Partial Justice: Successes and Failures of the International Criminal Tribunal for Rwanda in Ending Impunity for Violations of International Criminal Law

Parker Patterson*

I. INTRODUCTION

Joseph Stalin is reputed to have once quipped that "[o]ne death is a tragedy; one million is a statistic."[1] This cynical appraisal certainly reflected the law's traditionally lopsided approach to criminal responsibility across the domestic and international spheres.[2] Indeed, under the classical state-centric paradigm of public international law, international individual criminal responsibility was an oxymoron.[3] The prosecution of Axis leaders at the Nuremburg and Tokyo trials at the end of the Second World War gave many hope that a new era of international individual accountability had finally arrived, but the chill of the Cold War and the ensuing subversion of international law to ideological

* © 2010 Parker Patterson. J.D./M.S. candidate 2012, Tulane University Law School; B.A. in history and anthropology 2007, Case Western Reserve University. The author would like to thank Zarir, Appollinaire, and Ben.

1. Judge Byron, Opening Remarks at the International Symposium: International Criminal Tribunal for Rwanda: Model or Counter Model for International Criminal Justice? The Perspectives of the Stakeholders 16 (July 9, 2009), http://www.unictr.org/Portals/0/English/News/events/july2009/SESSION1.pdf.

2. STEVEN R. RATNER ET AL., ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBURG LEGACY 3-4 (3d ed. 2009).

3. *Id.* at 4.

machinations quickly disabused the world community of any such notion.[4] Most of those who committed violations of international humanitarian and human rights law, whether they were faceless foot soldiers or infamous dictators, continued to enjoy impunity throughout the postwar period due to a focus on state, rather than individual responsibility.[5] The end of the Cold War ushered in a new geopolitical order, and with it both impetuous optimism for the future role of international law in global peace and security, and some of the most disturbing challenges to that regime's normative underpinnings seen since the end of the Second World War.[6] It was out of this profoundly ambiguous mélange of hope and horror that the International Criminal Tribunal for Rwanda (ICTR) was born.[7]

Created by the U.N. Security Council in the aftermath of the 1994 Rwandan Genocide, the ICTR's mission expressly linked the accountability for the genocide with the promotion of peace and national reconciliation in Rwanda.[8] In 1995, the U.N. Special Rapporteur of the Commission on Human Rights found that impunity was an underlying cause of the genocide.[9] Other commentators have also noted how impunity in the Rwandan context contributed to a sense of frustration and hopelessness among the population that desperate Hutu elites manipulated to horrific effect.[10] The judges of the ICTR themselves are well aware of the importance of judicial accountability in promoting reconciliation in Rwanda and see the ICTR as central to this process.[11] To the extent that the ICTR has sought to hold accountable the leaders of the 1994 Rwandan genocide, it has been remarkably successful.[12] It has also made tremendous advances in international humanitarian and

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4. *Id.* at 8.

5. Byron, *supra* note 1, at 9.

6. MICHAEL BARNETT, EYEWITNESS TO A GENOCIDE: THE UNITED NATIONS AND RWANDA 25-26 (2002).

7. L.J. VAN DEN HERIK, THE CONTRIBUTION OF THE RWANDA TRIBUNAL TO THE DEVELOPMENT OF INTERNATIONAL LAW 1-2 (2005).

8. S.C. Res. 955, pmbl., U.N. Doc. S/RES/955 (Nov. 8, 1994). The Security Council had to justify its creation of the ad hoc tribunal, an exercise of a power not expressly delegated to it under Chapter VII of the Charter, as an effort to promote peace and security. VAN DEN HERIK, *supra* note 7, at 34-37.

9. Special Rapporteur of the Comm'n on Human Rights, *Rep. on the Situation of Human Rights in Rwanda*, ¶¶ 22, 25, U.N. Doc. E/CN.4/1995/71 (Jan. 17, 1995) (by René Degni-Ségui) [hereinafter *Rep. on the Situation of Human Rights in Rwanda*].

10. *See, e.g.*, PETER UVIN, AIDING VIOLENCE: THE DEVELOPMENT ENTERPRISE IN RWANDA 136-37 (1998).

11. Byron, *supra* note 1, at 9-10.

12. VAN DEN HERIK, *supra* note 7, at 263.

criminal law.[13] Nevertheless, its foreign genesis, location, and judicial methods have marginalized its relevance to the Rwandan people, and consequently its contribution to the process of reconciliation and peace building in Rwanda.[14] Furthermore, its failure to investigate allegations that invading Tutsi committed atrocities during the civil war that accompanied the genocide has led to allegations that the ICTR is handing down victor's justice.[15]

As a judicial institution, its power to heal the wounds of the genocide is inherently limited.[16] It is furthermore at the mercy of the political winds of the international community that created it.[17] It would thus be unfair to hold the ICTR responsible for ongoing tensions in Rwanda.[18] On the other hand, its successes and failures in ending impunity for violations of international criminal law in the Great Lakes region have been and are relevant to the continued peace and stability of Rwanda, the region, and the world.[19]

This comment will seek to evaluate the successes and failures of the Court in the light of its ambitious mandate and turbulent history. Part II introduces the legal and political context in which the Court arose and establishes its jurisdictional scope. Part III surveys a sampling of some of the ICTR's more notable cases. Part IV considers its struggle to conquer impunity in the face of its inherent restraints. The author does not propose any moral equivalency between the protagonists in the Rwandan conflict, but argues against double standards. Finally, Part V concludes that, despite its tremendous achievements, the ICTR's experience with impunity is only one example of a systematic problem facing the entire field of international criminal law.

II. ESTABLISHMENT OF THE TRIBUNAL

Many in the international community, the new Tutsi—dominated government in Rwanda included, saw the establishment of the ICTR as an act of contrition by the Security Council, which had refused to take action as the situation in Rwanda in 1994 unfolded or even call it

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13. KINGSLEY CHIEDU MOGHALU, RWANDA'S GENOCIDE: THE POLITICS OF GLOBAL JUSTICE 1 (2005).

14. Richard Vokes, *The Arusha Tribunal: Whose Justice?*, ANTHROPOLOGY TODAY, Oct. 2002, at 1, 2; RATNER ET AL., *supra* note 2, at 229-30.

15. RATNER ET AL., *supra* note 2, at 228-29.

16. MOGHALU, *supra* note 13, at 202-03.

17. *Id.* at 3.

18. *Id.* at 205.

19. Moghalu sees Africa's larger culture of impunity to be a central cause of its failure to achieve economic development. *Id.* at 183-84.

genocide.[20] The Rwandan government originally requested the creation of an international ad hoc tribunal, but it eventually voted against the resolution that established the ICTR over objections regarding the structure, jurisdiction, and location of the tribunal.[21] Also, other countries on the Security Council expressed their own reservations about the creation of an ad hoc tribunal to address the situation in Rwanda, as well.[22] China abstained and, while they voted in favor of the tribunal, Argentina and Brazil expressed doubts about the legitimacy of the tribunal.[23] The legality of the Security Council's ability to create ad hoc tribunals under chapter VII of the U.N. Charter was in dispute, and the creation of the ICTR undercut the previous assumption that the establishment of the International Criminal Tribunal for Yugoslavia (ICTY) a little more than a year earlier had been an exceptional action in response to a unique situation.[24] Nonetheless, Brazil and Argentina voted in favor of Resolution 995, which created the ICTR, due to the extreme exigencies of the situation and the fact that Rwanda itself had requested the tribunal (even though it ultimately did not vote for it).[25]

The conventional method through which the international community creates international judicial bodies is by treaty.[26] Ad hoc tribunals, on the other hand, are subsidiary bodies of the United Nations created by the Security Council in response to threats to international peace and security.[27] The Security Council's power to create subsidiary bodies derives from article 29 of the Charter, while under articles 41 and 42 (part of chapter VII), the Security Council has the power to take actions to address situations involving a breach or threat to international

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20. BARNETT, *supra* note 6, at 130-32; MOGHALU, *supra* note 13, at 23-24; VAN DEN HERIK, *supra* note 7, at 32.

21. U.N. SCOR, 49th Sess., 3453rd mtg. at 13-16, U.N. Doc. S/PV.3453 (Nov. 8, 1994). In a farcical turn of events, Rwanda happened to be a rotating member on the Security Council throughout the genocide and the establishment of the ICTR. BARNETT, *supra* note 6, at 145-47; WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE 29 (2006).

22. MOGHALU, *supra* note 13, at 42-44.

23. U.N. SCOR, 49th Sess., 3453rd mtg., *supra* note 21, at 3, 8-11.

24. *Id.* at 9; VAN DEN HERIK, *supra* note 7, at 37-41, 279.

25. U.N. SCOR, 49th Sess., 3453rd mtg., *supra* note 21, at 3, 8-10.

26. RATNER ET AL., *supra* note 2, at 213. The London Agreement signed by the Allies after World War II, for example, created the International Military Tribunal. *Id.* at 210.

27. VAN DEN HERIK, *supra* note 7, at 32; RATNER ET AL., *supra* note 2, at 246-47. Ad hoc tribunals, which are purely international bodies, are also separate from hybrid tribunals that consist of mixed benches of international and local judicial personnel. RATNER ET AL., *supra* note 2, at 246-47. The distinction is not always clear, however. Ratner et al., for example, classify the Special Court for Sierra Leone as a hybrid tribunal, while Schabas considers it an ad hoc tribunal. RATNER ET AL., *supra* note 2, at 246; SCHABAS, *supra* note 21, at 6.

peace and security.[28] Thus, it seems that when the Security Council identifies a threat to international peace and security (and it has discretion in determining when such situations exist), it has the power to create a subsidiary organ like a tribunal to tackle the problem.[29] Nevertheless, the Charter does not expressly empower the Security Council to create tribunals in response to threats to peace and security under chapter VII.[30] Defendants before both the ICTY and ICTR have challenged the legality of ad hoc tribunals, but in both cases the tribunals rejected such objections.[31]

The ICTR was modeled on the structure of its sister tribunal, the ICTY; they share the same Appeals Chamber judges, and at first, they even shared their Prosecutor's Office.[32] The Tribunal consists of three organs: the Chambers, composed of three Trial Chambers and an Appeals Chamber; the Prosecutor's Office, in charge of investigating and prosecuting defendants; and the Registry, which performs administrative tasks.[33] The trials proceed on an essentially common law, adversarial model, despite the fact that Rwanda itself is a civil law nation that utilizes an inquisitorial approach.[34] These foreign trial procedures have tended to alienate Rwandans and diminish their respect for the Tribunal.[35] The ICTR, furthermore, has primacy over national courts, meaning that it can require Rwandan courts to "defer to its competence."[36] This provision, while consistent with the Tribunal's independence and mandate to prosecute the leaders of the genocide, caused friction with Rwanda.[37] The ICTR additionally has the power to refer its cases to Rwanda's courts, which has at times also elicited objections from the Rwandan government.[38] After much deliberation, the Security Council chose to situate the Tribunal in Arusha, Tanzania, rather than in Kigali, in order to maintain its independence.[39] This decision, similarly, angered the

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28. U.N. Charter arts. 29, 39, 41-42.

29. SCHABAS, *supra* note 21, at 51-53; VAN DEN HERIK, *supra* note 7, at 34-41.

30. U.N. Charter ch. VII; VAN DEN HERIK, *supra* note 7, at 37-38.

31. Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 28-48 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); Prosecutor v. Kanyabashi, Case No. ICTR-96-15-T, Decision on Defence Motion on Jurisdiction, ¶¶ 17-27 (June 18, 1997).

32. RATNER ET AL., *supra* note 2, at 224. The Prosecutor's Office was eventually split. *Id.*

33. S.C. Res. 955, *supra* note 8, art. 10; VAN DEN HERIK, *supra* note 7, at 59-67.

34. MOGHALU, *supra* note 13, at 55.

35. *Id.* at 55, 187.

36. S.C. Res. 955, *supra* note 8, art. 8, § 2.

37. MOGHALU, *supra* note 13, at 33-36. Other countries also objected to the primacy provision's derogation of their sovereignty. *Id.*

38. VAN DEN HERIK, *supra* note 7, at 53-55; Vokes, *supra* note 14, at 2.

39. MOGHALU, *supra* note 13, at 36-39.

Rwandan government and distanced the Tribunal from the Rwandan people.[40] However, in light of the chaotic circumstances in Kigali at the time that the ICTR was established, and the Rwandese Patriotic Front's[41] subsequent attempts to control or marginalize the Tribunal, it does not seem likely that it could have remained viable or independent had it been situated in Rwanda.[42]

The ICTR has "the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighboring States, between 1 January 1994 and 31 December 1994."[43] The Tribunal has subject matter jurisdiction over crimes of genocide, crimes against humanity, and war crimes.[44] It has personal jurisdiction over natural persons, but not states, groups, or organizations.[45] The Tribunal's temporal jurisdiction is the calendar year of 1994, and its territorial jurisdiction is the country of Rwanda and neighboring states in cases where the defendant is a Rwandan citizen.[46] The Rwandan government objected to the ICTR's jurisdiction because it could include activities of the Rwandan Patriotic Front (RPF) during the civil war, but excluded potential crimes committed by members of the predecessor Hutu-power government before 1994.[47]

Individual criminal responsibility under the statute reaches "person[s] who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution" of one of the three categories of crimes enumerated: genocide, crimes against humanity, and war crimes.[48] Thus, the Tribunal has jurisdiction over various forms of direct participation, including forms of accessory

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40. *Id.*

41. The RPF, founded by exiled Tutsi during the reign of the Hutu power government in Rwanda, ended the genocide by defeating the Rwandan Army in 1994 and subsequently took control. GÉRARD PRUNIER, THE RWANDA CRISIS: HISTORY OF A GENOCIDE 73 (1995); MARTIN MEREDITH, THE FATE OF AFRICA: FROM THE HOPES OF FREEDOM TO THE HEART OF DESPAIR: A HISTORY OF FIFTY YEARS OF INDEPENDENCE 521-22 (2005).

42. MOGHALU, *supra* note 13, at 36-39.

43. S.C. Res. 955, *supra* note 8, art. 1.

44. *Id.* arts. 2-4.

45. *Id.* art. 5; VAN DEN HERIK, *supra* note 7, at 72.

46. S.C. Res. 955, *supra* note 8, art. 7.

47. MOGHALU, *supra* note 13, at 32.

48. S.C. Res. 955, *supra* note 8, art. 6, § 1. Liability may attach to three types of actors: individuals, organizations/groups, and states. It may be either civil or criminal (although state criminal responsibility is controversial). Thus, "individual criminal responsibility" covers the target and nature of responsibility, rather than its substance (genocide, for example). RATNER ET AL., *supra* note 2, at 15-17.

liability, such as aiding and abetting.[49] The Tribunal has express jurisdiction to prosecute state actors, including heads of state.[50] Its jurisdiction also includes command or superior responsibility, meaning that a superior may be criminally responsible for "failing to prevent or punish the crimes of his subordinates whom he knew or had reason to know."[51] To be liable under command responsibility, the superior must have had effective control of the subordinate.[52] Following the precedent set at Nuremburg, subordinates in turn may not defend their violations of humanitarian law by claiming to be acting on superior orders.[53] Nevertheless, judges may consider superior orders as a mitigating factor in determining punishment.[54]

Provocatively, the Secretary-General stated that the Security Council had included within the subject matter jurisdiction of the Tribunal "international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed . . . individual criminal responsibility."[55] International humanitarian and human rights instruments bind their state parties, and do not usually create criminal obligations on individuals directly.[56] Thus, the ICTY has consistently applied norms that entailed criminal obligations on individuals under customary international law when the acts were committed and, therefore, avoided using treaty law to support judgments.[57] The ICTR is not a law-making body and cannot import treaty law into customary international law on its own or make a law apply to individuals unless that law does so on its own terms.[58] Furthermore, if it were doing so, the Tribunal might be violating the prohibition against *ex post facto* laws because it would be convicting individuals for crimes that did not apply to them under any international law at the time they committed them.[59]

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49. GUÉNAËL METTRAUX, INTERNATIONAL CRIMES AND THE *AD HOC* TRIBUNALS 269, 284 (2005).

50. S.C. Res. 955, *supra* note 8, art. 6, § 2. Being a state actor may even be an exacerbating rather than mitigating factor. METTRAUX, *supra* note 49, at 276-77.

51. S.C. Res. 955, *supra* note 8, art. 6, § 3; METTRAUX, *supra* note 49, at 297.

52. RATNER ET AL., *supra* note 2, at 146-47.

53. S.C. Res. 955, *supra* note 8, art. 6, § 4; RATNER ET AL., *supra* note 2, at 150-51.

54. S.C. Res. 955, *supra* note 8, art. 6, § 4.

55. U.N. Secretary-General, *Rep. of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994)*, ¶ 12, U.N. Doc. S/1995/134 (Feb. 13, 1995).

56. METTRAUX, *supra* note 49, at 11. A treaty could, of course, create norms directly applicable to individuals who are citizens of state parties by expressly stating that it was intended to do so. *Id.* at 7.

57. *Id.* at 6.

58. U.N. SCOR, 49th Sess., 3453rd mtg., *supra* note 21, at 8.

59. RATNER ET AL., *supra* note 2, at 23.

Nevertheless, the ICTR has engaged in substantial innovation of international criminal law through the application of genocide, humanitarian, and war crimes law in its cases.[60] Given the relative underdevelopment of international criminal law, particularly when the Tribunal was first established, the Tribunal would not have been able to operate without doing so.[61] Although some have criticized the ICTR's judgments for being less coherently reasoned than judgments rendered at the ICTY, the normative impact of the Tribunal's cases is undeniable.[62]

III. MAJOR CASES

Although the Security Council established the ICTR in November of 1994, it did not begin its first trial until January of 1997.[63] That first trial, *Prosecutor v. Akayesu*, was a groundbreaking case in which the Trial Chamber secured the first conviction of an individual for the crime of genocide by an international institution.[64] Since then, the Tribunal has continued to make significant progress. As of February 2010, twenty-two *génocidaires* convicted at the ICTR are serving sentences in Mali and Benin.[65] It has completed forty-eight cases:[66] twenty-four detainees are on trial, two are awaiting trial, and eight have appeals pending.[67] Nevertheless, it has not always been smooth sailing.[68] Early on, cases progressed with glacial slowness due to a combination of inadequate facilities, procedural difficulties, and even corruption.[69] The Tribunal has been able to overcome these issues, and currently, it operates smoothly to deliver speedy trials and just verdicts.[70] Over the past decade and a half, the Tribunal has handed down many landmark judgments, and it is worth noting some here.

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60. VAN DEN HERIK, *supra* note 7, at 280.
61. SCHABAS, *supra* note 21, at 44.
62. VAN DEN HERIK, *supra* note 7, at 261.
63. Erik Møse, *Main Achievements of the ICTR*, 3 J. INT'L CRIM. JUST. 920, 920 (2005).
64. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, § 8 (Sept. 2, 1998), http://www.unictr.org/Portals10/Case/English/Akayesu/judgement/akay001.pdf; MOGHALU, *supra* note 13, at 76; Dianne Marie Amann, Prosecutor v. Akayesu. *Case No. ICTR-96-4-T*, 93 AM. J. INT'L L. 195, 195 (1999).
65. ICTR Detainees: Status, INT'L CRIM. TRIBUNAL FOR RWANDA, Oct. 17, 2010, http://69.94.11.53/ENGLISH/factsheets/detainee.htm.
66. *Id.*
67. *Id.*
68. SCHABAS, *supra* note 21, at 30-31.
69. *Id.*; MOGHALU, *supra* note 13, at 53-54.
70. MOGHALU, *supra* note 13, at 189-90; Møse, *supra* note 63, at 942.

A. Prosecutor v. Akayesu

Jean-Paul Akayesu was the mayor of the town of Taba during the genocide.[71] After the genocide ended, Akayesu fled to Zambia, where he was apprehended in 1995 and handed over to the ICTR.[72] The Prosecution indicted him for genocide, complicity in genocide, incitement to genocide, war crimes, and crimes against humanity.[73] The Tribunal found him guilty of genocide, incitement to genocide, and seven counts of crimes against humanity.[74] The judgment was the first successful conviction by an international tribunal for the crime of genocide.[75] The Trial Chamber was consequently the first to interpret and apply the hitherto abstract crime of genocide to a concrete case.[76] The Chamber held that "the crime of genocide does not imply the actual extermination of [a] group in its entirety."[77] The commission of the crime turns instead on the specific intent to destroy "in whole or in part" one of the groups enumerated.[78]

Additionally, the Tribunal had to demonstrate that the Tutsi constituted a "national, ethnical, racial or religious group" and thus fell within the ambit of the definition of genocide as stated in the ICTR statute.[79] This was not as straight forward as it seems, because the Tutsi share the same language, religion, and culture with the Hutu.[80] The Chamber held that any stable and permanent group, membership in which is determined by birth and in a "continuous and often irredeemable manner," would fall within the definition.[81] By taking note of the discriminatory history of de jure ethnic classification of the Rwandan population into Hutu and Tutsi, the Chamber was able to find that the Tutsi were a group that could fall within the genocide definition and thus avoid the counterproductive result that the ICTR Statute precluded a legal finding of genocide in Rwanda.[82]

The *Akayesu* judgment broke further ground by finding that sexual violence could constitute a crime against humanity or genocide under

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71. Amann, *supra* note 64, at 195.

72. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, § 1.4.1, ¶ 9 (Sept. 2, 1998), http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf.

73. *Id.* § 1.2, ¶ 6.

74. *Id.* § 8.

75. Amann, *supra* note 64, at 195.

76. MOGHALU, *supra* note 13, at 79.

77. *Akayesu*, Case No. ICTR-96-4-T, § 6.3.1, ¶ 497.

78. *Id.* § 6.3.1, ¶¶ 497-498.

79. Amann, *supra* note 64, at 196; S.C. Res. 955, *supra* note 8, art. 2, § 2.

80. Amann, *supra* note 64, at 196.

81. *Akayesu*, Case No. ICTR-96-4-T, § 6.3.1, ¶ 511.

82. *Id.* § 5.1, ¶¶ 169-171; MOGHALU, *supra* note 13, at 80.

international law.[83] Rape was not a part of the original indictment, but due to the disturbing testimony by victims, as well as pressure from Judge Navanethem Pillay (the only female judge on the panel) and NGOs, the Prosecutor amended the indictment to include allegations of rape.[84] Recognizing the status of sexual violence as an international crime, the Chamber defined it as "any act of a sexual nature which is committed on a person under circumstances which are coercive," including rape, which it defined as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."[85] In order to rise to the level of an international crime, sexual violence must be committed as part of a widespread or systematic attack against a civilian population on discriminatory grounds or against a protected group.[86] Penetration or physical contact, however, is not required.[87] In fact, "[t]hreats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion" that rises to the level of sexual violence.[88]

The Trial Chamber handed down its judgment in early September of 1998.[89] The Trial Chamber found Akayesu not guilty of five counts of war crimes based on Common Article 3 of the Geneva Convention and Additional Protocol II because the Prosecutor could not sufficiently connect him with the military or the civil war.[90] The Chamber did find him guilty of genocide, incitement to genocide, and various crimes against humanity including murder, torture, and rape.[91]

Akayesu was not a "big fish" among the *génocidaires*, but the judgment against him was particularly significant because of the normative ground it broke.[92] The *Akayesu* judgment set precedents that other international criminal tribunals have subsequently followed. Despite years of dispute at the ICTY over whether the events in the former Yugoslavia rose to the level of genocide, that tribunal secured its first genocide conviction in 2001 against the so-called "Butcher of

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83. *Akayesu*, Case No. ICTR-96-4-T, §§ 7.7-.8.

84. Amann, supra note 64, at 196; Valerie Oosterveld, *Gender-Sensitive Justice and the International Criminal Tribunal for Rwanda: Lessons Learned for the International Criminal Court*, 12 NEW ENG. J. INT'L & COMP. L. 119, 121-22 (2005).

85. *Akayesu*, Case No. ICTR-96-4-T, § 6.4, ¶ 598.

86. *Id.*; Amann, *supra* note 64, at 197 n.24.

87. *Akayesu*, Case No. ICTR-96-4-T, § 7.7, ¶ 688.

88. *Id.*

89. Amann, *supra* note 64, at 195.

90. *Akayesu*, Case No. ICTR-96-4-T, § 7.1.

91. *Id.* § 8. The Appeals Chamber upheld his conviction in 2001. Prosecutor v. Akayesu, Case No. ICTR-96-4-A, Judgement, ¶¶ 423-424 (June 1, 2001).

92. MOGHALU, *supra* note 13, at 77.

Srebrenica."[93] The ICTY furthermore cited the *Akayesu* rape definition in later cases.[94] The framers of the Rome Statute also drew on the *Akayesu* judgment in drafting the sexual violence crimes over which the International Criminal Court would have jurisdiction.[95] Thus, *Akayesu* represents the first and most famous example of ICTR's contribution to the establishment and elaboration of the so-called "new" international criminal law.[96]

B. Kambanda v. Prosecutor

One of the Tribunal's biggest successes in its quest to prosecute the "big fish" who had the largest role in the planning and execution of the genocide was the conviction of Jean Kambanda of genocide, complicity in genocide, conspiracy to commit genocide, and two counts of crimes against humanity in 1998.[97] Kambanda had served as Prime Minister in the provisional government established after the death of President Habyarimana that presided over the genocide.[98] Kenyan authorities caught Kambanda in 1997 and handed him over to the Tribunal, where he pleaded guilty to the charges against him, including genocide and crimes against humanity in 1998.[99] Kambanda signed a plea agreement with the Prosecutor and provided information about the genocide.[100] Much to his disappointment, however, the Prosecutor had no power to diminish his sentence in light of his cooperation, and the Trial Chamber sentenced him to life imprisonment.[101] The Chamber considered the mitigating factor of his guilty plea but held that "aggravating circumstances surrounding the crimes committed by Jean Kambanda negate the mitigating circumstances."[102] Kambanda was the first head of government to be convicted of genocide.[103]

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93. Prosecutor v. Krstic, Case No. IT-98-33-T, Judgement, ¶ 688 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001); MOGHALU, *supra* note 13, at 81.

94. *See, e.g.*, Prosecutor v. Furundžija, IT-95-17/1-T, Judgement, ¶ 176 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

95. Oosterveld, *supra* note 84, at 122-23.

96. Vokes, *supra* note 14, at 1; VAN DEN HERIK, *supra* note 7, at 3-4.

97. Prosecutor v. Kambanda (*Kambanda I*), Case No. ICTR-97-23-S, Judgement & Sentence, § IV (Sept. 4, 1998); MOGHALU, *supra* note 13, at 84.

98. PRUNIER, *supra* note 41, at 232-33; MOGHALU, *supra* note 13, at 84.

99. *Kambanda I*, Case No. ICTR-97-23-S, § I, ¶¶ 1-3.

100. MOGHALU, *supra* note 13, at 85-86.

101. *Id.*; Olivia Swaak-Goldman, Kambanda v. Prosecutor. *No. ICTR-97-23-A*, 95 AM. J. INT'L L. 656, 656 (2001).

102. *Kambanda I*, Case No. ICTR-23-S, § III.B, ¶ 62.

103. *Rwanda Genocide Appeal Fails*, BBC NEWS, Oct. 19, 2000, http://news.bbc.co.uk/2/hi/africa/979279.stm.

After the ICTR sentenced Kambanda to life in prison in 1998, he ceased his cooperation with the Prosecution and appealed his conviction and sentence.[104] Kambanda appealed on numerous grounds, among them that the Trial Chamber had failed to ascertain whether his plea was "voluntary and/or informed and/or unequivocal" and that it had "fail[ed] to apply the general principle of law that a plea of guilty as a mitigating factor carries with it a discount in sentence."[105] He also challenged his conviction based on the contention that he was unlawfully detained and denied his right to choice of counsel.[106] In 2000, the Appeals Chamber rejected both the challenge to the verdict and the sentence.[107] The Appeals Chamber dismissed the challenges to the conviction due, among other reasons, to his failure to bring up the issues previously.[108] It furthermore found his guilty plea to have been voluntary, informed, and unequivocal.[109] As far as the sentence was concerned, the Appeals Chamber saw "no reason to disturb the decision of the Trial Chamber" on such a discretionary issue.[110] As the first conviction of a head of state for genocide, *Kambanda* struck a direct blow to state-actor impunity.[111] The *Kambanda* decision served, for example, as precedent for the eventual trials of General Augusto Pinochet in the United Kingdom and Slobodan Milosevic at the ICTY.[112] Kambanda's guilty plea also undermined the credibility of those in Rwanda who continued to deny that the genocide had occurred.[113]

C. Prosecutor v. Nahimana (Media Case)

The ICTR again broke ground in 2003 when it found the leaders of Rwanda's pro-government media front guilty of genocide, incitement to genocide, conspiracy to commit genocide, and crimes against humanity for broadcasting and publishing hate speech that contributed to the events of 1994 in the *Media Case*.[114] Ferdinand Nahimana was a prominent

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104. MOGHALU, *supra* note 13, at 85-86; Swaak-Goldman, *supra* note 101, at 656.

105. Kambanda v. Prosecutor (*Kambanda II*), Case No. ICTR 97-23-A, Judgement, § I.B, ¶ 10 (Oct. 19, 2000).

106. *Id.*

107. Swaak-Goldman, *supra* note 101, at 657-59.

108. *Kambanda II*, Case No. ICTR 97-23-A, § II.B, ¶ 25, § III.B, 42.

109. *Id.* § IV.B.

110. *Id.* § V.C, ¶ 126.

111. Swaak-Goldman, *supra* note 101, at 659.

112. MOGHALU, *supra* note 13, at 87.

113. *Id.* at 86-87.

114. Prosecutor v. Nahimana (*Media Case I*), Case No. ICTR-99-52-T, Judgement and Sentence, ¶¶ 1092-1094 (Dec. 3, 2003); Catharine A. MacKinnon, Prosecutor v. Nahimana, Barayagwiza & Ngeze. *Case No. ICTR-99-52-T*, 98 AM. J. INT'L L. 325, 325 (2004).

Rwandan intellectual turned Hutu extremist who founded the infamous *Radio Télévision Libre des Milles Collines* (RTLMC), a radio station that promoted the militant Hutu supremacy and genocide against the Tutsi.[115] Jean-Bosco Barayagwiza, in turn, was the head of RTLMC as well as an extremist political party known as the *Coalition pour la Défense de la République* (CDR).[116] Hassan Ngeze was the founder and editor-in-chief of the Kinyarwanda newspaper *Kangura* ("Wake him up!"), which also published Hutu supremacy materials.[117] Nahimana and Barayagwiza were arrested in Cameroon in 1996 and transferred to Arusha in 1997.[118] Ngeze was apprehended in Kenya in 1997 and transferred to the Tribunal soon after.[119]

After Cameroonian officials arrested Barayagwiza in 1996, he remained in prison without trial for nineteen months.[120] Barayagwiza moved to nullify his arrest before the ICTR Trial Chamber because his prolonged detention in Cameroon violated his fundamental rights.[121] The Trial Chamber completely dismissed his motion in 1998.[122] On appeal, however, the Appeals Chamber reversed, commenting that "what makes this case so egregious is the combination of delays that seemed to occur at virtually every stage of the Appellant's case."[123] The dismissal of Barayagwiza's indictment infuriated Rwanda and the Rwandan government ceased cooperating with the Tribunal completely.[124] The ICTR could not operate without Rwanda's assistance, and its government demanded that the Appeals Chamber reverse its decision before it would resume collaborating with the Tribunal.[125] The Prosecutor was able to seek review of the decision under article 25 of the ICTR Statute by establishing "new facts."[126] After reviewing its prior decision, the Appeals Chamber reaffirmed that Barayagwiza's rights had been violated but decided that instead of releasing Barayagwiza, he should receive

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115. PRUNIER, *supra* note 41, at 129, 137 n.17; MacKinnon, *supra* note 114, at 325.

116. PRUNIER, *supra* note 41, at 128-29; MacKinnon, *supra* note 114, at 325.

117. PRUNIER, *supra* note 41, at 129, 131-32; MacKinnon, *supra* note 114, at 325.

118. *Media Case I*, Case No. ICTR-99-52-T, ¶¶ 13-14.

119. *Id.* ¶ 19.

120. Barayagwiza v. Prosecutor (*Barayagwiza I*), Case No. ICTR-97-19, Decision, ¶ 2 (Nov. 3, 1999).

121. *Id.* ¶ 10; MOGHALU, *supra* note 13, at 101.

122. *Barayagwiza I*, Case No. ICTR-97-19, ¶ 10.

123. *Id.* ¶¶ 109, 113.

124. MOGHALU, *supra* note 13, at 108.

125. *Id.*

126. S.C. Res. 955, *supra* note 8, art. 25; Barayagwiza v. Prosecutor (*Barayagwiza II*), Case No. ICTR-97-19-AR72, Decision, ¶¶ 6, 15 (Mar. 31, 2000).

compensation if found not guilty or be subject to a lower sentence if found guilty.[127]

Having cleared up this snag, the *Media Case* was able to begin. The Trial Chamber was not the first international tribunal to confront the issue of mass-hate media.[128] The International Military Tribunal at Nuremburg found Julius Streicher, the editor of the Nazi newspaper *Der Strümer*, guilty of crimes against humanity in 1946 because his publication "infected the German mind with the virus of anti-Semitism, and incited the German people to active persecution."[129] The ICTR Trial Chamber took the next step in the *Media Case*, holding that mass media hate speech could constitute genocide and incitement to genocide.[130] The court found that RTLMC, sometimes called "Radio Machete," had not only advocated the extermination of the Tutsi generally, but specifically targeted various individuals, some of whom were subsequently killed.[131] *Kangura* also "promoted violence by conveying the message that the machete should be used to eliminate the Tutsi, once and for all."[132] The CDR in turn "created a political framework for the killing of Tutsi and Hutu political opponents."[133] The Chamber warned that, given the overwhelming influence of media and its potential to affect fundamental values, media leaders must be held accountable.[134]

The Trial Chamber struggled with the issue of causation.[135] Concerning the crime of genocide, the defense argued that the assassination of President Habyarimana, which precipitated the genocide, was a supervening cause, but the Trial Chamber denied that the existence of a more immediate proximate cause could absolve the defendants of responsibility.[136] The Trial Chamber found that "if the downing of the plane was the trigger, then RTLM, *Kangura* and CDR were the bullets in

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127. *Barayagwiza II*, Case No. ICTR-97-19-AR72, ¶ 75.

128. *Media Case I*, Case No. ICTR-99-52-T, Judgement and Sentence, ¶¶ 980-981 (Dec. 3, 2003).

129. *Id.* ¶ 981; OFFICE OF U.S. CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, NAZI CONSPIRACY AND AGGRESSION: OPINION AND JUDGMENT 129 (1947).

130. *Media Case I*, Case No. ICTR-99-52-T, ¶¶ 1092-1094.

131. *Id.* ¶¶ 949, 1031.

132. *Id.* ¶ 950.

133. *Id.* ¶ 951.

134. *Id.* ¶ 945.

135. *International Law—Genocide—U.N. Tribunal Finds That Mass Media Hate Speech Constitutes Genocide, Incitement to Genocide, and Crimes Against Humanity*—Prosecutor v. Nahimana, Barayagwiza, and Ngeze *(*Media Case*), Case No. ICTR-99-52-T (Int'l Crim. Trib. for Rwanda Trial Chamber I Dec. 3, 2003)*, 117 HARV. L. REV. 2769, 2769 (2004) [hereinafter *U.N. Tribunal Finds*].

136. *Media Case I*, Case No. ICTR-99-52-T, ¶¶ 952-953.

the gun."[137] For speech to constitute incitement to commit genocide, according to the Chamber, a direct causal relationship did not need to be established because "the potential of the communication to cause genocide" sufficed.[138] Given the pervasive influence of RTLMC and *Kangura* in Rwanda and their pivotal role in creating the genocidal mentality, this relaxed standard seemed appropriate; however, it might be vulnerable to unwarranted extension in other contexts.[139]

Possibly aware of this potential, the Trial Chamber was careful to balance the interests in public order and free speech.[140] The defense argued that the Tribunal should adopt a standard of heightened protection for speech similar to that of U.S. law.[141] The Trial Chamber rejected this argument, affirming that international law provided the relevant standard, but also noted that even under U.S. law, incitement to violence is not protected speech.[142] The Trial Chamber was careful to differentiate censorship designed to subordinate minority populations or opposition political groups from the present situation, which involved punishment of hate speech advancing majority domination and violence.[143] Because the RTLMC, *Kangura*, and the CDR "presented a common media front . . . to mobilize the Hutu population against the Tutsi ethnic minority," the Trial Chamber found the defendants guilty and sentenced Nahimana and Ngeze to life imprisonment and Barayagwiza to thirty-five years in prison.[144]

In 2007, the Appeals Chamber affirmed some of the convictions and reversed others on various grounds, including that some relied on actions that occurred outside of the ICTR's temporal jurisdiction or before the killing began in April, 1994.[145] The Appeals Chamber, for the most part, accepted the Trial Chamber's analysis regarding the use of mass media hate speech to commit crimes of genocide.[146] The Appeals Chamber decided that the Trial Chamber could consider evidence of

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137. *Id.* ¶ 953.
138. *Id.* ¶ 1015.
139. *U.N. Tribunal Finds*, *supra* note 135, at 2774.
140. *Id.* at 2773.
141. *Media Case I*, Case No. ICTR-99-52-T, ¶ 1010.
142. *Id.*
143. *Id.* ¶ 1008.
144. *Id.* ¶¶ 943, 1105-1108. The Trial Chamber reduced Barayagwiza's sentence from life imprisonment due to the procedural violations of his rights. MacKinnon, *supra* note 114, at 325.
145. Nahimana v. Prosecutor (*Media Case II*), Case No. ICTR-99-52-A, Judgement, § XVIII (Nov. 28, 2007).
146. Catharine A. MacKinnon, Prosecutor v. Nahimana, Barayagwiza & Ngeze. *Case No. ICTR 99-52-A*, 103 AM. J. INT'L L. 97, 97 (2009).

events occurring before 1994 in certain circumstances.[147] Nevertheless, it can only convict individuals for crimes that occurred in that year, even in the case of so-called continuing crimes.[148] The Appeals Chamber also found that the link between broadcasts made before April 6, 1994 (when the killings began) and killings committed after that date was "tenuous" because "the longer the lapse of time between a broadcast and the killing of a person, the greater the possibility that other events might be the real cause of such killing."[149]

Thus, where the Trial Chamber based convictions on crimes committed before 1994 or on actions taken before April 6, 1994 that were not sufficiently connected with killings after that date, the Appeals Chambers overturned the convictions.[150] The Appeals Chamber did not necessarily dispute that many of these activities were criminal but read the Tribunal's temporal jurisdiction strictly to exclude them from its reach.[151] It also overturned convictions where it found that there was not enough evidence of effective control to support superior liability.[152] The Appeals Chamber consequently reduced Nahimana's sentence to thirty years, Barayagwiza's sentence to thirty-two years, and Ngeze's sentence to thirty-five years.[153] Dissenting partially, Judge Shahabuddeen, considered that "appellants could not be prosecuted for any liability accruing in the years before 1994; but they would have liability as from 1 January 1994 for previous publications and could be prosecuted for that liability."[154] He was also "unable to support the Appeals Chamber's view that RTLM did not incite genocide from 1 January 1994 to 6 April 1994."[155]

D. Prosecutor v. Bagosora (Military Trial)

On December 18, 2008, the ICTR scored one of its biggest victories in ending impunity and holding accountable those most responsible for the Rwandan genocide when it convicted Théoneste Bagosora of genocide, crimes against humanity, and war crimes, and sentenced him to

147. *Media Case II*, Case No. ICTR-99-52-A, § VIII.B.3, ¶ 315.
148. *Id.* § VIII.B.3, ¶ 317.
149. *Id.* § XII.B.3.b.i.a, ¶ 513.
150. Transcript of Summary of Judgement at 10-11, 13-14, *Media Case II*, Case No. ICTR-99-52-A (Nov. 28, 2007).
151. MacKinnon, *supra* note 146, at 99.
152. *Media Case II*, Case No. ICTR-99-52-A, § XII.D.2.a.ii.b.ii, ¶ 635.
153. *Id.* § XVIII.
154. *Id.* § XX.E, ¶ 45 (Shahabudden partially dissenting).
155. *Id.* § XX.G.l, ¶ 53 (Shahabudden partially dissenting).

life imprisonment in the *Military Trial*.[156] Bagosora, the so-called "mastermind" of the genocide, is widely recognized as having coordinated its actual execution.[157] Nominally the cabinet director of the Ministry of Defense, he in fact put together and functionally ran the provisional government established after the assassination of President Habyarimana.[158] Many, including the Prosecutor, also believe that he was a major figure in the long-term planning of the genocide prior to that.[159] After the RPF won the civil war, Bagosora escaped, possibly with French help, to the Democratic Republic of Congo (then Zaire) in order to wage continued war from across the border.[160] He eventually ended up in Cameroon, where officials arrested him in 1996.[161] The Prosecutor indicted him in a joint trial with three other high-level military officials, Anatole Nsengiyumva, Aloys Ntabakuze, and Gratien Kabiligi.[162]

The charges against the defendants included some allegations of direct responsibility, but the majority were based on superior responsibility.[163] The Prosecution alleged that Bagosora had command authority over the Rwandan military and civilian militiamen in his capacity as head of the Ministry of Defense.[164] The Trial Chamber found that Bagorosa had in fact exercised de jure and de facto control over the Rwandan military, which was the most powerful element of the government at the time.[165] The Trial Chamber also found that the civilian militias who, among other activities, erected roadblocks to catch and kill Tutsi, were also his subordinates for at least some of the period during which the genocide took place.[166] It was also "satisfied that Bagosora had actual knowledge that his subordinates were about to commit crimes or had in fact committed them" and that he failed to prevent or punish the

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156. Prosecutor v. Bagosora (*Military Trial*), Case No. ICTR-98-41-T, Judgement & Sentence, ¶¶ 2258, 2277 (Dec. 18, 2008).

157. VAN DEN HERIK, *supra* note 7, at 269; PRUNIER, *supra* note 41, at 240; *Rwanda Genocide Mastermind Jailed*, BBC NEWS, Dec. 18, 2008, http://news.bbc.co.uk/2/hi/africa/7789039.stm.

158. *Military Trial*, Case No. ICTR-98-41-T, ¶ 1; PRUNIER, *supra* note 41, at 232; VAN DEN HERIK, *supra* note 7, at 269.

159. *Military Trial*, Case No. ICTR-98-41-T, ¶ 194.

160. PRUNIER, *supra* note 41, at 316; BARNETT, *supra* note 6, at 171; MEREDITH, *supra* note 41, at 522-23. French support for the Hutu power clique throughout the genocide and aftermath, based on a theory of Francophone geopolitical struggle against the Anglophones, was appalling. BARNETT, *supra* note 6, at 171.

161. *Military Trial*, Case No. ICTR-98-41-T, ¶ 53.

162. *Id.* ¶¶ 1-2.

163. *Id.* ¶ 2007.

164. *Id.* ¶ 2015.

165. *Id.* ¶¶ 2021-2022, 2031.

166. *Id.* ¶¶ 2035-2037.

behavior of his subordinates.[167] The Trial Chamber absolutely refused to entertain the defense's contention that the crimes were unplanned and spontaneous.[168] It also found that Ntabakuze and Nsengiyumva had the requisite command control to be held responsible under superior responsibility, but that the Prosecution had not produced enough evidence to establish superior responsibility regarding Kabiligi.[169]

The Trial Chamber, after considering the evidence, acquitted Bagorosa and the others of the charge of conspiracy to commit genocide.[170] Despite Bagosora's alleged role in the training of civilian militias and death squads, participation in drawing up lists of Tutsi and opposition Hutu to be killed, and a comment during peace negotiations in Arusha that he was preparing an "apocalypse," the Trial Chamber found that the "Prosecution has not shown that the only reasonable inference based on the credible evidence in this trial was that this intention [to plan a genocide] was shared by the Accused."[171] The Trial Chamber recognized that history might well someday vindicate the Prosecutor's theory, but stated that its task was "narrowed by exacting standards of proof and procedure, the specific evidence on the record before it and its primary focus on the actions of the four Accused."[172]

The Trial Chamber did find Bagosora, Ntabakuze, and Nsengiyumva guilty of committing genocide, crimes against humanity, and war crimes, but acquitted Kabiligi of these as well.[173] The court rejected the notion that the murder of ten Belgian Peacekeepers qualified as an act of genocide, but found that it did constitute a crime against humanity and a war crime.[174] Regarding Kabiligi, the Trial Chamber found that the Prosecutor had failed to overcome his alibi defense and did not "present sufficient evidence to show the scope of his actual authority."[175] Consequently, while some evidence indicated "that Kabiligi played a more active role in the conduct of military operations than simply serving as a desk officer," it was not clear whether his role

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167. *Id.* ¶¶ 2038-2040.
168. *Id.* ¶ 2041.
169. *Id.* ¶¶ 2056, 2061-2083.
170. *Id.* ¶ 2113.
171. *Id.* ¶¶ 2098-2106, 2111.
172. *Id.* ¶ 2112.
173. *Id.* ¶ 2258.
174. *Id.* ¶¶ 2118, 2176, 2239-2240. During the genocide, ten U.N. Peacekeepers sent to protect an important moderate Rwandan politician named Agathe Uwilingiyimana were caught by the Rwandan military who subsequently tortured, mutilated, and dumped what was left of them at a Kigali hospital. BARNETT, *supra* note 6, at 98-99.
175. Transcript of Oral Summary at 6, *Military Trial*, Case No. ICTR-98-41-T (Dec. 18, 2008).

"entailed command authority, or whether any of the operations, in which he may have participated, targeted civilians."[176] The Rwandan government declared itself satisfied despite the total acquittal of Kabiligi, and stated, in the face of the dismissal of the conspiracy charges, that "Bagosora had the authority over the killers [and t]here can never be genocide without planning."[177]

IV. IMPUNITY AND THE TRIBUNAL

The ICTR has been successful in ending impunity for violations of international humanitarian and human rights law in several ways. The Tribunal has been phenomenally successful in securing the capture of the *génocidaires* scattered across the globe.[178] Escaping Rwanda after losing the civil war to the RPF, the *génocidaires* fled far and wide.[179] Many ended up in neighboring African countries, particularly in the DRC, in order, like Bagosora, to continue the war against the Tutsi, or in countries like Kenya that were politically sympathetic to their cause.[180] Rwanda, on its own, could never have accomplished the capture of all of these far-flung fugitives and, whatever its complaints about the ICTR, it must and does recognize as much.[181] The ICTR's power to compel the cooperation of nations in turning over fugitives derives from Security Council Resolution 955, the preamble of which states that "all States shall cooperate fully with the International Tribunal and its organs."[182] This requirement includes the "obligation of States to comply with requests for assistance or orders issued by a Trial Chamber."[183] The Security Council took these measures under article VII of the U.N. Charter, and the measures are consequently binding on states.[184] Nevertheless, securing the capture of various fugitives has frequently been politically and legally problematic, and some individuals remain at large.[185]

The United States has been particularly active in supporting the ICTR's global pursuit of the *génocidaires*. Throughout the course of the genocide, the United States, still stinging from its embarrassment in Somalia the previous year, staunchly opposed intervention in the face of

176. *Id.*
177. *Rwanda Genocide Mastermind Jailed*, *supra* note 157.
178. RATNER ET AL., *supra* note 2, at 226-27.
179. MOGHALU, *supra* note 13, at 165.
180. *Id.* at 166; MEREDITH, *supra* note 41, at 523.
181. MOGHALU, *supra* note 13, at 192; VAN DEN HERIK, *supra* note 7, at 263.
182. S.C. Res. 955, *supra* note 8, pmbl. ¶ 2.
183. *Id.*
184. *Id.*; U.N. Charter art. 39.
185. MOGHALU, *supra* note 13, at 155, 161.

overwhelming evidence of genocide, and many consider its subsequent support for the creation and efforts of the Tribunal acts of atonement.[186] The United States put significant weight behind diplomatic efforts to encourage Cameroon, Kenya, and the DRC to turn over *génocidaires*, with mixed results.[187] The United States has gone so far as to put out a bounty on the infamous fugitive Felicien Kabuga, the so-called financier of the genocide.[188] The United States also turned over a fugitive named Elizaphan Ntakirutimana, who was living in Laredo, Texas, in 1996 when the ICTR indicted him, pursuant to an agreement between the United States and the ICTR.[189] The United States Court of Appeals for the Fifth Circuit upheld in 1999 the constitutionality of Ntakirutimana's extradition to the ICTR.[190] Early in 2000, the United States Supreme Court denied Ntakirutimana's petition for certiorari, and he was extradited later that year.[191]

African countries have generally been more hesitant about cooperating with the ICTR, often because of political disputes with Rwanda or distaste for the institution itself.[192] Moghalu argues that the reluctance of African leaders is due to their general lack of commitment to legal justice, their concern that precedents set by the ICTR may someday be applied to their own potentially criminal actions, and their preference for adjudication of violations by national African courts, which tend to prosecute more leniently or grant amnesties.[193] Nevertheless, African states have generally cooperated, albeit often under international pressure.[194] Despite the close relationship between the Kenyan government and the *génocidaires*, for example, Kenyan authorities arrested seven fugitives in Nairobi, including Jean Kambanda and Hassan Ngeze, as part of "Operation NAKI" (Nairobi-Kigali).[195] Similarly, despite the long and bloody war between Rwanda and the DRC that followed the genocide, sometimes referred to as "Africa's First

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186. BARNETT, *supra* note 6, at 40, 101; MOGHALU, *supra* note 13, at 162; MEREDITH, *supra* note 41, at 517.

187. MOGHALU, *supra* note 13, at 156, 168-74.

188. *Rwanda Genocide Suspect Slips Net*, CNN, Jan. 21, 2003, http://edition.cnn.com/2003/WORLD/africa/01/21/kenya.fugitive/index.html?iref=allsearch.

189. *US Deports Rwandan Pastor*, BBC NEWS, Mar. 24, 2000, http://news.bbc.co.uk/2/hi/africa/690082.stm; Ntakirutimana v. Reno, 184 F.3d 419, 422-23 (5th Cir. 1999).

190. *Ntakirutimana*, 184 F.3d at 430.

191. Ntakirutimana v. Reno, 528 U.S. 1135, 1135 (2000); *US Deports Rwandan Pastor*, *supra* note 189.

192. MOGHALU, *supra* note 13, at 163.

193. *Id.* at 164-65.

194. *Id.* at 163.

195. *Id.* at 166-67; Press Release, ICTR, Rwanda: Top Figures of Former Regime Arrested (July 18, 1997), http://ictr.org/ENGLISH/PRESSREL/1997/061.htm.

World War," the DRC has turned over numerous *génocidaires* hiding in its territory.[196]

In addition to rounding up the scattered ringleaders of the genocide, the ICTR has been successful at convicting the majority of these genocidal "big fish."[197] The Tribunal has rendered judgments against individuals who acted at the highest levels of the Rwandan state, such as Jean Kambanda and Théoneste Bagosora. This triumph contributes to ending impunity specifically within the Rwandan context and also establishes precedents that strengthen the global culture of accountability under international criminal law.[198] Due to the underdevelopment of international criminal law at the time of its establishment, the ICTR has needed to innovate and expand the scope of international law as it tried its cases.[199] In this way, the Tribunal has been able to contribute substantially to the development of international criminal jurisprudence, as well as to substantive bodies of international law, such as international humanitarian and human rights law.[200]

Critics have disparaged, among other issues, the extreme costliness of the Tribunal, its ponderous pace, and its insensitivity to (particularly female) victims of the genocide.[201] To the extent that the Tribunal has overcome or at least addressed these issues, however, its struggles supply lessons-learned or best-practices contributions that future efforts to enforce international criminal law would be foolish to ignore.[202] It could well be that the lesson learned by the international community is that ad hoc tribunals are not the ideal solution.[203] "Tribunal fatigue" may make the establishment of another such institution politically infeasible, at least for the foreseeable future.[204] Nevertheless, the ICTR has left an indelible mark on international law.[205]

Yet some aspects of the Tribunal's legacy are fundamentally troubling. The ICTR has completely failed, for example, to investigate allegations that the RPF committed atrocities during the 1994 invasion

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196. MOGHALU, *supra* note 13, at 171-73.

197. Timothy Gallimore, *The Legacy of the International Criminal Tribunal for Rwanda (ICTR) and Its Contributions to Reconciliation in Rwanda*, 14 NEW ENG. J. INT'L & COMP. L. 239, 242 (2008).

198. *Id.*; Møse, *supra* note 63, at 932-33.

199. SCHABAS, *supra* note 21, at 44.

200. Gallimore, *supra* note 197, at 243.

201. Møse, *supra* note 63, at 941; RATNER ET AL., *supra* note 2, at 226; Oosterveld, *supra* note 84, at 125-26.

202. Oosterveld, *supra* note 84, at 119-20; Møse, *supra* note 63, at 927-32.

203. VAN DEN HERIK, *supra* note 7, at 279-80.

204. RATNER ET AL., *supra* note 2, at 246.

205. Møse, *supra* note 63, at 943.

that ended the genocide.[206] The ICTR clearly has jurisdiction to do so, because it has jurisdiction over any "serious violations of international humanitarian law committed in the territory of Rwanda . . . between 1 January 1994 and 31 December 1994."[207] Atrocities committed by the RPF during its invasion could well fall within the ICTR's power to prosecute crimes against humanity under article 3 of the ICTR Statute.[208] The failure of the Prosecutor's Office to prosecute the alleged violators has led some to accuse the Tribunal of applying victor's justice.[209] It has also caused many to question the independence of the court in the face of political manipulation, particularly by the Rwandan government and the Security Council.[210] As demonstrated by the *Barayagwiza I* and *Barayagwiza II* debacle, Rwanda has a significant capacity to influence the decisions of the ICTR because the Tribunal cannot function without it.[211] Similarly, when then-Prosecutor Carla Del Ponte announced her intention to investigate and prosecute RPF crimes, the Rwandan government launched an all-out campaign at the United Nations to have her removed, which was ultimately successful.[212]

This is not to imply that crimes that RPF soldiers may have committed should be equated to the genocidal crimes of the Hutu power government or support in any way their claims of a "double genocide."[213] The extent to which the Tribunal is successful in ending impunity, however, will depend on its ability to hold violators of international law responsible regardless of whether they are political or military winners or losers.[214] President Kagame, well aware of the importance of staying in power in order to avoid accountability, carefully cultivates political ties with the United States.[215] Given the conduct of RPF forces in the Democratic Republic of Congo in the years subsequent to the genocide, it seems clear that they do not consider themselves bound to comply with international humanitarian law.[216] In fact, as the organization responsible

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206. RATNER ET AL., *supra* note 2, at 228-29.

207. S.C. Res. 955, *supra* note 8, art. 1.

208. *Id.* art. 3; VAN DEN HERIK, *supra* note 7, at 255.

209. VAN DEN HERIK, *supra* note 7, at 283; Luc Reydams, *The ICTR Ten Years On: Back to the Nuremburg Paradigm?*, 3 J. INT'L CRIM. JUST. 977, 977 (2005).

210. MOGHALU, *supra* note 13, at 125-27; Reydams, *supra* note 209, at 981.

211. MOGHALU, *supra* note 13, at 108. *Compare Barayagwiza I*, Case No. ICTR-97-19, Decision, ¶ 113 (Nov. 3, 1999), *with Barayagwiza II*, Case No. ICTR-97-19-AR72, Decision, ¶ 75 (Mar. 31, 2000).

212. Reydams, *supra* note 209, at 979; MOGHALU, *supra* note 13, at 136.

213. VAN DEN HERIK, *supra* note 7, at 283.

214. Reydams, *supra* note 209, at 988.

215. MOGHALU, *supra* note 13, at 24, 162.

216. MEREDITH, *supra* note 41, at 540-44.

for ending the genocide, the RPF tends to see itself as morally superior to the international community that sat by while the Tutsi were slaughtered.[217] Nevertheless, the RPF's rule over Rwanda "has not brought liberation, inclusiveness and democracy, but oppression, exclusion and dictatorship."[218] If the Tribunal is successful only in prosecuting those who lost the civil war, it will signal to current and future would-be violators, including the incumbent RPF regime, not that they should avoid committing atrocities, but rather that they should avoid losing power.[219]

Ending impunity is the lynchpin of the ICTR's mandate to promote reconciliation in Rwanda.[220] Many consider impunity to have been a major precipitating cause of the genocide.[221] Consequently, preventing the reestablishment of a culture of impunity in Rwanda is crucial to preventing recurrence of serious violence.[222] The Tribunal's punishment of the perpetrators of the genocide has supplied victims with some sense of closure.[223] Some feel, however, that the Tribunal's impact on the people of Rwanda has been minimal or even negative in some cases.[224] To the extent that some Hutu may see it as an instrument of victor's justice, for example, it may actually exacerbate ethnic tensions.[225] Currently, the RPF is engaging in a process of "Tutsi-sation" of the Rwandan power structure that resembles the colonial ethnic distribution of power that provided fuel for the ascendency of the Hutu power government (which in turn instituted its own system of elitist exclusion).[226] Some believe that the RPF has received a sort of "get out of jail free" card from the international community as a reward for

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217. MOGHALU, *supra* note 13, at 24.

218. Filip Reyntjens, *Post-1994 Politics in Rwanda: Problematising 'Liberation' and 'Democratisation*,*'* 27 THIRD WORLD Q. 1103, 1104 (2006).

219. VAN DEN HERIK, *supra* note 7, at 264.

220. Gallimore, *supra* note 197, at 250.

221. UVIN, *supra* note 10, 136-37; *Rep. on the Situation of Human Rights in Rwanda*, *supra* note 9, ¶¶ 22, 25.

222. Gallimore, *supra* note 197, at 250-51.

223. Catharine Newbury, Remarks During the Debates with Academics at the International Symposium: International Criminal Tribunal for Rwanda: Model or Counter Model for International Criminal Justice? The Perspectives of the Stakeholders 16 (July 11, 2009), http://www.unictr.org/Portals/0/English/News/events/july2009/SESSION6.pdf.

224. VAN DEN HERIK, *supra* note 7, at 264; Vokes, *supra* note 14, at 2.

225. Lars Waldorf, Remarks During the Debates with Academics at the International Symposium: International Criminal Tribunal for Rwanda: Model or Counter Model for International Criminal Justice? The Perspectives of the Stakeholders 20 (July 11, 2009), http://www.unictr.org/Portals/ø/English/News/events/July2009/SESSION6.pdf.

226. Reyntjens, *supra* note 218, at 1109, 1113-14; UVIN, *supra* note 10, 32-36.

ending the genocide.[227] To the extent that Rwandans see the ICTR as complicit in this process, it will be unable to contribute to reconciliation.

This problem is exacerbated by the fact that many Rwandans see the institution as fundamentally foreign.[228] The decision to locate the Tribunal outside of Rwanda reflected concerns about its independence from Rwanda.[229] In light of the influence of the Rwandan government in the *Barayagwiza* cases and the removal of Prosecutor Del Ponte, this worry was prescient.[230] Nevertheless, out of sight is out of mind, and its physical absence has contributed to its marginalization in the political and social life of Rwanda.[231] More fundamentally, the nature of the court itself is alien to the Rwandans.[232] The adversarial process utilized at the ICTR seems full of "judicial romanticism" and obscure "technicalities . . . mainly a characteristic of Anglo-Saxon legal culture."[233] One need only recall the Trial Chamber's acquittal of Bagosora for conspiracy to commit genocide due to its "exacting standards of proof and procedure" to understand the frustration on this point.[234]

Additionally, the rough handling of victims of sexual violence during investigation and cross-examination has done little to raise the legitimacy of the Tribunal in the eyes of Rwandans.[235] This point has been particularly sore among Rwandans because, despite subsequent measures taken by the ICTR to provide for victims of sexual violence, there is a perception that the Tribunal's focus on procedural rights causes it to be lenient on defendants at the cost of providing substantive justice to victims.[236] Rwandans have dubbed the Tribunal's detention facilities the "Arusha Hilton," due to the perception that the genocidal masterminds awaiting trial there have it better than the impoverished

227. Reyntjens, *supra* note 218, at 1114.
228. Vokes, *supra* note 14, at 2.
229. Møse, *supra* note 63, at 939.
230. Reyntjens, *supra* note 218, at 1114; VAN DEN HERIK, *supra* note 7, at 263-64; *Barayagwiza II*, Case No. ICTR-97-19-AR72, ¶ 74 (altering defendant's remedies based on new facts).
231. RATNER ET AL., *supra* note 2, at 229.
232. Vokes, *supra* note 14, at 2.
233. MOGHALU, *supra* note 13, at 122, 176.
234. Prosecutor v. Bagosora, Case No. ICTR-98-41-T, Judgement and Sentence, ¶ 2112 (Dec. 18, 2008).
235. Oosterveld, *supra* note 84, at 125-26; Vokes, *supra* note 14, at 2.
236. MOGHALU, *supra* note 13, at 187.

victims of the genocide or the genocide's foot soldiers, currently rotting in Rwandan jails.[237]

The ICTR contributes to reconciliation in Rwanda, however, these problems notwithstanding. Its success in preventing impunity for the *génocidaires* is evident to everyone, Rwandans included.[238] Rwanda simply could not have done this on its own.[239] Additionally, to the extent that the ICTR's findings establish authoritatively that the genocide in fact occurred, it undermines a resurgence of Hutu racial extremism or genocide deniers.[240] In 2000, the Tribunal instituted a program to provide medical and psychological support for victims who provided testimony before the court.[241] The ICTR has also instituted an Outreach Programme to increase its profile among the Rwandan people.[242] These efforts will hopefully improve the Tribunal's reputation in Rwanda, and consequently its capacity to positively impact the reconciliation process.

Furthermore, Gallimore advances the argument that the Tribunal's focus on individual criminal responsibility itself contributes to reconciliation because it situates responsibility in discrete actors instead of ethnic groups.[243] This is an interesting point because it relates the celebrated advances in international law, achieved by the Tribunal, to the Rwandan people. If the ICTR turns out to be just an international law laboratory, in which the Rwandans constitute nothing more than ingredients in the legal experiment, it will have failed in its goal of contributing to reconciliation. If it is true, however, that the expansion of individual responsibility in international law undermines the processes of ethnic scapegoating that have characterized Rwanda's recent history, the ICTR's contribution to international law will also be a contribution to Rwanda and its future.

V. CONCLUSION

Looking back on Stalin's cynical appraisal of the commission of atrocities, Judge Byron of the ICTR recently concluded, "As a result of setting up the *ad hoc* Tribunals . . . millions of deaths are no longer

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237. *Should There Be One Court for the World?*, BBC WORLD SERV., Nov. 3, 2000, http://www.bbc.co.uk/worldservice/people/features/ihavearightto/four_b/debates4.shtml; Vokes, *supra* note 14, at 2.

238. Gallimore, *supra* note 197, at 242.

239. *Id.*

240. *Id.* at 255.

241. Møse, *supra* note 63, at 937.

242. *Id.* at 938.

243. Gallimore, *supra* note 197, at 255-56.

merely a statistic."[244] As we have seen, genocide in the Rwandan context has indeed been "identified in indictments brought against . . . murderers who are being brought to justice, even if they are former prime ministers, military or religious leaders or wealthy businessmen."[245] As the ICTR begins to wind up its activities this year, it can look back on this legacy with pride.[246] The Tribunal has been successful in both catching and convicting the genocidal "big fish" like Kambanda and Bagosora.[247] Its jurisprudence has also filled in some glaring gaps in the international criminal legal regime, such as the failure to recognize mass sexual violence.[248] Its experiences have also provided valuable lessons for subsequent institutions like the Special Court for Sierra Leone and the International Criminal Court.[249]

Nevertheless, the ICTR's experience has, in some respects, recapitulated rather than ameliorated the problematic issues with which the international criminal justice system struggles. The Tribunal has been unable to extricate itself from the "Nuremburg paradigm" that makes it politically incapable of prosecuting the politically and militarily powerful.[250] Similarly, the ICTY knew that seriously investigating NATO activities in the Balkans would be "institutional suicide."[251] The United States has already undermined the fledgling International Criminal Court by refusing to take part based on concerns that its citizens might fall within the Court's jurisdiction.[252] These examples indicate that impunity for the powerful remains an entrenched feature of the international criminal justice system. The inherently voluntaristic nature of state-level international law, on the other hand, prevents it from becoming a dependable source of satisfaction for violations. The DRC, for example, was unable to hold Rwanda accountable for the conduct of its army at the International Court of Justice.[253] Given the limited temporal jurisdiction of the ICTR, the Tribunal could not hold Rwandan officials accountable

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244. Byron, *supra* note 1, at 16.

245. *Id.*

246. President of the Int'l Crim. Tribunal for Rwanda, Letter dated May 14, 2009 from the President of the International Criminal Tribunal for Rwanda addressed to the President of the Security Council, ¶¶ 69-75, U.N. Doc s/2009/247 (May 14, 2009).

247. Møse, *supra* note 63, at 932-33.

248. Gallimore, *supra* note 197, at 243-50.

249. Oosterveld, *supra* note 84, at 132-33; SCHABAS, *supra* note 21, at 37-38.

250. Reydams, *supra* note 209, at 977.

251. MOGHALU, *supra* note 13, at 4-5.

252. *US Renounces World Court Treaty*, BBC NEWS, May 6, 2002, http://news.bbc.co.uk/2/hi/americas/1970312.stm.

253. Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda), 2006 I.C.J. 126, ¶ 127 (Feb. 3).

for these crimes either, even if it were inclined to try.[254] It seems unlikely that the ICC will be able to take on the Rwandan government either.[255] In the meantime, impunity remains.

254. S.C. Res. 955, *supra* note 8, art. 7.

255. *See* RATNER ET AL., *supra* note 2, at 243-45; Colum Lynch, *What's a War Crimes Prosecutor Doing at Kagame's Presidential Inauguration?*, FOREIGN POL'Y, Sept. 3, 2010, http://turtleboy.foreignpolicy.com/posts/2010/09/03/what_s_a_war_crimes_prosecutor_doing_at_a_war_criminals_presidential_inauguration.