Social Revolution" of 1959 which toppled and abolished the Tutsi monarchy. The "revolution" was led by Gregoire Kayibanda, a Hutu extremist who became President of Rwanda when the country became independent in 1962. In neighboring Burundi, where the Tutsi held political power after independence, Hutus were the victims of mass killings on nearly similar scales to that of the Tutsi in Rwanda. In 1972, about 100,000 Hutus were massacred in Burundi. These killings in both countries led to massive refugee outflows into these and other countries in East and Central Africa by the victims of the massacres.

⁵⁶ See *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, U.N. SCOR, U.N.Doc. S/2000/915 (2000).

⁵⁷ See Rome Statute of the International Criminal Court, U.N. Doc. A/Conf/183/9 (1998) [hereinafter Rome Statute].

manders of such crimes as genocide, crimes against humanity, and war crimes to justice in properly constituted courts of justice. The violations of international humanitarian law in Rwanda were no exception; they were known to have been inspired and directed by high-ranking individuals. As a matter of policy, the Office of the Prosecutor of the ICTR has, since the Tribunal commenced operations in 1995, focused most of its investigative and prosecutorial energies on such high-ranking accused persons and suspects — the “big fish.”⁵⁸ These individuals have been carefully chosen and cut across various spectra of Rwandan society’s erstwhile leadership: senior military commanders and politicians, senior civilian administrators, the clergy and senior media practitioners accused of inciting and sustaining the mass killings in Rwanda with hate propaganda.⁵⁹

In this pantheon of senior figures so far apprehended and brought to trial by the ICTR, the most senior individual has been Mr. Jean Kambanda, Prime Minister of Rwanda and Head of the Interim Government from April 8, 1994, until he left the country on or about July 17, 1994 — the three months during which the genocide occurred. Mr. Kambanda was arrested by the Kenyan authorities in July of 1997 on the basis of a formal request submitted by the Tribunal’s prosecutor on July 9, 1997, in accordance with the provisions of Rule 40 of the Rules of Procedure and Evidence of the ICTR.⁶⁰ On July 16, 1997, Judge Laity Kama, ruling on the prosecutor’s motion of July 9, 1997, ordered the transfer and provisional detention of the suspect at

⁵⁸ See Achievements of the ICTR, available at <http://www.icttr.org/wwwroot/English/geninfo/achieve.htm>.

⁵⁹ See Marlise Simons, *Trial Centers on Role of Press During Rwanda Massacre*, N.Y. TIMES, Mar. 3, 2002 (discussing the crucial precedents legal specialists believe will be established by the outcome of the joint “media trial” at the ICTR of Prosecutor v Jean-Bosco Barayagwiza, Ferdinand Nahimana, and Hassan Ngeze).

⁶⁰ Rule 40 (A) (i) provides that, in case of urgency, the prosecutor may request any State to arrest a suspect and place him in custody. While it is more typical for the Tribunal to issue a warrant of arrest of an accused person against whom an indictment prepared by the prosecutor has been confirmed by a judge of the Tribunal — which indictment is transmitted to the relevant State by the Registrar of the Tribunal — the prosecutor resorts to Rule 40 when operational considerations make it imperative, usually to prevent the escape of a suspect whose location has been identified but who has not yet been formally indicted by the Tribunal.

the Detention Facility of the Tribunal under Rule 40*bis*.⁶¹ The indictment against Jean Kambanda was confirmed on October 16, 1997, by Judge Yakov Ostrovsky, who issued a warrant of arrest and ordered the continued detention of the accused.⁶²

The indictment against Mr. Kambanda charged the former Prime Minister with genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide, and crimes against humanity.⁶³ In the concise statement of facts in the indictment, the prosecutor averred, *inter alia*, that Mr. Kambanda as Prime Minister exercised *de jure* and *de facto* authority and control over the members of his government, senior civil servants including *prefets* (regional governors), and senior officers in the military; and that he presided over meetings of the Council of Ministers, attended by Pauline Nyiramasuhuko, Eliezer Niyitegeka and Andre Ntagerura⁶⁴ among others, in which the massacres of the civilian population were discussed. He was also accused of inciting massacres of Tutsi and moderate Hutu at public meetings and through the media.⁶⁵

In a major development in the annals of international humanitarian law and the work of the ICTR, Jean Kambanda, at his initial appearance before the Tribunal on May 1, 1998, pleaded guilty to the six counts in his indictment. Mr. Kambanda had signed a plea agreement with the prosecutor in which he agreed that he was pleading guilty because he was in fact guilty and acknowledged full responsibility for the crimes alleged in the indictment.⁶⁶ In the document, Kambanda explained the motivation for his guilty plea: "the profound desire to tell the truth . . . his desire to contribute to the process of

⁶¹ See Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgment and Sentence (Sept. 4, 1998).

⁶² See *id.*

⁶³ See Prosecutor v. Kambanda, Case No. ICTR 97-23-DP, Indictment (Oct. 16, 1997).

⁶⁴ These former officials are among eleven cabinet ministers in Mr. Kambanda's government who are currently on trial or detained by the ICTR.

⁶⁵ See Prosecutor v. Kambanda, Case No. ICTR 97-23-DP, Indictment (Oct. 16, 1997).

⁶⁶ See Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Plea Agreement Between Jean Kambanda and the Office of the Prosecutor, Annexure A to the Joint Motion for Consideration of Plea Agreement Between Jean Kambanda and the Office of the Prosecutor (Apr. 29, 1998).

national reconciliation in Rwanda,” and his consideration that his confession would contribute to the restoration and maintenance of peace in Rwanda.⁶⁷ Trial Chamber I verified the validity of Kambanda’s guilty plea⁶⁸ before formally entering a plea of guilty and setting a date for the pre-sentencing hearing.

On September 4, 1998, Trial Chamber I convicted Mr. Kambanda on all counts in the indictment against him, and sentenced the former Prime Minister to life imprisonment for his crimes.⁶⁹ The ICTR thus became the first international tribunal in history to punish a head of government for genocide, dealing the first practical blow to the concept of sovereign immunity, which had been expressly negated in the Statute of the Tribunal.⁷⁰

Indeed, the Chamber made clear in its judgment and sentence that, despite the ordinarily mitigating factor of a guilty plea, it considered the combination of the gravity of the offense and Mr. Kambanda’s high position of authority to be overwhelmingly aggravating factors. The Chamber stated:

The heinous nature of the crime of genocide and its absolute prohibition makes its commission inherently aggravating. . . . The crimes were committed during the time when Jean Kambanda was Prime Minister and he and his government were responsible for the maintenance of peace and security. Jean Kambanda abused his authority and the trust of the civilian population. He personally participated in the genocide by distributing arms, making incendiary speeches and presiding over cabinet and other meetings where the massacres were planned and discussed. He

⁶⁷ *See id.*

⁶⁸ *See* Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgment and Sentence (Sept. 4, 1998). Kambanda affirmed that: (a) his guilty was voluntary; (b) he clearly understood the charges against him and the consequences of his guilty plea; and (c) his guilty plea was unequivocal, in other words, the said plea could not be refuted by any line of defense. *See id.*

⁶⁹ *See id.*

⁷⁰ Article 6, which provides for individual criminal responsibility for crimes within the Tribunal’s competence, states in sub-para (2): “The official position of any accused person, whether as Head of State or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.” An identical provision is contained in the Statute of the ICTY, and the Nuremberg Charter contained a similar provision. However, the ICTR judgment in *Kambanda* was the first-ever application of the provision in practice to an individual of such senior rank in a government.

failed to take necessary and reasonable measures to prevent his subordinates from committing crimes against the population.⁷¹

Jean Kambanda's subsequent appeal against his judgment and sentence, in which he requested a trial or, in the alternative, a reduction of his sentence, was unanimously rejected and his sentence confirmed by the Tribunal's Appeals Chamber on October 19, 2000.⁷²

The *Kambanda* case was another milestone in international humanitarian law, with overwhelming political and other significance.⁷³ It was the first confession by an individual for the crime of genocide, fifty years after the Genocide Convention. It confirmed that the criminal enterprise that was Rwanda's genocide was a state-sponsored plan aimed at wiping out the country's ethnic minority.⁷⁴ Kambanda's confession destroyed the credibility, such as it existed, of a small number of revisionist historians and lawyers in certain quarters who claimed that there was no genocide in Rwanda, and it had a discernible impact on the more than 100,000 genocide suspects imprisoned in Rwanda jails by triggering a significant number of confessions from some of these suspects shortly afterwards.⁷⁵

Most significant in a contemporary and global sense, the *Kambanda* judgment pre-dated and was cited by human rights groups in the 1998 case in which the United Kingdom's House of Lords ruled that General Augusto Pinochet, former Head of State of Chile, was not immune from prosecution for international crimes such as crimes against humanity, torture and hostage-taking, overruling a lower court.⁷⁶ Even more directly, the *Kambanda* judgment serves as precedent for the 1999 indict-

⁷¹ Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgment and Sentence, paras. 42, 44 (Sept. 4, 1998).

⁷² See Kambanda v. Prosecutor, Case No. ICTR-97-23-A, Judgment of the Appeals Chamber (Oct. 19, 2000).

⁷³ See MAGNARELLA, *supra* note 8, at 85, 93.

⁷⁴ See Kingsley Chiedu Moghalu, "Rwanda Panel's Legacy: They Can Run But Not Hide," INT'L HERALD TRIB., Oct. 31 – Nov. 1 1998, at 6.

⁷⁵ See MAGNARELLA, *supra* note 8, at 93.

⁷⁶ See Regina v. Bartle and the Commissioner of Police (Appellants) Ex Parte Pinochet (Respondent); Evans and Another and the Commissioner of Police and Others (Appellants) Ex Parte Pinochet (Respondent), Decision of the House of Lords on appeal from a Divisional Court of the Queen's Bench Division (Nov. 25, 1998), available at <http://www.publications.parliament.uk/pa/ld199899/ldjudmnt/jd981125/pino01.htm>.

ment and recent transfer to The Hague of Slobodan Milosevic, former President of the Federal Republic of Yugoslavia, to face trial before the ICTY. Considering the legal parallels between the *Kambanda* case and that of Milosevic,⁷⁷ the ICTY Trial Chamber in the Milosevic case will, in all probability, make significant references to the ICTR's *Kambanda* judgment in its future judgment of Milosevic.

D. *Can Civilians be Guilty of Violations of the Geneva Conventions?*

Another important aspect of the jurisprudence of the ICTR is the question of whether civilians can be convicted for serious violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II.⁷⁸ While these offenses are more traditionally associated with members of armed forces, partly because they are part of the corpus of the laws of war; the Rwandan conflict in 1994 produced situations in which there was a blur in the alleged roles of civilian officials during the conflict, with several of them appearing to exercise military or quasi-military functions in conjunction with army commanders. More importantly, the ICTR's Trial Chamber I stated the opinion, based on the Tokyo trials of the International Military Tribunal for the Far East, that civilians may be held liable for breaches of the laws of war.⁷⁹

Thus, several indictments of accused persons in the ICTR who held civilian positions in Rwanda during the violations of humanitarian law in 1994 had included charges of serious viola-

⁷⁷ See Kingsley Chiedu Moghalu, *Peace Through Justice: Rwanda's Precedent for the Trial of Milosevic*, WASH. POST, July 6, 1999, at A15.

⁷⁸ ICTR Statute, art. 4. These violations include, but are not limited to: (a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) Collective punishments; (c) Taking of hostages; (d) Acts of terrorism; (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; (f) Pillage; (g) The passing of sentence and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples; (h) Threats to commit any of the foregoing acts. *Id.*

⁷⁹ See *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment by Trial Chamber I, para. 634 (Sept. 2, 1998). The Chamber recalled, *inter alia*, that Hirota, the former Foreign Minister of Japan, was convicted at Tokyo for crimes committed during the rape of Nanking. *Id.*

tions of Article 3.⁸⁰ However, as noted earlier, in none of the cases completed so far — all involving civilians — in which this crime was alleged has the Tribunal entered a conviction on this specific charge.⁸¹ The reason for this situation is to be found in the legal findings of Trial Chamber I in the *Akayesu* judgment regarding five of the fifteen counts in his indictment that alleged violations of Common Article 3. The Chamber held that for Akayesu to be criminally responsible under Article 4 of the Statute, the prosecutor had to prove beyond a reasonable doubt that Akayesu, by virtue of his authority as a mayor, was either responsible for the outbreak of, or was otherwise directly engaged in, the conduct of hostilities.⁸² This position of the Chamber was held despite witness testimony that he was seen wearing a military jacket, carrying a rifle and assisting the military in their tasks. Hence, the prosecutor had to prove either that Akayesu was a member of the armed forces under the military command of either of the belligerent parties (the Rwandan Patriotic Front and the Rwandan Armed Forces of the government at the time), or that he was legitimately mandated and expected, as a public official or agent or person otherwise holding public authority or *de facto* representing the government, to support or fulfill the war efforts.⁸³ Considering these criteria and based on the evidence presented in the case, the Chamber ruled that Akayesu did not incur individual criminal responsibility for violations of Article 3 Common to the Geneva Conventions of 1949 for the Protection of War Victims.⁸⁴

In the judgment of the ICTR's Trial Chamber II in *Prosecutor v. Clement Kayishema and Obed Ruzindana*,⁸⁵ the Chamber advanced the jurisprudence in *Akayesu* by holding that, for a civilian to be culpable for violations of Common Article 3 and

⁸⁰ This may be more a matter of prosecutorial policy and discretion because while it was certainly the case in indictments proffered by the two previous Prosecutors of the Tribunal, Justice Richard Goldstone and Justice Louise Arbour respectively, it would appear from her indictments that the present Prosecutor, Ms. Carla Del Ponte, is not inclined to follow this practice.

⁸¹ See comments, *supra* note 33.

⁸² See *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment by Trial Chamber I, para. 640 (Sept. 2, 1998).

⁸³ See *id.*

⁸⁴ See *id.* paras. 643-44.

⁸⁵ See *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR – 95 – I-T, Judgment of Trial Chamber II (May 21, 1999).

Additional Protocol II, a “nexus” between the crimes alleged and the armed conflict had to be established, in addition to direct engagement in the conduct of hostilities, or a legitimate mandate or expectation of such people as public office holders or *de facto* representatives of the government, to support the war effort.⁸⁶ The accused people in this case, although convicted of genocide and crimes against humanity, were similarly acquitted on counts of their indictment charging them with violations of Common Article 3.⁸⁷ The Tribunal’s Appeals Chamber upheld this judgment.⁸⁸

The jurisprudence of the ICTR, while recognizing that the laws of war apply to civilians as well as military personnel, has raised the standard of proof needed to convict civilians of such crimes to a high one indeed. It is safe to surmise that the “nexus” and direct-mandate tests may not be as difficult to establish in the trials of military commanders expected to begin in the ICTR in the coming months, although the burden of proof beyond a reasonable doubt of specific, individual criminal responsibility remains the same.

III. STATE COOPERATION

The very idea of international criminal justice for violations of international humanitarian law, is predicated on the cooperation of States with the international criminal tribunals. It could not have been otherwise, for the ICTR and the ICTY have no police force and no prisons of their own. The legal basis for the cooperation of States with the ICTR is provided in Article 2 of Security Council Resolution 955. In Article 2, the Council decided “that all States shall cooperate fully with the International Tribunal . . . and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the resolution and the Statute” of the Tribunal. Article 2 provided that implementing the provisions of the resolution and the Statute included the obligation of States to comply with requests or orders issued by a Trial Chamber under Article 28 of the Statute.

⁸⁶ See *id.* paras. 590-624.

⁸⁷ See *id.*

⁸⁸ See *id.*

Article 28 of the Statute (Cooperation and Judicial Assistance) provides:

1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to:
 - (a) The identification and location of persons;
 - (b) The taking of testimony and production of evidence;
 - (c) The service of documents;
 - (d) The arrest or detention of persons;
 - (e) The surrender or the transfer of the accused to the International Tribunal for Rwanda.

Several States, mostly in Africa, Europe and North America, have extended cooperation to the ICTR as envisaged by the Statute of the Tribunal.⁸⁹ Under international law, decisions of the United Nations Security Council are binding on Member States, and the Tribunal was established under the Council's peace enforcement powers in Chapter VII of the United Nations Charter. Article 48 of the Charter obligates Member States to support decisions of the Security Council by cooperating in their implementation.

A. *Monism and Dualism in International Law and State Cooperation with the ICTR*

If decisions of the Security Council ought to be automatically binding on States, why does Article 2 of Resolution 955 requests States to take any measures necessary under their domestic law to implement the provisions of the resolution and the Tribunal's Statute? Are the decisions of the Security Council somehow, then, subordinate to the domestic laws of Member States? Certainly, the answer is no, for the reasons that follow. The first part of the answer to this seeming — but artificial —

⁸⁹ See *supra* note 13. Individuals sought by the Tribunal have been arrested in, and transferred from the following States so far: Belgium, Benin, Burkina Faso, Cameroon, Cote d'Ivoire, Denmark, France, Kenya, Mali, Namibia, Netherlands, South Africa, Switzerland, Tanzania, Togo, United Kingdom, United States, and Zambia.

contradiction lies in Article 2 itself, in which the Security Council “[d]ecides that all States *shall* cooperate fully with the International Tribunal” (second emphasis added). Both words are mandatory in law. The second part of the answer is that, in making it mandatory for States to take necessary measures under their domestic law, the Council, intentionally or not, makes a practical recognition of the theories of monism and dualism in the relation between international law and municipal law.

According to monism, international law and state laws are mutually reinforcing aspects of one system — law in general. Monists believe that all law is a single system of legal rules that are binding — whether on States, on individuals or on non-State entities.⁹⁰ Dualists believe that the juridical origins of state law and international law are fundamentally different; the source of state law being the will of the state itself, and that of international law being the common will.⁹¹ Thus, in the dualist view, for international law to apply within the domestic sphere, it needs to be enabled, empowered, or validated by domestic legislation.

The practical impact of the monist and dualist attitudes to international law (which in any event is far more relevant in relation to the law of treaties) on the work of the ICTR is that it tends to condition how national institutions, including judicial institutions and law enforcement agencies, react or pro-act to the needs or requests of the International Tribunal for judicial cooperation or assistance. States with a dualist approach believe that, to facilitate effective cooperation with the ICTR, it is necessary to adopt enabling domestic legislation. States with a monist perspective to international law and relations see no legal impediment to cooperating with the International Tribunal’s requests for arrests of suspects in their territory and their transfer to the Tribunal at Arusha.⁹² On the whole, the ICTR has had a high degree of cooperation from States, which accounts for the high success rate the Tribunal has achieved in

⁹⁰ See I.A. SHEARER, *STARKE’S INTERNATIONAL LAW* 65 (1994).

⁹¹ *Id.*

⁹² A State may not adhere to the dualist view and yet not extend full cooperation to the Tribunal for political or other non-legal reasons. This situation was encountered in a number of countries in the early years of the work of the Tribunal.

apprehending high-ranking former Rwandan officials who took refuge in various countries. In some instances, legal challenges in domestic courts, in the rare instance of a protracted nature,⁹³ have delayed the transfer of accused persons to the ICTR.

Irrespective of whether or not a State is monist or dualist, as the Secretary-General of the United Nations stated in the formative stages of the Yugoslavia Tribunal,

The establishment of the International Tribunal on the basis of a Chapter VII decision creates a binding obligation on all States to take whatever steps are required to implement the decision.⁹⁴

Furthermore, as stated by a respected publicist in a discussion of international tribunals and the operation of municipals courts,

The fact that municipal courts must pay primary regard to municipal law in the event of a conflict with international law, in no way affects the obligations of the state concerned to perform its international obligations.⁹⁵

Thus, while enabling legislation in the national sphere for state cooperation with the ICTR is welcome and encouraged, the obligation of States to cooperate with the Tribunal remains binding. In cases of non-cooperation, the Tribunal has recourse — that of a formal report to the Security Council, which may take measures, including sanctions, against a non-cooperating State.⁹⁶

From the foregoing, it is obvious that through the cooperation and judicial assistance it receives from States, many of the instances being high-profile cases, the ICTR has contributed to the promotion of international humanitarian law in the cooperating States. This is particularly true of African States, where violations of humanitarian law persist as a major problem.

⁹³ In the Elizaphan Ntakirutimana case, a former Seventh Day Adventist pastor indicted by the ICTR and arrested in the United States in September 1996 challenged his surrender to the Tribunal all the way to the U.S. Supreme Court, but ultimately without success. He was transferred to the ICTR in March 2000.

⁹⁴ *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. Doc. S/25704/Add. 1 (1993).

⁹⁵ SHEARER, *supra* note 90, at 78.

⁹⁶ *See id.*

IV. DEFENSE OF PERSONS ACCUSED OF VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

The ICTR has not only promoted international humanitarian law through the prosecution of accused persons. In the context of these prosecutions, the Tribunal strives to maintain the highest standards by ensuring fair trials. One of the most important aspects of a fair trial is a credible defense of the accused, the absence of which would have left the ICTR as something of a kangaroo court whose judgments would be fair game for an unkind, and valid judgment of history. At the International Tribunal, the accused may engage a lawyer at his expense, but the Tribunal has an extensive body of rules and regulations under which an accused person who is indigent may be assigned counsel for his defense at the expense of the Tribunal, or in other words, legal aid. These regulations include Rules 44-46 of the Tribunal's Rules of Procedure and Evidence,⁹⁷ as well as the Directive on the Assignment of Defence Counsel by the Registrar,⁹⁸ as adopted by the Judges of the tribunal.

However, this area of work of the Tribunal has generated a corpus of jurisprudence, mainly due to orchestrated attempts by some accused persons, their lawyers and political sympathizers, to manipulate the legal aid regime of the Tribunal for subjective interests, including the obvious purpose of delaying trials. The rights of the accused are enshrined in Article 20 of the Statute of the Tribunal, which makes it clear that all persons are equal before the Tribunal. These rights include the right of the accused to:

Defend himself or herself in person or through legal assistance of his own choosing; to be informed, if he or she does not have legal assistance of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it.⁹⁹

⁹⁷ See ICTR Rules of Procedure and Evidence at <http://www.ictr.org/wwwroot/ENGLISH/rules/index.htm>.

⁹⁸ See ICTR Directive on the Assignment of Defence Counsel at <http://www.ictr.org/wwwroot/ENGLISH/basicdocs/directiveadc.htm>.

⁹⁹ See ICTR Statute, art. 20(4)(d).

The bone of contention in many Tribunal cases has been whether an indigent accused person who, pursuant to Article 20(4)(d) of the Statute, has a right to be assigned counsel to defend him or her, additionally has the right to choose or impose particular counsel, at the Tribunal's expense. *Akayesu* was the main case in which this matter played out, leading to much controversy in the media. The Tribunal's Registry, which assigns defense counsel to indigent accused, was portrayed by individuals and groups as being biased against the accused. *Akayesu* had made five requests for replacement of counsel, based on "lack of confidence" in his lawyers, all of which were honored by the Registrar.¹⁰⁰ His frequent changes of defense lawyers cost the Tribunal over \$500,000.¹⁰¹ Upon a subsequent request, the Registrar refused to assign him new counsel of his choice.¹⁰² As *Akayesu* had made the question of lack of counsel of his choice a main ground of his appeal, the Appeals Chamber stated:

The Appeals Chamber holds that . . . the right to free legal assistance by counsel does not confer the right to counsel of one's own choosing . . . The right to choose one's counsel is therefore guaranteed only for accused who can bear the financial burden of retaining counsel. The Appeals Chamber recalls the Tribunal's practice in respect of indigent accused: the Registrar assigns counsel to an indigent accused from a list of available counsel whom he considers qualified under the Tribunal's official criteria. To be sure, the Tribunal's case law gives the opportunity to choose from amongst the counsel on that list. It is, nevertheless, also true that the Registrar is not necessarily bound by the wishes of an indigent accused. Indeed, he has wide discretion, which he exercises in the interest of justice.¹⁰³

The decision of the Appeals Chamber vindicated the position of the Tribunal's Registry: that an indigent accused has a right to be assigned counsel, but no right of selection. Hopefully, it has settled the law in a clear manner and overruled

¹⁰⁰ See *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment by Trial Chamber I, para. 69 (Sept. 2, 1998).

¹⁰¹ See Press Release, ICTR/INFO-9-2-168, *The Six Lawyers of Akayesu* (Feb. 25, 1999) at <http://www.icttr.org>.

¹⁰² See *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment by Trial Chamber I, paras. 45-48 (Sept. 2, 1998).

¹⁰³ *Prosecutor v. Akayesu*, ICTR-96-4-A, Judgment of the Appeals Chamber (June 1, 2001).

attempts to establish unrealistic standards in the legal aid regime of the Tribunal.¹⁰⁴

The ICTR also established precedent in another important and related area: situations where an accused person declines to be represented by counsel. The most famous contemporary example of this situation is the trial of former Serbian President Slobodan Milosevic at the ICTY. Mr. Milosevic has declined to formally appoint a lawyer or accept the assignment by that Tribunal to represent his interests, hence the appointment by the ICTY of a number of lawyers as *amicus curiae* (friend of the court) to assist the Tribunal — but not the defendant directly. This untidy situation arose earlier at the ICTR but has been decisively and innovatively dealt with by the Tribunal. Rule 45 *Quater* of the Tribunal's Rules of Procedure and Evidence provides that a Trial Chamber may, in the interest of justice, instruct the Registrar to assign counsel to represent the interests of the accused. This new rule formalized a power that the Tribunal previously exercised under its "inherent powers." In *The Prosecutor v. Jean-Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze*,¹⁰⁵ Trial Chamber I instructed the Registrar of the Tribunal to assign counsel to represent the interests of one of the three accused persons, Jean-Bosco Barayagwiza. Mr. Barayagwiza, who is indigent and so was assigned a defense counsel by the Tribunal, declined to accept the assigned counsel in a move that was viewed by the Trial Chamber as an attempt to obstruct the progress of the trial.

Again, these developments in the work of the Tribunal are helping to clarify the limits of an important area of international criminal law: the defense of accused persons to ensure a fair trial.

V. THE ICTR AND THE INTERNATIONAL CRIMINAL COURT

In the journey of the development of international humanitarian law, traced here from the Nuremberg trials to the present day, perhaps the most important development has been

¹⁰⁴ See, e.g., Michail Wladimiroff, *The Assignment of Defence Counsel before the International Criminal Tribunal for Rwanda*, 12 LEIDEN J. OF INT'L L. 957, 957-68 (1999).

¹⁰⁵ *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, Decision/Request for Withdrawal of Defense Counsel (Jan. 31, 2000).

the adoption of the Rome Statute establishing the permanent International Criminal Court (ICC or Court) in July 1998.¹⁰⁶ The Rome Statute went into legal force on July 1, 2002, following a tidal wave of ratifications by more than the required sixty States by April 2002 — much earlier than had been anticipated by even the most enthusiastic supporters and proponents of the Court.¹⁰⁷ But it is doubtful that the ICC would have become a reality when it did without the establishment and success of the ICTR and the ICTY.

The Rwanda Tribunal actively participated in the meetings of the Preparatory Committee for the establishment of the Court and in the work of the Preparatory Commission of the Court. In that context, the Tribunal made important contributions to the Statute of the ICC. Chief among these was its successful advocacy, taken up by several non-governmental organizations and States, for the establishment of a comprehensive system of restitutive justice in the ICC that would cater to victims of crimes under the jurisdiction of the Court, including the establishment of a trust fund for victims.¹⁰⁸ These innovative suggestions were inspired by the ICTR's own experience and challenges in providing effective support to witnesses who testified at the Tribunal.¹⁰⁹

Similarly, the ICTR has much to offer a permanent ICC in terms of a wealth of groundbreaking jurisprudence, which has been discussed above. With respect to practical operations in areas both legal, and not strictly legal, which serve as essential support functions for the legal work of an international criminal

¹⁰⁶ See Rome Statute, art. I.

¹⁰⁷ As of September 10, 2002, 78 countries had ratified the Rome Statute.

¹⁰⁸ Article 75 of the Rome Statute provides for reparations for victims through restitution, compensation and rehabilitation, while Article 79 provides for the establishment of a Trust Fund for victims for these purposes. See also the Statement of the ICTR Registrar to the Preparatory Committee on the Establishment of an International Criminal Court, which met in New York from March 16 – April 3, 1998.

¹⁰⁹ Rule 34(ii) of the Rules of Procedure and Evidence of the ICTR provides that a Victims and Witnesses Support Unit shall: "Ensure that [victims and witnesses] receive relevant support, including physical and psychological rehabilitation, especially counseling in cases of rape and sexual assault." The provision in Article 43.6 of the ICC Statute is broadly similar: it provides that a Victims and Witnesses Unit shall "provide. . .counseling and other appropriate assistance to witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses."

court, the ICTR is making its experience available as the process of formulating the practical operating framework of the ICC unfolds. These areas include witness support and protection, defense counsel issues, and administration and financing of the Court. The contributions of the ICTR to the establishment of a permanent framework of international criminal justice are particularly unique because the Tribunal operated in a difficult environment without adequate external support infrastructure, overcoming several obstacles in the process. A practical example is the Tribunal's witness support and protection operations, which are undertaken in a region of the world with no prior history of witness protection, and yet has been largely successful. The ICC, although located in The Hague — an advanced country with adequate infrastructure — will undertake operations on a global scale, and many of these operations, be they arrests or movements of witnesses, will take place in countries with an operating environment similar to what the ICTR has experienced.

VI. CONCLUSION: THE ICTR AND ACCOUNTABILITY IN AFRICA

The ICTR is not operating in a political or environmental vacuum. The debilitating effects of abuse of power by political leadership and authority have been particularly marked in Africa, where the principle of accountability has been absent for several decades as a result of the absence of strong, independent institutions. In this context, the ICTR is the first international judicial institution to call erstwhile powerful political and military leaders in Africa to judicial account for grave violations of humanitarian law. Its work is pioneering the establishment of the rule of law in Africa, which must take root if Africa is to leave behind its cycles of violence and poverty and achieve political stability and progress. Admittedly, this is a slow process, and not an overnight event. The work of the Tribunal sends a strong message to the leaders and warlords who have retarded Africa's political evolution and social cohesion.

It is understandable, then, that the ICTR's policy preference is generally to enforce its sentences in African prisons.¹¹⁰ The aim is to have a greater deterrent effect against impunity

¹¹⁰ See generally, ICTR Statute, art. 23.

in the continent. Agreements for the enforcement of the Tribunal's sentences have been signed between the UN Tribunal and three African countries — Mali, Benin and Swaziland, and other agreements are currently being negotiated with other African countries.¹¹¹ On December 10, 2001, six convicts of the Tribunal, including the former Rwandan Prime Minister Kambanda, were transferred to Mali to begin serving their prison sentences.¹¹² Kambanda thus became the first national political leader in history to be imprisoned for the crime of genocide.

Unquestionably, the example that has been set by the Rwanda Tribunal, that international criminal justice is workable and it is possible to bring high-ranking individuals suspected of violations of international humanitarian law to justice, influenced the establishment of a Special Court for Sierra Leone. Prior to the international community's decision to establish the Special Court as a separate judicial entity, several individuals and groups within Africa and outside the continent called for the expansion of the ICTR mandate to try suspects for war crimes and crimes against humanity committed in Sierra Leone.¹¹³ As it is, the Rules of Procedure and Evidence of the ICTR will apply *mutatis mutandis* to the Sierra Leone Court.¹¹⁴ This is an important contribution by ICTR to the work of the Special Court. It is envisaged that the ICTR will provide expertise and advice to the Special Court, in the form of consultations by judges of both jurisdictions, training of prosecutors, investigators and administrative support staff, and sharing of information, documents, judgments and other relevant legal material on a continuous basis.¹¹⁵

Independent and impartial judiciaries remain key to the establishment of the rule of law in Africa. The "African renaissance" will be difficult to achieve without justice and the rule of

¹¹¹ See Press Release, ICTR/INFO-9-2-163, ICTR Registrar Meets Mali's Head of State, Concludes Agreement on Enforcement of Sentences (Feb. 12, 1999); Press Release, ICTR/INFO-9-2-200, Agreement on Enforcement of Tribunal Sentences Signed in Benin (Aug. 26, 1999); and Press Release, ICTR/INFO-9-2-240, Swaziland Agrees to Enforce ICTR Sentences (Aug. 31, 2000) at <http://www.ictr.org>.

¹¹² See Press Release, ICTR/INFO-9-2-296, Former Prime Minister and Five Other Convicts Sent to Prison in Mali (Dec. 11, 2001), at <http://www.ictr.org>.

¹¹³ See Kingsley Chiedu Moghalu, *Sierra Leone: No Peace Without Justice*, WEST AFR. MAG., June 12-18, at 8.

¹¹⁴ ICTR RULE P. EVID. 13.

¹¹⁵ See *Report of the Secretary-General*, *supra* note 56, at 12.

law. The absence of both accountability and the rule of law is the root cause of Africa's problems. For this reason, it is vital that the continent embrace and become engaged with the work of the ICTR and internalize the latter's jurisprudence and larger meaning within its various national jurisdictions. The work of the Tribunal is a symbol of the key to Africa's future. If justice or the lack thereof represents the difference between Africa's progress, on the one hand, and its stagnation and retrogression on the other, then the future of that continent may lie in whether it can move from a culture of impunity to one of accountability represented by the work of the ICTR.

At a global level, on the long road from Nuremberg to Rome, the Tribunal's weighty milestones of precedent for the international rule of law are being increasingly recognized. Out of Africa have come not only the more widely reported mass killings but also a road map of exactly how impunity can be successfully addressed through the effective enforcement of international humanitarian law.