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## DECLARATION

I, **NGAITILA ZIFELA PHIRI**, do hereby declare that the work submitted for this dissertation is the result of my own efforts and that this work has not been submitted for any degree in any other university. Where any secondary information has been referred to it has been duly acknowledged.

Signed: \_\_\_\_\_

Date: \_\_\_\_\_

Ngaitila Zifela Phiri

I, **EMMANUEL YAW BENNEH**, have read this dissertation and approved it for examination.

Signed \_\_\_\_\_

Date: \_\_\_\_\_

Mr Emmanuel Yaw Benneh  
Supervisor

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Last but not least, I would like to thank God through whom all things are possible.

## **DEDICATION**

This work is dedicated to my parents Jennifer Mwaba and Amock Israel Phiri who epitomise humanity, and have taught me to continuously strive for a more just and humane world.

## CHAPTER 1: INTRODUCTION

### 1.1 Introduction of the study

The tragedy that befell Rwanda continues to haunt humanity. The death of President Juvenal Habyarimana unleashed an unprecedented wave of violence that resulted in the slaying of an estimated 800,000 Tutsi and Hutu moderates by Hutu extremists.<sup>1</sup> Pleas by the United Nations Assistance Mission to Rwanda (UNAMIR) Military Commander General Dallaire for additional military fell on deaf ears.<sup>2</sup> Instead the original force of 2,500 peacekeepers was withdrawn and reduced to a meagre 270.<sup>3</sup> These remaining peacekeepers were unable to bring an end to the violence. The only entity that actively sought to stop the genocide was the Rwandan Patriotic Front (RPF),<sup>4</sup> composed primarily of Tutsi living outside Rwanda.<sup>5</sup> The killings continued until July 1994 when the RPF gained control of Kigali.

The attack waged by the Hutu extremists on the Tutsi minority was meticulously orchestrated. There is overwhelming evidence that the extermination of the Tutsi was planned well in advance of April 1994. It is possible to trace the strategy developed for the mass killings which evolved to between October 1990 and April 1994.<sup>6</sup> Responsibility for the genocide in Rwanda lies not only with the Hutu extremists that carried out the killings but also with the international community who, aware of the unfolding events, did nothing. Little doubt remains that the international community could have prevented the genocide in Rwanda, but for reasons unknown, failed to do so.<sup>7</sup> The international

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<sup>1</sup> It is difficult to estimate the exact number of victims. A Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda 3, U.N.Doc. S/1999/1257 <<http://www.un.org> > (accessed on 10 September 2001) cites 800,000 deaths. Similarly Gourevitch P in *We wish to inform you that tomorrow we will be killed with our families: stories from Rwanda* (1998) 4 talks of out of an original population of about seven and a half million, at least eight hundred thousand people were killed. Human Rights Watch, *Leave No one to Tell the Story* (1999) 16 estimates at least half a million deaths.

<sup>2</sup> In December 1993 UNAMIR was sent to Rwanda to oversee the transition to peace and democracy.

<sup>3</sup> UN Security Council Resolution 912, 21 April 1994.

<sup>4</sup> African Rights, *Rwanda, Death Despair and Defiance* (1994) credits the RPF's military offensive as the chief reasons the killings were halted.

<sup>5</sup> The RPF comprised primarily of Tutsi who had fled to Burundi, Tanzania, Zaire and Uganda Rwanda after the 1959-1967 massacres.

<sup>6</sup> For an insight into the preparation of the genocide see African Rights (n 4 above) 42.

<sup>7</sup> In an interview with the Australian Broadcasting Corporation Radio on 24 July 1994, General Dallaire of UNAMIR stated that if he had had the mandate, the men, and the equipment, hundred of thousands of people would be alive today.

community appears to have now accepted responsibility for not taking constructive action to avert the killings.<sup>8</sup>

In an attempt to alleviate the international community's feeling of guilt<sup>9</sup> upon the request by the Rwandan government,<sup>10</sup> the United Nations (UN) Security Council passed Resolution 955 that established the International Criminal Tribunal for Rwanda (ICTR) in November 1994. The ICTR's mandate is to prosecute persons responsible for the serious violations of international humanitarian law (IHL) committed in the territory of Rwanda, and the Rwandan citizens responsible for those violations committed in the territory of neighbouring states between 1 January and 31 December 1994.<sup>11</sup>

## 1.2 The Problem

The establishment of the ICTR has very significant implications for Africa, a continent associated with widespread violations of human rights and humanitarian law. Africa is more familiar with human rights problems and humanitarian crises than with their solutions, more versed in the theory of international human rights law than its application and more with the failure of international law than with its successes.<sup>12</sup> According to Hussein Solomon, a leading authority on African conflicts, of the 48 genocides and 'politicides' registered throughout the world between 1945 and 1995, 20 took place in Africa all of which involved armed conflict.<sup>13</sup>

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<sup>8</sup> On a state visit to Rwanda on 24 March 1998, President Clinton apologised for the failure of the West to respond to the genocide, and stated that the international community together with Africa must bear its share of responsibility for this tragedy. Reported in *Le Monde* May 25 1998.

<sup>9</sup> The international community was blamed for having reacted far too little too late to the genocide in Rwanda.

C Cisse, 'The end of a culture of impunity in Rwanda' *Yearbook of International Humanitarian Law* (1998)1 163. In a letter dated 28 September 1994 from the Permanent Representative of Rwanda to the UN, the reasons invoked for the establishment of the ICTR included, that the genocide committed in Rwanda is a crime against mankind and should be suppressed by the international community as a whole, that international prosecutions would avoid any suspicion of Rwanda wanting to organise speedy or vengeful justice, that the establishment of the ICTR would offer the advantage of creating obligations binding on all states including Rwanda.

<sup>11</sup> Article 1 ICTR Statute.

<sup>12</sup> F Viljoen, 'Africa's contribution to the development of international human rights and humanitarian law' (2001)1 *African Human Rights Law Journal* (AHRLJ)18

<sup>13</sup> H Solomon, 'Analysing conflicts' *Searching for peace in Africa* (1999) European platform for conflict and transformation in co-operation with the African centre for constructive resolution of disputes <<http://www.euconflict.org>> (accessed on 20 August 2001)



When faced with the investigation and prosecution of perpetrators of past human rights violations, new governments have often simply granted general amnesties that cover all the acts of former rulers,<sup>14</sup> forgoing the pursuit of justice. By granting blanket amnesties, governments fail to prosecute those guilty of having committed gross human rights violations during peacetime or during war, resulting in the continued disregard of human rights and humanitarian law, thus perpetuating impunity. Cases of gross human rights abuses have occurred in the Central African Republic under the rule of Emperor Bokassa, Democratic Republic of Congo under the rule of Mobutu, Ethiopia under the rule of Mengistu, Nigeria under Abacha rule, and Uganda under both the Amin and Obote rule, these provide examples of this unfortunate state of affairs.

Without a proper enforcement mechanism for IHL this vital branch of law will continue to be disregarded. IHL is an area of law that is very well articulated, but needs to be given teeth, so as to ensure its application.<sup>15</sup> The ICTR provides an avenue through which IHL can be applied thereby contributing to the development of IHL and indeed its enforcement. In this manner IHL is able to fulfil its purpose of protecting individuals or groups in times of armed conflict.<sup>16</sup>

### 1.3 Importance of the Study

IHL is a set of rules aimed at limiting violence and protecting the fundamental rights of individuals in times of armed conflict.<sup>17</sup> IHL comprises primarily of the Geneva Conventions modified by the two Additional Protocols of 1977,<sup>18</sup> and the Hague Law. Since its development, much debate has focused on the legal status of IHL. Because

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<sup>14</sup> N Roht-Arriaza, *Impunity and human rights in international law and practice* (1995) 221.

<sup>15</sup> H Durham 'International criminal law and ad hoc tribunals' in H Durham (ed) *The changing face of conflict and the efficacy of international humanitarian law* (1999) 195.

<sup>16</sup> International Committee of the Red Cross (ICRC) 'Human Rights and the ICRC International Humanitarian Law' (1996) 3.

<sup>17</sup> *Ibid.*

<sup>18</sup> These are: the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces at Sea, Aug 12 1949 6 UST 3114, 75 UNTS 31; The Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug 12 1949 6 USDT 32173, 75 UNTS 85; The Geneva Convention Relative to the Treatment of Prisoners of War, Aug 12 1949 6 UST 3316, 75 UNTS 135; The Geneva Conventions Relative to the Protection of Civilian Persons in Times of War, Aug 12 1949 6 UST 3516 Additional Protocol I and II For text see < <http://www.icrc.org> >.

IHL lacks a proper enforcement mechanism it has been argued that it cannot therefore be law.<sup>19</sup>

The Nuremberg and Tokyo tribunals were the first tribunals to contribute to the development of IHL.<sup>20</sup> Forty-eight years later the International Criminal Tribunal for Yugoslavia (ICTY) was created to prosecute persons responsible for serious violations of IHL committed in the territory of the former Yugoslavia,<sup>21</sup> this was followed by the ICTR. These tribunals put to rest the debate on the legal status of IHL. IHL is being applied and thus developed and enforced.

The most significant contribution of the ICTR is the prosecution of high-ranking government officials.<sup>22</sup> The ICTR has targeted individuals who wielded immense political and military power in Rwanda during the 1994 genocide.<sup>23</sup> The detention centre in Arusha, a creation of the ICTR, houses some of the most powerful individuals,<sup>24</sup> who are for the very first time being held accountable in Africa for breaches of IHL. This reaffirms the principles of the rule of law requiring all persons and institutions to be treated equal before and under the law. When grave crimes go unpunished legal norms are disregarded.<sup>25</sup> Today, no state can violate human rights within its own borders. The notion of absolute state sovereignty has been rejected. Gross violations common in Africa, are no longer domestic but global issues.<sup>26</sup>

This study will demonstrate how the ICTR is developing and enforcing IHL. Already it has successfully sent out a clear message to leaders worldwide that gross human rights

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<sup>19</sup> See J Dugard *International law: a South African perspective* (2000)8.

<sup>20</sup> The Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis 8 August 1945, 82 UNTS 279 established the International Military Tribunal (the Nuremberg Tribunal) Art 6 provided that the Tribunal had a mandate to try crimes against peace, crimes against humanity, and war crimes. The Tokyo Tribunal established by a proclamation issued by the Supreme Commander for the Allied Powers in 1946, had jurisdiction over crimes against the peace, war crimes, and crimes against humanity.

<sup>21</sup> Adopted in May 1993. See art 1 ICTY Statute.

<sup>22</sup> Art 6 ICTR Statute lists persons who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation.

<sup>23</sup> K Kindiki (n 12 above) 75.

<sup>24</sup> Among those who have been held at the ICTR detention centre are a former Prime Minister, the Director of Cabinet, Minister of Transport, and Minister of Family and Welfare.

<sup>25</sup> K Kindiki (n 12 above) 71.

<sup>26</sup> C Mulei 'From Nuremberg to Arusha: The legal principles governing trials of genocide and crimes against humanity.' Paper presented at the 8<sup>th</sup> annual conference of the African Society of International and Comparative law El Jazira Shiraton Hotel Cairo Egypt 2-5 September 1996.

violations of this nature will no longer go unpunished, providing a form of deterrence. The ICTR continues to develop a rich jurisprudence on IHL that will be examined in this study. Being the first international tribunal to convict a person of genocide, the first to recognise rape as an element of genocide, and to try a woman for the crime of genocide, the ICTR jurisprudence will prove invaluable. The rules of procedure adopted by the ICTR that have greatly facilitated bringing to justice high ranking officials shall also be examined.

The study will contribute to the on going discussion on the role of the ICTR in developing and enforcing IHL. The study will specifically give insight on how the ICTR helps the development of IHL from an African perspective, thus contributing to ending impunity not only in Rwanda but in Africa as a whole.

#### **1.4 Literature Review**

Much literature has been written on both IHL and the establishment of *ad hoc* tribunals. Most writers in this area, place emphasis on the need to develop and enforce IHL if it is to serve its ultimate purpose of protecting victims of armed conflict from cruel, inhuman, and degrading treatment.<sup>27</sup> The lack of an enforcement mechanism has led to widespread criticism about this branch of law. Sir Hersch Lauterpacht commented that 'if international law is the weakest point of all law, then the law of war is virtually its vanishing point.'<sup>28</sup>

Concern for the absence of a comprehensive mechanism through which IHL can be enforced continues to be expressed. Skillen argues that the major point of difference between international law and domestic law is the absence of a systematic regime for its enforcement, contributing to the lack of respect for the legitimacy of IHL. Enforcement efforts since the First World War have proved largely unsatisfactory and require the international community to investigate new means of enforcement, which could promote international respect and observance of IHL.<sup>29</sup>

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<sup>27</sup> ICRC (n 16 above).

<sup>28</sup> H Lauterpacht in G Skillen 'Enforcement of International Humanitarian law' *International Humanitarian Law Series*(1999)205.

<sup>29</sup> *Ibid* 206.

The mechanisms for implementing IHL are in place but more has to be done to ensure its enforcement.<sup>30</sup> Before presiding over the ICTY, Antonio Cassese noted that the international legal control of warfare had kept pace with the developments in organised violence only to a limited extent leaving IHL riddled with “deficiencies, loopholes and ambiguities.”<sup>31</sup>

Whilst it is acknowledged that the *ad hoc* tribunals have contributed to the promotion and respect of IHL, political factors have influenced the decision to establish them. National interests have often outweighed the willingness to comply with IHL, and trials are only convened when national politics dictate.<sup>32</sup> This view is shared by Bassiouni who is of the opinion that both the ICTY and the ICTR are affected by the political climate.<sup>33</sup> Therefore, the most promising initiative in regard to the enforcement of IHL is presented by the International Criminal Court (ICC).<sup>34</sup>

Bassiouni further argues that as the world community achieves higher levels of perceived interdependence and commonly shared values of international criminal justice, the community will also demand greater actualisation of these humanitarian goals. Thus, the elimination of the traditional sovereignty barriers that stand in the way of the international prosecution of international criminal law violations is required.<sup>35</sup> Having overcome the various initial problems, the *ad hoc* tribunals have shown that with the combination of dedicated judges, prosecutors, staff, and the support of NGOs and civil society throughout the world, these tribunals can be used to achieve this goal.<sup>36</sup>

The key concern appears to be the need for an effective mechanism through which IHL can be developed and enforced in a consistent manner, unrestricted by improper and irrelevant considerations.<sup>37</sup> The development of IHL remained stagnant until the establishment of the *ad hoc* tribunals, and until the ICC is fully operational, these *ad hoc* tribunals provide the only avenue through which IHL can be developed and enforced.

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<sup>30</sup> ICRC(n 16 above).

<sup>31</sup> See Cassese in Mulei (n 26 above).

<sup>32</sup> Skillen (n above 28) 211.

<sup>33</sup> C Bassiouni *Crimes against humanity in international criminal law* 2(1999)555.

<sup>34</sup> Established by the Rome Statute adopted and opened for signature on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Rome Statute of the International Criminal Court C.N 577.1998.

<sup>35</sup> Bassiouni (n above 33)513-514.

<sup>36</sup> *Ibid.*

<sup>37</sup> Skillen (n 28 above)216.

## **1.5 Scope of the Study**

This analysis will adopt a legal perspective. The study will principally focus on the contribution that the ICTR has made to the development and enforcement of IHL in Africa. Whilst it is acknowledged that domestic efforts are in place, which will ultimately result in the further development of IHL and bring an end to impunity in Rwanda, this will not be the focus of this paper. Similarly, third country efforts at holding those responsible for violations of IHL in Rwanda during 1994 shall not be discussed in this paper.

## **1.6 Methodology adopted in the study**

This study will rely on both primary and secondary data. Treaties, conventions and resolutions of the UN will be referenced. Books, journals, and conference papers will also be used. The content of this paper that deals with the background to the 1994 genocide, the establishment of the ICTR, and the nature of IHL will remain primarily descriptive. The final part of this study will adopt a more prescriptive approach.

## **1.7 Overview of Chapters**

Chapter two will give a background to the 1994 genocide in Rwanda, which led to the establishment of the ICTR. This section will discuss the jurisdiction, structure, and procedures of the ICTR. Chapter three will examine the development and nature of IHL and the problems regarding its enforceability. Chapter four will address the contribution made by the ICTR to the development and enforcement of IHL. Chapter five will offer some concluding remarks.

## Chapter 2: Background to the 1994 Genocide

### 2.1 Pre-Independence Period

Much of the existing literature on the conflict in Rwanda is devoted to descriptions of the ethnic configuration and distinct physical features of the groups which make present day Rwanda. The Twa, those indigenous to Rwanda constitute 1% of the population. The two larger groups, the Hutu and the Tutsi make up 85% and 14% respectively, settled in Rwanda in the 15<sup>th</sup> century. The Hutu and the Tutsi created a highly centralised nation wherein a common language was shared.<sup>38</sup>

The European colonialists favoured the Tutsi over the Hutu and the Twa. The Tutsi possessed angular facial features and were generally taller and lighter complected, compared to the Hutu who were shorter, more muscled, darker skinned, and possessed more negroid features, characterised by a flat nose and thick lips. These physical features created a hierarchy in which the Tutsi was placed above the Hutu. The Europeans favoured the Tutsi who rose in influence and consolidated their positions of superiority over the Hutu. The Tutsi became the elite in Rwanda, but at this stage no clear ethnic divide existed between the Hutu and the Tutsi. If a Hutu amassed great wealth he would become Tutsi and a Tutsi who lost his wealth became a Hutu. Inter-marriages were common, diluting the physical attributes that the colonial powers promulgated.<sup>39</sup>

The conflicts in Rwanda are further rooted in the policies of European Colonialists which made ethnicity the defining feature of Rwandan existence.<sup>40</sup> The colonialists adopted various policies in order to maintain their dominance over the Tutsi. These policies perpetuated Tutsi dominance over Hutu. In 1933, Belgium introduced identity cards under an administrative pretext, marking the beginning of the separation of the Hutu and the Tutsi.<sup>41</sup> Everyone was made to carry these cards wherever they went, making each group easily identifiable. The identity cards entrenched ethnicity as a social divide.<sup>42</sup>

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<sup>38</sup> For brief history on Rwanda see <<http://www.rwandemb.org>> (accessed on 2 October 2001).

<sup>39</sup> For an in-depth account see E Nyankanzi, *Genocide Rwanda and Burundi*(1998).

<sup>40</sup> Rwanda was initially colonized by the Germans between 1885 and 1886, followed by Belgium until independence in 1960.

<sup>41</sup> Prunier G *The Rwanda crisis, history of a genocide*(1995)347.

<sup>42</sup> M Drumble 'The rule of law amid lawlessness counselling the accused in Rwanda's domestic genocide trials' *Colombia Human Rights Law Review*(CHRLR) (1998)556.

Belgium adopted a divide and rule policy that favoured the Tutsi at the expense of the Hutu, inevitably creating animosity between the two groups, the Tutsi became the elite in Rwanda.

In 1950, the Tutsi began demanding their independence. In response, Belgium shifted their attention in favour of the Hutu. The Hutu were availed with preferential treatment at the expense of their Tutsi oppressors. Realising the inevitability of independence, Belgium adopted a policy to integrate the Hutu majority into the power structure in order to prepare the country for democratic rule after independence.<sup>43</sup> In 1957, the Party for the Emancipation of the Hutu People (Parmehutu) was formed. Belgium feted the Parmehutu, suggesting their association in the sudden death of the Rwandan monarch in 1959. This marked the beginning of the end of Tutsi rule until July 1994. During 1959 ten thousand Tutsis were massacred as a result of the Hutus' rise to power. Many Tutsi fled to neighbouring Burundi, Tanzania, Uganda, and Zaire to avoid the persecution they increasingly faced during the next 35 years.<sup>44</sup>

## 2.2 The Independence Period

Rwanda gained independence in 1960, and the Parmehutu led by President Gregoire Kayibanda assumed power. The Tutsi monarchy fled. The new government immediately began to capitalise on this reversal of power and in the process began to intimidate the Tutsi, in response to years of being marginalised and discriminated against, first by the colonial masters and then by the Tutsi. The Hutus were now able to settle scores. The Tutsi continued to flee. In 1961, the Tutsis, convinced that they could regain control, began launching attacks on Rwanda from neighbouring countries. In retaliation, the Parmehutu government massacred Tutsi's still living in Rwanda. During the period of 1961 and 1966 an estimated 20,000 Tutsi lost their lives, causing further Tutsi migration.<sup>45</sup>

Further violence erupted in 1973, in an attempt to purge the Tutsi from the seminaries and the universities. The Parmehutu government no longer enjoyed popularity and had become discredited by allegations of corruption and nepotism. Thus, the *coup d'état*

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<sup>43</sup> Prunier (n 41 above) 41-54.

<sup>44</sup> Drumble (n 42 above) 557.

<sup>45</sup> *Ibid.*

mounted by the Chief of Staff Juvenal Habyarimana under the guise of restoring order went virtually unchallenged. President Habyarimana immediately announced an end to ethnic politics and the need to focus on economic development. In 1975, the National Revolution Movement for Development (MRND) was formed. However, as in the late 1950's, the early to mid 60's, the new government held no one accountable for the mass killings of the Tutsi.<sup>46</sup>

Although the Tutsi were enthusiastic with the change of government it soon became evident that not much had changed. Policies aimed at undermining Tutsi representation were put in place. The Tutsi represented 14% of the population but were officially stated to constitute only 9% of the population. Therefore they were only entitled to 9% of employment and educational positions. On a positive note, killings of the Tutsi had ceased.<sup>47</sup>

In the late 80's the collapse of coffee prices in the world market, economic decline, scarce resources, and widespread corruption led to disenchantment with the political set up.<sup>48</sup> The grievances endured by the Hutu majority were attributed to the Tutsi. For example, Hutu extremists often fabricated stories in which the RPF were planning to stage an attack on Rwanda, in order to regain the land rightfully belonging to the Hutu. Inevitably the Tutsi residing in Rwanda felt the full brunt of these unfolding accusations.<sup>49</sup>

Calls for change by Hutus disenchanted with Habyarimana's rule and the withdrawal of foreign aid by donors in 1993 resulted in political reforms. Reluctantly, in following years, Habyarimana acquiesced to demands for political pluralism. In the meantime the RPF took advantage of Habyarimana's unstable government, which had ceased to enjoy the support of the majority and launched an attack from Uganda. This attack was quickly foiled by the government, leading to the arrest and massacre of thousands of Tutsi, and the creation of propaganda machinery aimed at mobilising the entire Hutu majority in order to launch a pre-emptive strike against the Tutsi who were supposedly planning to

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<sup>46</sup> African Rights (n 4 above)13.

<sup>47</sup> *Ibid.*

<sup>48</sup> According to the Central Intelligence Agency World Fact Book (1997) Rwanda is one of the most densely populated countries in the world. Coffee accounted for 63% of Rwandan exports in 1995.

<sup>49</sup> African Rights (n 4 above)22.



exterminate the Hutu.<sup>50</sup> As a result, in 1991 and 1992 the Tutsi became victims of slaughter.

The *Radio Television Libre Mille Collines* (RTLM) was founded to perpetuate further ethnic hatred.<sup>51</sup> Private armed groups attached to the Habyarimana government, known as the *interahamwe*, those with a common goal, and militia organised by the coalition for the Defence of the Republic, the *impuzamugambi* those with the same goal were created as civilian militia. Moreover, the Habyarimana government enjoyed the assistance in the form of financial aid and the supply of weapons from the international community until 1993.<sup>52</sup> Foreign aid by donors sympathetic to the Habyarimana government, continued to flow into Rwanda despite knowledge of the spread of anti Tutsi propaganda, for the purpose of the Hutu taking up arms against the Tutsi. Whenever the Habyarimana government requested additional troops, it was done under the guise of quelling Tutsi invasion.<sup>53</sup>

Harsh economic conditions continued to prevail in Rwanda. In 1993 the Belgium ambassador was recalled and the United States redirected aid away from the Rwandan government forcing Habyarimana to pursue the path of power sharing.<sup>54</sup> In August 1993 the Arusha Peace Accords (the Accords), were signed between the Democratic Republican Movement (MDR), the National Revolutionary Movement for Development (MRND), and RPF. The Accords were negotiated by Tanzania and supported by the Organisation of African Unity (OAU) and the UN. The Accords consisted of five protocols on the rule of law, power sharing, repatriation of refugees and the resettlement of displaced people, integration of armed forces, and the protocol on the miscellaneous. The Accords further provided for the creation of the UNAMIR to oversee the implementation of the Accords. The Accords promised a peaceful transition into democracy through reconciliation.<sup>55</sup>

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<sup>50</sup> African Rights (n 4 above) 13-24.

<sup>51</sup> Other propaganda tools included the *Kangura* newspaper, songs and poems and the notorious Hutu Ten Commandments.

<sup>52</sup> Such support was rendered by Egypt France and South Africa.

<sup>53</sup> See 'France armed Rwandan killers after ban' Reuters News Service January 12 1998 <<http://www.infoseek.com>> (accessed on 15 August 2001).

<sup>54</sup> Drumble (n 42 above) 560.

<sup>55</sup> African Rights (n 4 above) 32.

Initially, the signing of the Accords was not taken seriously by any of the parties. For the Habyarimana government many observers concluded that the signing of the Accords was aimed at appeasing the donor community. However, mounting domestic opposition and pressure from Rwanda's neighbours, and the donor community eventually left Habyarimana with little choice but to implement the terms of the Accord, a stance not welcomed by the Hutu extremists within his government.<sup>56</sup>

### 2.3 The 1994 Genocide

On April 6 1994, a plane carrying President Habyarimana, President Cyrien Ntaryamira of Burundi, and the Rwandan Chief of Staff Deogratias Nsabimana, was shot down as it approached Kigali airport returning from Arusha. The RPF was immediately blamed for this attack although considerable evidence later emerged that the plane was shot down by Habyarimana's own soldiers.<sup>57</sup> Hutu extremists within Habyarimana's government assumed power.

Those who assumed power coerced everyone to take part in the killing of the Tutsi and Hutu moderates. The genocide continued for 15 weeks throughout the country. The magnitude of the killing remains incomprehensible. Victims running for refuge were lured and killed by those who opened their doors. Churches, hospitals, schools, and universities became killing fields. Order did not return until the RPF gained control of Kigali in July 1994. Soon after, a civilian government of National Unity incorporating all the political parties except the MRND party was established.<sup>58</sup>

The government of National Unity faced a mammoth task after the genocide. An estimated 500,000 to 1,500,000 Tutsi and moderate Hutus had been killed by Hutu extremists.<sup>59</sup> Rwanda's infrastructure had been destroyed. Highest on the government's list of priorities was bringing those responsible for the genocide to justice.<sup>60</sup> Unfortunately, the judiciary lay in tatters as most of the lawyers and judges had either been killed or had fled the country. The Rwandan government acknowledged that

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<sup>56</sup> *Ibid* 70-88.

<sup>57</sup> Drumble (n 41 above) 213-221.

<sup>58</sup> Human Rights Watch *Rwanda playing the communal card communal violence and human rights* (1995)17.

<sup>59</sup> *Ibid*.

<sup>60</sup> Amnesty International '1996 Human rights report on Rwanda' <<http://www.amnesty.org>> (accessed on 12 September 2001).

without the assistance and support of the international community it would be virtually impossible for the government to bring the perpetrators to justice.<sup>61</sup>

Protracted negotiations ensued between the Rwandan government and the UN regarding the establishment of the ICTR. The Rwandan government found it difficult to accept the time period over which the ICTR would have jurisdiction. The ICTR would only have competence to try crimes committed during the period from 1 January 1994 to 31 December 1994.<sup>62</sup>This meant that those who participated in the planning of the genocide that began as early as 1990 would not be held accountable.<sup>63</sup>

Concerns about the sentences that were to be given out by the ICTR were also expressed. The maximum sentence to be delivered by the ICTR was a life sentence, whereas the Rwandan judicial system provided for the death penalty. The Rwandan government requested that the ICTR be based in Kigali to ensure the proximity of justice to where the majority of the crimes had taken place. The Rwandan government further objected to the limited personnel proposed by the ICTR statute. The UN failed to take the Rwandan concerns on board and went ahead to establish the ICTR. Rwanda, a member of the Security Council at the time, was the only member that voted against the establishment of the ICTR.<sup>64</sup>

## 2.4 The Establishment of the ICTR

The ICTR Statute grants the Tribunal responsibility for prosecuting persons responsible for genocide and other serious violations of IHL committed in the territory of Rwanda, and Rwandan citizens responsible for genocide and other violations committed in the territory of other neighbouring states between 1 January 1994 and 31 December 1994.<sup>65</sup>

The ICTR has jurisdiction to prosecute persons responsible for committing genocide and crimes against humanity. Genocide is defined as:

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<sup>61</sup> For more details on the state of Rwanda's justice system after the genocide see <<http://www.reliefweb.int>> (accessed on 28 August 2001). See Amnesty International (n 60 above).

<sup>62</sup> Art 1 ICTR Statute.

<sup>63</sup> African Rights (n 4 above).

<sup>64</sup> See Statement of the Permanent Representative of Rwanda following the voting UNSCOR, 49th session, 3453 rtmtg UN Doc.S/PV.3453(1994).

<sup>65</sup> See (n 62 above).

'killing members of a group, causing serious bodily harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its destruction in whole or in part, imposing measures intended to prevent births within the group, forcibly transferring babies of the group to another group, with intent to destroy in whole or in part, a national, ethnical, racial, or religious group.'<sup>66</sup>

Article 3 of the ICTR Statute grants the ICTR jurisdiction to prosecute persons responsible for committing crimes against humanity. Crimes against humanity are not linked merely to the existence of armed conflict, international or internal. Rather, article 3 provides for a wider scope of conflict including one-sided attacks against non-resisting civilians in addition to a state of armed conflict between two armed belligerent groups. Thus, it allows for the prosecution of crimes committed in a state of armed conflict as was between the Rwandese Armed Forces (FAR) and RPF, and the massacre of the Tutsi carried out by Hutu extremists.<sup>67</sup> Article 4 of the ICTR Statute provides for serious violations of Article 3 Common to the Geneva Conventions of August 1949 and of Additional Protocol II of June 1997 relating to the protection of war victims, presupposing the existence of an armed conflict.

Criminal responsibility is extended to anyone who at any stage 'planned, instigated, ordered, committed or otherwise aided or abetted' the three categories of offences referred to in articles 2 to 4 of the ICTR Statute namely, genocide, war crimes, and crimes against humanity. Immunity is removed from government officials and Heads of State. Criminal responsibility extends to superiors who gave orders to their subordinates to carry out any of the acts stated in articles 2 to 4 of the ICTR Statute, if the superior knew or had reason to know of such acts and failed to take necessary measures to prevent or punish the perpetrator thereof.<sup>68</sup>

The ICTR has concurrent jurisdiction with the Rwandan national courts to prosecute persons for serious violations of IHL. The ICTR has 'primacy over the national courts of

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<sup>66</sup> Art 2 ICTR Statute.

<sup>67</sup> F Harhoff 'The Rwanda tribunal: a Presentation of some legal aspects' <<http://www.icrc.org>> (accessed on 26 March 2001).

<sup>68</sup> Art 6 ICTR Statute.

all states and may request a national court to defer to its competence.<sup>69</sup> No person shall be tried before a national court for acts constituting serious violations of IHL under the ICTR Statute if he or she has already been tried by the ICTR. However, such a person, if tried by a national court for serious violations of IHL, may still be tried by the ICTR.<sup>70</sup>

The work of the ICTR relies heavily on the co-operation of other states. States are obliged to co-operate with the ICTR in the investigation and prosecution of persons accused of committing serious violations of IHL. Such assistance includes identifying and seeking suspects, producing evidence, forwarding documents, arresting and detaining persons against whom the ICTR has initiated proceedings. These provisions extend to requests for information.<sup>71</sup>

The right to a fair trial of the accused is provided for under article 20 of the ICTR Statute. These conform to internationally acceptable standards. In addition, the Statute provides for the protection of victims and witnesses when required to give evidence.<sup>72</sup> The ICTR attempts to strike a balance between the application of common and civil law. The Tribunal has repeatedly underscored that neither of the two legal systems prevail at the Tribunal.<sup>73</sup>

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<sup>69</sup> Art 8 ICTR Statute.

<sup>70</sup> Art 9 ICTR Statute. The exceptions listed in art 9(2) are if the act the person is being tried for was characterized as an ordinary crime, the national proceedings were not impartial or independent were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.

<sup>71</sup> Art 28 ICTR Statute.

<sup>72</sup> Art 21 ICTR Statute.

<sup>73</sup> This point was emphasized in the *Prosecutor v George Rutaganda* ICTR-96-3-T.

## Chapter 3: International Humanitarian Law (IHL)

### 3.1 Development of IHL

IHL strives towards alleviating as much as possible the calamities of war. The only legitimate objective which states should endeavour to accomplish during war is to weaken the military force of the enemy.<sup>74</sup> As early as the fourth century BC, it was recognised that war should not be a campaign directed at the ultimate extermination of the enemy.<sup>75</sup> The Old Testament recognised certain limitations when tribes engaged in warfare.<sup>76</sup> Similarly, Islamic law imposes a ban on the killing of women, children, the old, the blind, the crippled, and the insane.<sup>77</sup>

During the Middle Ages certain weapons were banned such as the crossbow and arc, because they could be used from a distance enabling a man to strike without the risk of being struck himself. Feudal Knights were made to follow the law of chivalry, a customary code of respectful conduct regulating the behaviour of Knights in times of war. These rules however did not apply to foot soldiers until the 15<sup>th</sup> century,<sup>78</sup> at which point all men at war were subjected to a disciplinary code prohibiting the distribution of booty, forbidding pillage, and destroying private property. The respect for priests, women, children, the infirm, and others were also included.<sup>79</sup> By the 16<sup>th</sup> century the protection of women in times of war was a well established principle, as was the immunity for doctors in order to care for the wounded.

By the 17<sup>th</sup> century, attention was directed to the need for providing care for the wounded. In 1708, Louis XIV by decree established a permanent medical service.<sup>80</sup> The reciprocal care of the wounded on the field was later recognised. The principle that the wounded should not be made prisoners of war and should not enter into a balance of exchanges won recognition in 1862.<sup>81</sup>

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<sup>74</sup> Final Protocol of the Brussels Conference of 1874.

<sup>75</sup> Sun Tzu *The art of war* (1963)77.

<sup>76</sup> See Deuteronomy 21, 19-20, Kings 6, 22-23).

<sup>77</sup> See the Islamic law of nations sections 29-31, 47, 81 in Cornum R *She went to war*(1992).

<sup>78</sup> M H Keen *The law of war in the late Middle Ages* (1965)27.

<sup>79</sup> LC Green *The contemporary law of armed conflict*, (2000) 25.

<sup>80</sup> G Draper 'The interaction of christianity and chivalry in the historical development of the war' *International Review of the Red Cross* (IRRC) (1965)19.

<sup>81</sup> Butler and Maccoby, *The development of international law* (1928)134.

Francis Lieber, an American professor, drafted the first code of conduct of an armed force in the field, which was promulgated as law by President Lincoln in 1863 during the American civil war.<sup>82</sup> This formed the basis of similar codes adopted by Argentina, England, France, Germany, Spain, and Switzerland between 1870 and 1893, regulating the behaviour of armed forces.<sup>83</sup>

The end of the Crimean war in 1856 brought about the first inter-state agreement aimed at restraining the undesirable effects of warfare. This document called the Paris Declaration was confined to the law of maritime warfare.<sup>84</sup> This was followed by the Geneva Convention of 1864 which recognised as necessary the special distinctiveness and immunity of the Red Cross, and personnel wearing insignia to attend to those wounded in the field. This Convention was later revised by the Geneva Conventions of 1906, 1929, and 1949 and the Additional Protocols of 1977, constituting the laws of Geneva.<sup>85</sup>

The second source of humanitarian law, The Hague Law, originated at a conference held in Brussels in 1874. A body of regulations that address the means and methods of conducting military operations in armed conflict were agreed upon. In addition, an International Declaration concerning the laws and customs of war was drafted at this conference in order to revise the usages of war. This Declaration did not receive ratification from all the states present at the Conference, but it later served as the basis of the Manual of the Law of Wars on Land written by the Institution of International Law in Oxford in 1880.<sup>86</sup> The Brussels Declaration and the Manual of the Law of Wars provided the impetus for governments to adopt an international treaty concerning the conduct of armed conflict in 1899.<sup>87</sup>

In 1907, another conference was held resulting in the revision of the Hague Convention of 1899. This conference adopted ten other Conventions concerned with warfare

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<sup>82</sup> G R Doty 'The US and the development of the law of wars' (1998)56 Military Law Review (MLR), 224.

<sup>83</sup> These rules prohibited marauding in the countryside, individual attacks against the enemy without authority from a superior, private taking of booty, private detention of an enemy prisoner.

<sup>84</sup> Keen (n 78 above) 30.

<sup>85</sup> Geneva Conventions see (n 18 above).

<sup>86</sup> The resolutions and recommendations of this Institute often form the basis of draft agreements submitted to governments and have persuasive authority.

<sup>87</sup> These are also referred to as the Law of The Hague.

including, the opening of hostilities,<sup>88</sup> naval warfare,<sup>89</sup> and the rights and duties of neutrals.<sup>90</sup>The fourth Hague Convention introduced the principle of enforcement where:

‘a belligerent party which violates the provisions of the Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of the armed forces.’<sup>91</sup>

Other notable instruments that contributed to the development of the law of wars are the Declaration of London 1909 concerning naval warfare,<sup>92</sup>the Rules of Air Warfare 1922,<sup>93</sup>and the Geneva Protocol for the Prohibition of other Gases and of Bacteriological Methods of Warfare 1925. The London Charter 1945, establishing the International Military Tribunal further developed this branch of law. This tribunal had jurisdiction for the first time to try those accused of crimes against the peace, war crimes, and crimes against humanity. The Convention on the Prevention and Punishment of the Crime of Genocide (The Genocide Convention) adopted in 1948 further defined these acts<sup>94</sup> as crimes under international law whether committed in times of peace or in times of war.

### **3.2 Sources of IHL**

Today the main sources of IHL are the 1949 Geneva Conventions, which were later amended by the two Protocols of 1977 Additional to the Geneva Conventions, and The Hague law. The Geneva Conventions of 1949 brought about one of the most significant developments in the law of armed conflict.<sup>95</sup> The four Conventions apply to any international armed conflict regardless of whether war has been declared or not, and to situations of unopposed occupation. Each of these Conventions contains a Common

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<sup>88</sup> The Hague Convention III of 1907.

<sup>89</sup> The Hague Convention VI-XII of 1907.

<sup>90</sup> The Hague Convention V, XIII of 1907.

<sup>91</sup> Art IV Hague Convention.

<sup>92</sup> Although this Declaration failed to receive a single ratification, the rules it laid down were followed during World War 1.

<sup>93</sup> These did not constitute a binding document but were declaratory of the existing customary law principles concerning aerial warfare.

<sup>94</sup> Art 11 Genocide Convention 1948.

<sup>95</sup> Geneva Conventions (n 18 above).



Article 3, which extends humanitarian protection to parties involved in non-international conflict.<sup>96</sup>

The Geneva Conventions place states under an obligation to punish grave breaches even if the state involved is not a party to the conflict and applies even in instances when the offence is committed outside the jurisdiction of the state concerned.<sup>97</sup> Thus, universal jurisdiction is applicable to grave breaches. If a state is unwilling to try a person accused of having committed acts constituting grave breaches, such a state is under an obligation to hand such a person over to any party of the Conventions.<sup>98</sup>

In an attempt to reaffirm and further develop the existing principles of IHL, two Additional Protocols to the Geneva Conventions were adopted in 1977. Additional Protocol I recognised struggles conducted by national liberation movements in the name of self determination as international conflicts and subject to IHL. Military objective is defined as:

‘objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralisation in the circumstances ruling at the time offers a definite military advantage.’<sup>99</sup>

Furthermore, rules regarding the fundamental guarantees that anyone in the hands of the enemy may be availed are provided.<sup>100</sup> In addition, the protection availed to the wounded sick and medical personnel are improved.<sup>101</sup>

Additional Protocol II is the first international agreement regulating the conduct of parties in a non-international conflict. The law concerning non-international armed conflict is recognised as being distinct from that regulating an international armed conflict. Article 1 defines international armed conflict as including conflicts where people

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<sup>96</sup> This article provides that persons taking no active part in hostilities, including members of the armed forces who have laid down their arms and those *hors de combat*, by sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely.’

<sup>97</sup> See Art 50 Geneva Convention I, art 51 Geneva Convention II art 130 Geneva Convention III and art 147 Geneva Conventions IV.

<sup>98</sup> Keen (n 78 above) 45.

<sup>99</sup> Art 52(2) Additional Protocol I.

<sup>100</sup> Art 75 Additional Protocol I.

<sup>101</sup> Art 8-35 Additional Protocol I.

are fighting against colonial domination and alien occupation, and against racist regimes in the exercise of their right of self-determination.<sup>102</sup>

In addition, IHL is still governed by international customary law. 'The principles of the law of nations, as they result from the usages established among civilised peoples, from the law of humanity and the dictates of the public conscience are still in force.'<sup>103</sup>

### 3.4 The Problem with IHL

In the many wars that have occurred since 1945 civilians have been subjected to serious violations of IHL. Had IHL been respected by all sides to these conflicts a large proportion of the suffering would have been avoided. The contrast between the normative order and the behaviour of men cannot be denied.<sup>104</sup> One of the reasons for this is the fact that IHL does not possess an effective enforcement mechanism.<sup>105</sup>

Enforcement has often been delegated to individual states. The conventional forms of national enforcement of IHL have included retaliation, reprisals, and demands for compensation, self defence, and punishment of individuals. Punishment of war crimes has developed with IHL, and has indeed become one way of enforcing this branch of law.<sup>106</sup>

Initially, the punishment of war crimes through the injured state was based on international customary law. The possibility for the criminal prosecutions of war crimes existed under The Hague Regulations.<sup>107</sup> These provisions provided liability to punish individuals, but failed to detail regulations for the prosecutions of these crimes. An enforcement mechanism for the punishment of war criminals was therefore lacking.<sup>108</sup>

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<sup>102</sup> Keen (n 78 above) 61.

<sup>103</sup> Extract from the Martens Clauses that state that customary law continues to apply were the Hague Regulations were silent.

<sup>104</sup> ICRC (n 16 above) 11.

<sup>105</sup> Dugard (n 19 above) 8.

<sup>106</sup> Skillen (n 28 above) 208.

<sup>107</sup> Hague Regulation 41 addresses the violations of cease-fire terms by private individuals and provides that compensation from and punishment of the accused parties can be demanded. Similarly Regulation 56 provides that all seizure, destruction, or wilful damage to common and institutional property, historic monuments or works of art, and science is prohibited and punishable.

<sup>108</sup> D Fleck *The handbook of humanitarian law in armed conflicts* (1995)519.

After the First World War, attempts to punish those who had violated IHL was considered at the Paris Peace Conference. A Commission established at this Conference had to investigate who was responsible for the outbreak of the war and determine the offences against the rules of warfare committed by Germany and her allies, with a purpose of establishing a criminal court.<sup>109</sup> Unfortunately, these negotiations broke down when the German government refused to surrender individuals accused of having committed war crimes. Germany instead preferred to punish war criminals in the Supreme Court of the German *Reich*.<sup>110</sup>

During the Second World War, a UN War Crimes Commission was set up to work out the modalities in prosecuting German and Japanese war criminals. This culminated in the United States, United Kingdom, France, and the Former USSR signing the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers on 8 August 1945.<sup>111</sup> An integral part of this agreement is the Charter of the International Military Tribunal (IMT).<sup>112</sup>

The Nuremburg Tribunal had competence to try crimes against the peace, war crimes, and crimes against humanity. War crimes were defined as 'violations of the law and custom of war.' The violations included but were not limited to:

'murder, ill-treatment or deportation to slave labour, or for any other purpose the civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the sea, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.'<sup>113</sup>

The Tribunal stressed that these crimes had been recognised as war crimes by customary international law and treaty law. Similarly, in 1946 an International Military Tribunal for the Far East (Tokyo Tribunal) was set up by the Allied armed forces

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<sup>109</sup> United National War Crimes Commission (UNWCC), *History of the United Nations War Crimes Commission and the development of the Law of Wars* (1948) 34-35.

<sup>110</sup> The law providing for these prosecutions was passed on 18 December 1919.

<sup>111</sup> Nineteen other states ratified this agreement before the conclusion of the Nuremberg trials.

<sup>112</sup> Bassiouni (n 33 above) 521.

<sup>113</sup> Art 6 of the IMT Statute.

subjecting Japan's political and military decision makers during World War II to criminal prosecutions.<sup>114</sup>

The Nuremberg and Tokyo Tribunals enforced IHL by holding those responsible for war crimes accountable. Individual criminal accountability was recognised under international law. This principle is extended regardless of national law, and is applicable to Heads of State. The defence of obedience to superior orders was not available.<sup>115</sup>

Other tribunals were formed after World War II to try war criminals. On 20 December 1945 the Allies established military tribunals in their respective zones of occupation. These tribunals picked up where the Nuremberg and Tokyo tribunals left off and tried the lesser war criminals. Military trials for the violators of the laws of war were conducted by US Military Commanders.<sup>116</sup>

The prosecutions of violators of IHL after the Second World War have been subject to criticism. The tribunals have been perceived as dispensing 'victor's justice,' making a distinction between the winners and losers. The Allies are known to have committed war crimes but these were conveniently overlooked.<sup>117</sup> In the case of adopting national approaches to try war criminals, it has been argued that war crimes trials are convened when national political will dictates.<sup>118</sup>

The Geneva Conventions place states under an obligation to punish 'grave breaches.'<sup>119</sup> It places state parties under an obligation to enact legislation necessary to provide effective penal sanctions. Thus, the concept of universal jurisdiction is introduced in regard to grave breaches. If the state in question is unwilling to try an offender within its territory, it is obliged to hand him over to any party to the Convention.<sup>120</sup> The obligation to investigate and prosecute thus extends to other contracting states interested in

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<sup>114</sup> Established on 19 January 1946.

<sup>115</sup> Bassiouni (n 33 above) 554.

<sup>116</sup> *Ibid.*

<sup>117</sup> Skillen (n 28 above) 211.

<sup>118</sup> *Ibid* 208.

<sup>119</sup> Geneva Convention I, art 50(2) Geneva Convention II, art 51 Geneva Convention III and art 130 Geneva Convention IV art 147.

<sup>120</sup> Keen (n 78 above) 45.

prosecuting war crimes as long as they are able to produce incriminating evidence against the accused.<sup>121</sup>

While much progress had been made in the area of the law of armed conflict, adequate provisions for trying violators of IHL have not been made. The main problem is the lack of a systematic mechanism that would ensure that IHL is observed.<sup>122</sup>In the past those who breached IHL did not fear criminal disciplinary punishment. This has changed with the establishment of the *ad hoc* tribunals, but much remains to be done.

The compliance of IHL is in the interests of everyone involved in conflicts, therefore the provisions of this branch of law needs to be widely known and disseminated to all parties involved in conflict. Respecting IHL depends on reciprocity. Only those who themselves comply with the provisions of this area of law can expect the adversary to observe the dictates of humanity in armed conflict.<sup>123</sup> In addition the role of the media cannot be underplayed in enforcing IHL. Public opinion has proved to be a powerful tool in controlling and indeed bringing to an end many conflicts in the past.<sup>124</sup>

An independent and impartial court established to try violators of IHL would provide a powerful deterrent for those who blatantly disregard IHL. While the establishment of the *ad hoc* tribunals is a big step in the right direction, their establishment is often politically motivated, and it is questionable if they are able to operate inhibited by political considerations. Furthermore, because these tribunals have limited subject matter, temporal and territorial jurisdiction, they are unable to develop extensive jurisprudence.<sup>125</sup> Thus, the establishment of a permanent court would provide a more consistent method of developing and enforcing IHL.

### **3.4 The International Criminal Court (ICC)**

As demonstrated above, the record of the application and enforcement of IHL is far from impressive. States are competent and often legally obliged under international law to

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<sup>121</sup> Art 49(2) Geneva Convention I, art 50(2) Geneva Convention II, art 129(2) Geneva Convention III and art 146 (2) Geneva Convention IV.

<sup>122</sup> Keen (n 28 above) 211.

<sup>123</sup> Fleck (n 107 above) 525.

<sup>124</sup> The media broadcasts on Iraq, Yugoslavia and Somalia contributed significantly to swaying public opinion and getting the international community to intervene thereby bring the conflict to an end.

<sup>125</sup> Skillen (n 28 above) 211.

investigate, prosecute, and punish IHL violations but have either been unable or unwilling to do so. Today most conflicts are rooted in the failure to repair yesterday's injury. Lasting peace in post-conflict situations can only be achieved if violators of IHL are held accountable for their past wrongs.<sup>126</sup> Deliberations on the need to establish a fair and effective ICC for the enforcement of international criminal law can be traced to after the First World War.<sup>127</sup>

In July 1998, the Rome Statute was adopted presenting the possibility for such a court to be established.<sup>128</sup> The Preamble to the Rome Statute recognises the need for the most serious crimes of concern to the international community not to go unpunished, bringing an end to impunity for the perpetrators of these crimes.

The Rome Statute has jurisdiction over genocide,<sup>129</sup> crimes against humanity,<sup>130</sup> war crimes,<sup>131</sup> and the crime of aggression.<sup>132</sup> Where national legislation does not correspond with the definitions under the Rome Statute, the provisions of the Rome Statute prevail.<sup>133</sup> The Rome Statute elaborates on the principle of individual criminal responsibility by adding principles of criminal law and procedural regulations to the definition of the crimes listed in articles 5-8.<sup>134</sup>

The establishment of the ICC will mark the beginning of a new phase in the history of international criminal justice. Certain fundamental values and expectations shared by all people are embodied in the Rome Statute, such that crimes so repugnant to humanity will no longer be tolerated and go unpunished. By keeping a comprehensive record of the terrible crimes of the past, humanity will not forget, neither it is hoped repeat the mistakes of the past, thus strengthening world order, and contributing to world peace and security.<sup>135</sup>

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<sup>126</sup> R S Lee *International Criminal Court: The making of the Rome statute* (1999)1.

<sup>127</sup> Bassiouni (n 33 above)555.

<sup>128</sup> See Rome Statute of the ICC, 17 July 1998 <[www.un.org/icc/htm](http://www.un.org/icc/htm)> (accessed on 20 August 2001)32 states have ratified the Statute, 139 states have signed. A total of 60 ratifications are required before the Statute comes into force.

<sup>129</sup> Art 6 ICC Statute.

<sup>130</sup> Art 7 ICC Statute.

<sup>131</sup> Art 8 ICC Statute.

<sup>132</sup> Art 5 ICC Statute.

<sup>133</sup> Art 21 ICC Statute.

<sup>134</sup> Lee (n 126 above) 468.

<sup>135</sup> Bassiouni (n 33 above) 556.

## Chapter 4: The contribution of the ICTR to the development and enforcement of IHL

### 4.1 Introduction

This chapter aims at examining the significant contributions made by the ICTR to the development and enforcement of IHL. As will be shown, the ICTR has delivered the first international prosecution pursuant to the Genocide Convention.<sup>136</sup> The ICTR has also passed the first international judgement convicting an individual of the crime of genocide, thus bringing the Genocide Convention to life.<sup>137</sup> The ICTR has created a clear investigation and prosecution strategy that has facilitated the arrest of high ranking accused,<sup>138</sup> ensuring the prosecution of those who planned, instigated, ordered, and publicly incited the 1994 genocide. In addition, the ICTR has adopted innovative procedural techniques aimed at facilitating the gathering of evidence and expediting the cases brought before it.

The prosecutions rendered by the ICTR make it clear that the concept of sovereign immunity will no longer be accepted as a defence against individual criminal responsibility for human rights atrocities.<sup>139</sup> The ICTR sends a message to Rwanda, and indeed the rest of Africa that violations of IHL are the concern of the whole international community, and will no longer be tolerated. It hopes by this, to bring an end to impunity. The ICTR's mandate to 'prosecute and punish those responsible for breaches of Article 3 Common to the 1949 Geneva Conventions, modified by Additional Protocol 11 of 1977,' makes serious violations of IHL subject to international criminal sanctions. In the past, the lack of enforcement of IHL had been of major concern. The ICTR provides a way through which IHL can now be enforced.

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<sup>136</sup> The Convention on the Prevention and Punishment of the Crime of Genocide, Adopted on 9 December 1948 and entered into force on 12 January 1951.

<sup>137</sup> Viljoen (n 12 above) 32.

<sup>138</sup> Cisse (n 10 above) 170.

<sup>139</sup> Kindiki (n 12 above) 75.

## 4.2 Jurisprudential Contribution

The most significant jurisprudential contribution to the development of IHL made by the ICTR relates to the crime of genocide, a crime that is as old as humanity. Historically, genocide went unpunished because it was generally but not exclusively committed under the direction or at the very least the complicity of the state. In the interest of state sovereignty, universal jurisdiction over violations of humanitarian principles failed to be exercised. This changed at the end of the First World War, which saw the development of human rights law that imposed obligations upon the State and guaranteed certain rights of the individual.<sup>140</sup> Similarly, if an individual violates the fundamental rights of his or her fellow citizen the individual is liable to punishment under international law.<sup>141</sup>

### 4.2.1 The ICTR and Genocide

The landmark case of *Jean Paul Akayesu*<sup>142</sup> marks the first of several contributions the ICTR has made to the development and enforcement of IHL. Akayesu, former major of the Taba commune in Gitarama in 1994, was initially charged with 13 counts relating to genocide, crimes against humanity, and violations of Article 3 Common to the Geneva Conventions of 1949 and of Additional Protocol II of 1977. Akayesu maintained that he had tried to protect the Tutsis in his community but was unable to control the *interahamwe* who committed the killings, until he was forced to flee in May 1994. Akayesu was found guilty of one count each of genocide and incitement to commit genocide and seven counts of crimes against humanity.<sup>143</sup> This case provided the ICTR with the opportunity to implement the Genocide Convention, resulting in the first ever conviction of genocide.

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<sup>140</sup> W Schabas *Genocide in International law* (2000)1-2.

<sup>141</sup> This principle was established in *Valesquez Rodrieguez v Honduras* (1989).

<sup>142</sup> Case no ICTR-96-4-1 judgement of 2 September 1998 <<http://www.ictor.org>> (accessed on 29 July 2001).

<sup>143</sup> Akayesu was acquitted of five counts brought under Common Article 3 of the 1949 Geneva Conventions and Additional Protocol II of 1977 on the grounds that Akayesu did not fall within the class of perpetrators as contemplated by these instruments. In addition Akayesu was also acquitted of a count charging complicity in genocide having found him guilty as a principle.



Under the Genocide Convention genocide is defined as:

'any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious groups as such: the killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, forcibly transferring children of the group to another group.'<sup>144</sup>

The ICTR Statute adopts the same definition of genocide as that provided in the Genocide Convention.<sup>145</sup> Genocide is thus defined very narrowly, because it is limited to only 'national, racial, ethnic and religious groups.'<sup>146</sup>

The Tribunal had to consider whether the Tutsi constituted a group protected against genocide. The Tribunal held that the Hutu and Tutsi were technically not separate ethnic groups as envisaged by the ICTR Statute and the Genocide Convention,<sup>147</sup> because they shared the same nationality, race, religion, and partook of a common language, and culture.<sup>148</sup> However, in adopting a more constructive approach, the Tribunal interpreted what the drafters of the 1948 Genocide Convention intended, and concluded that the protection was not limited solely to the four enumerated groups, but extended to 'any group similar in terms of its stability and permanence.'<sup>149</sup>

The Tribunal concluded that decades of discrimination had led the Tutsi to be regarded as a distinct, stable, and permanent group. Victims were selected in 1994 not as individuals but because of this perceived ethnic difference. In particular Akayesu through his speeches, orders, and actions had demonstrated a specific intent to destroy the Tutsi as an ethnic group.

The Tribunal was mindful of the possibility that such a generous definition of genocide could result in the opening of the floodgates to all sorts of groups seeking protection

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<sup>144</sup> Art II of the Genocide Convention also adopted as article 4 of the ICTR Statute.

<sup>145</sup> Art 2(2) ICTR Statute.

<sup>146</sup> Schabas (n 140 above) 9.

<sup>147</sup> Art II of the 1948 Geneva Convention provides the same definition of Genocide as art 2(2) ICTR statute.

<sup>148</sup> Para 634 of the *Akayesu* judgment.

<sup>149</sup> *Ibid.*

from genocide. Therefore, the Tribunal made it clear that the decision of whether a particular group may be considered for protection from the crime of genocide would very much depend on the nature of the case taking into account both the relevant evidence proffered and the specific political, social, and cultural context in which the acts allegedly took place.<sup>150</sup>

In the *Prosecutor v Alfred Musema*,<sup>151</sup> the Tribunal went further and found that a subjective definition is not sufficient to determine the victim groups as provided for in the Geneva Convention.<sup>152</sup> Political and economic groups were excluded from being classified as a protected group, as they are considered non-stable and non-mobile and are groups to which one becomes a member out of choice.<sup>153</sup>

#### 4.2.2 The ICTR and Rape

Although rape was not among the initial charges brought against Akayesu, the overwhelming evidence given by witnesses of sexual assaults resulted in the charges being amended to include crimes against humanity (rape).<sup>154</sup> It was alleged that Akayesu knew of and encouraged acts of rape and sexual violence against Tutsi women who had sought refuge in the bureau communal at Taba. The Tribunal was thus presented with an opportunity to determine when sexual violence constitutes an international crime.

The Tribunal defined rape as ‘a physical invasion of a sexual nature which is committed on a person under circumstances which are coercive.’ Sexual violence was defined as ‘any act of a sexual nature committed on a person under circumstances which are coercive.’<sup>155</sup> Sexual violence was elaborated upon to include:

‘Serious bodily harm, constituting genocide under article 2(2)(b) of the ICTR statute;

An inhumane act, in which case it constitutes a crime against humanity under article 3(i) of the ICTR statute;

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<sup>150</sup>

*Ibid.*

<sup>151</sup>

Case no ICTR-96-13-T.

<sup>152</sup>

Para 162.

<sup>153</sup>

*Ibid.*

<sup>154</sup>

The indictment was amended in 1997.

<sup>155</sup>

Para 64 and 77 *Akayesu* judgement.

An outrage upon the personal dignity constituting a serious violation of Article 3 Common to the Geneva Conventions and Additional Protocol II thereto.<sup>156</sup>

Coercion was not limited to physical force, but includes ‘threats, intimidation, extortion, and other forms of duress.’<sup>157</sup> Thus, the Tribunal adopted a broader definition of rape that is more useful to the implementation of international law.<sup>158</sup> The Tribunal found that sexual violence specifically targeting Tutsi women was an integral part of the process of their destruction, and to the destruction of the Tutsi group as a whole.<sup>159</sup>

Akayesu was found guilty of crimes against humanity and genocide for aiding, abetting, ordering, or encouraging, and sometimes witnessing more than a dozen rapes and other sexual assaults at the bureau communal which, by virtue of his authority, he could have prevented. When a person in a public place or through a mass medium, directly encourages or persuades another to commit genocide with the specific intent that the person’s acts contribute to the destruction of a protected group, then the *actus reus* will have been fulfilled.<sup>160</sup> The evidence that Akayesu encouraged these crimes led to the charge of direct and public incitement to commit genocide, proscribed under both the ICTR Statute<sup>161</sup> and the Genocide Convention.<sup>162</sup>

#### 4.2.3 The ICTR and War Crimes

Akayesu was charged with violating article 4 of the ICTR Statute by committing serious violations of Common Article 3 of the 1949 Geneva Conventions and the Additional Protocols II of 1977. The Tribunal held that the provisions of article 4 purported to protect victims of armed conflict. These provisions are designed to constrain the activities of ‘persons who by virtue of their authority are responsible for the outbreak of, or are otherwise engaged in the conduct of hostilities,’<sup>163</sup> thus encompassing military personnel and some civilians. These civilians must have been legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or *de facto*

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<sup>156</sup> Punishable under art 4(e) ICTR Statute.

<sup>157</sup> *Ibid.*

<sup>158</sup> The Conventional definition of rape relies heavily on two or more parties, one being the victim and the other the perpetrator of the rape and the lack of consent thereof.

<sup>159</sup> Para 731 and 734 *Akayesu* judgment.

<sup>160</sup> Para 633 of the *Akayesu* judgement.

<sup>161</sup> Art 3(c) of the ICTR Statute.

<sup>162</sup> Art III(C) 1948 Geneva Convention.

<sup>163</sup> Para 65 of the *Akayesu* Judgment.

representing the government, to support or fulfil the war effort. Akayesu was duly acquitted of all charges under article 4 of the ICTR Statute because of insufficient evidence that Akayesu fell within this category.<sup>164</sup>

#### **4.2.4 The ICTR and Cumulative Charges**

The *Akayesu* case considered the issue of cumulative charges. In the amended indictment, Akayesu was charged cumulatively with more than one crime in relation to the same set of facts. First, the Tribunal had to consider beyond a reasonable doubt that a given factual allegation set out in the indictment is established. If so would the accused be found guilty of all the crimes charged in relation to those facts or only in respect to one of the alternate charges. Secondly, having found the accused guilty would a conviction on both counts be construed as judging the accused twice for the same crime, thereby violating the principle of double jeopardy.<sup>165</sup>

The Tribunal held that the crime of genocide exists to protect certain groups from extermination or attempted extermination, crimes against humanity exists to protect the civilian population from persecution, and Article 3 Common to the Geneva Conventions protects victims of war crimes and civil war. The crimes have different purposes and are therefore, never co-extensive.<sup>166</sup> Thus, it was legitimate to charge these crimes in relation to the same set of facts or single set of facts. If the Tribunal found it necessary to record a conviction for more than one of these offences in order to reflect what crimes an accused committed, then it would do so.

The Tribunal stressed that the ICTR Statute does not establish a hierarchy of norms, but rather all three offences are presented on an equal footing. While genocide may be considered the gravest crime, there is no justification in the Statute for finding that crimes against humanity or violations of Common Article 3 and Additional Protocol II are in all circumstances alternative charges to genocide and thus lesser-included offences. These offences have different constituent elements and this consideration renders

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<sup>164</sup> *Ibid.*

<sup>165</sup> Para 468-470 *Akayesu* Judgement.

<sup>166</sup> *Ibid* para 470.

multiple convictions for these offences in relation to the same set of facts permissible.<sup>167</sup> This is reflective of the nature of genocide, crimes against humanity, and war crimes.

#### 4.2.5 The ICTR and former Heads of State

The second significant contribution made by the ICTR was the decision in the *Prosecutor v Jean Kambanda*<sup>168</sup> former Prime Minister of Rwanda. Kambanda pleaded guilty to six counts of genocide, conspiracy to commit genocide, direct and public incitement to genocide, complicity in genocide, and crimes against humanity, thereby removing the need for trial.<sup>169</sup> Kambanda was convicted and given a sentence of life imprisonment for his crimes against humanity whilst he was Head of the Rwandan state in 1994, making him the first Head of State to be convicted for crimes against humanity.

The *Kambanda* judgement availed the ICTR the opportunity to further clarify the elements that constitute genocide, war crimes, and crimes against humanity. Despite the gravity of the violations of Article 3 Common to the Geneva Conventions and of the Additional Protocol II, the Tribunal considered these crimes lesser crimes than genocide or crimes against humanity. The Tribunal however found it difficult to rank genocide against crimes against humanity in terms of their respective gravity as both crimes shocked the collective conscience of mankind.<sup>170</sup>

The special intent required in the commission of genocide made this crime unique. This is not a prerequisite for crimes against humanity, which the Tribunal defined as:

'Serious acts of violence, which harm human beings by striking what is most essential to them: their lives, liberty, physical welfare, health and dignity. They are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment.

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<sup>167</sup> The Tribunal found two exceptions to this general rule. Where one of the offences in the indictment is a lesser-included offence of the other, the general rule does not apply e.g charges of murder and grievous bodily harm, robbery and theft, or rape and indecent assault. Where one offence charges accomplice liability and the other offence charges liability as a principle, e.g. genocide and complicity to genocide.

<sup>168</sup> Case ICTR-97-23-5 judgement of 4 September 1998<<http://www.ictor.org>> (accessed on 25 August 2001).

<sup>169</sup> Paragraphs 69-70 *Kambanda* judgement.

<sup>170</sup> Para 14 *Kambanda* judgement.

But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is thus negated.<sup>171</sup>

Furthermore, 'crimes against humanity are offences of the gravest kind against the life and liberty of the human being.'<sup>172</sup>

Kambanda later appealed against the judgement and sentence of the Trial Chamber. The grounds of appeal were that Kambanda had been denied the right to be represented by Counsel of his choice, that the Trial Chamber had failed to consider the appellants detention outside the detention unit of the Tribunal, that the Trial Chamber had failed to investigate thoroughly whether the guilty plea was unequivocal and voluntarily entered, that the Trial Chamber had failed to consider the guilty plea as a mitigating factor, and that the sentence was excessive. The appeal was dismissed on all grounds. The Appeals Chamber held that 'the crimes for which the appellant was convicted were of the most serious nature. A sentence imposed should reflect the inherent gravity of the criminal conduct.'<sup>173</sup>

As the first Prime Minister to be convicted of crimes against humanity, the Tribunal sent a clear message that even the highest ranking government officials will be held responsible for violations of IHL and face criminal sanctions:

'These crimes were committed when Kambanda was Prime Minister and he and his government were responsible for maintenance of peace and security. 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 failed to take necessary measures to prevent his subordinates from committing crimes against the population.'<sup>174</sup>

Secondly, the *Kambanda* case is of significance because Kambanda was the first person to enter a guilty plea which was crucial to the Prosecution being able to establish evidence of a conspiracy to commit genocide between the various layers of power, in

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<sup>171</sup> Para 15(A) *Kambanda* judgement.

<sup>172</sup> Para 43 *Kambanda* judgement.

<sup>173</sup> Para 125(7) judgement of the Appeals Chamber in *Kambanda*.

<sup>174</sup> Para 44 *Kambanda* judgement.

particular the collusion between the government and the military.<sup>175</sup> The implications of the guilty plea were summarised as follows; ‘the guilty plea of Kambanda is likely to encourage other individuals to recognise their responsibility during the tragic events which occurred in Rwanda in 1994.’<sup>176</sup>

#### 4.2.6 The ICTR and violations of Common Article 3

In the *Prosecutor v George Rutaganda*,<sup>177</sup> the issue of civilian liability for violations of Common Article 3 to the Geneva Conventions was considered. Rutaganda was the former second Vice-President of the *interahamwe* militia and shareholder in RTML.<sup>178</sup> Rutaganda was charged with eight counts, including genocide, crimes against humanity, and violations of Common Article 3 and Additional Protocol II of 1977.

The Tribunal held that for one to be liable for Common Article 3, the perpetrator must belong to a party to the conflict whereas under Additional protocol II the perpetrator must be a member of the armed forces of either the government or the dissidents. The Tribunal held that ‘too restrictive a definition of these terms would dilute the protection afforded by these instruments to the victims and potential victims of armed conflicts.’<sup>179</sup>

The Tribunal elaborated further and held that:

‘the duties and responsibilities of the Geneva Conventions and the Additional Protocols will normally apply to individuals of all ranks belonging to the armed forces under the military command of either the belligerent parties, or to individuals who were legitimately or expected as public officials or agents or persons otherwise holding public authority or de facto representing the government to support or to fulfil its war effort.’<sup>180</sup>

Rutaganda was found guilty of three of the eight charges and acquitted of five war crimes specified in the Geneva Convention because the *interhamwe* was not considered a combat force.

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<sup>175</sup> Cisse (n 10 above) 172.

<sup>176</sup> Para 46 *Kambanda* judgement.

<sup>177</sup> Case no ICTR-96-3-T.

<sup>178</sup> RTML was used as an instrument to incite and direct genocide.

<sup>179</sup> Para 96 *Rutaganda* judgment.

<sup>180</sup> *Ibid.*

#### 4.2.7 The ICTR and Inchoate Offences

The ICTR in the *Prosecutor v Alfred Musema*,<sup>181</sup> considered the issue of inchoate offences. Musema, former Director of the Gisovu Tea Factory, was convicted of genocide and crimes against humanity. Whilst acknowledging that a crime of an attempt is punishable, it is also true that an attempt is an incomplete act, and by definition, an inchoate crime. An attempt to commit a crime may be punishable as a separate crime irrespective of whether or not the intended crime is accomplished. Thus, an accused may incur individual criminal responsibility for inchoate offences under article 2(3)(d)<sup>182</sup> of the Statute even when the substantive offence is not committed. Furthermore, one could incur criminal liability for the acts of others, if, for example one committed, or aided or abetted another in the commission of such acts.<sup>183</sup>

#### 4.2.8 The ICTR and Women Genocide and Rape

*Pauline Nyiramasahuko*,<sup>184</sup> former Minister of Women's Development and Family Welfare in the *Habyarimana* government, presents the first ever indictment against a woman. *Nyiramasahuko* was charged jointly with her son *Arsene Shalom Ntahobali* with genocide, complicity in genocide, crimes against humanity, and serious violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II. This indictment was later amended to include six additional charges, which included responsibility for rape as part of a widespread and systematic attack against a civilian population on political, ethnic, and racial grounds, outrages upon personal dignity, in particular, humiliating and degrading treatment, rape, and enforcing prostitution and indecent assault against Tutsi women. Although the trial has yet to begin, the indictment demonstrates that the ICTR is determined to ensure that new boundaries are set in the area of crimes against humanity, particularly in the case of rape.

#### 4.3 Other Significant Contributions of the ICTR

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<sup>181</sup> *Musema* judgement (n 151 above).

<sup>182</sup> Article 2(3) (d) deals with attempt to commit genocide.

<sup>183</sup> Para 116-117 *Rutaganda* judgement.

<sup>184</sup> Case no ICTR-97-21-1.



The ICTR has not only made significant jurisprudential contributions to the development and enforcement of IHL, but the ICTR has also adopted innovative procedural techniques aimed at expediting cases, put into place measures aimed at protecting victims and witnesses, set new procedural standards relating to IHL, and developed a clear investigation and prosecution strategy resulting in the apprehension of high ranking governmental officials.

In response to the heavy backlog of cases,<sup>185</sup> the Prosecutor has introduced mass trials that present an advantage of a joint trial instead of single trials that could last for several years. The first attempt to join cases met with stiff opposition<sup>186</sup> in the case of *Theoneste Bagasora and 28 others*.<sup>187</sup> The first indictment for a joint trial was handed down in the case against *Obed Ruzindana*<sup>188</sup> and *Clement Kayeshima*,<sup>189</sup> other cases involving mass indictments have followed. These mass indictments have helped reduce the heavy backlog of cases, which if tried individually could last for years. In addition joint trials reflect more accurately the reality of genocide, an offence that rarely occurs without the involvement of more than one person.<sup>190</sup>

The protection of victims and witnesses is of paramount importance to the workings of the ICTR. The Tribunal has adopted a variety of protective measures ‘to safeguard the privacy and security of victims and witnesses provided these measures are consistent with the rights of the accused.’<sup>191</sup> These measures include in-camera proceedings, measures to prevent the disclosure to the public or the media the identity or whereabouts of the victim or witness, or of a person related to or associated with him or her, the expunging of names and identifying information from the Tribunal’s public records, non-disclosure to the public of any records identifying the victim, and the rendering of testimony through image or voice altering devices or closed circuit television, the assignment of pseudonym, closed sessions and any other appropriate

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<sup>185</sup> The ICTR detention centre currently houses 53 Accused persons, has given nine judgements. For more detail see ICTR Detainees Status List <[http:// www.ictor.org](http://www.ictor.org)> (accessed on 2 November 2001).

<sup>186</sup> Initially the judge dismissed the first mass indictment on the grounds that as a single judge he lacked the jurisdiction to confirm the indictment with respect to certain individuals who were named therein and who had already been indicted. See ICTR Press Release. ICTR/INFO-9-2-115, I April 1998.

<sup>187</sup> Case no ICTR-98-37-I.

<sup>188</sup> Case no ICTR-95-1-T.

<sup>189</sup> Case no ICTR-98-38-T.

<sup>190</sup> Cisse (n 10 above) 174.

<sup>191</sup> Rule 75(A) of the Rules and Procedure of the ICTR, see also art 21 of the ICTR Statute.

measures that will facilitate the testimony of vulnerable witnesses. Furthermore, the Chamber has the authority to control the manner of questioning to avoid harassment and intimidation.<sup>192</sup>

These provisions have greatly assisted the gathering of evidence. Giving evidence in cases of this nature often places the victims and witnesses under tremendous pressure often rendering them fearful of the repercussions they or their family will suffer as a result of giving evidence. Thus, the protective provisions have secured the testimonies of numerous witnesses who would otherwise have been reluctant to give evidence or otherwise unable to attend the proceedings.<sup>193</sup>

The ICTR has further contributed to the development of IHL by setting new procedural standards relating to IHL. The ICTR Statute adheres to the very high standards of international criminal justice, the Rules and Procedures of the ICTR ensure that the rights of the accused are protected to ensure that the trial is consistent with the principles of a fair trial. Thus an accused has the right to be assisted by counsel of his or her choice even if the accused is indigent,<sup>194</sup> has the right to the assistance of an interpreter,<sup>195</sup> and is availed with enough time to prepare ones defence,<sup>196</sup> the presumption of innocence,<sup>197</sup> and the conduct of trials without delay.<sup>198</sup>

The Tribunal has always maintained that the obligation to disclose as required under Rule 66 of the ICTR Rules and Procedure,<sup>199</sup> applies equally to both the Defence and the Prosecutor. In *Akayesu*, the Prosecutor was ordered to submit all written statements already made available to the Trial Chamber to the Defence.<sup>200</sup> This demonstrates that a greater burden is placed on the Prosecution, which further enhances the protection of victims and witnesses.

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<sup>192</sup> *Ibid* art 75(B-C).

<sup>193</sup> Cisse (n 10 above )168.

<sup>194</sup> Art 20(d) and Rule 42(i) of the ICTR Rules and Procedure.

<sup>195</sup> Art 20(f) ICTR Statute and Rule 42(ii) of the Rules and Procedure of the ICTR.

<sup>196</sup> Art 20(4)(b) ICTR Statute.

<sup>197</sup> Art 20(1) of the ICTR Statute.

<sup>198</sup> *Ibid* art 20(c) also Rule 40(J) of the Rules and Procedure of the ICTR. In *Jean Basco Baragwisa* case no ICTR-97-19-1. This provision was challenged and the accused was temporarily released

<sup>199</sup> The rule provides that the Prosecution should disclose all supporting material which accompanied the indictment when conformation was sought, copies of the statements of all witnesses whom the prosecutor intends to call to testify at trial, including any books, documents, photographs in the Prosecutors control.

<sup>200</sup> In *Akayesu* the Prosecutor was requested to submit the written statements already made available to her to the defence counsel .

The ICTR has been successful in apprehending high ranking administrative, military and political officials. This proves that the ICTR has in place a clear investigation and prosecution strategy, resulting in the apprehension of high ranking officials who would otherwise not have been arrested. This strategy could prove invaluable in the future, if adopted in the apprehension of accused persons before similar courts.<sup>201</sup>

Various countries have expressed the desire for similar tribunals as the ICTR to be set up to deal with violations of IHL committed in their respective countries.<sup>202</sup> Some of these requests have been successful, as in the case of Sierra Leone, and the Extraordinary Chambers in the Courts of Cambodia.<sup>203</sup> The Special Court for Sierra Leone is modelled on the ICTR in terms of composition and structure. Article 14 of the Special Court Statute states that the rules of procedure and evidence of the ICTR will apply *mutatis mutandis* to the Special Court,<sup>204</sup> thus the ICTR has been of precedential value to the establishment of Special Courts. However much concern has been expressed about the desirability of creating many *ad hoc* tribunals, there are only so many *ad hoc* tribunals that can be set up.<sup>205</sup> It is submitted that the ICC, when established, will provide the only cohesive manner through which to try those accused of international crimes worldwide.

The *Prosecutor v Bagilishema*<sup>206</sup> marks the first acquittal by the ICTR. The accused was found not guilty of seven counts of genocide, crimes against humanity, and serious violations of Article 3 Common to the Geneva Conventions. The indictment against Bagilishema alleged that he held meetings early in 1994 where he encouraged the local population to kill Tutsis, that he personally attacked and killed Tutsi men, women, and children residing and seeking refuge in Mabanza Commune, that he ordered *interahamwe* militiamen to dig a mass grave in the commune office in Mabanza, and that he directed massacres of Tutsi refugees in various areas of Kibuye *Perfecture*.

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<sup>201</sup> Cisse(n 10 above).

<sup>202</sup> Countries such as Burundi, Democratic Republic of Congo, East Timor.

<sup>203</sup> On 2 January 2001 Cambodia's National Assembly voted to set up a special tribunal, with the help of the United Nations to try some of the world's most notorious mass murderers during the period of Kampuchea.

<sup>204</sup> In October 2000 an agreement was made between the UN Secretary General and the Government of Sierra Leone for the establishment of Special Court for Sierra Leone.

<sup>205</sup> Morris & Scharf *The International Tribunal for Rwanda*(1995) 698 refer to the constant requests to set up similar tribunals has resulted in the international community experiencing 'tribunal fatigue.'

<sup>206</sup> Case no ICTR-95-1-T.

The Prosecution failed to disprove that the resources available to the accused were inadequate to prevent the massacres of the scale that took place in Mabanza *Commune*. The Prosecution also failed to disprove that the accused acted to maintain law and order in the commune with the means available to him. Thus, the accused had negated one of the ingredients of the offence he was charged with that was necessary to establish his guilt.

This case has attracted various reactions. The Tribunal's spokesman, Kingsley Mohalu, hailed the judgement as a sign of the ICTR's impartiality and independence, while the Prosecution attributed this decision to a weak prosecution.<sup>207</sup> What is clear however is that the ICTR will only convict an accused person if such a case is proven beyond a reasonable doubt.

#### **4.4. Criticisms of the workings of the ICTR**

The ICTR has been subject to numerous criticisms. The Tribunal fails to fulfil the basic requirement of an international criminal tribunal because of its *ad hoc* nature. The slow pace at which the ICTR dispenses justice has led to due process violations. The ICTR has so far only tried Hutus for violations of IHL when there is evidence that indicates Tutsi involvement resulting in IHL violations. This has brought into question the impartiality and independence of the ICTR. Justice rendered by the ICTR is also perceived to be remote from the people of Rwanda. In addition, allegations of administrative deficiencies, incompetence, and fraud have been levied against some of the ICTR staff.

The ICTR has been criticised for failing to fulfil the basic standards required by an international criminal tribunal because of its *ad hoc* nature. The ICTR has limited subject matter, temporal and territorial jurisdiction, and lacks the opportunity to establish extensive jurisprudence in relation to multiple conflicts over an extended period of time<sup>208</sup> The ICTR mandate further limits prosecutions to those accused of planning, instigating, ordering, committing or otherwise aiding or abetting the planning, preparation or execution of genocide, crimes against humanity, and war crimes as referred to in article

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<sup>207</sup> The East African, 11 June 2001 'Rwanda Army Says *Interahamwe* are regrouping' <<http://www.allafrica.com>>(accessed on 5 November 2001).

<sup>208</sup> Skillen (n 28 above)211.

2 to 4 of the ICTR Statute, from the period between 1 January 1994 to 31 December 1994. However evidence proves that the genocide was planned a number of years before this period of time,<sup>209</sup> therefore many acts that constitute the planning of the genocide fall outside the ICTR mandate.<sup>210</sup>

The Tribunal took off to a very slow start for several reasons. The work of the Tribunal was hindered by poor funding and a perennial lack of staff. In response to the initial budgets inadequacies a special fund was created wherein UN Member States could contribute monies to enhance the ICTR's activities. The Tribunal needed to be staffed and required technical assistance, only after this could the Tribunal start gathering evidence, issuing indictments, and processing cases. As a result it took the ICTR two years after its establishment before the first indictments received from the Prosecutor were approved by the ICTR judges.<sup>211</sup> During this period, the perception was that the ICTR was doing everything but what it was mandated to do.<sup>212</sup>

The ICTR delay in processing cases has resulted in the violations of the accused's right to be tried without due delay.<sup>213</sup> However, because the Tribunal relies heavily on the co-operation of other countries, with respect to the arrest of suspects, the delays are not always attributable to the Tribunal. This was the case in *the Prosecutor v Elizaphan Ntakiramara*,<sup>214</sup> whose extradition from the United States took four years. This length of time proved detrimental to the Prosecutor's case as demonstrated in the *Prosecutor v Jean-Basco Baragwiza*.<sup>215</sup> In this case, the Cameroonian authorities delayed transferring the accused, and subsequent delays during pre-trial detention constituted grounds for the accused's acquittal.

The effectiveness of the workings of the ICTR depends heavily on Rwanda's cooperation. In the past, this relationship has been strained, especially after the release of Baragwiza.<sup>216</sup> This has in the past hindered the ICTR from fulfilling its mandate. The

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<sup>209</sup> African Rights (n 4 above).

<sup>210</sup> Art 6 of the ICTR Statute.

<sup>211</sup> H Ball *Prosecuting war crimes and genocide* (1999)176.

<sup>212</sup> Five Years After the genocide in Rwanda, justice in question<<http://www.intl-crisis-group.org>> (accessed on 3 October 2001).

<sup>213</sup> International Covenant on Civil and Political Rights (ICCPR) art14 (3)(c).

<sup>214</sup> Case no ICTR-96-10-T.

<sup>215</sup> *Baragwiza* case(n 198 above).

<sup>216</sup> This case lead to the Rwandan authorities denying the Prosecutor Carla Del Ponti a visa to visit Rwanda soon after *Baragwiza's* acquittal.

ICTR tries to avoid actions that could strain an already fragile relationship with the Rwandan government.

To date the only prosecutions carried out by the ICTR have involved Hutus when there is proof that Tutsis also committed crimes against humanity.<sup>217</sup> The failure to prosecute Tutsis who are currently in power compromises the work of the Tribunal. Perhaps the ICTR's reasoning is that prosecuting Tutsis at this stage would antagonise the government and thus have serious implications on the ICTR's ability to perform its mandate. Consequently, the justice dispensed by the ICTR is perceived to favour the Tutsi. Co-operation between the ICTR and the Rwandan government must not be purchased at the expense of legitimacy. For as long as this perception remains, the independence and impartiality of the tribunal will continue to be questioned.<sup>218</sup>

Furthermore, the ICTR has been criticised for its lack of proximity to the Rwandan population most affected by the events of 1994. Past failures to publicise its activities led the ICTR to be perceived as remote. By being able to follow closely the proceedings of the Tribunal, the Rwandan people become more informed of the workings of the ICTR and more aware of justice being rendered. Recently, the ICTR has put into place various initiatives aimed at bringing justice closer to the Rwandan people. The ICTR Information Centre based in Kigali,<sup>219</sup> presents the backbone of the Tribunal's efforts to disseminate information about the ICTR's work more effectively throughout Rwanda. The Centre includes a public information section where the Tribunal's judgements and other materials are made available in *Kinyarwanda*.<sup>220</sup> In addition, initiatives by the private media to translate and broadcast the ICTR proceedings into *Kinyarwanda* and disseminate throughout Rwanda are in place.<sup>221</sup>

Recently, the workings of the ICTR have been subject to allegations of administrative deficiencies. Incompetence and fraud has been levied against the ICTR staff member's.

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<sup>217</sup> In 1994 a Commission of Experts tasked with investigating the genocide found that although there was no evidence that the Tutsi's intended to destroy the Hutu ethnic group within the meaning of the Genocide Convention, the Commission found that the Tutsi's participated in crimes against humanity.

<sup>218</sup> Skillen (n 28 above) 211.

<sup>219</sup> The *Umusanzu* Centre was opened on the 25 September 2000 in Kigali.

<sup>220</sup> Native language spoken by Rwandans.

<sup>221</sup> Such as *Hirondelle* and *Irin*.

Subsequently this has led to the restructuring of the Registry to ensure that the Tribunal runs more efficiently.<sup>222</sup>

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<sup>222</sup> See (n 212 above)

## Chapter 5: Conclusion

Rwanda is no stranger to conflict. Its history is one marked by violence and strife. The events in Rwanda in 1994 unleashed one of the worst recent examples of armed conflict that left over 800,000 Tutsis and moderate Hutus dead as a result of the genocide, crimes against humanity, and war crimes perpetrated against them. The world watched the horrors of Rwanda unfold while the international community failed to intercede. Soon after gaining control in July 1994, the RPF government of National Unity had the daunting task of holding the *genocidaires* accountable for their crimes, a task Rwanda was ill-equipped to handle. Four months later and after procrastinated negotiations between the Rwandan government and the UN, the Security Council passed resolution 955, establishing the ICTR.

IHL aims at limiting violence and seeks to protect the fundamental rights of individuals in times of armed conflict. The notion of exercising restraint in times of conflict can be traced to the fourth century. Over the last fifty years, IHL has become one of the most comprehensively regulated branches of international law.<sup>223</sup> Despite this, gross violations of IHL continue to occur. These violations are attributed to the lack of an effective enforcement mechanism through which IHL can be developed and enforced. In the past, both national and international efforts aimed at holding those responsible for IHL violations have proved inadequate. These prosecutions have received criticism for being inconsistent because some groups were held accountable while other groups were not. In addition when such prosecutions are instituted they are perceived as 'victor's tribunals.' Thus, the need for an independent and impartial court to try those responsible for IHL violations became imperative.

The establishment of the ICC demonstrates the international community's refusal to continue turning a blind eye towards the occurrence of gross violations. Certain crimes so repugnant to humanity will not longer go unpunished. The ICC, once in force, will present an avenue through which IHL can be developed and enforced in a consistent and impartial manner, act as a powerful deterrent to those who violate IHL, and keep a comprehensive record of terrible crimes committed in the past and future. It is hoped that the ICC will fill the gap in terms of enforcement that IHL has thus far lacked. In the

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<sup>223</sup> D Schindler 'Significance of the Geneva Conventions for the contemporary world' (1999)836 IRRC <<http://www.icrc.org>> (accessed on 16 August 2001).



meantime, the *ad hoc* tribunals, in particular the ICTR have made significant contributions to the development and enforcement of IHL.

By establishing the ICTR, the UN Security Council hoped that high ranking individuals who planned, instigated, ordered, and publicly incited the genocide would be brought to justice. The ICTR has been successful in this regard. Already the ICTR has prosecuted a former Prime Minister, a first for Africa. The ICTR continues to prosecute senior government officials making it clear that the concept of sovereign immunity will no longer be tolerated. Those violating IHL will be punished thus bringing an end to impunity.

So far the Tribunal has handed down judgements against nine individuals, with eight convictions and one acquittal.<sup>224</sup> The ICTR has rendered the first international prosecution pursuant to the Genocide Convention and has passed the first international judgement convicting an individual of the crime of genocide. Before the advent of the ICTR, the Genocide Convention had not been applied at an international level.<sup>225</sup> The events in Rwanda in 1994, leading to the establishment of the ICTR, presented an opportunity to apply the Genocide Convention to the new humanitarian challenges being faced today. In the process, the ICTR has developed a rich jurisprudence on IHL that will prove invaluable in the future.

The ICTR has created a clear investigation and prosecution strategy that has facilitated the arrest of high ranking accused, ensuring that those instrumental in planning the genocide are held accountable. In addition, the protection offered to witnesses has further facilitated the gathering of evidence, without which it would have been difficult for the ICTR to secure any convictions. The ICTR judges have also progressively improved their trial procedures to speed up cases without sacrificing the rights of the accused. For example the *Musema* trial lasted only six months and judgement was delivered within a year of the commencement of the trial.<sup>226</sup>

Furthermore the ICTR's Restitutive Justice Programme, implemented through the support to various Non-Governmental Organisations (NGOs) was introduced to assist

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<sup>224</sup> <<http://www.ictr.org>> Press Release 15 November 2001 (accessed on 2 November 2001).

<sup>225</sup> Applied at Nuremberg and Tokyo Trials. See D Kader 'Law and genocide: a critical annotated bibliography' 11 *Hastings International and Comparative Law Review* (HICLR) (1988)381.

<sup>226</sup> ICTR (n 223 above).

victims of the genocide.<sup>227</sup> Legal guidance, psychological counselling, and medical care is now offered to victims and witnesses, many of whom are women victimised from sexual violence. This innovation has countered concerns expressed about the ICTR failing to help the victims of the genocide.

The judicial and procedural precedents set by the ICTR have facilitated the establishment of other tribunals such as the Special Court for Sierra Leone which has adopted the ICTR rules *mutatis mutandis*.<sup>228</sup> In addition, the much needed impetus for the creation of the ICC has also been provided. Once established, the ICC will provide an avenue through which all IHL violations can be prosecuted.

The workings of the ICTR have increased awareness of IHL. Since the ICTR was established IHL has become a subject of in-depth discussions around Africa. Numerous conferences, and university seminars, relating to this area of law have been held, placing IHL firmly on the African human rights agenda. For the first time, national courts in Cameroon and Kenya have applied the system of grave breaches provided for in the Geneva Convention.<sup>229</sup> In addition to the *Umusanzu* Information Centre in Kigali, the ICTR CD-ROM has been created to further make known the Tribunals contributions to the development of IHL by rendering the ICTR's jurisprudence accessible.<sup>230</sup>

The ICTR has overcome most of the problems it was faced with at its outset. Funding and staffing levels at the Tribunal have increased and a third chamber has recently been created to facilitate the expedition of trials.<sup>231</sup> In addition, the President of the ICTR recently made a request for the UN Security Council to approve the election of 18 *ad litem* judges enabling the Tribunal to discharge its mandate more effectively and to conclude its work within the next few years.<sup>232</sup>

The ICTR has set an impressive record in developing and enforcing IHL since its inception. The proceedings of the ICTR continue to contribute to national reconciliation in Rwanda without which justice would remain elusive. Violators of IHL are now being

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<sup>227</sup> <<http://www.ictor.org>> Press Release of 19 September 2000 (accessed on 4 November 2001).

<sup>228</sup> Art 14 Draft Statute of the Special Court for Sierra Leone.

<sup>229</sup> D Wembou 'The International Criminal Tribunal for Rwanda: Its role in the African context' (1997) 321 IRRC 685 689 <<http://www.icrc.org>> (accessed on 20 October 2001).

<sup>230</sup> See ICTR Press Release of 15 September 2001 (n 223 above).

<sup>231</sup> ICTR (n 226 above)

<sup>232</sup> ICTR (n 223 above).

held accountable thus bringing an end to impunity. The ICTR has proved that IHL remains a fundamental component of the contemporary legal protection of human rights.<sup>233</sup> Until the ICC becomes operational, the ICTR's role in developing and enforcing IHL is commendable.

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<sup>233</sup> Schabas (n 140 above) 8.

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