INTERNATIONAL DECISIONS

EDITED BY BERNARD H. OXMAN

Humanitarian law—groups protected from genocide—rape and sexual violence as international crimes—incitement to genocide—class of perpetrators who may violate common Article 3 of 1949 Geneva Conventions and Protocol Additional II

PROSECUTOR v. AKAYESU. Case ICTR–96–4–T.
International Criminal Tribunal for Rwanda, September 2, 1998.

This pioneering opinion marks the first time an international criminal tribunal has tried and convicted an individual for genocide and international crimes of sexual violence. The case arose out of the massacres of perhaps a million Tutsi in Rwanda in 1994.[1] At least two thousand died in Taba, a rural commune where defendant Jean-Paul Akayesu was mayor.[2] A trial chamber of the International Criminal Tribunal for Rwanda concluded that, although Akayesu may at first have tried to prevent killings, he eventually donned a military jacket and participated in or ordered atrocities. The Tribunal found him guilty of one count each of genocide and incitement to commit genocide and seven counts of crimes against humanity.[3] It acquitted Akayesu of five counts brought under common Article 3 of the 1949 Geneva Conventions and Protocol Additional II to those Conventions on the ground that he was not within the class of perpetrators contemplated by them.[4]

The opinion first surveyed the history of the conflict in Rwanda. Tutsi had at one time been the nobility, ruling over the more populous Hutu. By the turn of the century, these labels referred not so much to groups as to individuals, who might move from one group to another through marriage or financial change. But German colonizers, perceiving Tutsi to be more like them in height and color, established Tutsi as the indigenous elite. In the 1930s, the Belgians, who had succeeded the Germans, solidified the distinction and reserved benefits such as education to members of the preferred group. Thus, when indigenous political parties formed in the mid-1950s, they organized themselves along group rather than ideological lines. Independence increased unrest as Tutsi exiles, called *inyenzi*, or cockroaches, periodically attacked the Hutu-led Government. Hutu propaganda campaigns spread pejorative myths that fomented distrust. By 1994, the

[1] Case ICTR–96–4–T, Judgement, §2 (Sept. 2, 1998) (Kama, Aspegren, Pillay, JJ.) [hereinafter Judgement]. In July 1994, the Tutsi-led Rwandan Patriotic Front seized control, which it holds to this day. *Id.*

[2] *Id.*, §5.2.1.

[3] Rwanda's former Prime Minister, who had pleaded guilty to genocide, was sentenced to life in prison two days after this judgment. *See* James C. McKinley, Jr., *Ex-Rwandan Premier Gets Life in Prison on Charges of Genocide in '94 Massacres*, N.Y. TIMES, Sept. 5, 1998, at A4. Akayesu received three life sentences plus 80 years in prison; he has appealed. Ann M. Simmons, *Prosecutor's Convictions Span the World Law*, L.A. TIMES, Oct. 3, 1998, at A1.

[4] It also acquitted him of a count charging complicity in genocide, having found him guilty as a principal. Judgement, §§6.3.2, 7.8. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 UST 3114, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 UST 3217, 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 UST 3316, 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516, 75 UNTS 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts [Protocol II], June 8, 1977, Art. 17, 1125 UNTS 609.

groups perceived each other as separate, ethnic, enemies. The death of Rwanda's President in a plane crash provoked Hutu to kill, maim, beat and rape Tutsi.[5]

Do the Tutsi, the Tribunal asked, constitute a group protected against genocide?[6] Both the ICTR Statute and the Genocide Convention proscribe acts "committed with intent to destroy . . . a national, ethnical, racial or religious group."[7] Hutu and Tutsi shared nationality, race and religion. They also partook of "a common language or culture." The Tribunal concluded that they were not, as a technical matter, separate ethnic groups.[8]

The Tribunal nevertheless discerned from records of the Genocide Convention the intent to protect not just the four enumerated groups but "any group, similar . . . in terms of its stability and permanence."[9] Such group membership must be "determined by birth," "in a continuous and often irremediable manner," in contrast with "the more 'mobile' groups which one joins through individual voluntary commitment, such as political and economic groups."[10] Decades of discrimination—by custom of patrilineal descent[11] and by laws, such as that requiring cards that identified each person by the *ethnie,* or ethnic group, of Hutu or Tutsi[12]—had led the Tutsi to be regarded as a distinct, stable, permanent group.[13] Victims were selected in 1994 not as individuals, but because of this perceived ethnic difference.[14] In particular, Akayesu, through his speeches, orders and actions, had demonstrated a specific intent to destroy Tutsi as an ethnic group. Thus, he was found guilty of genocide for actually participating in beatings, killings and rapes of Tutsi in some instances, and encouraging, abetting or ordering such acts in others.[15]

Rape was not among the initial charges against Akayesu. After witnesses testified about sexual assaults, pressure by Judge Pillay, the sole woman on the panel, and by human rights groups resulted in further investigation and an amended indictment.[16] The Tribunal was accordingly required to determine when sexual violence constitutes an international crime. It recognized that municipal rape laws often depend on a "mechanical description" of specific methods of assault.[17] Taking its lead, however, from the Convention against Torture, the Tribunal opted for a broader definition, "more useful in international law."[18] Both torture and rape, it noted, are crimes that violate personal dignity and that often further specific purposes like "intimidation, degradation, humil-

[5] *Id.,* §2. He and Burundi's President, also killed in the crash, had just attended a meeting to discuss Hutu-Tutsi power sharing. *Id.*

[6] *See id.,* §§6.3.1, 7.8. Count 1 of the indictment alleged killings, beatings and sexual violence, as genocide. *Id.,* §§1.2, 7.8. These alleged acts also provided the bases for convictions for crimes against humanity. *See id.,* §§1.2, 7.2–7.4, 7.6–7.7, 7.9.

[7] Statute of the International Tribunal for Rwanda, Art. 2(2), SC Res. 955, annex (Nov. 8, 1994), *reprinted in* 33 ILM 1602, 1603 (1994) [hereinafter ICTR Statute]; Convention on the Prevention and Punishment of the Crime of Genocide, Art. II, Dec. 9, 1948, 78 UNTS 277 [hereinafter Genocide Convention].

[8] Judgement, §6.3.1; *see id.,* §3. The ICTR Statute, unlike other instruments, in Article 3 also requires proof of protected status for all crimes against humanity. *Compare* ICTR Statute, *supra* note 7, Art. 3 *with* Statute of the International Tribunal for the Former Yugoslavia, Art. 5, UN Doc. S/25704, annex (1993), *reprinted in* 32 ILM 1192, 1193 (1993) (requiring showing of protected status only in case of persecution); Rome Statute of the International Criminal Court, July 17, 1998, Art. 7(1), UN Doc. A/CONF.183/9*, *reprinted in* 37 ILM 999 (1998) [hereinafter Rome statute] (same). Because Article 3 expressly protects political groups, however, the defendant may be held liable for crimes against humanity committed against Tutsi.

[9] Judgement, §7.8; *see id.,* §6.3.1 (citing summary records of the meetings of the Sixth Committee of the General Assembly, pt. 1, 21 September–10 December 1948).

[10] *Id.,* §6.3.1.

[11] *Id.,* §5.1; *see id.,* §3.

[12] *Id.,* §§5.1, 7.8; *see id.,* §3.

[13] *Id.,* §7.8; *see id.,* §5.1.

[14] *Id.,* §§3, 7.8.

[15] *Id.,* §7.8.

[16] *Id.,* §5.5; *see id.,* §§1.2, 1.4.1; Bill Berkeley, *Judgment Day,* WASH. POST MAG., Oct. 11, 1998, at W10.

[17] Judgement, §6.4; *see id.,* §7.7.

[18] *Id.,* §6.4; *see id.,* §7.7. *See also* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 UNTS 85.

iation, discrimination, punishment, control or destruction of a person."[19] Indeed, rape committed with the aid of a public official is torture. The Tribunal thus defined "rape"—listed as a crime against humanity in the ICTR Statute—"as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."[20] It defined "sexual violence"—a crime it derived from other provisions of the Statute—as "any act of a sexual nature which is committed on a person under circumstances which are coercive."[21] Within the latter category are affronts like forcing a student to perform gymnastics naked. Coercion, the Tribunal stressed, includes not only "physical force," but also "[t]hreats, intimidation, extortion and other forms of duress," such as the existence of armed conflict and the presence of armed militants.[22]

The Tribunal credited the testimony of several victims and eyewitnesses—each designated not by name but by letters—rather than Akayesu's "bare denial" that sexual violence had occurred.[23] Thus, it found him guilty of crimes against humanity and genocide for aiding, abetting, ordering, or encouraging, and sometimes witnessing, more than two dozen rapes and other sexual assaults at the bureau communal where, by dint of his authority, he could have prevented them.[24]

Akayesu's encouragement of crimes led to his conviction on an additional charge of direct and public incitement to commit genocide, proscribed both in the ICTR Statute and in the Genocide Convention.[25] After a review of national laws in common law and civil law systems, the Tribunal held that the Statute is violated when a person, in a public place or through a mass medium, directly encourages or persuades another to commit genocide, with the specific intent that the person's acts contribute to the destruction of a protected group.[26] It found Akayesu guilty of this crime for having publicly urged a crowd "to unite in order to eliminate what he termed the sole enemy," in a manner understood as a call "to kill the Tutsi," some of whom he named explicitly.[27] As intended, his speech "did lead to the destruction of a great number of Tutsi in the commune of Taba."[28]

The prosecutor had also alleged that Akayesu had violated Article 4 of the ICTR Statute by committing serious violations of both common Article 3 of the 1949 Geneva Conventions and the 1977 Protocol Additional II to those Conventions.[29] The Tribunal concluded that customary international law supported the inclusion of common Article 3 and the Protocol, designed to extend humanitarian protection to victims of internal

[19] Judgement, §§6.4, 7.7.

[20] *Id.*, §§6.4, 7.7. *See* ICTR Statute, *supra* note 7, Art. 3(g).

[21] Judgement, §§6.4, 7.7. The Tribunal concluded that the "sexual violence" is "serious bodily or mental harm" constituting genocide, ICTR Statute, *supra* note 7, Art. 2(2)(b); an "inhumane ac[t]" constituting a crime against humanity, *id.*, Art. 3(i); and an "outrag[e] upon personal dignity" constituting a serious violation of Article 3 common to the 1949 Geneva Conventions, *id.*, Art. 4(e).

[22] *See* Judgement, §7.7.

[23] *Id.*, §5.5. The identities of witnesses remained secret to the public but were disclosed to the defense, *id.*, §§1.4.1, 4, thus avoiding one concern about the fairness of the first trial before the International Criminal Tribunal for the former Yugoslavia. *See, e.g.*, Monroe Leigh, *The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused*, 90 AJIL 235 (1996) (criticizing ruling that identities of victim-witnesses could be withheld from defense).

[24] Judgement, §7.7. For acts of rape and sexual violence to constitute these international crimes, other elements needed to be shown. To be genocide, they had to have been committed with the intent to destroy a protected group. To be crimes against humanity, they had to have been part of a widespread or systematic attack against a civilian population. The Tribunal held that the prosecution had proved these additional elements. *See id.*, §§7.7, 7.8.

[25] ICTR Statute, *supra* note 7, Art. 2(3)(c); Genocide Convention, *supra* note 7, Art. III(c).

[26] Judgement, §6.3.3.

[27] *Id.*, §7.5.

[28] *Id.*

[29] Judgement, §§1.2, 7.1.

armed conflicts, in its Statute.[30] But it refrained from holding Akayesu criminally liable under the provisions. It reasoned that, because the provisions purport to protect victims of armed conflicts, they are designed to constrain the activity of "persons who by virtue of their authority, are responsible for the outbreak of, or are otherwise engaged in the conduct of hostilities."[31] This would encompass all military personnel and some civilians. The latter, however, must have been "legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war efforts."[32] Finding insufficient proof that Akayesu fell within this category, the Tribunal acquitted him of all charges under Article 4 of the ICTR Statute.[33]

* * * *

The Tribunal's ruling on sexual violence is but one of many intriguing international law issues addressed by this case. That the Tribunal extended protection to a group not among the four enumerated groups might surprise those familiar with the debates that led to the exclusion of other groups, particularly political or social groups, from the Genocide Convention.[34] Yet the enumerated groups are not defined in either the Convention or the Statute; in particular, the scope of the term "ethnic" remains in dispute.[35] Though Tutsi may not be an ethnic group within the strict definition, they share characteristics of the enumerated groups. Tutsi membership was defined at birth and, within the Rwandan social and legal system, remained for life. Both the victims and the perpetrators considered themselves to belong to separate ethnic groups. Tutsi identity was thus immutable, stable and permanent. The decision of the Tribunal to treat the Tutsi as if it were an enumerated group properly recognizes the role of socially imposed discrimination in establishing group identity.[36] It evinces the kind of flexibility that drafters of the Convention had, in fact, endorsed.[37]

On the other hand, the decision is unlikely to bring political or economic groups within the ambit of genocide. Membership in those groups is mutable and is neither dependent on birth nor readily recognized by the larger society. Moreover, the text of the ICTR Statute links the protected groups to the specific intent of the defendant. Akayesu regarded Tutsi as a separate ethnic group and chose his victims out of a belief that to harm them would help destroy their group. These factors also justified his conviction for genocide.[38]

[30] *Id.*, §6.5 (citing, inter alia, Prosecutor v. Tadić, Appeal on Jurisdiction, No. IT–94–1–AR72, paras. 116–17, 134 (Oct. 2, 1995), *reprinted in* 35 ILM 32 (1996) [hereinafter *Tadić* Appeals Chamber Decision]).

[31] *Id.*, §6.5.

[32] *Id.*

[33] Judgement, §7.1.

[34] *See* 1948–49 U.N.Y.B. 954, 957; 1947–48 U.N.Y.B. 597–98.

[35] *See Report on the Study of the Question of the Prevention and Punishment of the Crime of Genocide,* UN Doc. E/CN.4/Sub.2/416, paras. 69–73 (1978), *reprinted in* 1 INTERNATIONAL CRIMINAL LAW 293 (M. Cherif Bassiouni ed., 1986). Whereas the Tribunal focused on the common language and culture of Hutu and Tutsi, this source suggests that "descent" and "kinship ties," characteristics Hutu and Tutsi might not share, *see* Judgement, §§3, 5.1, help determine what an ethnic group is.

[36] Recent scholarship maintains that ethnic, even racial, group membership is the product of social construction rather than heredity. *See, e.g.,* STEPHEN JAY GOULD, THE MISMEASURE OF MAN 391–412 (2d ed. 1996); MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 54–55 (2d ed. 1994).

[37] *See* JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW 1083 (1996). France extends protection not only to the four enumerated groups, but also to any "group determined by any arbitrary criteria." C. PÉN. (NOUVEAU) Art. 211-1 (Fr.).

[38] Similarly, the trend for hate-crimes laws in the United States is to enhance punishment of one who commits a crime because of the victim's group identity, actual or perceived. *See* CAL. PENAL CODE §422.7 (West 1998); Federal Hate Crimes Prevention Act of 1998, S. 2484, 105th Cong., §3700 (1998).

The convictions for involvement in rapes and other sexual violence culminated a long campaign to have rape treated not as a "trophy" but as a crime of war.[39] The development was particularly appropriate in this instance: testimony indicated that victims were chosen because of their group identity, in order to wreak destruction on the group as a whole.[40] Likewise, the choice of a definition focusing on the concept of rape rather than on methodological detail properly reflects the aim of international humanitarian law to give full protection to the most vulnerable victims.[41] By requiring proof of both physical, sexual invasion and coercion for a rape conviction, the Tribunal fashioned a standard that is sufficiently precise and within accepted definitions to give notice of forbidden conduct. The definition of "sexual violence" may be another matter. Unlike rape, this crime is not specified in the ICTR Statute. The Tribunal inferred it from proscriptions against "inhumane acts," acts causing "serious bodily or mental harm," and "outrages against personal dignity," terms themselves indefinite. Furthermore, the Tribunal included within the meaning of sexual violence "any act of a sexual nature" involving coercion. Though the sexual mistreatment described by witnesses cries out for punishment, a clear, established definition would have obviated any risk of the kind of criticism based on the principle of *nullum crimen sine lege* that dogged the Nuremberg trials.[42]

Criminal punishment for incitement might, in the abstract, also give pause to civil libertarians. In this case, however, the Tribunal carefully applied elements drawn from the text of the Statute. It thus required that the words forming the gravamen of the crime were uttered in a public place; that the speaker had intended the words to provoke immediate, genocidal violence; and that the speaker had conveyed this intent to the listeners in a direct manner. Each element was proved; indeed, Akayesu's speech actually touched off killings and other assaults. Even according to U.S. Supreme Court doctrine, his words did not deserve protection.[43]

The Tribunal itself voiced a concern based on *nullum crimen* respecting the prosecution's effort to hold Akayesu liable for violations of common Article 3 and Protocol Additional II. Its effort to accommodate the principles that civilians may be guilty of war crimes and that convictions ought to be based upon customary international law is admirable. But its standard for civilian liability is unduly high, in that it excludes Akayesu, an elected official who held chief executive power in his community, who was a local representative of the national Government, and who gave some assistance to the Government's war effort. In contrast, opinions of the Tribunal for the Former Yugoslavia in *Tadić* suggest that everyone may be held criminally liable.[44] Unless the standard of the Rwanda Tribunal is relaxed on appeal, far too many civilians will escape responsibility for committing war crimes against noncombatants caught in the middle of internal armed conflict.

DIANE MARIE AMANN
University of California, Davis, School of Law

[39] Berkeley, *supra* note 16 (quoting Judge Pillay). *Cf.* Theodor Meron, *Rape as a Crime under International Humanitarian Law*, 87 AJIL 424 (1993) (arguing for prosecution of rape as an international crime).

[40] *See* Judgement, §7.8 (stating that "[s]exual violence was a step in the process of destruction of the Tutsi group").

[41] *See* Prosecutor v. Erdemović, Judgement, No. IT–96–22–A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 75 (Oct. 7, 1997).

[42] In recognition of this concern, the statute for the proposed international criminal court calls for adopting specific elements of crimes within its jurisdiction. Rome statute, *supra* note 8, Art. 9.

[43] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (permitting proscription of speech "directed to inciting or producing imminent lawless action" and "likely to incite or produce such action").

[44] *Tadić* Appeals Chamber Decision, *supra* note 30, paras. 128–37; Prosecutor v. Tadić, Opinion and Judgment, No. IT–94–1–T, paras. 609–17, 661–88 (May 7, 1997), *excerpted in* 36 ILM 908 (1997).