APPROPRIATENESS AND ADEQUACY OF JUDICIAL REMEDIES IN INTERNATIONAL HUMANITARIAN LAW:

A case study on the Rwanda Tribunal

A dissertation submitted in partial fulfillment of the requirement for the award of bachelor of laws (LL.B) Degree of the University of Nairobi.

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CHAPTER ONE

1.0 INTRODUCTION

The 1994 genocide civil war in Rwanda was sparked by the shooting of Rwandese President Juvenal Habyarimana’s private plane causing his death and other entourages aboard the plane, including the Burundian president Cyprien Ntarymira. Hutu extremists immediately accused the Rwandese Patriotic Front (RPF) of assassinating President Habyarimana who was a Hutu. This resulted to a systematic and well organised killing of the minority Tutsis and moderate Hutus by the militiamen of the ethnic Hutu majority. The killings then spread throughout the countryside as Hutu militia, armed with machetes, clubs, guns, and grenades, began indiscriminately killing Tutsi civilians who were referred to as ‘cockroaches’ and ‘the enemy.’ Subsequently, all individuals in Rwanda carried identification cards specifying their ethnic background. The media played a major role in spreading hate racist propaganda. For instance, radio broadcasts from the station popularly known as Radio-Television Libre des Milles Collines, set-up by two close associates of president Habayarimana came in handy. The station is said to have broadcasted unceasing message of hate in the months leading up to the massacre. At the height of the killings, one message reportedly sent over the airwaves was, “the grave is only half full, who will help us fill it?” Hutu soldiers, the presidential guard, and the militias- interahamwe (those who attack) and the impuzamugambi (those with one aim) began to hunt down and kill Tutsi civilians. Sufficient evidence exists to confirm that the slaughter that ensued was not chaotic, uncontrolled violence but rather a planned and organised campaign of genocide. At this time, there was the U.N (United Nations) Assistance Mission in Rwanda (UNAMIR), which had been established by the Security
Council. However, at the time of the genocide, UNAMIR was dogged with financial and administrative problems. This resulted in the force not receiving essential equipment and supplies, including armoured personnel, carriers and ammunition. As a consequence, when the killing began in April 1994, UNAMIR lacked reserves of such basic commodities as food and medicine as well as military supplies. Constrained by the relatively small size of the force as well as other problems, the U.N-established body could not effectively engage in restoring peace amid the massacre.

Amid the onslaught, the then small United Nations peacekeeping force was overwhelmed as terrified Tutsi families and moderate Hutus sought protection. Some of the peacekeepers were captured, tortured and even murdered by the Hutus. As a result, the United States, France, Belgium, and Italy all began evacuating their own personnel from Rwanda leaving behind Tutsi civilians or Hutu moderates at the mercy of Hutu extremists. The killings were initially categorized by the U.N headquarters as a breakdown in the cease-fire between the Tutsi and Hutu. Throughout the massacre, both the U.N. and the United States of America carefully refrained from labeling the killings as genocide, which would have necessitated some kind of emergency intervention.

Consequently, about 800,000 Rwandan citizens were killed during the genocide that lasted for 100 days and approximately three million people were forced into exile. As a result, the institutions in charge of upholding the law, courts, police and prisons ceased to function effectively. The killings only ended after armed Tutsi rebels, invading from neighbouring countries, managed to defeat the Hutus and halt the genocide in July 1994. On 19th July of the same year, a new multi-ethnic government (government of National Unity) was formed headed by President Pasteur Bizimungu, a Hutu while the majority of cabinet posts were assigned to RPF members. After the genocide, almost 130,000 people accused of having organised and taken part in it were put in prison in worst possible

6 Security Council established UNAMIR with 2,548 troops on 5th October 1993
7 Ibid
8 Ibid
At this time, a general amnesty was out of the question as the new government, the Rwandan people and the international community all agreed that those responsible for the genocide should be held accountable for their acts in order to eradicate the culture of impunity, reinforce respect for the law and uphold the principle of punishment for crimes, and above all bring about the process of reconciliation between the two major tribes in Rwanda, the Hutu and the Tutsi.

1.1 The genocide question and its status in Rwanda

As aforementioned, during the 1994 Rwanda massacre described above, the greatest question, which was of much significance, was whether the 100 days massacre amounted to genocide. As evidenced throughout the massacre, both the U.N. and the U.S.A carefully refrained from labeling the killings as genocide, which would have necessitated some kind of emergency intervention. This demands therefore an analysis of whether the Rwanda massacre could amount to a genocide, which could have deserved more attention and quick response by the International community.

Genocide by definition is a deliberate extermination of a nation or race of people. Originally, Raphael Lemkin came up with the term genocide in his 1944 work. Lemkin created the term ‘genocide’ from two words, “genos” which means clan, family or people in ancient Greek and “occidio” meaning total extinction or extermination. Thus, he formulated the following as the definition of genocide.

A coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objective of such a plan would be disintegration of the political and social institutions of culture, language, national feelings, religion and the economic existence of national groups and the destruction of the personal security, liberty, health, dignity and even the lives of individuals belonging to such groups. Genocide is directed against the national groups as an entity and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.

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11 Article 3 common to the four Geneva Conventions of 1949
12 Oxford Advanced Learners Dictionary
13 Axis Rule in occupied Europe
14 Ibid note 13
During the Nuremberg Trial which was established in 1945, these crimes were officially described as “intended and systematic ‘genocidio’\textsuperscript{15} however, this definition was narrow and not very comprehensive to cover a wider spectrum. The International Community first recognized the crime of genocide when the UN passed the Convention on Prevention and Punishment of the Crime of Genocide.\textsuperscript{16} Accordingly, this Convention adopts a broader and detailed definition and the definition can be invoked within the context of the massacre in Rwanda. Rwanda is a party to the Convention\textsuperscript{17} therefore it is bound by its provisions which it is under an obligation to apply in the event of genocide. However, it entered a reservation that states: “The Rwandese Republic does not consider itself as bound by article IX of the Convention.” Which article states that: “Disputes between the contracting parties relating to the interpretation, application or fulfillment of the present convention including those relating to the responsibility of a state for genocide or any other acts enumerated in article III shall be submitted to the International Court of Justice at the request of the parties to the dispute?” Rwanda, though not having ratified the Convention was still bound by the prohibition of genocide, which forms part of customary International Law. Further, it had been universally accepted and recognized by the international community that the prohibition of genocide had attained the status of \textit{jus cogens}.\textsuperscript{18} Article II of the Convention provides that

“In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

\textsuperscript{15} (This means the extermination of racial and national groups of civilian population in a certain territories in order to destroy certain races and layers of nations and people, racial and religion groups.) Leo Kuper, The Prevention Of Genocide (Yale Uni. Press, 1985)

\textsuperscript{16} On 9th December 1948, the UNGA at its 179th meeting (Paris session) had the draft convention debated by the legal committee and adopted as the Convention on the Prevention and Punishment of the Crime of Genocide. The Convention went into force on 12th January 1951 in accordance with article XIII (‘it shall come into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession’\textsuperscript{...}) after twenty member states had appended their signatures.

\textsuperscript{17} Rwanda acceded to the Convention on the Prevention and Punishment of the Crime of Genocide on 15 April 1975

\textsuperscript{18} Lyal Sunga, the Emerging System of International Criminal Law in Codification and Implementation (Kluwer Law International, The Hague, 1997) pg. 300
Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group."

The International legal definition captured above describes two elements of the crime of genocide:

1) The mental element, meaning the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such", and
2) The physical element which includes five acts described in sections a, b, c, d and e. A crime must include both elements to be called "genocide."

The Article indicates that genocide is broadly defined and it includes a wide rage of genocidal acts that need not kill or cause the death if committed as part of a policy to destroy a group’s existence. Having a glance at the scenario in Rwanda, the cases of inter-communal violence brought to the international community’s attention indicate very clearly that the victims of the attacks, Tutsis in the overwhelming majority of cases, have been targeted solely because of their membership of a certain ethnic group, and for no other objective reason. Article II, paragraphs (a) and (b), therefore, may be considered to apply to these cases.

The violations of the right to life could fall within the purview of Article III of the convention, which provides:

The following acts shall be punishable:

(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide.
The article therefore means that it is a crime to plan or incite genocide, even before killing starts, and to aid or abet genocide. These criminal acts include conspiracy, direct and public incitement, attempts to commit genocide, and complicity in genocide. Also, persons committing genocide or any of the other acts shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.¹⁹

This follows that the massacre that was evidenced in Rwanda amounts to genocide and consequently, the perpetrators and those who participated in the genocide and other related acts that violated International humanitarian Law would be subjected to the law.

1.2 Establishment of International Criminal Tribunal for Rwanda

Following the Rwanda's violence, the international community made an outcry in respect to the grave consequences of the genocide. Prior to the massacre of 1994, the Security Council had already determined that the situation in Rwanda pose a threat to international peace and security. In July 1994, partially in response to a request for assistance from the Rwandan government, the Security Council passed resolution 935 requesting the Secretary General to form a commission of experts to report on the violence. The commission’s report indicated that there was commission of international crimes, including genocide and violations of International Humanitarian Law.²⁰ Therefore the international community, through the United Nations’ Security Council decided to create a jurisdiction in charge of prosecution of persons responsible for genocide or grave violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such acts and violations of International Humanitarian Law committed in the territory of neighbouring States. The U.N derived the above authority from Chapter VII of the Charter of the United Nations, which provided 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 Article 41²¹ and 42,²² to maintain or restore international peace and security.²³

¹⁹ Article III of the Convention on Prevention and Punishment of the Crime of Genocide
²⁰ S/1994/1125
²¹ Article 41, Charter of the United Nations, “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
Consequently, and upon the initial request by the Rwandan government, Security Council of the UN established the ICTR (International Criminal Tribunal of Rwanda) in 1994\(^{24}\) as subsidiary organ to the Security Council pursuant to Article 29 of the U.N charter\(^{25}\). The ICTR (hereinafter called the Tribunal) was given the mandate,

> To prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwanda citizens responsible for genocide and other such violations committed in the territory of neighbouring states between 1\(^{st}\) January 1994 and 31\(^{st}\) December 1994.\(^{26}\)

In addition, the ICTR Statute established the Tribunal’s jurisdiction to prosecute persons responsible for; genocide,\(^{27}\) crimes against humanity,\(^{28}\) and serious violations to the Geneva Conventions (1949) and of Additional Protocol II thereto (1977).\(^{29}\) Therefore as a judicial body, the ICTR was to offer judicial remedies in respect those who are proved to have participated in the 1994 genocide and other related atrocities. This was aimed at ensuring that such violations were put to an end and effectively redressed.

In establishing the tribunal, the Security Council had the following options:\(^{30}\)

1. To expand the mandate of the exiting Tribunal for the former Yugoslavia to include Rwanda,

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Members of the United Nations 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.”

\(^{22}\) Article 42, Charter of the United Nations, “Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”

\(^{23}\) Article 39, Charter of the United Nations

\(^{24}\) Resolution 955 Adopted by the Security Council at its 345 3rd meeting, on 8 November 1994 for the establishment of ICTR. The Resolution included the Tribunal’s Statute as an annex

\(^{25}\) The article provides that the Security Council may establish such subsidiary, as it deems necessary for the performance of its functions

\(^{26}\) Article 1, the Statute of the ICTR

\(^{27}\) Supra Article 2

\(^{28}\) Ibid article 3

\(^{29}\) Article 3 common to the Geneva Conventions of 12\(^{th}\) August 1949 and Article 4 of the Additional Protocol II of the 8\(^{th}\) June 1977 relating to the protection of victims of non-international armed conflicts

2. To create a wholly separate entity under the United Nations auspices with its own charter, judges, personnel facilities e.t.c,

3. To create a separate, tribunal for Rwanda, sharing administrative staff, facilities and other resources with the Yugoslavia Tribunal.

On the other hand, the Rwanda Government took issue with:

1. The proposed form the tribunal would take; the proposed temporal jurisdiction of 1st January to 31st December 1994 would exclude jurisdiction over certain persons who were involved in the planning of the genocide prior to 1st January 1994.

2. The proposed seat of the tribunal; it was the government’s wish to have the trials held in Rwanda and not outside the country. This, it was argued would ensure that justice is not only done but seen to be done.

3. The proposed scale of punishment; The government strongly favoured the death penalty to satisfy demands in Rwanda for justice commensurate with the gravity of genocide, while a number of United Nations member states were strongly against it.

4. The Tribunal not being totally independent, as the ICTY and the ICTR shared the same Chief Prosecutor and Appeals Chamber.

5. Other issues such as the right to have some input in the selection of judges to the Tribunal

These different approaches resulted into a series of negotiations culminating to a draft resolution being subjected to the popularity of the vote by the Security Council. 13 members voted in favour, Rwanda voted against and China abstained voting. In the November resolution, the Security Council adopted a combination of the 3 approaches afore-mentioned:

1. The International Criminal Tribunal for Rwanda was established as a separate entity with its own judges, registry system, and administrative staff.

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31 Ibid
32 supra note 24
33 Article 10, ICTR
2. The same persons who serve as Chief Prosecutor and Appeal judges for ICTY would carry out functions for the Rwanda Tribunal.\textsuperscript{34}

3. The ICTR would adopt the rules of evidence and procedure developed by ICTY.\textsuperscript{35}

1.2.1 The principal objectives of setting up the ICTR

(a) To act as a deterrent against genocide and other serious violations of International Humanitarian Law.

(b) To bring to justice persons responsible for these crimes.

(c) To contribute to the process of national reconciliation, the restoration and maintenance of peace in Rwanda.

The Statute establishing the ICTR was based on the earlier ad hoc Tribunals that had been set up for the same. This included the Nuremberg Tribunal and the International Criminal Tribunal for Former Yugoslavia (ICTY). In many ways, the statute of the ICTY served as a model hence the two statutes have many features in common.

1.2.2 The seat of the Tribunal

Security Council Resolution 955 provides yardsticks upon which considerations shall be based in determining the location of the Tribunal.\textsuperscript{36} The location of the seat of the Tribunal and the site of its hearings has been a subject of debate among policymakers for a long time. However, the September 29 Commission of Experts’ report concluded that “for the purposes of independence, objectivity and impartiality, there are advantages of having trials conducted by an international criminal tribunal in a place such as the Hague for the very reason that there would be a certain measure of distance from the venue of

\textsuperscript{34} Ibid Article 12(2)

\textsuperscript{35} Ibid Article 14

\textsuperscript{36} The Resolution provides that the seat of the International Tribunal shall be determined by the council having regard to considerations of justice and fairness as well as administrative efficiency, including access to witnesses, and economy...having regard to the fact that the International Tribunal may meet away from its seat when it considers it necessary for the efficient exercise of its functions...an office will be established and proceedings will be conducted in Rwanda, where feasible and appropriate, subject to the conclusion of...appropriate arrangements.
the trial and the places where severe atrocities have been perpetrated.” This position was opposed by the Rwandan government arguing that the Tribunal should be located in Rwanda. Negotiations were held and a suitable location was to be identified for the interest of justice. Consequently, by resolution 977 of 22\textsuperscript{nd} of February 1995,\textsuperscript{37} the Security Council set the location of the court in Arusha, in the United Republic of Tanzania. This was after the Rwandan government expressed willingness to co-operate with the Tribunal and the appropriate arrangement which had been reached between the U.N and the government of the United Republic of Tanzania. At the seat of the Tribunal, there are the chambers of the Tribunal and other offices. However not all the Organs of the Tribunal are situated in Arusha. The joint Chief Prosecutor for the Rwanda and Yugoslavia Tribunals is based at The Hague and the Rwanda arm of the prosecutor’s office is based at Kigali, Rwanda headed by a Deputy prosecutor.

1.3 Organization and composition of the Tribunal

For the effective functioning of the Tribunal, it is divided into different organs and units. The division envisaged a better management of the Tribunal and efficiency in dispensation of justice. The ICTR Statute has provided for three principal organs of the Tribunal: the Chambers consisting of two Trial Chambers and one Appeals Chamber, the prosecutor, and the registry.\textsuperscript{38}

1.3.1 The Chambers

At its inception, the Tribunal had two Trial Chambers all based in Arusha and the Appeals Chamber located in The Hague, Netherlands.\textsuperscript{39} At the Trial Chambers and Appeals Chamber, cases are heard and determined by the judges. The three Trial Chambers and the Appeals Chamber of the Tribunal are composed of judges elected by the General Assembly from a list submitted by the Security Council. The judges, who are

\textsuperscript{37} The Resolution S/1995/148 was adapted by the Security Council at its 3502\textsuperscript{nd} meeting on 22\textsuperscript{nd} February 1995. Arusha, Tanzania was declared the seat of the Tribunal and it began its work on 26\textsuperscript{th} June 1995, which was the day of the first plenary session of its eleven judges in The Hague, Netherlands.

\textsuperscript{38} \textit{Ibid} Article 10

\textsuperscript{39} The Appeals Chamber, which is located in The Hague, Netherlands, is shared by both the ICTR and the ICTY.
to adjudicate trials and motions, are initially selected from a list of nominees submitted by Member States of the United Nations. During the Nomination exercise, regard shall be had to the qualification of the judges\(^40\) and adequate representation of the principal legal systems of the world.\(^41\) The judges are elected for a term of four years and the elected judges are eligible for re-election.

On the establishment of the Tribunal, the United Nations General Assembly elected 11 judges, three in each of the Trial Chambers and five in the Appeal Chamber. However, due to increased work load, another Chamber was established. Consequently, there are 3 Chambers in the ICTR with 14 judges, nine in the Trial Chamber whereby three judges sit in each of the three Chambers and five in the Appeal Chamber.\(^42\) The President of the ICTR is elected by all judges and each Trial Chamber elects a Presiding Judge, who shall conduct all of the proceedings of that Trial Chamber as a whole. The President presides at all plenary meetings of the Tribunal, coordinate the work of the Chambers and supervises the activities of the Registry as well as the exercise of all the other functions conferred on him by the Statute and the Rules.

There was need to expedite the Tribunal’s work. This necessitated the United Nations Security Council to draft Resolution 1431 of 2002 to establish a pool of *ad litem* judges for the ICTR. As a result, The UN General Assembly elected eighteen *ad litem* judges to the ICTR on 25\(^{th}\) June 2003 who will serve a four-year term. A maximum of four *ad litem* judges shall be members of each Trial Chamber at any one time.\(^43\) The Appeals Chamber of the Tribunal is based at The Hague. The members of the Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law Committed in the Territory of the Former Yugoslavia since 1991 shall also serve as the members of the Appeals Chamber of the International Tribunal for Rwanda. This means that Appeals emanating from The ICTR are heard at

\(^{40}\) The 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 due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law

\(^{41}\) Article 12 ICTY; the judges, who must be of high moral character and suitably qualified, are all elected by the U.N General Assembly and no two judges can be of the same nationality.

\(^{42}\) ICTR Newsletter, vol. 1, No. 2, July 2003

\(^{43}\) *Ibid*
Regarding Appellate Proceedings, the Appeals Chamber Shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:

a) An error on a question of law invalidating the decision, or
b) An error of fact which has occasioned a miscarriage of justice.

Based on the above grounds, and upon hearing the appeal, the Appeal Chamber may affirm, reverse, or revise the decisions taken by the Trial Chambers.

1.3.2 The Office of the Prosecutor

The Office of the Prosecutor is a separate and independent organ of the Tribunal. Article 15 of the ICTR statute provides that the prosecutor of the ICTY will also serve as the prosecutor of the ICTR. In pursuance of this article, there is one joint chief prosecutor for both the Rwanda and Yugoslavia Tribunals who is based at The Hague. The Rwanda arm of the prosecutor’s office^44 is located in Kigali, Rwanda as well as in Arusha where the Deputy Prosecutor who is responsible for day-to-day operations, heads it. This office is responsible for investigating crimes within the Tribunal’s jurisdiction, framing indictments (charges) and prosecuting cases before the Tribunal pursuant to Article 17 of ICTR. The Chief Prosecutor is appointed for a four-year term by the Security Council upon nomination by the Secretary General.\(^46\) The Office is divided into the following Sections:

- The Investigation Section: This section is divided into teams responsible for collecting evidence implicating individuals in crimes committed in Rwanda in 1994, falling within the Tribunal's jurisdiction. It is also involved with the interviewing of witnesses and conducting field investigations.

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^44 The Deputy prosecutor heads the office
^45 The Prosecutor is in charge of investigations, prosecution, and indictment of suspects. Since resolution 1503 of the security Council on the 28th of August 2003, its mandate was modified and it provides that "The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994."
^46 See Article 16, Statute of the ICTY
The Prosecution Section: This section is composed of Trial Attorneys responsible for drafting indictments and prosecuting all cases before the Tribunal and Legal Advisers for both the Investigations and the Prosecution.

The Special Advisory Section advises the Investigation and Prosecution sections on international and comparative law. It advises both the ICTR and the ICTY and seeks to harmonize approaches and avoid duplication.

Administration and Records Section responsible for computer systems and the handling of materials generated by the prosecutor’s office.

These sections work collectively in the discharge of their duties and for the furtherance of the office of the prosecutor’s functions. The prosecution forms the backbone of the Tribunal in that for the perpetrators to be subjected to a fair trial and for justice to be seen to be done, the prosecutor’s has to carry out a comprehensive and effective investigation and a subsequent thorough prosecution.

1.3.3 The Registry

The registry is the juridical and judiciary helping-hand of the other organs of the tribunal. It is responsible for both administration and servicing of the tribunal pursuant to Article 16 of the Statute. The registry, which is located in Arusha, is headed by the Registrar who provides judicial and legal support services for the work of the Trial Chambers and the Prosecution. The Registry also performs other legal functions assigned to it by the Tribunal’s Rules of Procedure and Evidence, and it is the Tribunal’s channel of communication. The Registry comprises two principal Divisions: the Judicial and Legal Services Division and the Division of Administration. The Registrar, who is the head of the registry, is the Representative of the Secretary General of the United Nations. The Registrar to the Tribunal is appointed by the Secretary General after consultation with the President of the International Tribunal for Rwanda. The appointed registrar shall serve for a four-year term and be eligible for re-appointment. Other terms and conditions of the Registrar shall be those of an Assistant Secretary-General of the United Nations. The

48 Article 16(3) ICTR Statute
registry has other staff members who are appointed by the Secretary General on the recommendation of the Registrar pursuant to Article 16(4). The Registrar, after consultation with the President, shall make his recommendations to the Secretary-General of the United Nations for the appointment of the Deputy Registrar and other Registry staff. Currently, more than 700 persons representing around 85 nationalities are working for the registry in Arusha and Kigali.

1.3.4 Relationship of the Registry to the Chambers

The Tribunal being one body, all the departments need to work closely in order to realise its objective and to be able to complete it work within the stipulated timeframe. Much emphasis is with regard to the two main organs that is, the Registry and the Chambers. Pursuant to Article 16 of the Statute of the Tribunal, the Registry is responsible for the administration and servicing of the Tribunal. Pursuant to Rule 33 of the Rules, the Registrar assists the Chambers, the plenary meetings of the Tribunal, the Judges, and the Prosecutor in the performance of their functions. Under the authority of the President, the Registrar is responsible for the administration and servicing of the Tribunal and serves as its channel of communication. Therefore, to ensure smooth coordination between the Registry and the Chambers, the Registrar regularly schedules meetings with the Judges to share ideas and concerns and to work out means for enhanced cooperation and improved efficiency in the workings of the Tribunal.49

In addition to these organs of ICTR, there are other departments, divisions, and units, which have been established within the Tribunal. These units have been solely set to assist the Tribunal in the efficient dispensation of justice. These units, inter alia include; The Judicial and Legal Services Division, the Court Management Section, The Correspondence Section, e.t.c

This shows that the organization of the Tribunal is geared towards better management of the Tribunal and meant to ensure that the suspects of the 1994 Rwanda genocide are tried accordingly. The realization of objectives of the tribunal therefore, depends on the structuring of the Tribunal and how efficient the departments work. This includes being able to harmonize its work and work as a team.
CHAPTER TWO

"History teaches that as long as the duty of justice has not been discharged, the spectre of war can re-emerge."

Claude Jorda, the President of the International Criminal Tribunal for the Former Yugoslavia.

THE JURISDICTION AND COMPETENCE OF ICTR

2.0 Jurisdiction

In a national context, a narrow concept of jurisdiction may be warranted but this may not be the case in International Law because it lacks a centralized structure, does not provide for an integrated judicial system. In International Law, every tribunal is self-contained system (unless otherwise provided). This is incompatible with a narrow concept of jurisdiction, which presupposes a certain division of labour. In sum therefore, if the International Tribunals were not validly constituted, they would lack the legitimate power to decide in time or space or over any person or subject matter. In establishing a tribunal, the Security Council sets out the Jurisdiction which the tribunal is to adopt and the said jurisdiction is limited to what the Security Council intends to entrust the Tribunal with.

2.1 The jurisdiction of the UN Security Council in establishing the ICTR

The UN Security Council, having established the ICTR and setting out its objective, it had to determine the Jurisdiction of the Tribunal to ensure its effective functioning. Whether the Security Council has the mandate to establish and determine the jurisdiction of the criminal Tribunal for the prosecution of persons responsible for Violations of International Humanitarian Law was first determined in the Tadic case at the International criminal tribunal for the Former Yugoslavia (ICTY). In this case the power

51 Prosecutor vs. Tadic case No. IT-94-1-AR72 (1995)
52 Prosecutor vs. Tadic case No. IT-94-1-AR72 (1995)
of the UN Security Council to establish a Tribunal was challenged by the defence in a motion seeking the Trial Chamber to dismiss the case for lack of jurisdiction. The Trial Chamber ruled that the issue was a political question and hence non-justifiable. However on Appeal, the Appeal Chamber disagreed with the Trial Chamber and ruled that the establishment of the ICTY by the UN Security Council was indeed a jurisdictional question that the Tribunal could properly review. The Appeal Chamber ruled that the establishment of the Tribunal fell squarely within the powers of the Security Council under Article 41 of the UN Charter because it was on the basis of the actions envisaged under article 41 of the UN Charter that the security council set up the Tribunal for the promotion and maintenance of international peace and security. The atrocities committed in the Former Yugoslavia constituted a threat to international peace and security as stated in Chapter three of the UN Charter hence warranted such an action.

A similar attack on the jurisdiction of the ICTR was asserted in the Kanyabashi case on the basis of the same argument advanced in Tadic, the second Trial Chamber of the ICTR, in a unanimous decision, quashed the challenge and reaffirmed the legality of the establishment of the International Criminal Tribunal for Rwanda by the UN Security Council.

Before resolution 955 was passed, it was the Rwandan government’s wish to have trials held in Rwanda. On the other hand, the United Nations Commission of Experts strongly opposed this idea arguing that such prosecution would be well undertaken by an International Tribunal rather than a municipal one. Their argument was premised on the fact that proceedings and subsequent convictions by Rwanda national courts or a Rwandan based Tribunal would not be perceived to amount to effective retribution and fair dispensation of justice. Consequently the seat of the Tribunal was situated in Arusha, Tanzania.

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Criminal Tribunal for Rwanda was empowered to prosecute persons responsible for Genocide and other serious violations of International

53 Supra note 2
55 Supra note 24
56 See Alison des forges, ‘leave none to tell the story’: genocide in Rwanda 14 (1999)
Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1st January 1994 and 31st December 1994. However, in the exercise of this power, the Tribunal is to act, function and dispense justice in accordance with the provisions of the statute. The competence of the Tribunal is in fact rooted in article 1 of the ICTR statute as a consequence therefore, it’s jurisdiction, if exercised within the provisions of the statute, will not be successfully challenged. This is geared towards giving the tribunal the required mandate and power in the pursuit of justice.

2.2 The mandate of the ICTR

The principle mandate of the ICTR is to prosecute persons responsible for genocide and other serious violations of International Humanitarian Law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring states between 1 January and 31 December 1994. This is reflected in the preamble to the statute of the ICTR. The Tribunal is carrying its mandate as provided and it is due to complete its mandate by 2010. To achieve this, the Tribunal is to formalize a detailed completion strategy modeled on the ICTY strategy, which has been endorsed by the Security Council. This includes transferring cases involving intermediate and lower-rank accused persons to competent national jurisdictions, as it is appropriate, including Rwanda national courts, in order to allow the ICTR to achieve its objective of completing investigations in time and all trial activities at first instance by

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57 Article 1 of the ICTR statute
58 Ibid
59 Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 (hereinafter referred to as "The International Tribunal for Rwanda") shall function in accordance with the provisions of the present Statute
60 http://www.ictr.org/ENGLISH/tribunal's mandate html (last accessed on 15th July 22, 2005)
61 The Security Council endorsed the ICTY’s strategy for completing investigations by the end of 2004, all trial activities at first instance by the end of 2008, and all of its work in 2010 (ICTY Completion Strategy) (S/2002/678), by concentrating on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes within the ICTY’s jurisdiction and transferring cases involving those who may not bear this level of responsibility to competent national jurisdictions, as appropriate, as well as the strengthening of the capacity of such jurisdictions
62 Resolution 1503 (2003), Adopted by the Security Council at its 4817th meeting on 28 August 2003
the end of 2008, and all of its work in 2010. To meet this deadline, the office of the
Prosecutor has started to transfer some cases to national jurisdictions pursuant to Rule 11
bis adopted in July 2002. However, there is a risk that prosecutions in some national
jurisdictions, including Rwanda, may not be conducted according to internationally
accepted human rights and due process standards. The Rwandan judicial system itself is
overwhelmed and unable to bring to trial persons who are detained. Therefore ideally, the
number of cases to be transferred can be reduced by speeding up the current pace of
ICTR trials so that more suspects can be tried at the Tribunal before it ends its operations.
Towards this end and for expeditious disposal of cases, there has been need to expedite
the Tribunal’s work. For instance, in the summer of 2001, ICTR President Pillay
requested the UN to appoint ad litem judges to enable the timely completion of the
mandate of the tribunal. This necessitated the United Nations Security Council to draft
Resolution 1431 of 2002 to establish a pool of ad litem judges for the ICTR.

2.3 JURISDICTION OF ICTR

2.3.1 Temporal Jurisdiction
Temporal jurisdiction means that the Tribunal has a stipulated timeframe within which it
is to exercise its jurisdiction. The UN Security Council, in establishing the Tribunal,
specified the time within which it would refer to in terms of convicting the perpetrator of
the 1994 genocide. The temporal jurisdiction of the ICTR (ratione temporis) is limited
and closed, not only with respect to the dies a quo, but also with respect to the dies ad quem. The Statute of the ICTR provides that “…the temporal jurisdiction of the
International Tribunal Rwanda shall extend to a period beginning on 1 January 1994 and
ending on 31 December 1994.” This kind of jurisdiction was affirmed in the appeal case
of Jean Bosco Barayagwiza v. The Prosecutor, where the appellant argued that the

63 On 28 July 2005, the prosecutor of the UN ICTR handed 10 cases of suspects in the 1994 genocide to
authorities in Kigali, Rwanda, saying this would help the Tribunal meet the deadline of completing its trial
by 2008. Available at http://www.fomeka.net/luglio05/DH1695ENG.htm (last visited on 3 August, 2005)
64 Human Rights Brief; A Legal Resource for the International Human Rights Community. (News from the
International Criminal Tribunals) Volume 9 issue No.3
65 Supra note 42
66 Article 7 of the ICTR statute
67 Jean Bosco Barayagwiza v. The Prosecutor Case No: ICTR-97-19-AR72
Trial Chamber had no temporal jurisdiction to join his indictment with those of one Hassan Ngeze and Ferdinand Nahimana. The appellant contented that some of the allegations contained in the indictment fall outside the temporal jurisdiction of the tribunal. However, Pursuant to rule 72(1) of the Rules of Procedure and Evidence the Appeal Chamber dismissed the appeal on the alleged breach of temporal jurisdiction. The Appeal Chamber went ahead to restate the temporal jurisdiction as provided under Article 7 of the Statute.

This meant that the tribunal would only prosecute persons who participated in the genocide or violated the law between the aforementioned dates. This was somewhat arbitrary because some of the acts that led to the violation of International Humanitarian Law were planned and occurred well before January 1994. As a result therefore, the planning or incitement of the crimes of genocide, would exclude acts that were carried out prior to 1 January 1994, and crimes that were committed after 31 December 1994, even if the planning, conspiracy and incitement were carried out between 1 January and 31 December 1994. There is conclusive evidence that armed conflict between rebel RPF and Rwanda government commenced on 1 October 1990 and not on 1 January 1994. There is also proof that both parties signed a cease-fire agreement on 9 January 1993 but resumed fighting on 10 February 1993. A second agreement was signed on 4 August 1993; but the agreement was again breached and armed conflict resumed on 6 April 1994 leading to the final defeat of the Rwanda government. It can reasonably be inferred that the armed conflict in Rwanda started on 1 October 1990. There is also evidence of foreign involvement in the internal affairs of Rwanda, particularly of France and Uganda. It therefore makes legal sense for the competence of the ICTR to encompass criminal prosecution of foreign nationals who were in breach of the laws of war during and after the armed conflict in Rwanda. This limitation of the competence of the ICTR was one of the reasons why there was opposition from the Rwandan

71 The East Africa Magazine, August 31-September 6, 1998
72 Article 7 of the ICTR statute
government in respect to the establishment of the ICTR. However negotiations were held and a vote as to the establishment was held where most members voted in favour of the establishment of ICTR.\textsuperscript{73}

\subsection*{2.3.2 Territorial Jurisdiction.}

The territorial jurisdiction of the ICTR (\textit{ratione loci}), which is also referred to as geographical jurisdiction, extend to the territory of Rwanda including land and airspace as well as neighbouring states in respect of serious violations of International Humanitarian Law committed by Rwandan citizens.\textsuperscript{74} This geographical coverage of the jurisdiction of ICTR makes the Tribunal competent not only for offences committed on the territory of Rwanda itself, but also on the territory of neighbouring states. However the extension of the territory to other neighbouring states is in respect to offences committed by Rwandan citizens.\textsuperscript{75} The terms ‘neighbouring states’ referred to by the statute do not exactly indicate the specific states, which fall under the term. In broadening the territorial jurisdiction of the ICTR beyond the boundary of Rwanda, the Security Council had hoped to bring into jurisdiction the refugee camps in Zaire (Democratic Republic of Congo) and other neighbouring states, where gross and systematic violations of Humanitarian Law are alleged to have occurred in connection with the conflict.\textsuperscript{76} Therefore it follows that the ICTR’s jurisdiction tends to be interpreted to extend to offences committed in Democratic Republic of Congo, Uganda, Tanzania and Burundi thus in exercising this jurisdiction in respect to perpetrators, their nationalities is not relevant to ICTR. The Tribunal was set up on an \textit{ad hoc} basis by specific political consensus of the member states of the UN Security Council. Therefore their jurisdiction is binding on all UN member states. This gives the Tribunal power to extend its jurisdiction to the specified states. The Security Council in Resolution 955 decided that all states should cooperate fully with the Rwanda Tribunal and take any measures necessary to implement the resolution and statute, ‘...including the obligation of States to

\begin{thebibliography}{9}
\bibitem{73} Supra Note 30
\bibitem{74} Ibid Note 14
\bibitem{75} Ibid
\bibitem{76} http://www.murdoch.edu.au/elaw/issues/v6n3.html (Last accessed on 24th July 2005)
\end{thebibliography}
comply with requests for assistance or orders issued by a Trial Chamber under Article 28 of the Statute’. In addition, the Security Council urged states:

To arrest and detain, in accordance with their national law and relevant standards of international law, pending prosecution by the International Tribunal for Rwanda or by the appropriate national authorities, persons found within their territory against whom there is sufficient evidence that they were responsible for acts within the jurisdiction of the International Tribunal for Rwanda.\textsuperscript{77}

Under the Rules of Procedure and Evidence of ICTR, it is provided that in urgent situations, the Prosecutor may request any state to arrest a suspect provisionally, seize physical evidence and take all necessary measures to prevent the escape of a suspect or an accused, injury to or intimidation of a victim or witness or the destruction of evidence.\textsuperscript{78} The state concerned ‘shall comply forthwith, in accordance with Article 28’.\textsuperscript{79}

2.3.3 Subject Matter Jurisdiction

The ICTR statute articulates clearly the subject-matter jurisdiction (rationae materiae), giving the Tribunal powers to prosecute in relation to subject matter. Under the ICTR statute, in determining the subject matter, there must be a link between the criminal act and the armed conflict. This position was captured in the judgment of the Tadic case.\textsuperscript{80} In this case, the Trial Chamber remarked that ‘the only question to be determined in the circumstances of each individual case was whether the offences were closely related to the armed conflict as a whole.’ Consequently, In the Akayesu Judgment,\textsuperscript{81} the Trial Chamber found that ‘...it has not been proved beyond reasonable doubt that the acts perpetrated by Akayesu ...were committed in conjunction with the armed conflict.’ Such a conclusion means that, in the opinion of the Trial Chamber, such a connection is necessary. Besides the requisite nexus with an internal armed conflict, the crimes must be committed on national, political, ethnic, racial or religious grounds and this shall be in relation to natural persons. According to Articles 2 and 3 of the ICTR Statute, the ICTR has power to prosecute persons who committed genocide as defined in Article 2 of the statute and persons responsible for crimes against humanity as defined in Article 3 of the

\textsuperscript{77} Resolution 978 of the UN Security Council
\textsuperscript{78} Rule 40 of the Rules of Procedure and Evidence, ICTR/TCIR/2/L.2 (1996)
\textsuperscript{80} Ibid
\textsuperscript{81} Ibid

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Article 4 provides that the Tribunal shall have powers to prosecute persons responsible for serious violations of Article 3 common to the Geneva Conventions of 12th August 1949 on the protection of victims of war and Additional Protocol II thereto of 8th June 1977 and other crimes provided under Article 4 of the statute.

Article 2 of the statute confers on the ICTR the power to prosecute persons who commits, conspires, directly and publicly incites, attempts, or is complicit in committing genocide. The article mirrors Article II of the 1948 Genocide Convention. The Genocide convention, which is today considered part of customary International Law, confirms that the crime of genocide, whether committed in time of peace or in time of war, is a crime under international law for which individuals shall be tried and punished. Article 2 has defined Genocide using the language of the Genocide Convention of 1948. However, for genocide to have been committed the prosecution has to prove intent; that the acts were motivated by the desire to destroy, in whole or in part a national, ethnic, racial, or religious group. These acts constituting genocide are enumerated as:

- a) Killing members of the group;
- b) Causing serious bodily or mental harm to members of the group;
- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d) Imposing measures intended to prevent births within the group;
- e) Forcibly transferring children of the group to another group.

These means that if a person commits any of the acts above the Tribunal shall have jurisdiction and power to prosecute the suspects involved. The following therefore shall be punishable:

- a) Genocide;
- b) Conspiracy to commit genocide;
- c) Direct and public incitement to commit genocide;
- d) Attempt to commit genocide;
- e) Complicity in genocide

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83 See Reservation to the Convention on Genocide Case (Advisory Opinion) 1951 ICJ Reports 15
In pursuance of Article 3 of the Statute of the ICTR, the Tribunal shall have power to prosecute persons responsible for crimes against humanity. These crimes include:

a) Murder;
b) Extermination;
c) Enslavement;
d) Deportation;
e) Imprisonment;
f) Torture;
g) Rape;
h) Persecutions on political, racial and religious grounds;
i) Other inhuman acts.

The statute provides that the acts enumerated shall have been committed as part of a widespread and systematic attack against any civilian population on national, political, ethnical, racial or religious grounds. Contrary to the corresponding provision of the ICTY statute, crimes against humanity in ICTR statute are not linked to the existence of an armed conflict (international or internal). Article 3 of the ICTR provides for a wider scope of conflict by including one-sided attacks against non-resisting civilians rather than requiring a state of armed conflict between two armed belligerent groups on one hand and one on the other, the article narrows the field of application by requiring a qualification of the grounds for the attack. Therefore, a widespread and systematic attack on economic grounds, for example, would fall outside the ambit of Article 3 of the ICTR Statute, unless the attack was also driven by national or political grounds. An armed attack, in the words of the Appeals Chamber, “exists whenever there is resort to armed force between States or protracted armed violence between Government authorities and organized armed groups or between such groups within a State.”

Rape is specifically included as a prohibited act, and it may therefore constitute a crime against humanity in itself. However, other forms of sexual violence are not explicitly

84 Article 5, Statute of the ICTY (The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: Murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds and other inhuman acts.)
85 See the Appeals Chamber’s decision of 2 October 1995, Para 70, p.37
In the *Akayesu* case, the Trial Chamber found the accused, Jean Paul Akayesu guilty of the offence of rape being a crime against humanity under Article 3. Adopting this holding, the ICTY in *Prosecutor v. Kunarac & others* found the accused guilty of rape, enslavement and outrage on personal dignity as crimes against humanity. On appeal, the Appeal Chamber upheld the Trial Chamber finding and affirmed the recognition of rape as a distinct serious violation of customary International law contrary to Article 3. Thus under the subject matter jurisdiction, the Tribunal has power to prosecute rape related cases which took place during the 1994 genocide.

It is of essence to note that the definition includes broad category of ‘Political grounds.’ This is relevant in the Rwandan context since the former Rwandan Government systematically targeted the Tutsis and the Hutu moderates in the massacre. Thus the widespread killings of the Hutus-dominated former government and military could not constitute genocide but would fall under prohibition of widespread and systematic attacks and persecutions based on political grounds, provided for in Article 3. Similarly, the Tutsi-dominated RPF’s attacks on Hutu civilians, while not amounting to genocide could come within the Article 3 definition of crimes against humanity.

Article 4 of the ICTR criminalizes violations of common Article 3 of the 1949 Geneva Conventions and of Additional Protocol II thereto of June 1977 thereby significantly expanding the grounds of individual criminal liability. Common Article 3 and Protocol II impose important prohibitions on the behaviour of participants in non-international armed conflicts, be they governments, other authorities and groups, or individuals. The language used addresses fundamental offences such as murder and torture, offences that are prohibited in all member states of the United Nations. It is because of these, that persons, who violate Article 4 of the Rwanda Statute, even if the crimes are committed after 31 December 1994, ought to account for their criminal activities.

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86 *Prosecutor v. Akayesu* Case No. ICTR-96-4-T (Trial Chamber), 2 September 1998
87 *Prosecutor v. Kunarac & others* Case No. IT-96-23T, Judgment, 22 February 2001
Concurrent Jurisdiction

The ICTR and national courts have concurrent jurisdiction to prosecute individuals for serious violations of International Law as defined in Articles 1, 2, 3 and 4 of the ICTR Statute. The ICTR, which is modelled under the ICTY, provides, just like the ICTY that the Tribunal has concurrent jurisdiction with national courts to prosecute persons for serious violations of International Humanitarian Law. Therefore both the national courts and the Tribunal has jurisdiction to try and prosecute those who were responsible for serious violations of International Humanitarian Law committed in Rwanda in 1994. However on the authority of the UN Security Council Resolution that brought the ICTR into being, the ICTR enjoys primacy of jurisdiction over national courts. This means that, where the ICTR and a national body each have a legal basis for jurisdiction over a given case, the ICTR is entitled, but not obliged, to exercise jurisdiction to the exclusion of the national body. The issue of deferral by national courts to the Tribunal was first exercised by the ICTY in the Tadic case where the ICTY on 8 November 1994 made a request for deferral to the Federal Republic of Germany, whose authorities were investigating Tadic’s alleged crimes, Germany immediately complied with the request and surrendered the accused to the Tribunal. This is the approach the ICTR has adopted and the Tribunal’s primacy is over the national courts of all states the Republic of Rwanda inclusive.

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90 Article 9(1) of the Statute of ICTY
91 Article 8 of the Statute of ICTR
93 Whenever criminal proceedings within the jurisdiction of the tribunals are pending before a state judicial or investigating authority, this authority shall defer to the competence of the tribunal if so requested (Yugoslavia Statute, Article 9 (2); Rules of Procedure and Evidence, UN Doc. IT/32/Rev. 9 (1996), Rules 9 to 11; Rwanda Statute, Article 8 (2); Guidelines, Article 4; Rules of Procedure and Evidence, UN Doc. ICTR/TCIR/2/L.2 (1996), Rules 9 to 11)
94 Ibid see Tadic, Decision on deferral to the competence of Tribunal
95 Article 8(1) establishes the concurrent jurisdiction of the ICTR and national criminal courts, while Article 8(2) provides that "The International Tribunal shall have primacy over national courts." This primacy is left to the determination of the ICTR on grounds which are not included in Article 8, but are found instead in Article 9(2) (a) and (b). Thus, concurrent jurisdiction and the primacy of the ICTR's jurisdiction must be read in conjunction with the provision of Article 9 of the Statute
The Tribunal may, at any stage of the investigation and prosecution, formally request the national courts to defer to the competence of the tribunal. Pursuance to rule 9 of the Rules of procedure and evidence of the ICTR, the prosecutor, Where it appears that a crime within the jurisdiction of the Tribunal is or has been the subject of investigations or criminal proceedings instituted in the courts of any State, may request the State to forward to him all relevant information in that respect, and the State shall transmit to him such information forthwith in accordance with Article 28 of the Statute. The Tribunal can request national courts to halt its proceedings against a suspect and hand the suspect and evidence over to the Tribunal for the Tribunal to proceed with the prosecution.

For the interest of fair justice, the Tribunal applies the doctrine of *non-bis in idem*. This is a right that protects the person from repeated prosecution or punishment for the same conduct, irrespective of the prosecuting system. This therefore rules out prosecution of persons in domestic justice system in Rwanda or in other countries, who have already been tried by the Tribunal thus prohibiting retrial and multiple punishments for the same offence before two separate sovereignties. However, there are two exceptions to doctrine of *non-bis in idem* under concurrent jurisdictions. These are circumstances when individuals tried before national courts may be tried by the Tribunal in the event that:

a) The act for which he or she was tried was characterized as an ordinary crime; or

b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

These exceptions must be seen in the context that the Security Council sought to establish a careful balance between national jurisdiction and the ICTR's jurisdiction. Thus the

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96 Article 8(2) of the Statute of ICTR The issue of deferral to the Tribunal was discussed in detail in The matter of: Application by Prosecutor for a formal request for deferral by the Kingdom of Belgium and in the matter of Théoneste Bagosora; Case No. ICTR-96-7-D
97 Rule 8 of the Rule of Procedure and Evidence of the ICTR (The rules of procedure and evidence were drafted by the ICTY Judges and adopted by the ICTR Judges with minimal amendments.)
98 Article 9(1) of the Statute of the ICTR
99 Article 9(2) (a) of the statute of the ICTR
100 Article 9(2) (b) of the statute of the ICTR
purpose appears not to establish a Tribunal that would have exclusive jurisdiction. The jurisdiction is however limited in those non-bis *in idem* under Fundamental Freedoms applies as between the member states of the United Nations.

If the Tribunal is to try an individual after a trial by a national court, the Tribunal, in reaching a conclusion, will consider penalties, if any, imposed by the national courts. To ensure effective jurisdiction of the Tribunal, the Security Council resolution’s provision that “all states shall cooperate fully with International Tribunal …and that consequently all states shall take any measures...to comply with requests for assistance or orders issued by a trial chamber...” the ICTR’s primary jurisdiction over cases within its competence is absolute.

To achieve this, the ICTR will depend on the willingness of other states to turn over indicted persons, making state cooperation essential to the realization of the Tribunal ‘s objectives and mandate. It is worth to note that prohibiting a national trial following a trial at the ICTR is due to the fact that re-trials would undermine the credibility of the ICTR and raise doubts about its utility. Re-trials would also amount to blatant violations of the rule against double jeopardy. The ICTR may seek a deferral from national courts before, during or after a trial. However usually there are problems attendant to this concept in relation to when trials have begun or ended. Under the Lawyers Committee’s report on ICTY, it is noted that;

One issue arising from the concurrent jurisdiction of the tribunal and national courts is the tribunal’s ability to determine when the conditions for deferral have been met, or when a person already sentenced by a national court should be retried before the tribunal.

101 There are essentially two reasons: (1) to allow national jurisdiction to function, if they are willing and capable of doing so because they would be better suited to do so, and that would minimize costs to the United Nations; and (2) to allow, eventually, national prosecutions to have a role in the context of national reconciliation between the ethnic communities. See Lawyers Committee for Human Rights, Prosecuting War Crimes in the Former Yugoslavia - The International Tribunal, National Courts and Concurrent Jurisdiction: A Guide To Applicable International Law, National Legislation and its Relation to International Human Rights Standards (May 1995). Though written for Former Yugoslavia, the material is relevant since the articles commented upon are identical.


In the Rwanda genocide, the mechanism of the national courts jurisdiction was constricted, therefore, in the hope that national authorities would eventually be willing and able to carry out seriously their primary responsibility for prosecuting war crimes. In practical terms though, concurrent jurisdiction is the inevitable result of the circumstances under which the Tribunal was established and of the manner in which its jurisdiction was defined.

2.3.5 Personal Jurisdiction

The Tribunal has jurisdiction over natural persons only, and no prosecutions may be brought against juridical persons such as governments, organizations and associations. For the purpose of International Tribunal Trying individuals, it is not sufficient merely to affirm this fact. Even if Article 6 of the statute provides for individual criminal responsibility as pertains to Articles 2, 3 and 4 of the Statute, it must also be shown that an individual committing serious violations of these customary norms incurs, as a matter of custom, individual criminal responsibility thereby. Individual criminal responsibility for serious violations of Common Article 3 was affirmed in the Tadic Case by the ICTY. Dusko Tadic, traffic cop, was a civilian leader in his town. Tadic was charged with crimes against humanity and violations of Common Article 3 and he was found guilty of violating Article 3. In this case the Tribunal for the Former Yugoslavia held that

"A single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offences to be held liable."

According to the preamble of the statute of the ICTR, the Tribunal has the responsibility of prosecuting Rwandan citizens accused of genocide and other serious violations of International humanitarian Law committed in the territory of Rwanda and that of the neighbouring states between 1 January 1994 and 31 December 1994. Moreover Article 4 of the ICTR Statute provides that 'the Tribunal shall have the power to prosecute persons

104 Article 6 of the Statute of the ICTR
106 Ibid
committing or ordering to be committed serious violations…’ It is not clear why the *ratio personam* of the Tribunal was limited to Rwandan citizens when, and if, the crime was committed in neighbouring states.

There are three categories of people who are responsible for the mass killings in Rwanda. They are: The planners, the military superiors and subordinates, and the unwilling accomplices. The planners include high-ranking officials and government politicians. It also includes, among others, investors for example the owners and directors of the Radio des Mille Collines (RTLM) ordinary citizens, which broadcasted the Hutus’ hatred for the Tutsis and encouraged the killings. The second category is the military superiors and subordinates who supervised and carried out the killings. The third category is the unwilling accomplices, ordinary citizens, who were forced to kill the Tutsis. Thus a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the Statute shall be individually responsible for the crime and the official position of such a person, whether as Head of State or Government or as a responsible Government official, shall not relieve him of criminal responsibility nor mitigate punishment. The fact that any of the acts referred to in articles 2 to 4 of the Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish perpetrators thereof. Also the fact that an accused acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the ICTR determines that justice so requires. In the case of the *Prosecutor vs. Akayesu* the Trial Chamber held that ‘where an accused is indicted for one or more of the violations enumerated under Article 4 of the Statute of ICTR…Akayesu would incur individual criminal responsibility for his acts…’


109 Ibid

The ICTR thus shall have jurisdiction to try all those involved with the commission of the crimes.

2.3.6 States’ duty to cooperate with ICTR

The ICTR was established by the UN Security Council resolutions acting under Chapter VII of the UN Charter. As a consequence, states are compelled to provide the necessary cooperation and assistance to the Tribunal. The basis of this affirmation is derived from Article 25 of the UN Charter where all member states agree to accept and to carry out the decisions of the Security Council.

In order to realize its objectives, states shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of International Humanitarian Law during the 1994 Rwanda genocide. Evidently, the state cooperation is essential to the effectiveness of judicial process. Since the ICTR has no enforcement agencies at its disposal, without the assistance of national authorities, it cannot execute and fulfill its mandate. International cooperation extends to include extradition of the suspects to another jurisdiction or the implementation of

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111 In establishing the ICTR, the Security Council decided that: "all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measure necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 28 of the Statute [specifying orders which the Trial Chambers may issue]."

112 See Article 2(6) and Article 103 of the UN Charter

113 On 17 October 1995, the President of the Security Council, on behalf of the Council, called upon Member States "to comply with their obligations with regard to cooperation with the Tribunal in accordance with resolution 955 (1994)". UN Doc. S/PRST/1995/53 In Resolution 1029, adopted on 12 December 1995, the Security Council called upon states to fulfill their earlier commitments to give assistance for rehabilitation of Rwanda "and in particular to support the early and effective functioning of the International Criminal Tribunal of Rwanda ."

114 Article 28(1) of the Statute of ICTR

arrest warrants. As was stated in the Elizaphan Ntakirutimana case,\textsuperscript{116} where the bone of contention was whether the USA’s cooperation with the ICTR was unconstitutional, that:

'A State in whose territory a gross human rights offence suspect is found shall prosecute him or her in good faith or extradite or surrender him or her to any other State or International Tribunal willing and able to prosecute such suspect.'

The absence of an extradition treaty or other enabling legislation shall not bar the extradition, surrender or transfer of such a suspect to any State or International Tribunal willing and able to prosecute the suspect. Usually this is unenthusiastic and susceptible issue for states, as a result, national sovereignty influences the implementation and enforcement of criminal law limiting state’s international cooperation and assistance. Article 28(2) of the Statute provides that states shall comply without any undue delay with any request for assistance or an order issued by a Trial Chamber. As far as this is concerned therefore, politics and international relations play an imperative role. This type of cooperation is provided by states either on informal basis or pursuant to bilateral or multilateral agreements.\textsuperscript{117} The ICTR thus enters into agreements with other states for the states to cooperate with the Tribunal. Pursuant to such an agreement for example, acting on a warrant issued by the Tribunal, France authority arrested one Mr. Jean de Dieu Kamuhanda, who served in Rwanda’s genocidal government as minister of education, research and culture for suspicion of helping plan and carrying out of the genocide.\textsuperscript{118} In the case of grave breaches to the Geneva Conventions\textsuperscript{119}, an obligation exists as a matter of conventional law for the majority of States, which are parties to the conventions, and as a matter of customary law for the limited number of States that are not parties thereto.\textsuperscript{120} All these raise the issue of political implications to the cooperating state. Under this framework, it is clear that the capability of the ICTR to achieve its mandates effusively depends on whether States are willing and able to provide the necessary


\textsuperscript{118} Tribunal Arrests Genocide suspect in Europe; Available at; http://www.internews.org/activities/ICTR_reports/ICTRnewsNov99.html (Accessed on 25 July 2005)

\textsuperscript{119} Ibid

\textsuperscript{120} See Ibid note 55 p. 629
assistance and cooperation in criminal justice and law enforcement matters. Thus the investigations, summon of witnesses, serve of arrest warrants and other requests by the Tribunal for identification and location of persons, search, taking of testimony and the production of evidence, surrender or transfer of persons are addressed to, and processed by the municipal system of the relevant state. In this sense, States require to endorse implementing legislation to harmonize their municipal legal system with the requirements of the ICTR. In some circumstances, a state may refuse to cooperate with the ICTR. In the event of such scenario, rule 7 bis of the Rules of procedure and evidence of the ICTR provides that at the request of the prosecutor, a trial chamber or Judge, the president of the Tribunal may notify the Security Council of the failure of a state:

a) To provide necessary cooperation or assistance in response to a specific request or order,
b) To comply with Rule 11 on deferral,
c) To comply with an order to discontinue permanently its criminal proceedings in accordance with the non bis idem principle (Rule 13),
d) To execute an arrest warrant or transfer order (Rule 59 or 61).

Based on the above provisions and as a consequence thereto, it is illustrated that when the Democratic Republic of Congo (DRC) refused to cooperate with the ICTR, the Tribunal’s prosecutor formally mentioned the matter at the UN Security Council for appropriate action. It is important to note however, that the ICTR is not authorized to impose any penalties on states for non-cooperation. Its jurisdiction is limited to individuals and consequently does not include states. It is upon the Security Council to determine whether to impose sanctions on a state for non-compliance with its obligation to cooperate.

On 27 February 1995, the Security Council in Resolution 978 emphasized the need for states "to take as soon as possible any measure necessary under their domestic law" to implement Resolution 955 and urged states: "to arrest and detain, in accordance with their national law and relevant standards of international law, pending prosecution by the International Tribunal for Rwanda or by the appropriate national authorities, persons found within their territory against whom there is sufficient evidence that they were responsible for acts within the jurisdiction of the International Tribunal for Rwanda" Hirondelle News Agency a publication issued on 24 November 2004 Also available at http://www.globalpolicy.org/intljustice/tribunals/rwanda/2004/1124kinshasa.htm (Accessed on 14 July 2005)
24 JURISDICTIONS; A COMPARATIVE STUDY

24.1 The ICTR jurisdiction vis-à-vis the ICTY

First and most importantly, it is worth mentioning that the UN Security Council established both the Tribunals resolutions acting under chapter VII of the UN Charter. The main characteristic of both Tribunals is that they exercise jurisdiction over natural persons and they were set up on ad hoc basis by specific political consensus of the Member States of the UN Security Council. They have been created to investigate and prosecute specific atrocities and their jurisdiction is temporally and geographically limited. Their jurisdiction is binding on all UN member States and their primary goal being to contribute to the restoration of disturbed peace in the territory of Rwanda and Former Yugoslavia respectively. The establishment of the ICTR was heavily modelled on the statute establishing the ICTY and it borrows a lot in terms of its functioning and jurisdiction from the ICTY. This is clearly captured by the fact that both Tribunals have one Appellate Chamber that is shared. The ICTR also shares the Office of the Prosecutor with the ICTY. However there are notable differences with respect to jurisdiction.

**Temporal jurisdiction:** The Statute of the ICTR provides that “…the temporal jurisdiction of the International Tribunal Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994.” This means that the Tribunal would only prosecute persons who participated in the genocide or violated the law between the aforementioned dates. There is a marked difference in that the ICTY Statute provides that the ICTY shall be an ‘...International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991...’ This makes the ICTY’s jurisdiction open in that any offence as defined in the ICTY Statute shall be punishable so long as the said offences were committed beginning 1991. There is no limitation as evidenced under the ICTR Statute.

123 The ICTY was created by Security Council resolution 827 of 25 May 1993. On the other hand, the ICTR was established by Security Council resolution 955 of 8 November 1994
124 *Ibid*
125 *Ibid*
**Territorial Jurisdiction:** The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States. The ICTR statute refers to Rwandan citizens who committed the offences but it is silent on which states constitutes ‘neighbouring States’. On the other hand the territorial jurisdiction of the ICTY extends to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The ICTY is specifically and expressly limiting the territorial jurisdiction to the former Socialist Federal Republic of Yugoslavia. However it may be said that there is a universal element in ICTY’s jurisdiction to the extent that it has the power to prosecute any person, irrespective of nationality, for crimes committed in the territory of the former Yugoslavia.

**Subject Matter jurisdiction:** Contrary to the corresponding provision in the ICTY Statute (Article 5), crimes against humanity in the ICTR Statute are not linked to the existence of an armed conflict (international or internal). Article 3 of the ICTR Statute provides, on the one hand, for a wider scope of conflict by including one-sided attacks against non-resisting civilians rather than requiring a state of armed conflict between two armed belligerent groups. On the other hand, Article 3 of the same Statute narrows the field of application by requiring a qualification of the grounds for the attack. A widespread and systematic attack on economic grounds, for example, would fall outside the ambit of Article 3 of the ICTR Statute, unless the attack was also driven by national or political grounds. An armed attack, in the words of the Appeals Chamber, “exists whenever there is resort to armed force between States or protracted armed violence between Government authorities and organized armed groups or between such groups within a State.”126

2.4.2 ICTR versus Nationals courts of the republic of Rwanda

The ICTR has territorial jurisdiction to prosecute persons responsible for genocide and other violations of IHL in the territory of Rwanda. It also has jurisdiction over Rwandan

126 Ibid
citizens responsible for the mentioned offences in the territory of neighbouring states. However its jurisdiction is temporarily limited to the offences that were committed in 1994. ICTR has concurrent jurisdiction with the Rwanda national courts to prosecute persons for serious violations of IHL but under article 8 (2) the Tribunal shall have primacy over national courts therefore at any stage of the procedure; the Tribunal may formally request national courts to defer to the competence of the Tribunal.\textsuperscript{127} The ICTR, as opposed to the national courts, have universal jurisdiction. Under the national courts, when the prosecutor investigates an international crime, the national courts conduct proceedings with regard to the crime not as an international crime but as ordinary crime. Also the ICTR concentrates on the military and civilian leaders implicated during the genocide leaving to Rwandan court the task of trying minor offenders. The core of Rwandan law governing the judicial system was inspired by the Belgian colonial rule. Based on the Belgium legal system, the Rwandan government established four level of ordinary jurisdiction.

\textbf{Canton Courts:} This is a court of general jurisdiction of first degree thus it hears both criminal and civil case in their first pleading. Its jurisdiction is limited to lawsuits involving RWF 50,000 or less and the decisions may be appealed to the next court level.

\textbf{Courts of First Instance:} The court hears appeals of canton court decisions. It also serves as a court of original jurisdiction over all civil and commercial case valued at more than RWF 50,000; family law, conflicts related to property matters and criminal matters.

\textbf{Courts of Appeals:} The principle of double jurisdiction permits the court of Appeals to review all court of first instance decisions on appeal and to hear limited cases of original jurisdiction.

\textbf{Supreme Court:} This is the leading body of judicial power and \textit{inter alia}, performs the following.

a) Lead and coordinate the activities of the courts and tribunals of the Republic. This court is the guardian of judicial independence, and is solely responsible for professional ethics.

b) Guarantee the constitutionality of laws and decrees, and rule on appeals for nullification of administrative regulations, decrees, and decisions.

\textsuperscript{127} \textit{Ibid}
c) Regulate the referendum process and provide, on demand, advice on the lawfulness of draft presidential decrees, Prime Minister Decrees, ministerial decrees, and other decrees for public administration.

d) Provide authentic interpretation of customary law, where there is an absence of written law and review appeals of lower court decisions and determine transfers of proceedings.

The above national court jurisdiction notwithstanding, the primacy of the Tribunal means that it shall override over the national courts in relation to offences committed during the 1994 genocide.

2.4.3 ICTR and the ‘Gacaca’ Courts

The ICTR was established by the UN Security Council to prosecute persons responsible for genocide and other serious violations of International Humanitarian Law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring states between 1 January and 31 December 1994.\(^{128}\) Due to the many suspects who were arrested as a result of the 1994 genocide, it was becoming increasing difficulty for the Tribunal and the national courts to measure up to the expectations of the Rwandan people and the international community at large in prosecuting the suspects. Based on this, and guided by the policy of national healing and reconciliation, the Rwandan parliament, in 2001\(^{129}\) enacted a genocide law, which established the ‘Gacaca’ courts and their jurisdictions.\(^{130}\) The ‘gacaca’ system constitutes part and parcel the three judicial mechanisms\(^{131}\) currently in the process of trying thousands of prisoners accused of having committed crimes of genocide. Under this system, the presiding judges are not professionally qualified to act as so and the suspects have got no right of representation by a qualified advocate. Consequently, under the

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\(^{128}\) Ibid

\(^{129}\) In July 1999 the Government of Rwanda published a paper on ‘Gacaca’ jurisdictions. After several redrafts, the ‘Gacaca law ‘was adopted and published in March 2001


\(^{131}\) International Criminal Tribunal for Rwanda, the national Rwandan court system and the Gacaca courts
Gacaca jurisdictions, the judges also known as Inyangamugayo are elected from among the men of integrity of the community to sit on a nine-member panel in gacaca sessions to hear and record testimonies from community members who witnessed what happened during the genocide. The panels, after gathering data, sit in community gacaca courts in their respective villages and preside over trials of genocide suspects depending on the categories.

The genocide suspects are divided into the following categories under this jurisdiction:

**Category one:** This comprises of suspects whose deeds during the genocide put them among the planners, organizers, instigators, leaders and supervisors of the genocide. (These suspects will not be tried within the Gacaca system, but referred to the national judicial system)

**Category two:** Comprises of suspects who participated in physical attacks that resulted into the death of the victim. Rape is included in this category.

**Category three:** Suspects accused of terrible assaults that did not result into the death of some one.

**Category four:** Genocide suspects accused of looting, theft or other crimes related to property.

The Gacaca jurisdiction is limited to the carrying out of trials and sentencing for persons accused of offences in the fourth, third and second category. In establishing the Gacaca courts, the government envisaged the following advantages:

132 For all other cases the government created around 11,000 Gacaca jurisdictions, each made up of 19 elected judges known for their integrity. Over 254,000 of these civil judges were elected between the 4th and 7th October 2001 and received training in 2002 before the courts began to function

133 Each court has a three-tier structure. There is the General Assembly, an Assembly Court and a Co-ordination Committee. The General assembly is made up of all the population of that sector who are above 18 years old. The Assembly Court is elected – 19 people who have to be above 21 years old. The 19 elected meet among themselves and elect 5 people: a president, two vice presidents and two secretaries – they comprise the Co-ordination Committee. The Co-ordination Committee then in turn elects a chairman and a secretary who hold a one-year renewable mandate. All these people must know how to read and write

• Neither the victims nor the suspects will have to wait for years for justice to be done.
• The cost to the taxpayer for the upkeep of prisons will be reduced, enabling the government to concentrate on other urgent needs.
• The participation of every member of the community in revealing the facts of a situation will be the best way to establish the truth.
• The Gacaca courts will enable the genocide and other crimes against humanity to be dealt with much faster than the formal justice system. This should end the culture of impunity that currently exists.
• The new courts will put into practice innovative methods in terms of criminal justice in Rwanda, in particular sentencing people to Community Service to aid the re-integration of criminals into society.

The Gacaca courts do not have the right to pass the death penalty. Defendants who were aged between 14 and 18 at the time of the crimes receive sentences that are half as long as those for adults. Those who were less than 14 years old at the time are not sentenced and are set free. This notwithstanding, the ICTR has primacy over the jurisdiction of these courts.
CHAPTER THREE

"There 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 rule of law."

Kofi Annan, General-Secretary of the UN, during his visit to the Tribunal on May 5th May 1998

JUDICIAL REMEDIES

3.0 INTRODUCTION TO JUDICIAL REMEDIES

The Rwanda Tribunal\textsuperscript{135} was set up to prosecute the suspects who had participated in the 1994 genocide. The UN Security council, in establishing the Tribunal, had an objective that the Tribunal was to redress the breaches to International Humanitarian Law (IHL) and other offences related to Genocide. The UN relied on the experience learned from the earlier Tribunals. Nuremberg and Tokyo Tribunals are the benchmarks in relation to earliest development as a response to Humanitarian crisis of World War II. These Tribunals were established to assist in the enforcement of IHL thus redressing the same through judicial remedies.

The Nuremberg and the Tokyo Tribunals, which were set up by the victorious powers to try war criminals from the defeated axis powers, helped develop important jurisprudence in International Criminal Law. Under these bodies, for example, there was an attempt to define 'Genocide' as an international crime. Most importantly they established the concept of Individual Criminal Responsibility in International Law. However, the great impetus saw the development of IHL through judicial mechanisms in the 1990’s following the outbreak of armed conflicts in the late 1980s and earlier 1990s in the Former Yugoslavia. The International Community through the UN Security Council established the ICTY to try the suspects in the said armed conflict. In 1994, in the wake of the worst post World War II genocide in the world, the UN Security Council

\textsuperscript{135} Ibid

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established the ICTR to prosecute the perpetrators of the 1994 genocide in Rwanda. The latter two judicial bodies have established and clarified further international war crimes in very many respects. For instance, ICTR became the first court to render judgment on rape as an International criminal offence. Thus by creating the two Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR), the Security Council took a great leap forward and established beyond any doubt that individuals may now, in respect of International Humanitarian Law, appear as subjects bound by certain legal obligations directly under International Law, and that they can be held individually responsible before an International forum for their violations of the laid down obligations.

3.1 The practice regarding remedying of International Humanitarian Law

There has been a practice developed over time nationally and internationally in remedying the victims of IHL. In employing the principles of remedying the victims, there has always been obstacles which hamper the effective implementation of the right to remedy. These include inter alia immunities (sovereign immunity), amnesties and Statutes of limitation. In pursuant of remedies, it has been also held that the relevant provisions of International Humanitarian Law instruments do not give individuals the necessary standing to pursue their claims directly before domestic courts i.e. they are not self-executing. It is also evident that neither IHL as a whole nor any specific instrument imposes an obligation on States to give direct effect in their national legal systems to the provisions of IHL. Where a State does choose to do so, the precise article may be invoked directly before national courts. For other States there is the possibility of integrating the substance, of IHL into domestic law. But where neither course is adopted, victims are left empty-handed.

136 Since hierarchically all States are equal, the courts of one State cannot stand in judgment on the actions of another State and traditionally national courts have been reluctant to deviate from this principle, which is the basis of sovereign immunity, even in cases relating to serious violations of human rights and international humanitarian law. The position of international tribunals is different, as States have either agreed to their jurisdiction or it has been imposed upon them by a Security Council resolution

3.1.1 National practice

The IHL instruments are silent as to who are the beneficiaries of reparation for violations of IHL. They only address the responsibility to compensate. There is increasing acceptance that individuals do have a right to reparation for violations of International Law of which they are victims.\(^{138}\) This is particularly well established with regard to human rights law. Not only do many of the specialized human rights tribunals have the right to award “just satisfaction” or “fair compensation”,\(^ {139}\) but a number of human rights treaties also expressly require States to establish a remedy for violations before national courts.\(^ {140}\) Individuals are merely beneficiaries and must claim reparation via their country of origin. While it is now accepted that individuals have rights under international law, this traditional view is still at the base of many of the hurdles faced by individuals when attempting to directly enforce their rights under international law. The courts of various States have considered claims by individual victims of violations of IHL on a number of occasions and the results of such cases have been far from being uniform.

Despite indications to the contrary in the drafting history of Article 3 of the 1907 Hague Convention IV, national courts have thus far regularly rejected individual claims for compensation based on that provision. Courts have found most of the IHL rules to be public law norms applying to States only and not applicable in litigation between injured individuals and the State. In terms of domestic remedies the prospects for a shift under IHL to responsibility vis-à-vis individuals depend largely on national and international legislative developments. At the national level, a State should have in place a legal framework incorporating IHL. An obligation to enact such legislation could arguably be derived from Article 1 common to the 1949 Geneva Conventions, which stipulates that contracting States must ensure respect for those Conventions at all times and the

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\(^{138}\) See, also Principle 15, draft Basic Principles and Guidelines

\(^{139}\) See, for example, Article 41 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol 11 and Article 63(1) of the American Convention on Human Rights. Such awards have included material losses (e.g. loss of earnings and medical expenses) and nonmaterial damage (e.g. pain, suffering and humiliation)

\(^{140}\) See, for example, Article 2(3) of the International Covenant on Civil and Political Rights and more specifically Articles 9(5) and 14(6), which expressly provide that anyone unlawfully arrested, detained or convicted shall have an enforceable right to compensation, Article 14 of the Convention against Torture and Article 6 of the Convention on the Elimination of Racial Discrimination

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obligation to prosecute can only be implemented through some kind of criminal law statute.\textsuperscript{141}

3.1.2 Responsibility to make reparations

Increasingly, the question of who is responsible for making reparation has also been raised. The principle of individual criminal responsibility for violations of International Humanitarian Law has long been established, but traditionally it was only States that made reparation. None of the IHL instruments specifically address the question of individuals’ responsibility to make reparation to their victims. This obligation can, however, be inferred from the provisions on individual responsibility for violations of IHL more generally.\textsuperscript{142}

The question of individuals’ duty to make reparation has been addressed in the statutes of the three International Criminal Tribunals. Although the provisions of the Statute of the ICTY on penalties only refer to restitution, the Rules of Procedure address the question of reparations more generally. Thus, Article 24(3) of the Statute provides that “in addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.” Rule 105 of the Tribunal’s Rules of Procedure and Evidence establishes procedures for the restitution of property, according to which the ICTY and national courts will cooperate in determining the rightful owners of the property while, Rule 106 deals with compensation to victims. Although the Statute is silent on the question of compensation, this Rule establishes a system of cooperation between the Tribunal and national authorities whereby a finding of guilt by the ICTY can enable a victim to institute proceedings under national law.\textsuperscript{143} The ICTY itself does not recommend the award of

\textsuperscript{141} T. Meron, “International criminalization of internal atrocities”, \textit{American Journal of International Law}, Vol. 89, 1995, p. 570

\textsuperscript{142} The four Geneva Conventions and Additional Protocol I establish a system of individual criminal responsibility for persons suspected of war crimes (GC I, Article 50; GC II, Article 51; GC III, Article 130; GC IV, Article 147; and PI, Article 85). The focus is on persecution by national courts. States are required to criminalize, under national law, certain violations of international humanitarian law and to prosecute or extradite persons suspected of these crimes

\textsuperscript{143} Rule 105B of the ICTY Rules of Procedure and Evidence provides that pursuant to the relevant national legislation, a victim or persons claiming through the victim may bring an action in a national court or other competent body to obtain compensation”
compensation and the existence of such a remedy is still entirely dependent on the provisions of the relevant national laws.

The relevant provisions of the Statute of the International Criminal Tribunal for Rwanda (ICTR) and of its Rules of Procedure and evidence mirror those of the ICTY.\textsuperscript{144} The Statute of the International Criminal Court (ICC) adopts a fundamentally different approach, granting the Court itself the power to make awards of compensation. Thus, Article 75 of the Statute, which deals with reparations to victims, provides that:

"The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation." On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

3.2 Applicable Law and Punishable Offences under the ICTR

3.2.1 The applicable Law

The prosecution of the suspects in the ICTR is based and governed by the law established. The International criminal Tribunal draws its validity from the statute, which was annexed to the UN Security Council resolution 955 thus the ICTR is governed by this Statute. However, the Security Council, being a non-legislative body, it lacks the competence to enact substantive law. Therefore the ICTR is left to incorporate and rely on the provisions of various existing legal systems i.e. the common and civil law systems. The Statute confers on the ICTR the power to prosecute persons for the crime of genocide, as set forth in the 1948 genocide Convention,\textsuperscript{145} crimes against humanity, as defined in the Nuremberg Charter,\textsuperscript{146} and violations of Article 3 common to the Geneva Conventions and Additional Protocol II. The Rules of Procedure and Evidence, which are prepared and adopted by the judges in accordance with Article 14 of the Statute of the ICTR, establishes the required framework for the efficient functioning of the Tribunal.

\textsuperscript{144} Article 23(3) of the Statute of the ICTR repeats verbatim the provisions of Article 24 of the Statute of the ICTY, and Rules 105 and 106 of its Rules and Procedure and Evidence
\textsuperscript{145} Convention on the Prevention and Punishment of Crimes of Genocide, 9 December 1948, 78 UNTS 277
\textsuperscript{146} Charter of the International Military Tribunal, Annex to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, August 8, 1945, 82 UNTS 279
3.2.2 Punishable crimes

The ICTR Statute establishes the Tribunals jurisdiction to prosecute persons responsible for:

- Genocide.\textsuperscript{147}
- Crimes against humanity.\textsuperscript{148}
- Serious violations of Article 3 common to the Geneva conventions of 12 August 1949 and of Additional Protocol II thereto of 8 June 1977 relating to the protection of victims of non-international armed conflict.\textsuperscript{149}

In addition, Article 6 (1) of the Statute sets out the conditions for individual criminal responsibility by providing that anyone who at any stage “planned, instigated, ordered, committed or otherwise aided or abetted” the three categories of crime defined in Articles 2 to 4 may be held criminally responsible. Article 6 (2) goes on to disclaim immunity for Government officials and Heads of State, while Article 6(3) provides for the criminal responsibility of superiors in respect of acts of their subordinates if the superior knew or had reason to know of such acts and failed to take the necessary measures to prevent or punish the perpetrators thereof.

3.2.2.1 Genocide

The crime of genocide is defined in the Statute in replication of the Genocide Convention of 1948 and includes a number of atrocities committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such. The Statute further replicates the Genocide Convention by adding in Article 2(3) that, apart from genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide are also punishable under that same crime. The conflict in Rwanda is however unique in relation to definition as to who is either a Hutu or a Tutsi. This is because they, in particular, speak the same language and share the same religion, and intermarriages through many generations.

\textsuperscript{147} Article 2 of the ICTR Statute

\textsuperscript{148} Supra Article 3

\textsuperscript{149} Ibid Article 4
between the two groups have rendered any biological or cultural distinction virtually impossible. Therefore one might ask which criteria or by which standards the Tutsi group can be defined so as to fit the criteria in Article 2 of the Statute. The prosecutor also as to choose between the applicability of Article 2 (3) and Article 6 (1).

3.2.2.2 Crimes against humanity

Article 3 of the Statute establishes the Tribunal’s jurisdiction over certain crimes (murder, extermination enslavement, deportation, imprisonment, torture, rape, persecution on political, racial and religious grounds, and other inhumane acts) when committed as part of a widespread and systematic attack against any civilian population on national, political, ethnical, racial or religious grounds. It could be argued that Article 3 of the ICTR Statute was tailored to meet the particular features of the conflict in Rwanda, since this conflict consisted of two simultaneous spheres of bloodshed, one being a true state of armed conflict involving two regular armies (the FAR against the RPA) fighting for power in the country, while the other took the form of a systematic hunting down and slaughter of specific unarmed civilians. Hence, by avoiding reference to an armed conflict, Article 3 of the Statute allows for prosecution of crimes committed in both spheres.

3.2.2.3 Serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II thereto

Article 4 of the ICTR Statute criminalizes a wide range of serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. In contrast to what is required under the previous provisions of the ICTR Statute, Article 4 does presuppose the existence of an armed conflict. The Geneva Conventions, it is generally assumed, only apply to International armed conflicts, but common Article 3 of the Geneva Conventions specifically addresses internal (armed) conflicts.
3.3 Individual criminal responsibility

The Tribunal has jurisdiction over natural persons only, and no prosecutions may be brought against juridical persons such as governments, organizations and associations. For the purpose of International Tribunal Trying individuals, it is not sufficient merely to affirm this fact. Even if Article 6 of the statute provides for individual criminal responsibility as pertains to Articles 2, 3 and 4 of the Statute, it must also be shown that an individual committing serious violations of these customary norms incurs individual criminal responsibility thereby. Article 6 of the Statute provides that:

1. "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment."

Individual criminal responsibility for serious violations of Common Article 3 was affirmed in the Tadic Case by the ICTY. This was extended to the ICTR where the court set out the required elements which are to be satisfied in order to establish individual criminal responsibility under Article 6 (1). In the Kayishema and Ruzindana case, it was held that the test required the demonstration of “participation… that the accused’s conduct contributed to the commission of an illegal act, and knowledge or intent by the actor aware of his participation in a crime” This was confirmed in the Akayesu case where it was held that “The principle of individual criminal responsibility . . . implies that the planning or preparation of the crime actually leads to its commission.” Thus, a person can only be liable under Article 6(1) covering “Individual Criminal Responsibility,” if the offense was actually committed. Thus under individual criminal responsibility, acts for instance; planning, instigating, ordering,
committing, aiding, abetting are read disjunctively meaning each of the modes of participation may independently give rise to criminal responsibility. There are different categories of people who are responsible for mass killing in Rwanda. The planners, who include high-ranking officials, government politicians and investors. The second category is the military superiors and subordinates who supervised and carried out the killings. The third category is the unwilling accomplices, ordinary citizens, who were forced to kill the Tutsis. Thus a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the Statute shall be individually responsible for the crime notwithstanding the official position of such a person, whether as Head of State or Government or as a responsible Government official.

3.4 Enforcement of the judicial remedies

The enforcement of sentences in ICTR is a novel concept that is being developed since the establishment of the Tribunal. The jurisprudence being developed and advanced by the Tribunal is geared towards punishing the perpetrators during the 1994 genocide. The Tribunal’s policy preference is that to the extent possible, its sentences should be served in the African counties. It is believed that this approach takes cognizance of social and cultural factors and more importantly it will reinforce the deterrent message within the region. In furtherance of this policy, agreements have been reached between the Tribunal and the Governments of Mali, Benin and the Kingdom of Swaziland. However, other non-African States like Italy, France and Sweden have entered into agreement with ICTR for the incarceration of individuals convicted by the Tribunal. Besides, the Tribunal does not have any police powers or sovereign authority to enforce the judgments. As such there is an expectation that the individual member states of the UN will enforce orders

155 Theodor Meron, Editorial Comment: War Crimes Law Comes of Age, 92 A.J.I.L. 462 (1998). Investors for example the owners and directors of the Radio des Mille Collines, ordinary citizens, which broadcasted the Hutus' hatred for the Tutsis and encouraged the killings
157 Ibid
158 ICTR entered into an agreement with Mali on 12 February 1999, Benin on 18 August 1999, Swaziland on 30 August 2000, France on 14 March 2003, Italy 17 March 2004 and Sweden on 27 April 2004

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and judgments of the ICTR.\textsuperscript{159} However prior to a decision on the place of imprisonment, the Chamber must notify the Government of Rwanda\textsuperscript{160} and the transfer of the convicted person to the place of imprisonment must be effected as soon as possible after the time limit for the appeal has elapsed.

The Tribunal in doing this derives its authority from Article 26, which provides that:

\begin{quote}
Imprisonment shall be served in Rwanda or any of the States on a list of States, which have indicated, to the Security Council of their willingness to accept convicted persons, as designated by the International Criminal Tribunal for Rwanda. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal for Rwanda.
\end{quote}

The important point to be noted in this Article is that the imprisonment is served in accordance with the applicable law of the State concerned. This means that the nature of imprisonment for persons convicted of the same offence and sentenced to imprisonment for the same period will vary in accordance with the laws of imprisonment of the State where such imprisonment will be served. However, the overall supervision of the convicted persons serving sentences will remain with the Tribunal or a body designated by it.\textsuperscript{161} This is important and practical because it takes into account the \textit{Ad hoc} nature of the Tribunal and provides for a successor body which will supervise the imprisonment of ICTR prisoners at the end of the mandate of the Tribunal.\textsuperscript{162}

In addition, the ICTR President issued a practice Direction\textsuperscript{163} that deals in a more elaborate manner with an internal procedure for the designation of the State in which a convicted person is to serve his or her sentence of imprisonment. As regards to pardon, if a convicted person is eligible for pardon or commutation of sentence, the State concerned shall notify the ICTR accordingly and there shall only be pardon or commutation of

\textsuperscript{159} Enforcement of sentences; http://www.ictr.org/ENGLISH/colloquium04/munlo.htm Last accessed on 8 August 2005
\textsuperscript{160} Rule 103 of the Rule of Procedure and Evidence
\textsuperscript{161} Rule 104 of the Rule of Procedure and Evidence
\textsuperscript{162} Ibid
\textsuperscript{163} The ICTR president, in accordance with Rule 19 of the Rules of Procedure and Evidence, issued a Practice Direction on 10 May 2000
sentence if the President of the Tribunal, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.\textsuperscript{164}

3.5 Principles of sentencing

The jurisprudence of the ICTR with regard to penalties is elaborate and has addressed the principal aims of sentencing, namely retribution, deterrence, rehabilitation and justice. Thus in determining the sentence, the Trial Chamber is mindful of the fact that this Tribunal was established by the Security Council, pursuant to Chapter VII of the Charter of the United Nations. Under Article 39 of the Charter of the United Nations, the Council has been empowered to ensure that violations of IHL in Rwanda in 1994 are halted and redressed. Thus the objective of the Tribunal is to prosecute and punish the perpetrators of the atrocities in Rwanda, to put an end to impunity, and thereby promote national reconciliation and restoration of peace. Guided by this objective, the Trial Chamber in the \textit{Kambanda case}\textsuperscript{165} held:

\begin{quote}
"It is clear that the penalties imposed on accused persons found guilty \ldots must be directed, on the one hand, at retribution of the said accused, who must see their crimes punished, and over and above that, on the other hand, at deterrence, namely to dissuade for ever, others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate the serious violations of international humanitarian law and human rights."
\end{quote}

Pursuant to this, the Trial Chamber is required, in determining the sentence, to take into account a number of factors, keeping in mind the need to individualize the penalty.\textsuperscript{166} However, the Judges need not limit themselves to the factors mentioned in the Statute and/or the Rules.\textsuperscript{167} Here again, their unfettered discretion to evaluate the facts and

\textsuperscript{164} Article 27 of the ICTR Statute See also the ICTR President’s Practice Direction issued on 10 May 2000
\textsuperscript{165} The Prosecutor v. Jean Kambanda, (Judgment and Sentence) ICTR-97-23-S (Sept 4, 1998) para 28
\textsuperscript{166} Article 23 (2) of the Statute of ICTR See also Rule 101 (B) of the Rules of Procedure and Evidence, See Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, Sentencing Judgment Para 3-4: The enumerated circumstances set out in the Statute and the Rules “are not necessarily mandatory or exhaustive. It is a matter of individualising the penalty considering the totality of the circumstances.”
\textsuperscript{167} See Kambanda, (Trial Chamber), September 4, 1998, para. 11, 18, 22-24, 41: “Neither\ldots the Statute nor…the Rules determine any specific penalty for each of the crimes. The determination of sentences is left to the discretion of the Chamber, which should take into account\ldots the general practice regarding prison sentences in the courts of Rwanda.” The Trial Chamber “has recourse only to prison sentences applicable
attendant circumstances should enable them to take into account any other factor that they deem pertinent. A question then arises as to what scale of sentence is applicable to an accused found guilty of one of the crimes listed in Articles 2, 3 or 4 of the Statute? After being found guilty, a person convicted by the Tribunal may be sentenced to imprisonment for a fixed term or the remainder of his life.\textsuperscript{168} It follows therefore from the forgoing that the only penalty the Tribunal can impose on an accused person who pleads guilty or is convicted, as such, is a term of imprisonment up to and including a life sentence. The Statute of the Tribunal excludes other forms of punishment such as the death sentence, penal servitude or a fine. In sentencing, the Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently and credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending his surrender to the Tribunal or pending trial or appeal.

In Rwanda there is the Organic Law for the prosecution of offences which constitute crimes of genocide or those against humanity. Under this law it provides \textit{inter alia} a death penalty as a sentence. The ICTR, while it will refer where practicable, to the sentencing provisions under the Organic Law,\textsuperscript{169} it will nevertheless exercise its unfettered discretion to determine sentences taking into account the facts of the case, circumstances of the accused and mitigating factors. In \textit{Omar Serushago v. the Prosecutor},\textsuperscript{170} the Appeal Chamber held that "It is the settled jurisprudence of the ICTR that the requirement that 'the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda' does not oblige the Trial Chambers to conform to that practice; it only obliges the Trial Chambers to take account of that practice." Thus it has the discretion not adopt the death penalty provided under the Organic Law. Following are some of the sentences meted out by the court:

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\textsuperscript{168} \textit{Ibid} Rule 103 (A) See Kambanda, (Trial Chamber), September 4, 1998, para. 10: "The only penalties the Tribunal can impose on an accused person who pleads guilty or is convicted as such are prison terms up to and including life imprisonment...The Statute of the Tribunal excludes other forms of punishment such as the death sentence, penal servitude or a fine." \textit{See also Prosecutor v. Serushago, Case No. ICTR-98-39 (Trial Chamber), February 5, 1999, Sentence para. 12}

\textsuperscript{169} \textit{Ibid} Article 23

\textsuperscript{170} \textit{Prosecutor v. Serushago, Case No. ICTR-98-39-A}
1. **Life imprisonment.** The maximum sentence the ICTR can impose is life imprisonment. According to the Rwandan *Code Pénal*, the sentence for premeditated murder is death, and for voluntary homicide it is life imprisonment.\(^{171}\) As opposed to the Rwandese national courts, the Tribunal shall not impose the death penalty however, it considers several factors in determining a sentence, including aggravating and mitigating circumstances, time already served—either in another state or in pre-trial detention.\(^{172}\)

2. **Pardon or commutation.** The Statute of the Tribunal under Article 27 provides for the possibility of pardon or commutation, if, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence. It shall first be determined whether an offender is eligible for pardon or commutation under the applicable law of the State in which the convicted person is imprisoned. If so, the President of ICTR then decides on the matter, in consultation with the judges, on the basis of the interests of justice and the general principles of law. Assuming that offenders are eligible for pardon or commutation, the President of the Tribunal, in consultation with the judges, is to review the matter "on the basis of the interests of justice and the general principles of law." The Rules provide for the criteria to be applied by the President in consultation with the judges: The convicted person shall serve his/her sentence either in Rwanda or any other state that has indicated its willingness to accept convicted persons.\(^{173}\)

3. **Restitution of property.** The Rules provide that in addition to imprisonment, "...the Trial Chamber... may order such provisional measures for the preservation and protection of the property or proceeds as it considers appropriate."\(^{174}\) This was re-stated in *Ntakirutimana and Ntakirutimana* case\(^{175}\) where the Chamber held "The Tribunal may impose . . . the restitution of property or proceeds acquired by criminal conduct." The Security Council had, prior to adoption of the

\(^{171}\)REYNTJENS & JAN GORUS para 311-312 *See also The prosecutor vs. Ruggiu, Georgies* (Judgement and Sentence) ICTR-97-31-1
\(^{172}\)Rule 101
\(^{173}\)Rule 103
\(^{174}\)Rule 105
\(^{175}\)ICTR (Trial Chamber), 21 February, 2003, Para 880

52
Statute of the Rwanda Tribunal, endorsed the principle that all statements or commitments made under duress, particularly those relating to land and property, are wholly null and void.\textsuperscript{176}

4. **Compensation to victims.** Rule 106 provides that Pursuant to the relevant national legislation, a victim or persons claiming through him may bring an action in a court or other competent body to obtain compensation.

The Statute appears to exclude the possibility of fines. Nevertheless, the judges have provided for fines in the case of offenses that they themselves have created as part of the Rules, in the case of contempt of the Tribunal and false testimony under solemn declaration.\textsuperscript{177}

3.6 Tribunal Indictments

3.6.1 Cases at a glance

Created on 8 November 1995 by the UN Security Council,\textsuperscript{178} the Tribunal opened its first trial in January 1997.\textsuperscript{179} Approximately one year after the genocide, the Tribunal had 400 suspects as a result of investigations by relevant authorities\textsuperscript{180} most of whom were officials and military leaders of the former Hutu-dominated regime who had fled to other countries after the genocide. Following this, the Tribunal’s first trial against Jean Paul Akayesu opened in October 1996 and he was sentenced to life imprisonment after being found guilty of genocide and crimes against humanity particularly, the offence of rape. Since then, the Tribunal has managed to judge 24 people in the last eight years (1997-2005).\textsuperscript{181} Out of the 24 judged, 21 people have been sentenced to various prison terms

\textsuperscript{177} Rules 77(A) and 91(E)
\textsuperscript{178} Ibid
\textsuperscript{179} Ibid, Akayesu case
\textsuperscript{180} “Rwanda War Crimes Tribunal Holds First Session,” Associated Press, June 29, 1994, Lexis-Nexis News Library.
\textsuperscript{181} http://web.amnesty.org/report2005/rwa-summary-eng (last accessed on 16 August 2005)
ranging from six years to life imprisonment and three have been acquitted.\textsuperscript{182} The first acquittal was in 2001 and two other subsequent acquittals in February 2004.

The ICTR by June 2005 had indicted 81 persons ever since it was established, 69 of whom have already been arrested. 57 people, among them a woman, are being detained in Arusha while six are serving their sentences in Mali.\textsuperscript{183} From the indictments and subsequent sentence, it has emerged that the ICTR has developed jurisprudence in International criminal law. For instance when the ICTR condemned Kambanda in the \textit{Kambanda case}, it established an international jurisprudence by showing that leaders were responsible for human rights violations committed in the course of exercising their duties. The Tribunal also set another precedence in the \textit{Akayesu} trial when it concluded that rape, which is a crime against humanity, constituted a genocide when it was committed as part of a systematic and widespread attack against a civilian population because they belonged to a certain ethnic group.

### 3.6.2 Summary of detainees

<table>
<thead>
<tr>
<th>Detainees on Trial</th>
<th>25</th>
</tr>
</thead>
<tbody>
<tr>
<td>Awaiting Trial</td>
<td>17</td>
</tr>
<tr>
<td>Awaiting Transfer (Ruggiu, Rutaganda, Niyitegeka, Ntakirutimana E &amp; G, Rutaganira, Kajelijeli, Kamuhanda)</td>
<td>8</td>
</tr>
<tr>
<td>Pending Appeal (Arusha) (Semanza, Nahimana, Ngeze, Barayagwiza, Imanishimwe, Ndindabahizi, Gacumbitsi, Muhimana)</td>
<td>8</td>
</tr>
</tbody>
</table>

\textsuperscript{182} Among those sentenced was the former Prime Minister, Jean Kambanda (\textit{Kambanda case}) who pleaded guilty to genocide and crimes against humanity on 04 September 1998. He was sentenced to life imprisonment. Others who pleaded guilty include the only non-Rwandan implicated in the genocide, Georges Ruggiu the former presenter of the radio station (Radio-television libre des Mille collines) who was sentenced for 12 years and the most recent case of former councilor of Mubuga, Vincent Rutaganira, who pleaded guilty and was sentenced to six years in March 2005

\textsuperscript{183} \textit{Ibid} note 56

\textsuperscript{184} ICTR DETAINENES, available at \url{http://www.ictr.org/ENGLISH/factsheets/detainee.htm} (Last accessed on 19 August 2005)
### Total Detainees in Arusha

<table>
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<tr>
<td>Serving Sentences (Mali) (Akayesu, Ruzindana, Kambanda, Kayishema, Musema, Serushago)</td>
<td>6</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Description</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Detainees</td>
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</tr>
<tr>
<td>Released</td>
<td>3</td>
</tr>
<tr>
<td>Conditional Release</td>
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</tr>
<tr>
<td>Died</td>
<td>1</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Description</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of accused whose cases have been completed</td>
<td>25</td>
</tr>
<tr>
<td>Number of Judgments rendered</td>
<td>19</td>
</tr>
<tr>
<td><strong>Total Arrests</strong></td>
<td>70</td>
</tr>
</tbody>
</table>

### 3.7 Efficacy and appropriateness of the judicial remedies

The Tribunal was mandated to render judicial remedies in relation to the 1994 genocide. This, the UN Security council envisaged, would bring about national reconciliation and peace in the embattled Republic of Rwanda. Thus the Tribunal was/is to try the perpetrators and pronounce adequate and appropriate judicial remedies. The Rwandese and the world at large hoped that the Tribunal could expeditiously bring into book the suspects and help in national reconciliation among the Rwandan people and spearhead peace in the region. As evidenced above, the Tribunal has indeed tried in fulfilling its objective by initiating and prosecuting high-ranking leaders and military officers of the former regime.

However, from the foregoing, it is evident that ICTR has not lived to its expectations. Many of the leaders and military officers in the then Rwanda government were implicated as having participated in the genocide but just a handful of them have been apprehended. The trials have been painfully slow due to a number of factors for instance; between 1995 and 2003 the Tribunal had rendered ten judgments to genocide suspects.¹⁸⁵ And the investigating department is wanting in the way it is conducting the investigation.

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¹⁸⁵ Marcellin Gasana, Internews Justice and Rwanda Project pg 15 April 1, 2004
The absence of the death penalty also has generated enormous debate. Under the ICTR Statute, the penalties imposed by the Trial Chamber is limited to imprisonment and in determining this, the Tribunal has recourse to the general practice regarding prison sentences in the courts of Rwanda. This provision *prima facie* rule out the death penalty. In contrast, in Rwanda, which is trying the suspects of the genocide, the Rwandan Organic Law provides for the death penalty in respect to the perpetrators of the genocide. This brings confusion as to the harmonization of the remedies rendered by the Tribunal and those of the Rwandan National courts and the survivors of the genocide believe that the killers should be sentenced to death for they committed or facilitated the commission of a crime which warrants a death penalty. For this reason, Rwanda has tried and sentenced the perpetrators to death. As a result, it carried out its first executions in 22nd April 1998 where 33 prisoners who were convicted of killing or aiding the massacre were executed. Comparatively therefore, in Rwanda, about 1,300 people were tried in connection with the 1994 genocide in 2002, about the same number tried in 2001. By the end of 2002, the Specialized Chambers, which became operational in December 1996, had tried about 7,700 individuals suspected of participating in the genocide. In many cases however, trials did not meet international standards of fairness. Nevertheless, at least 40 defendants were sentenced to death.

For the ICTR to meet its deadline, it has indicted its willingness to transfer some detainees to Rwanda for trial. This will complicate the issue of sentencing. The employment of the *Gacaca* courts to try those who were involved in the genocide shows that Rwanda has resorted into other institutions to enable them bring about national reconciliation and peace. This is because the judicial remedies offered by the Tribunal do not directly advance the concept of national reconciliation, which Rwanda needs for its healing process.

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186 Article 23(1) of the Statute of the ICTR see also rules 101 and 102 of the Rules of Evidence and Procedure
189 Integrated Regional Information Networks 13 September 2004
190 *Ibid*
CHAPTER FOUR

"There can be no peace without justice, no justice without law and no meaningful law without a Court to decide what is just and lawful under any given circumstance."

B. Ferencz, a former Nürnberg prosecutor

ACHIEVEMENTS, CHALLENGES, CONCLUSION AND RECOMMENDATIONS

4.0 INTRODUCTION

It is approximately ten years since the establishment of the International Criminal Tribunal for Rwanda.\(^{191}\) The Tribunal was mandated to prosecute persons who were implicated in the 1994 genocide and violation of International Humanitarian Law in Rwanda.\(^{192}\) Its jurisdiction was extended to prosecute persons responsible for; genocide,\(^{193}\) crimes against humanity,\(^{194}\) and serious violations to the Geneva Conventions (1949) and of Additional Protocol II thereto (1977).\(^{195}\) This was aimed at ensuring that such violations were put to an end and effectively redressed thus instilling an element of deterrence and prevention of such acts in future.

Over the years the Tribunal has had moments of triumph and celebration punctuated with challenges and shortcomings in its quest to dispense justice. Under this Chapter we will endeavour to attempt and identify the achievements and challenges which have faced the Tribunal so far in the dispensation of justice. The chapter will also make an attempt to

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\(^{191}\) Resolution 955 Adopted by the Security Council at its 345 3rd meeting, on 8 November 1994 for the establishment of ICTR

\(^{192}\) Ibid

\(^{193}\) Article 2 Statute of ICTR

\(^{194}\) Article 3 Statute of ICTR

\(^{195}\) Article 3 common to the Geneva Conventions of 12th August 1949 and Article 4 of Additional Protocol II thereto of 8th June 1977 relating to the protection of victims of non-international armed conflicts
outline thought provoking recommendations and conclusion in relation to the efficacy of International Humanitarian Law judicial remedies, more emphasis being on the case study carried i.e. the ICTR experience.

4.1 ACHIEVEMENTS

The atrocities committed in Rwanda shocked the conscience of humankind and galvanized the will of the international community. Under great pressure and in the absence of any other effective measures, the Security Council established the ICTR under Chapter VII of the United Nations charter as enforcement measures. So far the Tribunal has done some tremendous work and helped in development of new principles in International Criminal law and Humanitarian law among other things.

4.1.1 Indictments and Judgments

The Tribunal was basically instituted to prosecute the genocide perpetrators. Pursuant to this mandate, the Tribunal opened its first trial in January 1997 and after one year since the genocide, it had 400 suspects as a result of investigations by relevant authorities most of whom were officials and military leaders of the former Hutu-dominated regime who had fled to other countries after the genocide. Since then, the Tribunal has managed to judge 24 people in the last eight years (1997-2005). Out of the 24 judged, 21 people have been sentenced to various prison terms ranging from six years to life imprisonment and three have been acquitted. The first acquittal was in 2001 and two other subsequent acquittals in February 2004. The ICTR by June 2005 had indicted 81

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197 Ibid, Jean Kambanda case
200 Among those sentenced was the former Prime Minister, Jean Kambanda (Kambanda case) who pleaded guilty to genocide and crimes against humanity on 04 September 1998. He was sentenced to life imprisonment. Others who pleaded guilty include the only non-Rwandan implicated in the genocide, Georges Ruggiu the former presenter of the radio station (Radio-television libre des Mille collines) who was sentenced for 12 years and the most recent case of former councilor of Mubuga, Vincent Rutaganira, who pleaded guilty and was sentenced to six years in March 2005
persons ever since it was established, 69 of whom have already been arrested. 57 people, among them a woman, are being detained in Arusha while six are serving their sentences in Mali.\textsuperscript{202} Besides, the Tribunal has made decisions on more than 300 motions on various points of law. This performance is much better than the Sister Tribunal, the ICTY.

4.1.2 Development of jurisprudence

The Tribunal's main judicial focus is on the crimes of genocide and crimes against humanity. Its mandate, unlike that of the ICTY, includes only one war crime - Violations of Article 3 common to the 1949 Geneva Conventions for the Protection of War Victims and of Additional Protocol II of 1977. The Tribunal has greatly developed the concept of Individual criminal responsibility in International Law and International Humanitarian Law. The ICTR jurisprudence has thus focused heavily on genocide and has established fundamental precedents in International Criminal Law. For instance, in 1998, the Tribunal set a precedent in the history of international court by ruling that rape constituted an act of genocide.\textsuperscript{203} Also when the Tribunal condemned Kambanda in the \textit{Kambanda case}, it established an international jurisprudence by showing that leaders were responsible for human rights violations committed in the course of exercising their duties. The Tribunal also set an important milestone in 2003 when it passed judgment in the so-called 'Media trial' case that grouped three former operators of what came to be known as the 'hate media' RTLM and Kangura newspaper. The journalists' acts were held to be acts of genocide.\textsuperscript{204}

4.1.3 ICTR's cooperation with states

Most of the perpetrators of the 1994 Rwanda, after the genocide, went into hiding in neighbouring countries. Upon the establishment of ICTR, one of its objectives was to arrest and prosecute such perpetrators. With the concept of state sovereignty and given that ICTR had neither a police force nor an enforcement mechanism, it relied on states to

\begin{itemize}
\item \textsuperscript{202} http://web.amnesty.org/report2005/rwa-summary-eng (last accessed on 16 August 2005)
\item \textsuperscript{203} \textit{Ibid Prosecutor v. Akayesu} case
\item \textsuperscript{204} Internet extract see http://www.un.org/icty/glance/keyfactindex-e.htm
\end{itemize}
assist it realize out its objectives. To achieve this, states are to cooperate with the Tribunal in the investigation and prosecution of such persons. So far, through the initiative of the ICTR, it has received excellent cooperation and judicial assistance from member states of the United Nations in the arrest and surrender of accused persons. As a result, all the Tribunal’s detainees and convicts were arrested outside Rwanda, in various African and European countries as well as in the U.S.A. Also, the Tribunal has entered into agreements with the Governments of Mali, Benin and the Kingdom of Swaziland for the incarceration of individuals convicted by the Tribunal pursuant to Article 26 of the ICTR Statute. Through such relationship and cooperation with other states, the Tribunal has greatly benefited from assistance offered by other states.

Notably, there are other achievements of the ICTR worthy to be discussed. The Tribunal started a program, which was geared towards restitutive Justice through offering assistance to victims. The Registrar of the Tribunal, pioneered advocacy for victims to compliment the retributive justice against perpetrators of crimes such as genocide, crimes against humanity and war crimes, which is being handed down by the Tribunal. Consequently, the Registry wing of ICTR has established a Support Program for Witnesses and Potential Witnesses. The program supports NGOs to provide legal, psychological, medical and limited rehabilitation assistance to Rwandan witnesses and potential witnesses at the Tribunal. This has helped inculcate confidence to witnesses called to testify.

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205 On 17 October 1995, the President of the Security Council, on behalf of the Council, called upon Member States "to comply with their obligations with regard to cooperation with the Tribunal in accordance with resolution 955 (1994)". UN Doc. S/PRST/1995/53 In Resolution 1029, adopted on 12 December 1995, the Security Council called upon states to fulfill their earlier commitments to give assistance for rehabilitation of Rwanda "and in particular to support the early and effective functioning of the International Criminal Tribunal of Rwanda."

206 Article 28(1) of the Statute of ICTR


208 The Tribunal benefitted from the active political support of the Government of the United States of America through the Government’s Reward for Justice Program, in accomplishing these achievements. The Tribunal has also welcomed the cooperation of the Governments of Angola, DRC. Available at; http://www.ictr.org/ENGLISH/pressbrief/2003/150903.pdf. (Last visited on 26th October 2005) and the Republic of Congo

209 The Registrar of the Tribunal then was Dr. Agwu Ukiwe Okali (Nigeria) available at; http://www.ictr.org/ENGLISH/pressbrief/2003/150903.pdf. (Last visited on 26th October 2005)
Following the ICTR’s request, the Security Council created a pool of 18 *ad litem* judges thus increasing the Tribunal’s capacity. The arrival of the *ad litem* resulted to the split of a Trial Chamber into two sections each including permanent and *ad litem* judges. This has improved greatly the pace at which the Tribunal is moving.

Another important step forward was the achievement of simultaneous interpretation from Kinyarwanda into English and French in all three Chambers. This procedure saves comparatively more time than to have consecutive translation.

Since 1998, the ICTR has undertaken an active Outreach Programme to Rwanda, with the goal of increasing the impact of the Tribunal’s work inside Rwanda and thus fostering national reconciliation through justice. Pursuant to this programme, the Tribunal inaugurated a full-time ICTR information and Documentation Centre in Kigali, Rwanda for this purpose and the Registry of the Tribunal runs the whole programme.

### 4.2 CHALLENGES

Notwithstanding the achievements as aforementioned, the ICTR has experienced a number of challenges in its quest to dispense justice. These have, to a greater extent impacted adversely in the effective functioning of the Tribunal.

#### 4.2.1 The location of the Tribunal

After the adoption of Resolution 955 establishing the ICTR, the Security Council proceeded to determine the ICTR’s location. Consequently, by resolution 977 of 22nd of February 1995, the seat of the Tribunal was set in Arusha, in the United Republic of Tanzania. There was a stiff opposition by the Rwandan Government regarding the seat of the Tribunal and indeed it voted against the Tribunal’s establishment based on this ground. Thus the cooperation was jeopardized. However after a series of negotiations it

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210 ICTR made a request on 9 July 2001 and the Security Council adopted Resolution 1431 (2002) on 14 August 2002, which enabled the creation of a pool of 18 *ad litem* judges. The Security Council Forwarded the nominations received by the Secretary General to the General Assembly whereupon election of the *ad litem* judges took place on 25 June 2003

211 *Ibid*

212 The Resolution S/1995/148 was adapted by the Security Council at its 3502nd meeting on 22nd February 1995. Arusha, Tanzania was declared the seat of the Tribunal and it began its work on 26th June 1995, which was the day of the first plenary session of its eleven judges in The Hague, Netherlands

213 *Ibid*
begrudgingly, agreed to cooperate with the ICTR but up to date that bad blood still subsists thus rendering the pace at which the Tribunal works to be very slow.\textsuperscript{214}

4.2.2 Jurisdictional challenges

The ICTR only cover crimes committed January 1\textsuperscript{st} and December 31\textsuperscript{st} 1994.\textsuperscript{215} This limited temporal jurisdiction prevents the Tribunal from prosecuting criminal activities that culminated in the 1994 genocide or after the said date. Those activities began with planning, incitements and sporadic massacres, pilot projects and extermination dating back in 1990.\textsuperscript{216} This meant that planning, preparation or aiding and abetting crimes carried out prior to 1994 was outside the Tribunal’s jurisdiction.

The issue of concurrent jurisdiction\textsuperscript{217} with the Rwanda national courts has been a source of conflict in a number of respects. These ranges from the category of suspects the national courts are supposed to try to the issue of sentencing.\textsuperscript{218} The statute provides for imprisonment as the most severe sentence while the Rwandan penal code provides for death penalty as the maximum penalty. This situation where there is marked disparity of penalties is not conducive to national reconciliation.

4.2.3 The prosecutor’s office

The Office of the Prosecutor is a separate and independent organ of the Tribunal. Article 15 of the ICTR statute provides that the prosecutor of the ICTY will also serve as the prosecutor of the ICTR. In pursuant of this article, there is one joint chief prosecutor for both the Rwanda and Yugoslavia Tribunals who is based at The Hague. The Rwanda arm of the prosecutor’s office\textsuperscript{219} is located in Kigali, Rwanda as well as in Arusha where the Deputy Prosecutor who is responsible for day-to-day operations, heads it. This arrangement as resulted into a number of problems. For instance cases are not effectively investigated and in court the prosecution is not done with the zeal required.

\textsuperscript{214} Report on The International Criminal Tribunal for Rwanda, available at; http://ist-socrates.berkeley.edu/~warcrime/Rwanda/Rwanda_ICTR.htm (Last accessed on 28 August 2005)

\textsuperscript{215} Ibid Article 7

\textsuperscript{216} S/1994/1125 para 41

\textsuperscript{217} Ibid

\textsuperscript{218} Ibid Article 23 (1)

\textsuperscript{219} The Deputy prosecutor heads the office
4.2.4 Financial constraints and allegations of corruption

To realize its objectives, the Tribunal needs substantial funding from outside. However despite the massive support the Tribunal gets financially, it needs increased voluntary contribution to its ICTR Trust Fund to help it effective discharge of its mandate including the recently launched outreach programme to Rwanda designed to enable the work of the Tribunal to impact on the Rwandan society and facilitate reconciliation. Despite this, most states do not honour their financial commitments to the Tribunal. Thus the smooth running of the Tribunal is greatly hampered.

In addition there are allegations of corruption among the ICTR staff. The courtroom has been obscured by the scandals that have plagued it since its creation in 1995. As a result this as greatly slowed down the work of the Tribunal. The prosecution office has been dogged with allegations of corruption and incompetence of the officers and this was reflected in the A 1997 UN audit report which blamed the court for corruption and gross mismanagement.

4.2.5 The issue of cooperation with other states

The Tribunal lacks a regular and effective means of acquiring custody over alleged offenders thus Article 28 of the Statute obliges states to cooperate with the ICTR in investigating and prosecution of the said persons. The issue is whether the states have entirely embraced this requirement.

Although Article 26 of the ICTR Statute provided that imprisonment shall be served in any of the States on a list of States which have indicated to the Security Council of their willingness to accept convicted persons, there were no countries that indicated willingness to accept ICTR prisoners on their own volition. In this regard the Registry had to take the initiative to negotiate with member states to assist the Tribunal in accepting its prisoners. So far the Tribunal has managed to secure the concurrence of six

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220 The Tribunal’s regular budget is from the assessed contributions from member states of UN
221 The UN had approved US$ 212,257,500 for the 2004-2005 budget but by the end of May 2004, pledges of up to US$ 150 million had not yet been paid and that more than 140 out of 191 member states had not honoured their commitments. See also: Arusha Times weeks, July 3-9, 2004 p 1
countries to accept ICTR prisoners to serve their term of imprisonment in their states. These countries are: Mali, Benin, Swaziland, France, Italy, and Sweden.²²⁴

There are also allegations that the penalties rendered by the Tribunal are not adequate enough to deter such crimes in future.²²⁵ Besides the Rwanda national courts are also trying the 1994 genocide suspects. Under the Rwandan penal law, there is the provision of the death penalty which is contrary to the Statute of the ICTR. This brings confusion as to the effectiveness of the ICTR judicial remedies.

The ICTR, as a subsidiary organ of the Security Council, a political body, the Tribunal has been criticized for not being wholly independent from the Council or the political influences of the more powerful body, the Security Council.²²⁶

The ad hoc nature of the Tribunal has come under criticism because it becomes functus officio on the completion of its task. This connotes that Tribunals will only materialize when the world feels outraged by the intensity of the wanton acts of destruction. Thus it is at the mercy of the Security Council to determine whether particular acts warrant intervention. This was the case in Rwanda where the UN was informed earlier enough of the possible genocide but it never acted immediately. The former UN secretary General Boutros Boutros-Ghali has in retrospect acknowledged that the UN was slow to warn of the plans for genocide in Rwanda, and that greater notice should have taken upon notification.²²⁷

One unique aspect of the jurisprudence of the Tribunal is the effort to strike a balance between the application of common law and civil law procedures in the Chambers' interpretation of the Rules of Procedure and Evidence and in the rulings rendered by the Chambers. However there has been a challenge in marrying the two systems thus slowing

²²⁴ http://www.ictr.org/ENGLISH/colloquium
²²⁵ Ibid available also at, http://www.udayton.edu/~rwanda/articles/aigentrials.html

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down the pace of the Tribunal. Also a problem associated with this is the translation of the proceedings from English to French and Kinyarwanda. This consumes a lot of time.

4.3 CONCLUSIONS AND RECOMMENDATIONS

4.3.1 CONCLUSION

We stated in the introduction that the 1994 genocide civil war in Rwanda was triggered by the shooting of the then president.\textsuperscript{228} This resulted to a systematic and well organised killing of the minority Tutsis and moderate Hutus by the militiamen of the ethnic Hutu majority. The killings then spread throughout the countryside as Hutu militia began indiscriminately killing Tutsi civilians resulting to about 800,000 people being killed.

In Chapter one, we examined and determined the genocide question and whether the massacre in Rwanda amounted to genocide. We critically analyzed the establishment of the ICTR, its organization and composition, and the seat of the Tribunal. The objectives of the Tribunal and its functions were also dealt with under this chapter.

In Chapter two we analyzed the jurisdiction and competence of the Tribunal, its legitimacy to render judicial remedies in respect to the perpetrators of the 1994 genocide and those who violated the provisions of International Humanitarian Law. We also carried a comparative study of the Tribunal’s jurisdiction \textit{vis à vis} the jurisdiction of both the Rwanda national courts and that of the \textit{Gacaca} courts.

In chapter three we defined what constitutes judicial remedies and evaluated the practice regarding remedying of International Humanitarian Law. We pointed out the bodies with the responsibility to make reparations and the law applicable in the ICTR. With specific reference to ICTR as a case study, the discourse further assessed various punishable crimes and the enforcement of the judicial remedies indicating the effectiveness or otherwise of the said judicial remedies.

\textsuperscript{228} \textit{Supra} note 2 pg. 1
Under chapter four we considered the achievements and challenges facing the Tribunals in the dispensation of justice.

We end this work by briefly stating that the notion of judicial remedies in IHL cannot be divorced from the analysis of UN ad hoc Tribunals. The idea of such Tribunals traces back into nascent stages of the twentieth century. The International community sought to counter impunity by establishing tribunals to try the perpetrators of heinous crimes. These included: The Nuremberg International Military Tribunal; Tokyo International Military Tribunal; the International Criminal Tribunal for Former Yugoslavia; the International Criminal Tribunal for Rwanda. The latter two tribunals were established by the SC of the UN acting under Chapter VII of the UN charter. This culture culminated into the adoption of the Rome Statute of the International Criminal Court (ICC) in the twilight of the twentieth century. The objective of these tribunals and in reference to Rwanda is to ensure that those responsible for the 1994 genocide are brought to justice if the culture of impunity is to be eradicated and the country set on the path of democracy and rule of law. On the other hand, the pursuit of justice must be part and parcel a wider program to reconstruct and stabilize our society and to create an atmosphere conducive to national unity, reconciliation, peace and development.

Through trials the Tribunal has contributed to the healing process, however for instance by 2002, there were about 115,000 genocide suspects awaiting trial and the Tribunal had tried a handful of the suspects. Due to the pace of the Tribunal, the Government decided to enact organic law number 08/96 governing trials of genocide and crimes against humanity. In addition and for reconciliation purposes, the Government employed the services of the grassroots tribunals, the gacaca courts that were to hear all but most

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229 The International community met in Rome Italy, from 15 June to 17th July to finalize a draft statute. The statute entered into force on 1st July 2002 after the 60th ratification. It was launched on 2nd July 2002 at The Hague. It will only investigate crimes committed after 1 July 2002: Internet extract: http://www.un.org. (Last visited on 2nd September 14, 2005)

230 S/RES/955, The SE was convinced that the prosecution of persons responsible for serious violations of IHL in Rwanda would contribute to the process of national reconciliation and to the restoration and maintenance of peace

231 Sunday Standard, June, 2002 pg. 8
serious cases. Thus although the *gacaca* courts are traditional, it is an indication that the Tribunal’s Remedies were not adequate and expeditious enough.

Under the Rwandan law, the death penalty is imposed for the suspects of the genocide who are found guilty as the maximum sentence. This means that the people involved in the massacre will also be subjected to death. The law of Rwanda recognizes the right to a fair trial and the government takes its obligation as a signatory to the International Convention on Civil and Political Rights (ICCPR) thus in its legal system it guarantees a fair trial. Contrary to this, the maximum sentence of ICTR is life imprisonment. Thus persons who were involved in the massacre will be sentenced to a maximum of life imprisonment. This may not be appropriate enough to necessarily bring about deterrence in future.

The temporal jurisdiction of the Tribunal also limits the persons who are tried as having participated in the 1994 genocide. This affords persons who organized or committed acts, which are related to the genocide freedom by virtue of being committed outside the jurisdiction of the Tribunal.

**4.3.2 RECOMMENDATIONS**

It has been 50 years since the United Nations first recognized the need to establish an International criminal court to prosecute crimes such as genocide. The United Nations General Assembly in 1948, recognized the that at all periods of history genocide had inflicted great losses on humanity and was convinced that in order to liberate mankind from such an odious scourge, international co-operation was required. This saw the adoption of the Convention on the Prevention and punishment of Crimes of Genocide. In the same resolution, the UNGA invited the International Law Commission (ILC) “to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide…”

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232 The Economist weekly review, June 8th - 14th 2002 pg. 40
233 S/RES/260
234 Ibid
Following the report of ILC, which suggested the possibility of an International Tribunal, UNGA directed the ILC to draft a statute for an International Criminal Court (ICC) and in 1994 it submitted the draft to the General Assembly.\textsuperscript{235} It is worth noting that the ICC is built on the successes of the ICTR and the ICTY.

An International Criminal Court has been called the missing link in the International legal system.\textsuperscript{236} The International Court of Justice (ICJ) at The Hague handles only cases between States, not individuals.\textsuperscript{237} Without such an international criminal court as an enforcement mechanism, acts of genocide and egregious violations of human rights often go unpunished. Thus the ICC will ensure that there is justice for all.

The Jurisdiction of the permanent ICC as provided under article 5 of the Rome Statute does not depart radically from the jurisdiction of the preceding Tribunals. Thus being a permanent Tribunal all crimes, which are defined under the Statute,\textsuperscript{238} should be tried by the ICC.

Being the objective of the UN to secure universal respect for human rights and fundamental freedoms of individuals, the establishment of the ICC is seen as a decisive step forward. To give it relevance, the UN should extend the Jurisdiction of ICC to cover non-international crimes and the UN members to legislate laws, which recognizes and appreciates the Jurisdiction of ICC.

In situations such as those involving ethnic conflict, violence begets further violence; one slaughter is the parent of the next. The guarantee that the perpetrators of war crimes or genocide shall be brought to justice and appropriate judicial penalty rendered acts as deterrence and enhances the possibility of bringing a conflict to an end. The two \textit{ad hoc} International Tribunals, one of the former Yugoslavia and another for Rwanda were


\textsuperscript{236} \textit{Ibid}

\textsuperscript{237} Article 34(1) Statute of the ICJ

\textsuperscript{238} Articles 5-8 of the Rome Statute of the International Criminal Court

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created in pursuit of the above-said guarantee. However there should be immense support from the International community financially and in terms of cooperation to enable the Tribunals realize their respective objectives. The creation of the Tribunals also raises the question of selective justice because there are wars of similar nature in other parts of the world but there are no such Tribunals. Thus a Permanent court could operate in a more consistent and inclusive way.

There as also been complaints on the issue of UN’s response in case of such a conflict, this will also be solved by the permanent Court. Penalties offered should also be appropriate and reflect those, which are offered by the respective National courts. This will bring about consistence thus enhance reconciliation.

4.3.3 Conclusion

The ad hoc tribunals have been set up as a response by the UN in relation to the violence that has been evidenced in the history of mankind. In the last fifty years, there as been eruptions of conflict around the world. During such conflicts, millions of people have lost their lives, property destroyed and the victims of those conflicts not adequately awarded reparation. The International community now has a solemn opportunity to correct this situation- to help end impunity for the most serious crimes committed by individuals. Establishing up the ICC is recommendable this being a key to channel and provide justice for victims by giving them rights in the new judicial system and facilitating their access to various forms of reparation. The perpetrators should therefore be brought to justice and prompt, adequate and appropriate judicial remedies rendered.