

# Criminal justice through international criminal tribunals: Reflections on some lessons for national criminal justice systems

George William Mugwanya\*

Advocate, Uganda Court of Judicature; Appeals counsel, Office of the Prosecutor, United Nations International Criminal Tribunal for Rwanda, Arusha, Tanzania

## Summary

*This article explores some lessons national criminal justice systems may draw from the law applicable to, and the jurisprudence engendered by, United Nations ad hoc international criminal tribunals, with emphasis on the International Criminal Tribunal for Rwanda. In adjudicating the core international crimes of genocide, crimes against humanity and war crimes, these tribunals have broken new ground that enrich the development of international law. It is noteworthy that the contribution of these tribunals is also relevant to national criminal justice systems. The article argues that, although UN ad hoc tribunals are more recent and lesser developed than national criminal justice systems around the world, and were not established strictly speaking as oversight mechanisms to verify that actions of states give effect to international law, several aspects of the law applicable to, and the jurisprudence of, UN ad hoc tribunals may guide the reform and development of national criminal justice systems in their procedural, evidential and substantive laws, and bring them to the standards of international law and human rights.*

---

\* LLB (Makerere), LLM (Pretoria), JSD (Notre Dame); mugwanya5@yahoo.co.uk. This article represents the author's personal views. An earlier version of this paper was presented at the Association of Law Reform Agencies of Eastern and Southern Africa (ALRAESA) Annual Conference on Fusion of Legal Systems and Concepts in Africa, 4-8 September 2005, Entebbe, Uganda.

## 1 Introduction: Issues and aims

This article explores some lessons national justice systems may draw from certain aspects of the law applicable to, and the jurisprudence engendered by, United Nations (UN) *ad hoc* international criminal tribunals in dispensing international criminal justice, with emphasis on the *ad hoc* UN International Criminal Tribunal for Rwanda (ICTR). Established in 1994 by the UN Security Council, the ICTR is mandated to prosecute persons responsible for genocide and other serious transgressions of international humanitarian law that took place in Rwanda and neighbouring states between 1 January 1994 and 31 December 1994.<sup>1</sup>

The thesis of this article is that, although *ad hoc* international criminal tribunals and the international justice system are more recent, less developed and seem to face more challenges compared with national criminal justice systems around the world, some aspects of the law applied, and the jurisprudence engendered by, *ad hoc* international criminal tribunals contain lessons that may guide and enrich not only international law, but also national criminal justice systems. Those aspects of the law of, and jurisprudence engendered by, international criminal tribunals may guide the reform and development of national criminal justice systems, in both their procedural, evidential and substantive laws, and bring them up to the standards of international law and human rights. Although not established, strictly speaking, as an oversight mechanism to verify that actions of states give effect to international law, as is the case with global and regional institutions established under human rights treaties, the law applied by, and the jurisprudence engendered by, the ICTR can influence state actions. Moreover, national institutions, such as legislatures and law reform agencies may draw lessons from it in reforming state laws and practices. The wide dissemination of the jurisprudence and procedures of the ICTR, like that of other international criminal tribunals, is vital in this effort.

International criminal tribunals have played a pivotal role in responding to gross violations of human rights and transgressions of international humanitarian law, particularly when national systems have been unable or unwilling to respond. International criminal tribunals are instrumental in stamping out impunity for gross human rights violations that constitute international crimes. A culture of impunity for international crimes has characterised various national systems. The laws

---

<sup>1</sup> Statute of the International Tribunal for Rwanda, Annex to UN Security Council Resolution 955 of 8 November 1994.

applied by international criminal tribunals and the jurisprudence they engendered have underscored the fact that international crimes, notably the core crimes of genocide, crimes against humanity and war crimes, are a concern of the entire human family and transcend state sovereignty. Arguably, these tribunals are key building blocks in the effort to ensure that states not only co-operate with the tribunals in the discharge of their mandates, but also embrace norms of international criminal law in order to deal with international crimes, particularly the core crimes just mentioned.

Taking the pioneering role in criminalising genocide and war crimes committed in internal armed conflicts, the ICTR has innovatively and progressively elaborated the crimes within its jurisdiction in ways that develop not only international law, but also inform national criminal justice systems in different ways. In addition, some aspects of the laws applied to, and the jurisprudence engendered by, the ICTR enrich substantive, evidential and procedural aspects of international law, aspects that may equally enrich national criminal justice systems in their response to crimes in full conformity with internationally accepted standards.

The guidance and enrichment of national criminal justice systems by international criminal tribunals are even more critical at a time when national criminal systems are constantly revisiting and expanding their laws and practices in response to contemporary concerns, notably terrorism. While such expansions are necessary in dealing with crimes, if they are unguided and unrestrained, they may pose dangers to internationally accepted norms, such as fair trial and due process rights and guarantees of suspects and accused persons.

In examining lessons that may be drawn by national criminal justice systems from international criminal tribunals, especially the ICTR, this article is arranged as follows:

Part 2 below provides the background to the analysis. It examines, *inter alia*, the background to the establishment and also the challenges of international criminal tribunals *vis-à-vis* national criminal justice systems.

With the emphasis on the ICTR, part 3 identifies and explores some aspects of the law and jurisprudence of international criminal tribunals that may be relevant in enriching national justice systems, and enhancing their standards of international law and human rights. Part 4 embodies concluding recapitulations.

## 2 Background to the establishment and challenges of international criminal tribunals *vis-à-vis* those of national justice systems

Overall, compared with national criminal justice systems, international criminal tribunals and the international criminal justice system are more recently established, less developed and face several challenges.

After the post-World War II Nuremberg and Tokyo International Military Tribunals (IMT), no international criminal tribunal was established to adjudicate international crimes<sup>2</sup> until 1993, when the UN Security Council established the UN International Criminal Tribunal for the Former Yugoslavia (ICTY)<sup>3</sup> and later the ICTR. These tribunals' jurisdictions are not universal; that of ICTR is limited to Rwanda and neighbouring states, while that of the ICTY is limited to the former Yugoslavia. Thus, even the well-codified international genocide crimes and war crimes had for a long time remained without international judicial enforcement, notwithstanding having been committed often.<sup>4</sup> The absence, at the international level, of fully fledged and/or permanent legislative and executive machineries with clear-cut divisions of labour for making and enforcing laws, as is the case in many national criminal justice systems, creates several challenges for the functioning of international criminal tribunals. These tribunals have had to grapple with questions arising from or relating to laws they are to apply in the adjudication of crimes. They also have had to rely on states and other institutions to obtain witnesses, effect arrests and enforce sentences.

On the other hand, although, like the international system, they have for a long time not addressed core international crimes overall, national criminal systems have been operational for a long time in enforcing

---

<sup>2</sup> There have been scholarly efforts to distinguish between international crimes and transnational crimes, but such efforts face difficulties. International crimes are created directly by international law, especially through treaties but also through customary international law. Broadly, international law authorises or requires states to criminalise, prosecute and punish international crimes. Transnational crimes may not strictly be based in international law. Transnational crimes involve a transnational element (eg conspirators of money laundering, or drug trafficking, may be stationed in more than one nation). International crimes may not require a transnational element. Eg, apartheid, genocide and crimes against humanity do not require such element. The distinction, however, seems blurred. Many transnational criminal activities constitute international crimes. This includes crimes such as the taking of hostages, counterfeiting currency, slavery and slave-related crimes, crimes against maritime navigation, unlawful use of mail for terror activities, etc. See generally J Paust *et al International criminal law* (1996) 18. For further commentary on the core international crimes, see below.

<sup>3</sup> Like the ICTR, the ICTY was established by the UN Security Council pursuant to Resolution 827 of 25 May 1993, to prosecute persons responsible for serious violations of international humanitarian law in the territory of the former Yugoslavia since 1991.

<sup>4</sup> See generally A Cassese *International criminal law* (2003) 3-5.

national criminal laws. Thus they possess established institutions, including the judiciary, courts, police and corrections facilities, for the enforcement goals of criminal justice. These goals include delivering justice for all, by bringing to justice the perpetrators of crimes and helping to rehabilitate them, while at the same time protecting the innocent.<sup>5</sup> These goals also encompass the detection of crime, the enforcement of court orders, such as collecting fines and supervising community and custodial punishment.<sup>6</sup> Also, national legal systems worldwide have on the whole established substantive and procedural criminal laws, most of which are well-codified in legislation passed by national legislative bodies. They also have in place more or less permanent institutions that are involved in the enforcement of criminal law.

The very nature and magnitude of international crimes, such as those that engulfed Rwanda in 1994, present critical difficulties. International crimes are characterised by extreme barbarity, involve large numbers of victims and perpetrators and normally have taken place during armed conflict, whether internal or international. These aspects present difficulties, not only in identifying and apprehending perpetrators, but also of accessing and securing witnesses and victims who face serious risks of reprisal for co-operating with the tribunals. Related to the overwhelming magnitude of international crimes are the attendant multiple objectives the prosecution of such crimes must serve, including stamping out the culture of impunity; halting and deterring future transgressions; and contributing towards national reconciliation, reconstruction and the restoration of peace and security.<sup>7</sup> Giving effect to these and achieving the proper balance among conflicting values, such as the interests of the international community and victims in having perpetrators punished and deterred from offending again, is a complicated undertaking.

The timeframe, background and methods for the establishment and operation of international criminal tribunals also create challenges. As is demonstrated by the Nuremberg and Tokyo Tribunals, and of late the ICTR and ICTY, as well as the Special Court for Sierra Leone (SCSL),<sup>8</sup> the

---

<sup>5</sup> See generally 'The criminal justice system (CJS) of England and Wales — Dispensing justice fairly and efficiently' [http://www.cjsonline.gov.uk/the\\_cjs/aims\\_and\\_objectives/index.html](http://www.cjsonline.gov.uk/the_cjs/aims_and_objectives/index.html) (accessed 28 February 2006).

<sup>6</sup> As above.

<sup>7</sup> See UN Security Council Resolution 955 (1994), 3453rd Meeting of 8 November 1994 for the establishment of the ICTR.

<sup>8</sup> The SCSL was set up jointly by the government of Sierra Leone and the UN, pursuant to Security Council Resolution 1315 (2000) of 14 August 2000. It is mandated to prosecute persons responsible for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.

establishment of these tribunals and the invocation of 'international criminal law' have often been triggered by or in the aftermaths of gross human rights violations and transgressions of international humanitarian law. The recently established International Criminal Court (ICC)<sup>9</sup> shares the same impetus. The IMT was accused of enforcing 'victor's' justice, while the UN Security Council's establishment of the ICTR and ICTY other than by treaty, as is the case with ICC, was challenged as illegal by accused persons.<sup>10</sup>

It follows that the ICTR, like the ICTY, has had to confront not only challenges to the legality of its establishment, as well as questions as to its independence and impartiality, but also questions relating to the legality, scope and content of the laws it applies. These are both substantive and procedural. Whether or not these international criminal tribunals are in the position and can in practice afford justice to persons appearing before them and whether they have succeeded in achieving the aims for which they were established, have thus been differently answered.

Some commentators have taken a very skeptical approach towards *ad hoc* international criminal tribunals. For instance, they have argued that the assumption that the establishment of the ICTY and ICTR would put an end to serious crimes, such as genocide, and take effective measures to bring to justice persons responsible for such crimes, are 'at least with regard to the Rwandan Tribunal . . . deeply flawed'.<sup>11</sup> The ICTR 'will have little, if any, effect on human rights violations of such enormous barbarity'.<sup>12</sup> The same commentators have also questioned the motive for establishing such tribunals. In respect of the ICTR, for instance, they have argued that its establishment was '[t]o deflect responsibility, to assuage the conscience of states which were unwilling to stop the genocide, or to legitimise the Tutsi regime . . .'.<sup>13</sup>

It also follows from the above that, whether *ad hoc* international tribunals may afford lessons to national criminal justice systems may be a subject of contention.

---

<sup>9</sup> The Court was established under the Rome Statute of the International Criminal Court. See UN Rome Statute of the ICC, A/CONF 183/9, 17 July 1998. The Statute was adopted by 120 states participating in the 'United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court' on 17 July 1998. The Statute entered into force on 1 July 2002. The ICC is mandated to complement national jurisdictions in the prosecution, *inter alia*, of genocide, crimes against humanity and war crimes committed after 1 July 2002 when the Statute entered into force.

<sup>10</sup> See below.

<sup>11</sup> M Mutua 'From Nuremberg to the Rwandan Tribunal: Justice or retribution?' (2000) 6 *Buffalo Human Rights Law Review* 77-78.

<sup>12</sup> As above.

<sup>13</sup> As above. See also P Ironside 'Rwanda *gacaca*: Seeking alternative means to justice peace and reconciliation' (2002) 15 *New York International Law Review* 31 34.

This article argues that, despite the above criticisms, *ad hoc* international criminal tribunals and the international criminal justice system in general may provide some lessons that may enrich national legal and justice systems. International criminal tribunals possess a unique status and mandate *vis-à-vis* national courts and institutions which place them in a position to play a pivotal role in setting important standards that may guide and enrich not only international law, but national criminal justice systems. For instance, while national courts as well as international tribunals are mandated to impartially and fairly dispense justice, it is widely accepted that international courts are or should be the watchdogs for the protection of universal human rights norms, particularly where national systems are unwilling or unable to protect those rights.<sup>14</sup> Indeed, it is indisputable that international criminal tribunals, beginning with the IMT, and later the existing tribunals (including the ICTR, ICTY and ICC), have been established as a response of the human family to gross human rights violations within national systems rising to such levels of magnitude and barbarity as to shock human conscience and to warrant the response of the international community as a whole.

Against this background, many analysts have correctly argued that the roles of international criminal courts transcend mere adjudication of cases, to include such roles as '[e]xtending the rule of law and [bringing] national courts up to the standards of international law'.<sup>15</sup> It appears that the ICTR has accepted its special position, as can be discerned from a statement of the judges of the ICTR in one of the cases, *Barayagwiza v Prosecutor*.<sup>16</sup> In that case, the judges ordered the release of a defendant because of 'egregious'<sup>17</sup> delays in indicting and bringing him to justice following his arrest and detention, emphasising that:<sup>18</sup>

The Tribunal — an institution whose primary purpose is to ensure that justice is done — must not place its imprimatur on such violations. To allow the

<sup>14</sup> S Stepleton 'Ensuring a fair trial in the International Criminal Court: Statutory interpretation and the impermissibility of derogations' (1999) 31 *New York Journal of International Law and Politics* 535.

<sup>15</sup> n 14 above, 546.

<sup>16</sup> *Jean-Bosco Barayagwiza v Prosecutor* ICTR-97-19 (Appeal Chamber), judgment of 3 November 1999. Hereafter, the abbreviation AC is used to indicate Appeal Chamber judgments and decisions, while TC is used to indicate judgments and decisions of Trial Chambers.

<sup>17</sup> n 16 above, para 109.

<sup>18</sup> n 16 above, para 112. On the prosecutor's application for review of the decision, however, the Appeals Chamber found that on the basis of newly discovered facts, the violations suffered by the appellant and the omissions of the prosecutor were not the same as those which emerged from the facts on which the decision to release the appellant was founded. Accordingly, the Appeals Chamber vacated the remedy of dismissal of the indictment and the release of the appellant. See *Prosecutor v Barayagwiza* Decision (Prosecutor's Request for Review or Reconsideration), judgment of 31 March 2000.

appellant to be tried on the charges for which he was belatedly indicted would be a travesty of justice. Nothing less than the integrity of the Tribunal is at stake in this case. Loss of public confidence in the Tribunal, as a court valuing human rights of all individuals — including those charged with unthinkable crimes — would be among the most serious consequences of allowing the appellant to stand trial in the face of such violations of his rights. As difficult as this conclusion may be for some to accept, it is the proper role of an independent judiciary to halt this prosecution, so that no further injustice results.

The above position is critical in underscoring that, in responding to international crimes, however barbaric and heinous, internationally accepted norms, including those of fair trial and due process, cannot be suspended or derogated from — a position that is normally assailed by national criminal systems, as shown below.

Many national criminal systems need guidance, particularly from international criminal tribunals, when responding to contemporary crimes. There is no doubt that the reach of substantive criminal laws of states is constantly expanding, especially in response to contemporary concerns, about both national and transnational criminal activity, ranging from crimes in such areas as consumer protection, environmental control, to trafficking in drugs and humans, abductions, money laundering, trafficking in obscene materials and the threat posed by terrorism. Indisputably, in effecting such constant revisiting and expansion of national laws and enforcement agencies, as well as interstate cooperation in penal matters in order to respond to the ever-emerging contemporary problems of crime, there is a danger that internationally accepted norms might be endangered, including the fair trial and due process rights of suspects and accused persons.

The proliferation of organised crime always comes with new challenges, calling for constant re-thinking and strategising (nationally and through state co-operation), to ensure an effective response, but a key lesson from international criminal tribunals, is that such responses must also be in accord with internationally established norms, particularly universally recognised human rights and fundamental freedoms. International criminal tribunals also contain important insights regarding the implementation of a proper balance between the interests of society or humanity in dealing with crime, *vis-à-vis* the rights of individuals, including not only accused persons, but also witnesses and victims.

### **3 International criminal tribunals: Lessons for national criminal justice systems**

As shown in the following analysis, despite challenges that *ad hoc* international criminal tribunals have had to address, most of which are novel in nature, the law applied and the jurisprudence engendered by those



tribunals, especially the ICTR, include important aspects that may enrich not only international law, but also national justice and legal systems. Those aspects relate to procedural as well as substantive legal issues. It is not possible within the confines of this article to deal with all such aspects. A few of these follow:

### 3.1 Stamping out impunity

International criminal tribunals, including the ICTR, are instrumental in responding to gross human rights violations constituting international crimes, the search for justice and truth for the victims of such crimes, and the struggle against impunity that have characterised the larger part of human history, especially in Africa.<sup>19</sup> The establishment of the ICC, with its mandate to assume jurisdiction, *inter alia*, when national courts are unable or unwilling to respond to the commission of international crimes, was also motivated by the need to stamp out the culture of impunity for gross human rights violations. Importantly, as shown below, these tribunals are also building blocks for involving or mobilising national criminal systems to take part in similar efforts. The success of the *ad hoc* tribunals in apprehending and bringing to justice the perpetrators of crimes has put in place a historical record of atrocities before the guilty could re-invent the truth. It has also galvanised international efforts for the establishment of the ICC.<sup>20</sup> The ICC, an organ of global jurisdictional reach,<sup>21</sup> and whose Rome Statute has been ratified widely, has the potential of completing the tribunal's efforts of stamping out impunity. States ratifying the Rome Statute of the ICC are obligated to assume jurisdiction over international crimes; failure to do so compels the ICC to assume jurisdiction.<sup>22</sup>

As noted earlier, for over half a century since the efforts at Nuremberg and Tokyo, the world has experienced situations of criminality involving gross and widespread violence amounting to international crimes, but no judicial enforcement, whether international or national, took place.

---

<sup>19</sup> See generally GW Mugwanya *Human rights in Africa: Enhancing human rights through the African regional human rights system* (2003) 53-106; K Ancheampong 'The Rwandan genocide and the concept of the universality of human rights' (1992-1993) 8 *Lesotho Law Journal* 87; Human Rights Watch 'The scars of death: Children abducted by the Lord's Resistance Army in Uganda' Report of September 1997, <http://hrw.org/reports97/uganda/index.html> (accessed 28 February 2006).

<sup>20</sup> See generally Cassese (n 4 above) 341-342; MP Scharf 'The politics of establishing an international criminal court' (1995) 6 *Duke Journal of Comparative and International Law* 167; GW Mugwanya 'Expunging the ghost of impunity for severe and gross violations of human rights and the commission of *delicti jus gentium*: A case for the domestication of international criminal law and the establishment of a permanent International Criminal Court' (1999) 8 *Michigan State University Journal of International Law* 765.

<sup>21</sup> Cassese (n 4 above) 341.

<sup>22</sup> See para 10 Preamble and arts 1, 15, 17, 18 & 19 Rome Statute.

Even long established national courts were either unwilling or unable to respond to gross human rights violations and the transgressions of international humanitarian law. In the case of Rwanda, before the establishment of the ICTR in 1994 to deal with the country's bloodbath and criminality, genocide targeting a minority group had taken place in 1959, 1963, 1966, 1973, 1990 and 1992,<sup>23</sup> but neither the international community nor Rwanda's courts and institutions took action to punish the perpetrators. Other than those of Rwanda, national courts in other countries where international crimes were committed took no action, because many states had not embraced the notion of universal jurisdiction in international law in order for them to assume jurisdiction over crimes not committed by their nationals and occurring outside their territorial jurisdictions.<sup>24</sup> Countries where such crimes occurred did not take legal action to bring offenders to justice, either because they were unable or unwilling to do so because of factors such as the breakdown of the legal system as a result of the crimes, or because those in power participated in the crimes, or states chose to grant immunities and amnesties, instead of criminal prosecutions for fear that prosecutions may not promote reconciliation.

International criminal tribunals, including the ICTR, are instrumental in dealing with impunity. In the case of Rwanda's 1994 bloodbath, the massacres dismantled almost the entirety of the country's judicial system and rendered Rwanda virtually incapable of implementing the massive task of bringing to justice all the perpetrators of the crimes. Those who masterminded the genocide, mainly members of the self-proclaimed interim government of 1994 and senior members of the Rwandan army, had fled into exile and established their seat in Zaire from where they prevented other refugees from returning. They also planned and launched attacks against Rwanda, leading to more deaths and the exacerbation of tensions and violence. In such circumstances, the UN Security Council deemed it necessary to establish an independent and impartial international criminal tribunal to bring to justice

---

<sup>23</sup> MM Wang 'The International Criminal Tribunal for Rwanda: Opportunities for clarification, opportunities for impact' (1995) 27 *Columbia Human Rights Law Review* 180-181; Provisional *Verbatim* Records of the UN Security Council, 3453rd meeting, 8 November 1994, New York, UN Doc S/PV.3453) 13-15 (deliberations by Rwanda's representative).

<sup>24</sup> Universal jurisdiction stems from the notion that some international prohibitions (such as the core international crimes of genocide, crimes against humanity and war crimes) are so important that their commission by anyone, anywhere, warrants any nation to assume jurisdiction. Thus, under universal jurisdiction, the nationality of the offender or the territory where the crime is perpetrated is immaterial. Unfortunately, for many states to assume jurisdiction, they consider the nationality and territory where the crime is committed, hence the wide recognition of states of nationality and territorial jurisdiction in international law. On the different grounds of jurisdiction in international law, see generally T Hillier *Principles of public international law* (1999) 124-141.

those responsible for the genocide and other transgressions of international humanitarian law in Rwanda and neighbouring states between January and December 1994.

Since the issuing of indictments against eight accused persons, beginning on 28 November 1995, the ICTR has apprehended and brought to its detention facility in Arusha, Tanzania, 69 persons, comprising mainly those persons who masterminded the 1994 genocide in Rwanda. They include the Prime Minister of the 1994 self-proclaimed interim government, as well as many other members of that government. There are also senior army officials, high-ranking central and local government officials, intellectuals and church and other influential personalities who played a key role in the perpetration of the genocide. Twenty-five of these have already been tried, of which 22 have been convicted (including the Prime Minister) and three have been acquitted. Cases involving 25 other persons are in progress, while the rest will be initiated in the coming years. The ICTY, based at The Hague, has similarly succeeded in apprehending and bringing to justice several key perpetrators of massacres and other violations of international humanitarian law in the former Yugoslavia.

Through its law and jurisprudence, the ICTR is noteworthy for involving states and their national institutions in the discharge of its mandate. Arguably, this involvement has laid the foundation for the dismantling of the culture of impunity for international crimes beyond the life of the ICTR. National criminal justice systems, especially those that are parties to the Rome Statute of the ICC, are to take part in this effort as a treaty obligation. Importantly, the ICTR has identified principles that states must observe in their response to international crimes. They are the following:

First, it is the obligation of states to co-operate with international criminal tribunals. Article 28(1) of the ICTR Statute provides that states *shall* co-operate with the ICTR in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law. This provision reaffirms an earlier UN Security Council Resolution on the same subject.<sup>25</sup> Under article 28(2), states are under an obligation to comply without undue delay with any request for assistance or order issued by a Chamber of the ICTR, including, but not limited to:

- the identification and location of persons;
- the arrest or detention of persons;
- the surrender or the transfer of the accused to the ICTR;
- the taking of testimony and the production of evidence; and
- the service of documents.

---

<sup>25</sup> See eg UN Security Council Resolution 955 (1994) (n 7 above) and Resolution 978 of 27 February 1995.

The obligations laid down in article 28 prevail over any legal impediment to the surrender or transfer of any accused or of a witness to the ICTR existing under the national law or extradition treaties of the state concerned.<sup>26</sup> States cannot invoke national laws or the absence of extradition treaties between them and the ICTR to refuse to co-operate with the ICTR. Even where information in possession of a state may raise concerns of public or state security, states are under an obligation to co-operate.<sup>27</sup> ICTR judges have on occasion reiterated the obligation of states to co-operate with the Tribunal, sometimes issuing subpoenas to compel states to co-operate with the Tribunal's orders, including for allowing witness appearance, interviews or access to relevant evidence.<sup>28</sup> Under ICTR rule 7 *bis*, in the event of a failure by a state to co-operate, the President of the ICTR shall notify the Security Council.

Also important is the ICTR's involvement of national criminal justice systems in the prosecution of international crimes. Pursuant to UN Security Council Resolutions 1503 (2003) and 1534 (2004), both the ICTR and ICTR are scheduled to complete trials by 2008 and appeals by 2010. In order to effectively complete its mandate, like the ICTY, the ICTR will transfer some cases to national courts for prosecution, pursuant to rule 11 *bis* of its Rules of Procedure and Evidence. The ICTR's transfer of cases to states is not only critical in involving states in the fight against impunity; it also underscores principles that must be observed by national courts in responding to international crimes. Under rule 11 *bis*, transfer of cases for which an indictment is already confirmed is a judicial determination. The objective of this is to ensure that ICTR judges are satisfied that the national court is adequately prepared and capable of giving a fair trial. It follows that the ICTR Trial Chamber, *proprio motu* or at the request of the prosecutor, after having given the prosecutor and the accused (if he or she is in the custody of the Tribunal) the opportunity to be heard, may order such referral '[if satisfied . . . that the accused will receive a fair trial in the courts of the state concerned and that the death penalty will not be imposed or carried out'.<sup>29</sup>

In order to ensure the above, the ICTR prosecutor may send observers to monitor proceedings in the courts of the state concerned.<sup>30</sup>

---

<sup>26</sup> Art 58 ICTR Statute.

<sup>27</sup> See eg Rule 66(C) ICTR Rules of Procedure and Evidence.

<sup>28</sup> See eg *Prosecutor v Bagosora et al*, ICTR-98-41 *Decision on Prosecutor's Request for a Subpoena Regarding Witness BT*, decision of 28 August 2004; *Prosecutor v Bagosora et al*, *Request to the Republic of France for Co-operation and Assistance Pursuant to Article 28 of the Statute*, decision of 22 October 2004; *Prosecutor v Bagosora et al*, *Request to the Government of Rwanda for Co-operation and Assistance Pursuant to Article 28 of the Statute*, decision of 31 August 2004.

<sup>29</sup> Rule 11 *bis* (C). Under rule 11*bis* (H), a Trial Chamber decision may be appealed by the accused or the prosecutor as of right.

<sup>30</sup> Rule 11 *bis* (D)(iv).

Moreover, at the request of the ICTR prosecutor, and after affording opportunity for the state's authorities to be heard, an order of transfer may be revoked by the ICTR Trial Chamber before the accused is found guilty or acquitted by the national court.<sup>31</sup> The state shall comply with such revocation in line with article 28 of the Statute which obligates states to co-operate with the ICTR.<sup>32</sup>

From the above, the ICTR may be credited for contributing to efforts for the elimination of impunity for gross human rights violations constituting international crimes, and for laying an important foundation for involving states in this effort. It is also important to note that the ICTR law identifies principles that states must observe in dealing with international crimes.

### **3.2 Any court or tribunal, whether 'special' or otherwise, must be established by law, and must respect fair trial and due process guarantees**

An important aspect of ICTR jurisprudence which may guide and/or restrain states, particularly today when states around the world are taking steps to respond to contemporary crimes such as terrorism, arises from the ICTR's construction of the notion 'established by law'. This jurisprudence underscores standards that must be met by any court or tribunal, whether specially constituted to deal with special crimes or not. Such courts or tribunals must be established by law, and must provide all guarantees of fairness, justice and even-handedness in full conformity with internationally recognised human rights norms.

The ICTR and the ICTY have met challenges by accused of their legality. The question was posed whether these tribunals were *established by law*, and whether they are competent to try anyone. The fact that both the ICTR and ICTY were established, not by treaty or general consent of states (as is the case with the ICC), but by UN Security Council Resolutions under chapter VII of the UN Charter, has raised the question whether the tribunals were legally established. Such issue is critical, since it is widely accepted that a vital component of the right to fair trial and due process is that trials must be conducted by tribunals or courts *established by law*.<sup>33</sup> Thus, if tribunals were 'illegally' established, it would render their trials equally 'illegal' and 'illegitimate'. Similarly, it would generally render an inquiry into their contribution to criminal justice somewhat superfluous.

---

<sup>31</sup> Rule 11 *bis* (F).

<sup>32</sup> Rule 11 *bis* (G).

<sup>33</sup> See eg art 14(1) International Covenant on Civil and Political Rights; art 6(1) European Convention on Human Rights; art 8(1) Inter-American Convention on Human Rights.

As shown below, an examination of the law under which the Tribunals were established, and the construction given to that law by the Tribunals, demonstrate that the Tribunals are not illegal or illegitimate. Importantly, the Tribunal's construction of the guarantee of trials by courts or tribunals *established by law* also contains aspects that may guide approaches in national systems, particularly at the present time when states are creating special courts or procedures to respond to contemporary crimes, such as terrorism. The jurisprudence also underscores that state sovereignty cannot be invoked when international crimes are at issue, a position critical for efforts to deal with those crimes.

Chapter VII of the UN Charter, under which the ICTR and ICTY were established, empowers the UN Security Council to deal with threats to international peace and breaches of international peace, but it does not expressly provide the Council with powers to establish criminal tribunals in order to deal with such threats. Despite the absence of an explicit provision for the establishment of judicial institutions, such as courts or tribunals, such establishment is legitimately within the powers of the UN Security Council, a body established by treaty and thus by the consent of states, to choose the judicial process, as one of the measures to deal with threats to or breaches of international peace under chapter VII of the Charter. This position is particularly defensible in view of the now widely accepted nexus between international justice, human rights and international peace, as summarised by the UN Secretary-General in the following statement: '[T]here can be no healing without peace; there can be no peace without justice; and there can be no justice without respect for human rights and the rule of law.'<sup>34</sup>

This position has been reiterated in a recent UN General Assembly special resolution in remembrance of the Rwandan genocide, where the Assembly observed that:<sup>35</sup>

Exposing and holding perpetrators, including their accomplices, accountable, as well as restoring the dignity of victims through acknowledging and commemorating their suffering would guide societies in the prevention of future violations.

The jurisprudence of the ICTR and ICTY on the legality of the Tribunals was addressed in two cases, *Prosecutor v Kanyabashi*<sup>36</sup> (for the ICTR), and *Prosecutor v Tadic*<sup>37</sup> (for the ICTY).

<sup>34</sup> Mr Kofi Annan's statement following the delivery by the ICTR of its first judgment on genocide (the *Akayesu* judgment), the first such judgment by an international court. The statement is available at <http://www.ictor.org/about.htm> (accessed 28 February 2006).

<sup>35</sup> UN Doc A/RES/58/234, Plen 39(b), 23 December 2003.

<sup>36</sup> *Prosecutor v Kanyabashi* ICTR-96-15, decision on the Defence Motion on Jurisdiction, 18 June 1997.

<sup>37</sup> *Prosecutor v Tadic*, Decision on the Defence Motion on Jurisdiction, 10 August 1995 (TC), and the Appeals Chambers decision in the same case, ie Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

In the *Kanyabashi* case, the accused challenged, among others, the legality of the ICTR, arguing that the UN Security Council lacked the ability to legally establish a criminal tribunal under chapter VII of the UN Charter. It was argued that a judicial institution is not a measure contemplated by chapter VII of the Charter for dealing with threats to peace or breaches of international peace. The accused also submitted that the establishment of the ICTR violated the sovereignty of Rwanda as the Tribunal was not established by treaty through the UN General Assembly. Moreover, Kanyabashi argued that the ICTR could not have jurisdiction over individuals directly under international law. The Trial Chamber dismissed Kanyabashi's motion on the following grounds.

First, the Trial Chamber found that article 39 under chapter VII of the UN Charter<sup>38</sup> affords the UN Security Council a margin of discretion 'in deciding when and where there exists a threat to international peace'.<sup>39</sup> While noting that it was not within the competence of a judicial institution such as the Tribunal to objectively assess the factors the Security Council may consider prior to determining which situation constitutes a breach of peace or threat to international peace, the Trial Chamber found that the human rights situation in Rwanda in 1994 presented some discernible and objective factors in such assessment. Thus, the Trial Chamber<sup>40</sup>

took judicial notice of the fact that the conflict in Rwanda created a massive wave of refugees, many of whom were armed, into the neighbouring countries which by itself entailed a considerable risk of serious destabilisation of the local areas in the host countries where the refugees had settled.

Moreover:<sup>41</sup>

The demographic composition of the population in certain neighbouring regions outside the territory of Rwanda . . . showed features which suggest[ed] that the conflict in Rwanda might eventually spread to some or all of these neighbouring regions.

The Trial Chamber's consideration of the issue of refugees fleeing to neighbouring countries, alongside the possibility of violence spilling over into neighbouring states, as constituting threats to international peace, is defensible and finds support in research and scholarship.<sup>42</sup>

Concerning Kanyabashi's contention that the establishment of a

---

<sup>38</sup> Art 39 of the UN Charter provides that 'the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with articles 41 and 42, to maintain or restore international peace and security'.

<sup>39</sup> n 36 above, para 20.

<sup>40</sup> n 36 above, para 21.

<sup>41</sup> As above.

<sup>42</sup> See eg L Henkin 'Humanitarian intervention' in L Henkin & L Hargroves (eds) *Human rights: An agenda for the next century* (1994) 383, 389; Mugwanya (n 19 above) 121-122.

judicial institution for prosecuting genocide and other transgressions of international humanitarian law was not a measure contemplated by chapter VII of the UN Charter for restoring international peace, the Trial Chamber held that article 41 of the Charter provides a non-exhaustive list of actions that the Security Council may take. In order to respond to threats to the peace, breaches of the peace and acts of aggression, article 41 of the UN Charter provides that the Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the members of the UN to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations. A judicial institution 'clearly falls within the ambit of measures to satisfy that goal'.<sup>43</sup> As noted above, this approach gives effect to the established recognition of the nexus between justice, human rights and peace. Enforcing accountability for human rights violations and transgressions of the rule of law through the judicial process breaks the cycle of impunity for those transgressions and may contribute to sustainable respect for the rule of law and peace in society.

The *Kanyabashi* decision also invokes the ICTY appeals decision in *Tadic*. This decision addresses most of the issues raised in *Kanyabashi* in detail. The *Tadic* decision recognises that the powers or discretion of the UN Security Council under article 39 are not totally unfettered,<sup>44</sup> but that the Council<sup>45</sup>

has a very wide margin of discretion . . . to choose the appropriate course of action and to evaluate the suitability of the measures chosen, as well as their potential contribution to the restoration or maintenance of peace.

The establishment of a judicial institution fell within the scope of article 41, which provides for 'measures not involving the use of force' (as opposed to measures of a military nature under article 42, or 'provisional measures', under article 40).<sup>46</sup> The measures set out in article 41<sup>47</sup>

are merely illustrative examples which obviously do not exclude other measures such as the establishment of a judicial body. All that the article requires is that they do not involve 'the use of force'. It is a negative definition.

Whether or not a prosecution by a tribunal was an appropriate measure was a matter that fell within the discretion of the Security Council. In any case,<sup>48</sup>

<sup>43</sup> *Kanyabashi* (n 36 above) para 27.

<sup>44</sup> *Tadic* (n 37 above) para 29.

<sup>45</sup> n 37 above, para 32.

<sup>46</sup> n 37 above, paras 34-36.

<sup>47</sup> n 37 above, para 35 (my emphasis).

<sup>48</sup> n 37 above, para 39.



[i]t would be a total misconception of what are the criteria of legality and validity to test the legality of such measures *ex post facto* by their success or failure to achieve the ends (in the present case, the restoration of peace . . .).

Addressing whether the Tribunal was *established by law* as required in the international human rights law instruments mentioned earlier, the Appeals Chamber noted the differences between most municipal legal systems, on the one hand, and international legal settings on the other: The former provides clear-cut divisions of labour between the legislature, executive and judiciary, but under the latter, the divisions are not so clear-cut.<sup>49</sup> It was thus not possible to apply the obligation imposed by the requirement that courts be *established by law* on states (ie the observance of strict division of labour to ensure that that the administration of justice is not a matter for executive discretion, but is regulated by laws made by the legislature) to the international legal setting.<sup>50</sup> Instead, two constructions of the term *established by law* are appropriate to the international legal setting. First, it meant the 'establishment of international criminal courts by a body which, though not a parliament, has limited power to take binding decisions'.<sup>51</sup> The Security Council, when acting under chapter VII of the UN Charter, fulfils this test, since it makes decisions binding by virtue of article 25 of the Charter.<sup>52</sup> The second and most sensible construction of the term 'established by law' is that the establishment must be in accordance with the rule of law. In other words,<sup>53</sup>

[i]t must be established in accordance with the proper international standards; it must provide all guarantees of fairness, justice and even-handedness, in full conformity with internationally recognised human rights instruments.

It appears from the *Tadic* and *Kanyabashi* decisions that these two constructions must be read together: Thus the body establishing the court must be 'competent' in keeping with the relevant legal procedures,<sup>54</sup> and must ensure the guarantee of a fair trial highlighted above. As shown below, the ICTR and ICTY are established as independent

<sup>49</sup> n 37 above, para 43. Eg, regarding judicial functions, 'the International Court of Justice is clearly the *principal* judicial organ' (UN Charter art 92). There is, however, no legislature in the technical sense of the term, in the UN system and, more generally, no parliament in the world community. That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects. n 37 above, para 43.

<sup>50</sup> n 37 above, para 43.

<sup>51</sup> n 37 above, para 44.

<sup>52</sup> As above.

<sup>53</sup> n 37 above, para 45.

<sup>54</sup> *Kanyabashi* (n 36 above) para 43; *Tadic* (n 37 above) paras 42 & 45. The *Tadic* Appeals decision thus explains that an international criminal court could not be set up 'at the mere whim of a group of governments' (n 37 above, para 42).

organs, and are obligated to accord all persons appearing before them the right to a fair trial and due process.

The foregoing jurisprudence appears competently to address the legality of the *ad hoc* tribunals for Rwanda and the former Yugoslavia. As shown above, determining whether a court or tribunal was legally established in a municipal setting may be easier than making a similar determination in an international law setting, which lacks clearly defined divisions of labor between the legislature, executive and judiciary. The jurisprudence engendered by the decisions above addressed a complex question. Their approaches to construing the UN Charter appear correctly to construe the relevant provisions in their context and in light of their objects and purposes, an approach sanctioned under the Vienna Convention on the Law of Treaties (1969). A restrictive construction of Security Council powers and the measures the Council may deploy under articles 39 and 41, as excluding the establishment of tribunals to try those involved in massive transgressions of international humanitarian law, would be incompatible with the terms of those provisions in their context and in light of their objects and purposes. The provisions give examples of the measures the Council may take without seeking to be exhaustive, thereby allowing the Council a margin of discretion necessary to deal with threatening breaches of peace or threats to peace.

While the above jurisprudence addressed the legality of the two *ad hoc* international tribunals, certain other aspects are relevant not only to international law, but to the rule of law and practices in national legal systems in general. For instance, the *Tadic* appeals decision explained the obligation imposed on states by the requirement that trials must be conducted by courts *established by law*. As pointed out above, the Tribunal noted that many national legal systems clearly define the division of labour among the legislature, executive and judiciary. It follows that the requirement that trials must be conducted by courts or tribunals *established by law* imposes on states the obligation to observe a strict division of labour to ensure that the administration of justice is not a matter for executive discretion, but is regulated by laws made by the legislature.<sup>55</sup>

In addition to fulfilling the above somewhat procedural requirements, national systems, like the international system, must observe *substantive* obligations, namely, that any court or tribunal established by them, whether 'special' or 'extraordinary', must genuinely afford the accused the full guarantees of fair trial.<sup>56</sup> This approach is pertinent in guiding

<sup>55</sup> n 37 above, para 43.

<sup>56</sup> n 37 above, para 45, also citing, *inter alia*, the approaches of the Human Rights Committee (established under the International Covenant on Civil and Political Rights of 1966) in construing art 14 of the Covenant. See eg the Committee's General Comment on art 14, HR Comm 43rd session, Supp No 40 para 4, UN Doc A/43/40 (1988); *Caribono v Uruguay*, HR Comm 159/83, 39th session Supp No 40 UN Doc A/39/40.

and restraining states and the international community, particularly today when states are trying to respond to organised crimes such as terrorism, including by establishing special or extraordinary courts.<sup>57</sup> Invoking the practices of the UN Human Rights Committee, the *Tadic* appeals decision notes that such courts or tribunals are subjected to close scrutiny in order to ascertain whether they ensure compliance with fair trial requirements.<sup>58</sup>

Also important are the Tribunals' approach to the limits of state sovereignty when international crimes, such as crimes of genocide, crimes against humanity and war crimes, are at issue. Perpetrators of such crimes cannot invoke state sovereignty and the doctrine of *jus de non evacando*<sup>59</sup> against the jurisdiction of international tribunals. Those crimes are a concern of the entire human family and transcend state sovereignty; their prohibition assumes a universal character.<sup>60</sup> Implied in these statements is the urgent need for states to embrace the notion of universal jurisdiction discussed earlier, not only to co-operate with international criminal tribunals, but also to domesticate international criminal law in order to deal particularly with the core crimes of genocide, crimes against humanity and war crimes.<sup>61</sup> Such domestication should involve the codification of those crimes in state penal laws for prosecution before national courts. States should also co-operate, not only with international tribunals, but with each other in extraditing offenders and lending assistance to each other in the investigation, prosecution and punishment of core international crimes.

### 3.3 Impartiality and independence

In addressing accused persons' challenges regarding its independence and impartiality, the ICTR has provided jurisprudence that enriches

<sup>57</sup> See generally F Reinares 'Democratic regimes, internal security policy and the threat of terrorism' (1998) 44 *Australian Journal of Politics and History* 351, summary available at <http://www.blackwell-synergy.com/links/doi/10.1111/1467-8497.00026> (accessed 18 August 2005); 'Secret terror courts considered' *BBC News* 9 August 2005, available at [http://news.bbc.co.uk/1/hi/uk\\_politics/4133564.stm](http://news.bbc.co.uk/1/hi/uk_politics/4133564.stm) (accessed 10 August 2005); 'Britain mulls special courts for terror suspects' *Associated Press* 9 August 2005, available at <http://www.foxnews.com/story/0,2933,165185,00.html> (accessed 11 August 2005) (reporting that the British government was considering creating special, closed-door anti-terror courts for pre-trial hearings to determine how long suspects can be held without charge).

<sup>58</sup> *Tadic Appeals Decision* (n 37 above) para 45.

<sup>59</sup> This principle is derived from constitutional law in civil law jurisdictions. This principle means that persons accused of certain crimes should retain their right to be tried before the regular domestic criminal courts rather than by politically founded *ad hoc* tribunals which, during emergencies, may fail to provide impartial justice. See *Kanyabashi* (n 36 above) para 31; *Tadic Appeals Decision* (n 37 above) paras 61-64.

<sup>60</sup> *Tadic* (n 37 above) paras 55-64; *Kanyabashi* (n 36 above) paras 33-36.

<sup>61</sup> See generally Mugwanya (n 20 above).

international law. That jurisprudence may also guide national courts. The right to a trial before impartial and independent courts or tribunals is also universally recognised as a key component of the rights to fair trial and due process.<sup>62</sup> The ICTR's jurisprudence enriches our understanding of these rights in important respects, and of the role of judges. As shown below, the jurisprudence identifies objective and subjective criteria delineating the concepts of independence and impartiality. Some aspects of the criteria identified by the ICTR may guide national courts in different ways. Importantly, ICTR jurisprudence develops an aspect uncommon in common law systems, namely judges' intervention and questioning of witnesses. Such intervention and questioning are critical in the search for the truth. ICTR jurisprudence elucidates principles for distinguishing such legitimate intervention by judges from bias or lack of impartiality.

Historically, challenges to tribunals' independence and impartiality are commonplace. The Nuremberg Tribunal faced critical challenges to its independence and impartiality, not only from the defendants but also from a number of scholars. The IMT has been criticised as 'a victor's tribunal before which only the vanquished were called to account for violations of international humanitarian law committed during war'.<sup>63</sup> Challenges against the independence of the IMT included, first, that the 'victorious' states established the IMT and appointed their nationals as judges.<sup>64</sup> Secondly, 'these judges oversaw the collection of evidence, [and] participated in selecting the defendants and in the drafting of the indictments'.<sup>65</sup> It was also argued for the defendants that the judges could not pass judgment on them since the 'victor' states were equally culpable for atrocities.<sup>66</sup> Despite these, it may be argued that, as a matter of international law, the victors were competent to try members of the defeated armed forces for violations of the law and customs of law.<sup>67</sup> The judges' participation in investigations and preparation of indictments may be impugned, but considering that the only alternative responses at the time were 'victors' vengeance' (ie summary execution) or leaving the perpetrators to go free (thus perpetuating impunity), the IMT trial may be credited as a triumph of justice and the rule of law.<sup>68</sup>

---

<sup>62</sup> See eg art 14(1) International Covenant on Civil and Political Rights; art 6(1) European Convention on Human Rights; art 8(1) Inter-American Convention on Human Rights; art 7(1)(d) African Charter on Human and Peoples' Rights; art 10 Universal Declaration of Human Rights.

<sup>63</sup> V Morris & M Scharf *The International Criminal Tribunal for Rwanda* (1998) 10.

<sup>64</sup> As above.

<sup>65</sup> As above.

<sup>66</sup> As above.

<sup>67</sup> As above.

<sup>68</sup> As above.

As noted above, the ICTY and ICTR were not established by so-called 'victors' (the two states), but by the UN Security Council acting on behalf of the international community. As shown below, the ICTR and ICTY judges are not appointed by the two states, and those judges do not take part in investigations or preparation of indictments as such. They only confirm indictments independently prepared by the prosecutor. Despite these, as shown below, defendants appearing before the Tribunals have impugned their independence and impartiality. The Tribunal thus has had occasion to address those challenges.

The meaning and scope of the independence and impartiality of courts and tribunals have been the subject of debates and deliberations by international human rights institutions. Under the oldest regional human rights system, the European human rights system, the independence of a court or tribunal may be determined by the manner of appointment and duration of office, guarantee from outside interference and the appearance of independence, among other factors.<sup>69</sup> According to the African Commission on Human and Peoples' Rights (African Commission) (established under the African Charter on Human and Peoples' Rights (African Charter) of 1981), once it is found that a court or tribunal is partial on face value, for instance due to its membership or composition or the mode of appointment, that partiality overrides the claimed good character or qualifications a member or members of such court or tribunal may possess.<sup>70</sup>

The Statute of the Tribunal and Rules of Procedure embrace a number of factors that are of key importance to ensuring the independence and impartiality of judges and the Tribunal as a whole. First, the Tribunal is governed by its own Statute and Rules of Procedure and Evidence adopted by the judges pursuant to article 14 of the Statute. Under rule 89 of those Rules, the Tribunal is not bound by national rules of procedure and evidence. Instead, it can apply those rules which best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.<sup>71</sup>

Under article 12 of the Statute, both permanent and *ad litem* judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers and sections of the Trial Chambers, the Tribunal's Statute provides that due account shall be taken of the experience of

---

<sup>69</sup> See generally F Jacobs & R White *The European Convention on Human Rights* (1996) 138.

<sup>70</sup> Communication No 60/91, *Constitutional Rights Project v Nigeria* para 37; Communication No 87/93, *Constitutional Rights Project (in respect of Lekwot & Others) v Nigeria* para 31; and Communication No 67/91, *Civil Liberties Organisation v Nigeria (in respect of the Nigeria Bar Association)* para 19.

<sup>71</sup> Art 89(B) Statute of the ICTR.

the judges in criminal law, international law, including international humanitarian law, and human rights law.<sup>72</sup> The judges of the ICTR, like the ICTY, are elected by the UN General Assembly from a list of names submitted by the UN Security Council. The procedure followed is intended to prevent undue influence from any member state or states in the composition and membership of the Tribunals' judges.<sup>73</sup> In further elaboration of the notion of independence and impartiality under article 12 above, rule 15(A) provides that:

A judge may not sit at trial or appeal in any case in which he has a personal interest or concerning which he has or has had any association which might affect his impartiality. He shall in such circumstances withdraw from that case.

Furthermore, under rule 15(D), no member of the Appeals Chamber shall hear any appeal in a case in which another judge of the same nationality sat as a member of the Trial Chamber.

Besides the provisions of its Statute and Rules, in practice, the judges of the ICTR have elucidated the meaning and scope of the requirement of impartiality and independence of courts or tribunals in the course of adjudicating case challenging its independence and impartiality. This has afforded the Tribunal the opportunity to further illuminate the scope and contents of those concepts in international law, and the jurisprudence engendered is also relevant to national legal systems.

In the case of *Prosecutor v Kayishema & Ruzindana*,<sup>74</sup> for instance, the appellant (Kayishema) challenged the independence and impartiality of the ICTR. He argued that the UN was partially responsible for the genocide that occurred in Rwanda in 1994, and that since the Tribunal was established by this same UN, this tainted the legitimacy and independence of the Tribunal.<sup>75</sup> He further claimed that the Tribunal was under pressure from Rwanda to 'systematically [deliver] verdicts against one ethnic group'.<sup>76</sup> Furthermore, the appellant contended that<sup>77</sup>

<sup>72</sup> Art 12 Statute of the ICTR.

<sup>73</sup> Eg, in appointing the 11 permanent members of the Tribunal, pursuant to an invitation for nomination of judges by the UN Secretary-General addressed to all permanent members of the UN and non-member states maintaining permanent observer missions at the UN, each state may nominate up to two candidates meeting the qualifications set out in art 12, and no two of whom shall be of the same nationality, and neither of whom shall be the same nationality as any judge who is a member of the Appeals Chamber. The Secretary-General forwards the nominations received to the Security Council. From those nominations, the Council establishes a list of no less than 22 and no more than 33 candidates, taking due account of the adequate representation on the ICTR of the principal legal systems of the world. The list is then forwarded to the General Assembly which elects the 11 judges. Only candidates receiving an absolute majority of votes become judges.

<sup>74</sup> *Prosecutor v Kayishema & Ruzindana* (AC) ICTR-95-1, 1 June 2001.

<sup>75</sup> n 74 above, paras 52-53.

<sup>76</sup> n 74 above, para 53.

<sup>77</sup> n 74 above, para 52.

the idea of the Tribunal administering justice to contribute to the process of national reconciliation and the restoration and maintenance of peace runs counter to the concept of justice as understood by states under the rule of law.

The Appeals Chamber dismissed the appellant's claims, *inter alia*, because they were not substantiated by evidence (for example the alleged pressure from Rwanda),<sup>78</sup> or irrelevant to the independence and impartiality of the Tribunal (for example the alleged involvement of the UN in the Rwanda events),<sup>79</sup> but also because the claims could not meet the objective and subjective elements delineating the concepts of independence and impartiality.

Regarding the objective criteria, the *ratio* in the *Kayishema* judgment is that independence and impartiality of a court or tribunal may be discerned from an examination of its jurisdiction and standing *vis-à-vis* other institutions, including those responsible for establishing such court or tribunal. In the case of the ICTR and ICTY, the objective test is that they were established by the UN Security Council as judicial organs with jurisdiction, and as entirely independent of the organs of the UN.<sup>80</sup> As an independent entity,<sup>81</sup>

[the Tribunal] is not in place to interpret the actions of the United Nations in general, and . . . as an *ad hoc* United Nations judicial organ, the Tribunal issues decisions within its jurisdiction, as established by Security Council Resolution 955, and within the inherent jurisdiction of any tribunal.

The contents of the subjective elements of independence and impartiality of courts or tribunals are wide-ranging. According to *Kayishema*, the Appeals Chamber explained as follows: A judge is presumed to be impartial until proven otherwise. This is a subjective test: Impartiality relates to the judge's own personal qualities, his intellectual and moral integrity. A judge is bound only by his conscience and the law. That does not mean that he rules on cases subjectively, but rather that he rules according to what he deems to be the correct interpretation of the law. An unbiased and knowledgeable observer is thus sure that his objectivity does not give the impression that he is not impartial, even though in fact he is. Moreover, before taking up his duties, each judge makes a solemn declaration, obliging him to perform his duties and exercise his powers as a judge 'honourably, faithfully, impartially and conscientiously'.<sup>82</sup>

There is no doubt that the above requirements enrich international law and may be relevant to national courts. This jurisprudence under-

<sup>78</sup> n 74 above, para 61.

<sup>79</sup> n 74 above, para 59.

<sup>80</sup> n 74 above, para 55.

<sup>81</sup> n 74 above, para 56.

<sup>82</sup> n 74 above, para 55.

scores, *inter alia*, that justice must not only be done, but that it must be seen to be done. This principle, though widely recognised in national systems, must guide judges when confronted by requests that they should recuse themselves in certain cases. The ICTR's jurisprudence is noteworthy for underscoring, *inter alia*, that judges examine all surrounding circumstances to determine whether objectively such circumstances give rise to an appearance of bias.<sup>83</sup>

However, also salient to national systems, especially those of common law countries, is the jurisprudence that has arisen from ICTR and ICTY judges' interventions and questions put to witnesses during testimony. Such interventions, which are particularly rare in common law systems, as opposed to civil law systems, are important in the search for the truth. In a number of cases, however, such questioning or interventions by ICTR judges or statements made by them have been challenged by accused persons as demonstrating bias on the part of the judges.

Under the ICTR and ICTY Rules of Procedure and Evidence, which are drawn largely from rules of procedure and evidence from the common law and civil law systems, judges are empowered to have control over the mode and order of interrogation of witnesses as well as the presentation of evidence in order (a) to make interrogation and presentation effective for the ascertainment of the truth and (b) to avoid needless consumption of time.<sup>84</sup> Moreover, a judge may put questions to a witness at any stage of his or her testimony.<sup>85</sup>

The latter is critical in the search for the truth. When exercising their powers under the Rules above, defendants facing trials have sometimes raised issues of bias on their part. The issue is: How do you distinguish the legitimate exercise by the judges of their powers and statements or actions from bias or lack of impartiality? This is a complex question. The case of *Rutaganda v Prosecutor*,<sup>86</sup> which also addresses the notions of impartiality, identifies pertinent principles or criteria that may direct the interpretation of impartiality, and guide judges on issues of bias. In the *Rutaganda* case, the Appeals Chamber explained that<sup>87</sup>

[t]here is a general rule that a judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias. On this basis, the Appeals Chamber considers that the following principles should direct it in interpreting and applying the impartiality requirement of the Statute:

A A judge is not impartial if it is shown that actual bias exists.

<sup>83</sup> See eg *Rutaganda v Prosecutor* ICTR-96-3, Appeals Chamber Judgment, 26 May 2003. See also below.

<sup>84</sup> Rule 90(F) ICTR Rules of Procedure and Evidence.

<sup>85</sup> Rule 85(B), similar to Rule 85 of the ICTY Rules of Procedure and Evidence.

<sup>86</sup> n 83 above.

<sup>87</sup> n 83 above, para 39, citing ICTY Appeals Judgment in *Frundzija* para 189.



- B There is unacceptable appearance of bias if:
- i a judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if a judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a judge's disqualification from the case is automatic; or
  - ii the circumstances would lead to a reasonable observer, properly informed, to reasonably apprehend bias.

The test of the 'reasonable observer', according to the Appeals Chamber, means that<sup>88</sup>

... the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that judges swear to uphold.

From the above case, it appears that, although judges have the powers to make interventions in exercising their powers to control proceedings, it must be borne in mind that any judge is under an obligation to<sup>89</sup>

rule on cases according to what he deems to be the correct interpretation of the law, by ensuring that his behavior does not give the impression to an unbiased and knowledgeable observer that he is not impartial.

### **3.4 Material jurisdiction, law applicable and key aspects of jurisprudence engendered**

The jurisdiction of the ICTR, like the ICTY, is limited to the prosecution of the core international crimes of genocide, crimes against humanity and what are collectively known as war crimes.

Under article 2 of the ICTR Statute, the crime of genocide is defined as the commission of enumerated criminal acts with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such. Those criminal acts are: killing members of the group; causing bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or in part; imposing measures intended to prevent birth within the group; and forcibly transferring children of the group to another group.

Under article 2(3) of the ICTR Statute, besides the substantive crime of genocide, the Tribunal has the competence to punish complicity in genocide and what may be described as inchoate acts of genocide, defined under the Statute as 'other acts of genocide': conspiracy to commit genocide; direct and public incitement to commit genocide; and attempt to commit genocide.

<sup>88</sup> n 87 above, para 40.

<sup>89</sup> n 87 above, para 41.

Crimes against humanity are defined under article 3 of the ICTR Statute as certain enumerated crimes committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. Those crimes are: extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial and religious grounds, and other inhumane acts.

War crimes encompass certain enumerated criminal acts or violations if committed in conjunction with the war; they thus require a nexus with the war.<sup>90</sup> In international law, war crimes are laid down in the four Geneva Conventions of 1949, which establish rules applicable to international conflicts.<sup>91</sup> The 1977 Protocol I to these Conventions equally applies to international conflicts. If a conflict is not international, only 'common article 3' to these Conventions is applicable. This article contains limited guarantees of protection.<sup>92</sup> Protocol II to the Conventions also relates to non-international conflicts, and will come into play for states parties to it.<sup>93</sup> The ICTR Statute criminalises for the first time common article 3 and Protocol II. This is an important development, which may influence national courts to extend their legal norms and deal with crimes committed during non-international conflicts. The ICTR provides for a wide range of crimes meant to protect civilians during such conflicts. These are, among others, violence to life, health and physical or mental well-being, in particular murder, as well as cruel treatment such as torture, mutilation or any form of corporal punishment, collective punishment, taking of hostages, acts of terrorism, outrage upon personal dignity, in particular humiliating and degrading treatment, rape, enforced persecution and any form of indecent assault, the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording judicial guarantees which are recognised as indispensable by civilised peoples, and threats to commit any of the foregoing acts.<sup>94</sup>

In rendering international criminal justice, the *ad hoc* Tribunals for Rwanda and the former Yugoslavia have made a notable contribution to defining these crimes and to developing international criminal law and jurisprudence. As noted earlier, many national legal systems have not embraced universal jurisdiction over international crimes. The domestication of international criminal law by states is necessary to ensure that national courts and institutions collaborate with international tribunals in dealing with international crimes, particularly the

<sup>90</sup> Art 4 Statute of the ICTR.

<sup>91</sup> See generally T Buergethal *International human rights law in a nutshell* (1995) 248-255.

<sup>92</sup> n 91 above, 256-257.

<sup>93</sup> n 91 above, 262-265.

<sup>94</sup> Art 4 Statute of the ICTR.

core crimes of genocide, crimes against humanity and war crimes. The ICTR and ICTY have elucidated the meanings and contents of those crimes, elucidations that not only enrich international law, but which may also assist national systems in their efforts to domesticate international criminal law. It is not possible within the confines of this article to engage in a detailed examination of the jurisprudence engendered by the Tribunals. A few highlights are shown, with emphasis on the ICTR.

First, considering the apparent overlap among criminal acts constituting the three core crimes above, the Tribunal has succeeded in elaborating the key elements delineating each of the crimes, particularly the crime of genocide *vis-à-vis* other crimes. The ICTR was the first international criminal tribunal to adjudicate and find a person guilty of genocide.<sup>95</sup> The Tribunal has clarified that, contrary to popular belief, 'the crime of genocide does not imply the *actual extermination* of group (*sic*).'<sup>96</sup> Instead, it means the commission of any of the above enumerated criminal acts *with the specific intention* of destroying a protected group in whole or in part. Thus, even a single murder may constitute genocide if committed with such intent.<sup>97</sup>

What distinguishes genocide from massive murders as understood in many national legal systems, or from any of the other core international crimes, is specific intent, or what some judges have called *dolus specialis*. That intent is different from 'general *mens rea*', which only involves a showing that 'the defendant desired to commit the act which served as the *actus reus*'.<sup>98</sup> 'Specific intent', which has also been defined as the 'surplus of intent',<sup>99</sup> or 'an aggravating criminal intention',<sup>100</sup> requires proof that the accused, in addition to desiring to bring about the *actus reus* (for example the killing of members of a group), must have desired to destroy a protected group in whole or in part. According to *Prosecutor v Akayesu*, special intent of a crime, such as is required of the crime of genocide,<sup>101</sup>

is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus the special intent in the crime of genocide lies in the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such.

<sup>95</sup> *Prosecutor v Akayesu* ICTR-96-4, judgment of 2 September 1998.

<sup>96</sup> n 95 above, para 497 (my emphasis).

<sup>97</sup> See eg *Akayesu* (n 95 above) para 521; *Prosecutor v Musema*, Trial Chamber Judgment para 165. For a contrary position, see Cassese (n 4 above) 102. Art 6(c)(1) of ICC's Elements of Crimes endorses the ICTR position.

<sup>98</sup> S Emanuel (ed) *Criminal law* (1992-93) 13.

<sup>99</sup> See *Prosecutor v Stakic* (TC) para 520. See also D Stuart *Canadian criminal law: A treatise* (1995) 217-220.

<sup>100</sup> Cassese (n 4 above) 103.

<sup>101</sup> *Akayesu* (n 95 above) para 498. See also *Prosecutor v Rutaganda* (TC), ICTR-96-3 59.

Another notable contribution of the ICTR to an understanding of these crimes, notably genocide, is its finding, the first in international law, that rape and other acts of sexual violence can constitute genocide if committed with specific intent to destroy a group. In *Akayesu*, which was the first judgment of an international tribunal to hold a person guilty of rape as genocide, the Trial Chamber held that<sup>102</sup>

rape and sexual violence . . . constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflict (*sic*) harm on the victim as he or she suffers both bodily and mental harm. In light of all the evidence before it, the Chamber is satisfied that the acts of rape and sexual violence described above, were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public, in the Bureau Communal premises or in other public places, and often by more than one assailant. 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.

The *Akayesu* judgment also explained how rape may fall under 'measures intended to prevent birth' within a targeted group, and thus lead to its destruction in whole or in part. According to the judgment:<sup>103</sup>

In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group.

In addition, *Akayesu* explained in the following terms that rape and other acts of sexual violence are capable of destroying the victim physically and mentally, causing them to refuse further procreation:<sup>104</sup>

[The] Chamber notes that measures intended to prevent births within the group may be physical, but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.

The ICTR's definition of rape is also noteworthy. The Tribunal's approach may enrich or guide national criminal laws and practices which tend to be restrictive in their construction of the crime of rape.

<sup>102</sup> *Akayesu* (n 95 above) para 731. See also *Prosecutor v Kayishema & Rutaganda* (TC), ICTR-95-1 para 95.

<sup>103</sup> n 102 above, para 507.

<sup>104</sup> n 102 above, para 508.

In many national systems, rape has been defined as non-consensual intercourse, but there appears to be variations among the systems as to whether such intercourse must involve penetration by the male organ, or whether acts of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual.<sup>105</sup> The *Akayesu* judgment pursues a purposive approach, noting that 'rape is a form of aggression and . . . the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts'.<sup>106</sup> It thus concludes that:<sup>107</sup>

The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence, which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.

It is argued that the above approaches are defensible. A mechanistic approach to the definition of rape, which concentrates only on the physical penetration of a specific body part by another body part, undermines the protection that must be afforded to victims of rape and sexual violence.

The Tribunal's approach to what amounts to consent in rape is also noteworthy. Consent is a common defence raised by defendants in many national legal systems in answer to rape charges. According to the ICTR, the absence of consent of the victim of rape need not take the form of physical force, but all surrounding circumstances must be examined holistically. A broad range of coercive circumstances negate consent. For instance:<sup>108</sup>

Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of *Interahamwe* [militias] among refugee Tutsi women at the Bureau Communal.

The jurisprudence from the ICTY pursues a similar approach. In *Kunarac*, for instance, the ICTY explained that '[c]onsent [for purposes of rape] must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances'.<sup>109</sup> The approaches of the ICTR and ICTY are correct and may enrich national systems, many of which are yet to embrace such approaches.<sup>110</sup> A

<sup>105</sup> n 102 above, para 596.

<sup>106</sup> n 102 above, para 597.

<sup>107</sup> n 102 above, para 598.

<sup>108</sup> n 102 above, para 688 (my emphasis).

<sup>109</sup> *Prosecutor v Kunarac et al* Trial Chamber Judgment para 460. This position was upheld by the Appeals Chamber. See *Prosecutor v Kunarac et al* Appeals Chamber Judgment paras 127-129.

<sup>110</sup> It appears that only a few legal systems have yet embraced such an approach. See generally *Prosecutor v Kunarac et al* Appeals Chamber Judgment para 130.

mechanistic approach to consent that emphasises physical force is wrong. It ignores that coercion takes various forms, hence the need to take into account all surrounding circumstances.

The Tribunal's Rules of Procedure may also provide critical guidance for many national legal systems in their approach to the crime of rape. Under rule 96, with the exception of a child victim, no corroboration of a rape victim's testimony is required. Moreover, consent shall not be allowed as a defence under the following circumstances:

- (a) if the victim has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression; or
- (b) if the victim reasonably believed that if h/she did not submit, another might be so subjected, threatened or put in fear.

Before evidence of the victim's consent is admitted, the accused must satisfy a trial chamber *in camera* that the evidence is relevant and credible.<sup>111</sup> Prior sexual conduct of the victim shall not be admitted in evidence or as defence.<sup>112</sup>

The above positions are critical in enhancing protection and justice in relation to victims of rape and sexual violence. They legitimately transcend defences that perpetrators of such crime have traditionally misused to avoid criminal responsibility.

Finally, in view of the principle of legality in criminal law, expressed as *nullum crimen sine lege*, it is necessary to comment briefly on the sources of substantive law applied by the ICTR and ICTY. The question of legality was addressed in the establishment of the Tribunals. In the case of the ICTY, in his report to the Security Council, the UN Secretary-General recommended that the ICTY should apply existing principles of international law which were part of customary international law. The rationale was that<sup>113</sup>

the application of the principle of *nullum crimen sine lege* [required] that the international tribunal [applied] rules of international humanitarian law which are beyond any doubt part of customary international law so that the problem of adherence of some, but not all states to specific conventions does not arise.

In the case of the ICTR, a broader approach to the law applicable was adopted by including in the Statute 'international instruments regardless of whether they were considered part of customary international law or whether customarily entailed individual criminal responsibility for the perpetrators of the crimes'.<sup>114</sup> Does this mean that the ICTR violates the principle of legality?

<sup>111</sup> Rule 96(iii) Rules of Procedure and Evidence of the ICTR.

<sup>112</sup> n 111 above, rule 96(iv).

<sup>113</sup> Report of the Secretary-General pursuant to para 2 of Security Council Resolution 808 (1993), UN Doc S/25/704 (3 May 1993) para 34.

<sup>114</sup> UN Doc S/1995/134 3-4 para 12.

As noted above, international crimes are created by international law directly, especially through treaties, but also through customary international law. The ICTR includes crimes defined in treaties, such as the Genocide Convention of 1948 and common article 3 to the Geneva Conventions and of Additional Protocol II. Rwanda, like many other states, was a party to these treaties. In any case, the ICTR, like the ICTY, has found that various provisions of those treaties are part of customary international law and involve the notion of individual responsibility for transgressions.<sup>115</sup> From these, it may be concluded that ICTR jurisprudence is important in guiding national courts in construing the core crimes adjudicated by the Tribunal.

### 3.5 Procedure and evidence

The ICTR and ICTY each possesses Rules of Procedure and Evidence to govern proceedings. Those Rules of Procedure and Evidence are adopted by the judges, and extend over a wide perimeter. The Tribunals' Statutes contain few articles dealing with procedural law,<sup>116</sup> and overall, the law-making processes of international law and scholarly efforts paid little attention to procedural law. In this regard, the elaboration of Rules of Procedure and Evidence by the Tribunals is noteworthy for developing international law in the areas of procedure and evidence. Although the Rules of Procedure and Evidence were drafted by the judges on the basis of existing criminal procedures and practice, and reflect an interplay among the major common law and civil law systems of the world, some aspects of those Rules of Procedure and Evidence may be pertinent to the development or enrichment of rules of procedure and evidence applied by national courts. As the Rules of Procedure and Evidence governing the Tribunals cover several areas, only a few are highlighted here.

Overall, the Rules embrace a flexible approach. Their chief rationale is the facilitation of substantive justice. They endeavour to draw on rules

---

<sup>115</sup> See eg *Prosecutor v Musema* (TC) ICTR-96-13 para 240; *Prosecutor v Kayishema & Ruzindana* (TC) ICTR-95-1 paras 156-158; *Akayesu* (n 95 above) paras 608, 610 & 611-617.

<sup>116</sup> See eg Statute of the ICTR, art 17 (on the powers of the Prosecutor to initiate investigations and question victims, suspects and witnesses to collect evidence and prepare indictments); art 18 (on review of indictments by a judge); art 19 (providing in general terms, *inter alia*, that trials shall be fair and expeditious, and must be conducted in accordance with the Rules of Procedure and Evidence, with full respect to the rights of the accused with due respect to the protection of witnesses and victims); art 20 (containing a catalogue of fair trial and due process guarantees); art 21 (identifying some measures that may be taken to protect witnesses and victims); art 22 (on the pronouncement of judgments and the imposition of sentences); art 24 (on appellate proceedings); art 25 (review proceedings); and art 27 (on pardon and commutation of sentences). Overall, these provisions are brief, and details on the subject matters they address are contained in the Rules of Procedure and Evidence.

applicable in both common and civil law systems, hence benefiting from rules and practices developed over the years.

A key rule is rule 89. Under rule 89(A) of the ICTR, similar to rule 89(A) of the ICTY, the Tribunals are not bound by national rules of evidence. In cases not expressly covered by the Rules, the Tribunals shall 'apply rule of evidence which in [their] view best favour a fair determination of the matter before [them] and are consonant with the spirit and general principles of law'.<sup>117</sup> Under rule 89(C), a Chamber 'may admit any relevant evidence which it deems to have probative value'.

Under rule 89, the judges have elaborated extensive jurisprudence to deal with critical issues, many of which are also faced by national courts worldwide. These include the admission of hearsay evidence, accomplice evidence, documentary evidence, evidence of other persons charged and facing charges before the Tribunal, and prior witness statements. Overall, the judges have pursued a flexible approach to the admission of evidence, taking a two-pronged approach to the matter. First, any evidence, including evidence falling in the enumerated categories, is admissible as a general rule 'regardless of its form',<sup>118</sup> as long as it is deemed to be relevant and has probative value. The second stage is that of evaluation, or determination of probative value, or weight to be attached to the evidence. In other words, the admission of evidence during the first stage is not equivalent to accepting it: Judges have to assess the weight attached to any evidence that is admitted, and can either accept or reject it at the time of determining an issue before them. The notions of 'relevance' and 'probative value' are broad terms. They have in some cases been clarified. For instance, in *Musema* it was held that:<sup>119</sup>

[f]or evidence to be relevant and to have a nexus between it and the subject matter, such evidence must be reliable. The same is true for evidence which is said to have probative value.

Under this flexible approach, the jurisprudence of the Tribunals is to the effect that whether or not any evidence (except that of a child victim under rule 90(C)) will require corroboration is a matter to be determined in each case. In other words, it is not a requirement that certain evidence must be corroborated. It follows from this, for instance, that 'hearsay evidence is not inadmissible *per se*, even when it is not corroborated by direct evidence'.<sup>120</sup> In practice, depending on all the

<sup>117</sup> Rule 89(B) ICTR/ICTY Rules of Procedure and Evidence.

<sup>118</sup> *Prosecutor v Musema* (TC) ICTR-96-13 para 34.

<sup>119</sup> n 118 above, para 36, also citing *Prosecutor v Celibici* ICTY (TC) Decision on the Prosecution's Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Muci, to Provide a Handwriting Sample, Case No IT-96-21-T (21 January 1998) (RP D5395-D5419) para 34.

<sup>120</sup> *Prosecutor v Nahimana et al* (TC) ICTR-99-52 para 97.



circumstances, in some cases, judges have taken or viewed some evidence with caution, for instance, hearsay evidence, or the evidence of accomplices, and required corroboration.<sup>121</sup>

As noted earlier, it is not a requirement that the evidence of a rape victim (except a child, under rule 90(C)) must be corroborated, an approach rejected in some national legal systems. It must be stated that national legal systems that require as a rule that evidence of a rape victims be corroborated violate gender equality.<sup>122</sup> The claim that corroboration is needed to guard against false charges is unfounded; surely, the risk of laying false charges cannot be limited only to rape and sexual offences.<sup>123</sup> The Tribunal is thus saluted for pursuing an approach that recognises gender equality, an approach that should influence national legal system that perpetuate stereotypes that are inimical to the protection of women.

Also of note are the Tribunal's rules on disclosure, or what some legal systems refer to as discovery. The Rules of the Tribunals guard against criminal trials 'by ambush'. They thus impose extensive disclosure obligations on the prosecutor, an approach uncommon in some national legal systems. Under rule 66A(ii) of the ICTR Rules, the prosecutor must disclose to the accused all the supporting materials that were used for the confirmation of an indictment within 30 days of the initial appearance of the accused. Moreover, not later than 60 days before the date set for trial, the prosecutor must disclose to the accused copies of statements of all witnesses whom he intends to call. Upon good being shown, the Chamber may permit the prosecutor to disclose to the defence statements of additional witnesses after the trial has commenced.<sup>124</sup> Furthermore, under rule 68(A), the prosecutor must, as soon as practicable, disclose any exculpatory material. Such materials encompass materials that may suggest the innocence or mitigate the guilt of the accused or affect the credibility of prosecution evidence. Under rule 67(A)(i), as early as reasonably practicable, and in any event prior to the commencement of the trial, the prosecutor shall notify the defence of the names of the witnesses that he intends to call to establish the accused's guilt, and in rebuttal of any defence plea of which the prosecutor has received notice.

The defence, on the other hand, has limited disclosure obligations.

---

<sup>121</sup> n 120 above, para 97.

<sup>122</sup> A number of legal systems provide definitions of rape that allow a rape victim to be of either sex. Arguably, in such legal systems, there is no gender inequality if the rule of corroboration is applied to both male and female victims.

<sup>123</sup> See the Namibian case of *S v D & Another* (1992) 1 SA 513 (Frank J, 515-516). See generally GW Mugwanya 'Augmenting the struggle for gender equality in Uganda: A case for the domestication of international human rights standards' (1999) 19 *Netherlands Quarterly of Human Rights* 235 264.

<sup>124</sup> Rule 66(A)(ii) Rules of Procedure and Evidence for the ICTR.

For instance, if, in addition to the above materials that must be disclosed to the defence by the prosecutor, the defence makes a request to obtain full statements of persons referred to in the supporting materials, but disclosure of whose statements is not obligatory, this request creates a reciprocal disclosure.<sup>125</sup> It entitles the prosecutor to inspect any books, documents, photographs and tangible objects which are within the custody or control of the defence and which it intends to use as evidence at the trial.<sup>126</sup> In addition, if the defence seeks to rely on an alibi, it is under an obligation to notify the prosecutor of such intention. It then must disclose to the prosecutor the place(s) which the accused claims to have been present at the time of the crimes with which he is indicted and the names and addresses of the witnesses and any other evidence upon which the accused intends to rely to establish the alibi.<sup>127</sup> Similarly, the defence is under an obligation to disclose to the prosecutor names and other evidence in support of any other special evidence the accused seeks to invoke, such as diminished responsibility.<sup>128</sup> The failure by the defence to discharge these obligations, however, does not limit the accused's right to rely on the defences in question, although such failure may be taken into account by the judges in weighing the merits or credibility of the defences raised by an accused.<sup>129</sup>

It is clear from the above that the prosecutor's disclosure obligations are wider and somewhat stringent, but their discharge is critical in availing the accused of all the relevant information to enable him prepare his defence, a guarantee recognised under international law. The approach of the ICTR may guide national systems in their efforts to afford fair trial and due process to accused persons.

Also of note in the Statute and Rules of Procedure and Evidence of the Tribunals is the effort to expressly codify a catalogue of rights of the accused, from investigations and through to trial. The reason for this is to ensure the right to a fair trial and due process to all persons appearing before the Tribunals. In addition to some of the rights identified above, the law and practices of the Tribunals are also noted for incorporating human rights in their sentencing regime, such as excluding the death penalty and corporal punishment. While a number of states still embrace these penalties, and while the notions of 'cruel, inhumane and degrading' punishment may be the subject of degrees of vagueness, corporal punishment and the death penalty are difficult to reconcile with the prohibition of cruel, inhumane and degrading punishment.

---

<sup>125</sup> n 124 above, rule 66(B) & 67(C).

<sup>126</sup> As above.

<sup>127</sup> n 124 above, rule 67(A)(i).

<sup>128</sup> n 124 above, rule 67(A)(ii).

<sup>129</sup> *Prosecutor v Musema* (TC) ICTR-96-13 para 107.

### 3.6 Rights of witnesses and victims

Another important aspect of the law and jurisprudence of international criminal tribunals relates to their efforts to strike a balance between the rights of the accused to a fair trial and due process *vis-à-vis* other competing values, particularly the rights of victims and witnesses.

Such balance is very critical. As noted earlier, witnesses and victims may be exposed to danger in the form of retaliation for co-operating with the Tribunals, a problem that may in varying degrees also afflict witnesses appearing before national courts. Many witness appearing before UN tribunals need protection. It follows that the Tribunals have had to address a complex task of balancing the rights of the accused with those of victims and witnesses appearing before the Tribunals. There is no doubt that witnesses are indispensable to any trial, unless an accused pleads guilty. If witnesses and victims refuse to testify for either party because of safety concerns, such refusal undermines the process of justice.

The efforts by international criminal tribunals to identify criteria for balancing the rights of the accused and those of witnesses and victims constitute a fundamental contribution to the evolution of international criminal justice standards, and may also guide national courts when faced with similar challenges.

An analysis of the law and jurisprudence engendered by the ICTR and ICTY points to an endeavour to carefully balance the conflicting values of protecting witnesses and victims, while at the same time endeavouring to ensure that the core minimum guarantees of fair trial and due process are not undermined. The Tribunals' 'balancing' approach attempts to ensure that, while victims and witnesses must be afforded protection, the accused is always afforded adequate time to prepare his defence, and that his rights to confront and cross-examine witnesses are respected.

Under article 19 of the Statute, trial chambers of the ICTR are under an obligation to afford fair and expeditious trials in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses. Trial chambers are thus to pay attention to the protection of witnesses and victims by ordering appropriate measures of protection to them, while at the same time ensuring that the rights of the accused are respected. Article 21 of the Rules of Procedure and Evidence makes provision for the protection of witnesses and victims, including the conduct of *in camera* proceedings and the protection of the victim's identity. Under rule 69, *in exceptional circumstances* either of the parties may apply to a trial chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the chamber orders otherwise. Non-disclosure of the identity of victims and witnesses is intended to protect those victims and witnesses who may be

endangered because of the testimony they provide to the Tribunal. Because non-disclosure of the identity *ipso facto* affects the right of the accused to prepare his defence, the jurisprudence of the Tribunals has had to strike a balance between the life and security of witnesses and victims and the right of the accused to fair trial, notably by ensuring that the anonymity of witnesses and victims is not permanent and not total.

Total and permanent anonymity of a witness prior to and during the testimony of the witness would be irreconcilable with the rights of the accused. This is thus not allowed by the Tribunals' Statutes and the Rules of Procedure and Evidence, as well as by the practices of the trial chambers. Under rule 69(c), subject to rule 75, the identity of the victims shall be disclosed within such time as determined by the trial chamber to allow adequate time for the preparation of the prosecution and the defence. Under rule 75, a judge or trial chamber may, *proprio motu* or at the request of either party or the victim or witness concerned, or the Victims and Witness Support Unit, order appropriate measures for the safeguard of the privacy and security of victims and witnesses, *provided that the measures are consistent with the rights of the accused*.<sup>130</sup>

In practice, the judges have also elaborated key criteria to guide the balancing of conflicting values. For instance, in *Prosecutor v Bagosora*,<sup>131</sup> a trial chamber has held that<sup>132</sup>

[t]o grant protective measures to a witness, pursuant to Rule 75, the following conditions must apply; Firstly, the testimony of the witness must be relevant and important to a party's case. Secondly, there must be a real fear for the safety of the witness and an objective basis underscoring the fear. Thirdly, any measure taken should be strictly necessary. If a less restrictive measure can secure the required protection, that measure should be applied.

In some cases, such as *Prosecutor v Nahimana et al*,<sup>133</sup> some witnesses were especially vulnerable to danger. Trial chambers have had to offer 'extraordinary measures' of protection to such witnesses, such as testifying by video link from a location away from the Tribunal. Such extraordinary measures must not negate the rights of the accused to a fair trial. Thus, even those extraordinary measures, such as testifying by video link, must allow the right to confront the witnesses. Moreover,

<sup>130</sup> My emphasis.

<sup>131</sup> *Prosecutor v Bagosora*, ICTR-96-7, decision on the extremely urgent request made by the defence for the protection measures for Mr Benard Ntuyahaga, 13 September 1999.

<sup>132</sup> n 132 above, also citing one of the earliest decisions in the case of *Tadic: Prosecutor v Tadic*, Decision on the Prosecutor's motion requesting protective measures for victims and witnesses, 10 August 1995.

<sup>133</sup> *Prosecutor v Nahimana, Barayagwiza & Ngeze (TC)*, ICTR-99-52.

while the identity of the witnesses and the content of their statements are the subjects of restrictions, they have to be disclosed to the defence at least some time prior to the testimony.<sup>134</sup>

#### 4 Conclusion

An inquiry into the contribution of international criminal tribunals to international criminal justice, and lessons for national justice and legal systems, includes several issues, and thus may extend over a very wide area. Only a few critical issues have been addressed above. International criminal tribunals are indispensable in ongoing efforts to foster accountability for transgressions of human rights and to break the culture of impunity and the cycles of violence and disrespect for the rule of law. They occupy a centre stage in ongoing efforts of ensuring that those who commit core crimes, particularly genocide, crimes against humanity and war crimes, do not escape justice by hiding under the veils of state sovereignty, immunities, or the breakdown or incapacities of national legal systems, particularly as a result of massacres and other acts of violence.

The above discourse has highlighted some areas where the Tribunals' jurisprudence, especially that of the ICTR, may positively influence and enrich the laws and practices of states, both in their substantive, evidentiary and procedural arenas. Indeed, in such areas, the Tribunals' jurisprudence provides important precedents for reforming national laws to bring them to the standards of international law, including international human rights law. As noted above, such influence and enrichment of national criminal systems by international criminal tribunals are critical in a time when national systems are constantly revisiting and expanding their laws to respond to contemporary crimes such as terrorism. Unless they are guided and restrained, national responses to such crimes may endanger internationally accepted norms, such as fair trial rights and due process rights of suspects and accused persons. The laws and jurisprudence of the ICTR contain some relevant guidance.

International criminal tribunals can achieve some influence over national systems if their work and jurisprudence are widely disseminated and accessed by national legislatures, law reform agencies, lawyers and others. The ICTR has a website with relevant case law, and some of its judgments have been published, also on a CD-ROM.<sup>135</sup> More needs to be done, however, to publicise the Tribunal's work.

---

<sup>134</sup> *Media* case (n 133 above). See Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures, 14 September 2001.

<sup>135</sup> <http://www.ictr.org>.

Unfortunately, the international media has not given the ICTR the same coverage as that afforded the ICTY.<sup>136</sup> This needs to change.

---

<sup>136</sup> See generally K Moghalu 'The International Criminal Tribunal for Rwanda in perspective' paper presented at the African Dialogue II Conference, Arusha, Tanzania, 24-26 May 2002 6 (on file with author).