

Punishing Sex Crimes Perpetrated During the Rwandan Genocide
The Case of Akayesu

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I. Introduction

Problem/Significance

The Rwandan genocide is perhaps best known for the fever of mass murder that eliminated three quarters of the Tutsi population. With mostly sticks, hoes, and machetes, a citizen mob whipped into a genocidal frenzy through carefully orchestrated propaganda hacked to death 800,000 of their neighbors. The disaster in Kosovo claimed the lives of between ten and twenty-thousand people. In Rwanda, an average of ten to twenty thousand were murdered each day. In one hundred days, Hutu extremists perpetrated the most efficient genocide of the twentieth century, tripling the pace of the Nazis in Holocaust Germany.

In the wake of such horrific mass murder, it is not entirely surprising that the violent sexual crimes committed against Tutsi women during the genocide did not come sharply into focus until much later. In the case of *Akayesu*, the International Criminal Tribunal for Rwanda decides for the first time in international legal history that rape and sexual violence can constitute genocide. This legal foundation for this landmark case is highly controversial. The problem then is this: should the *Akayesu* case be used in the future as good law, or should courts undercut the precedential power of the decision by exploiting its legal weaknesses?

Thesis

This essay argues that *Akayesu*'s legal innovations on rape and sexual violence as genocide is good law that should be followed by future international courts. The essay is divided into four main sections. The first section provides factual background on the mass murder that took place in Rwanda and illustrates the prevalence and gravity of sex crimes committed against Tutsi women. The second section considers the genesis of the International Criminal Tribunal for Rwanda and considers the legal basis for its jurisdiction. The third section discusses facts

and legal analysis of the *Akayesu* case with special attention to its holding on rape and sexual violence. Finally, the fourth section considers the legal weaknesses of the judgment, but argues that *Akayesu* is good law that should be followed by future international courts.

II. The Atrocities in Rwanda

A. Background

Rwanda's population consists of two major groups—the Hutu majority (roughly 85%) and the Tutsi minority (roughly 15%).¹ Violence between the two quasi-ethnic groups had been brewing for years. In the 19th century, Belgian colonizers ruled through a Tutsi elite, creating an apartheid-like system in which Tutsis were strongly privileged in every area of life and Hutus were a brutally oppressed mass.²

In the late 1950s and early '60s, a Hutu revolution ushered in independence from colonization and brought the Hutu into power in the name of majority rule (“Hutu Revolution”).³ The result was simply to reverse the apartheid system. The polarized ethnic state remained, only now the Hutu majority was in charge—and it was payback time. From the Hutu Revolution until the genocide in the mid-nineties, Hutus committed systematic political violence against the Tutsis to maintain power.⁴ As a result, there was a massive outpouring of Tutsi refugees into bordering countries, not naturalized in any other country, and wishing to return home to Rwanda.⁵ But the Hutu government refused to re-admit those who had fled.⁶

¹ Frontline Interview with Phillip Gourevitch, available online at <<http://www.pbs.org/wgbh/pages/frontline/shows/evil/interviews/gourevitch.html>> (visited June 6, 2002). The information for this section was taken largely from this interview and is greatly expanded upon in Phillip Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed With Our Families: Stories from Rwanda*, (Picador 1998).

² Id.

³ Id.

⁴ Id.

⁵ Id.

⁶ Id.

In 1990, a Tutsi rebel army known as the Rwandan Patriotic Front (“RPF”) appeared unexpectedly on the scene surprising the Hutu government from Uganda in the north.⁷ Civil war broke out sporadically on and off for more than three years.⁸ In 1993, a cease-fire known as the Arusha Accords was arranged to usher in ethnic power sharing, a multi-party state, integration of the armies, and return of the refugees.⁹ In fall of 1993, pursuant to an agreement between Hutu and Tutsi leaders, the United Nations sent a peacekeeping force to Rwanda to broker the power sharing arrangements, ensure the safety of returning refugees, and enforce the cease-fire between these antagonistic groups.¹⁰

However, “[t]o the Hutu extremists who formed the entourage around the Hutu dictatorship, President Habyarimana, the threat of peace was even greater than the threat of war, because it amounted to a defeat It meant they couldn’t have a total victory. They faced suddenly the threat of sharing power, which was the one thing on earth they couldn’t stand sharing. It was against that backdrop that the U.N. peacekeeping force began to arrive, and to attempt to preside over the implementation of a peace [agreement] which the president’s men had no intention of allowing him to implement.”¹¹

B. Mass Murder

On April 6, 1994, Rwandan President Habyarimana died in a mysterious plane crash.¹² Almost immediately, zealous Hutus in the government and paramilitary groups joined forces to fill the power vacuum and incite murderous hysteria against Tutsis and moderate Hutus.¹³

⁷ Id.

⁸ Id.

⁹ Id.

¹⁰ Id.

¹¹ Id.

¹² Gary A. Haugen, Good News About Injustice: A Witness of Courage in a Hurting World 26 (InterVarsity Press 1999). Haugen was the director of the United Nations genocide investigation in Rwanda.

¹³ Id.

Spreading rumors that the Tutsis had killed their president and were now coming to annihilate all Hutus, extremist Hutus whipped up a frenzied mob of citizen militia and local villagers determined to exterminate Tutsi *inyenzi* (“cockroaches”) from the face of the earth.¹⁴

When the violence began, thousands of Tutsis were directed by public officials to churches and stadiums where they had found sanctuary during previous eruptions of ethnic violence.¹⁵ This time, however, the Tutsis did not find sanctuary. Once the Tutsis had been herded to central locations, local officials sent a mob of ordinary local villagers—farmers, tailors, school principals—to surround these sanctuaries and began to hack to death the defenseless Tutsis inside.¹⁶

With mostly machetes, metal rods, spears and wooden clubs with nails protruding at the head, the mob cut down the Tutsis by the hundreds—men, women, and children—and bludgeoned them to death.¹⁷ Attackers left the walls of Rwandan churches stained with bloodlines knee-high.¹⁸ The exhausting task of mass murder took days. Attackers grew weary of hacking people to death. At sundown, local police sealed victims in churches and stadiums for the night, so the mob could get some sleep before beginning the next day’s orgy of murder.¹⁹ In 100 days, the Hutus massacred approximately three quarters of the Tutsi population.²⁰ With mostly sticks, hoes, and machetes, Hutus perpetrated the most efficient killing spree of the 20th

¹⁴ Id. See also Payam Akhavan, Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities? 95 AJIL 7, 11 (2001) (noting that Hutu “reviled the Tutsi as ‘cockroaches’ that had infested the country”).

¹⁵ Haugen, Good News About Injustice at 26-27 (cited in note 12).

¹⁶ Id at 27.

¹⁷ Id.

¹⁸ Gary A. Haugen, Christians, Violence, and Injustice 7, 1 Discernment (Winter 2000); also available online at <<http://www.ijm.org/article3.htm>> (visited June 6, 2002) (noting that thousands of corpses littered the churches of Rwanda leaving “blood lines on the walls [that] were knee-high”).

¹⁹ Haugen, Good News About Injustice at 28 (cited in note 12).

²⁰ Monika Satya Kalra, Forced Marriage: Rwanda’s Secret Revealed 7 UC Davis J Int’l L & Policy 197, 198 (2001) citing Alison Des Forges, Leave None to Tell the Story: Genocide in Rwanda 1 (Human Rights Watch 1999).

century—tripling the pace of the Nazis during World War II.²¹ Between 800,000 and a million Rwandans had been murdered by their neighbors.²²

C. Sexual Crimes

In the wake of this blitz of mass murder, it is not entirely surprising that violent sexual crimes committed against Tutsi women did not come sharply into focus until much later.²³ But the ugliness and terror of these sex crimes is no less overwhelming than that of the mass murder. During the 1994 genocide, perpetrators committed sexual violence against Rwandan women on an utterly massive scale.

Roughly 250,000 Tutsi women were gruesomely raped and tortured in the most violent and sadistic ways.²⁴ Survivors confirm that rape during the genocide was

extremely widespread and that thousands of women were individually raped, gang-raped, raped with objects such as sharpened sticks or gun barrels, held in sexual slavery (either

²¹ Steve Bradshaw and Ben Loeterman, The Triumph of Evil 1710 (Frontline 1999) available online at <<http://www.pbs.org/wgbh/pages/frontline/shows/evil/etc/script.html>> (visited June 6, 2002) (“With their hoes and machetes, the extremists had killed three times faster than the Nazis.”).

²² Prosecutor v. Kayishema and Ruzindana, Judgment, Case No. ICTR-95-1-T, P 291 (ICTR Trial Chamber May 21, 1999), available online at <<http://www.ictor.org/wwwroot/ENGLISH/cases/KayRuz/judgement/index.htm>> (visited June 6, 2002) aff’d, Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-A (ICTR App. Chamber June 1, 2001), available online at <<http://www.ictor.org/wwwroot/ENGLISH/cases/KayRuz/appealchamber.htm>> (visited June 6, 2002). See also David L. Nersessian, The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals, 37 *Tex Int’l L J* 231, 233 (2002) citing Catherine Cisse, The End of a Culture of Impunity in Rwanda?, 1 *YB Int’l Humanitarian L* 161, 162 (1998).

²³ Both the U.S. and the U.N. knew about the genocide as soon as it began. Indeed, new evidence suggests that the U.S. in particular had ample warning of the genocide and with extremely modest military force could have prevented it from happening. See, e.g., Samantha Power, Bystanders to Genocide *The Atlantic Monthly* (September 2001), available online at <<http://www.theatlantic.com/issues/2001/09/power.htm>> (visited June 6, 2002). (Drawing on sixty interviews with policy makers at the State Department, Defense Department, and National Security Council; dozens of interviews with Rwandan, European, and United Nations officials and with peacekeepers, journalists, and nongovernmental workers in Rwanda; and hundreds of pages of newly available government records, Power concludes “that the U.S. government knew enough about the genocide early on to save lives, but passed up countless opportunities to intervene [both militarily and otherwise].”). Moreover, details of the mass murder popped up regularly during April 1994. See Power, Bystanders to Genocide at <<http://www.theatlantic.com/issues/2001/09/power.htm>> (revealing a deluge of specific information of the feverish murders in major U.S. newspapers) (cited in note 23). By contrast, the first major work chronicling systematic rape and sex crimes in Rwanda was based on interviews conducted in March and April of 1996, almost two years after the genocide. See Binaifer Nowrojee, Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath vii (Human Rights Watch 1996).

collectively or through forced ‘marriage’) or sexually mutilated. These crimes were frequently part of a pattern in which Tutsi women were raped after they had [been forced to] witness the torture and killings of their relatives and the destruction and lootings of their homes. According to witnesses, many women were killed immediately after being raped. Other women managed to survive only to be told that they were being allowed to live so that they would ‘die of sadness.’ . . . Rapes were sometimes followed by sexual mutilation, including mutilation of the vagina and pelvic area with machetes, knives, sticks, boiling water, and in one case, acid.²⁵

These attacks were the product of a detailed Hutu propaganda campaign designed to target Tutsi women.²⁶ The invective exaggerated the stereotype that Tutsi women were beautiful and desirable—that they were “too good” for Hutu men and looked down on them as ugly and inferior.²⁷ Tutsi women were portrayed as “calculat[ing] seductress-spies bent on dominating and undermining the Hutu.”²⁸ The Tutsi used their women, suggested the propagandists, to infiltrate Hutu ranks.²⁹ As a result, military men were strictly forbidden from marrying Tutsi women, punishable by mandatory discharge. Tutsi women were Delilahs, pawns of the enemy who used their disarming sexual powers to seduce and deceive unassuming Hutu men, to steal their secrets and give them to Tutsis bent on Hutu destruction. Rape, then, was a means turning the table by exerting power over Tutsi women—a way to shatter these images by humiliating, degrading, and ultimately destroying the Tutsi woman.³⁰ The propaganda encouraged in the

²⁴ Kalra, 7 UC Davis J Int’l L & Policy at 199.

²⁵ Nowrojee, *Shattered Lives* at 1 (cited in note XX).

²⁶ Kalra, 7 UC Davis J Int’l L & Pol’y at 199.

²⁷ Nowrojee, *Shattered Lives* at 16, 18 (cited in note XX).

²⁸ *Id.* at 18.

²⁹ *Id.* at 16.

³⁰ *Id.*

Hutu an us-or-them mentality: the only way to prevent Tutsi women from controlling and destroying us is for us to first control and destroy them.

III. The International Criminal Tribunal for Rwanda

A. Authority for Establishment

The genocide came to an abrupt halt in July of 1994 in part because the perpetrators ran out of Tutsis, and, against all odds, a Tutsi rebel army took over the country, sparking a massive exodus of Hutus fearing reprisal.³¹ The genocidal hysteria left the country in chaos. When the violence ebbed, the question became what to do about the genocide. Most of those chiefly responsible for the genocide had fled the country, and Rwanda lacked the political leverage, the extradition treaties, and the resources necessary to gain custody of and try them.³² Rwanda's judicial system had been decimated. As of February 1, 1995, Rwanda had only a few surviving judges and not a single functioning court.³³ The trial of 30,000 Hutus suspected of involvement in the genocide had been put off indefinitely because of lack of resources.³⁴ Rwanda's only realistic hope of bringing the major instigators of the genocide to justice depended on international support. And that's precisely what they got.

On July 1, 1994, the U.N. Security Council adopted Resolution 935, which requested the Secretary General to establish a commission of experts to determine whether serious breaches of humanitarian law (including genocide) had occurred in Rwanda.³⁵ In the autumn of 1994, the commission reported to the Security Council that genocide and widespread, systematic, and

³¹ Paul J. Magnarella, Expanding the Frontiers of Humanitarian Law: The International Criminal Tribunal for Rwanda 9 Fla J Int'l L 421, 423 (1994).

³² Alphonse Marie Nkubito, Statement by the Minister of Justice of Rwanda to the First Public Hearing of the First Session of the International Criminal Tribunal for Rwanda at the Hague (June 27, 1995) (transcript) cited in Magnarella, 9 Fla J Int'l L at 426.

³³ Tom Ashbrook, Rwanda's Fate Lies with Refugees, Boston Globe, Feb 1, 1995, at 1, cited in Magnarella, 9 Fla J Int'l L at 435.

³⁴ Rwanda Opens the Trial of 14 in the Military, NY Times, May 3, 1995, at A12 cited in Magnarella, 9 Fla J Int'l L at 435-36.

flagrant violations of international humanitarian law had been committed in Rwanda, resulting in massive loss of life.³⁶ On November 8, 1994, the U.N. Secretary General submitted to the Security Council a statute authorizing the creation of the International Criminal Tribunal for Rwanda (“ICTR”).³⁷ Boutros Ghali claimed he was “convinced . . . [that] the prosecution of persons responsible for serious violations of international humanitarian law in Rwanda . . . would contribute to the process of national reconciliation and to the restoration and maintenance of peace.”³⁸ The Security Council adopted the Secretary General’s report and the ICTR statute without change.³⁹

Aware that member states might be reluctant to support the ICTR, the U.N. strategically established the tribunal by exercising the Security Council’s powers under Chapter VII of the U.N. charter.⁴⁰ Article 39 of Chapter VII authorizes the Security Council to determine when threats to the peace exist and requires it to determine, in accordance with Articles 41 and 42, what measures will be taken to maintain or restore international peace and security.⁴¹ Article 42 governs military actions, and Article 41 empowers the Security Council to determine what measures shall be applied to non-military actions.⁴² Article 41 lists a variety of measures that may be used to achieve Article 39 objectives. Although judicial measures are not listed expressly, the “may include” language suggests the list is not exhaustive.⁴³ Article 48 obligates

³⁵ SC Res 935, UN SCOR, 3400th mtg at 2, UN Doc S/RES/935 (1994) cited in Magnarella, 9 Fla J Int’l L at 424.

³⁶ Magnarella, 9 Fla J Int’l L at 424.

³⁷ Id.

³⁸ SC Res 955, UN SCOR, 3453rd mtg at 1, UN Doc S/RES/955 (1994) quoted in Magnarella, 9 Fla J Int’l L at 424. This remark tracks the language of Chapter VII of the U.N. charter, the provision used to authorize the creation of the tribunal. See text accompanying notes 40-46.

³⁹ Magnarella, 9 Fla J Int’l L at 425.

⁴⁰ Id at 426.

⁴¹ UN Charter, art 39 cited in Magnarella, 9 Fla J Int’l L at 426 (noting that the Security Council presumably regarded the massive flow of refugees and the remnants of the Hutu militias as a threat to international peace).

⁴² UN Charter, art 41 cited in Magnarella, 9 Fla J Int’l L at 426.

⁴³ UN Charter, art 41 cited in Magnarella, 9 Fla J Int’l L at 427.

member states to support the Security Council's determination by implementing these measures.⁴⁴

The traditional process of establishing such a tribunal by treaty had two major disadvantages. First, it was too slow. It might take years to reach full ratification.⁴⁵ Second, member states could drag their feet, and the U.N. could not force them to ratify the treaty against their wishes.⁴⁶ By going the Chapter VII route, the U.N. could establish the ICTR immediately and require member states to cooperate with the ICTR and honor any lawful requests for assistance consistent with its statute.

B. The ICTR's Composition

The ICTR is made up of two trial chambers, each with three judges and one appeals chamber with five judges, the office of the prosecutor, and a registry.⁴⁷ The Chief prosecutor and all judges are elected and appointed by the U.N. The judges, chief prosecutor and registrar are all from different countries, including several African countries.⁴⁸

C. The ICTR Statute and Its Jurisdiction

1. Temporal and Personal Jurisdiction

The temporal jurisdiction of the ICTR is limited to the year 1994 only.⁴⁹ The ICTR statute ("the statute") exerts personal jurisdiction more broadly than any other international tribunal.⁵⁰ Under the statute, the ICTR possesses both personal and territorial jurisdiction in

⁴⁴ UN Charter, art 48 cited in Magnarella, 9 Fla J Int'l L at 427.

⁴⁵ UN Doc A/49/342, S/1994/1007 (1994) cited in Magnarella, 9 Fla J Int'l L at 426.

⁴⁶ UN Doc A/49/342, S/1994/1007 (1994) cited in Magnarella, 9 Fla J Int'l L at 426.

⁴⁷ SC Res 955, UN SCOR, arts 10-11 cited in Magnarella, 9 Fla J Int'l L at 427.

⁴⁸ Magnarella, 9 Fla J Int'l L at 427.

⁴⁹ SC Res 955, UN SCOR, Art. I.

⁵⁰ See Magnarella, 9 Fla J Int'l L at 428 (noting that "[b]y granting the ICTR competence to prosecute Rwandans who allegedly committed certain crimes abroad, the Security Council has added a new dimension to the humanitarian law of non-international armed conflict").

Rwanda *as well as* limited personal and territorial jurisdiction in surrounding states.⁵¹ Moreover, while the statute allows concurrent jurisdiction between the ICTR and domestic courts,⁵² it requires national courts to defer to its jurisdiction upon formal request.⁵³ On its face, this appears to violate the principle of territoriality, which confers on all states the competence to prosecute defendants for crimes committed within their territories.⁵⁴ Although Rwandans voluntarily ceded some of their jurisdiction to the ICTR by formally requesting it, neighboring states never did so.⁵⁵ Thus, under the statute, neighboring states are required to give up some of their territorial jurisdiction without their consent.⁵⁶ The legal justification is Chapter VII, which is binding on all member states.⁵⁷ If states refuse to honor the statute's assertion of jurisdiction, they are subject to U.N. sanctions.⁵⁸

2. Subject Matter Jurisdiction

The Security Council is not a legislative body and therefore lacks the competency to enact substantive law for the ICTR.⁵⁹ Instead, it authorized the ICTR to apply existing international humanitarian law governing non-international armed conflicts.⁶⁰ The humanitarian law incorporated into the statute consists of the Genocide Convention,⁶¹ which was ratified by

⁵¹ SC Res 955, UN SCOR, Art. I (extending jurisdiction over Rwandan citizens falling under the court's subject matter jurisdiction who committed crimes in neighboring states).

⁵² SC Res 955, UN SCOR, Art. VIII, § 1.

⁵³ SC Res 955, UN SCOR, Art. VIII, § 2 (granting the ICTR "primacy over the national courts of all states" and noting that it may "formally request national courts to defer to its competence in accordance with the present statute").

⁵⁴ See Magnarella, 9 Fla J Int'l L at 428 (recognizing that "[a]ll states . . . have the competence to prosecute Rwandans for crimes committed within their territories").

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ Id.

⁵⁸ Id.

⁵⁹ See UN Charter Arts. 24-26.

⁶⁰ SC Res 955, UN SCOR, Art. I (authorizing the prosecution of "persons responsible for serious violations of international humanitarian law").

⁶¹ Convention on the Prevention and Punishment of the Crime of Genocide 78 UNTS 277 (Dec 9, 1948).

Rwanda, crimes against humanity as defined by the Nuremberg Charter,⁶² Article 3 Common to the Geneva Conventions,⁶³ and Additional Protocol II,⁶⁴ also ratified by Rwanda. Crimes against humanity and the prohibition and punishment of acts of genocide are part of customary international law, binding on all states.⁶⁵ The specific provisions and reasoning giving rise to the landmark jurisprudence on rape and sexual violence are discussed in the next section.

IV. The Akayesu Case

A. Background

The Akayesu case was a case of “firsts.”⁶⁶ In addition to being the first full case decided by the ICTR, it marked the first time an international criminal tribunal has tried and convicted an individual for genocide and international crimes of sexual violence.⁶⁷ It was also the first time an international criminal tribunal found that in certain contexts sexual violence, including rape, could constitute genocide.⁶⁸

⁶² Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, 59 Stat 1544, 1546, 82 UNTS 279, 284 (Aug 8, 1945).

⁶³ Geneva Conventions Nos. 970-73, 75 UNTS 31, 85, 135, 287 (Aug 12, 1949).

⁶⁴ Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of Non-International Armed Conflict, 1125 UNTS 609 (Dec 12, 1977).

⁶⁵ Hilaire McCoubrey, International Humanitarian Law: The Regulation of Armed Conflicts 140 (Gower 1990); Theodor Meron, War Crimes in Yugoslavia and Development of International Law, 88 Am J Int'l L 78 (1944) cited in Magnarella, 9 Fla J Int'l L at 429.

⁶⁶ Prosecutor v Jean-Paul Akayesu, Case No ICTR 96-4-T (Sept 2, 1998), available online at <<http://www.ictor.org/wwwroot/ENGLISH/cases/Akayesu/judgement/akay001.htm>> (visited June 7, 2002).

⁶⁷ Diane Marie Amann; Bernard D. Oxman, ed. International Decisions: Prosecutor v. Akayesu Case ICTR-96-4-T. International Criminal Tribunal for Rwanda, September 2, 1998.

⁶⁸ Paul J. Magnarella, Some Milestones and Achievements at the International Criminal Tribunal for Rwanda: The 1998 Kambanda and Akayesu Cases, 11 Fla J Int'l L 517, 518, 528 (1997). However, there were some domestic decisions headed in that direction. See, for example, Kadic v Karad i, 70 F3d 232 (2d Cir 1995) (holding that for purposes of the Alien Tort Act and the Torture Victim Protection Act rape could be claimed as an act of genocide in law). This civil action was brought in U.S. district court against Radovan Karad i, leader of the Bosnian Serbs who engaged in a genocidal campaign of “ethnic cleansing” of Bosnia-Herzegovina of all non-Serbs in the mid-1990s, for planning and directing mass rape. See Catharine A. MacKinnon, Sex Equality 898 (Foundation 2001). A New York jury eventually awarded the Kadic plaintiffs \$745 million in compensatory and punitive damages. Judgment, Kadic v Karad i, (S D NY No 93 Civ 1163) (August 16, 2000) cited in MacKinnon, Sex Equality at 898 (cited in note 68). See also, In re Yamashita, 327 US 1 (1946) (enforcing the principle of command responsibility for rape in war); Mejía v Peru, Case 10.970, Report No 5/96, Inter-Am CHR, OEA/Ser.L/V/II.91 Doc 7, at 157 (1996) reprinted in 1 Inter-Am YB on HR 1120 (finding a nation responsible for acts of rape committed by official actors and conceiving rape as torture under regional human rights instruments) cited in MacKinnon, Sex Equality at 903 (cited in note 68).

Jean-Paul Akayesu is a Rwandan national born in 1953.⁶⁹ He spent most of his adult life as a local teacher and later, a school inspector.⁷⁰ In 1991, Akayesu entered into politics, serving as a founding member of the Mouvement Democratique Republican (“MDR”).⁷¹ He served as the chairman of the local wing of the MDR in the Taba commune.⁷² In April 1993, about a year before the genocide, Akayesu was elected *bourgmestre* (mayor) of Taba.⁷³ He held that position until June 1994, when he fled to Zambia.⁷⁴ Akayesu was arrested in Zambia on October 10, 1995.⁷⁵

B. Sexual Violence and Rape as Crimes Against Humanity and Genocide

On February 13, 1996, prosecutor Richard Goldstone submitted an indictment against Akayesu.⁷⁶ Rape was not part of the original indictment.⁷⁷ After witnesses testified about brutal sexual assaults, the sole female judge on the panel, Judge Pillay—backed by a number of human rights groups—pressured the ICTR to pursue further investigation into these sexual crimes.⁷⁸ The investigation led to an amended indictment on June 17, 1997, adding rape to the charges against Akayesu.⁷⁹

Specifically, the indictment added counts 13 through 15. Counts 13 alleged rape in violation of article 3(g), and Count 14 alleged other inhumane acts in violation of article 3(i) of the statute—both crimes against humanity.⁸⁰ Count 15 alleged “outrages upon personal dignity,

⁶⁹ Akayesu, ICTR 96-4-T at 1.1, cited in Magnarella, 11 Fla J Int’l L at 528.

⁷⁰ Akayesu, ICTR 96-4-T at 1.1, cited in Magnarella, 11 Fla J Int’l L at 528.

⁷¹ Akayesu, ICTR 96-4-T at 1.1, cited in Magnarella, 11 Fla J Int’l L at 528.

⁷² Akayesu, ICTR 96-4-T at 1.1, cited in Magnarella, 11 Fla J Int’l L at 528.

⁷³ Akayesu, ICTR 96-4-T at 1.1, cited in Magnarella, 11 Fla J Int’l L at 528.

⁷⁴ Akayesu, ICTR 96-4-T at 1.1, cited in Magnarella, 11 Fla J Int’l L at 528.

⁷⁵ Akayesu, ICTR 96-4-T at 1.4.1, cited in Magnarella, 11 Fla J Int’l L at 528.

⁷⁶ Magnarella, 11 Fla J Int’l L at 528.

⁷⁷ Amann, 93 AJIL at 196.

⁷⁸ Id.

⁷⁹ Id. See also, Amended Indictment, available online at

<http://www.ictr.org/wwwroot/ENGLISH/cases/Akayesu/indictment/actamond.htm> (visited June 7, 2002).

⁸⁰ Amended Indictment, available online at

<http://www.ictr.org/wwwroot/ENGLISH/cases/Akayesu/indictment/actamond.htm> (visited June 7, 2002).

in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault” in violation of article 4(e), which punishes violations of article 3 common to the Geneva Conventions and of Additional Protocol II.⁸¹

1. Sexual Violence

To support these three counts, the prosecutor added three paragraphs to the indictment—10A, 12A, and 12B. 10A proposes a definition of sexual violence as one kind of inhumane act in violation of article 3(i) (count 14) and attempts to clarify the allegations set forth in paragraphs 12A and 12B:

10A. In this indictment, acts of sexual violence include forcible sexual penetration of the vagina, anus or oral cavity by a penis and/or of the vagina or anus by some other object, and sexual abuse, such as forced nudity.⁸²

12A. Between April 7 and the end of June, 1994, hundreds of civilians (hereinafter "displaced civilians") sought refuge at the bureau communal. The majority of these displaced civilians were Tutsi. While seeking refuge at the bureau communal, female displaced civilians were regularly taken by armed local militia and/or communal police and subjected to sexual violence, and/or beaten on or near the bureau communal premises. Displaced civilians were also murdered frequently on or near the bureau communal premises. Many women were forced to endure multiple acts of sexual violence which were at times committed by more than one assailant. These acts of sexual violence were generally accompanied by explicit threats of death or bodily harm. The female displaced civilians lived in constant fear and their physical and psychological health deteriorated as a result of the sexual violence and beatings and killings.⁸³

12B. **Jean Paul AKAYESU** knew that the acts of sexual violence, beatings and murders were being committed and was at times present during their commission. **Jean Paul AKAYESU** facilitated the commission of the sexual violence, beatings and murders by allowing the sexual violence and beatings and murders to occur on or near the bureau communal premises. By virtue of his presence during the commission of the sexual violence, beatings and murders and by failing to prevent the sexual violence, beatings and murders, **Jean Paul AKAYESU** encouraged these activities.⁸⁴

⁸¹ Amended Indictment, available online at <http://www.ictor.org/wwwroot/ENGLISH/cases/Akayesu/indictment/actamond.htm> (visited June 7, 2002).

⁸² Amended Indictment, available online at <http://www.ictor.org/wwwroot/ENGLISH/cases/Akayesu/indictment/actamond.htm> (visited June 7, 2002).

⁸³ Amended Indictment, available online at <http://www.ictor.org/wwwroot/ENGLISH/cases/Akayesu/indictment/actamond.htm> (visited June 7, 2002).

⁸⁴ Amended Indictment, available online at <http://www.ictor.org/wwwroot/ENGLISH/cases/Akayesu/indictment/actamond.htm> (visited June 7, 2002) (emphasis in original).

The court ultimately adopted a definition of sexual violence even broader than that proposed by the prosecution in 10A. The court defined sexual violence as “any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.”⁸⁵ Forcing a girl to strip in a public courtyard and do gymnastics in front of a crowd constitutes sexual violence.⁸⁶

2. Rape

Although the statute lists “rape” specifically as a crime against humanity, it does not define it. The next step is to look at what rape means under international law. Because the ICTR concluded that “there is no commonly accepted definition of the term ‘rape’ in international law,” it had to determine on its own what rape (as a crime against humanity) means.⁸⁷ The court chose to regard rape as a form of aggression and looked to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment for guidance.⁸⁸ The court noted that the Convention “does not catalogue specific acts in its definition of torture, but rather focuses on the conceptual framework of state sanctioned violence.”⁸⁹ Following suit, the court reasoned that like torture, rape is used for such purposes as “intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person.”⁹⁰ Similarly, rape and torture both violate personal dignity, and rape constitutes torture when it is “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in

⁸⁵ Akayesu, Case No ICTR 96-4-T (Sept 2, 1998), available online at <http://www.ictor.org/wwwroot/ENGLISH/cases/Akayesu/judgement/akay001.htm> (visited June 7, 2002).

⁸⁶ Id.

⁸⁷ Id.

⁸⁸ Id.

⁸⁹ Id.

⁹⁰ Id.

an official capacity.”⁹¹ The court defined rape as any “physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”⁹²

The court found that (i) there was sufficient evidence to establish beyond a reasonable doubt that Tutsi girls and women were subjected to sexual violence, beaten, and killed on or near the communal premises and elsewhere in Taba in 1994; (ii) Akayesu knew, or should have known, that sexual violence was being inflicted on those women who were kept at the bureau communal and those taken from there; (iii) no evidence suggested that Akayesu attempted to prevent this sexual violence or punish the perpetrators; and (iv) there was evidence that Akayesu, ordered, instigated, aided and abetted the sexual violence.⁹³ Accordingly, Akayesu was convicted of crimes against humanity for rape and other inhumane acts corresponding to the allegations in counts 13 and 14.⁹⁴

3. Rape and Sexual Violence as Genocide

Perhaps the most famous holding in Akayesu—that rape can constitute genocide—was raised *sua sponte* by the court. Article 2 defines genocide as “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”⁹⁵ The *actus reus*⁹⁶ does not require systematic murder of members of the group. “Causing serious bodily or mental harm to members of the group” is enough.⁹⁷ Because rape and sexual violence constitute serious bodily or mental harm, the court found them to be genocide in the same way as any other act falling under article 2(2) so long as they were committed with the specific intent to destroy, in whole or in part, a particular group.

⁹¹ Id.

⁹² Id.

⁹³ Id.

⁹⁴ Id.

⁹⁵ SC Res 955, UN SCOR, Art 2(2).

⁹⁶ Every crime has two components that must be proved by the prosecutor—the *actus reus*, or required act, and the *mens rea*, or required mental state.

In light of all the evidence before it, the court found that acts of rape and sexual violence were committed against exclusively Tutsi women, many of whom were subject to the worst sort of humiliation, mutilated and raped numerous times, frequently in public, in the Bureau communal or other public places, and frequently by multiple assailants.⁹⁸ These rapes “resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.”⁹⁹ The court concluded that Akayesu had aided and abetted these sexual crimes by allowing them to take place in his presence and by verbally encouraging them. Because of his position of authority, his open encouragement was clear signal of official tolerance for sexual violence, and the court found that the violence would not have occurred absent his approval.¹⁰⁰ Akayesu was therefore criminally responsible for the acts of genocide alleged in paragraphs 12A and B.

V. Analysis of the Case

While criminal trials are clearly legal events designed to determine guilt in a specific case, they almost always include a political element. This political element is enhanced when the trial is public. In the case of the ICTR, its very creation was premised in part on the political objectives of bringing peace to the region and facilitating reconciliation. As a result, an analysis of Akayesu is incomplete without an analysis of both the legal and political dimensions. While a

⁹⁷ Id. at Art 2(2)(b).

⁹⁸ Magnarella, 11 Fla J Int'l L at 536.

⁹⁹ Magnarella, 11 Fla J Int'l L at 536 quoting Prosecutor v Jean-Paul Akayesu, Case No ICTR 96-4-T (Sept 2, 1998), available online at <<http://www.ictor.org/wwwroot/ENGLISH/cases/Akayesu/judgement/akay001.htm>> (visited June 7, 2002).

¹⁰⁰ Magnarella, 11 Fla J Int'l L at 536 citing Prosecutor v Jean-Paul Akayesu, Case No ICTR 96-4-T (Sept 2, 1998), available online at <<http://www.ictor.org/wwwroot/ENGLISH/cases/Akayesu/judgement/akay001.htm>> (visited June 7, 2002).

number of issues could be considered, the focus of this section will be limited to analyzing the reasoning and effects of Akayesu with respect to sex crimes.

A. Legal Analysis

Not surprisingly, the Akayesu case has received a lot of praise from commentators. For those interested in human rights, it is hard to bicker with an opinion that expands the power international tribunal to hold accountable the perpetrators of some of the most heinous human rights abuses committed in the 20th century. However, there are a number of legal grounds on which the Akayesu Court might be criticized. Several critiques are considered below as well as possible responses the Akayesu court might make.

1. Crimes Against Humanity

While it is uncontroversial that mass rape occurred in Rwanda and that rape constitutes a crime against humanity, there is a strong argument that the court made a significant legal error in finding Akayesu guilty of rape and sexual violence as a crime against humanity. The concept of crimes against humanity grew out of Nuremberg where the category was established to prosecute “war criminals.”¹⁰¹ It specifically limited crimes against humanity to acts committed “before or during war.”¹⁰² “War” described a state of armed conflict between two more countries.¹⁰³ The ICTR expressly characterizes the situation in Rwanda as an internal armed conflict.¹⁰⁴ Because crimes against humanity only apply to disputes between countries at war, it is not at issue in the civil conflict between Hutus and Tutsis.

¹⁰¹ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, 59 Stat 1544, 1546, 92 UNTS 279, 284 (August 8, 1945) cited in Magnarella, 9 Fla J Int'l L at 431.

¹⁰² Id.

¹⁰³ Id.

¹⁰⁴ Akayesu, Case No ICTR 96-4-T (Sept 2, 1998), available online at <http://www.ictr.org/wwwroot/ENGLISH/cases/Akayesu/judgement/akay001.htm> (visited June 7, 2002).

On the other hand, perhaps limiting the concept of crimes against humanity to wars formally declared between two states exalts form over substance. The main purpose of criminal law is to punish those who are blameworthy. Analytically, there is no principled difference between the culpability of citizens of a different state committing widespread systematic violence against a civilian population and citizens of the same state doing the same. Nor should the culpability calculus change where war is not formally declared. On the contrary, if anything, it is *more* blameworthy to commit such atrocious acts without declaring war. Declaring war at least puts potential victims on notice that they may be vulnerable to acts of aggression. Commentators diverge widely on what exactly constitutes war,¹⁰⁵ so perhaps the ICTR was a valid and important clarification of how broad war can be read when defining crimes against humanity.

2. Genocide

There are three elements to the crime of genocide. The first two elements are part of the *actus reus*. The third is the *mens rea*.

First, an act will not constitute genocide unless it is committed against members of a protected group. Specifically, the victims and the attackers must be distinct “national, ethnical, racial or social groups.”¹⁰⁶ After considering as a matter of first impression the meaning of each of these terms, the court determined that the Tutsis did not fall into any of these four categories.¹⁰⁷ That should be decisive. If the prosecution fails to prove beyond a reasonable doubt any of the elements necessary for the crime, then the defendant must be found not guilty of that crime.

¹⁰⁵ See, for example, Magnarella, 9 Fla J Int’l L at 431.

¹⁰⁶ Akayesu, Case No ICTR 96-4-T (Sept 2, 1998), available online at <<http://www.ictor.org/wwwroot/ENGLISH/cases/Akayesu/judgement/akay001.htm>> (visited June 7, 2002).

¹⁰⁷ Id.

Instead, the court offered a subjective test: “a court may regard any stable and permanent group, whose membership is largely determined by birth, as an ethnic group for purposes of the Genocide Convention as long as the people of the society in question perceive that group to be different from others according to local, subjective criteria.”¹⁰⁸ This is probably a sensible test. An act does not become less culpable because the victim turns out to be part of the same national, ethnic, racial, or social group. Lots of evidence at trial demonstrated that the Hutus and Tutsis viewed each other as distinct stable and permanent groups determined by birth. So the Tutsis ought to be considered a protected group.

Second, the perpetrators must commit “serious bodily or mental harm to members of the group.”¹⁰⁹ There is no dispute that the mass rape committed against Tutsi women in Rwanda rises to the level of serious bodily or mental harm. Women were frequently gang-raped publicly and left mutilated and bleeding to die. After the deeply scarring trauma of a series of rapes, one victim begged her attackers to kill her out of mercy. Acid, boiling water, sticks, and machetes were used to mutilate the vaginas of Tutsi women in the most excruciating and humiliating ways. There is simply no way to escape the fact that the mass rape and torture committed against Tutsi women satisfies the second element of genocide.

Third, the attackers must act with the intent to destroy, in whole or in part, the protected group. Proving genocidal intent is tricky, so the ICTR conceived a test for *constructive* genocidal intent: “it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others.” Factors to be considered include the scale of atrocities, the general nature of the acts, and whether there

¹⁰⁸ Magnarella, 11 Fla J Int'l L at 531.

was deliberate and systematic targeting of people because of their membership in a particular group, while excluding members of other groups.

This test is too broad. It allows the conviction of a random person—even a Tutsi—who happened to rape a Tutsi woman during the genocide. The test is formally met, and all the factors point toward conviction. Yet, it is highly unlikely that this hypothetical Tutsi actually possessed intent to destroy all Tutsis (which would entail a suicide wish). Moreover, the test could have perverse effects. It encourages the killing and rape of non-Tutsis to avoid the disparate impact factor—a small price to pay to get away with genocide.

The test is particularly problematic when applied to Akayesu. The prosecutions allegations against Akayesu relating to rape and sexual violence were largely limited to accomplice liability for failure to prevent others from committing these horrible acts when he should have. The allegations arose primarily from Akayesu's presence at the scene of several crimes. Under American jurisprudence the general rule is that no one is criminally liable for an omission unless there is a legal duty to act. This rule on omissions is, however, somewhat peculiar to American law. The prosecutor might argue that an omission should be culpable or, what amounts to practically the same thing, that Akayesu possessed a legal duty to act, but failed to do so. But isn't imposing a legal duty on Akayesu too much? He would probably be killed as a Tutsi-sympathizer or moderate Hutu had he protested. Does the law force him to choose between sacrificing his life and life in prison at the hands of the ICTR. If so, didn't he make the right choice? The necessity defense exonerates a defendant from illegal acts where one of two evils is inevitable and the actor chooses the lesser. Could Akayesu avail himself of the necessity defense here?

¹⁰⁹ Akayesu, Case No ICTR 96-4-T (Sept 2, 1998), available online at <http://www.ictor.org/wwwroot/ENGLISH/cases/Akayesu/judgement/akay001.htm> (visited June 7, 2002).

While the prosecutor might concede that the court's test is too broad, he could argue that Akayesu would be guilty even under a more stringent test. Evidence at trial suggested that Akayesu not only was present at several rapes, but at least in some instances affirmatively encouraged them. That encouragement survives even the American standard on omissions.

The necessity defense would not work for a number of reasons. First, the balance of evils would be between Akayesu paying with his life versus hundreds of women suffering horrific torture, abuse, and murder. Second, no one knows whether Akayesu would have suffered reprisal for punishing acts of sexual violence and rape against Tutsi women. Given his position of authority, the mob might have actually stopped the genocidal behavior if they believed the only alternative was to suffer sanctions. Although the consequences of Akayesu attempting to punish the mob are speculative at best, the analysis clearly favors the prosecution's position because the interests of hundreds of women in their dignity and lives decisively trumps Akayesu's interest in avoiding any risk of reprisal.

3. Purposes of Punishment

Most of the criminal law's traditional purposes of punishment are not at issue in Akayesu's case. Incapacitation is generally an attempt to keep dangerous criminals from being released into the general population where they are likely to commit crimes again. Because of the unique nature of the genocidal context in which his crimes occurred, Akayesu is probably not that likely to commit crimes again. For the same reason, rehabilitation is probably not much of an issue. Akayesu is unlikely to be a repeat offender. Specific deterrence—deterrence aimed at preventing an individual offender from repeat offenses—is also unlikely to be an issue. Even without a lengthy sentence, Akayesu is unlikely to need additional incentives to keep him from committing the same crimes again.

But all this is largely armchair psychology. We have no idea what Akayesu is likely to do if he were released. He is certainly blameworthy and deserves punishment on that count alone. Moreover, as a matter of general deterrence (deterring others from committing these crimes), the justification of a long sentence depends on how widespread this sort of rape is. If it not very widespread, the need for general deterrence is slight. Otherwise, general deterrence calls for a significant penal cost. History suggests that “[t]he utilization of rape and other violence against women during times of war has been the accepted rule. Women have been raped, intentionally, as a tactic of war, in virtually all wars, mostly by almost all military forces.”¹¹⁰ General deterrence and desert therefore counsel against allowing Akayesu a mild sentence.

B. Political Analysis

Unlike the Nuremberg trials, there is no *ex post facto* problem. It is certainly true that the principle of *nullum crimen sine lege* (requiring fair notice that an act constitutes a criminal offense) is a central premise of international law.¹¹¹ But the perpetrators of genocide possessed at least constructive notice of their crimes from international law. And there acts clearly violated domestic laws for rape, assault, murder, etc.

A more serious political issue arises in all tribunals formed in the wake of mass human rights abuses. Tribunals are enormously expensive and slow processes. And they possess limited resources. As a result, it is simply impossible to go after all the perpetrators. There must be some limiting principles, if the tribunal is to achieve its goals. This proposition suggests a general presumption against expanding legal concepts of culpability. This expansion could also raise due process problems because perpetrators did not receive advance notice of their exposure

¹¹⁰ Beth Stephens, Humanitarian Law and Gender Violence: An end to centuries of neglect? 3 Hofstra L & Pol’y Symp 87, 88 quoted in 7 UC Davis J Int’l L & Pol’y at 201.

to enhanced criminal liability. On the other hand, the U.N. conceived the ICTR as legal institution with strong political goals: namely—facilitating reconciliation and preserving peace in the region. Part of this goal depends on a strong sense by the victims that the perpetrators have not literally gotten away with murder. But reconciliation can cut both ways. Rwandan national courts have reduced maximum rape sentences to three years to encourage Hutus fearing reprisal to return to the country, serve their time, and be reintegrated in the country. Thus, absent a strong stand against rape by the ICTR, most rapists will get away with 3 years or less of punishment, which must in the eyes of the victim marginalize the gravity of the terror and abuse they suffered. Thus, the ICTR faces the difficult task of balancing the practical limitations on its ability to expand criminal categories against the need promote reconciliation by providing a sense that justice is done. Perhaps the ICTR has struck this balance correctly by infusing a large volume of jurisprudential innovations in a single case like Akayesu's.

VI. Conclusion

Genocide cannot be fixed, it must be prevented. In the years following the Rwandan genocide, it has become increasingly clear that this genocide in particular could easily have been thwarted with a very modest military presence. It is a frightening illustration of Edmund Burke's famous warning that "all that is necessary for the triumph of evil is for good men [and women] to do nothing." In the wake of perhaps the most egregious foreign policy error in history, the world must acknowledge that it cannot make the victims whole or bring the country back to a pre-genocide state. The best we can hope for is partial mitigation of the cataclysmic effects of the disaster.

In a human rights atrocity of any proportion, four things are necessary: (i) urgent release for the victims; (ii) perpetrator accountability; (iii) structural prevention, and (iv) victim after

¹¹¹ Nersessian, The Contours of Genocidal Intent, 37 Tex Int'l L J at 245 n 103.

care. The international community utterly failed to bring Rwandans urgent release. Perhaps the ICTR can at least bring some measure of perpetrator accountability and structural prevention. Balancing the political and legal objectives is tricky business, but so far, the ICTR has done an admirable job.