

Prosecuting the perpetrators of the 1994 genocide in Rwanda: Its basis in international law and the implications for the protection of human rights in Africa

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1 Introduction

Tremendous progress has been made in relation to the protection of human rights all over the world. Nevertheless, accounts of human rights violations continue to be a major feature in many countries.¹ How emerging democracies ought to address the human rights violations of the recent past when the perpetrators still wield considerable political or military influence is a significant problem.² Some states have resorted to granting amnesty to the perpetrators,³ others have opted to prosecute

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1 From dozens of countries on all continents, political regimes continue to perpetrate, tolerate or fail to stop torture, forcible deportations and persecution of whole populations, rape of women, and conscription of children into wars. For details see, for instance, Amnesty International's country reports, 2000 <<http://www.amnesty.org>> (accessed 25 January 2001).

2 J Zalaquett 'Balancing ethical imperatives and political constraints: The dilemma of new democracies confronting past human rights violations' (1992) 43 *Hastings Law Journal* 1425 1426.

3 Such as Argentina, El Salvador and South Africa.

them,⁴ and still others have done nothing about the issue, adopting a 'business as usual' attitude.⁵

This contribution examines the legal basis for the prosecution of those responsible for the genocide in Rwanda in 1994, and the implications of those prosecutions for the protection of human rights on the African continent. The introduction is followed by a brief account of the 1994 Rwandan genocide. Part 3 discusses the measures that were taken to ensure justice after the genocide. The government of Rwanda played an important role in the process that led to the establishment of the International Criminal Tribunal for Rwanda (ICTR). Moreover, the Rwandan government initiated prosecutions within the domestic court system. To deal with the problem of delays in the prosecutions in the regular courts, proposals have been made to establish *gacaca* tribunals, which will blend traditional and modern methods of administration of justice.

Part 4 analyses the legal basis for prosecuting the perpetrators of the genocide as a crime under international law. Here it is argued that Rwanda's choice to prosecute, rather than grant amnesty or ignore the perpetrators of the 1994 genocide, is compatible with the duty of states imposed by international criminal law. Part 5 examines the possible implications of Rwanda's prosecution of those accused of committing genocide on the protection of human rights on the African continent. Part 6 contains some concluding remarks.

2 The genocide

In the spring of 1994, an estimated 800 000 people⁶ were killed in Rwanda in one of the worst cases of genocide in history. The slaughter began on 6 April 1994, a few hours after the plane bringing home Rwandan President Juvenal Habyarimana and his Burundi counterpart Cyprien Ntaryamira from peace talks in Tanzania was shot down by rocket fire as it approached Kigali airport.⁷

4 Such as Rwanda.

5 Malawi, for instance, falls into this category. Despite the atrocities that were committed during the reign of 'life president' Kamuzu Banda, the successor government has not so far come up with a detailed, systematic plan for prosecuting those responsible for human rights violations during the regime of President Banda. In Eastern European countries, following the fall of communism, little action has been taken against the functionaries of the previous regimes.

6 The exact number of those who were killed during the genocide has never been known. Estimates range from 500 000 to 1 000 000 persons. See UN Doc E/CN.4/1994/7 (1994) para 24.

7 A Destexhe (1995) *Rwanda and genocide in the twentieth century* 1.

It seems that the genocide had been planned long in advance and that the only thing needed was the spark to set it off.⁸ Even before the national radio announced the death of President Habyarimana, death lists were being circulated to facilitate the identification of the targets.⁹ Furthermore, a few months before, *Radio-Télévision Libre des Mille Collines* (RTLM) had been spreading violent propaganda on a daily basis, fomenting hatred and urging its listeners to exterminate the Tutsi, whom they referred to as the *inyenzi* or 'cockroaches'.¹⁰ Working from prepared lists, an unknown number of people, often armed with machetes, nail-studded clubs or grenades, methodically murdered those on the lists. Virtually every segment of the society participated: doctors, nurses, teachers, priests, nuns, businessmen, government officials of every rank, and even children.¹¹

In Rwanda a person's ethnic identity became his or her death warrant or guarantee of survival. The crusade was led by the Rwandan Armed Forces as well as two militia groups: the *interahamwe* (those who stand together) and the *impuzamugambi* (those who only have one aim). Within a span of 100 days, almost 800 000 men, women and children (mostly Tutsis) were killed, not only in their villages but also in schools, hospitals and even churches.

3 Justice after the genocide: prosecuting the perpetrators

A pertinent question that confronted the Rwandan society after the genocide was how to deal with the perpetrators of the genocide. The scale of the genocide and the extent to which it affected the entire country and almost the entire population — whether as victims or as perpetrators — have presented Rwanda with obstacles of an unprecedented magnitude.¹² The Rwandan government set in motion a process aimed at ensuring individual criminal responsibility for the perpetrators. To this

8 See Report on the situation of human rights in Rwanda, (UN Doc E/CN.4/1995/7 (1994) para 19), where the Special Rapporteur of the UN Commission on Human Rights noted that the assassination of Habyarimana was simply the spark to the powder keg which set off the massacre of civilians and not the root cause of the genocide.

9 See Destexhe (n 7 above) 1 ; CM Peter 'The International Criminal Tribunal for Rwanda: Bringing the killers to book' (1997) 321 *International Review of the Red Cross* 695 <<http://www.ictrc.org/English/publications>> (accessed 25 January 2001).

10 Peter (n 9 above) 1; also see T Meron 'International criminalization of internal atrocities' (1995) 89 *American Journal of International Law* 554.

11 Peter (n 9 above) 2.

12 IG Tuzinde (2000) *Justice and social reconstruction in the aftermath of genocide in Rwanda: An evaluation of the possible role of the gacaca tribunals* Unpublished LLM dissertation, University of Pretoria 16.

end, the government played a crucial role in the establishment of the ICTR. The government also began to prosecute accused persons within the domestic courts.

3.1 The International Criminal Tribunal for Rwanda

The International Criminal Tribunal for Rwanda (ICTR) was established by United Nations (UN) Security Council Resolution 955 of 8 November 1994.¹³ Its purpose is to 'prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring states between 1 January and 31 December 1994'.¹⁴ At the same time, the Security Council adopted the Statute of the ICTR (ICTR Statute) and requested the UN Secretary General to make political arrangements for its practical functioning. The ICTR is based in Arusha, Tanzania.¹⁵

The idea of creating the ICTR actually originated from the Rwandan government. Rwanda happened to be a member of the Security Council in 1994. In September that year the government of Rwanda wrote to the President of the Security Council calling for the earliest possible establishment of an international tribunal to try the alleged criminals.¹⁶ However, it is interesting to note that eventually Rwanda voted against Resolution 955, which established the Tribunal. The reasons advanced for this conduct were as follows:¹⁷

- The seat of the Tribunal should have been in Kigali, so that it could play an exemplary and deterrent role.
- The Tribunal's competence *ratione temporis* (temporal jurisdiction) was limited to acts committed in 1994. Acts committed during the preceding planning period, and smaller-scale massacres occurring before 1994, were not taken into account.

13 Rwanda was the only member of the Security Council that voted against the resolution.

14 Art 1, ICTR Statute <www.ictor.org> (accessed 25 January 2001).

15 The decision to have the ICTR in Arusha was reached after protracted deliberations. Geographical, political and legal considerations had to be taken into account.

16 See O Dubois 'Rwanda's national criminal courts and the International Tribunal' (1997) 321 *International Review of the Red Cross* 717. For the content of the Rwandan government's letter to the President of the Security Council, see UN Doc S/1994/115 of 29 September 1994. On 6 October 1994 the President of Rwanda in his address to the UN General Assembly reiterated that the establishment of an international tribunal for Rwanda was an 'extremely urgent matter': see Official Records of the UN General Assembly, 49th session, Plenary Meetings, 21st Meeting, 5.

17 These reasons are elaborated on in Dubois (n 16 above); see also V Morris & MP Scharf (1995) *The International Criminal Tribunal for Rwanda: Volume 1* generally.

- The Tribunal could not possibly deal with its task effectively, considering that the Appeals Chamber and the Prosecutor were to be common to the tribunals for Rwanda and for the former Yugoslavia.
- There was nothing in the statute to establish the Tribunal's priorities with regard to the crime of genocide underlying its very inception.
- Some countries that had supported the genocidal regime would participate in the process of nominating judges.
- The exclusion of capital punishment from the penalties that the Tribunal was empowered to impose was unacceptable because convicted persons would not be subjected to the death penalty like their counterparts convicted under the national courts in Rwanda for similar offences.

Erasmus¹⁸ has argued that the ICTR was in effect born out of the efforts of the international community to respond to the Rwandan genocide. While this may be true, one must not underestimate the role played by Rwandan authorities in pressing the international community to establish the ICTR. Security Council Resolution 955 of 1994, which established the ICTR, pertinently refers to the 'request of the Government of Rwanda',¹⁹ making it clear that the co-operation and consent of Rwanda had been obtained.²⁰

3.2 Prosecution in domestic courts

Rwandan authorities decided to supplement the work of the ICTR by prosecuting those implicated in the 1994 genocide in the domestic courts of Rwanda. To this end, Rwanda's Transitional National Assembly enacted an 'organic law'²¹ which came into effect on 1 September 1996. The Organic Law creates chambers to prosecute four levels of

18 See G Erasmus & N Fourie 'The International Criminal Tribunal for Rwanda: Are all issues addressed? How does it compare to South Africa's Truth and Reconciliation Commission?' (1997) 321 *International Review of the Red Cross* 705 708-9, where they argue that the ICTR may not be directly compared with the South African Truth and Reconciliation Commission (TRC) because, while the establishment of the ICTR was an initiative of the international community, the TRC owes its existence to a 'home-grown' process designed by South Africans themselves without international involvement. However, R Aly ('The Truth and Reconciliation Commission' (1998) Centre for Human Rights, Occasional Paper 12) argues that even with respect to the TRC, 'international experience and considerations' did play a crucial role in its establishment.

19 See Res 955 (1994) 2.

20 F Viljoen 'The role of the law in post-traumatised societies: Addressing gross human rights violations in Rwanda' (1997) 30 *De Jure* 18.

21 See Organic Law 8/96 of 30 August 1996, on the Organisation of prosecution of offences constituting the offence of genocide or crimes against humanity committed since 1 October 1990. Reprinted in *Rwanda Reconciliation* (1996) 15-22.

offenders,²² ranging from the planners of the genocide to those who merely committed offences against property.

Any person accused before domestic courts in Rwanda may confess to the alleged offence.²³ However, such a confession is only a mitigating factor,²⁴ operating similarly to the concept of 'plea bargaining' common in adversarial justice systems. Disclosure of specific offences does not exempt one from prosecution, conviction and punishment under the criminal justice system.²⁵

The justice process has remained a laborious and frustrating one in domestic courts. The trials began in 1996, yet by January 2000 no more than 2 500 people had been tried and no fewer than 120 000 are still detained and awaiting trial, often in deplorable conditions.²⁶ At the present rate, it is estimated that it would take anywhere between two and four centuries to try all those in detention.²⁷ It is against this background that the *gacaca* system of justice has been proposed.

The *gacaca* system has been proposed in order to address the number of outstanding prosecutions. The process is also expected to allow communities (usually lay people) to establish the facts and decide the fate of the vast majority of those accused of lesser offences, while at the same time addressing reconciliation objectives and involving the population on a mass scale in the disposition of justice.²⁸ The *gacaca* tribunals will apply both customary and statutory law. Whether or not the *gacaca* proposals will adhere to the procedural and substantive elements of the right to a fair trial is a matter of speculation and is outside the scope of the present enquiry.

4 The basis for prosecuting perpetrators of the crime of genocide in international law

Academic writers are sharply divided over the wisdom of the choice by transitional democracies to prosecute the perpetrators of gross violations of human rights, such as the 1994 genocide.²⁹ Amnesty is often seen as

22 Arts 2 and 14 Organic Law 8/96.

23 The admission and confession provisions are set out in Chapter III of the Organic Law.

24 Art 15; see Viljoen (n 20 above) 26.

25 Viljoen (n 20 above) 27.

26 Tuzinde (n 12 above) 33.

27 As above.

28 Tuzinde (n 12 above) 34.

29 See, for instance, MA Drumbl 'Punishment, postgenocide: From guilt to shame to *civis* in Rwanda' (2000) 75 *New York University Law Review* 1221, where the author doubts the ability of achieving peace, justice and human rights through prosecution of the perpetrators of the 1994 genocide in Rwanda. See also Tuzinde (n 12 above) 33. But other writers such as DF Orentlicher 'Settling accounts: The duty to prosecute human rights violations of a prior regime' (1991) 100 *Yale Law Journal* 2537 2540 (n 5) support prosecutions for atrocious crimes such as genocide.

an effective way of consolidating the society, ensuring that both the victim and the aggressor are able to continue co-existing. Despite the fact that the general issue of accountability for past human rights abuses has generated rich discussion, there has been relatively little analysis to date of applicable rules of international law.³⁰

The following part of this contribution examines some of the policy reasons that are advanced for and against the prosecution of those accused of past violations of human rights. It proceeds to elucidate the principles of international law regarding the individual prosecution of the perpetrators of genocide, with a view to measuring the reasons for and against prosecutions against the yardstick of the law. The basic presumption here is that the law has a role to play in ending cycles of violence and the consolidation of democratic institutions.

4.1 The case for amnesty

First, proponents of the view that granting amnesty to those implicated in atrocities in the past argue that amnesty helps a society to achieve reconciliation and healing after a period of conflict and social trauma.³¹ Societies must, according to this view, accept that one of the prices of consolidating a post-traumatised democracy is the forgoing of redress of past human rights violations.³² States that have relied on this argument to grant amnesty include Argentina, Benin, Chile, El Salvador and South Africa. The 'reconciliation theory' also argues that a retributive approach to past atrocities (by punishing violators) may provoke, by a causal chain, similar or even worse abuses.³³

This view sees amnesty as the best option for sustaining a young and fragile democracy that is reeling from human rights atrocities committed in the recent past.

Second, it has been argued that granting amnesty to perpetrators of gross violations of human rights helps to reveal the truth and establish an official record of what occurred.³⁴ This argument is linked to the reconciliation theory. Basically, the exposure of the truth is seen as crucial to the promotion of social healing and the provision of victims with at least some psychological satisfaction.

Third, it has been argued that amnesty is a better alternative to a complete failure to prosecute.³⁵ The failure to prosecute past violations,

30 Orentlicher (n 29 above) 2540.

31 International Council on Human Rights (1999) *Hard cases: Bringing human rights violators to justice abroad — a guide to universal jurisdiction* 15; Villoren (n 20 above) 18.

32 Villoren (n 20 above) generally.

33 See CS Nino 'The duty to punish past abuses of human rights put into context: The case of Argentina' (1991) 100 *Yale Law Journal* 2619 2620.

34 See International Council on Human Rights (n 31 above).

35 n 31 above 'Introduction'.

it is argued, may quite often arise from the inability to do so, for example, in weak and failed states where the legal structures for such prosecutions are not in place.³⁶ This argument may be valid in relation to Rwanda, where the large number of suspects in detention has almost overwhelmed that country's structures for the administration of justice.

4.2 The case for prosecutions

A number of arguments have been advanced in favour of prosecuting past violators of human rights. First, it is often argued that violations must be prosecuted in order to bring them to justice for the commission of terrible offences.³⁷ It is contentious what the term 'justice' means,³⁸ and there is clearly a delicate balance between seeking vengeance and desiring suitable punishment. However, some argue that punishment of some sort is a component of justice.³⁹

Second, prosecutions are considered to be supporting the rule of law. This view asserts that failure to prosecute past human rights violations will not provide a firm basis for building the rule of law in future.⁴⁰ The rule of law requires that all persons and institutions are equal before and under the law. No one is above the law. Therefore, when grave crimes are not prosecuted, these principles will be disregarded and the rule of law will be disregarded.⁴¹ The central importance of the rule of law in civilised society requires, within defined but principled limits, prosecution of especially atrocious crimes.⁴²

Third, support for prosecutions is based on the need to protect society. As long as perpetrators remain at large, they continue to be a threat to the society in which they reside. This argument, however, may not be very strong if one considers that once the perpetrators of human rights are no longer in power, their capacity to perpetuate the violations with impunity is greatly curtailed.

Fourth, past perpetrators of human rights abuses ought to be prosecuted to deter future abuses. Usually, the deterrence argument is raised to make the point that punishing offences will deter future crimes. This view is based on the assumption that perpetrators commit their crimes in the expectation that, because they hold power in their country or because the country's legal system is unwilling or unable to prosecute such crimes, they will not face justice.⁴³

36 As above.

37 n 31 above 8.

38 As above. One may also ask whether justice includes an element of retribution.

39 As above.

40 n 31 above 14.

41 n 31 above 13.

42 Orentlicher (n 29 above) 2551.

43 n 31 above 11–12.

4.3 International law and the prosecution of the crime of genocide

Despite the various policy and ethical arguments for and against prosecution as discussed above, the guiding principle when considering whether states should punish or forgive those implicated in genocide should be the provisions of the law. Legal scholars must be loyal to what the law provides and any attempt to defend or criticise a cause, however strongly one feels about it, should be premised in the law. Of course, the law does not operate in a vacuum. Rather, it resonates within the context of the society. All in all, our first port of call as legal scholars should be the provisions of the law.

Genocide falls within a category of offences known as international crimes. International law requires states to punish international crimes committed within their territorial jurisdictions.⁴⁴ The term 'international crimes' in its broadest sense comprises offences which conventional or customary international law either authorises or requires states to criminalise, prosecute and punish.⁴⁵ International law imposes a duty to prosecute these crimes, thus failure to prosecute them violates international law.⁴⁶ The duty to prosecute is owed *erga omnes* (to all the world), and those accused of international crimes may be punished by any state, not just the state where the crimes were committed. Commission of such crimes renders one *hostis humanis generis* (enemy of all mankind).

The most serious crimes that are of concern to the international community as a whole are genocide, war crimes and crimes against humanity.⁴⁷ All these crimes were reportedly committed in Rwanda, since the genocide was committed in the context of an armed conflict. It is therefore important to touch briefly on each. Genocide refers to any act committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group.⁴⁸ War crimes are crimes committed in the context of internal or external armed conflict. These crimes are regulated by international humanitarian law, the branch of law that seeks

44 See Orentlicher (n 29 above) 2551.

45 Orentlicher (n 29 above) 2552.

46 Orentlicher (n 29 above) has argued similarly.

47 See art 5, the Rome Statute of the International Criminal Court (Rome Statute), adopted on 17 July 1998; not yet in force.

48 See the Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948 (art 2) UNGA Res 260 (III) A, 78 UNTS 227; text of the Convention reproduced in FF Martin et al *International human rights law and practice* (1997) 193. See also art 2 ICTR Statute <www.ictj.org> (accessed 20 January 2001) and art 6 of the Rome Statute.

to protect human rights during situations of armed conflict.⁴⁹ The four Geneva Conventions of 12 August 1949⁵⁰ and their two Additional Protocols⁵¹ of 8 June 1977 are the principal instruments of international humanitarian law.

In the case of a non-international armed conflict such as the one that occurred in Rwanda in 1994, the applicable law on war crimes is laid down under article 3, common to the four Geneva Conventions, as modified by Additional Protocol II thereto. These rules, as reiterated in the ICTR Statute,⁵² criminalise pillage, taking of hostages, extrajudicial executions and rape.

The category of crimes against humanity includes a long list of acts, including murder, extermination, rape, and the crime of apartheid.⁵³ In the case of *Prosecutor v Duško Tadić*,⁵⁴ the International Criminal Tribunal for the Former Yugoslavia held that crimes against humanity do not require a connection to international armed conflict.

Having elaborated on the concept of international crimes, it is important to reiterate that international law provides that these offences must be punished. The most explicit obligation to punish international crimes is established by the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention),⁵⁵ to which Rwanda is a party. Under the Genocide Convention, contracting parties confirm that genocide is an international crime, and they undertake to prevent and **punish** (not to forgive) it.⁵⁶ Article 4 provides further that persons committing genocide shall be **punished**, whether they are constitutionally punishable rulers, public officials or private individuals. The Genocide Convention also requires that persons charged with genocide (including attempts or complicity therewith) **shall be tried** by a competent tribunal

49 International humanitarian law does not aim at humanisation of warfare as such, an impossible task in itself, but of its inevitable consequences, by strengthening the protection of persons affected by hostilities (the civilian population, combatants who have been rendered *hors de combat* by reason of sickness, wounds or shipwreck, and the prisoners of war). See K Drzewicki 'Internationalization and juridization of human rights' in R Hanski & M Suksi (eds) *An introduction to the international protection of human rights: A textbook* (1999) 25–45 43.

50 The first Convention protects the wounded and the sick in armed forces; the second Convention protects the wounded, sick and shipwrecked among armed forces at sea; the third Convention protects prisoners of war, and the fourth Convention protects civilians.

51 Additional Protocol I strengthens the protection of victims of international armed conflicts, while Additional Protocol II strengthens the protection of victims of non-international conflicts.

52 Art 4.

53 See list in art 7 of the Rome Statute.

54 (1996) 35 *International Legal Materials* 32 72.

55 n 48 above.

56 See Preamble, para 1 and art 2 of the Genocide Convention.

of the state in the territory where the act was committed, or such international penal tribunal as may have jurisdiction.⁵⁷

In pressing for the establishment of the ICTR for the prosecution of those implicated in the 1994 genocide, and in prosecuting the suspects in its domestic courts, Rwanda was complying with its obligations under the Genocide Convention. Under the international law doctrine of *pacta sunt servanda*⁵⁸ states are required to carry out obligations of the treaties they are parties to in good faith. Moreover, Rwanda was complying with the requirements of customary international law that impose a duty on states to punish those who commit genocide for the law regards such as *hostis humanis generis*.

Besides the Genocide Convention, the other basis for prosecuting those who perpetrated the tragic events that took place in Rwanda in 1994 is in the already alluded to Geneva Conventions of 1949. The conflict that occurred in Rwanda was characterised as a non-international armed conflict, and Rwanda is a party to the Geneva Conventions.⁵⁹ Thus article 3, common to the four Geneva Conventions, as well as Protocol II are applicable to the Rwandan situation. State parties are under an obligation to punish violations of common article 3, as strengthened by Protocol II.⁶⁰

Customary international law also regards the rule requiring the punishment of the perpetrators of genocide, war crimes and crimes against humanity as *jus cogens*.⁶¹ *Jus cogens* is a term usually used to denote a body of overriding or 'peremptory' norms of such paramount importance that they cannot be set aside by acquiescence or agreement of the parties to a treaty.⁶² It follows that states are not only entitled, but are also obliged to punish these crimes. This obligation is unequivocal.

Where a state is for one reason or another unable to prosecute an international crime, international law requires the state concerned to extradite the accused. This requirement is embodied in the customary international law principle of *aut dedere aut judicare*.

57 Art 6.

58 As enunciated by art 26 of the 1969 Vienna Convention on the Law of Treaties, signed at Vienna on 23 May 1969, entry into force 27 January 1980, UN Doc A/ CONF.39/27; text reproduced in Martin *et al* (n 48 above) 991.

59 Tuzinde (n 12 above) 25.

60 As above.

61 As above.

62 The concept of *jus cogens* now forms part of treaty law and is enshrined in art 53 of the Vienna Convention on the Law of Treaties.

5 The impact of the prosecutions on the protection of human rights in Africa

The prosecution of the perpetrators of the Rwandan genocide domestically under the ICTR has gone a long way to underscore the increased desire within the international legal community to disqualify those who commit human rights atrocities from blanket amnesties. The implications of those prosecutions on the protection of human rights on the African continent are briefly discussed here.

First, it is worth noting that the prosecutions at the ICTR have targeted individuals who wielded political and military power in Rwanda during the genocide. The prosecutions of such high-profile individuals send a clear message that commission of gross human rights offences may be a thing of the past. In this regard the ICTR made history as the first international tribunal to convict a former head of state for genocide and violations of international humanitarian law. Jean Kambanda, former prime minister of Rwanda, was convicted on his own plea of guilty and was sentenced to life imprisonment. One commentator said that the indictment of Slobodan Milosevic while he was still a sitting head of state⁶³ builds on the precedent established by the ICTR.⁶⁴

The ICTR has not brought only Kambanda to justice. The UN detention facility at Arusha is housing some of the most senior people who served in the genocidal regime. These include Theoneste Bagashora (Director of Cabinet), Andre Ntagerere (Minister of Transport), Pauline Nyiramashuko (Minister of Family Welfare and the first woman to be prosecuted by an international tribunal), and many others.⁶⁵ One author quips that 'these are not minor players like Dusko Tadic',⁶⁶ obviously referring to the first convict of the International Tribunal for the Former Yugoslavia, Dusko Tadic, a former karate teacher. Prosecution of former wielders of power makes it clear that the concept of sovereign immunity would no longer be tolerated as a defense against individual criminal responsibility for human rights atrocities.

Second, the advent of the ICTR has contributed to the development in international human rights jurisprudence. In its landmark decision of

63 Mr Milosevic was reported to have been forced out of office finally on 6 October 2000 after refusing to step down, having lost the elections held on 23 September 2000. See <www.bbc.co.uk/news> (accessed 25 January 2001).

64 K Moghalu 'The International Criminal Tribunal for Rwanda and the development of an effective criminal law: Legal, political and policy dimensions' Unpublished paper presented at the International Conference Replacing the Law of Force with the Force of Law, organised by the Committee for an Effective International Criminal Law, Konstanz, Germany, 5–8 April 2000, 5 (paper on file with the author).

65 For a list of detainees, consult <<http://www.icttr.org>>.

66 Morris & Scharf (n 17 above) 705.

Prosecutor v Jean Paul Akayesu,⁶⁷ the ICTR became the court to define rape in international law. In this case, the ICTR convicted Akayesu, a former *bourgmestre* of the Taba commune in Rwanda, under the ICTR's Statute which explicitly identifies rape as a crime against humanity.⁶⁸

Third, the prosecution of the perpetrators of the Rwandan genocide of 1994 presents an opportunity for the enforcement of international humanitarian law. It is now generally accepted that human rights law and international humanitarian law are distinct but interrelated bodies of law to the extent that the two bodies of law overlap and share the same basic objective — the protection of human life and dignity.⁶⁹ International humanitarian law, without express reference to human rights, protects and promotes the most fundamental rights during armed conflict.⁷⁰ International humanitarian law usually lacks an enforcement mechanism. In applying the principles of international humanitarian law in its proceedings, the ICTR is contributing to the enforcement of this branch of law.

6 Conclusion

This contribution argues that perpetrators of international crimes such as genocide are to be prosecuted as a matter of law. As stated by the International Military Tribunal at Nuremberg, crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.⁷¹ Perpetrators of gross violations of human rights must be punished as a symbolic gesture against impunity for human rights atrocities.⁷² That way it will be shown that the family of nations has a conscience and a memory.⁷³

Admittedly, fragile democracies emerging from the commission of atrocities may find it difficult to sustain themselves if they choose to prosecute rather than to grant amnesty to past violators of human rights. However, it should be noted that international law itself helps to assure the survival of fragile democracies when its clear pronouncement

67 ICTR 96-4-T, judgment of 2 September 1998, reproduced in (1998) 37 *International Legal Materials*; (1999) 11 *African Journal of International and Comparative Law* 336.

68 See art 3(g) of the ICTR Statute.

69 M Griffin 'Ending the impunity of perpetrators of human rights atrocities: A major challenge for international law in the 21st century' (2000) 839 *International Review of the Red Cross* 369.

70 As above.

71 Judgment of the International Military Tribunal at Nuremberg, reprinted in (1947) 41 *American Journal of International Law* 172-333 221.

72 Viljoen (n 20 above) 27.

73 As above.

removes certain atrocities from the provincial realm of a country's internal politics and places those crimes squarely within the scope of universal concern and the conscience of all civilised people.⁷⁴ The prosecution of the perpetrators of the Rwandan genocide of 1994 makes it clear that impunity for the gross violation of human rights will no longer be tolerated in Africa. It also contributes to the jurisprudence and enforcement of international humanitarian law.

74 Orentlicher (n 29 above) 2537.