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Some Milestones and Achievements at the International Criminal Tribunal for Rwanda: The 1998 Kambanda and Akayesu Cases

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SOME MILESTONES AND ACHIEVEMENTS AT THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA: THE 1998 *KAMBANDA* AND *AKAYESU* CASES

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I. INTRODUCTION

During 1998 the United Nations (U.N.) International Criminal Tribunal for Rwanda (ICTR) made significant progress in the prosecution of persons

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The author dedicates this article to the people of Rwanda.

responsible for the 1994 genocide of Tutsi and moderate Hutu in Rwanda.[1] The ICTR's first two cases create an important historical record and a jurisprudential road map to justice. The case against Rwandan ex-premier Jean Kambanda established essential facts concerning what happened in Rwanda during those fateful 100 days in 1994.[2] Kambanda's extensive admissions of guilt should dispel forever any doubts about the occurrence of an intentionally orchestrated genocide in Rwanda. In the case against former Taba *bourgmestre* (mayor) Jean-Paul Akayesu,[3] the ICTR created a number of important jurisprudential concepts and reasoning paths that it and other tribunals will apply in future cases.

In addition, these two trials represent several milestones for international humanitarian law. Jean Kambanda is the first person in history to accept responsibility for genocide before an international court. He did so fifty years after the U.N. adopted the Convention on the Prevention and Punishment of the Crime of Genocide.[4] Jean-Paul Akayesu is the first person in history to have been found guilty of genocide after a trial by an international tribunal. In addition, his trial represents the first time an international tribunal has conceptualized sexual violence, including rape, as an act of genocide.

II. BACKGROUND TO THE RWANDAN CRISIS AND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

Following the assassination of Rwandan President Juvenal Habyarimana when the plane carrying him was missiled out of the sky, probably by hard-line Hutu, on April 6, 1994, Rwanda erupted into horrifying violence[5] resulting in the murder of approximately 800,000 people (mostly Tutsi), the uprooting of about two million within Rwanda's borders, and the exodus of over two million (mostly Hutu) to the neighboring countries of Zaire, Burundi, Tanzania, Kenya and Uganda.[6] Immediately after Habyarimana's death, the Presidential Guard, the Hutu-dominated national army, and the

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1. *See generally* Payam Akhavan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 AM. J. INT'L L. 501 (1996) (describing the background, organization, and law of the ICTR); Paul J. Magnarella, *Expanding the Frontiers of Humanitarian Law: The International Criminal Tribunal for Rwanda,* 9 FLA. J. INT'L L. 421 (1994) (describing the background, organization, and law of the ICTR).

2. Prosecutor v. Kambanda, Case No. ICTR 97-23-S (Sept. 4, 1998) (visited Nov. 18, 1998) <http://www.ictr.org/english/judgements/kambanda.html>.

3. Prosecutor v. Akayesu, Case No. ICTR 96-4-T (Sept. 2, 1998) (visited Nov. 18, 1998) <http://www.ictr.org/english/judgements/akayesu.html>.

4. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]

5. GÉRARD PRUNIER, THE RWANDA CRISIS: HISTORY OF A GENOCIDE 211-12 (1995).

6. *Id.* at 265, 312; *see also* COLETTE BRAECKMAN, RWANDA: HISTOIRE D'UN GENOCIDE (1994) (describing the Rwandan events related in this article).

Interahamwe (Hutu death squads) began a systematic campaign of murder and genocide against hundreds of moderate and opposition Hutu and all Tutsi.[7]

Rwanda was Africa's most densely populated country, with rural peasants constituting the bulk of its inhabitants.[8] It had a pre-genocide population of approximately eight million,[9] most of whom spoke Ikinyarwanda, a Bantu language.[10] About eighty-five percent of the people were classified as Hutu, fourteen percent Tutsi, and one percent Twa or Pygmies.[11] Intermarriage among these people, many of whom are Christian, was not uncommon.[12]

Precolonial rule by the aristocratic Tutsi minority, as well as indirect rule later by Belgian colonialists through Tutsi royalty, had created resentment among the majority Hutu.[13] Rwanda became independent of Belgium in 1962, and various Hutu factions controlled the government and military until July of 1994.[14] Periodically, throughout the period of independence there were outbreaks of violence, resulting in the flight of Tutsi to surrounding countries, especially to Uganda where they formed the Rwandan Patriotic Front (RPF) and Army.[15] In the 1960s, some exiled Tutsi invaded Rwanda in unsuccessful attempts to regain power.[16]

Major-General Juvénal Habyarimana, a Hutu, came to power in 1973 as the result of a military coup.[17] During his twenty-one years of rule (1973-1994), there were no Tutsi mayors or governors, only one Tutsi military officer, just two Tutsi members of parliament, and only one Tutsi cabinet minister.[18] In addition, Hutu in the military were prohibited from marrying Tutsi,[19] and all citizens were required to carry ethnic identity

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7. PRUNIER, *supra* note 5, at 192-257.

8. Theodor Hanf, *Rwanda, in* 20 COLLIER'S ENCYCLOPEDIA 308 (Bernard Johnston ed., 1993).

9. PRUNIER, *supra* note 5, at 4 (reporting the Rwanda population at 7,128,000 in 1989).

10. RICHARD F. NYROP, ET AL., AREA HANDBOOK FOR RWANDA 2 (1969).

11. Hanf, *supra* note 8, at 308; NYROP ET AL., *supra* note 10, at 6.

12. PRUNIER, *supra* note 5, at 5; *see* CATHERINE NEWBURY, THE COHESION OF OPPRESSION: CLIENTSHIP AND ETHNICITY IN RWANDA: 1860-1960 (1988) (discussing clientship and shifting ethnicity in Rwanda).

13. NYROP ET AL., *supra* note 10, at 44-47; PRUNIER, *supra* note 5, at 5; Catharine Newbury, *Background to Genocide in Rwanda*, 23 ISSUE 12, 12 (1995).

14. PRUNIER, *supra* note 5, at 54, 299. The political history of Rwanda and its important relations with surrounding countries, especially Burundi, are beyond the scope of this article. For these important topics, see generally DIXON KAMUKAMA, RWANDA CONFLICT: ITS ROOTS AND REGIONAL IMPLICATIONS (1993); RENÉ LEMARCHAND, RWANDA AND BURUNDI (1970).

15. PRUNIER, *supra* note 5, at 61-74. For a discussion of the RPF army and the civil war up to 1994, see *id.* at 90-213.

16. *Id.* at 54.

17. *Id.* at 61.

18. *Id.* at 75.

19. *Id.*

cards.[20] Habyarimana promoted a policy of internal repression against Tutsi, particularly in the 1990s, when his government indiscriminately interred and persecuted Tutsi, claiming they were actual or potential accomplices of the RPF.[21] Hutu ultranationalists killed an estimated 2,000 Tutsi between 1990 and 1993 in addition to targeting human rights advocates, regardless of ethnicity.[22]

The campaign of genocide that followed Habyarimana's death ended in July 1994 when the RPF Army routed the Hutu militias and army. The RPF and moderate Hutu political parties formed a new government on July 18, 1994, but the country was in a state of chaos.[23] The new government pledged to implement the Arusha peace agreement on power sharing, which previously had been reached between the Habyarimana regime and the RPF on August 3, 1993.[24] In a Presidential statement issued on August 10, 1995, the U.N. Security Council called upon the new Rwandan government to ensure that there would be no reprisals against Hutu who wished to return to their homes and resume their work, reminded the government of its responsibility for a national reconciliation, and emphasized that the Arusha peace agreement constituted an appropriate framework for reconciliation.[25]

The new Rwandan government was formed by a coalition of twenty ministers drawn from the RPF (with nine ministers) and four other political parties.[26] With both Tutsi and Hutu among its top officials, the government committed itself to building a multiparty democracy and to discontinuing the "ethnic" classification system utilized by the previous regime.[27]

On July 1, 1994, the U.N. Security Council adopted Resolution 935, which requested the U.N. Secretary General to form a commission of experts to determine whether serious breaches of humanitarian law, including genocide, had been committed in Rwanda.[28] In October 1994, the commission reported to the Security Council that genocide and systematic,

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20. *Id.* at 76 n.62, 77. For purposes of these identity cards, ethnicity was determined by patrilineal descent. U.S. Dep't of State, *Rwanda Human Rights Practices* (1994), *available in* LEXIS, INTLAW Library, DSTATE File. Consequently, even the children of mixed marriages were classified either as Hutu, Tutsi, or Twa, depending on the identity cards of their fathers. *Id.*

21. Villia Jefremovas, *Acts of Human Kindness: Tutsi, Hutu and the Genocide*, 23 ISSUE 28, 29 (1995); Newbury, *supra* note 13, at 14.

22. Newbury, *supra* note 13, at 14.

23. PRUNIER, *supra* note 5, at 299.

24. *Id.* at 329.

25. U.N. SCOR, *Statement by the President of the Security Council*, 3414th mtg. at 1-2, U.N. Doc. S/PRST/1994/42 (1994).

26. U.S. Dep't of State, *supra* note 20.

27. Raymond Bonner, *Rwanda's Leaders Vow to Build a Multiparty State for Both Hutu and Tutsi*, N.Y. TIMES, Sept. 7, 1994, at A10.

28. S.C. Res. 935, U.N. SCOR, 3400th mtg. at 2, U.N. Doc. S/RES/935 (1994).

widespread, and flagrant violations of international humanitarian law, resulting in massive loss of life, had been committed in Rwanda.[29] On November 8, 1994, the U.N. Secretary-General submitted to the Security Council a statute for the International Criminal Tribunal for Rwanda, stating that he was "[c]onvinced that . . . the prosecution of persons responsible for serious violations of international humanitarian law [in Rwanda] . . . would contribute to the process of national reconciliation and to the restoration and maintenance of peace."[30] He recommended that this Tribunal, like the one created by the Security Council in 1993 for the former Yugoslavia, be established under Chapter VII of the U.N. Charter.[31] The Security Council adopted the Secretary-General's report and the ICTR Statute without change.[32]

Article 1 of the Statute limits the ICTR's temporal jurisdiction to the year 1994 only.[33] Article 1 also states that the ICTR "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 neighboring states."[34] Consequently, the Statute gives the Tribunal both personal and territorial jurisdiction in Rwanda, as well as limited personal and territorial jurisdiction in surrounding states.

Because the Security Council is not a legislative body, it had no competency to enact substantive law for the Tribunal. Instead, it authorized the Tribunal to apply existing international humanitarian law that is applicable to noninternational armed conflict.[35] The humanitarian law included in the ICTR Statute consists of the Genocide Convention,[36] ratified

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29. *Letter Dated 1 October 1994 from the Secretary-General Addressed to the President of the Security Council*, U.N. SCOR, at 1, U.N. Doc. S/1994/1125 (1994).

30. S.C. Res. 955, U.N. SCOR, 3453rd mtg. at 1, U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute].

31. *Id.* Annex, at 3; *see* M. Cherif Bassiouni, *Former Yugoslavia: Investigating Violations of International Humanitarian Law and Establishing an International Criminal Tribunal*, 18 FORDHAM INT'L L. J. 1191, 1192 (1995) (discussing the establishment of the International Tribunal for the former Yugoslavia); *see also* Paul J. Magnarella, *Trying for Peace Through Law: The U.N. Tribunal for the Former Yugoslavia*, 10(3) HUMAN PEACE 3-8 (1995) (describing and analyzing that Tribunal's legal structure); Theodor Meron, *War Crimes in Yugoslavia and Development of International Law*, 88 AM. J. INT'L L. 76, 78 (1994); Ruth Wedgwood, *War Crimes in the Former Yugoslavia: Comments on the International War Crimes Tribunal*, 34 VA. J. INT'L L. 266-75 (1994) (stating that the tribunal for Yugoslavia was the first significant international criminal tribunal).

32. *See* ICTR Statute, *supra* note 30.

33. *Id.* art. 1.

34. *Id.*

35. *Id.*

36. Genocide Convention, *supra* note 4, 78 U.N.T.S. at 277.

by Rwanda, crimes against humanity as defined by the Nuremberg Charter,[37] Article 3 Common to the Geneva Conventions,[38] and Additional Protocol II[39] also ratified by Rwanda. Both the prohibition and punishment of acts of genocide and crimes against humanity are part of customary international law imposing legal obligations on all states.[40]

III. THE CASE AGAINST JEAN KAMBANDA

A. *Introduction*

The case against former Rwandan Premier Jean Kambanda,[41] the first person in history to accept responsibility for genocide, is of monumental significance to Rwandans, Africans, and all people concerned with this dreadful crime. This, the first case to be concluded at the ICTR, is extremely important for learning the truth about what happened in Rwanda during those fateful 100 days in 1994. Kambanda's extensive admissions of guilt should dispel forever any doubts about the occurrence of intentionally orchestrated mass murder in Rwanda. Kambanda's confession and willingness to offer testimony in other cases are significant because they will probably influence the pleas of other Rwandan defendants in ICTR custody.

B. *Kambanda's Background and Arrest*

Jean Kambanda, the highest-ranking former political leader in ICTR custody, was born on October 10, 1955 at Mubumbano in the Prefecture of Butare.[42] He has a wife and two children, and holds the Diploma d'Ingenieur Commercial.[43] From May 1989 to April 1994, he was employed by the Union des Banques Populaires du Rwanda, where he became the Director.[44] He was Vice President of the Butare Section of the MDR (*Mouvement Democratique Republicain)* and a member of its political

37. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, Charter of the International Military Tribunal. Done at London, Aug. 8, 1945, 59 Stat. 1544, 1546, 82 U.N.T.S. 279, 284.

38. Geneva Conventions Nos. 970-973, Aug. 12, 1949, 75 U.N.T.S. 31, 85, 135, 287, respectively.

39. Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of Non-International Armed Conflict, Dec. 12, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

40. HILAIRE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW 140 (1990).

41. Prosecutor v. Jean Kambanda, Case No. ICTR 97-23-S (visited Nov. 18, 1998) <http://www.ictr.org/english/judgements/kambanda.html>.

42. *Id.* at § III.B., ¶ 45.

43. *Id.*

44. *Id.*

bureau.[45] He became Prime Minister of Rwanda's interim government on April 9, 1994, three days after the mysterious downing of the plane carrying then-President Juvenal Habyarimana and Burundian President Cyprian Ntayamira.[46] Habyarimana's death signaled the beginning of three months of carnage. Kambanda's predecessor, Agathe Uwilingiyimana, and ten of the Belgian U.N. soldiers protecting her were slaughtered by extremist Hutu soon after Habyarimana's plane crash.[47] Shortly before the RFP Army took control of Rwanda in July 1994, Kambanda fled with his family to Kenya.[48]

At the request of the ICTR, Kenyan authorities arrested Kambanda along with six other Rwandan genocide suspects on July 18, 1997.[49] Former Cabinet minister, Pauline Nyiramasuhuko, the interim family welfare minister, was arrested with Kambanda, along with her son, Arsene Shalom Ntahobali.[50] Colonel Gratien Kabiligi and Commander Aloys Ntabakuze, two senior military officials, Sylvain Nsabimana, prefect of Butare, where many anti-Tutsi massacres occurred, and Hassan Ngeze, a prominent media figure accused of distributing materials inciting violence against the Tutsi were also arrested.[51] The suspects were transferred to the ICTR's detention center in Arusha, Tanzania, where they were held.[52] The arrests meant that the ICTR, after a slow start, had more high ranking suspects in custody than its sister institution — The U.N. International Criminal Tribunal for the Former Yugoslavia (ICTY) — at the Hague.

C. *Indictment*

The Prosecutor's Office submitted its indictment against Kambanda on October 16, 1997 to Judge Yakov Ostrovsky (Russia), who confirmed it, issued a warrant of arrest against the accused and ordered his continued detention.[53] The indictment contained six counts: genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide, crimes against humanity (murder), and crimes against humanity (extermination).[54] On May 1, 1998, during his initial appearance before Trial Chamber 1, consisting of Judges Laïty Kama (Senegal), Lennart

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45. *Id.*
46. *Id.*
47. PRUNIER, *supra* note 5, at 229-30.
48. *Rwanda: Top Figures of Former Regime Arrested*, ICTR/INFO-9-2 (18 July 1997) Arusha, TZ.
49. *Rwanda-U.N.: Tribunal Nabs Former Prime Minister, Six Others*, Inter Press Service, July 18, 1997, *available in* LEXIS, News Library.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Kambanda*, Case No. ICTR 97-23-S, § I.A., ¶ 2.
54. *Id.* ¶ 3.

Aspegren (Sweden), and Navanethem Pillay (South Africa), Kambanda pleaded guilty to all six counts.[55]

Genocide, as defined in the 1948 Convention for the Prevention and Punishment of the Crime of Genocide and in the Statute of the ICTR (Art. 2), is a specific intent crime.[56] Thus, for a crime of genocide to have been committed, it is necessary that one of the acts listed under Article 2(2) of the ICTR Statute, for example, killing, or causing serious bodily or mental harm, be committed against a specifically targeted "national, ethnical, racial or religious group" with the intent to destroy it, "in whole or in part."[57] A potential defense for many Rwandan genocide suspects is that the 1994 killings were part of an ordinary war or civil upheaval, without any intent to destroy a particular national, ethnical, racial or religious group, in whole or in part. Significantly, however, Kambanda admitted that the extermination of Tutsi was a policy of his government.[58]

D. *Kambanda's Admissions and Sentence*

On May 1, 1998, during his initial appearance before an ICTR Trial Chamber in Arusha, Tanzania, Jean Kambanda pleaded guilty to the six counts contained in his indictment, "namely genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide, crimes against humanity (murder), punishable under Article 3(a) of the [ICTR] Statute and crimes against humanity (extermination), punishable under Article 3 (b) of the [ICTR] Statute."[59]

Together with his guilty plea, on April 28, 1998 Jean Kambanda submitted to the Chamber a document entitled "Plea Agreement between Jean Kambanda and the Office of the Prosecutor," which was signed by himself and Oliver Michael Inglis his defense counsel from Cameroon.[60] The Plea Agreement states that "no agreements, understandings or promises ha[d] been made between the parties with respect to sentence, which . . . is at the discretion of the Trial Chamber."[61] In the Plea Agreement, however, the Prosecutor disclosed that it had recognized Kambanda's cooperation by promising protection measures for his family to alleviate concerns he had for their safety.[62]

In his plea Jean Kambanda admitted all the relevant facts alleged in the

55. *Id.*
56. Genocide Convention, *supra* note 4, art. II; ICTR Statute, *supra* note 30, art. 2.
57. ICTR Statute, *supra* note 30, art. 2(2).
58. *Kambanda*, Case No. ICTR 97-23-S, § III.A, ¶ 39(i)-(xi).
59. *Id.* § I.A., ¶ 3.
60. *Id.* § III.A., ¶ 39.
61. *Id.* § III.B., ¶ 48.
62. *Id.* ¶ 49.

indictment.[63] In particular,

> (i) [h]e admitted that there was in Rwanda in 1994 a widespread and systematic attack against the civilian population of Tutsi, with the intent to exterminate them. Mass killings of hundreds of thousands of Tutsi occurred in Rwanda, including women and children, old and young who were pursued and killed at places where they had sought refuge, [that is,] prefectures, commune offices, schools, churches and stadiums.
> (ii) [He] acknowledge[d] that as Prime Minister of the Interim Government of Rwanda from April 8, 1994 to July 17, 1994, he was head of the 20 member Council of Ministers and exercised de jure authority and control over the members of his government. The government determined and controlled national policy and had the administration and armed forces at its disposal. As Prime Minister, he also exercised de jure and de facto authority over senior civil servants and senior officers in the military.
> (iii) [He] acknowledge[d] that he participated in meetings of the Council of Ministers, cabinet meetings and meetings of prefets where the course of massacres were actively followed, but [took] no action . . . to stop them. . . . [He] also acknowledge[d] participation in the dismissal of the prefet of Butare because the latter had opposed the massacres and the appointment of a new prefet to ensure the spread of massacre of Tutsi in Butare.
> (iv) [He] acknowledge[d] his participation in a high level security meeting at Gitarama in April 1994 between the President, T. Sindikubwabo, himself and the Chief of Staff of the Rwandan Armed Forces (FAR) and others, which discussed FAR's support in the fight against the Rwandan Patriotic Front (RPF) and its "Accomplices," understood to be the Tutsi and moderate Hutu.
> (v) [He] acknowledge[d] that he issued the Directive on Civil Defence addressed to the prefets on May 25, 1994 (Directive No. 024-0273, disseminated on June 8, 1994). [He] further admitted that this directive encouraged and reinforced the Interahamwe who were committing mass killings of the Tutsi civilian population in the prefectures [and] . . . acknowledge[d] that by this directive the Government assumed the responsibility for the actions of the Interahamwe.
> (vi) [He] acknowledge[d] that before April 6, 1994, political parties in concert with the Rwandan Armed Forces organized and began the military training of the youth wings of the MRND and CDR political

63. *Id.* § III.A., ¶ 39.

parties (Interahamwe and Impuzamugambi respectively) with the intent to use them in the massacres that ensued. Furthermore, [he] acknowledge[d] that the Government headed by him distributed arms and ammunition to these groups. Additionally, [he] confirmed that roadblocks manned by mixed patrols of the Rwandan Armed Forces and the Interahamwe were set up in Kigali and elsewhere as soon as the death of President J.B. Habyarimana was announced on the Radio. [He also] acknowledge[d] the use of the media as part of the plan to mobilize and incite the population to commit massacres of the civilian Tutsi population. [He] acknowledge[d] the existence of groups within military, militia, and political structures which had planned the elimination of the Tutsi and Hutu political opponents.

(vii) [He] acknowledge[d] that, on or about June 21, 1994, in his capacity as Prime Minister, he gave clear support to Radio Television Libre des Mille Collines (RTLM), with the knowledge that it was a radio station whose broadcasts incited killing, the commission of serious bodily or mental harm to, and persecution of Tutsi and moderate Hutu. On this occasion, speaking on this radio station, [he], as prime minister, encouraged the RTLM to continue to incite the massacres of the Tutsi civilian population, specifically stating that this radio station was "an indispensable weapon in the fight against the enemy."

(viii) [He] acknowledge[d] that following numerous meetings of the Council of Ministers between April 8, 1994 and July 17, 1994, he as Prime Minister, instigated, aided and abetted the Prefets, Bourgmestres, and members of the population to commit massacres and killings of civilians, in particular Tutsi and moderate Hutu. Furthermore, between April 24, 1994 and July 17, 1994, [he] and [the] ministers of his Government visited several prefectures, such as Butare, Gitarama (Nyabikenke), Gikongoro, Gisenyi and Kibuye to incite and encourage the population to commit these massacres, including by congratulating the people who had committed these killings.

(ix) [He] acknowledged that on May 3, 1994, he was personally asked to take steps to protect children who had survived the massacre at a hospital[, but] he did not respond. On the same day, after the meeting, the children were killed. He acknowledge[d] that he failed in his duty to ensure the safety of the children and the population of Rwanda.

(x) [He] admitt[ed] that in . . . the name of the government, he addressed public meetings, and the media, at various places in Rwanda directly and publicly inciting the population to commit acts of violence against Tutsi and moderate Hutu.

(xi) [He] acknowledge[d] that he ordered the setting up of roadblocks

> with the knowledge that these roadblocks were used to identify Tutsi for elimination, and that as Prime Minister he participated in the distribution of arms and ammunition to members of political parties, militias and the population knowing that these weapons would be used in the perpetration of massacres of civilian Tutsi.
> (xii) [He] acknowledge[d] that he knew or should have known that persons for whom he was responsible were committing crimes of massacre upon Tutsi and that he failed to prevent them or punish the perpetrators. [He] admitte[d] that he was an eye witness to the massacres of Tutsi and also had knowledge of them from cabinet discussions and regular reports of prefets, and cabinet discussions.[64]

After determining that Kambanda's guilty plea was entered voluntarily and knowingly, without threats or promises, the Trial Chamber found him guilty on all six counts and, on September 4, 1998, sentenced him to a single term of life in prison.[65]

E. *Conclusion*

Kambanda's extensive confession concerning his government's intentional and well-advertised policy of genocide constitutes the fundamental fact upon which future ICTR prosecutions will rest. His confession also destroys the credibility, if it existed, of revisionist historians, who claim a genocide never took place. Kambanda's confession will affect all ICTR suspects as well as the over 100,000 suspects imprisoned in Rwanda. Those who are guilty of participating in the genocide will have little choice but to admit their crimes or modify their defenses in hopes of getting more lenient sentences.

According to ICTR prosecutor Mohammad C. Othman, Kambanda is expected serve as a prosecution witness in several upcoming trials.[66] Kambanda may also supply additional pages to Rwanda's recent history by answering questions surrounding the April 6, 1994 mysterious downing of the plane carrying Rwandan President Juvenal Habyarimana.

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64. *Id.* § III.A.(i)-(xii).
65. *Id.* ¶ 61.
66. James C. McKinley, *Ex-Rwandan Premier Gets in Prison on Charges of Genocide in '94 Massacres*, N.Y. TIMES, Sept. 5, 1998, at 4A.

IV. THE CASE AGAINST JEAN-PAUL AKAYESU

A. *Introduction*

The case against Jean-Paul Akayesu[67] is significant for a series of reasons: it was the first trial before an international tribunal of someone charged with genocide, and it was the first trial in which an international tribunal conceptualized sexual violence, including rape, as an act of genocide. Also, because this was the ICTR's first judgment based on a contested trial, the justices had to face many jurisprudential issues for the first time. Trial Chamber I's lengthy Judgment of September 2, 1998 carefully explicates the facts, reasoning, and rules it relied upon to reach its conclusions. By so doing, this Judgment will stand as an historic precedent for future tribunals dealing with similar issues.

B. *Akayesu's Background*

Jean-Paul Akayesu, a Rwandan national, was born in 1953.[68] He is married, with five children. Prior to becoming bourgmestre (mayor) of Taba commune, in the Gitarama prefecture of Rwanda, he was a teacher, then an inspector of schools. Akayesu entered politics in 1991, becoming a founding member of the *Mouvement Démocratique Républicain* (MDR). He served as chairman of the local wing of the MDR in Taba commune. In April 1993, Akayesu, with the support of several key figures and influential groups in the commune, was elected bourgmestre of Taba. He held that position until June 1994, when he fled to Zambia.[69]

C. *Arrest and Indictment*

Jean-Paul Akayesu was arrested in Zambia on October 10, 1995.[70] On November 22, 1995, the Prosecutor of the Tribunal, pursuant to Rule 40 of the Rules, requested the Zambian authorities to keep Akayesu in detention for a period of 90 days, while awaiting the completion of the investigation into potential charges against him. On February 13, 1996, the then Prosecutor, Richard Goldstone, submitted an indictment against Akayesu. This was subsequently amended on June 17, 1997 to add rape to the charges. The final indictment contained a total of fifteen counts individually charging Akayesu with genocide, complicity in genocide, direct and public incitement

67. Prosecutor v. Jean-Paul Akayesu, Case No. ICTR 96-4-T (Sept. 2, 1998) (visited Nov. 18, 1998) <http://www.ictr.org/english/judgements/akayesu.html>.
68. *Id.* § 1.1, ¶ 3.
69. *Id.*
70. *Id.* § 1.4.1, ¶ 7.

to commit genocide, extermination, murder, torture, cruel treatment, rape, other inhumane acts and outrages upon personal dignity, crimes against humanity and violations of Article 3 Common to the 1949 Geneva Conventions and Additional Protocol II.[71] Judge William H. Sekule confirmed the indictment and issued an arrest warrant, accompanied by an order for continued detention, on February 16, 1996. Akayesu was transferred to the ICTR detention facilities in Arusha, Tanzania on May 26, 1996.[72]

D. *Are the Tutsi a Protected Group?*

Before deciding whether Akayesu was guilty of acts of genocide, the Chamber had to determine whether genocide as defined in Article 2 of the ICTR Statute, which replicates the Genocide Convention, had occurred in Rwanda. According to ICTR Statute Article 2(2):

> 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;
> 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.[73]

The Chamber reasoned that since the special intent to commit genocide lies in the intent to destroy, in whole or in part, a national, ethnical, racial or social group, it was necessary to determine the meaning of these social categories. Because neither the Genocide Convention nor the ICTR Statute had defined them, the task fell upon the Chamber itself. Based on its reading of the *travaux préparatoires* of the Genocide Convention, the Chamber concluded that the drafters perceived the crime of genocide as targeting only stable, permanent groups, whose membership is determined by birth.[74] The drafters excluded more mobile groups, such as political and economic groups,

71. *Id.* § 1.4.1 ¶ 9.
72. *Id.* ¶ 11.
73. ICTR Statute, *supra* note 30, art. 2(2).
74. *Akayesu*, Case No. ICTR 96-4-T, § 6.3.1.

that one joins voluntarily.[75] The Chamber then proceeded to define each of the social categories listed in the ICTR Statute:

> Based on the Nottebohm decision rendered by the International Court of Justice, the Chamber holds that a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.
>
> . . .
>
> An ethnic group is generally defined as a group whose members share a common language or culture.
>
> . . .
>
> The conventional definition of racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors.
>
> . . .
>
> The religious group is one whose members share the same religion, denomination or mode of worship.[76]

Significantly, the Tutsi-Hutu distinction in Rwanda does not fit into any of the above categories. The Tutsi belong to the same religious groups and national group as do the Hutu. The Tutsi and Hutu share a common language and culture. And, if there had been any hereditary physical traits distinguishing Hutu from Tutsi, they have become largely obliterated through generations of intermarriage. Consequently, had the ICTR justices stopped here, they would have been forced to conclude that genocide, as legally defined in the Convention and Statute, had not occurred in Rwanda.

Fortunately, the justices did not stop here. They next asked "whether it would be impossible to punish the physical destruction of a group as such under the Genocide Convention, if the said group, although stable and membership is by birth, does not meet the definition of any one of the four groups expressly protected by the Genocide Convention [and Article 2 of the ICTR Statute]."[77] They concluded that the answer is "no," because it is "important to respect the intention of the drafters of the Genocide Convention, which according to the *travaux préparatoires*, was patently to ensure the protection of any stable and permanent group."[78]

Next, the Chamber asked whether the Tutsi constituted a stable and permanent group for purposes of the Genocide Convention. To answer this

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75. *Id.*
76. *Id.* § 6.3.1, ¶¶ 299-305.
77. *Id.* ¶ 307.
78. *Id.*

question, the Chamber considered evidence provided by eye-witness and expert testimony during the trial. The Chamber noted that the Tutsi constituted a group referred to as "ethnic" in official Rwandan classifications.[79] Identity cards prior to 1994 contained a reference to "*ubwoko*" in Kinyarwanda or "*ethnie*" (ethnic group) in French which referred to the designations Hutu, Tutsi, and Twa.[80] The Chamber noted that all the Rwandan witnesses who appeared before it invariably answered without hesitation the prosecutor's questions regarding their ethnic identity.[81]

Earlier in its Judgement, the Chamber noted that witnesses testified that "[e]ven pregnant women, including those of Hutu origin, were killed on the grounds that the foetuses in their wombs were fathered by Tutsi men, for in a patrilineal society like Rwanda, the child belongs to the father's group of origin."[82] Witness PP testified that Akayesu had made a public statement to the effect that "if a Hutu woman were impregnated by a Tutsi man, the Hutu woman had to be found in order 'for the pregnancy to be aborted.' "[83] Given these and related facts, the Chamber found that at the time of the alleged events, "the Tutsi did indeed constitute a stable and permanent group and were identified as such by all."[84] Consequently, they were protected by the Genocide Convention and Article 2 of the ICTR Statute.

Here, the Chamber made two critical determinations that will greatly influence future cases involving the crime of genocide. By adding "stable and permanent group, whose membership is largely determined by birth," to the four existing categories, that is, national, ethnical, racial, and religious group, of the Genocide Convention, the Chamber has significantly expanded the kinds of populations that will be protected by that Convention. The Chamber also expanded upon the categories of protected peoples by refusing to confine itself to an objective, universalistic definition of ethnic group. Instead, it relied on the subjective perceptions of the Rwandan people. Consequently, it established as a precedent the idea that a court may regard any stable and permanent group, whose membership is largely determined by birth, as an ethnic group for purposes of the Genocide Convention as long as the people of the society in question perceive that group to be different from others according to local, subjective criteria.

E. *Determining Intent*

As explained above, specific intent is a constitutive element of the crime

79. *Id.* § 7.8, ¶ 157.
80. *Id.*
81. *Id.*
82. *Id.* § 3, ¶ 225.
83. *Id.*
84. *Id.* § 7.8, ¶ 157.

of genocide. Intent is a mental factor that is difficult to determine with precision in the absence of a sincere confession or public admission by the accused. The Chamber provided another jurisprudential roadway by maintaining that in the absence of a confession, the accused's intent can be inferred from a number of presumptions of fact. The Chamber reasoned that "it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others."[85] Specific factors that the Chamber believed could enable it to infer the genocidal intent of a particular act included the scale of atrocities committed, their general nature, and the deliberate and systematic targeting of people because of their membership in a particular group, while excluding members of other groups.[86]

Here, the Chamber offers a method for determining an individual's constructive genocidal intent. This method involves placing an accused's particular act(s) against a victim within the broad context of prevalent and culpable acts directed at other persons because they are members of the victim's group, even if these acts were perpetrated by persons other than the accused.

F. *Sexual Violence and Rape as Crimes Against Humanity and Genocide*

The Indictment against Jean-Paul Akayesu was submitted on February 13, 1996 by then Prosecutor Richard Goldstone and was confirmed on February 16, 1996.[87] Originally, it did not contain specific charges of sexual crimes. However, prosecutors amended the Indictment during the trial, in June 1997, and resubmitted it, under the signature of Prosecutor Louise Arbour, with the addition of three counts (13 to 15) and three paragraphs (10A, 12A, and 12B).[88]

In paragraph 10A the Prosecutor proposes a definition of sexual violence to clarify the allegations set forth in paragraphs 12A and 12B.[89] These three paragraphs are reproduced below:

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

85. *Id.* § 6.3.1, ¶ 321.
86. *Id.*
87. *Id.* § 1.2.
88. *Id.*
89. *Id.* ¶ 10A.

such as forced nudity.

. . . .

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

12B. Jean Paul AKAYESU knew that the acts of sexual violence, beatings and murders were being committed and was at times present during their commission. Jean Paul AKAYESU facilitated the commission of the sexual violence, beatings and murders by allowing the sexual violence and beatings and murders to occur on or near the bureau communal premises. By virtue of his presence during the commission of the sexual violence, beatings and murders and by failing to prevent the sexual violence, beatings and murders, Jean Paul AKAYESU encouraged these activities.[90]

Count 13 of the Indictment charged Akayesu with rape as a crime against humanity, punishable under ICTR Statute Article 3(g) (which specifically names rape as a crime against humanity).[91] In addressing this charge, the Chamber noted that "there is no commonly accepted definition of the term

90. *Id.* ¶¶ 10A, 12A, 12B. In introducing the amended Indictment, prosecutors stated that "the testimony of Witness H motivated them to renew their investigation of sexual violence in connection with events which took place in Taba at the bureau communal." *Id.* § 5.5, ¶ 107. Prosecutors noted that evidence previously available was insufficient to connect Akayesu to acts of sexual violence. *Id.* They explained that the lack of evidence might be attributed to the shame that victims of sexual violence feel and the insensitivity shown in investigations of sexual violence. *Id.* The defense in its closing statement complained that "the Indictment [had been] amended in response to public pressure concerning the prosecution of sexual violence." *Id.* The Chamber noted that nongovernmental organizations had expressed interest in this issue. *Id.*

91. *Id.*; ICTR Statute, *supra* note 30, art. 3(g).

['rape'] in international law."[92] It chose to regard rape as a form of aggression and looked to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment for guidance in its formulation of a definition. The Chamber observed that that Convention "does not catalogue specific acts in its definition of torture, [but rather focuses] on the conceptual framework of state sanctioned violence."[93] The Chamber reasoned that rape, like torture, is used for such purposes as "intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person."[94] It further stated that "[l]ike torture, rape is a violation of personal dignity, and rape . . . constitutes torture when . . . inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[95]

The Chamber also reasoned that acts constituting crimes against humanity have "four essential elements:"[96]

> (i) the act must be inhumane in nature and character, causing great suffering, or serious injury to body or to mental or physical health;
> (ii) the act must be committed as part of a widespread or systematic attack;
> (iii) the act must be committed against members of the civilian population;
> (iv) the act must be committed on one or more discriminatory grounds, namely, national, political, ethnic, racial or religious grounds.[97]

With these elements in mind, the Chamber defined rape and sexual violence for purposes of Crimes against Humanity as

> a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive. This act must be committed:
>
> (a) as part of a wide spread or systematic attack;

92. *Akayesu*, Case No. ICTR 96-4-T, § 7.7, ¶ 127.
93. *Id.* ¶ 129.
94. *Id.*
95. *Id.*
96. *Id.* § 6.4, ¶ 81.
97. *Id.* ¶ 82.

(b) on a civilian population;
(c) on certained catalogued discriminatory grounds, namely: national, ethnic, political, racial, or religious grounds.[98]

Further on in the Judgment, the Chamber stated that "[s]exual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact."[99] The Chamber noted as an example of sexual violence the incident described by Witness KK in which Akayesu ordered the Interahamwe to undress a student and force her to do gymnastics naked before a crowd in the public courtyard of the bureau communal.[100] Hence, by not confining sexual violence to cases of bodily penetration, the Chamber went beyond the definition of sexual violence offered by the Prosecutor in paragraph 10A of the Indictment.[101]

The Chamber found that there was sufficient credible evidence to establish beyond a reasonable doubt that Tutsi girls and women were subjected to sexual violence, beaten, and killed on or near the bureau communal premises, as well as elsewhere in the commune of Taba in 1994.[102] The Chamber also found beyond a reasonable doubt that Akayesu knew, or had reason to know, that sexual violence was being inflicted on those women who were kept at the bureau communal and on those who were taken from there. The Chamber found no evidence that the accused took any measures to prevent acts of sexual violence or to punish the perpetrators.[103] To the contrary, there was evidence that Akayesu ordered, instigated, aided, and abetted sexual violence.[104] Consequently, the Chamber found Akayesu guilty of rape as a crime against humanity.[105]

Count 1 of the Indictment charged Akayesu with the crime of genocide, punishable under Article 2(3)(a) of the Statute, which simply lists "genocide" as one of the acts of genocide.[106] Count 1 made no specific reference to sexual violence or rape. However, among the definitions of genocide offered by Article 2(2) is "[c]ausing serious bodily or mental harm to members of [a] group."[107]

The Tribunal *sua sponte* chose to consider sexual violence in connection to Count 1 and the allegations made in paragraphs 12(A) and 12(B) of the

98. *Id.* ¶¶ 121-22.
99. *Id.* § 7.7, ¶ 131.
100. *Id*
101. *See supra* note 90 and accompanying text.
102. *Akayesu*, Case No. ICTR 96-4-T, § 5.5, ¶ 171.
103. *Id.* § 7.7, ¶ 137.
104. *Id.* ¶ 139.
105. Id. at § 8.
106. *Id.* § 1.2.
107. ICTR Statute, *supra* note 30, art. 2(2)(b).

Indictment.[108] The three justices reasoned that the acts of rape and sexual violence contained in the Indictment constituted genocide in the same way as any other act listed under "Genocide" Article 2(2) of the ICTR Statute, as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, in this case the Tutsi.[109] Rape and sexual violence certainly constitute inflictions of "serious bodily and mental harm"[110] on victims. In light of all the evidence before it, the Chamber was satisfied that the acts of rape and sexual violence described by witnesses were perpetrated solely against Tutsi women, many of whom were subjected to the worst public humiliation, being mutilated and raped several times, often in public, in the Bureau Communal premises or in other public places, and frequently by more than one assailant.[111] The Chamber concluded that these rapes "resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole."[112]

The Tribunal found that Akayesu had "aided and abetted" the acts of sexual violence by allowing them to take place in his presence on, or near, the premises of the bureau communal and by "verbally encouraging" the commission of these acts.[113] The Chamber stated that because of his position of authority, his open encouragement was a clear signal of official tolerance for sexual violence, which would not have happened if he had not done so.[114] Consequently, the Chamber concluded that the acts alleged in paragraphs 12A and 12B of the Indictment and subsequently proven at trial constitute the crime of genocide for which it found Akayesu individually criminally responsible.[115]

V. SOME FINAL OBSERVATONS

The *Kambanda* case constitutes a fundamental, factual building block

108. *See supra* note 90 and accompanying text.
109. *Akayesu*, Case No. ICTR 96-4-T, § 7.8, ¶¶ 219-21.
110. ICTR Statute, *supra* note 30, art. 2(2)(b).
111. *Akayesu*, Case No. ICTR 96-4-T, § 7.8, ¶ 215.
112. *Id.*
113. *Id.* at § 7.7, ¶ 141.
114. *Id.*
115. *Id.* § 7.9, ¶ 237. Judge Navanethem Pillay of South Africa, the Tribunal's only female judge, served on Trial Chamber I and participated in the Akayesu judgment. She reportedly told a reporter: " 'From time immemorial, rape has been regarded as spoils of war. . . . Now it will be considered a war crime. We want to send out a strong signal that rape is no longer a trophy of war.' " Bill Berkeley, *Judgement Day*, WASH. POST, Oct. 11, 1998, at W10 (quoting Judge Pilley).

upon which an understanding of the decisions and policies of the immediate post-Habyarimana Rwandan government will be built. Kambanda's comprehensive admissions expell any doubts about the existence of an official policy of genocide against Tutsi. His future cooperation with the prosecution may well streamline trials by convincing defendants to stipulate to the policy of genocide and focus their defenses soley on their alleged role in it. Some may well confess, express remorse, and ask for the Tribunal's mercy.

Observers will wonder, however, why the prosecution did not charge Kambanda with violations of Article 3 Common to the 1949 Geneva Conventions and Additional Protocol II. He did admit that he, as prime minister, had "exercised de jure and de facto authority over senior civil servants and senior officers in the military."[116] He also admitted that he had issued the Directive on Civil Defense, which was addressed to the prefets on May 25, 1994, and that this directive encouraged and reinforced the Interahamwe who were committing mass killings of the Tutsi civilian population in the prefectures.[117] Kambanda further acknowledged that by this directive the government assumed responsibility for the actions of the Interahamwe.[118] Consequently, by virtue of the humanitarian law principle of command responsibility, Kambanada is culpable for those violations of Article 3 Common to the 1949 Geneva Conventions and Additional Protocol II committed by the military forces and the Interahamwe.

The *Akayesu* case has immense factual and jurisprudential importance. During the trial, the Chamber heard forty-two witnesses, including five expert witnesses. Many of those testifying were eye-witnesses and victims, who told gruesome stories of their ordeals. The proceedings generated more than 4000 pages of transcripts and 125 evidentiary documents.[119] The final Judgment runs over 200 pages.

This article addressed only a limited number of the case's many important issues. With its decision in *Akayesu*, the Trial Chamber expanded the Genocide Convention and Tribunal Statute and introduced a subjective standard for determining what groups in a particular society are protected by the Genocide Convention. Arguably, by definition there would have been no genocide in Rwanda had the Chamber not done so. In addition, the Chamber explicated a method for determining an individual's constructive genocidal intent. It also offered definitions of rape and sexual violence for purposes of humanitarian law.

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116. *Kambanda*, Case No. ICTR 97-23-S, § III.A., ¶ 39(ii).
117. *Id.*
118. *Id.*
119. *Judgment in the Case Against Akayesu* (nonofficial — for media information only) (available on the U.N. Website).

Given Akayesu's de jure and de facto authority and given the fact that Akayesu, dressed in a military jacket and carrying a military weapon, had accompanied the Interahamwe on some of its criminal missions against civilians, some observers will criticize the Chamber for not finding Akayesu guilty of violations of Article 3 Common to the 1949 Geneva Conventions and Additional Protocol II.[120] The prosecution has already appealed the not guilty verdicts concerning the charges against Akayesu of violations of Article 3 Common (murder and cruel treatment) and Article 4(2)(e) of Additional Protocol II (outrage upon personal dignity, in particular rape, degrading and humiliating treatment and indecent assault).[121] Consequently, the Appeals Chamber in The Hague will have the final word on these issues. This case has generated some major contributions to humanitarian law. Undoubtedly, it will also generate voluminous commentary.

120. *Akayesu*, Case No. ICTR 96-4-T, §§ 7.1, 8.

121. Press Release No. 144, ICTR/INFO-9-2-144 (7 Oct. 1998), Arusha, TZ. Akayesu has also appealed his conviction. *Id.*