Symposium on the Legacy of International Criminal Courts and Tribunals in Africa

with a focus on the jurisprudence of the International Criminal Tribunal for Rwanda

A publication of the International Criminal Tribunal for Rwanda (ICTR) in collaboration with The International Center for Ethics, Justice, and Public Life, Brandeis University, USA
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Symposium on the Legacy of International Criminal Courts and Tribunals for Africa

With a Focus on the Jurisprudence of the International Criminal Tribunal for Rwanda (ICTR)

Brief Background of the ICTR

Less than one hour’s bus drive from the capital of Rwanda, Kigali, in the Bugasera district, sits the Ntarama Church, now a memorial to the victims of the Rwandan Genocide. When ethnic tensions in Rwanda exploded in the wake of President Habyarimana’s death on 6 April 1994, Tutsi civilians fled to the church, where they had been promised refuge by François Karera, the préfet of Kigali-rural préfecture. On 15 April 1994, the church was attacked by soldiers and civilian militia, or Interahamwe, who massacred an estimated 5,000 Tutsi civilians, hacking women and men with machetes and clubs, and smashing the bodies of small children against the walls of the church.1

The Ntarama memorial site serves as a bleak reminder not only of the sheer number of people who were massacred in this small district alone, but also of the brutality of the killings perpetrated throughout Rwanda between April and July 1994. Inside the church, the clothing of victims sits like slumped bodies on the rows of pews. Lining the walls of the church are rows upon rows of skulls, bones, and coffins. To the front of the church are the victims’ personal belongings, including kitchenware, jewelry, and glasses, simple reminders of the lives that the victims lived before their brutal deaths.

The story of the Ntarama Church massacre is similar to one repeated in countless churches, schools, and public buildings throughout Rwanda in which Tutsi civilians sought refuge from the violence perpetrated during the 1994 Genocide. Over the course of one hundred days, more than eight hundred thousand ethnic Tutsis, Twas, or moderate Hutus were the victims of genocide in Rwanda, a tiny country of a thousand hills, often referred to as the Switzerland of East Africa. Despite the lessons of the Holocaust during the last century, the international community did not act to prevent the escalation of violence in Rwanda between 6 April and mid-July 1994, even in the face of documented reports of mass brutalities throughout the country.

However, four months later, on 8 November 1994, the United Nations Security Council established the ad hoc International Criminal Tribunal for Rwanda (ICTR), based in Arusha, Tanzania. The ICTR came into existence eighteen months after the creation of the ad hoc International Criminal Tribunal for the former Yugoslavia (ICTY), which sprang from the violent ethnic conflict in the area formerly constituting Yugoslavia. Both tribunals were established to “put an end to … genocide and other systematic, widespread and flagrant violations of international humanitarian law.”2

In prosecuting individuals considered to bear the greatest responsibility for the Rwandan Genocide, the ICTR has played a significant role in delivering some justice to genocide victims and survivors. Since the commencement of the first trial, the ICTR has issued, as of 1 January 2010, forty-nine judgments involving forty accused persons, nine of whom were tried jointly with one or more other co-defendants. Thirty-three accused persons have been convicted, and seven have been

1. On 7 December 2007, Trial Chamber I of the International Criminal Tribunal for Rwanda found Mr. Karera to be guilty for instigating and committing genocide and for extermination as a crime against humanity during the attack against the Tutsi refugees who died at the Ntarama Church on 15 April 1994, Prosecutor v. Karera, Case No. ICTR 01-74-T, Judgment, ¶¶ 25, 315, 544, 557 (7 December 2007).

acquitted of crimes charged against them. Since issuing its first judgment in the case of Prosecutor v. Akayesu on 2 September 1998, the ICTR has evolved to become a precedent-setting ad hoc tribunal and has made a noteworthy imprint on the development of international criminal jurisprudence. Yet, as the Tribunal approaches the end of its mandate, myriad issues have emerged related to its legacy for Africa, the broader influence of the Tribunal’s work, and its subsequent repercussions within the complementary fields of national and international law.

The Symposium

In light of the many issues related to the approaching completion of the Tribunal’s mandate, the ICTR, in collaboration with Brandeis University and the East African Law Society, held a symposium on The Legacy of International Criminal Courts and Tribunals for Africa from 29 November to 1 December 2007 in Arusha, Tanzania. More than 200 participants of thirty-five countries, including seventeen from Africa, attended the symposium. This report is a summary of both the presentations that were made during the symposium sessions and the subsequent discussions that took place with audience members.

3. Pursuant to S/RES/1512 (2003), all ICTR trial activities were mandated for completion by the end of 2008. However, S/RES/1878 (2009) extended the mandate for completion of the ICTR trial activities until mid 2010.

During the three-day symposium, a range of opinions regarding the Tribunal’s work and its ongoing legacy were voiced by presenters and participants, including judges, lawyers, ICTR staff, journalists, legal scholars, and representatives of Rwandan survivor organizations. Seven topics were presented, each by an eminent panel of four or five legal scholars, ICTR legal officers, and international or national practitioners. Each of the panel presentations was followed by dynamic discussion. Over the course of the symposium, the speakers and participants debated the legacy that international justice institutions, and particularly the ICTR, will provide for the legal community of Africa and other areas of the world well past the expiration of the Tribunal’s mandate.

ICTR Judge Inés Mónica Weinberg de Roca of Argentina opened the symposium with a warm welcome and an acknowledgement of the diverse roster of participants. After describing the three day program, she expressed the hope that, through the promotion of dialogue between the Tribunal, African judiciaries and the international legal community, the symposium would play a critical role in the achievement of the Tribunal’s mandate and would contribute to the development of deeper and broader understandings of correlations between international criminal law, democratization, reconciliation, and implementation of human rights.

Acknowledgements

The ICTR Continuing Legal Education Committee would like to extend its gratitude to the following persons for their dedicated work in orchestrating the Legacy Symposium and preparing this publication: Suzanne Chenault, Senior Legal Officer and Chair of the Continuing Legal Education Program at the ICTR; Leigh Swigart, Director of Programs in International Justice and Society at the International Center for Ethics, Justice, and Public Life at Brandeis University; Lewis Rice, former Communications Specialist of the International Center for Ethics, Justice, and Public Life at Brandeis University; and Timothy Gallimore, former spokesperson for the ICTR Office of the Prosecutor.

Several other individuals also deserve recognition for their assistance in preparing and editing this publication on the Legacy Symposium: Dan Koosed, former academic intern at the ICTR and currently a student at the School of Law, University of Miami; Elena Pappas, legal intern at the ICTR, current LLM student at the University of Melbourne, and lawyer at Maddocks Lawyers, Melbourne; as well as Melanie Beckwith, former ICTR intern.

Suzanne Chenault, (r), principal Symposium organizer, chats with a staff member at the registration table.
Ms. Cecile Aptel-Williamson
Senior Fellow at the International Center for Transitional Justice
First Trial Coordinator for the ICTR Chambers

In her opening presentation of the symposium, Ms. Aptel-Williamson spoke of the legacy of the ICTR in prosecuting genocide for the first time in international law. Ms. Aptel-Williamson revisited the cases of Prosecutor v. Kambanda, in which the ICTR entered its first conviction for genocide (and against a head of state); and Prosecutor v. Akayesu, the first international trial in which an accused was convicted of genocide on the basis of his responsibility for the killing and the rape of Tutsi civilians, with the specific intent to destroy the Tutsi group, as such.

As one of the first legal officers of the ICTR, Ms. Aptel-Williamson noted the significant expansion of the ICTR’s capacity since the first days of its operation. She recalled that, when the first trial commenced in Arusha, Tanzania, no court room had yet been constructed and the proceedings were held in a basement with no windows or ventilation. Ms. Aptel-Williamson also observed that the first judges appointed to the ICTR were “very aware” of the importance of their roles in “defining for the very first time the constitutive elements of the crime of genocide.”

Ms. Aptel-Williamson focused on two key legal principles that were central to the Kambanda and Akayesu convictions: first, the requirement that the prosecution establish the “special intent” (dolus specialis) of the accused person to commit genocide; and second, the definition and the identification of a “protected group” under the Genocide Convention.

In discussing these principles, Ms. Aptel-Williamson emphasized the ICTR’s role in strengthening the power of international criminal law to prosecute those responsible for acts of genocide, and in developing jurisprudence on the constitutive elements of genocide.

Intent to Commit Genocide
Ms. Aptel-Williamson identified the principle of “special intent” – requiring the prosecution to establish that the accused specifically intended to destroy, in whole or in part, a national, racial, ethnic or religious group – as the “key element” in defining genocide.

In establishing “special intent,” she stated, the prosecution must prove that the accused intended to produce a genocidal result through his or her actions: that is, there must be “a psychological relationship between the physical result and the mental state of the perpetrator.” However, the actual physical destruction of the

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4. Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgment (4 September 1998). Jean Kambanda, the former Prime Minister of Rwanda, was found guilty of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide and crimes against humanity. The conviction was entered by Trial Chamber I on 1 May 1998, following Kambanda’s guilty plea and full admission of all events alleged against him. He was sentenced to life imprisonment on 4 September 1998; Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment (2 September 1998). Jean-Paul Akayesu, a bourgemestre in Taba commune was found guilty of crimes against humanity and of genocide for his role in ordering, instigating, aiding or abetting acts of sexual violence, including rape during the 1994 period of conflict in Rwanda.

targeted group is not required in order to establish special intent. As noted by Ms. Aptel-Williamson, “contrary to popular belief, the crime of genocide does not imply the actual extermination of the group in its entirety.” Genocide may also be constituted by non-lethal acts of violence, such as rape. In clarifying what is required to establish “special intent,” Ms. Aptel-Williamson maintained that the jurisprudence of the ICTR has broadened the scope of genocide as a legal principle and as a prosecutable crime under international law.

Protected Groups

Ms. Aptel-Williamson proceeded to discuss the jurisprudence of the ICTR relating to the definition of “protected groups.” The Genocide Convention designates only four groups – national, racial, ethnic, and religious groups – as “protected” against genocidal extermination. At the commencement of the ICTR’s mandate, these protected groups had not yet been legally defined through a judicial system of international law. It was accordingly left to the ICTR’s judges to interpret this provision of the Genocide Convention relating to protected groups in such a way as to allow for its application to future cases.

In its early jurisprudence, the ICTR used “objective” criteria to define protected groups, under the Genocide Convention, presuming that the groups did in fact have “an objective existence.” However, in the case of Prosecutor v. Kayishema and Ruzindana, the Trial Chamber II articulated a more “subjective” analysis. In this case, Trial Chamber II found that a protected group under the Genocide Convention need not necessarily be identifiable “objectively,” but may exist only in the mind of the perpetrator. Specifically, in relation to the identification of ethnic groups, Trial Chamber II found that an ethnic group can be either a group “whose members share a common language and culture, or a group which distinguishes itself as such (self identification), or a group identified as such by others, including perpetrators of the crimes (identification by others).”

In the subsequent judgment of Prosecutor v. Rutaganda, the Trial Chamber stated that the definition of a protected group “must be assessed in the light of the particular political, social, historical and cultural contexts” in which the alleged genocidal acts have taken place. As a result, the perception of the perpetrator may be the defining factor in determining whether a “protected group” existed at the relevant time.

Conclusion

Ms. Aptel-Williamson emphasized the ICTR’s important contribution to international criminal jurisprudence through its careful mediation between “objective” and “subjective” approaches to the definition of protected groups under the Genocide Convention. She also noted that the jurisprudence of the ICTR was “the only case law existing on the crime of genocide” at the time the Rome Statute of the International Criminal Court (ICC) was ratified. Accordingly, she observed, the ICTR’s jurisprudence “constituted the basis for negotiations to take place at Rome.” In this respect, she concluded that the ICTR has “played a huge part” in facilitating the development of international criminal law both in relation to the constitutive elements of genocide and in the incremental development of international law.

Professors John Cerone

Director of the Center for International Law & Policy at the New England School of Law

Professor Cerone spoke of the “tremendous impact” of the ICTR’s jurisprudence on the development of international criminal law in relation to crimes against humanity. In his view, the impact of the ICTR’s jurisprudence in the “struggle to end impunity” for crimes against humanity is evident when looking back at the historical context of the development of jurisprudence in this area.

Historical Development of Crimes Against Humanity

Professor Cerone first discussed Westphalian state sovereignty, “the most basic principle of the international legal system.” He identified the principle of non-intervention into the affairs of a sovereign state as the cornerstone of the international legal system. Within such a system, individuals were traditionally “mere objects of the state,” having no right to protection against the state. Even the law of armed conflict, from which international humanitarian law originated, provided only for the protection of states against one another rather than for the protection of individuals against the state.

Professor Cerone noted that the concept of the “principles” or “laws of humanity” first appeared in the preamble to the Hague Convention on the Laws and Customs of War on Land. The clause provided for the protection of the inhabitants of a nation at war by reference to “the protection of the rule of the principles of the law of nations as they result from … the laws of humanity.”9 It did not, however, result in an international consensus as to the legal content of such laws or of their violation.

After World War I, the idea of prosecuting heads and officers of state for the commission of crimes against humanity was for the first time raised within the international community. The 1915 Treaty of Sèvres provided for the prosecution of Turkish war criminals for mass executions of Armenians. However, this treaty was never ratified, and was instead replaced by the Treaty of Lausanne, which included an amnesty for all Turkish military and political actions. Similarly, no consensus could be reached by the victorious nations of World War I at the Paris Peace Conference regarding the inclusion of crimes against humanity as a legally justiciable crime. Several states, the United States being the most vocal, objected to the idea of applying a vague legal concept to actions that were not explicitly recognized as illegal at the time of their commission. Accordingly, the resulting Treaty of Versailles did not refer to crimes against humanity.

9. Convention With Respect to the Laws and Customs of War on Land (Hague IV), Pmbl., 18 October 1907, 36 Stat. 2277, 1 Bevans 631. The “Martens Clause” appearing in the preamble to the convention, provided that “Until a more complete code of the laws of war has been issued … the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.”


The watershed moment in the development of crimes against humanity as a legal concept occurred following the atrocities of World War II and the creation of the International Military Tribunal (IMT) at Nuremberg. Consolidating the principle of individual criminal responsibility for serious violations of international law, the London Agreement and the Charter of the IMT included crimes against peace, war crimes, and crimes against humanity as distinct categories of crimes.

The inclusion of crimes against peace (which by definition involved inter-state actions) and war crimes (which involved protection of individuals from a state against attacks by another state) was not controversial. Both involved a transnational dimension and were thus within the bounds of the traditional inter-state framework of international law. However, the inclusion of crimes against humanity, which comprised certain inhumane acts committed in the course of an attack against any civilian population, was a watershed event in international law. This represented a major erosion of the principle of non-intervention, establishing crimes, under international law, that could be committed within a single state. Nonetheless, the drafters expressed some caution by including a “nexus requirement.” Crimes against humanity could be prosecuted only if they were committed in execution of, or in connection with, another crime within the IMT’s jurisdiction: that is, crimes against humanity could not be prosecuted in the absence of an inter-state violation. Thus domestic acts of extermination, such as those that later occurred in Rwanda, were still in effect considered within the bounds of the state’s sovereignty and beyond the reach of international law.
The Creation of the ICTR

Professor Cerone described the creation of the ICTR as "revolutionary." For the first time in history, the United Nations (UN) had created a Tribunal in response to atrocities committed during a conflict that was regarded as internal in nature. While the ICTR Statute does not contain a nexus requirement in the sense of the IMT's specification, the ICTR Statute requires that the individual crime be linked to a broader attack against a civilian population. This nexus requirement is now accepted as an element for all crimes against humanity as defined by each of the international and hybrid criminal courts. It is this linking, or nexus requirement, that distinguishes crimes against humanity from ordinary crimes.

Defining Crimes Against Humanity

Article 3 of the ICTR Statute sets out a list of acts that may constitute crimes against humanity, if committed as part of a widespread or systematic attack. Professor Cerone noted the innovative features of this definition of crimes against humanity, namely, that it expressly sets forth the requirement that an attack be widespread or systematic, and that it does not include a requirement that the crimes be committed during an armed conflict.

Professor Cerone then set out the Tribunal’s most significant contributions, to date, to the legal notion of crimes against humanity. He observed that the jurisprudence emanating from the ICTR clarifies the distinct components of the definition of crimes against humanity in the Statute. Specifically, the Tribunal’s jurisprudence has provided guidance in relation to the meaning of an “attack,” what is required for the attack to be “widespread,” and the definition of a “civilian population.” The Tribunal’s jurisprudence has also provided guidance in relation to the requirement that the attack be based on national, political, ethnic, racial, or religious grounds, and on the nexus between the act and the attack.

Len Blazeby

Director, International Committee of the Red Cross (ICRC)

Mr. Blazeby spoke about the Tribunal’s contribution to the international law of armed conflict and, in particular, war crimes jurisprudence. Noting that Article 4 of the ICTR Statute refers to the provisions of Common Article 3 (see sidebar) and Additional Protocol 2 of the Geneva Conventions, Mr. Blazeby proceeded to analyze the application of Article 4 in Prosecutor v. Akayesu, one of the ICTR’s seminal judgments.

In Akayesu, Trial Chamber I determined that Common Article 3 to the Geneva Conventions had become so widely incorporated into the domestic legal systems of the world so as to render it “customary law,” but that Additional Protocol 2 had not yet reached this critical level of domestic incorporation. However, in the context of Rwanda this distinction was irrelevant, as Rwanda was a signatory to both Common Article 3 and Additional Protocol 2 at the time of the 1994 conflict.

In determining culpability under Common Article 3 and Additional Protocol 2, Trial Chamber I formulated a “public agent test.” The test provided that only those with a direct link to the armed forces or a ranking in the military could be held culpable.
criminally responsible for the perpetration of war crimes under international law.\textsuperscript{13}

The \textit{Akayesu} Trial Chamber's application of the "public agent test," however, was overturned by the Appeals Chamber. The Appeals Chamber found that the minimum protections provided under Common Article 3 of the Geneva Conventions must be extended to all individuals, and required that there be effective punishment of all persons who violate Common Article 3, without discrimination. Specifically, the Appeals Chamber determined that "international humanitarian law would be lessened and called into question" through the application of the "public agent test," as its application would exclude certain persons from individual criminal responsibility for violations of Common Article 3 because they did not belong to a specific category.\textsuperscript{14}

Mr. Blazeby then considered the "nexus requirement" of culpability for war crimes under Article 4 of the ICTR Statute (and the Geneva Conventions), under which there must exist a direct connection between the criminal actions of the accused person, who is a civilian, and the military command of the state. As Mr. Blazeby explained, the purpose of the nexus requirement was "to make sure that acts that would have been domestic crimes … were not given the status of war crimes if they had no affiliation with the armed conflict."

One problem with the nexus requirement, Mr. Blazeby noted, lies in establishing the connection between the criminal acts of the accused civilian and the military armed conflict. As a result, even the jurisprudence of the ICTR is somewhat contradictory in its treatment and application of the nexus test. For example, in \textit{Prosecutor v. Kayishema} the Trial Chamber concluded that the genocide and the armed conflict between the Rwandan Patriotic Front (RPF) and the \textit{Mouvement Révolutionnaire National pour la Démocratie et le Développement} (MRND) were distinct events, and subsequently acquitted the accused of war crimes charges.\textsuperscript{15} However, in \textit{Prosecutor v. Rutaganda}, the

\textbf{Common Article 3 of the Geneva Conventions}\textsuperscript{*}

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

\textsuperscript{*} http://www.icrc.org/ihl.nsf/WebART/365-570006

\textsuperscript{13} Mr. Akayesu was charged with five counts under Article 4 of the ICTR Statute. At first instance, Akayesu was found not guilty on each of these counts. Trial Chamber I found that the Prosecution failed to establish beyond reasonable doubt that Akayesu was a member of the armed forces, or that he was legitimately mandated and expected to support or fulfill the war efforts, either as a public official or agent, or person otherwise holding public authority, or as a \textit{de facto} representative of the Government. Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 643 (2 September 1998).

\textsuperscript{14} Prosecutor v. Akayesu, Case No. ICTR 96-4-A, Appeals Chamber Judgment, ¶ 443 (1 June 2001).

\textsuperscript{15} Prosecutor v. Kayishema and Ruzindana, Case No. ICTR 95-1-T, Judgment (21 May 1999). The MRND was at the time of the genocide the ruling party in Rwanda. The RPF was an opposition political party formed in Uganda by exiled Tutsis.
Appeals Chamber drew a direct link between the defendant Mr. Rutaganda’s membership in the paramilitary Interahamwe and the armed conflict itself, thus rendering crimes committed by Interahamwe members, under his command, formally prosecutable as war crimes. The Appeals Chamber, overturning the Rutaganda Trial Chamber, held that the nexus requirement had been met, and that Mr. Rutaganda, as a leader of the Interahamwe, was guilty of war crimes under Article 4 of the ICTR Statute.16

Mr. Blazeby concluded that, under established international law, a defendant, even if he or she is not directly connected to a military or political party engaged in the armed conflict, may be convicted of war crimes if the nexus requirement is satisfied.

Dr. Khoti Kamanga
Faculty of Law, University of Dar es Salaam, Tanzania

Dr. Kamanga spoke about the influence of the ICTR on the development of jurisprudence concerning genocide, war crimes, and crimes against humanity in the Great Lakes Region of East Africa, specifically in academia, in legislation, and in the courtroom. In balancing the contributions of the ICTR against criticism of the Tribunal’s procedures and jurisprudence, Dr. Kamanga posed the question whether the ICTR “glass” should be considered “half full or half empty.”


Dr. Kamanga used the Rwandan Genocide of 1994 as a delineating marker in the development of international law in the Great Lakes Region. Prior to 1994, the provisions of the Genocide Convention had never been tested in East African courts of law. There were almost no rules in the region to address issues of genocide, crimes against humanity, or war crimes. This gap in jurisprudence was reflected in, and reinforced by, the lack of expertise and knowledge in both courtrooms and law schools of East Africa. Years of civil war, and the Genocide itself, had a further crippling effect on the development of both knowledge and the practice of international criminal law in the region, physically devastating the infrastructure of the judicial system and the courts, and destroying legal documents in Rwanda and surrounding states.

Before surveying the contributions of the ICTR, Dr. Kamanga addressed one of the most frequent criticisms of the Tribunal: its lengthy trials, sometimes extending for years. Noting that “the ICTR is frequently lambasted for trials taking too long,” Dr. Kamanga questioned whether anyone could, “with a straight face … say that trials in our courts of law run for short periods of time?”

Dr. Kamanga then considered the ICTR's contributions to the development of judicial and academic international law awareness within the Great Lakes Region. He observed that even the most cursory comparison of the region’s capacity for developing and applying principles of international criminal law before and after the ICTR’s creation would lead one to conclude that the “ICTR glass” was indeed “half full.” In his view, the jurisprudence developed by the ICTR has provided East African advocates with invaluable guidance about genocide, individual criminal responsibility, command responsibility, universal jurisdiction, pardons/amnesties, and the definition of rape. Dr. Kamanga also praised the ICTR’s contributions to academia in East Africa, citing the Tribunal’s role as a regional stimulus for student research, moot court exercises, and legal journals, as well as its role in raising the profile of public international law in the region.

Members of the Legacy Symposium audience.
Mr. Murtaza Jaffer
Policy Coordinator for the ICTR Office of the Prosecutor

Mr. Jaffer opened his presentation with an emphasis on the importance of locating, arresting, and extraditing *genocidaires* still evading capture in the East African Region. He stated that there are many indictees and alleged *genocidaires* still hiding in the region, and asserted that it is paramount to foster even stronger regional cooperation to arrest these individuals and to ensure that “there is no place for them to hide at home.”

Mr. Jaffer noted two primary mechanisms for ensuring accountability for crimes committed during the Rwandan Genocide: effective and efficient prosecutions by the ICTR, and effective investigation and prosecution of wanted persons by responsible governments, either individually or through the transfer of suspects to an appropriate jurisdiction. Mr. Jaffer noted that, since its inception, the ICTR has been dependent upon cooperative UN member states for the arrest, detention, and extradition of indictees to Arusha for trial. As the ICTR approaches the expiration of its mandate, however, the responsibility for these functions, as well as prosecutions and court proceedings, will be borne by the domestic national judiciaries of the East African region. Accordingly, there is a need for accountability at the state level to locate and arrest alleged *genocidaires*.

Given the ICTR’s impending closure, Mr. Jaffer observed, more attention and energy should be devoted to the “domestication” of the ICTR Statute to ensure that local jurisdictions comply with rules of evidence and with their arrest and transfer responsibilities. The process of domesticating the ICTR Statute and Rules of Procedure and Evidence, he asserted, would allow both national and local jurisdictions to carry on the ICTR’s work beyond the dissolution of the Tribunal. Mr. Jaffer lamented that this domestication process has not yet been accomplished to a sufficient degree in the East African Region.

Addressing the question of whether the region will be ready for this challenge once the ICTR closes, Mr. Jaffer noted that the ICTR will “leave behind” a sizable cadre of well-trained and qualified staff, including researchers, interpreters and advocates. However, he emphasized that the ICTR will also be leaving behind many accused and indicted individuals who will never be tried by the ICTR. As a result, he stressed the need to utilize the residual resources left behind to strengthen the capacity of regional legal systems to continue to prosecute and try alleged perpetrators of the 1994 Rwandan Genocide.

Mr. Jaffer asserted that, even without specific local legislation to allow the transfer of cases from the ICTR to local East African courts, a sufficient basis exists in international law for cases to be transferred. Thus, the question of whether local courts have the jurisdiction to hear these cases is no longer an issue. In order to ensure the effective transition from the ICTR to local courts, however, lawyers, judges, and active members of civil society organizations in East Africa, and particularly in Rwanda, must draw on the experience and jurisprudence of the ICTR. The experiences of the ICTR will be especially useful for local courts in navigating logistical problems, such as apprehending perpetrators, extracting evidence from witnesses who are unable or unwilling to cooperate with the court, and more generally in applying principles of international law to ensure the fairness of trials.

Mr. Jaffer concluded with a plea to all nations to try the perpetrators of genocide, war crimes, and crimes against humanity at home. He stated that “there are enough perpetrators in Rwanda to go around” and that, unfortunately, there will be enough “future genocidaires” in Africa to test this system. He also called for the establishment of war crimes units in the prosecutorial departments of national and local jurisdictions, in order to undermine the absolute power many political leaders currently enjoy.

Session I Discussion

Moderated by the Honorable Judge Inés Weinberg de Roca, ICTR

Nicholas Munuo, a local lawyer from Arusha, Tanzania, opened the discussion with a suggestion that the ICTR should remain functional beyond the expiration of its mandate, if only in a consultative capacity. Mr. Munuo also addressed certain challenges related to the process of transferring the ICTR’s jurisprudence to domestic jurisdictions within Africa, particularly in the absence of input from East African tribal and cultural leaders. He suggested that the ICTR’s mandated closure in Arusha (at the time of the symposium set for the end of 2008) is premature and that through the extension of its mandate and the incorporation of Swahili as a working language, the ICTR may make a more significant contribution to the development of international criminal law in the region.
Judge Kasanga Mulwa of the East African Court of Justice questioned what measures, if any, have been established to ensure the continued arrest, detention, and trial of genocide perpetrators after the ICTR’s closure. He noted the lack of any formalized agreement between African countries to contribute to this process.

Murtaza Jaffer addressed Judge Mulwa’s concerns, emphasizing that the Office of the Prosecutor continues its assiduous efforts to locate wanted criminals around the world. He lauded the ICTR’s record in apprehending several of these fugitives without the executive power necessary to carry out any arrests independently. He noted that the process for transferring information from the ICTR to local courts, and the arrest and transfer of fugitives from local courts to the ICTR, had not been made the subject of an agreement because it is incumbent upon all member states of the UN to comply with indictments and arrest warrants issued by the ICTR. He added that issues of noncompliance with this policy were matters to be addressed by the Security Council for the determination of appropriate sanctions.

Dr. Ekuru Aukot, a lawyer from Kenya, asked who would exact pressure to compel countries to independently take such action. He suggested that NGOs and civil society organizations take the ICTR’s place in ensuring the continued arrest of international criminals.

Beth Lyons, a member of the Association des Avocats de la Défense, noted that there were far fewer ICTR defense attorneys than prosecutors among the scheduled speakers at the symposium. She suggested that an objective evaluation of the ICTR’s work to date would be illegitimate without more representatives of the defense on the panels.\(^\text{17}\)

In response to Ms. Lyons’ comment, ICTR Judge Inés Weinberg de Roca noted that deliberate measures had been taken to prevent any member of the defense or prosecution involved in a specific case from sitting on a symposium panel. It was in the interest of preventing any individual directly involved with current cases from presenting a biased argument that she, as an ICTR judge, was acting as a moderator and not as a panelist.

Ms. Lyons also challenged the ICTR to follow the example of South Africa and to apply the law to all parties suspected of committing crimes within the ICTR’s jurisdiction regardless of political affiliation. She insisted that the substantive developments of the ICTR’s jurisprudence were inseparable from the procedures used to create such jurisprudence and must be understood and analyzed as inter-related. Ms. Lyons asked if the current president of Rwanda, Paul Kagame, would be indicted and tried before the ICTR’s closure.

Mr. Nzatabingwa, a Rwandan delegate, first spoke briefly about the doctrine of “responsibility to protect,” which may have the potential to change the dynamics that currently define active military intervention as a crime against peace. Mr.  

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Nzatabingwa then responded to Ms. Lyons’ question regarding the South African model of post-conflict reconciliation. He cautioned against applying an example from South Africa to the very different atrocity in Rwanda, and expressed the view that “Africans must find solutions to African problems.” While Africans should not reinvent the wheel, he said, they need not always borrow solutions from the West. Mr. Nzatabingwa emphasized the importance of using local justice systems, if appropriate, and cited the *gacaca* trial system currently operating on the grassroots level of Rwandan society as a model of justice. This system, he noted, has evolved in response to constructive criticism, and potentially has more relevance and effectiveness than the ICTR model, “borrowed” as it is from the West. The Rwandan delegate concluded by reminding participants that no official allegations against President Kagame had been filed and that to raise in this forum an issue that has not been properly considered in a court of law does not serve the interests of justice.

John Philpot, an ICTR defense attorney from Quebec, asked Mr. Jaffer how a representative of the ICTR’s prosecution could possibly talk about working to fight impunity, in light of the fact that former Chief Prosecutor Carla del Ponte had been removed from her position for expressing her intention to indict and prosecute members of the RPF. Mr. Philpot suggested that the “prosecutorial policy” of impunity for the RPF may serve to discredit the work of the ICTR’s judges and prosecutors and to perpetuate the notion of “victor’s justice.”

The discussion continued with several participants expressing frustration concerning the limited amount of time left for the ICTR to continue its work. One participant expressed disappointment that no representatives of the UN Security Council were present at the symposium to address these concerns or to provide a clear justification for the ICTR’s closure date. Another participant suggested that the “African solutions for African problems” doctrine may prove to be problematic if strictly followed, as “problems of justice are universal.”

Cecile Aptel-Williamson observed that, because the ICTR was created by the UN Security Council, it is first and foremost an institution of the UN. She emphasized that, since no real model for an ad hoc international criminal tribunal existed at the time of its creation, the ICTR was required to develop its own strategy and procedures. Ms. Aptel-Williamson noted that the ICTR’s focus of prosecuting individuals alleged to bear the highest level of responsibility for the Genocide constitutes only one element in the fight against impunity. She suggested that the ICTR should view itself as a complement to local Rwandan courts, including *gacaca* courts, and encouraged a realistic approach towards the ICTR’s judicial capacity. She further noted that the completion strategy was not imposed on the Tribunal, but initiated by the former President of the Tribunal.

Professor Cerone warned against looking at international criminal courts as though they existed “in a vacuum,” and maintained that the greatest advancements in the evolution of international criminal law have in fact been motivated by politics.

Professor Kamanga called for increased incorporation of international criminal law into African educational institutions. He also highlighted two major challenges faced when prosecuting international criminals in domestic courts: first, the “wall” currently separating international and domestic law; and second, the lack of instruction provided to courts on how to address situations in which international and domestic laws may conflict.

Mr. Jaffer closed the session by calling for a more comprehensive development of law in the East African Region. He stated that one critical way in which domestic jurisdictions may contribute to the ICTR’s legacy is to accept cases transferred from the ICTR under Rule 11bis of the Court’s Rules of Procedure and Evidence.  

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18. Rule 11bis of the ICTR Rules of Procedure and Evidence is discussed and set out under Session VI of this publication.
Session II

Freedom of Speech and Incitement to Criminal Activity: A Delicate Balance

The Honorable Judge Navanethem Pillay
United Nations High Commissioner for Human Rights
former Appeals Chamber Judge at the ICC
former ICTR President

Session II opened with a presentation by Judge Pillay, who was ICTR president from 1999-2003, and a judge of the ICTR from 1995-2003. Judge Pillay, the presiding judge in Prosecutor v. Nahimana et al. (the Media Case), discussed the nuanced process of maintaining a “delicate balance” between protecting the right to freedom of speech and preventing incitement to criminal activity through discriminatory “hate speech.”

Judge Pillay commenced her presentation by noting that freedom of expression and freedom from discrimination are not incompatible legal principles. Hate speech is not protected under international law. While freedom of speech is “a fundamental right recognized in international law and entrenched in most national constitutions,” a balance must be maintained between protected speech and prohibited expression “to ensure the protection of other rights.” In fact, governments have an obligation under international law to prohibit any advocacy of national, religious, racial, or ethnic hatred that constitutes incitement to discrimination, hostility, or violence.

Having established these principles, Judge Pillay discussed the Media Case, which was decided by Trial Chamber I in 2003. Specifically, she discussed the way in which the ICTR balanced protected freedom of speech and prohibited expression in its assessment of criminal accountability for incitement to genocide and hate speech.

The ICTR’s Approach to Freedom of Speech under International Law

In the Media Case, defense counsel urged the Tribunal to follow American law, considered by counsel to be strongly speech-protective, as a standard to ensure universal acceptance and legitimacy of the Tribunal’s jurisprudence. The Trial Chamber, however, considered “international law, which has been well developed in the areas of freedom from discrimination and freedom of expression, to be the point of reference for its consideration of these issues, noting that domestic law varies widely, while international law codifies existing standards.”

Judge Pillay surveyed the “evolving universal standards,” as reviewed in the Trial Chamber’s decision in the Media Case. Article 19 of the Universal Declaration of Human Rights expressly protects the right to freedom of opinion and expression. That right, however, is tempered by Article 29, paragraph 2, which


limits an individual’s exercise of rights and freedoms. These rights and freedoms are limited by reference to due recognition and respect for the rights and freedoms of others, morality, public order, and general welfare in a democratic society.

Principles on Incitement to Discrimination and Violence

Judge Pillay noted that ICTR case law to date has applied the central principles that emerge from international jurisprudence on incitement to discrimination and violence. These principles serve as a useful guide concerning the factors to be considered in defining incendiary expressions. Judge Pillay identified these factors as follows:

1. The intent or purpose of the communication: that is, whether or not the material is of a \textit{bona fide} nature. This is a question of the actual language used in the publication.

2. The content of the text, and whether the language used is merely offensive or is intended to inflame. This is a question of evidence and judicial determination of the actual intent of the expression, taking the context into account.

3. The context of the communication, for example, whether it was made in an already volatile situation. In determining whether communication represents intent to cause genocide and thereby constitutes incitement, the ICTR has considered it significant that genocide in fact occurred in Rwanda. Judge Pillay referred specifically to the case of \textit{Prosecutor v. Akayesu}, in which the Tribunal recognized the need to interpret the term “direct” in the context of Rwandan culture and language. In that case, the Tribunal found that a particular speech may be perceived as “direct” in one country, but not so in another.\textsuperscript{24}

4. The relationship between the speaker and the subject. In this regard, the ICTR has identified “critical distance” as a key factor in evaluating the purpose of a publication. That is, in the case of media reporting of views that constitute ethnic hatred and calls to violence for informative or educational purposes, a clear distancing from such reporting is necessary to avoid conveying an endorsement of the message.


\begin{quote}
\textbf{Summary of the Trial Chamber’s decision in the Media Case}
\end{quote}

The case of \textit{Prosecutor v. Nahimana et al.} is more commonly known as “the Media Case” because of its consideration of RTLM radio broadcasts and \textit{Kangura} newspaper publications during 1994. The original judgment issued by the ICTR Trial Chamber on 3 December 2003 contains judicial “readings” of these broadcasts and publications, several of which focus on the Rwandan terms \textit{Inkotanyi} (members of the RPF) and \textit{Inyenzi} (“cockroaches”), both of which were commonly understood to refer to Rwandan Tutsis and RPF sympathizers. The decision sought to contextualize the popular usage of these terms as incitement in light of the atmosphere of escalating ethnic tensions, despite the fact that “some RTLM broadcasts talked about \textit{Inkotanyi} and/or \textit{Inyenzi} without explicit reference to the Tutsi population as a whole, or even the Tutsi composition of the RPF.”\textsuperscript{*} The Trial Chamber’s judgment in the Media Case relied upon contextual evidence related to the historical, political, and cultural contexts through which these messages were disseminated and understood.

The Appeals Chamber Judgment in this case is discussed by Mr. Stephen Rapp below.

\footnotesize{\textsuperscript{*} \textit{Prosecutor v. Nahimana et al.}, Case No. ICTR 99-52-T, Judgment, ¶ 401 (3 December 2003).}

Judge Pillay noted that these criteria, used to assess whether certain communications constitute hate speech, provide “invaluable guidance” for future courts in assessing criminal accountability in light of the fundamental right of freedom of expression.
In closing, Judge Pillay reflected on the ICTR’s legacy in providing “rich and precedential jurisprudence” on the identification of prohibited hate speech. In particular, she noted the Tribunal’s “careful attention to attaining a delicate balance between freedom of speech and incitement to criminal activity.” If this balance can be carefully maintained, she argued, “fears of impeding speech need not stand in the way of the prevention of criminal activity.”

Mr. Stephen Rapp

U.S. Ambassador for War Crimes
former Prosecutor for the Special Court of Sierra Leone (SCSL)
former Chief of Prosecutions at the ICTR

Mr. Rapp addressed several freedom of speech issues in relation to the Media Case. Mr. Rapp’s presentation was delivered the day after the Appeals Chamber delivered its judgment in the Media Case, for which he acted as Chief Counsel for the Prosecution at first instance. His presentation addressed several legal ramifications of the Appeals Chamber’s decision as well as the definitions of incitement to genocide and persecution, as a crime against humanity.

Incitement to Genocide

In discussing the definition of direct and public incitement to commit genocide under international law, Mr. Rapp noted that propaganda itself is not a prohibited form of speech. Further, the possibility that propaganda may lead to genocidal acts does not alone render it as incitement to genocide. Rather, in order to be prohibited, the communication in question must be direct and capable of provoking another to commit genocide.

Mr. Rapp characterized incitement to genocide as an “inchoate offense”: that is, it is not necessary to prove that genocide itself actually occurred as a result of the incitement in order to prove that incitement to genocide occurred. However, messages may be categorized as incitement only where there exists a reasonable potential for violent or destructive behavior as a result of the message. Accordingly, messages that may not be viewed as incitement in “peaceful” societies may constitute incitement in societies undergoing escalating violent tensions.

Persecution as a Crime against Humanity

Mr. Rapp distinguished the crime of incitement to genocide from that of persecution as a crime against humanity. He noted that, unlike incitement, persecution or the promotion of hatred by communication does not alone constitute a crime against humanity. The communication must accomplish its purpose. Accordingly, persecution as a crime against humanity is not an inchoate offense. In order to be prosecutable, the communication must be connected to a widespread and systematic attack on civilians.

The Media Case

Mr. Rapp then turned to consider the decision of the Appeals Chamber in the Media Case. He focused specifically on the Appeals Chamber’s judgment, which overturned a number of convictions entered by the Trial Chamber for conspiracy to commit genocide and, in regard to broadcasts by Radio Télévision Libre des Milles Collines (RTLM) and the Kangura newspaper, incitement to commit genocide.

Mr. Rapp highlighted several fundamental differences between the approaches of the Trial Chamber and the Appeals Chamber in the Media Case. He characterized the distinction between the two judgments as the difference between a “contextual” and an “explicit” approach to defining hate speech. According to Mr. Rapp, the Appeals Chamber determined that in more than one instance the Trial Chamber had been overly reliant upon the “context” of the messages under consideration as opposed to their explicit content. This was evident in the Appeal Chamber’s quashing of the conviction against RTLM for incitement to commit genocide. The Appeals Chamber found that the Trial Chamber had erred in finding RTLM guilty of incitement, given the lack of “explicit calls” in the messages published by RTLM for victims to be murdered on the grounds that they were Tutsis.
The Appeals Chamber also found that incitement is not a "continuing crime," but is "completed" at the end of the act of incitement itself. Accordingly, messages that incited violence but were not of a genocidal nature, and that were delivered prior to the commencement of the Genocide on 7 April 1994, could not constitute the basis for a conviction for incitement to genocide. At the same time, however, the Appeals Chamber sustained several original convictions on counts of incitement to genocide. These convictions were upheld where there were sufficient grounds for identifying a causal connection between the messages of RTLM and the Kangura newspaper, the two primary media outlets in the case, and the killing of Tutsis during the Genocide.

Mr. Tom Kagwe
Senior Program Officer, Kenya Human Rights Commission

Mr. Kagwe, a representative of the Kenya Human Rights Commission spoke about the influence of the Tribunal's work on the hate speech debate in Kenya. He also highlighted the Commission's efforts to monitor and respond to potential human rights violations resulting from hate speech transmitted through the Kenyan mass media.

Mr. Kagwe presented a brief overview of the laws regarding freedom of speech in Kenya. The Constitution of Kenya protects the right to freedom of expression, but tempers this right with the requirement that free expression should not contravene public order or violate the rights of others.31 There is, however, no legislation specifically directed towards regulating hate speech. Mr. Kagwe asserted that, without such legislation, there had been minimal progress in prosecuting those responsible for inciting violence through hate speech in Kenya. Mr. Kagwe noted the timeliness of the symposium and its discussion of hate speech in light of the impending multiparty elections in Kenya. He observed that Kenyan politicians, similar to the politicians in Rwanda before the 1994 Genocide, often "play on ethnic sentiments, fears, and sensitivities" to consolidate their positions. He noted further that messages inciting hatred are often delivered in vernacular languages, making the monitoring of local media outlets a critical part of the Commission’s work.32


32. Mr. Kagwe proved correct in his fears about the upcoming elections. There was much ethnic-targeted violence in the wake of the 27 December 2007 presidential elections in Kenya, and many are still calling for a process that would bring about accountability and justice for the loss of life and displacement caused by this violence.

Turning to the legacy of the ICTR as it relates to Kenya and to the Commission, Mr. Kagwe outlined five key lessons from the 1994 Rwandan Genocide and from the work of the Tribunal.

- First, the publication by the Commission of issues surrounding hate speech, combined with a trip to Rwanda by Members of the National Assembly, had, in his view, the potential to raise levels of accountability among political leaders in Kenya;

- Second, the jurisprudence of the ICTR and the Rwandan experience more generally have influenced the development of informed debate in Kenya regarding hate speech;

- Third, the prosecution of those responsible for the Rwandan Genocide has strengthened the Commission’s project, through its Campaign Against Impunity, to push for the prosecution of those responsible for human rights violations in Kenya;

- Fourth, informed by the Rwandan Genocide, Kenya has concluded the Political Parties Act to ensure that parties are not organized under ethnic or religious banners;
Finally, Mr. Kagwe noted that the widespread efforts to monitor the role of the media in Kenya’s elections had been inspired by the Rwandan experience and the ICTR’s Media Case.

In closing, Mr. Kagwe called upon non-governmental organizations (NGOs) and civil society organizations, as well as domestic and regional courts, to continue to advocate against hate speech.

Mr. Jean-Pierre Gatsinzi
former Director, School of Journalism, National University of Rwanda

Mr. Gatsinzi, a journalist from Rwanda, discussed the two primary functions of the media: to serve as an avenue for the expression of freedom of speech, and as a tool for educating and informing the general public.

Mr. Gatsinzi emphasized that freedom of speech is a fundamental right that fosters democratic forms of governance. Nonetheless, he asserted, there must be some limitations on freedom of speech. In particular free speech cannot be used to legitimate violence or genocide. Mr. Gatsinzi questioned whether regulation of the media through a code of ethics might be a more effective way to influence speech than the enactment of restrictive legislation. He argued that regulation through a code of ethics would avoid the criticism that the government is legislatively restraining freedom of the press and impeding democratic governance.

Mr. Gatsinzi then considered the media’s educative function. He asserted that, in illiterate or poorly educated societies, those responsible for formulating and broadcasting messages through the media effectively become the “educators” of the nation. Given this educative function, the responsibilities of those who control the media are greater in illiterate societies than in highly educated societies. Without education about the nature and use of the media, Mr. Gatsinzi said, the recipients of messages from the media in illiterate societies “don’t know what to do with them,” and the media has an even greater potential to act as a socially divisive force. Accordingly, he observed, it is critical that the public receives education about how to analyze information transmitted through the media.

In conclusion, Mr. Gatsinzi cautioned that, in the absence of education promoting critical thinking, the media, in its various forms, possess great potential to present socially divisive messages. Accordingly, the most important legacy “for us [and] for the ICTR is to reinforce education in that sphere.”

Session II Discussion

Moderated by the Honorable Judge Lee Gacuiga Muthoga, ICTR

The discussion following Session II focused on the issue of how to regulate, legally define, and ultimately prosecute hate speech while protecting free speech, which is a central and widely recognized tenet of human rights.

One common problem, cited by several participants from Africa, is the number of inflammatory programs disseminated by the mass media, particularly radio and television, that address wide audiences, the majority of whom may not be literate. This common issue sparked conversation regarding the capacity of African states to regulate and obtain the legal guidance necessary to legislate against incitement speech.

Several participants voiced concerns about governments that themselves promote hate messages, sometimes directly but more often through the calculated use of proxy media organizations. Other participants noted that a journalistic code of ethics is in fact already in place in several African countries and should serve as a deterrent against the broadcasting of potentially inflammatory messages. Ms. Mbosa of the ICTR stated that ethical codes implemented without the support of “the full force of the law” risk not being enforced through positive governmental action. Thus, she said, those actively engaged in the development of
international law should focus on creating ways to ensure that governments, which promote hate messages of the type deemed criminal by the ICTR, should be held accountable.

Professor Cerone commented that the distinction between protected speech and hate speech should not be conceptualized as an “absolute dichotomy.” Rather, there is a “spectrum of speech” -- protected speech; speech which is possibly harmful and must be regulated to some degree; and blatant incitement -- which states are obliged to combat and prosecute.

Mr. Kagwe stated that, in Kenya, the criminal justice system is already overwhelmed by these issues even in the absence of hate speech legislation. He maintained that there is a need for legislation that defines and regulates public speech. He voiced his hope that the ratification of hate speech laws would begin to transform popular conceptions of ethnic division in Kenya and avoid future outbreaks of ethnic violence.

Judge Pillay expanded upon Professor Cerone’s comments, reminding the participants that criminalization of speech was neither the only object of the present discussion, nor the only tool available. She emphasized each state’s obligation to protect the rights of all citizens to freedom of speech, and cited the South African apartheid system as an example of the use of targeted suppression of free speech to perpetuate ethnic inequality. Judge Pillay responded to Mr. Kagwe’s comments on transforming popular conceptions of ethnicity, noting that the current government of Rwanda had taken substantive steps to eradicate ethnic division by enacting legislation that prohibits the identification of ethnic origin in public life.

Michelle Jacobs, a law professor from the United States, questioned the usefulness of prosecuting journalists when the primary problem facing communities vulnerable to incitement is illiteracy. Mr. Jean-Pierre Gatsinzi observed that the media play key roles in educating the masses and that many radio and newspaper journalists are in fact aware of their influential role in providing information and education to the public.

Dr. Leigh Swigart, a linguistic anthropologist from Brandeis University, observed that media channels should be encouraged to disseminate information about human rights in African languages. She observed that many radio programs that border between popular humor and hate speech are produced in these languages, but there is little information disseminated in either broadcast or written format about human rights, for those who do not speak or read European languages, to counter the message of such programming. Making a full range of information available in African languages, including an explanation of the rights and obligations pertaining to freedom of speech, would contribute greatly to the responsible use of media outlets on the continent. Brandeis University is currently collaborating on a project, Know Your Rights!, which aims to fill this gap by translating and disseminating information about human rights through the medium of African languages.

**Screening of “Beyond Justice” Synopsis of the ICTR “Media Case” Movie**

At the conclusion of Session II, the documentary film Beyond Justice was screened.

The documentary looks at the role of the Rwandan media in spreading the ideology of genocide, encouraging and inciting the general population to join in the government’s orchestrated killing campaign in 1994, and identifying individuals targeted to be killed. Specifically, it analyzes the Media Case in which the owners and journalists from RTLM and the Kangura newspaper were convicted for using the media to incite the Rwandan population to commit genocide.

The documentary presents highlights of the courtroom trial sessions at the ICTR and explores the role of the Rwandan media, especially radio, in spreading genocide ideology and the propaganda of ethnic hatred to incite the population. It presents a brief history of the development of mass media in Rwanda, surveys the present media environment, and examines the potential of the media to re-educate the population and to promote societal reconciliation and peace in the country.

The theme of going beyond justice is developed through interviews with genocide convicts, family members of genocide convicts, genocide survivors, political and judicial leaders in Rwanda, as well as with the ICTR Prosecutor and legal staff who prosecuted the Media Case. By showing that the defendants in the Media Case were brought to justice for their misuse of the media, this documentary provides a legal and social context that may help to refute the propaganda messages of Rwandan hate media and to counter the ideology that led to the 1994 Genocide.

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33. For more information on Know Your Rights!, visit http://alma.matrix.msu.edu/know-your-rights.
34. The film was produced by Mr. Timothy Gallimore, then Spokesperson for the ICTR Office of the Prosecutor. It is available via the External Relations and Strategic Planning Section of the ICTR or through Images Media, P.O. Box 4356, Kigali, Rwanda. Phone: +250-08306809.
Ms. Suzanne Chenault
Senior Legal Officer, ICTR

Ms. Chenault, Senior Legal Officer and Jurist Linguist in the Chambers of the Tribunal, discussed the development of sexual violence jurisprudence under international law, commencing with the Akayesu judgment. She observed that this judgment heralded the legacy of the Tribunal in prosecuting crimes of sexual violence. It broke ground in articulating a conceptual definition of rape under international law, and in convicting a defendant of rape as both an instrument of genocide and a crime against humanity.

Ms. Chenault discussed three key elements of the Akayesu case: the amendment of the original indictment to include charges of rape; the definition of rape articulated by the Trial Chamber; and the Trial Chamber's finding that rape constitutes not only a crime against humanity, but also genocide. She also discussed the legacy of the Tribunal in prosecuting sex-related crimes in conflict situations, looking specifically at the more recent judgment of Prosecutor v. Muhimana.


Jean-Paul Akayesu was the bourgmestre of the Taba commune from April 1993 to June 1994. In this role he was a civil authority who exerted significant influence in the community, and was described by one witness in the trial as a “father-figure or parent of the commune.” On 13 February 1996, Akayesu was charged with 15 counts covering genocide, crimes against humanity, and violations of Article 3 Common to the Geneva Conventions (see sidebar on p. 11) and Additional Protocol II.

As Ms. Chenault pointed out, the original indictment against Akayesu did not include charges of rape. However, in the course of the prosecution case, several witnesses testified about rapes that they had personally experienced or witnessed. Because of this evidence, the prosecution, at the conclusion of its case and four months prior to the commencement of the defense case, moved for an amendment to the indictment to include three new charges: rape and inhumane acts as crimes against humanity, outrages upon personal dignity as war crimes, and genocide. The Chamber granted the motion for amendment and, four months later, the prosecution re-opened the case and presented six additional witnesses who testified about Akayesu’s encouragement, by his words or presence, of brutal rapes and acts of gender violence. The amended indictment included facts regarding sexual violence, beatings, and murders alleged to have occurred on or near the premises of the Taba commune office. Notably, the indictment did not specifically identify the victims or indicate with precision the dates and places of the offenses.

Ms. Chenault noted that the amendment of the indictment in the midst of the proceedings was highly irregular at the time. She questioned whether such an amendment would be allowed today, in light of the “fair notice” jurisprudence developed by the ad hoc Tribunals subsequent to the Akayesu judgment. She also questioned whether the facts in support of the new charges would now be considered sufficiently concise to fairly inform a defendant about the nature and cause of the charges. Yet, as she noted, “it was because the indictment was amended to
include the charge of rape that the Trial Chamber was able to render what so many have considered a seminal opinion on sexual violence.”

Defining Rape under International Law

Noting that there was no commonly accepted definition of rape under international law, the Trial Chamber defined rape as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”

Ms. Chenault pointed out two important features of the Trial Chamber’s definition of rape: first, the definition was a significant departure from the traditional “mechanical” definition of rape, which focused on the parts of the body of the perpetrator and the victim. According to the Akayesu definition, rape is not limited to non-consensual sexual intercourse but may involve the insertion of objects or the use of bodily orifices not considered to be intrinsically sexual. The Trial Chamber went on to describe sexual violence, including rape, as “any act of a sexual nature which is committed on a person under circumstances which are coercive.” Thus, as pointed out by Ms. Chenault, sexual violence may involve acts of a sexual nature which do not involve penetration of the sexual organs or even physical contact, such as forced undressing or forced performance of exercises in the nude.

Second, the Trial Chamber found that “coercive circumstances” need not be evidenced by physical force. Coercion includes all circumstances where a victim’s consent cannot be freely given. This would include all circumstances involving duress, including “threats, intimidation, extortion and other forms of duress which prey on fear or desperation.” Further, in the context of a widespread or systematic attack during which genocidal rape is committed, the presence of “overwhelming force” means that an inquiry into individual “consent” is not an element that needs to be proved, or even considered by the court.

Evidence of Rape and Sexual Violence in the Akayesu Judgment

Before considering the Trial Chamber’s judgment in detail, Ms. Chenault briefly reviewed the evidence adduced to establish Akayesu’s culpability for rapes in the Taba commune. She described this evidence as “poignant, detailed, but uncorroborated accounts of rape and sexual violence.” Significantly, she noted, none of the seven witnesses testified about ever seeing the Accused rape anyone.

Ms. Chenault pointed to two key findings of fact that led to Akayesu’s conviction: that Akayesu could have prevented the rapes and sexual violence; and that Akayesu encouraged rape and acts of sexual violence. These findings were supported by witness testimony, including evidence that Akayesu had the authority to tell Interahamwe not to take women and rape them but did not do so, that he directly told Interahamwe to “take” women, knowing of their plans to rape them; that he told Interahamwe to order a girl to undress and perform exercises naked, and that he directed Interahamwe to take a pregnant girl and her nieces in a commune vehicle to a valley where the young women were subsequently raped and murdered.

Rape as a Crime Against Humanity and Genocide

The Trial Chamber found that crimes of rape and other inhumane sexual violations on or near the Taba commune were committed as part of a widespread and systematic attack against the Tutsi civilian population. Akayesu was convicted of both rape and inhumane sexual violations as crimes against humanity for his role in ordering, instigating, and aiding and abetting acts of rape and sexual violence; by allowing these crimes to take place; and by facilitating the commission of the crimes through his words of encouragement and by virtue of his authority.

The Trial Chamber also found Akayesu guilty of genocide, for having caused bodily and mental harm to Tutsi women with the "specific intent to destroy, in whole or in part, a particular group" in the same way as through any other genocidal act.43

Ms. Chenault noted that the Akayesu judgment is significant for many reasons: it was the first judgment issued by the ICTR; the first to provide a definition of rape under international law; one of the first international judgments to influence national laws on rape; the first judgment to find rape and sexual violence as crimes against humanity; and the first to issue a conviction for rape and sexual violence as genocide. She observed the significance of this jurisprudence in the subsequent case of Prosecutor v. Muhimana, which was issued by the ICTR Trial Chamber III in April 2005.44

Prosecutor v. Muhimana

Mikaeli Muhimana, a conseiller in the Gishyita commune, was charged with genocide, or alternatively complicity in genocide, and crimes against humanity (rape and murder). Unlike the Akayesu indictment, the factual allegations in the Muhimana indictment were specific regarding the identity of the victims and the dates and the places of the rapes. However, the Trial Chamber did not find Muhimana guilty of many of the precisely identified acts of rape because the times and locations specified in the indictment were different from the testimonies of several of the witnesses.

In its judgment, the Muhimana Trial Chamber endorsed the Akayesu definition of rape. It furthermore reconciled the seeming split in the ICTR jurisprudence in relation to the definition of rape, explaining that the seeming differences could be aligned within the conceptual rape definition articulated in Akayesu. The Trial Chamber also found that the physical elements of rape articulated by the ICTY Appeals Chamber in Kunarac simply specified the parameters of “a physical invasion of a sexual nature” amounting to rape.45 Thus the Akayesu definition encompassed the Kunarac elements of rape.

Considering the question of consent, the Muhimana Trial Chamber concluded that circumstances which exist “in most cases charged under international criminal law, as either genocide, crimes against humanity, or war crimes, will be almost universally coercive, thus vitiating true consent.”46

Trial Chamber III found Muhimana guilty of rape as a crime against humanity for personally committing rapes of seven young women and for aiding and abetting rapes of five other women committed by Interahamwe. However, the Chamber found him not guilty of the rapes of ten other identified women because of insufficient evidence or lack of precision concerning dates and locations of the crimes.

According to Ms. Chenault, the Trial Chamber’s decision in Muhimana was significant in its endorsement of the Akayesu definition of rape, and in reconciling seeming divergences in the definition of rape. The Muhimana judgment further clarified that the element of consent is not a relevant consideration in assessing acts of rape committed in coercive circumstances. Finally, it refined the standard of evidence required to meet the gender law articulated in Akayesu.

Ms. Chenault pointed out that since the conviction of Mr. Akayesu of rape, regrettably the ICTR has missed many opportunities to charge gender crimes or to pursue gender crimes on appeal. Nonetheless, in ongoing cases it is foreseeable that the jurisprudence in relation to many of the alleged gender crimes will further develop the Akayesu legacy.

Professor Catharine MacKinnon47

University of Michigan Law School

Professor MacKinnon commenced her presentation with the observation that “legacies begin after.” While it may seem premature to speak of the ICTR’s legacy on sexual violence at this time, she noted, with so many violated women in Rwanda left with their injuries unaddressed and unredressed and their violators far from any kind of justice, it is not too early to begin to assess the Tribunal’s signal accomplishments and remaining shortfalls.

According to Professor MacKinnon, legacies of international initiatives are usually measured by the violators held accountable and the promotion of peace. In the area of sexual violence, the ICTR's influence will also be measured against the backdrop of the reality and the laws concerning sexual violence in every nation in the world including outside zones of recognized conflict. Three areas could be affected: substantive law, law of criminal responsibility, and process.

**Substantive Law**

In Professor MacKinnon's view, the Tribunal's most significant substantive accomplishment is its definition of rape in the *Akayesu* judgment as “a physical invasion of a sexual nature under circumstances which are coercive.”\(^{48}\) She also noted the “tremendous breakthrough” by the *Akayesu* Trial Chamber’s recognition that consent is meaningless for acts of a sexual nature that have a nexus to genocide, armed conflict, or crimes against humanity. She pointed out that the related rape provisions of the Rome Statute of the ICC likewise do not contain reference to consent under such coercive circumstances.

While subsequent ICTR cases temporarily undermined *Akayesu*’s “core insight,”\(^{49}\) and while the ICTY also tended to pull in the opposite direction, the decision of the Appeals Chamber in *Prosecutor v. Gacumbitsi* “effectively sustained the core insight of *Akayesu* in finally holding, as a matter of fact if not law, that, under coercive circumstances, non consent is not a separate element to be proven, but can be inferred from those circumstances.”\(^{49}\) Noting the relationship between the theory of rape used and the outcome achieved in these two cases, Professor MacKinnon stated that it was “no accident” that, in *Akayesu* and *Gacumbitsi*, the defendants were found guilty of rape as genocide.

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48. The Trial Chamber also defined sexual violence as “any act of a sexual nature … under circumstances which are coercive.” *Prosecutor v. Akayesu*, Case No. ICTR 96-4-1, Judgment, ¶¶ 598, 688 (2 September 1998).


**Criminal Responsibility**

Professor MacKinnon then turned to look at the “liability tools” available to the ICTR in applying the substantive law on rape. She noted that the ICTR Statute permits holding a man individually responsible for sexual acts other men committed as if he committed them himself.\(^{50}\) She noted the prosecutorial strategy of going after “the top of hierarchies,” which has meant that prosecutions have been, in the main, not for acts that a defendant committed himself, but for acts attributed to him – acts that other men engaged in, in some sense, for him.

Professor MacKinnon elaborated on the ICTR’s failure to prosecute perpetrators of sexual violence. She identified a “prosecutorial pattern” of failing to charge rape at the same time as murder despite there being equally compelling evidence for both crimes. In addition, she noted a “parallel judicial pattern” in the Tribunal’s reluctance, at times, to hold a man responsible for a sexual violation another man committed when it is willing to hold the same man responsible for murder on virtually the same evidence, at the same time and place, by and against the same people. As she noted, “it is as if, at both prosecutorial and judicial levels, a tacitly higher standard of credibility for witnesses to rape pertains than for witnesses to murder.”

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50. Acts by others attributed to a defendant as a result of his authoritative relation to the immediate perpetrator are covered under Article 6(1) of the ICTR Statute. Acts that the defendant could have prevented or punished but did not (termed “command or superior responsibility”) are covered under Article 6(3) of the ICTR Statute.
Professor MacKinnon also spoke about the policy of the ICTR Office of the Prosecutor to pursue superiors and to ignore subordinates. Noting that men tend to protect the sexual prerogatives of other men, particularly their hierarchical superiors, she said, “The [Rwandan Genocide] picture that emerges is of rapes committed by subordinates, few of whom the ICTR has held or will hold responsible, and superiors sometimes being held responsible for rapes, not one of which they committed themselves.” This is a troubling legacy “both as to the message it sends and the incentives it sets in motion for the top and the bottom of hierarchies alike, as well as for the realities it ignores.”

**Process**

Professor MacKinnon noted that the ICTR is also afflicted on the level of process by problems common to rape prosecutions outside zones of recognized conflict, including most prominently the pervasive sense that sexual violence is not a serious priority. In her analysis, “The ICTR shares these shortcomings with sexual violence prosecutions around the world, failing often to charge rape when it should.” Professor MacKinnon noted in particular the failure of the ICTR prosecution in the “Media Case” to charge the media leaders for inciting and instigating rapes, although they were charged, on the same facts, with the killings incited and instigated by the media. She lamented that “when charges are not laid, and convictions not obtained … particularly when killing the same people by the same people at the same time is alleged, women’s intimate and distinctive violations are disregarded, leaving the impression that women do not matter.”

In her conclusion, Professor MacKinnon tempered her criticism, observing that the ICTR’s shortfalls cannot overshadow its “biggest accomplishment,” one that it shares with the survivors of sexual atrocities: expanded world attention under international law to these violations. While the international response to the monumental scope of survivors’ violations may be inadequate, both in quantity and profundity, that response has finally started to be made. Professor MacKinnon observed that this process began at the ICTR, not at the ICTY. She also noted that the creation of the ICC by the Rome Statute, with its prohibitions on sexual violence, is due to the impetus provided by the ad hoc tribunals, especially the ICTR. Indeed, she observed, the Rome Statute shows that sexual outrages are more palpable and prominent in international legal thinking now than they have ever been. This legacy cannot be erased, Professor MacKinnon concluded, and “Akayesu’s legs are only beginning to walk all over the world.”

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**Ms. Bellancille Umukobwa**

**AVEGA Genocide Widows’ Group, Rwanda**

Ms. Umukobwa provided a brief history of the propaganda against Tutsi women that precipitated the 1994 Genocide. Her presentation focused on sexual violence against Tutsi women during the 1994 Genocide, the social consequences of sexual violence on women, and the strengthening of international criminal law in response to crimes of sexual violence.

Ms. Umukobwa noted that both before and during the 1994 Genocide, Tutsi women were used as an element of propaganda. Tutsi women were said to be able to make a man “lose his head.” In contrast, Hutu women were declared to be more trustworthy and better mothers.

Throughout the Genocide, Tutsi women were raped, often by harmful objects, and were sometimes intentionally exposed to HIV/AIDS by known carriers. Ms. Umukobwa noted that, in many cases, the after-effects of sexual violence on victims are not visible and that women are often ashamed to come forward to disclose the crimes committed against them. Further, in Rwandan culture, a stigma surrounding public admissions of sexual violations or the subsequent contraction of HIV/AIDS still persists. Ms. Umukobwa characterized such shame as one of the most significant barriers to the process of healing traumatized Rwandan women. Yet, she observed, it is through the public recognition of the injustices committed against her that a woman’s healing process may be enhanced. She further noted that the victims’ public accounts of the violence perpetrated against them during the Genocide portray a pattern of government involvement in the widespread sexual crimes. In her view, victims’ stories need to be told to the international community.

Ms. Umukobwa noted that many psychological effects suffered by victims of sexual violence may not appear for several years, and that a number of women are yet to be treated psychologically and medically in relation to the rapes that they suffered. The delays in the healing process are exacerbated when victims live alone or with young children, who may also be affected by the situation. Such victims of sexual violence are often incapable of changing their medical or psychological conditions in a meaningful way.
Ms. Umukobwa concluded by recognizing that sexual violence against women is part of a common “rising phenomenon” during periods of violent conflict. Accordingly, she asserted, criminal prosecutions carried out against the primary organizers of such sexual violence should be a central concern of the ICTR, and are essential in order to afford respect and protection of the social and political rights of women.

Professor Romauld Haule
Faculty of Law, St. Augustine University, Tanzania

Professor Haule opened his presentation with examples of brutal sexual violence perpetrated against girls and women during the armed conflicts in Sudan, the former Yugoslavia, the Democratic Republic of Congo, Sierra Leone, Liberia, northern Uganda, Chechnya, and Rwanda. He noted that, while sexual violence has always been a brutal crime, “its brutality is worse during armed conflict and leaves unspeakable consequences.” Professor Haule acknowledged that crimes of sexual violence have for centuries gone unpunished; however, “the last decade of the twentieth century has manifested the end of the culture of impunity.”

Professor Haule noted that, while the trials in Nuremberg and Tokyo adduced evidence of widespread and systematic rape and sexual violence committed during World War II, these trials greatly ignored sex-based crimes. According to Professor Haule, the establishment of the ICTR and the ICTY was the “breakthrough” in the development of the body of law concerning war crimes, crimes against humanity, and genocide. Further, the adoption of the Rome Statute of the ICC evidenced the “globalization of the rule of law,” calling for the acknowledgement and the punishment of criminal responsibility in the international sphere as in national jurisdictions. The establishment of international criminal courts signaled the end of a culture of impunity in relation to sexual violence and rape. Specifically, the ICTR’s judgment in Akayesu “took the first step in breaking down the international legal community’s ambivalence toward rape and sexual violence as crimes under international law.” Accordingly, he observed, “it is the ICTR that has [made] sexual violence a subject of universal jurisdiction.”

Professor Haule characterized the Akayesu judgment as an “alarm,” which, since its delivery in 1998, should compel the international community to consider rape and other sexual offenses as having “equal status” to other offenses against humanity, genocide, and gross violations of human rights. Noting that the harm caused by sexual offenses is persistent and pervasive, he recommended that crimes of sexual violence should be prosecuted with the same seriousness as other crimes under international law.

Professor Haule noted that laws and strategies to ensure a safer environment, where women and children are protected against sexual violence, are yet to be articulated. He maintained that the conceptual definitions of rape and sexual violence established in Akayesu should extend to state jurisdictions.

While victims of sexual violence would like to see the perpetrators of their crimes tried by courts of law, the experience of the ICTR shows that witnesses often have felt stigmatized and harassed after having given evidence of sexual crimes. Professor Haule lauded the improvements in the ICTR’s policy of handling sexual violence cases, noting in particular the Rape and Sexual Violence Unit in Kigali, but asserted that victims and witnesses need far greater assistance.

In order to provide a comprehensive program for the restoration of peace and the rehabilitation of victims of sexual violence and other crimes committed during the 1994 Genocide, Professor Haule asserted, greater attention must be given to the victims -- hearing their stories, providing them with medical and psychological care, and providing education and training to enable them to become economically independent. Facing the truth of the past, and providing remedies to the victims of the past, are necessary conditions to enable a wounded community to recreate the conditions for reconciliation.
Professor Haule concluded that there remains much to be done to assist the victims of sexual violence in Rwanda. He emphasized the need for the ICTR Office of the Prosecutor to put into place an effective and comprehensive prosecution strategy and for the ICTR Registry to provide greater support to witnesses before, during and after testifying about sexual violence and other crimes committed during the 1994 Rwandan Genocide.

Ms. Elsie Effange-Mbella
former Gender Adviser, ICTR

Ms. Effange-Mbella, former gender advisor at the ICTR, opened her presentation by observing that it took fifty years from the ratification of the Genocide Convention for someone to be convicted of genocide and for an international definition of the crime of rape to be articulated. Accordingly, the Akayesu judgment can be viewed as the culmination of a fifty-year process of legal development beginning at Nuremberg and ending at Arusha.

Ms. Effange-Mbella discussed the initiatives undertaken by the ICTR to assist witnesses and their families who continue to suffer from the after effects of the Genocide. Noting problems related to funding and political will at the highest levels, she described the efforts to provide assistance to the victims of sexual violence in Rwanda as an ongoing struggle, which may continue long after the dissolution of the Tribunal.

Ms. Effange-Mbella recounted the story of one witness, RAS, which mirrored the experiences of many Rwandan women who were victims of sexual violence during the 1994 Genocide. The witness’ husband and youngest child were killed by assailants brandishing machetes during the early days of the Rwandan Genocide. Witness RAS became a prisoner in a “slave” marriage. Although she managed to escape from her captor “husband” after the war, she could not escape her wounds and continued to have incurable headaches and stomach pains. The witness eventually received psychotherapy, which helped her “come to grips” with her losses and injuries from the Genocide.

Programs to assist victims, one of which directly provides HIV-positive witnesses with medical and psychological care, are completely dependent upon small loans from donor states. Ms. Effange-Mbella observed that this funding is a “pittance” compared to the magnitude of money available to the ICC for essentially the same purpose. She stated that programs to assist victims are essential for any meaningful attempt to provide outreach to the local Rwandan population directly affected by the Genocide, and must be supported for many years to come.

Ms. Effange-Mbella lamented that the Tribunal cannot directly address problems faced by genocide survivors, because it is not within the Tribunal’s mandate to do so. While former Presidents Pillay and Møse requested compensation for genocide survivors from the UN Security Council, the only result was a call for good will and reconciliation. After the ICTR closes, many victims of the Genocide will remain in great need, and Ms. Effange-Mbella called for post-ICTR continuous funding support for victims.

In conclusion, Ms. Effange-Mbella stated that the ICTR has made only a “dent” in providing support and rehabilitation to victims of the 1994 Rwandan Genocide. To ensure that a positive legacy is left by the Tribunal, the ongoing problems faced by victims and witnesses, who have been integral to the Tribunal’s work, must be addressed, and the outreach support to them must continue.

Session III Discussion

Moderated by Mr. Murtaza Jaffer
Policy Coordinator, Office of the Prosecutor, ICTR

The panel discussion on sexual violence under international law focused on three aspects of the ICTR’s practice in the area: prosecution and judicial practice; victim/survivor support; and lessons learned for domestic prosecutions. What ensued was an in-depth and at times emotional discussion of the law’s role in preventing sexual violence and the ICTR’s substantive contribution to this area of law.

Mr. Makongoro, a researcher at the Institute of Criminal Studies in the UK, queried whether international criminal judgments on sexual violence were really for the benefit of the victims, or rather were the products of the “academic pursuit of international law and jurisprudence.” A Kenyan minister in the audience echoed this sentiment later in the discussion, asking how the legal action under discussion could materially contribute to the reconstruction of broken social relationships between men and women and within war-torn communities.
Tanzanian law professor Asina Omari discussed the problem of overcoming cultural taboos that have traditionally restrained East African women from reporting sexual violence or even recognizing it as such. Professor Omari told the participants that rape in Tanzanian society has traditionally been something considered “private.” This, he argued, has created a need for a society-wide demystification of the private sphere, fueled by laws with enough legislative force to influence the private sphere and to protect those most vulnerable to sexual violence. Addressing the contribution of Akayesu to this endeavor, Professor Omari noted that, if the principles of the judgment could travel as far as California, USA, then there is “no excuse” for the failure of their implementation in Tanzania and other African states.

Binta Mansaray of the SCSL suggested that the ICTR had created “unrealistic expectations” regarding its capacity for effecting social change in the East African region. She stated that the ICTR was created for the specific and limited purpose of prosecuting those at the highest levels of political command during the Rwandan Genocide, and that it should not be viewed in the same way as a permanent tribunal such as the ICC. She suggested that many of the responsibilities commonly attributed to the ICTR should actually be undertaken by government organizations and civil society: “Instead of asking what the ICTR is doing to bring Akayesu to our courts, we should be asking, ‘What are we going to do to make certain Akayesu stays in our courts?’”

Patricia Ntahurubuze of Burundi provided an alternative perspective, characterizing Burundi as “a forgotten country” with significant problems related to sexual violence and rape, and where an estimated 50,000 cases of sexual abuse occur annually. Citing the failure of the Burundian government to intervene on behalf of these victims, Ms. Ntahurubuze lamented the fact that the responsibility for assisting victims has fallen solely on rudimentary civil society organizations, which lack adequate resources.

Ayodeji Fadugbe of the ICTR reiterated the need for great sensitivity in eliciting traumatic testimony from survivors of sexual violence. She explained certain difficulties inherent in collecting reliable information sufficient for mounting effective prosecutions for rape and sexual violence. In most instances, Ms. Fadugbe said, asking about a woman’s children is a good way to establish a common ground between the lawyer and the witness. However, as many children born to traumatized witnesses are themselves the products of sexual violence, even this seemingly “safe” subject can be loaded with the potential to re-traumatize a witness.

Ms. Effange-Mbella spoke about the influence of ICTR precedents on the development of domestic legislation against sexual violence. She referred to Senegal and Niger, countries that have responded to the precedent set by the ICTR by adopting their own national laws relating to sexual violence, a task Rwanda also will be required to accomplish under Rule 11bis of the ICTR Statute. This rule requires that any state to which a case from the ICTR is transferred must adhere to internationally recognized judicial and legislative standards in order to become eligible for such transfers. Ms. Effange-Mbella also commented that the ICTR’s work in placing gender issues at the forefront of the international global stage already has had a significant impact on the ICC, even in its embryonic state. 51


Carla Del Ponte, Chief Prosecutor of both the ICTR and the ICTY from 1999 to 2003.
Fairness of the Proceedings

Honorable Judge Mary Davis\(^{52}\)

*former Justice of the Supreme Court, State of New York, USA*

Judge Davis opened her presentation concerning fair trial rights at the ICTR with a quotation by Judge Patricia Wald, a former judge of the ICTY: “A vigorous, unintimidated, knowledgeable defense is the *sine qua non* of a fair trial.”\(^{53}\) Judge Davis noted that, at the conclusion of the ICTR’s operations, its success will be measured not by the number of convictions or acquittals it enters, but by the fairness of its proceedings.\(^{54}\)

Reflecting on the importance of ensuring fair trials, Judge Davis noted that the challenge for international tribunals is to deliver justice under circumstances in which commentators might feel that the very notion of justice is impossible. Indeed, “in the early days of the tribunals, the right to a fair trial in connection with charges of genocide, crimes against humanity, and war crimes was viewed more or less as an oxymoron.” For reasons that included the severity of the crimes alleged, civil society demonstrated relatively little interest, in the early stages of international tribunals, in advocating for respect of the rights of the accused.

Other obstacles which discouraged the waging of an “active and engaged defense” at the ICTR included the relative inexperience of many defense lawyers, the lack of access by the defense to witnesses and evidence, “logistical difficulties in meeting with clients,” the risks of “homegrown intimidation” of witnesses, and the “strange” hybrid procedures governing practice before the tribunals.\(^{55}\) Yet, despite these issues, through “vigorous lawyering” by accomplished professionals, fair trial rights are “alive and well” at the ICTR. For example, the “vitality of fair trial rights” is evident, Judge Davis observed, in the ICTR case of *Prosecutor v. Rwamakuba*.\(^{56}\)

 Prosecutore v. Rwamakuba

André Rwamakuba, a doctor and a public health specialist, was appointed as the Minister of Primary and Secondary Education in the interim Rwandan government following the death of President Habyarimana on 6 April 1994. Mr. Rwamakuba was charged by the ICTR Prosecution with planning, ordering, instigating, and committing genocide, or alternatively, with complicity in genocide, as well as with murder and extermination as crimes against humanity. He was initially indicted with three co-defendants. However, the prosecution successfully applied to have Mr. Rwamakuba’s case severed from the joint indictment.

After hearing testimonies of eighteen prosecution witnesses and thirty-one defense witnesses, Trial Chamber III acquitted Mr. Rwamakuba of all charges, and awarded him US $2,000.00 as compensation for the violation of his right to counsel and his right to be promptly informed of the charges against him. According to Judge Davis, this case offers “an excellent vantage

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55. Wald, *supra* note 52, at 102-103.

### Fairness of the Proceedings: Length of completed cases and numbers of witnesses

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<td>Ruzindana***</td>
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- Shaded names indicate that individuals are tried in a “multi-accused” case.
- Number of asterisks indicates individuals in same group.
point from which to survey the landscape of fair trial rights.” It also demonstrates the skill of the defense lawyers appearing before the Tribunal in this case, in particular, in discrediting the credibility of all eighteen witnesses called by the ICTR prosecution, beyond a reasonable doubt.

Judge Davis examined three defense strategies employed in the proceedings, which she noted would be “familiar to all defense lawyers who practice in national jurisdictions.”

First, the defense paid attention to procedural regularity. In line with the right of the accused to know and defend the charges against him, the defense lawyers were able to persuade the Chamber to give little weight to evidence that diverged from the prosecution’s theory of the case, or from the specific facts detailed in the indictment. The defense also persuaded the Chamber to discredit the prosecution case because of a lack of consistency between the indictment and the prosecution evidence.

Second, Judge Davis noted the defense’s “relentless attack on the credibility of prosecution witnesses.” She argued that, by “carefully battering down and taking apart the bricks of each witness’s testimony” and by exposing inconsistencies in the evidence, the defense was able to persuade the judges that not one of the eighteen witnesses called by the prosecution was credible.

Third, the “strong alibi testimony” with respect to all charges demonstrated that the defense conducted an aggressive investigation. The alibi testimony was provided not only by friends and colleagues of Mr. Rwamakuba, but also by strangers who were not “vulnerable to suspicion” for bias. The defense also presented evidence regarding the poor condition of the roads on which the prosecution alleged Mr. Rwamakuba had traveled to commit the alleged crimes.

Finally, Judge Davis commended the “creative lawyering” by the defense in obtaining a remedy for the accused, including compensation, for the violation of his right to legal assistance during the initial months of his detention in Arusha. Despite the absence of international law on the issue, the remedy was granted by the Trial Chamber and upheld by the Appeals Chamber.57 However, the compensation is yet to be paid, because the ICTR Registry claims it is without the requisite statutory or budgetary authority to make the payment.

In concluding, Judge Davis emphasized that the ICTR will ultimately be judged by the fairness of its trials. She acknowledged that the Tribunal will inevitably face questions concerning its goal of furthering the cause of peace in the Great Lakes Region, particularly in light of the failure until now to prosecute all parties who may have been involved in grave crimes in Rwanda. Judge Davis noted that part of the Tribunal’s “genius” was in its “dullness.” Although the ICTR is located in a showcase setting, the “grinding work of justice is no different in Arusha than it is in many less splendid courtrooms around the world.” Despite the “lofty aims and ambitious goals of international criminal justice,” Judge Davis observed, “it is the everyday, routine effort by lawyers and judges to try cases, just as they do in national jurisdictions, that in the end will be the basis for evaluating whether the ICTR’s promise of peace with justice for the people of Rwanda has been achieved.”

Mr. Iain Morley58
Senior Trial Attorney, Special Tribunal for Lebanon
former Trial Attorney, Office of the Prosecutor, ICTR

Mr. Morley, a prosecution attorney at the ICTR, provided a critique of the ICTR’s judicial mechanisms. He asserted that, while trials are generally fair and judges make every effort to

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guarantee fair trial rights, there remains room for improvement. Mr. Morley offered his suggestion of a “program for reform” for ICTR practice and procedure, based on the mnemonic “BASIC Inquisition.”

1. BA: Bar Association
Mr. Morley argued that it would be of benefit to the institution of international criminal justice if a bar association were established, which included the prosecution, the defense, and judges, to encourage mixing between these divisions in a social and professional context. He lamented the current lack of trust between the prosecution and the defense, and noted some mistrust of the bench among lawyers as well. Not only would the establishment of a bar association break down the fragmentation between professionals, and the prevailing “us” against “them” attitude, but it would also improve accountability among professionals and the job performed by all parties. International criminal justice, as with any form of justice, is a cooperative process, rather than a war. As expressed by Mr. Morley, “we are all rowing down the same river, but just in slightly different ways.”

2. S: Sessions
Mr. Morley questioned whether the current practice of sitting in discrete trial sessions promoted fair trials. He suggested that this practice causes cases to get drawn out and to go on for years, which is not fair to the defendants, their lawyers, the judges, or witnesses. If cases were allowed to run until they ended, they would finish more rapidly. Further, as an ongoing case progressed, issues would become more focused, and some witnesses might well become unnecessary. Conversely, where there are long breaks between sessions, attorneys tend to over-prepare or to forget the evidence between breaks.

3. I: Inequality of Arms
Mr. Morley noted that there is an inequality of arms between the prosecution and the defense, in relation to resources and disclosure. He observed that massive amounts of material have been acquired since 1994 and that much of it has not been properly documented or categorized. Furthermore, different individuals tend to interpret disclosure obligations differently. Mr. Morley suggested that a solution would be to create a separate department whose function would be to deal with disclosure issues, so that each new prosecutor is not “reinventing the wheel.” He suggested that there may be a good argument for turning over the entire prosecution database to the defense, once it had been purged of all confidential information.

4. C: Cross-examination
Mr. Morley suggested that cross-examination is often not done well at the ICTR because the lawyers practicing at the ICTR come from different jurisdictions from all over the world. Noting that cross-examination might not be a trial practice to which all ICTR lawyers are accustomed, Mr. Morley suggested that, as an institution, the Tribunal should host advocacy courses in order to improve the cross-examination skills of all Tribunal lawyers.

5. Inquisition
Given the “enormous” scale of the events that occurred in Rwanda in 1994, and the “colossal” amount of material collated, Mr. Morley questioned whether the adversarial process is the appropriate process to apply in ICTR trials. He argued that when judges are involved in fact-finding, as in a more inquisitorial-style system, they are able to cut through what would otherwise be irrelevant arguments.

Mr. Morley concluded by calling for the use of more elements of the continental inquisitorial legal system in the ICTR’s proceedings. In particular, he advocated “a more active role on the part of the judges so that we can speed the trials up.”

Mr. Peter Robinson
Defense Counsel, ICTR

Mr. Robinson, a lead counsel for the defense at both the ICTR and the ICTY, opened his presentation by telling the audience: “You can put your pens down because you’re not really going to learn anything here. But I hope I can maybe make you feel things and maybe make you think.” Mr. Robinson discussed the challenges for a criminal defense lawyer in representing an accused person at the ICTR.

Much of Mr. Robinson’s presentation concerned the inequality of arms between the prosecution and the defense. He noted, for instance, that the defense suffers an “institutional disadvantage” as compared with the prosecution, even in seeking to influence the operations or rules of the Tribunal. While the prosecution has full-time staff present in Arusha, defense counsel are “scattered

59. For a more detailed version of this presentation, see Peter Robinson, So You Want to be an International Criminal Lawyer?: Getting and Defending a Case at the International Criminal Tribunal for Rwanda, 14:2 New Eng. J. of Int’l & Comp. L. 277 (2008).
throughout the globe” and come to Arusha only for pretrial or trial proceedings. This situation results in an imbalance in resources and rules of procedure in favor of the prosecution. Mr. Robinson observed, “The entire international community has dedicated their resources to prosecuting and convicting our clients.” He noted that the ICTR prosecution lawyers, who have the authority to make people talk to them, have already conducted extensive investigations before the defense counsel even comes into the case. The judges, he stated, have the law. “They know the jurisprudence or, if not, have legal staff to brief them on the law, which they can apply as they see fit. Defense counsel have one thing really, he asserted, and that is passion.”

Mr. Robinson then considered the challenges of navigating the ICTR itself. He noted that most Defense clients are sophisticated, with high expectations, having been political and military leaders in Rwanda. Furthermore, most of the accused persons at the ICTR have amassed “collective knowledge” about the trial process while in the ICTR detention facility. Gaining the trust of a client is made difficult due to language and cultural barriers, although it can be earned by fighting for the client’s interests with the ICTR Registry, the Office of the Prosecutor, and the Trial Chamber.

Dealing with the prosecutor is another challenge, Mr. Robinson noted. Despite the prosecutor’s obligations to “assist in the administration of justice” and to disclose to the defense all exculpatory material, he noted that only some members of the Office of the Prosecutor live up to this standard. Furthermore, the superior resources of the prosecutor “should never be underestimated.” Given that most of the accused persons before the Tribunal did not directly participate in the underlying crimes, but are being prosecuted for their criminal responsibility as superiors of the perpetrators, the prosecution often knows more about the case than the accused. The defense, accordingly, must be vigilant in its investigations, in reviewing all material, and in obtaining disclosures, prior to taking any firm factual position. On a more positive note, Mr. Robinson praised the camaraderie between defense lawyers and the importance of sharing information in order to keep abreast of the jurisprudence of the ICTR.

Mr. Robinson turned to a consideration of the pretrial stage in preparation for the defense case. Addressing the issue of the indictment, he pointed out the “myriad” possibilities for the conviction of an accused at the Tribunal. One strategy available to the defense is to make a preliminary motion challenging the indictment on the basis of jurisdiction or in relation to the form of the indictment. However, whether challenges to the form of the indictment are made at the outset is a strategic question. Many defense counsel instead choose to exploit any deficiencies after presentation of the prosecution evidence.

Managing the disclosure of large volumes of documents and seeking further disclosure are also challenges for the defense. Electronic databases have in some ways simplified disclosure management. Yet many disclosure issues remain, including the volume of documents to consider, the redacted nature of documents, and the translation of documents from Kinyarwanda. All these issues “make for an amorphous case” and require a system to be implemented to catalogue the disclosure and enable it to be usefully retrieved as needed. As “knowledge is power,” the importance of obtaining as much disclosure as possible before trial cannot be overemphasized.

60. See FN 17 for information on the first conference convened by international defense counsel in The Hague in November 2009.
Investigations are also critical in trial preparation. Information gained through thorough investigations can be used to discredit prosecution witnesses and to support or corroborate the position of the accused. Such work, said Mr. Robinson, is best done by qualified investigators from Rwanda, where the crimes took place.

Mr. Robinson noted that plea bargaining, which has become a reality at the ICTR in the last few years, must be handled with sensitivity. Given that plea bargaining is heavily dependant on the wishes of the accused, Mr. Robinson suggested that all options should be discussed with the client, who must then decide in which direction to go.

In relation to the trial itself, Mr. Robinson noted that the ICTR borrows strongly from the common law system. The defense counsel must have a theory of the accused's defense before beginning the trial and must then emphasize the facts in support of this theory throughout each phase of the trial.

Noting the length of ICTR trials, Mr. Robinson highlighted the dual purpose of the ICTR: to determine the guilt or innocence of an accused, and to create an accurate historical record to promote peace and reconciliation among Rwandans.

Displaying to the audience two wrist bands, one reading “Genocide: Never Again” and the other, “Save Darfur,” Mr. Robinson contended that by defending persons accused of having committed genocidal crimes, he is significantly contributing to the prevention of such atrocities in the future: “I’m here because I believe in human rights, and I think I play an important role in the preservation of human rights. As defense counsel I am the guardian of the fair trial rights of my client.”

He concluded by emphasizing the important role of defense counsel in ensuring the delivery of justice in international criminal courts. “By standing up there every day, by objecting, by obstructing, by delaying, by doing whatever I have to do to represent my client, I feel at least that I and my colleagues are making a really important contribution to international criminal justice.”

Mr. Mathew Carlson
Legal Officer, ICTR Appeals Section in The Hague
former Coordinator of ICTR Trial Chamber I in Arusha

Mr. Carlson, a legal officer in the Chambers Appeals Section in The Hague and former Trial Chamber Coordinator of Trial Chamber I in Arusha, discussed the origins of the fair trial standards found in the ICTR Statute. Specifically, he noted that Articles 19 and 20 of the Statute are based largely on the fair trial rights found in the International Covenant on Civil and Political Rights (ICCPR). He also considered the interpretation of fairness requirements articulated in two ICTR cases.

Mr. Carlson focused on two specific rights of a defendant’s before the ICTR: the right to be physically present at his or her own trial, and the right to a remedy when a defendant’s rights have been violated.

Regarding a defendant’s right to be present, Mr. Carlson cited the Zigiranyirazo Interlocutory Appeals Chamber’s Decision, involving a video-link testimony provided through a satellite video transmission between Arusha and The Hague. Because of security concerns, Trial Chamber III decided to hold the formal proceedings to hear the testimony of one key witness in The Hague, where the witness was located. The ICTR was unable to transfer the defendant, Mr. Zigiranyirazo, to The Netherlands for that portion of the trial and instead chose to allow him to participate in the proceedings by video-link from Arusha, in the presence of Defense counsel. Upon appeal, the ICTR Appeals Chamber scrutinized the meaning of the right of a defendant to be present at his own trial, pursuant to Article 20 of the ICTR Statute. Through its close reading of the Statute and an examination of jurisprudence revealing that “presence via video-link” had never been used before, the Appeals Chamber determined that the meaning of “presence” necessarily required the imminent physical presence of the defendant at the trial. Thus, the Appeals Chamber held that the Trial Chamber had not properly exercised its discretion in its restriction of Mr. Zigiranyirazo’s right to be present at the proceedings in The Hague and that, accordingly, the evidence from the video-link testimony was excluded.

In regard to the issue of remedy, Mr. Carlson referred to the Rwamakuba case, discussed earlier by Judge Davis. In this case, the defendant, Mr. Rwamakuba, had waited in detention for 167 days without any legal representation. As a remedy for the violation of Mr. Rwamakuba's fair trial rights, the Trial Chamber awarded him $2,000.00. The Appeals Chamber confirmed the Trial Chamber's ruling, holding that the Tribunal has the implied power, under Article 19 of the Statute and Article 2 of the ICCPR, to provide effective remedies to ensure the fairness of the proceedings.

In summary, Mr. Carlson stated that, when interpreting an accused's fair trial rights, the Tribunal will look first at the plain language of the ICTR Statute. It will then consider the broader international legal framework, which "both informs and ensures the legacy of its jurisprudence in this area."

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Dr. Aukot then explored the question of who should tell the story of the Genocide: the surviving victims, relatives of deceased victims, or surviving political leaders? In his opinion, they should all have their say about the 1994 events in Rwanda.

Turning to consider the post-Genocide government's narrative of the 1994 events, Dr. Aukot noted two key aspects: the government's urgency to reconstruct Rwandan society, by calling on all refugees to return home; and its international commitment to address the crimes committed through prosecutions at the ICTR and in Rwanda.

Dr. Aukot considered the narratives of Rwandan refugees, whom he has interviewed in the camps of Kakuma and Dadaab, Kenya. The refugees, he said, see themselves as victims of the politics of genocide. For example, in 2001, those seeking official refugee status in Kenya connected the "happenings" at the Tribunal in Arusha with their problems in seeking asylum in Kenya, and consequently did not view the ICTR in good faith. They were also critical of the Rwandan government's policy, which urged them to return to Rwanda, where in many cases their property had been seized. The view expressed by many refugees was that the ICTR had been "established by powerful people," and was "not reconciliatory" but "political, and not just."

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Alluding to war crimes committed allegedly by the currently ruling RPF regime in Rwanda, Dr. Aukot challenged the audience to ask themselves whether the victims themselves had in fact become killers.

Dr. Aukot also referred to a connection between the ICTR and the colonial legacy, which has shaped the structure and the substantive elements of judicial institutions within East Africa.

In conclusion, Dr. Aukot questioned whether the ICTR is trying “the idea of genocide or the act itself.”

Session IV Discussion

Moderated by Dr. Aaron Karnell

U.S. Agency for International Development, Tanzania

Martin Ngoga, Prosecutor General of Rwanda, opened the discussion on the fairness of the proceedings by defending the ICTR’s limited number of prosecutions to date. Addressing criticism of the ICTR as ineffective because it does not try all parties, he asked, “How many parties? Where does it stop?” Mr. Ngoga questioned why the French government, which sold large caches of machetes to the dominant government political party, the MRND (with an arguably clear understanding of the machetes’ intended use), should not be tried.

Mr. Robinson was asked by one participant to respond to Mr. Morley’s suggestions for improving the efficiency and fairness of the ICTR’s proceedings. Mr. Robinson agreed that more extensive training should be provided for ICTR lawyers in general and defense lawyers in particular. He suggested that new and intensified training initiatives would be the best way to effect the changes suggested by Mr. Morley. He also noted that the “low point” of the ICTR’s work had been when the Rwandan government refused to allow witnesses to travel to Arusha to testify, in the wake of rumors that members of Rwanda’s current ruling political party were under consideration for indictment by the ICTR. Without the cooperation of the Rwandan government, Mr. Robinson emphasized, the Tribunal cannot work.

Mr. Morley responded to Mr. Robinson’s comments, asserting that greater consideration should be given to transforming the style of courtroom inquiry currently practiced at the ICTR. He once again voiced his preference for an inquisitorial style of proceedings that would be less adversarial and would enable greater control by the judges. He also advocated more formal training for lawyers in order to create a more level playing field in terms of courtroom performance expectations. He observed that there is a great need for “camaraderie” between prosecution and defense lawyers at the ICTR.

Ms. Umukobwa closed the discussion by reminding the audience that the law is not merely an abstract intellectual exercise, but rather a profoundly human process that holds the potential to transform the social framework of any given society for better or for worse. She argued that politics cannot be separated from the formulation and establishment of legal activity and must be considered as objectively as possible when discussing the legacy of an institution such as the ICTR.

Félicien Kabuga, accused of genocide in Rwanda, is still a fugitive from justice.
Mr. Roland Ammoussouga  
_Senior Legal Officer, ICTR Spokesperson and Chief of External Relations and Strategic Planning Section, ICTR_

Mr. Ammoussouga provided an overview of the Tribunal’s Outreach Program and its effect on regional and Rwandan capacity-building. He stated that in order for the Tribunal to contribute to the restoration and maintenance of peace in Rwanda and the Great Lakes Region, as mandated by the UN Security Council, it is “essential that the Rwandan population and the peoples of the African continent have a clear understanding of the work of the Tribunal.” To this end, the Outreach Program provides a mechanism through which to explain and provide information about the work, achievements, and challenges of the Tribunal.

Mr. Ammoussouga outlined the primary features of the Tribunal’s Outreach Program, which include the implementation of communication strategies to convey persuasive messages to target audiences inside and outside of Rwanda; training programs and professional workshops; institutional partnerships with higher learning institutions; the _Umusanzu mu Bwiyunge_ Information and Documentation Centre; visits to the Tribunal by journalists, lawyers, and human rights advocates; and a Capacity Building Task Force to provide support to national jurisdictions including the Rwandan judiciary (see sidebar for more details about the Outreach Program).

Despite the challenges in communicating the work of the Tribunal to the people of Rwanda, especially given the geographical distance between Rwanda and the Tribunal, Mr. Ammoussouga maintained that the Outreach Program has been effective in providing “direct and indirect contributions to the national reconciliation process.” In particular, through its Outreach Program, the Tribunal has effectively engaged peoples and governments, thereby assisting in the development of the rule of law while promoting its visibility.

Nonetheless, Mr. Ammoussouga highlighted a number of factors that have inhibited the comprehensive implementation of the Outreach Program’s goals. These include the lack of UN funding for outreach initiatives, as well as broader issues that arise because “international law is rather a new concept for many of the groups in Africa targeted by the Outreach Program.” Because the most fundamental problem facing the ICTR in its outreach efforts has been a basic lack of information coming into and flowing throughout Rwanda, he emphasized that the effective construction of new channels of communication should be the Tribunal’s primary concern as it approaches its mandated closure.

In discussing the potential legacy of the ICTR’s Outreach Program, Mr. Ammoussouga asserted that, despite its success, the ICTR model cannot be applied universally: “The experience has demonstrated that there is no one model of an outreach initiative that fits all situations. Every institution has to examine its own goals and situation.” However, he noted some common factors required in order for outreach initiatives to succeed. These include a good qualitative analysis among intended audiences and the creative use of media integrated with, and in support of, interpersonal communication.
Mr. Ammoussouga called for prioritizing an Outreach Program that seeks to preserve and ensure the survival of the legacy of the ICTR in Rwanda, in the Great Lakes Region, and throughout the African continent. This, he argued, “will help to increase and sustain the awareness of current and future generations about the achievements and challenges of international criminal justice and its quest for the eradication of the culture of impunity.”

**Ms. Binta Mansaray**  
*Deputy Registrar, Special Court for Sierra Leone (SCSL)*

Ms. Mansaray drew heavily on her personal experience as Deputy Registrar for the SCSL to examine how the work of international tribunals can foster the rule of law in national jurisdictions. She compared the experience of the SCSL with that of its “sister institution,” the ICTR.

Ms. Mansaray noted that, in addition to its specific mandate to bring to justice those responsible for crimes committed in Sierra Leone’s civil war, the SCSL also has a broad mandate to contribute to the consolidation of peace and to foster the rule of law. It was considered important from the outset of the SCSL to establish an Outreach Program in order to fulfill its broader mandate through “a robust public information and public education scheme.”

Ms. Mansaray focused on two key differences between the SCSL and the ICTR: the location of the SCSL within the country where the atrocities took place, and the SCSL’s formal integration into Sierra Leone’s domestic judiciary as an “internationalized” rather than international court. These two points of difference, she argued, have helped the outreach efforts of the SCSL, particularly when compared with the ICTR’s own outreach efforts. Ms. Mansaray described a feeling of “ownership” on the part of Sierra Leone’s citizens that has served to create an atmosphere of heightened awareness and active participation in the SCSL’s proceedings that has not been achieved by the ICTR thus far.
Ms. Mansaray outlined the achievements of the SCSL relevant to realization of its mandate. First, she described the SCSL as a "standard-setting institution" for the advancement of the fundamental principles of the rule of law. In particular, she noted the importance of SCSL procedures and jurisprudence in re-establishing the principles of independence, impartiality, and equality before the law in Sierra Leone.

Second, she noted the capacity building potential of the SCSL. In particular, as a hybrid court with its location at the “seat of the conflict,” it provides opportunities for the recruitment and training of national staff and contractors.

Third, the jurisprudence of the SCSL influences the conceptualization of rule of law principles in various ways. These include influencing, in a positive manner, the quality of justice delivered in the national judicial system, providing a model for procedural rules that may be incorporated into the national system, and creating precedent in a range of areas. In this regard, Ms. Mansaray stressed the need to “popularize” the SCSL’s jurisprudence in order to allow for the punishment of future perpetrators of crimes under international law once the SCSL’s work is complete.

Ms. Mansaray emphasized the need for objectivity not only with regard to the legal proceedings but also with regard to the way outreach programs are structured to address their target audiences. Outreach programs, Ms. Mansaray said, cannot be a tool of the prosecution or of the defense. The programs need to be neutral because they disseminate messages in favor of both parties.

Ms. Mansaray noted the influence of outreach activities in encouraging civil society to advocate for improved mechanisms for the promotion of the rule of law in a number of areas. These mechanisms include advocacy for the institutionalization of a witness protection scheme, a robust Director of the Public Defender’s office, the strengthening of legal aid programs, and the promotion of the rights of the accused. These achievements are the result of an outreach program that has taken into account the context of the operations of the SCSL and has used an extensive grassroots network to reach out to communities. For example, core rule of law concepts have been communicated through specialized briefing and training sessions targeted to a number of important groups, including religious leaders and organizations that represent persons disabled during the conflict in Sierra Leone. These outreach sessions have enabled interested groups to comment with more knowledge on judicial matters and to advocate for their rights under law. Further, a priority of the Outreach Section has been to engage potentially destabilizing groups such as ex-combatants, the army, and youth.

In conclusion, Ms. Mansaray emphasized that fostering the rule of law “cannot be relegated to only core judicial activities and courtroom theatre.” Rather, it also requires “robust and sustained public information and public education that target the whole population with diverse strategies."

Ms. Sara Darehshori

Senior Counsel, International Justice Program, Human Rights Watch

Ms. Darehshori was one of the few presenters who had been present during the ICTR’s first days of operation, having worked as a prosecutor at the Tribunal from 1995 to 1997. Describing her entry into the ICTR in 1995 as “an idealistic young lawyer,” she characterized her two years of experience with the Tribunal as somewhat “disillusioning,” particularly in respect of outreach initiatives undertaken by the ICTR in its first years of operation.

65. For a more detailed version of this presentation, see Sara Darehshori, Lessons for Outreach from the Ad Hoc Tribunals, the Special Court for Sierra Leone, and the International Criminal Court, 14:2 New Eng. J. of Int’l & Comp. L. 299 (2008).
Ms. Darehshori considered that a significant part of the legacy of the ICTR should be to impart “lessons learned” to subsequent courts. Specifically, the experience of the ICTR demonstrates that outreach initiatives must be considered from the outset of a court’s operation. In the Tribunal’s early stages, the overarching objectives of its lawyers were to ensure that proceedings were conducted professionally and fairly with regard to the rights of the accused, and to investigate crimes committed during the Genocide. It did not occur to the Office of the Prosecutor to publicize its work, given that most lawyers came from national systems and legal cultures in which the legitimacy of the court system is taken for granted and courts are generally accessible to the population. The prosecution underestimated the impact of language barriers and assumed that it was “wrong” to talk to the press. Accordingly, the initial approach taken by prosecution staff was to keep “a low profile.” In retrospect, Ms. Darehshori stated, this was not the best approach. She also noted that an active ICTR outreach program was not initiated until 1998.

Ms. Darehshori briefly examined the outreach initiatives of the ICTY, SCSL, and ICC and compared their successes and shortcomings. The ICTY’s outreach program was not initiated until 1999. By that time, the ICTY was perceived as remote and disconnected from the population of the regions of the former Yugoslavia where the devastating incidents had occurred. Further, the ICTY had become politicized and was at times used for “propaganda purposes” by its opponents, which damaged efforts to foster reconciliation in the areas of the former Yugoslavia and also impeded the prosecutor’s work.66

The SCSL, on the other hand, provides the best example, among the three tribunals, of an effective outreach program. Its approach has been to engage the local population in the SCSL’s judicial work by holding town and village meetings and by continually disseminating information through video, radio, workshops, and written materials.

In contrast, Ms. Darehshori criticized the low profile, “trickle down” approach of the ICC, which relies on community leaders to disseminate information to communities. This less effective approach has left room for erroneous rumors to spread about the work of the ICC in countries where it is currently conducting investigations.

Ms. Darehshori concluded that, despite a slow beginning, the ICTR has come a long way in its efforts to include Rwandan citizens in its trial proceedings, and to raise awareness about the trials throughout Rwanda. In this regard, she observed, it is important that the Tribunal’s “legacy” reach the communities themselves, and that the legacy have a positive influence on the people affected by the crimes with which the Tribunal is concerned.

Professor Nigel Eltringham67
University of Sussex, United Kingdom

Professor Eltringham’s presentation offered a poignant insight into his interviews, conducted over two years, with various judges, lawyers, and legal officers within the ICTR. As an anthropologist, Eltringham’s approach was noticeably more personal than many other academic studies of international judicial institutions, which he characterized as “abstract and detached from the daily experiences” of the individuals at the ICTR actually undertaking the Tribunal’s groundbreaking work.


In examining the inner workings of the ICTR, Professor Eltringham highlighted the importance of the Tribunal’s “process,” in addition to its “product.” A failure to understand the significance of the judicial process, including the ancillary work to support investigations, trial proceedings, judgment production, as well as work relating to human resources, logistics, and budgetary support, has led to academic criticism by many who are disconnected from the routine process of the Tribunal. While Professor Eltringham acknowledged the importance of the Tribunal’s jurisprudence and the development of best practices, he described these accomplishments as the “apex” of “a process of legal accretion.” It is difficult, he observed, as an “outsider” to obtain an accurate understanding of the Tribunal’s process: “You have to be in the process.”

Eltringham noted that the nuanced and often tedious work of an institution such as the ICTR seems inherently to promote a sense of institutional insularity. The harsh criticism the Tribunal has received from the academic and journalistic spheres has accentuated this insular tendency. In particular, there is a reticence among those who work in the Tribunal to advertise what they actually do: “There is a sense that the mundane, day-to-day challenges that lawyers face are not worthy of being publicized.”

Eltringham discussed the difficulties for defense or prosecution lawyers from civil law jurisdictions to practice at the ICTR, where the context is predominantly adversarial/common law. He observed that, despite these difficulties, the personality and skills of civil lawyers enable them to adapt. Yet he noted that the trial process revealed “unanticipated differences within the essential category of common law.” Indeed such variations in procedures, among common law systems, has meant that common law lawyers also engage in a process of “collaborative adaptation and synthesis” at the ICTR. Accordingly, he said, there is for all lawyers working at the Tribunal an ongoing process of challenge, reflection, and adaptation. This personal transformative process runs parallel to the process of legal accretion, through the development of the court’s jurisprudence.

Eltringham also discussed the degree of personal cost involved in agreeing to commit one’s life to the work of international criminal law. Specifically, practitioners are faced with the challenge of being away from their families, the disruption of professional life, and the emotional cost borne by the judges and legal staff who process on a daily basis vivid evidence of individual and large scale atrocities, such as those committed during the 1994 Genocide in Rwanda.

Eltringham called for the “seemingly mundane” aspects of the Tribunal’s work to be publicly discussed and to be considered as part of the ICTR’s legacy, which is something more than “jurisprudence” and “best practices.” “Personal enrichment, adaptation and cost are intrinsic aspects of the Tribunal’s work,” Professor Eltringham concluded.

■ Mr. Benoît Kaboyi
Representative of IBUKA Genocide Survivors’ Organization, Rwanda

Mr. Kaboyi presented a brief synopsis of the history of the Rwandan Genocide and the ramifications of the UN’s decision to withdraw its troops as killings escalated, following the death of President Habyarimana when his plane was shot down on the evening of 6 April 1994. In Mr. Kaboyi’s view, the decision of the UN to withdraw from Rwanda, following the killing of ten Belgian soldiers, was perceived by the Interahamwe militia and other forces as a “green light” to attack and exterminate the Tutsis with impunity.

The only native Rwandan on this session’s panel, Mr. Kaboyi spoke of his own survival, stating that his presence at the symposium was possible only “because the RPF defeated the evil force and restored stability.”

Mr. Kaboyi highlighted a number of positive aspects of the ICTR’s work, particularly in relation to the Tribunal’s success in apprehending and prosecuting several persons at the highest levels of political power in Rwanda. He noted that the prosecution of Prime Minister Kambanda, who headed the interim government after the death of President Habyarimana, sent a clear message “to the Rwandan people and the international community as a whole that nobody is above the law.” This message continues to be reinforced through the work of the gacaca courts that are trying roughly 800,000 alleged genocide perpetrators.

Mr. Kaboyi lauded the impact of the ICTR’s work on reconciliation within Rwandan society, the rebuilding of the Rwandan community, and the healing of victims.
Mr. Kaboyi acknowledged the precarious balance between maintaining the rights of the accused and delivering justice to the victims of genocide. As a human rights activist and a lawyer, he supported the right of accused persons to a fair trial and advocated full respect for this right. However, he argued that the exercise of the right should not be used to allow Tutsi witnesses and survivors to be humiliated or to deny that genocide occurred in Rwanda in 1994.

Mr. Kaboyi concluded with a call for “measured objectivity going forward,” arguing that RPF members guilty of committing war crimes or crimes against humanity should indeed be tried and punished, just as any other criminal is. However, he said, prosecutions of RPF members should not be forced in the name of equality.

Session V Discussion

Moderated by Ms. Clair Duffy

Senior Legal Officer, Appeals Division of the ICTR Office of the Prosecutor
former Judgment Coordinator of ICTR Trial Chamber III

During the discussion following the fifth session, several participants raised questions in relation to themes discussed in the preceding four sessions. A representative of the Kenyan Human Rights Commission inquired whether the ICTR outreach program includes any mechanisms for addressing reconciliation and rehabilitation. Another participant asked whether the Rwandan government had initiated a compensation program for victims of the 1994 Genocide.

Ms. Mansaray responded to one participant’s allegation that a great disparity in sentencing existed between the judgments issued by the ICTR in Arusha and the judgments of the ICTY in The Hague. Ms. Mansaray stated that multiple factors come into play in each particular case and sentence. She firmly rejected the proposition that a “different standard of justice” had been applied by the African ICTR and the European ICTY because of the geographic distance between the two. Ms. Mansaray urged the audience to consider the highly nuanced and complex nature of the legal processes, which are being developed and applied in both tribunals simultaneously.

Mr. Kaboyi noted that, while the Rwandan government has created a fund to help survivors, the entire international community needs to assume a role in providing assistance to the surviving victims of the 1994 Genocide.

Ms. Darehshori observed that the idea that the ICC might extend jurisdiction over crimes committed in Rwanda has already inspired several local jurisdictions to take a more active role in prosecuting alleged perpetrators of the 1994 Rwandan Genocide. She called on the ICTR to prosecute members of the RPF prior to its closure. Regarding the alleged disparity in sentencing, Ms. Darehshori noted that this perception may be attributed to a general lack of formal and uniform sentencing guidelines between the ICTY and ICTR, as well as to judicial discretion.
Ms. Silvana Arbia
Registrar of the ICC
former Chief of Prosecutions, ICTR

Ms. Arbia’s presentation addressed the legal mechanisms available for the transfer of cases from the ICTR to national jurisdictions, in particular, those of East Africa and Rwanda.

The primary legal mechanism for the transfer of cases to national jurisdictions is Rule 11 bis of the ICTR’s Rules of Procedure and Evidence. According to Rule 11 bis, the prosecutor may, at his or her discretion, transfer any case – along with all relevant materials and files – to any national jurisdiction. In order to transfer a case, the prosecutor must determine that the relevant national court is willing and capable of conducting legal proceedings in accordance with contemporary standards of international law.

Significantly, there is no judicial involvement in the transfer of files. Accordingly, Ms. Arbia observed, it is important that the relevant national court seek guidance from the Tribunal’s jurisprudence when taking on transferred files, to ensure that it acts in a manner consistent with the Tribunal’s own practices and limitations. This requires some adaptation of local laws to enable the local judiciary to deal with international crimes. For example, a trial in a national court must be conducted in a manner that is fair according to the standards of the Tribunal. Furthermore, in line with international law’s universal prohibition on capital punishment, a case may be transferred only to a jurisdiction in which capital punishment is not practiced. She noted that Rwanda has been eligible to receive transferred cases from the ICTR since June 2007, when the Rwandan legislature voted to abolish the death penalty.

Ms. Arbia described the transfer process as a form of “delegation,” with the proviso that the Tribunal retains a supervisory and monitoring role over the local courts. She noted that, while the process of transferring cases and files to national jurisdictions is “enormously challenging,” it is extremely important for the Tribunal’s legacy. In particular, the adaptation of local laws and practices to meet the standards and procedures of the Tribunal is critical with regard to the Tribunal’s ongoing influence past the expiration of its mandate.

Ms. Arbia referred to the case of Prosecutor v. Bagaragaza as an example of what happens when a state is not ready or able to take on responsibility for a case. In that case, the prosecutor attempted unsuccessfully to have the proceedings transferred to Norway. The prosecutor then attempted to transfer the case to The Netherlands. Yet, despite The Netherlands having made an official statement that its criminal statute was in line with that of the ICTR and that it was ready to accept the case, the national judiciary subsequently declared that it was not able to try Mr. Bagaragaza. The case was thus transferred back to the Tribunal for determination. Mr. Bagaragaza subsequently pled guilty to the charge of complicity in genocide and in 2009 was sentenced by Trial Chamber III of the ICTR to eight years imprisonment.68 The delay and the expense involved in this failed transfer attempt demonstrate that it is essential for states to take proactive measures to ensure that they are ready and capable to take on ICTR cases before a transfer is proposed.

In conclusion, Ms. Arbia reiterated that the transfer of cases is one of the most challenging aspects of the Tribunal’s completion strategy. Given the importance of trying perpetrators in or close to the places in which the relevant crimes were committed, she asserted that Rwanda should be the “transferee of first choice” as the Tribunal approaches the end of its mandate.

Mr. Stephen Rapp
U.S. Ambassador for War Crimes
former Prosecutor, SCSL
former Chief of Prosecutions, ICTR

Mr. Rapp addressed the symposium once again to examine the Tribunal’s completion strategy and in particular the transfer of cases to national jurisdictions. He expressed the view that ending impunity and ensuring accountability for horrific crimes such as genocide and crimes against humanity are best achieved at a national level. Accordingly, he stated, there must be an accountability mechanism in every part of the world.

Rule 11bis of the ICTR Rules of Procedure and Evidence provides:

(A) If an indictment has been confirmed, whether or not the accused is in the custody of the Tribunal, the President may designate a Trial Chamber which shall determine whether the case should be referred to the authorities of a State:
   (i) in whose territory the crime was committed; or
   (ii) in which the accused was arrested; or
   (iii) having jurisdiction and being willing and adequately prepared to accept such a case, so that those authorities should forthwith refer the case to the appropriate court for trial within that State.

(B) The Trial Chamber may order such referral proprio motu or at the request of the Prosecutor, after having given to the Prosecutor and, where the accused is in the custody of the Tribunal, the accused, the opportunity to be heard.

(C) In determining whether to refer the case in accordance with paragraph (A), the Trial Chamber shall satisfy itself that the accused will receive a fair trial in the courts of the State concerned and that the death penalty will not be imposed or carried out.

(D) Where an order is issued pursuant to this Rule:
   (i) the accused, if in the custody of the Tribunal, shall be handed over to the authorities of the State concerned;
   (ii) the Trial Chamber may order that protective measures for certain witnesses or victims remain in force;
   (iii) the Prosecutor shall provide to the authorities of the State concerned all of the information relating to the case which the Prosecutor considers appropriate and, in particular, the material supporting the indictment;
   (iv) the Prosecutor may send observers to monitor the proceedings in the courts of the State concerned on his or her behalf.

(E) The Trial Chamber may issue a warrant for the arrest of the accused, which shall specify the State to which he is to be transferred for trial.

Mr. Rapp noted the irony of the present discussion. While in the early days of the Tribunal the prosecutor fought hard for cases to be transferred to the ICTR, now, he observed, the preference should always be for cases to be prosecuted “close to home,” that is, in the region or ideally in the country, where the crimes were committed.

Mr. Rapp asserted that it is necessary to create a “fabric of international justice” that is “sewn” in such a way as to ensure accountability of all individuals for the commission of horrendous crimes. He described the current system of international justice as a “patchwork” that is ripped and torn in many places and in need of repair.

Mr. Rapp considered this current “patchwork” of international justice in more detail, and the processes already in place to ensure the successful transfer of cases from the Tribunal. Mr. Rapp cited the rapidly growing trend for national jurisdictions to incorporate into their own systems and practices international standards of justice and elements of “universal jurisdiction” addressing crimes such as genocide. In particular, he noted countries such as Belgium and Spain, which have developed at a national level the mechanisms necessary to try international crimes. He argued that this trend will make the process of transferring ICTR cases much easier than in the early days of the Tribunal.

The process of the incorporation of ICTR jurisprudence and the transfer of ICTR cases is particularly important, Mr. Rapp maintained, as tribunals such as the ICTR and the ICC will never be able to handle more than a “handful” of cases and can conduct only limited investigations. Accordingly, it is necessary to have an international system in which nations states themselves prosecute cases. For such a system to work effectively, it is necessary that assistance be provided across national boundaries and from international institutions to make the process fair, transparent, and just.

Mr. Rapp referred to domestic jurisdictions and international courts that have adopted the jurisprudence, rules, and procedures of the ICTR. For example, the SCSL has adopted by reference some of the ICTR’s Rules of Procedure and Evidence. In addition, it has adopted and applied the Tribunal’s jurisprudence, specifically in relation to rape as a crime against humanity. In the case of Prosecutor v. Brima et al., the SCSL applied the law developed by the ICTR in finding that in order to establish rape, it was not necessary to prove the absence of the victims’ consent because of the coercive context in which the rape occurred.69

69. Prosecutor v. Brima et al., Case No. SCSL 04-16-T, Judgment (20 June 2007).
Mr. Rapp argued that the ICTR’s jurisprudence will also have a particular impact on Rwandan law, especially through cases transferred to Rwanda under Rule 11bis. Not only will Rwandan courts need to refer to ICTR jurisprudence in defining the elements of crimes at international law, such as genocide and crimes against humanity,70 but in trying any ICTR transferred cases, Rwandan courts will also be limited to prosecuting only those crimes that fall within the jurisdiction of the ICTR.71

Mr. Rapp also provided examples demonstrating the impact of the ICTR’s jurisprudence on other national systems. In the Canadian case of Mugesera v. Canada, the Canadian Supreme Court cited the Trial Chamber’s decision in Prosecutor v. Nahimana et al. in defining direct and public incitement to commit genocide and persecution as a crime against humanity.72 In The Netherlands, The Hague Appeals Court relied on Prosecutor v. Akayesu in determining whether a Dutch citizen who provided poison gas to Saddam Hussein for the Al Anfal campaign against the Kurds was guilty of complicity in genocide.73 In the case of Hamdan v. Rumsfeld, the US Supreme Court looked to the case law of the ICTR and ICTY to determine possible prosecution of the defendant for the crime of conspiracy to commit war crimes.74

These examples, he concluded, demonstrate the increasing influence of international law and the ongoing legacy of international tribunals throughout the world.

Professor Yitiha Simbeye

Faculty of Law, Open University of Tanzania
Consultant Legal Officer, International Refugee Rights Initiative, Kampala, Uganda

Professor Simbeye spoke about the ability of national jurisdictions in East Africa to assume responsibility for future Tribunal cases. In particular, she discussed the role of the ICTR archives in ensuring that the jurisprudence of the Tribunal “trickles down” to local jurisdictions, as well as the placement of the archives following the Tribunal’s closure.

The archives of the ICTR, consisting of thousands of pages of documentary evidence and countless hours of video and audio evidence, are, Prof. Simbeye suggested, the most important aspect of the Tribunal’s legacy. Accordingly, discussions regarding the placement of these archives once the Tribunal has closed have understandably been contentious.

Prof. Simbeye observed that, in order for national jurisdictions to assume the work of the Tribunal, relevant decision-makers, including parliamentarians, judges, and commentators, must be educated in international criminal law. There is, thus, a need in East Africa for the establishment of educational programs that deal specifically with international criminal law. Such programs can be delivered only with access to appropriate resources. Accordingly, Prof. Simbeye argued strongly for the retention in Africa of the Tribunal’s, specifically in Arusha. She cited the newly established African Court of Human and Peoples’ Rights and the Open University of Tanzania’s new International Criminal Law Center as two examples of institutions where this invaluable resource could be put to use locally. However, because of concerns regarding the capacity of African countries to properly maintain the archives, particularly in relation to security and care for highly sensitive, classified documents, it seems likely that the archives will find their way to The Hague or New York. This would be a significant loss, the professor noted.
On a practical level, Prof. Simbeye stated that retention of the archives in East Africa would avoid the lengthy visa process and financial cost to Africans of traveling to Europe or the U.S. to make use of the archives. More fundamentally, Prof. Simbeye argued that the ICTR’s jurisprudence and its archives are part of the African heritage and thus should remain in Africa. To relocate the archives outside the continent, where they will not be readily accessible to Africans, would victimize Africans once again. Providing Africans with ready access to records regarding African conflicts and ensuring the preservation of these records will not only act as a tribute to those who suffered, but will also aid in preventing the repetition of such tragedies in the future. Retention of the archives in Africa would furthermore provide Africans with a sense of ownership over the tragedy in Rwanda and assist in transferring the ICTR’s legacy to the people of Africa.

Prof. Simbeye concluded by reiterating that the historical records of Africa must remain on the continent as a physical reminder to all Africans not only of what happened in Rwanda, but also of what is happening in places such as Darfur and the Democratic Republic of Congo, and a reminder of what will continue to happen if lessons are not learned from history.

Mr. Anees Ahmed
Senior Assistant Prosecutor, Office of the Co-Prosecutors for the Extraordinary Chambers in the Courts of Cambodia
former Legal Assistant in the Office of the Prosecutor, International Criminal Tribunal for the former Yugoslavia
Mr. Ahmed discussed the challenges of attempting to incorporate international standards of procedure and jurisprudence into a post-conflict legal setting. In particular, he discussed the work of the Extraordinary Chamber in the Courts of Cambodia, a specialized, internationalized tribunal established to try leading members of the Khmer Rouge regime. 75

Mr. Ahmed spoke about the structure of the Extraordinary Chamber and how it differs from that of the ad hoc tribunals. Within the Extraordinary Chamber, every organ is equally balanced between a representative from the UN and a Cambodian representative. In the context of the co-prosecutor’s office, this structure requires that the co-prosecutors from the UN and from Cambodia agree on whom to indict, the charges against the indictees, and which witnesses to call before taking any action. Likewise, core investigating judges must also consent before any action is taken. Any dispute between investigating judges, or between the co-prosecutors, is resolved by the pre-trial chamber at a judicial hearing.

This structure necessarily requires the utilization of a number of lawyers, prosecutors, and judges from Cambodia. While the process is beneficial in terms of engaging the local community in the work of the Extraordinary Chamber, it is somewhat problematic in the context of post-conflict Cambodia. Because of the Khmer Rouge’s determination to exterminate all Cambodians with higher education, the pool of local staff from which legal practitioners can be drawn is limited, and a number of lawyers in Cambodia do not in fact hold law degrees.

Mr. Ahmed discussed the influence of the ICTR’s jurisprudence on the Extraordinary Chamber’s work in relation to crimes against humanity, war crimes, and genocide. For example, one of the first issues before the Extraordinary Chamber pertained to the requested immediate release of the defendant, who argued that his detention was an abuse of process. The Chamber, relying on the ICTR decision in Prosecutor v. Barayagwiza, denied the application and found that relief would be granted only after a defendant was tried.76

Mr. Ahmed predicted that the Extraordinary Chamber would “extensively rely” on the jurisprudence of the ICTR, particularly in relation to the categories of protected groups under the genocide convention. The ICTR’s reasoning is particularly relevant, he observed, in the context of current discussions about whether the killings of Buddhist or Vietnamese Cambodians, who were not seen as Khmer at the time of the killings, can be considered as crimes of genocide.

Another issue before the Extraordinary Chamber relates to the applicable law in the absence of Cambodian law concerning certain issues. According to the Statute of the Extraordinary Chamber, international law should be applied in this situation. However, many civil law advocates have called for the application of French law, which they maintain is the source of existing Cambodian law. “It will be interesting to see whether the jurisprudence of the Tribunal can assist in these and other novel issues faced by the Extraordinary Chamber,” Mr. Ahmed concluded.

75. The regime is suspected of having caused the deaths of approximately 1.5 million people in Cambodia between the years of 1975 and 1979.
Session VI Discussion

Moderated by Mr. Jamie Williamson
Legal Advisor, International Committee of the Red Cross,
former Legal Officer for the ICTR Registrar and Trial Chamber I

Judge Gérard Ngungeko, President of the African Court of Human and Peoples’ Rights, suggested that when considering the transfer of the ICTR’s legacy to different countries or organizations, it is important to categorize the different “objects” of this transfer. Such “objects” may include jurisprudence, files, archives, the library, or the detainees themselves. Each of these “objects” requires a different approach.

Prof. Simbeye expressed the view that the ICTR’s primary legacy is its jurisprudence and practices, which will serve as a foundation for improving the work of national jurisdictions.

Mr. Rapp commented further on the institutional form that future international tribunals may take. He noted the widely held belief that the ICC will, upon the closure of the ICTR and the ICTY, be the only international court, and questioned whether there would be a need for hybrid courts such as the SCSL in the future. He suggested that the function of the ICC should be as a “court of last resort,” and that it should attempt to defer as many cases as possible to competent and willing national jurisdictions. Mr. Rapp noted that the ICC will remain firmly rooted in the jurisprudential legacies of the ICTR and the ICTY. He voiced the view that the archives of the ICTR should rightly stay in Africa. He emphasized, however, that great care must be taken to maintain the anonymity of witnesses and the protection of sensitive information.

Ms. Aptel-Williamson observed that the archives of the Tokyo and Nuremberg tribunals are not located in a single, centralized location but are scattered throughout North America and Asia. She added that the ICTR and the ICTY have recently established a joint committee to decide the fate of their archives upon the closure of the tribunals. She reminded the audience that there is a scientific aspect to preserving archived information, particularly when the information has been recorded using several different media. Ms. Aptel-Williamson stated that utilizing modern technology to ensure the widespread availability of digitized copies of ICTR documents should be a priority. She also observed that the use of digitized records will both preserve and assist in the reproduction of the ICTR records.

Justice Richard J. Goldstone, a South African national who served as the first joint Chief Prosecutor for the ICTR and ICTY, recently chaired the Advisory Committee on Archives of the United Nations Tribunals for the former Yugoslavia and Rwanda. The Committee’s final report was issued on 30 September 2008. The committee’s recommendations include:

- that the archives of each tribunal remain as complete entities and be held in a single location;
- that the archives of the ICTR be held on the African continent, most likely in Arusha, the site of the ICTR;
- that the archives remain under UN custody as long as they contain confidential records;
- that all public documents of the archives be made available to appropriate archives, museums and other memory institutions, and governmental and local authorities, both in the countries concerned and beyond.
Justice Hassan B. Jallow

Chief Prosecutor, ICTR
former Judge, SCSL

Justice Jallow, who opened the final session of the symposium, spoke of Africa’s role in the development of international law.

Justice Jallow characterized the origins of international and humanitarian law as distinctly Eurocentric and primarily confined to questions of war and relations between sovereign states. However, because of the large increase in the number of independent states since 1945, the nature of international law has changed dramatically in the last half of the past century. On the African continent alone, there are now more than 50 states that can have a voice in international law, and Africa is emerging as a leader in the formulation, execution, and dissemination of international jurisprudence and procedure, particularly in the area of human rights. For instance, the African human rights system recognizes the justiciability of economic, social, and cultural rights. Furthermore, the African Charter on Human and Peoples’ Rights is the first inter-state agreement to bring together the rights protected by various treaties in the international law system. This charter, which provides for the protection of economic and social rights and establishes a foundation for third-generation rights, presents an opportunity for the rest of the world to learn from the African experience.

Justice Jallow noted that the development of international human rights law in Africa has provided an impetus for cooperation between African states and the ICTR. This cooperation has been particularly important, in light of the ICTR’s lack of executive and arrest powers. Without such cooperation from a number of African countries, the accused persons who have been prosecuted by the ICTR might never have been apprehended and brought to trial.

Justice Jallow observed that Africa is the single largest regional block within the ICC. The large volume of ICC cases emanating from African states by reason of voluntary self-referral, he said, demonstrates the clear commitment by African states to ensure that the international legal system works. Justice Jallow also noted the commitment of the African Union to intervene in “grave situations,” which represents a shift from the Union’s prior emphasis on non-intervention.

In concluding his presentation, Justice Jallow addressed the challenges faced by the ICTR in transferring cases to the courts of African states. He lamented that not a single African nation had yet accepted a case for transfer, either for lack of capacity or political will. He observed that the ICTR’s work will continue beyond its formal mandate only through the commitment of African states to accept the transfer of ICTR cases and to incorporate the Tribunal’s jurisprudence into their own legal systems.

Mr. Donald Deya

President, East Africa Law Society

Mr. Deya continued the session’s discussion by addressing recent trends in national, regional, and international jurisprudence within Africa.

Mr. Deya observed that Africa has traditionally been relegated to being “a mere spectator” and a “subject” of international law, politics, and economics. In fact, he noted that it is often argued that Africa is still a “guinea pig” in the experimental process of establishing international criminal jurisprudence. Mr. Deya countered this argument, pointing out that the continent
Africa’s influence can be seen, Mr. Deya said, in the prominence of African civil society and academia, the proliferation of “North-South” partnerships in academia, and, since 2002, the “renaissance” of continental and regional cooperation. Mr. Deya praised the impact of international legal initiatives on the rule of law and human rights in Africa. Such legal initiatives include not only the ICTR, but also the SCSL and the ICC, which is operating in Uganda, Sudan, and the Democratic Republic of Congo.

Mr. Deya noted that, at a regional level, the new African Court of Human and Peoples’ Rights is significant in the application of international human rights law in Africa. The Court’s Charter provides that legal actions may be brought on the basis of virtually any international instrument that has been ratified by the relevant partner state. Furthermore, the court may apply any relevant human rights instrument that the partner state has ratified as a source of law.

According to Mr. Deya, the unprecedented and broad nature of such jurisdiction, and the instruments used to establish it, are evidence of the inversion of Africa’s “historical position.” If the nations of Africa were once given “guinea pig status” by Euro-American powers, they now function as “experimental laboratories of law,” acting according to their own initiatives.

Mr. Deya also highlighted the importance of regional legal communities, such as the East African Community. He observed that, because of the unique nature of regional communities, a number of states have been bold in committing themselves to mechanisms to ensure good governance and the maintenance of human rights.

Mr. Deya expressed a number of proposals for the way forward in the development of human rights law in Africa. Specifically, he advocated the continued focus by intergovernmental and international organizations on human rights; the “mainstreaming” of human rights in regional communities; the encouragement of partnerships with academia, civil society and the media; and the increased prominence of international law in both schools and societies. He concluded with the hope that the Tribunal’s physical legacy, its archives, will be located in Arusha, which is the site of the international proceedings and the source of the archived documents. Locating the archives in Arusha, Mr. Deya said, will contribute to the jurisprudence of African courts, the Regional Economic Community courts, and legal scholarship and practice on the African continent.

Mr. Martin Ngoga
Prosecutor General, Rwanda

Mr. Ngoga, Prosecutor General for Rwanda, spoke about the contributions of international judicial institutions to the restoration of peace and the rule of law in post-conflict communities in Africa.

Mr. Ngoga commenced his presentation by discussing the historically ambivalent relationship between the ICTR and Rwanda. He noted that when the mass atrocities were being committed in Rwanda in 1994, Rwanda was a member of the UN Security Council and participated in the formal vote finding that genocide had not occurred. Although the Tribunal was created at Rwanda’s request, Rwanda in fact voted against the Tribunal’s establishment due to disagreement over issues relating to the ICTR’s impartiality and security operations. Mr. Ngoga emphasized that, despite these issues, Rwanda has supported the Tribunal and that Rwanda’s overarching priority is for perpetrators of the Genocide to be brought to justice.

Given this history, Mr. Ngoga emphasized that the creation of the ICTR was a political act of immense importance for the people of Rwanda. In particular, the acknowledgement that there had been a genocide and that the genocide required a tribunal to punish the perpetrators settled the controversy about whether or not a genocide had occurred. Answering the genocide question was, Mr. Ngoga argued, the first “major achievement” of the Tribunal, and the recognition on the part of the international community that genocide took place is itself a central element in the Tribunal’s legacy.

Mr. Martin Ngoga (l), Prosecutor General of Rwanda, converses with other participants between sessions.
Yet, while the importance of the ICTR lies in part in its creation by an international community of foreign states, it is this same “foreignness” that serves to create a physical and cultural distance between the Tribunal and Rwanda. Because of the perception that international judicial institutions are inherently “foreign,” Mr. Ngoga asserted, such institutions are not the solution to human rights abuses in Africa. Rather, in order to ensure the preservation of the rule of law in Africa, international institutions must not work in isolation but must complement national efforts and strengthen local institutions.

Regarding the question of Rwanda’s capacity to take on ICTR transferred cases, Mr. Ngoga stated the “obvious point” that no single national institution can have as much capacity as an international institution. Yet, he asserted that the basic obligation for addressing the Genocide lies with Rwanda. As the source of the genocidal atrocities, Rwanda must deal with the crimes. He asserted that the preferred approach to any future atrocities in Africa should be pan-African and should benefit from the Tribunal’s lessons.

Mr. Ngoga drew an important distinction between governments, such as the current RPF regime in Rwanda, and institutions, which are by their very nature designed to outlive political regimes. Speaking not as a member of his political party but as a citizen of Rwanda, he concluded that the key to ensuring the security of the African continent lies in strengthening its institutions.

Session VII Discussion

Moderated by Dr. Henry Kibet Mutai

School of Law, Moi University, Kenya

Dr. Leigh Swigart of Brandeis University opened the final discussion with a query about the integration of the multi-tiered legal systems of Africa. Considering that great disparities inevitably arise between local, national, regional, and international adjudicative bodies, she questioned what African states can do to synthesize these simultaneously functioning systems in the most harmonious way while also codifying practicable standards of procedure and law.

Within the scope of this discussion, one topic of interest for several participants was the relationship between the traditional gacaca proceedings undertaken at the local level in Rwanda and the broad range of external judicial bodies in Africa, including the ICTR. One participant suggested that perhaps future courts may find guidance in the jurisprudence produced by the gacaca proceedings. A Kenyan participant asked Justice Jallow whether he would choose to be tried before a gacaca court or before the ICTR. Justice Jallow responded that traditional forms of justice play an important role in the resolution of serious conflicts and noted that traditional legal practices similar to gacaca exist in venues other than Rwanda. Mr. Jallow also called for the strengthening of communicative channels among the legal communities of African states, observing that effective communication is the only way to truly effect a practicable codification of procedural and legal standards.

Mr. Ngoga observed that gacaca proceedings and trials at the ICTR cannot be easily compared. The two systems were created within different contexts: one within Rwanda, and one among the members of the “international community.” He expressed skepticism that the procedures followed in the gacaca proceedings would stand up to the more rigid standards under which the ICTR operates. Mr. Ngoga also emphasized that the empowerment of national institutions is the most effective way to contribute to the domestic codification and enforcement of international standards of justice. Regarding the question of the gacaca courts’ contributions to international jurisprudence, Mr. Ngoga suggested that their contributions may not be in the realm of legal precedents but rather, in a more holistic sense, in the formulation of new and progressive methods of conflict management.

Mr. Timothy Gallimore, Spokesperson for the ICTR Office of the Prosecutor, queried, “While measures intended to respond to genocide have been discussed extensively, how can the international community, including the ICTR, create effective ways to prevent it?” Justice Jallow responded that prosecution is a means of accountability, even if it cannot stop the commission of atrocities. He also referred to an action plan presented by the Secretary-General of the UN on the ten-year anniversary of the Rwandan Genocide. The plan called for the promotion of good governance, respect for human rights, and the improvement of social conditions, in order to create an environment in which genocide is less likely to occur. At a more immediate level, the action plan also suggested the implementation of early warning systems, intervention as a final step, and a justice mechanism to hold perpetrators accountable. Mr. Deya suggested that, in many African contexts, regional cooperation can act as a pressure mechanism to ensure that situations do not become as “terrible” as they were in Rwanda in 1994. He noted that, if Rwanda had been a party to a strong regional group in the early 1990s, the Genocide might have been mitigated, if not prevented entirely.
Closing Address

The Honorable ICTR President, Sir Dennis Byron
Presiding Judge of ICTR Trial Chamber III

President Byron delivered the closing address of the symposium. He noted that, as the ICTR approaches the end of its mandate, several issues have arisen in relation to the Tribunal’s influence on the world, on history, and on the development of international criminal law. These issues are the source of inspiration for the present symposium on the legacy of international criminal courts and tribunals for Africa.

President Byron observed that every speaker in the seven sessions challenged the audience members to think about their role in fighting impunity and promoting peace in the region and beyond. In looking back on the discussions held over the last three days, President Byron emphasized that the legacy of the ICTR is far from fully determined. While the symposium provided an opportunity to share news and views of what has already been achieved, it also provided an opportunity for participants to appreciate more fully what is yet to be done. “If there is one message to come out of the symposium,” he said, it is that “we all have a great responsibility in more fully forming and then sustaining this legacy.”

Furthermore, the ICTR has helped to destroy the notion that perpetrators of such crimes could hide behind a veil of political power and global apathy.

President Byron noted the “groundbreaking precedent” established in the Akayesu judgment, in which the Tribunal found that rape may comprise a constituent act of genocide and of a crime against humanity. He noted that the ICTR has paved the way for the prosecution of sexual crimes committed during genocidal and non-international armed conflicts. Thus, the ICTR has lifted this plight, particular to women in conflict situations, to its rightful level as a grave international crime. He also noted instances in which the Tribunal’s jurisprudence has influenced the development of domestic law: such as the efforts of the Kingdom of Norway to incorporate the provisions of the Genocide Convention into its domestic criminal law; and the abolition of the death penalty in Rwanda. Noting the “pioneering jurisprudence” established by the Tribunal in trying, convicting, and sentencing a witness for perjury, the President observed that the ICTR has strengthened the fight against impunity not only by prosecuting perpetrators of heinous crimes, but also by prosecuting those who aim to obstruct the court’s function.

77. For a more detailed version of this presentation, see Dennis C. M. Byron, Looking at Legacy and Looking Back at the Legacy Symposium, 14:2 New Eng. J. of Int’l & Comp. L. 319 (2008).

78. Prosecutor v. GAA, Case No. ICTR 07-90-R77-I, Judgment (4 December 2007).
The President stressed that the influence of the Tribunal’s work has already extended beyond the number of persons prosecuted. Although a final assessment of the ICTR’s legacy must await the completion of its work, the Tribunal has already set an important precedent for the development of international criminal law and the rule of law. Noting that the ICTR’s trial proceedings, decisions, and judgments already provide essential guidance for national and international courts, the President acknowledged the importance of learning from the Tribunal’s mistakes and missed opportunities. He emphasized the significance of the decision by the United Nations, a political body, to establish the Tribunal in order to achieve an essentially political goal: the restoration of peace and stability in Rwanda and the region. He suggested that the lessons learned from that decision may be instrumental in disseminating the rule of law and the application of international criminal jurisprudence and, thereby, may prevent the occurrence of mass atrocities in the future.

In conclusion, President Byron stated that a critical test of the ICTR’s legacy will be the transfer of the ICTR’s jurisprudence to the domestic jurisdictions of Rwanda and greater East Africa. “It is only through such developments that the Tribunal’s legacy will be safeguarded.”

Glossary

**Association des Avocats de la Défense**
ICTR Defense Lawyers’ Association

**Geneva Conventions**

**Genocide Convention**

**ICC**
International Criminal Court

**ICCPR**

**ICTR or Tribunal**
International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighboring States, between 1 January 1994 and 31 December 1994

**ICTR Statute**

**ICTY**
International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991

**IMT**
International Military Tribunal, Nuremberg

**MRND**
*Mouvement Révolutionnaire National pour la Démocratie et le Développement*

**Rome Statute**

**RPF**
Rwandan Patriotic Front

**RTLM**
*Radio Télévision Libre des Milles Collines*

**SCSL**
Special Court for Sierra Leone
The mission of the International Center for Ethics, Justice, and Public Life is to develop effective responses to conflict and injustice by offering innovative approaches to coexistence, strengthening the work of international courts, and encouraging ethical practice in civic and professional life. The Center was founded in 1998 through the generosity of Abraham D. Feinberg.

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Other Center publications relating to international justice:

These publications are available online at:
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Also of interest:
• The International Judge: An Introduction to the Men and Women Who Decide the World’s Cases by Daniel Terris, Cesare Romano, and Leigh Swigart (University Press of New England 2007)

• “International Justice in the News,” a monthly e-letter with news about the people involved in the work of international courts and tribunals, significant developments in international justice, and articles and publications of interest.

See http://www.brandeis.edu/ethics/internationaljustice/internationaljusticeinthenews.html.

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