THE IMPACT OF INTERNATIONAL CRIMINAL LAW ON DOMESTIC JURISDICTIONS*

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Introduction

The United Nations Statute which established the International Criminal Tribunal for Rwanda (ICTR or the 'Tribunal') identified three missions for the Tribunal: 1) to prosecute those most responsible for the atrocities that had occurred in Rwanda in 1994, 2) to facilitate reconciliation between the former combatants, and 3) to restore peace in the Great Lakes Region. In 1994 at the time of the UN's decision to set up the ICTR the judicial system in Rwanda had been destroyed, in large part because the judicial officials had either been killed or had fled the country and Rwanda was, at least initially, incapable of providing any appropriate judicial response. The stated missions imply that the politicians in the United Nations, when confronted with the mass atrocity in Rwanda in 1994, considered that the political objectives of reconciliation and peace restoration could best be achieved by a fair, independent and international judicial process. This idea is linked to the widespread belief that well-functioning law and justice institutions and a government bound by the rule of law are important to economic, political and social development.[1]

In the Rwandan context, it is interesting to note that the 2013 Index of Economic Freedom states that despite the difficult global economic environment, Rwanda's economy has expanded at an average rate of over 10 percent during the past five years. Foreign direct investment has picked up over the same period.[2] This economic development and social stability provides support for the UN's vision. To the extent that the thesis that the judicial and rule of law reforms is accurate, then the contributions made by the ICTR in this area could be one of the more important impacts it has had on

[1] 'Rule of Law and Development' Law and Justice Institutions, accessed November 8, 2013 <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:20934363~menuPK:1989584~pagePK:210058~piPK:210062~theSitePK:1974062,00.html>.

[2] 'Rwanda' 2013 Index of Economic Freedom, accessed November 8, 2013 <http://www.heritage.org/index/country/rwanda>.

Rwanda. While the debate whether the Tribunal made any contribution to reconciliation in Rwanda rages on, it may be argued, on one view of what reconciliation entails, that the restoration of the economy and social stability is a factor that facilitates reconciliation within the country. This paper presents an overview of the work of the ICTR as a conduit through which principles of international criminal law are able to connect and impact domestic jurisdictions with particular focus on how the Tribunal impacted Rwanda in the area of capacity building and reforms in the judiciary and rule of law in order to facilitate that country's development.

Direct impact on domestic courts through the transfer of cases

Today, complementarity is a fundamental principle on which the functioning of the International Criminal Court (ICC) is based. Under the Rome Statute[3] which established the court, the ICC can only exercise its jurisdiction where the State Party of which the accused is a national is unable or unwilling to prosecute. A part of the principle of complementarity is building judicial capacity in countries where mass atrocities create inability to bring the perpetrators to justice. This principle is now regarded as an important part of the role of the International Court systems. The work of the ICTR was a forerunner in this regard. The process by which Rwanda moved from a country whose judicial system had been destroyed by the atrocity to one where its judicial system was judicially described as meeting international standards is largely due to the approach of the ICTR in dealing with the referral of cases to domestic jurisdictions.

It was the Tribunal's policy that the cases of the most serious category should only be tried by an International Court. Other cases could be transferred to domestic jurisdictions for trial. It was for the Prosecutor to identify which cases could be so transferred. However, Rule 11 *bis* of the Statue of the ICTR mandated that the transfers only be effected with the approval of the judicial branch of the Tribunal after being satisfied that certain standards were met by the States to which transfer were being sought. The standards that were applicable were interpreted in the case law to mean referrals could only be ordered to countries where there was a legal framework

[3] Rome Statute of the International Criminal Court 2002.

that: 1) criminalised the alleged conduct of the accused involved, 2) provided an adequate penalty structure that provided appropriate punishment and prohibited the imposition of the death penalty, 3) secured conditions of detention that accord with internationally-recognized standards, and 4) guaranteed to the accused a fair trial.[4]

The first transfers were made to France without rigorous judicial scrutiny. However, the position was different when consideration was given to the desire of Rwanda to have cases transferred for trial there. Rwanda's desire to have the cases repatriated was strongly opposed by the accused who did not want to face trial there and a number of non-governmental organizations that contended that the accused would not get a fair trial in that country. The position was also reiterated when Rwanda tried to have suspects extradited from foreign jurisdictions to Rwanda for trial. In relation to both situations it was felt that Rwanda could not meet the required standards, particularly, the fair trial test and the tests relating to the penal structures. One of the little known facts of the ICTR is the way the Prosecutor worked with Rwanda to be able to present evidence that Rwanda met the criteria for transfers. It is known that the first round of cases for transfer were unsuccessful as the case law indicated in some detail that capacity-building was required in order for Rwanda to become eligible. Through its case law the Tribunal clarified that the matters to be addressed by Rwanda included its penalty structure, conditions of detention, the protection of witnesses and other fair trial issues.[5]

Penalty structure and conditions of detention

The International Law framework does not support the death penalty. However, this was part of the legal framework of Rwanda and was applicable to the crimes related to the mass atrocities for which prosecution was being sought. After calls from the

[4] See *Prosecutor v Uwinkindi* Case No ICTR-2001-75-R11bis Decision on Prosecutor's Request for Referral to the Republic of Rwanda [15].

[5] See *Prosecutor v Munyakazi* Case No ICTR-97-36-R11bis Decision on the Prosecution's Appeal against Decision on Referral under Rule 11bis; *Prosecutor v Kanyarukiga* Case No ICTR-2002-78-R11bis Decision on the Prosecution's Appeal against Decision on Referral under Rule 11bis; *Prosecutor v Hategekimana* Case No ICTR-00-55B-R11bis Decision on Prosecutor's Request for the Referral of the Case of Ildephonse Hategekimana to Rwanda; *Prosecutor v Gatete* Case No ICTR-2000-61-R11bis Decision on Prosecutor's Request for Referral to the Republic of Rwanda.

Tribunal, Rwanda abolished the death penalty in the Death Penalty Abolition Act[6] and legislated that life imprisonment should be the heaviest penalty that could be imposed on a convicted person in a case transferred to Rwanda from the ICTR.[7] Interestingly, this significant development of the domestic judicial process was introduced by a Parliament controlled by the ethnic group that was the victim of the genocide being sought to be prosecuted. It appears, thus, to have been an indication that the mission of reconciliation had met some success, demonstrating the effect of international interventions on domestic jurisdictions.

Rwanda invested extensively in improving the physical and related aspects of the detention facilities that would house any person transferred from the ICTR. However, it still faced the hurdle in the form of its law that provided for the possibility of solitary confinement of prisoners sentenced to life imprisonment. This provision was held to be inconsistent with international standards of the conditions of imprisonment.[8] Rwanda responded by making appropriate legislative changes in the general detention legislation[9] and the legislation regulating the transfer of cases from the ICTR ('Transfer Law').[10]

Other aspects of Rwanda laws were amended to become consistent with the international standards on sentencing.[11] This achievement came about through the workings of time, a few refused referrals, a number of legislative changes and

[6] Organic Law No 31/2007 of 25/07/2007 Relating to the Abolition of the Death Penalty. Article 2 states '[t]he death penalty is hereby abolished'.

[7] Organic Law N° 11/2007 of 16/03/2007 Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States. Article 21

[8] See *Prosecutor v Munyarugarama* Case No ICTR-02-79-R11bis Decision on the Prosecutor's Request for Referral of the Case to the Republic Of Rwanda [9].

[9] Organic Law No 66/2007 of 21 November 2007 Modifying and Complementing the Organic Law No 31/2007 of 25 July 2007 Relating to the Abolition of the Death Penalty.

[10] See Organic Law N° 11/2007 of 16/03/2007 Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States Art 21.

[11] See *Prosecutor v Sikubwabo* Case No ICTR-95-1D-R11bis Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda [41] The Tribunal commented that Rwanda's statutory provisions are consistent with the Tribunal's Rules on sentencing. Article 21 of Rwanda's Transfer Law is consistent with Rule 101 of the Rules which allows for a maximum penalty of life imprisonment. Article 82 of the Rwandan Penal Code allows for consideration of individual circumstances of a convicted person when determining his or her sentence. Article 22 of the Transfer Law states that convicted person will be given credit for time spent in custody.

necessary social adjustments. However, Rwanda reaped significant benefits from its work as it was eventually judicially determined that the nation fully met the acceptable standards in international criminal law.[12]

Witness protection as a fair trial issue

Another issue exposed in the judicial proceedings leading to the referral of cases to Rwanda was the fear of witnesses to testify for either the Prosecution or the Defence. These fears went to the root of the judicial structure set up by the UN as without witnesses and their first-hand evidence it would have been tremendously difficulty, almost impossible, to prosecute and make accountable the perpetrators of the genocide, or to guarantee the fair trial of accused persons who may have been unable to call witnesses to testify in their defence. Witnesses feared being subject to intimidation, harassment, arrest and detention, even death. Some were also in fear of exposing themselves to criminal charges as a result of what they would divulge in their testimonies. There was fear of prosecution on the basis that statements in witnesses' testimonies promoted 'genocide ideology' in violation of the constitution.[13] Some witnesses outside of Rwanda faced a different issue; many would have claimed refugee status in other States or were abroad as illegal immigrants and so faced legal obstacles that prevented them from returning to Rwanda.[14] Rwanda therefore had to modify its legal structure to provide adequate protection and assistance to witnesses in the trials, both those who were inside and outside of Rwanda, [15] and address its witness protection programme. [16]

Rwanda addressed these issues by amending its legislative framework. Article 13 of the Transfer Law was amended to provide immunity for statements made by witnesses at trial and immunity from search, seizure, arrest or detention during witnesses'

[12] See *Prosecutor v Sikubwabo* (n 9) [42].
[13] The Rwanda Constitution 2003 Art 13.
[14] See *Prosecutor v Hategekimana* Case No ICTR-00-55B-R11bis Decision on the Prosecution's Appeal against Decision on Referral under Rule 11bis [68].
[15] See *Prosecution v Kanyarukiga* (n 3); *Prosecutor v Hategekimana* (n 3).
[16] See *Prosecutor v Munyakazi* Case No ICTR-97-36-R11bis Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda [62].

testimonies and their travel to and from the trials. Article 14 of the Transfer Law was also amended to allow a witness residing abroad to provide testimony through deposition, by video-link hearing or by a judge sitting in a foreign jurisdiction. The existing witness protection programme, controlled by the Executive, saw an increase in staff, funding and awareness-raising programmes. More importantly, there was the introduction of a second witness protection unit under the authority of the Judiciary.

Other significant and material changes in the Rwandan laws included the addition of the presumption of innocence in the Constitution of Rwanda, the Code of Criminal Procedure and the Transfer Law.[17] Introduced was the guarantee to an accused's rights to a fair and public hearing and to be informed promptly of the charge against him.[18] Additionally, Rwanda improved its judicial structure by providing for the possibility of a panel of three or more Judges of the High Court to deal with cases, depending on their complexity and importance.[19] It was after these and other changes were made that the ICTR referred its first case to Rwanda[20] and since then referred seven other cases to that State. Whereas there must have been many factors that inspired the reforms of the judicial process and the application of the rule of law, it is indisputable that the case law of the ICTR in the referral process was a substantial contributor. It is impressive how the country made a transition, in just 15 years, to a state where its judicial system was judicially declared as complying with international standards.

It is important to note, however, that the scope of the Tribunal's influence on domestic legal systems extends outside Rwanda as several African countries introduced legislation inspired by the ICTR case law. The impact is also felt beyond the continent of Africa. A specific situation in the European Kingdom of Norway demonstrates this global influence of the ICTR case law. Although it had ratified the Genocide

[17] See Rwanda Constitution 2003 Art 19; Rwanda Code of Criminal Procedure Art 44 (2); Organic Law N° 11/2007 of 16/03/2007 (n 8) Art 13(2).
[18] See amendment to Organic Law N° 11/2007 of 16/03/2007 Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States Art 14.
[19] See Organic Law No 11/2007 of 16/03/2007 (n 8) Art 2.
[20] See *Prosecutor v Uwinkindi* (n 2).

Convention[21] and held values that condemn crimes against humanity, Norway did not implement the necessary statutory framework to give effect to its values and international obligations. When Norway agreed to accept a referral case from the ICTR, it was subject to the same judicial investigation and assessment as Rwanda.[22] The Tribunal found that the absence of specific offences to address genocide and related crimes was an impediment to ordering the referral to that country.[23] Consequently, the request for referral was refused and Norway was urged to amend its laws to criminalize these acts found in international criminal law. Like Rwanda, Norway amended its Penal Code.[24] It introduced provisions criminalising genocide, crimes against humanity and war crimes and has subsequently undertaken prosecutions under this new legislation.[25]

The case law of the ICTR in the referral cases had a direct impact on judiciaries around the world. This not only evidenced the value of the Tribunal but also how international criminal law can directly influence the framing of domestic legal systems, resulting in the adoption of fairer, more independent domestic judicial processes.

The Fair Trial practice of the ICTR and its effect on domestic courts

Generally, the ICTR can be credited for its legacy of fair trial. It has conducted proceedings beyond reproach and has thus set an important precedent for domestic courts to follow. The case law of the Tribunal conveys the importance placed on ensuring fair trials for those accused.[26] It has examined and clarified a number of elements of the right to a fair trial and its jurisprudence has offered tremendous guidance on its application.

[21] Convention on the Prevention and Punishment of the Crime of Genocide 1948 ('Genocide Convention').
[22] See *Prosecution v Bagaragaza* Case No ICTR-2005-86-R11bis Decision on the Prosecution Motion for Referral to the Kingdom Of Norway.
[23] See *Prosecution v Bagaragaza* Case No ICTR-05-86-AR11bis Decision on Rule 11bis Appeal [17].
[24] Norwegian Penal Code Act No 28/2005.
[25] See *Prosecution v Bugingo* Case No 07/63-1-04 8910621 Oslo District Court, Norway.
[26] See for example *Prosecutor v Ntagerura* Case No ICTR-99-46-T (Separate Opinion of Judge Pavel Dolenc); *Prosecutor v Bagosora* Case No ICTR-96-7-T Decision on the Defence Motion for Pre-Determination of Evidence, 4.

i. Issuing the indictment

The simple procedure for issuing indictments set out in the Rules of Procedure and Evidence[27] can guide domestic court systems, especially the common law countries that are considering eliminating Preliminary Enquiries as a condition precedent to the issue of indictments for serious crimes. The relevant rule has been clarified extensively in the case law.[28] In a nutshell, the process involves the Prosecutor submitting the draft indictment with supporting material which is reviewed by a Judge to determine whether a case exists against the accused. The Judge can request additional information, dismiss or affirm each count or allow modification of the indictment. If the indictment is affirmed, then the process for commencing proceedings is initiated. The accused has the opportunity to challenge judicially the issuance, and the form and content of the indictment in streamlined procedures. This system has proved to be successful and provides a model for domestic jurisdictions to emulate to achieve greater levels of efficiency and effectiveness.

ii. The form and content of the Indictment

Article 20 (4) (a) of the Statute of the ICTR provides that the accused is entitled to be informed promptly and in detail of the nature and cause of the charge against him or her, in a language which he or she understands. This right provides the 'elementary safeguard that any person arrested should know why he is deprived of his liberty'.[29] It is also consistent with provisions that guarantee fair trial in national constitutions. There has been abundant case law clarifying the nature and extent of information that must be contained in the indictment in order to provide adequate opportunity for the preparation

[27] See ICTR Rules of Procedure and Evidence Rule 47 *et seq*.

[28] See for example *Prosecution v Nizeyimana* Case No ICTR-2001-55-PT Decision on Prosecutor's Request for Leave to File an Amended Indictment [12]; *Prosecutor v Nizeyimana* Case No ICTR-2001-55C-PT Decision on Nizeyimana's Motion for Certification [5]; *Prosecutor v Kalimanzira* Case No ICTR-05-88-T Decision of Defence Motion to Exclude Prosecution Witnesses BWM, BWN, BXC, BXD and BXL [4]; *Prosecutor v Karemera* Case No ICTR-98-44-T Decision on Defence Oral Motions for Exclusion of Witness XBM's Testimony, for Sanctions against the Prosecution and for Exclusion of Evidence outside the scope of the Indictment [11]; *Prosecutor v Ntagerura* Case No ICTR-99-46-T Separate Opinion of Judge Pavel Dolence [7], [19].

[29] See *Prosecution v Barayagwiza* Case No ICTR-97-19-AR72 Decision [81].

of the Defence.[30] Some of the points that have been made are that the indictment must state the material facts underpinning the charges in a clear manner, specify relevant places, relevant times,[31] the names of victims[32] or perpetrators, dates, the means by which acts were committed, the method of participation by the accused. Conversely, it should not include facts that the Prosecution does not intend to prove[33] in order to prevent the accused from preparing for issues that will not be addressed. The case law has been extensive and clarifies aspects of this practice.

iii. Disclosure

The quality of disclosure by the Prosecution is critical to a fair trial and ensuring that the Defence does not suffer any prejudice.[34] The Tribunal offers tremendous guidance that clarifies the Rules governing this issue.[35] This requirement of disclosure commences from the beginning of the process as the Prosecutor is required to disclose to the Defense copies of the supporting material which accompanied the indictment when confirmation was sought.[36] The Prosecutor must permit inspection of the information in his custody that he intends to use at trial, may be material to the Defense's preparation, or was obtained from or belonging to the accused. Prosecutorial allegations of confidentiality or that disclosure may prejudice ongoing investigations, allegations that disclosure would present a conflict with the public interest or affect the security of any State are addressed with modified procedural requirements.[37] Undoubtedly, interpretations and explanations of principles of disclosure are capable of providing

[30] See for example *Prosecutor v Seromba* Appeal Judgment Case No ICTR-2001-66-A [27]; *Gacumbitsi v Prosecutor* Case No ICTR-2001-64-A Appeal Judgment [49]; *Muvunyi v Prosecutor* Case No ICTR-2000-55A-A Appeal Judgment [19]; *Semanza v Prosecutor* Case No ICTR-97-20-A Appeal Judgment [67], [85]; *Prosecutor v Ntakirutimana* Cases Nos ICTR-96-10-A and ICTR-96-17-A Appeal Judgment [469] – [471]; *Prosecutor v Ntagerura* Case No ICTR-99-46-A Appeal Judgment [121] – [122];

[31] Prosecutor v Ntakirutimana (n 30)[69] – [71].

[32] ibid [32] citing *Prosecutor v Kupreskic* IT-95-16-A Appeal Judgment [89].

[33] See *Prosecutor v Ntakirutimana* (n 30) [43].

[34] ibid [38].

[35] See for example *Prosecutor v Mugenzi and Mugiraneza* Case No ICTR-99-50-A Appeals Judgment [63]; *Kajelijeli v Prosecutor* Case No ICTR-98-44A-A Appeal Judgment [262]; *Niyitegeka v Prosecutor* Case No ICTR-96-14-A Appeal Judgment [30] – [32].

[36] See ICTR Rules of Procedure and Evidence Rule 66.

[37] ibid Rule 70.

meaningful assistance to domestic courts as they continually grapple with issues relating thereto.

iv. Right to be brought promptly before a judge

The Tribunal deplores the abuse of the right to be brought promptly before a judge, as is conveyed in the case law. In the case of *Kajelijeli v Prosecution*[38] where the accused was detained for over three hundred days before his initial appearance before a Judge of the ICTR, the Appeal Chamber not only declared that there was a violation of his right but it provided compensation for that breach by a reduction of sentence. In doing so it articulated and affirmed a number of principles relating to the right, particularly the principle that pre-trial detention should be taken into account in the sentence of a convicted person. The Tribunal has also affirmed the related right to an appropriate and effective remedy where a breach of an accused's right to fair trial has occurred.[39]

Fair trial rights have become a hallmark of domestic courts across the world, usually given the security of placement in the constitutions of these jurisdictions. The ICTR has certainly augmented the available jurisprudence to which domestic courts can refer as it offers significant contribution to the understanding of a number of specific elements of the right. This impact of the ICTR on the understanding of fair trial rights has been addressed on a number of occasions[40] and undoubtedly stands as a legacy of the Tribunal and a demonstration of the effects of international criminal law in domestic jurisdictions.

[38] *Kajelijeli v Prosecution* Case No ICTR-98-44A-A Appeals Judgment. See also *Prosecutor v Bagosora* Case No ICTR-98-41-T Judgment and Sentence [91] – [96].

[39] See *Prosecutor v Bagosora* (n 38) [87] where the Tribunal indicated that remedies may include an apology, reduction of sentence or financial compensation in the event of an acquittal.

[40] See Mark A. Drumbl, 'Prosecution of Genocide v the Fair Trial Principle' J Int Criminal Justice (2010) 8 (1): 289, 294; Yvonne McDermott, 'Rights in Reverse: A Critical Analysis of Fair Trial Rights under International Criminal Law' in William A Schabas, Yvonne McDermott and Niamh Hayes (eds) The Ashgate Research Companion to International Criminal Law: Critical Perspectives (Ashgate 2013) 179-80.

Interpretive Guidance on several aspects of International Criminal and Humanitarian Law

In January 2010 Human Rights Watch released a 500-page book, 'Genocide, War Crimes and Crimes against Humanity: A Digest of the Case Law of the International Criminal Tribunal for Rwanda'. [41] This work was oriented to practitioners, non-governmental organizations, and academics working in the field of human rights. It will also be a tool for staff at institutions established to try such crimes, such as the ICC, as well as domestic judiciaries. This is evidence of the proposition that the Tribunal has offered significant and ground-breaking directions on the manner of proving genocide, war crimes and crimes against humanity in a court of law. A few areas that illustrate these ground-breaking directions relate to the Tribunal's assessment of issues related to sexual violence, hate speech and accomplice liability.

Genocide

The Genocide Convention[42] had been entered into force about fifty years prior to the establishment of the ICTR but there had been little experience in prosecuting genocide. Thus, the prosecutions at the ICTR 'breathed relevance to this convention with unprecedented vitality'.[43] One critical contribution of the Tribunal is its clarification of the definition of the groups protected by the convention and the ICTR Statute. Both documents relate genocide to the destruction of four groups, national, ethnical, racial or religious.[44] However, *Prosecutor v Akayesu*,[45] the ICTR's first case, clarified the concept of the groups that were protected by the convention and laid down definitions that have been followed, applied and expanded in the Tribunal's case law and elsewhere.[46] Significantly, in considering the extent to which the four groups in the

[41] 'Genocide, War Crimes and Crimes against Humanity: A Digest of the Case Law of the International Criminal Tribunal for Rwanda' Human Rights Watch 2010 accessed November 11, 2013 http://www.hrw.org/news/2010/01/15/ictr-tribunal-creates-rich-body-legal-precedent.
[42] Convention on the Prevention and Punishment of the Crime of Genocide 1948.
[43] Payam Akhavan, 'The Crime of Genocide in the ICTR Jurisprudence' Journal of International Criminal Justice 3 (2005) 989, 990.
[44] Article 2(2) of the ICTR Statute replicates Article II of the Genocide Convention.
[45] *Prosecutor v Akayesu* Case No ICTR-96-4-T Judgement.
[46] ibid [513]. See also See *Prosecutor v Kayishema and Ruzindana* Case No ICTR 95-1-T Judgement [98].

convention were absolutely exclusive, the Chamber emphasized that 'it is particularly important to respect the intention of the drafters of the Genocide Convention, which according to the *travaux préparatoires*, was patently to ensure the protection of any stable and permanent group'. [47]

i. The Mental Element of Genocide

No conduct can be properly described as genocide unless there is the specific intent by the perpetrator to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.[48] The Tribunal has found that it is this specific intent that distinguishes the crime of genocide.[49] This intent could be inferred from the general context of the perpetration of culpable acts systematically directed against that same group, the scale of atrocities committed, or the deliberate and systematic targeting of victims on account of their membership of a particular group, while excluding the members of other groups.[50]

The Tribunal's case law indicates that the definition of genocide requires the intent to destroy a group 'as such'. This seemingly superfluous term is a vital element of the crime because for acts to constitute genocide, they must have been done to a person(s) of a specific group with the ulterior purpose to destroy the group in whole or in part[51] as this has been recognized to be the differentiating factor between genocide and other discriminatory crimes, like persecution.[52]

ii. The Material Elements of Genocide

The material elements of genocide have also been the subject of extensive case law. 'Killing' is intentional killing, not necessarily premeditated.[53] 'Causing serious bodily or mental harm' has been decided to include acts of torture but it does not necessarily

[47] See *Prosecutor v Akayesu* (n 45) [516].
[48] ibid [117], [122].
[49] See Prosecutor *v Kayishema* (n 46) [91].
[50] See *Prosecutor v Musema* Case No ICTR-96-13-A Judgment and Sentence [166] citing *Prosecutor v Akayesu* (n 45) [523].
[51] See *Prosecutor v Musema* (n 50) [165].
[52] See *Prosecutor v Kupreskic* IT-95-16-T Judgment [636].
[53] See *Prosecutor v Kayishema* Case No ICTR 95-1-A Appeal Judgment [151].

mean that the harm is permanent and irremediable.[54] Systematic sexual violence, rape, mutilations and interrogations, beatings and/or threats of death have also been considered to constitute bodily and mental harm.[55]

The element of 'deliberately inflicting on a group conditions of life calculated to bring about its destruction' has been explained.[56] This may include subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement.[57] It has been said that the element of 'imposing measures intended to prevent births within the group' may be construed to include sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages.[58] The Tribunal has acknowledged that these measures may also be mental[59] where, through threats and trauma, members of a group are led not to procreate.

With respect to 'forcibly transferring children of the group to another group', the ICTR has explained that the objective is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another.[60] The classification of various conduct in the case law as genocide, torture, persecution, crime against humanity is likely to have significant impact on the interpretation of related provisions in national constitutions and so extend the scope of behavior applicable to the remedies of constitutional litigation.

Sexual Violence

One of the major contributions of the Tribunal has been its treatment of sexual violence in times of conflict. From the first case, sexual violence was treated as a criminal offence for which there must be accountability. The case law has amplified this and set

[54] See *Prosecutor v Akayesu* Case (n 45) [502] – [04].
[55] ibid [706] – [12].
[56] ibid [505].
[57] ibid [506].
[58] ibid [507].
[59] ibid [508].
[60] ibid [509].

standards that have influenced the international community and domestic jurisprudence. It first defined rape as 'a physical invasion of a sexual nature, committed on a person under circumstances which are coercive', reasoning that a mere mechanical description of objects and body parts failed to capture its core.[61] This has allowed convictions of rape to be imposed where there was no physical contact between the perpetrator and the victim.[62] The Tribunal's definition of rape demonstrated a critical development of the 'rape as non-consensual sex' discourse still prevalent in some domestic criminal law systems.[63] It has also judicially characterised as rape expanded sets of behaviour, such as oral or anal penetration, by any body part or object used by the perpetrator.[64] It has been articulated that violence is not a part of rape[65] and that the lack of consent can be established by the coercive environment including a place of detention.[66]

Significantly, there has been discernment of a domestic tendency to broaden the definition of rape so that it now embraces acts that were previously classified as comparatively less serious offences such as sexual or indecent assault.[67] This is as a result, at least in some part, to the work of the ICTR. The classification of rape as genocide, and torture and persecution also can influence domestic jurisprudence in the interpretation of constitutional and other provisions.

Hate Speech

The ICTR was the first international tribunal to address the issue of criminal responsibility for media hate speech since the conviction of Julius Streicher at the Nuremberg trials. It further clarified the role of hate speech in the commission and prosecution of genocide and crimes against humanity. The Tribunal stated in the

[61] ibid [688]. See also *Prosecutor v Musema* (n 50) [227] – [28]; *Prosecutor v Niyitegeka* Case No ICTR-96-14-T Judgement and Sentence [456]; *Prosecutor v Furundzija* IT 95-17/1-T Judgment [176].
[62] See *Prosecutor v Semanza* Case No IcTR-97-20-T Judgement and Sentence [478] – [79].
[63] For one example, see the discussion in the Scottish Law Commission, 'Report on Rape and Other Sexual Offences' December 2007.
[64] See *Prosecutor v Kajelijeli* Case No ICTR-98-44A-T Judgment and Sentence [913] citing *Prosecutor v Furundzija* (n 61) [185]; *Prosecutor v Gacumbtsi* Case No ICTR-2001-64-T Judgment [321].
[65] *See Prosecutor v Akayesu* (n 45) [688].
[66] See *Prosecutor v Muhimana* Case No ICTR-95-1B-T Judgment and Sentence [544] – [46] citing *Prosecutor v Kunarac* IT-96-23 & IT-96-23/1-A [129] – [30]; *Prosecutor v Furundzija* (n 61) [271].
[67] See *Prosecutor v Musema* (n 50) [224] citing *Prosecutor v Furundzija* (n 61) [179].

landmark rulings of the ICTR in 2003, known as the *Media Trial*, '[t]he power of the media to create and destroy fundamental human values comes with great responsibility. Those who control such media are accountable for its consequences'.[68] In this case the Trial Chamber convicted three high-rank media persons for genocide, incitement to commit genocide and crimes against humanity.[69] The Tribunal also addressed the issue in the *Bikindi* case where the music of an entertainer was held to support a conviction for incitement to genocide.[70] Direct impact of the Tribunal's case law on this issue is evident as the jurisprudence of the ICTR has found its way into the reasoning of domestic courts. For example, in the case of *Mugesera v Canada*[71] the Supreme Court of Canada addressed the specific question of whether a speech that incites hatred meets the initial criminal act requirement for persecution as a crime against humanity. The court considered the ICTR decision in the *Media* case and concluded that it could. The court found that:

> The harm in hate speech lies not only in the injury to the self-dignity of target group members but also in the credence that may be given to the speech, which may promote discrimination and even violence.[72]

The United States Supreme Court has also taken guidance from ICTR jurisprudence when addressing the crime of conspiracy to commit war crimes.[73]

Extended Liability

Other important concepts have been addressed, including the law relating to the modes of participation under Article 6(1) of the ICTR Statute which criminalises the conduct of persons who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime. This has been extensively dealt with in the case law.[74] Under this article the Tribunal has been able to articulate the concept

[68] *Prosecutor v Nahimana, Barayagwiza and Ngeze* Case No ICTR-99-52-T Judgment.
[69] ibid.
[70] See *Prosecutor v Bikindi* Case No ICTR-01-72-T Judgment [396].
[71] [2005] 2 SCR 100, 2005 SCC 40 (Can).
[72] *Mugesera v Canada* [2005] 2 SCR 100, 2005 SCC 40 (Can) [147].
[73] *Hamdan v Rumsfeld, Secretary of Defense* 548 US 557 (2006).
[74] See for example *Nahimana v Prosecutor* Case No ICTR-99-52-A Appeal Judgment [477] – [482]; *Prosecutor v Gacumbtsi* Case (64) [270] *et seq*; *Prosecutor v Kamuhand* Case No ICTR-95-54A-T Judgment [592] – [97]; *Prosecutor v Ntakirutimana* (n 30) [499] – [501]; *Prosecutor v Seromba* (n 30) [161].

of superior responsibility, indicating that a superior may be liable where he knew or had some general information in his possession which would put him on notice of possible unlawful acts by his subordinate.[75] The Tribunal has also indicated that the doctrine of joint criminal enterprise, which allows for the finding of criminal liability for acts by other perpetrators through the link established by an enterprise, is applicable to prosecuting crimes under the Statute. [76]

In articulating and applying these concepts the Tribunal provides domestic courts with additional tools to assist in the prosecution of genocide and crimes against humanity. The ICTR's jurisprudence is proved to be able to meaningfully impact the understanding and interpretation of these international crimes in domestic jurisdictions. The case law of the Tribunal provides invaluable assistance to domestic courts in their exercise of defining and interpreting various elements and concepts relating to genocide and crimes against humanity. It sets outs clearly the acceptable standards which domestic courts should meet and provides guidance on otherwise undefined elements of these crimes, demonstrating another dimension of the impact of international criminal law on domestic jurisdictions.

Conclusion

The reach and impact of the ICTR is vast. Many lawyers and judges who have worked at the Tribunal have returned to work in domestic court systems. The value of this should not be underestimated as there is hardly any country in the world which is not affected by this. Those who have read and contributed to the jurisprudence of the ICTR and then reverted to practice in domestic courts will see the relevance and utility of the work done at the ICTR and the way in which it provides guidance and supportive rationalisation for issues affecting domestic jurisdiction. Its practices, procedures, jurisprudence collectively serve as a conduit through which international criminal law touches and affects domestic jurisdiction. The work of the Tribunal will have long-

[75] See *Nahimana v Prosecutor* (n 74) [484] – [86] citing *Blagojevic and Jokic* Case No IT-02-60-A Appeal Judgment [280] – [82]; *Prosecutor v Gacumbtsi* (n 30) [143]; *Prosecutor v Musema* (n 50) [141]; *Prosecutor v Kvocka* Case No IT-98-30/1 Judgement [322] .

[76] See *Prosecutor v Karemera* Case No ICTR-98-44-T Judgment and Sentence [1433] *et seq*; *Prosecutor v Tadić* Case No IT-94-1-A Appeal Judgment [188].

lasting impacts, not only on Rwanda but on courts around the world, thereby extending the impact of international criminal law on domestic jurisdictions.

The Right Honourable Sir Dennis Byron