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Universal Jurisdiction and the Concept of a Fair Trial Prosecutor v. Fulgence Niyonteze: A Swiss Military Tribunal Case Study

Joshua E. Kastenber^{*}

On April 30, 1999, in a case titled *Prosecutor v. Niyonteze*, a Swiss military court convicted a former Rwandan mayor for war crimes committed during the 1994 Rwandan genocide. Prior to 2001, this was the only time a Rwandan suspect had been tried by a court other than the International Criminal Tribunal for Rwanda (ICTR) or a Rwandan national court.¹ Indeed, it may constitute the first time that a nation's military tribunal exercised universal jurisdiction over either an individual it had no connection to or an offense it had no nexus with. Yet, little attention was given to this trial by international legal scholars. Moreover, international human rights groups, such as Amnesty International and Human Rights Watch, did not criticize the Swiss decision to prosecute. Even the United Nations did not protest the Niyonteze trial. Within Europe, no

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¹ In 2001, Belgium prosecuted two nuns, a physics professor, and a former government minister for their role in the Rwandan genocide. United States Department of State International Religious Freedom Report for Rwanda (released October 26, 2001). These individuals were prosecuted under the Belgian universal jurisdiction law. *Belgian Loi Relative a la Repression des Violations Graves de Droit International Humanitaire* (Feb. 10, 1999), in *MONITEUR BELGE* § 7 (Mar. 23, 1999), (allows prosecution under the universality principle), cited by Anne-Marie Slaughter & William Burke White, *An International Constitutional Movement*, 43 *HARV. J. INT'L LAW*, 1, 9 (2002).

visible protest occurred against a military tribunal exercising universal jurisdiction. The fact that the trial occurred within the jurisdiction of Swiss military law is somewhat remarkable given the trend towards a European distaste of military trials.²

It is the overall goal of this article to assess and evaluate concepts of universal jurisdiction and the interrelated right to a fair trial within the capsule of *Prosecutor v. Niyonteze*. This article analyzes the Niyonteze trial both within a framework of comparative law and against contemporary international law theories of universal jurisdiction and fair trial standards. In this article the term "due process" is subsumed into the larger concept of a fair trial. Likewise, a specific theory of universal jurisdiction is adopted. While universal jurisdiction and the right to a fair trial are often seen as exclusive areas, this article advances a theory of interrelationship.

Part I provides relevant background information regarding both the Rwandan genocide and Niyonteze's role in it. Additionally, Niyonteze's trial and two subsequent appeals are covered. Both an overview of the Rwandan genocide and Niyonteze's trial are important for analyzing the twin issues of universal jurisdiction and the right to a fair trial.³ Part II

² See, e.g., Report of the Commission on Human Rights, Application No. 22107/93, cited in Judge J.W. Rant, *The British Courts-Martial System: It Aint Broke but it Needs Fixing*, 152 MIL. L. REV. 179, 180 (1996); Wing Commander Simon P. Rowlinson, *The British System of Military Justice*, 52 A.F. L. REV. 17, 18-20 (2002). Wing Commander Rowlinson writes of the influence of the European Court of Human Rights in reforming the British Court-Martial system.

³ Black's Law Dictionary defines a fair and impartial trial as "a hearing by an impartial and disinterested tribunal; a proceeding which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial consideration of evidence and facts as a whole." The dictionary cites *Raney v. Commonwealth* for the proposition that a fair trial is "one where the accuser's legal rights are safeguarded and respected. BLACKS LAW DICTIONARY 596 (6th ed. 1990). See also *Irwin v. Dowd*, 366 U.S. 717, 728 (1961), holding:

More than one student of society has expressed the view that not the least significant test of the quality of a civilization is its

analyzes the evolving concept of universal jurisdiction as well as the accompanying guarantees of a right to a fair trial. The fundamental right to a fair trial in international law rests on several pillars. Three of these ‘pillars’ are the right to competent counsel, the reasonableness of exercising jurisdiction over offenses, and notice of both criminality and jurisdiction. Understanding these principles is essential to evaluate the fairness of *Prosecutor v. Niyonteze* and to analyze the practicality of future state-sponsored trials over war crimes. Part III compares the due process framework and practice of Niyonteze’s trial with the ICTR case, *Prosecutor v. Akayesu*.⁴ This comparison is rooted in the fact that the two cases have been viewed as “practical companions.”⁵ Again, in determining the fairness of *Niyonteze*, a comparative analysis is helpful. This is primarily accomplished by comparing the performance of both trials from a perspective of the defendant’s right to a fair trial. At the outset, it is essential to note that the *Akayesu* record of trial and appeals is far more voluminous than the record for *Niyonteze*. Finally, the article concludes with an assessment that while Switzerland provided Niyonteze with a fair trial rooted in an international understanding of due process, a trial perhaps fairer than the ICTR case of *Akayesu*, state practice should be utilized very rarely.

treatment of those charged with a crime, particularly with offenses which arouse the passions of a community. One of the rightful boasts of Western civilization is that the state has the burden of establishing guilt solely on the basis of the evidence produced in court and under circumstances assuring an accused all the safeguards of a fair trial.

Id., at 729 (Frankfurter J. concurring).

⁴ *Prosecutor v. Akayesu*, judgment of trial chamber, ICTR-96-4-T (1996) [hereinafter ICTR-96-4-T].

⁵ Bernard Oxman & Luc Reydam, *International decision: Niyonteze v. Public Prosecutor*, 96 AM. J. INT’L. L. 231, 235 (2002).

I. Background to the Rwandan Genocide

A. Generally

Between April and July 1994, somewhere between 500,000 and over one million persons belonging to a distinct ethnic group, the Tutsi, were executed by Rwandan government forces, their intermediaries, and supporters.⁶ Individuals considered by the United Nations (U.N.) Security Council to be the perpetrators or main participants of this genocide were ultimately indicted and, in an ongoing process, brought to trial before an *ad hoc* tribunal specifically created to punish those offenders under international law.⁷ To understand the ICTR and its approach to prosecuting persons deemed responsible for this genocide, it is essential to understand - albeit briefly - the background to the genocide itself. Understanding the historic background to the Rwandan genocide is also imperative to analyzing Niyonteze's trial, both from a perspective of universal jurisdiction and due process.

Prior to 1994, Rwanda was the most densely populated country in Africa.⁸ From 1897 until 1917 most of its territory was ruled by Germany through a colonial administration.⁹ From 1917 through its eventual independence, Rwanda was governed by Belgium through a mandate granted by the League of Nations.¹⁰ The Belgian colonial administration in its African territories, such as Rwanda, promoted a descending superiority of white Europeans and then stratified other classes

⁶ ICTR-96-4-T, ¶ 111.

⁷ *Id.*

⁸ *Id.*

⁹ Robert F. van Lierop, *Report on the International Criminal Tribunal for Rwanda*, 3 HOFSTRA L. & POL'Y SYMPOSIUM 203, 207-08 (1999). van Lierop argues that German and later Belgian colonial authorities drove the distinction between Hutu and Tutsi to even further prominence. *Id.* This argument appears to have been adopted by the ICTR in several trial chamber decisions. See also RICHARD F. NYROP ET AL., RWANDA, A COUNTY STUDY 11-13 (1982).

¹⁰ *Id.*

accordingly.¹¹ This stratification formed the basis for decades of post-colonial upheaval.¹² The colonial administration was also responsible for repression and other human rights violations. Belgian colonial authorities vested a minority indigenous ethnic group, the Tutsi, with substantial benefits that were deprived to the majority ethnic group, the Hutu.¹³ Indeed, the authorities recognized a Tutsi monarchy, subservient to Belgian authority, but above that of any Hutu form of government.¹⁴ In 1956, the United Nations Trusteeship Council directed Belgium to organize elections on the basis of universal suffrage.¹⁵ Essentially, four political parties were formed largely on ethnic lines.¹⁶ As a result of these elections, the Hutu gained a political majority.¹⁷ From November 1959 until October 18, 1960, a series of ethnic-based attacks, reprisals, and counter-reprisals occurred between the Hutu's majority party and the Tutsi

¹¹ Peter Uvin, *On counting, categorizing, and violence in Burundi and Rwanda*, 148, 149-50, in *CENSUS AND IDENTITY, THE POLITICS OF RACE, ETHNICITY, AND LANGUAGE IN NATIONAL CENSUS* (Kertzer & Arel ed. 2002). The five categories of race from descending order were: Europeans, "Mulattos" referring to children of white males and African females, Asians, Tutsi (labeled as "blacks not submitted to customary chiefs"), and Hutu (labeled as "indigenous"). *Id.*

¹² *Id.*

¹³ ICTR 96-4-T, ¶ 82-84. According to evidence from a prosecution expert, Dr. Alison De Forges, the population percentages in 1930 were composed as follows: 84% Hutu, 15% Tutsi, and 1% Twa. As of 1930, every Rwandan was required to carry an identification certificate and be identified as a member of either ethnic group. Apparently this practice continued after Rwandan independence and lasted until 1994. *Id.*

¹⁴ *Id.*

¹⁵ *Id.* ¶ 87.

¹⁶ *Id.* ¶ 88. The four parties were the Parmehutu (MDR); the Union Nationale Rwandaise (UNAR) a party comprised of Tutsi "monarchists"; the Aprosoma, a predominately Hutu group, and the Rassemblement Democratique Rwandais (RADER), a combination of Hutu and Tutsi moderates. *Id.*

¹⁷ *Id.*

minority.¹⁸ On that later date, Belgian authorities established an autonomous provisional government headed by Gregoire Kayibanda, the Hutu head of the majority Hutu party (hereafter MDR).¹⁹ In turn, a large population of Tutsi, including the monarchy, fled to neighboring countries.²⁰ These groups became known as "exiles."²¹

After Rwandan independence was declared on July 1, 1962, the MDR became the sole governing party under Kayibanda.²² While large numbers of Tutsi fled Rwanda, some of the population remained behind.²³ Moreover, some groups that had fled launched armed incursions into Rwanda, destabilizing its economy.²⁴ By 1973, Rwanda was wracked by internal unrest, which coupled with the Tutsi incursions, led to the collapse of Kayibanda's government.²⁵ Kayibanda's successor, General Juvenal Habyarimana, achieved power by armed force and had several opposition and political leaders imprisoned and executed, including the former president.²⁶

In 1975, Habyarimana instituted a one-party system under his regime: the Mouvement revolutionnaire national pour

¹⁸ *Id.* See also Jose Alvarez, *Crimes of State, Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 389 (1999). See also Uvin, *supra* note 11, at 153. Professor Uvin writes that in early 1962 more than 2,000 Tutsi were killed, and the following year, more than 10,000. Over 40,000 fled Rwanda in 1963. *Id.*

¹⁹ ICTR 96-4-T, ¶ 88.

²⁰ *Id.* See also, Nyrop, *supra* note 8, at 17.

²¹ ICTR 96-4-T, ¶ 88. See also Ogenga Otunnu, *Rwandese Refugees and Immigrants in Uganda*, 3, 5-7, in THE PATH OF A GENOCIDE: THE RWANDA CRISIS FROM UGANDA TO ZAIRE (HOWARD ADELMAN & ASTRI SUHRKE 1999). Some of the Tutsi exiles were employed by Idi Amin's regime in the Ugandan military and death squads. Amin actively supported the exile's incursions into Rwanda. *Id.* at 14-15.

²² ICTR 96-4-T, ¶ 88.

²³ *Id.*

²⁴ *Id.* ¶ 89.

²⁵ *Id.*

²⁶ *Id.* ¶ 91.

le developpement (MRND).²⁷ At first, Habyarimana's government did not present itself as anti-Tutsi. However, by 1980, with a continually weakening economy and internal dissension, the government became anti-Tutsi.²⁸ On October 1, 1990 Tutsi exiles in Uganda launched a failed attack in Rwanda.²⁹ The MNRD government's response to this attack included the arrest of thousands of opposition members, mainly Tutsi, in Rwanda.³⁰ However, some internal and international pressure remained so that Habyarimana was pressured into political multi-party recognition.³¹ Furthermore, his government agreed to accept political reforms.³² This action did not stop Tutsi incursions into Rwanda because the government remained unwilling to accept the free return of all exiles.³³

As a result of the government's intransigence toward the Tutsi exiles (RPF), their political organization's military wing, the Rwandan Patriotic Army (RPA), launched a large-scale attack on Rwanda on October 1, 1991.³⁴ From that time until a cease-fire agreement in July 1992, Tutsi exile forces engaged in open warfare with the Hutu dominated Rwandan military.³⁵ The cease-fire allowed the RPF into Rwandan politics, but ultimately this acceptance did not stem the RPA from continuing to attack Hutu targets.³⁶ As a result, Hutu political groups grew

²⁷ *Id.* ¶ 92

²⁸ *Id.* ¶ 93. The government began systematically discriminating against Tutsi by establishing quotas in universities, government employment and services. Additionally, Hutu from Habyirama's native regions, Gisenyi and Ruhengeri were given preference.

²⁹ *Id.*

³⁰ *Id.* The Tutsi forces were joined under the aegis of a new political group, the Rwandan Patriotic Front (RPF) composed mainly of Tutsi exiles in Uganda.

³¹ *Id.* ¶ 94.

³² *Id.* See also Alvarez, *supra* note 18, at 389.

³³ ICTR 96-4-T, ¶ 95.

³⁴ *Id.* ¶ 93.

³⁵ *Id.* ¶ 96.

³⁶ *Id.* ¶ 96, 97.

increasingly anti-Tutsi and drew a harder-line toward the Tutsi than Habyarimana.³⁷ For example, radio stations transmitted anti-Tutsi propaganda.³⁸ However, a break in the fighting appeared when both parties agreed to settle disputes by signing parts of peace accords created in Arusha.³⁹ During this time, Habyarimana made contradictory public statements both about the peace-accords and the Tutsi in general.⁴⁰ However, he agreed publicly to implement the Arusha peace accords.⁴¹ Then, on April 6, 1994, while returning from a trip in Dar-es-Salaam, Tanzania, he and the new Burundi president were killed when their aircraft crashed in Rwanda.⁴² Although the cause of the crash was not immediately determined, blame was quickly placed on the RPA.

On April 7, 1994, the Presidential Guard and Hutu militia, called *interhamwe*, began killing Tutsi and moderate Hutu throughout parts of the country.⁴³ Some of these victims, such as the president of the Rwandan Supreme Court, represented the best chance to avert genocide.⁴⁴ Additionally, the Rwandan Armed Forces executed ten United Nations troops.⁴⁵ In quickly erected detention centers and in the open, a

³⁷ *Id.* ¶ 98.

³⁸ *Prosecutor v. Ruggiu*, No. 97-32-I ¶ 44 (ICTR (June 1, 2000) available at

<http://www.ictr.org/ENGLISH/cases/Ruggiu/judgment/rug010600.htm>.

³⁹ ICTR 96-4-T, ¶ 96.

⁴⁰ *Id.*

⁴¹ *Id.* ¶ 96.

⁴² *Id.* ¶ 105.

⁴³ *Id.* ¶ 107. *See also Alvarez, supra* note 18, at 390. *Interhamwe* stands for “those who stand together.” *Id.*, (citing PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES*, 93 (1989).) According to Alvarez, the *Interhamwe* were armed by French agents. Additionally, these French agents were in control of Rwandan counter-insurgency operations.

⁴⁴ ICTR 96-4-T, ¶ 107.

⁴⁵ *Id.* ¶ 108. *See Alvarez, supra* note 18, at 390. Alvarez writes that after the execution of the ten Belgian soldiers, the U.N. peacekeeping forces abandoned Rwanda. The Security Council eventually permitted

wholesale slaughter of civilians occurred on a scale unprecedented since 1945. Unlike the highly systematized “final solution” of the Nazi genocide program, the Rwandan genocide stemmed from a largely unplanned popular uprising.⁴⁶ In several cases, political leaders of prefectures and towns (communes) became the local “movers and shakers” of the genocide.⁴⁷

B. Fulgence Niyonteze’s Role in the Genocide and Subsequent Trial

In 1994, Niyonteze was employed as the bourgmestre (mayor) of the Mushubati Commune.⁴⁸ During the outbreak of the genocide he was in France, attending an educational

French troops into the area. However, the French were accused, with some evidence, of defending the genocide’s perpetrators. *Id.*

⁴⁶ Although persecutions and murders of Jewish individuals occurred in Germany prior to its invasion of Poland in 1939, the “final solution” was designed at the Wansee Conference. This conference was held on January 20, 1942, at a villa in the Berlin suburb of Wansee to coordinate the activities of German government agencies in developing Zyklon-B gas, crematoria, and dedicated death camps for the “final solution.” The Wansee Conference was convened by Gestapo chief and SS Commander Reinhard Heydrich, the head of the Reich Security Main Office (“RHSA”), who indicated to the conference that “in the course of this Final Solution of the European Jewish problem approximately eleven million Jews are involved” - to be worked to death or killed outright. *See* XIII Trials of War Criminals before the Nuremberg Military Tribunals 210-19 (Nuremberg Document No. NG-2586-G), in WILLIAM L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH: A HISTORY OF NAZI GERMANY*, 965-66 (1990 fourth ed.).

⁴⁷ *See, e.g.,* Cecile E. M. Meijer, *The War Crimes Research Office Presents: News from the International Criminal Tribunals*, 9 Hum. Rts. Br. 30,33 (2002). In addition to Akayesu, the ICTR charged Ignace Baglishema for war crimes. He was the bourgmestre of the Mabanza commune. *See* Prosecutor v. Bagilishema, No. ICTR 95-1A-T (June 7, 2001) available at

<http://www.ictor.org/ENGLISH/cases/Bagilishema/judgement/index.htm>.

⁴⁸ Oxman, *supra* note 5, at 231. *See also* Hironnelle News Agency release 12 April 1999 at www.hironnelle.org.

conference.⁴⁹ Upon returning to Mushubati, Niyonteze convened a "town meeting," where he reported to the local residents that the commune received a "bad mark" because several Tutsi and moderate Hutu were living within the commune unmolested.⁵⁰ He urged the population to eliminate these individuals, by ordering the meeting's attendants to "clear the brush."⁵¹

Some time later, Niyonteze made several visits to a refugee camp in Kabgayi and encouraged the Tutsi Mushubati residents seeking refuge there to return to the commune.⁵² Once these residents returned to the commune they were slaughtered.⁵³ Additionally, while at the camp, he specifically ordered militia troops to kill two individuals.⁵⁴ Finally, evidence was adduced that Niyonteze routinely and actively encouraged the commune population to murder Tutsi, and he at no time attempted to stop persons from carrying out his orders.⁵⁵

In October 1994, Niyonteze arrived in Switzerland with his family, where he sought political asylum.⁵⁶ From that time on, he resided in the canton of Fribourg.⁵⁷ In August 1996, the Swiss government ordered him detained in the canton.⁵⁸ Normally, cantonal courts have jurisdiction over criminal offenses.⁵⁹ However, in this case, Niyonteze was prosecuted

⁴⁹ Oxman, *supra* note 5, at 232.

⁵⁰ Hirondelle News Agency release, *supra* note 48.

⁵¹ Oxman, *supra* note 5, at 232, *citing* Niyonteze v. Public Prosecutor (Trib. militaire de cassation Apr. 27, 2001)[hereinafter Niyonteze cassation judgment].

⁵² Oxman, *supra* note 5, at 231-232, *citing*, *International decision: Niyonteze v. Public Prosecutor*, 96 A.J.I.L. 231, 235 (2002) [hereinafter Niyonteze trial judgment].

⁵³ *Id.*

⁵⁴ Oxman, *supra* note 5, at 231-232.

⁵⁵ *Id.* at 233.

⁵⁶ *Id.* at 231.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ S. Treschel, *Law of Criminal Procedure*, in F. DESSEMONTET, INTRODUCTION TO SWISS LAW, 246 (1995).

before a national court. The decision to detain Niyonteze was based on information from the ICTR as well as a non-governmental organization (NGO) called the Association for International Justice in Rwanda (AJIR).⁶⁰ Switzerland, however, declined to extradite Niyonteze to Rwanda or the ICTR.⁶¹ Shortly after his detention, the Swiss Military Attorney General charged him under the Swiss Military Penal Code (CPM) with murder (Article 116), incitement to commit murder (Articles 22 and 116), and violations of the laws and customs of war (Article 109).⁶² Niyonteze faced additional charges for war crimes under Common Article 3 of the 1949 Geneva Conventions⁶³ and Article 4(2)(a) of Additional Protocol II.⁶⁴ The indictment was later amended to include genocide, incitement and complicity to commit genocide, crimes against humanity, and incitement and complicity to commit crimes against humanity.⁶⁵ However, prior to the military tribunal convening in Lausanne, the amendment was quashed for lack of jurisdiction.⁶⁶

Niyonteze's trial began on April 12, 1999. The military tribunal was presided over by its president, Colonel Jean-Marc

⁶⁰ Oxman, *supra* note 5, at 231.

⁶¹ *Id.*

⁶² *Id.* at 232. Article 109 is discussed in full detail below.

⁶³ *Id.* The specific charges fell under: Convention [No. I] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, Art. 3, 75 UNTS 31; Convention [No. II] for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, Art. 3 75 UNTS 85; Convention [No. III] Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Art. 3, 75 UNTS 135; Convention [No. IV] Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Art. 3 75 UNTS 287. *Id.*

⁶⁴ *Id.* Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature, Dec. 12, 1977, 1125 UNTS 609. *Id.*

⁶⁵ The charges were based, in part, on the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 UNTS 277.

⁶⁶ Oxman, *supra* note 5, at 232.

Schwenter, a trained judge, two officers and two non-commissioned soldiers.⁶⁷ Niyonteze was defended by two appointed lawyers versed in the Swiss military code.⁶⁸ One month prior to the trial's opening, the prosecution, the tribunal, and the defense traveled to Rwanda to observe on-site evidence.⁶⁹ On the third day of the trial, Niyonteze refused to attend the proceedings.⁷⁰

Witnesses were permitted to testify anonymously in front of the tribunal, and their identities were protected from the public by using a single alphabetic letter.⁷¹ However, witnesses were not permitted to consult with lawyers during proceedings, and their names were provided to the defense with the caveat of non-disclosure.⁷² Ostensibly, the defense was given these names to research and explore issues of witness bias and credibility.⁷³

Niyonteze was permitted to defend against all

⁶⁷ See, e.g., Niyonteze trial judgment.

⁶⁸ *Id.* The lawyers were Messrs Robert Assael and Vincent Spira. Mr. Assael is currently a partner in the firm Poncet, Turrentini, Amaudruz, Neyroud, & Partners. His practice areas include criminal law and international white collar criminal law. He received his law degree from the University of Geneva in 1980. According to his firm's home page, he currently represents a high level client in a Russian laundering case. Likewise, Mr. Spira received his degree from the University of Geneva in 1980. Information available at www.ptan.ch. (last visited 03/01/04).

⁶⁹ Oxman, *supra* note 5, at 232. The Swiss procedure for pretrial on-site inspections is called *administration anticipée d'une preuve*. Compare Uniform Code of Military Justice, Rules for Courts-Martial (RCM) 913(3) Views and Inspections. United States military courts-martial have a similar procedure for on-site views and inspections of evidence. However, these inspections occur as part of the formal trial and not as a pretrial matter.

⁷⁰ Oxman, *supra* note 5, at 232.

⁷¹ Witnesses Start Testifying Amid Special Measures to Protect Their Identity, available at <http://www.hirondelle.org/hirondelle.nsf> (April 15, 1999). See also Oxman, *supra* note 5, at 233.

⁷² *Id.*

⁷³ *Id.*

allegations. He contested the allegations on the basis of mistake of fact, impossibility, lack of jurisdiction, and witness credibility.⁷⁴ For example, Niyonteze, in his defense, admitted to calling a town meeting and ordering the persons in attendance to "clear the brush."⁷⁵ However, he argued that he meant for them to do nothing more than horticultural labor.⁷⁶ Additionally, he attacked witness credibility regarding the two named individuals he allegedly ordered killed at the refugee camp.⁷⁷ Specifically, he attacked the bias of prosecution witnesses testifying to their recollection of what they saw Niyonteze do at the refugee camp.⁷⁸ In both Swiss civilian and military courts, all witnesses are required to testify under oath and are subject to the criminal sanction of perjury.⁷⁹

Niyonteze was permitted to call defense witnesses, *voire dire* the tribunal members as to bias, and contest matters of law before the tribunal.⁸⁰ He was also afforded the right to not testify.⁸¹ Swiss criminal law permits questioning of an accused only when that individual has chosen to testify on his or her behalf, but if the individual chooses not to testify, he may not be questioned.⁸² In the end, Niyonteze's defense was not given weight, and he was found guilty of the remaining charges. Niyonteze was sentenced to life imprisonment with expulsion

⁷⁴ Oxman, *supra* note 5, at 233-234.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Treschel, *supra* note 59, at 255.

⁸⁰ Oxman, *supra* note 5, at 233.

⁸¹ *Id.*

⁸² Treschel, *supra* note 59, at 255. It should be noted that ordinarily a court is not required to inform an accused of this right. However, in 1974, the Zurich Canton required informing an accused of the right not to testify as a matter of due process. Interestingly, the Canton cited *Miranda v. Arizona* as persuasive in its decision. *Id.* See also Zurich Code of Criminal Procedure, ¶ 11.

from Switzerland after the sentence was served.⁸³ Niyonteze's trial lasted less than a month, with few breaks.⁸⁴ The majority of the trial was open to the public and media, in accordance with Swiss law.⁸⁵

On appeal, the Tribunal militaire d'appel (hereafter Military Appeals Tribunal) upheld most of the lower court's factual findings, but reversed all convictions for murder and incitement to commit murder on jurisdictional grounds.⁸⁶ The Military Appeals Tribunal concluded the CPM does not confer jurisdiction over civilians for these offenses.⁸⁷ The Military Appeals Tribunal upheld the convictions for war crimes.

Niyonteze argued notice deficiency in that civilians could not be held accountable for the war crimes category under which he was charged.⁸⁸ In essence, he argued that only military officers and high ranking government officials with control over the military could meet the elements of the war crimes offense. The Military Appeals Tribunal upheld the convictions based on war crimes because it found Niyonteze had "regularly exercised effective control over his *administrators* [persons within his charge]

⁸³ Oxman, *supra* note 5, at 234.

⁸⁴ *Id.* at 235. See also U.S. Department of State, Country Reports on Human Rights Practices – Switzerland (2000).

⁸⁵ Witnesses Start Testifying Amid Special Measures to Protect Their Identity, *supra* note 73. A public trial is considered a fundamental right in Swiss law. See Treschel, *supra* note 59, at 254, citing Weber v. Switzerland, European Court of Human Rights, judgment of May 22, 1990, Series A, vol. 177.

⁸⁶ See Judgment du Tribunal Militaire d'appel 1 A (Niyonteze v. Public Prosecutor) (May 26, 2000) 4-5, 25-31 [hereinafter Niyonteze Trib. App.], at <http://www.trial-ch.org/Fichiers/Appel-FN-29mai00.pdf>. See also Oxman, *supra* note 5, at 234; U.S. Department of State, Country Reports on Human Rights Practices – Switzerland (2000).

⁸⁷ Niyonteze Trib. App. at 25-31. The court reversed on the indictment to commit murder charge because it found that it involved an internal armed conflict, which 109 CPM does not cover. 109 CPM presupposes the existence of an international agreement. Absent such an agreement 109 CPM has no application. *Id.*

⁸⁸ *Id.* at 6, 38-44.

as well as some members of the FAR and interhamwe."⁸⁹ The Military Appeals Tribunal also found that where he convened the meeting and ordered individuals to "clear the brush," this occurred in his capacity as a state agent.⁹⁰ Finally, it found beyond a reasonable doubt that he specifically ordered militia personnel to kill two named refugees during this meeting.⁹¹ Interestingly, the Military Appeals Tribunal did not conduct a historic analysis of civilian liability for war crimes such as the Nuremberg tribunals. Nonetheless, the Appeals Tribunal upheld the conviction for war crimes.⁹² The appeals chamber then reassessed his sentence to fourteen years imprisonment and expulsion from Switzerland for fifteen years.⁹³

Niyonteze appealed to the Military Court of Cassation, arguing that even if the facts accepted by the Military Appeals Tribunal were true, these did not constitute war crimes in the absence of a close link with armed conflict.⁹⁴ The Military Court of Cassation disagreed with this argument in articulating the two elements of a war crime under the CPM. First, the class of persons involved "extends to all individuals lawfully invested with authority and who are expected to further or participate in the war effort because of their capacity as officials or agents of the state, or as persons who are *de facto* representatives of the

⁸⁹ *Id.*

⁹⁰ *Id.* The Appeals Tribunal did not accept Niyonteze's impossibility argument, finding he had complete control of his villagers and ordered the attack. Moreover, the Appeals Tribunal considered his order to "clear the brush" as doublespeak intended to inflame hatred. *Id.*

⁹¹ *Id.*

⁹² *Id.* at 6, 40-41. *See also* Oxman, *supra* note 5 at 233.

⁹³ Niyonteze Trib. App., at 6

⁹⁴ *See* Arrêt du Tribunal Militaire de Cassation (Military Court of Annulment) (Apr. 27, 2001) 15-17, at <http://trial-ch.org/Fichiers/cassation-FN-27avril.pdf>;
DAS MILITÄRKÄSSATIONSGERICHT, LE TRIBUNAL MILITAIRE DE CASSATION [IT TRIBUNALE MILITAIRE SAID CASSAZIONE] (MILITARY COURT OF ANNULMENT) (April 27, 2001) 15-17 [hereinafter Cassation Judgment]

government."⁹⁵ Second, the link between the offense and armed conflict must be close.⁹⁶ According to the cassation court, both elements were established in Niyonteze's case.⁹⁷ Again, the Court recognized civilian liability for war crimes.

As in the case of his argument before the Appeals Tribunal, Niyonteze also argued lack of notice as to criminality. The Military Court of Cassation dismissed this argument and held that Niyonteze knew the criminality ramifications of his orders and acts.⁹⁸ Ultimately, his conviction and sentence were upheld.⁹⁹

As previously noted, Niyonteze's prosecution before a Swiss military tribunal received little criticism from the international community or human rights groups. For instance, a Rwandan survivor's group welcomed "Switzerland's courage" in bringing Niyonteze to trial.¹⁰⁰ Likewise, Amnesty International merely reported its occurrence, criticizing only the tribunal's failure to ensure complete witness anonymity.¹⁰¹ Additionally, the International Committee for the Red Cross reported Niyonteze's prosecution without comment.¹⁰² Neither the European Union nor the European Court of Human Rights has seen fit to publicly criticize the prosecution.

II. Universal Jurisdiction and the Right to a Fair Trial in International Law

Before an analysis of Switzerland's military tribunal can be accomplished, a brief understanding of both universal jurisdiction and the right to a fair trial must be achieved. Universal jurisdiction has been defined as "a principle allowing jurisdiction over acts of non-nationals where the circumstances,

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *See, e.g.,* Hirondele, *supra* note 48.

¹⁰¹ Amnesty International, Switzerland, Report for 2001.

¹⁰² *See, e.g.,* State Department, country report, *supra* note 86.

including the nature of the crime, justify the repression of some types of crime as a matter of international public policy." ¹⁰³ Universal jurisdiction occurs where a state exercises jurisdiction over offenses to which it has no geographic, *in-personam*, or other nexus. ¹⁰⁴ Offenses targeted for universal jurisdiction typically involve war crimes, crimes against humanity, or other *jus cogens* offenses. ¹⁰⁵

Courts exercising universal jurisdiction are rare. Most national courts deny jurisdiction over crimes that have no geographic or personal nexus to them. However, where a court exercises universal jurisdiction, greater scrutiny should be given to its protection of due process rights, such as the right to a fair trial. It has been observed that a primary role of a criminal court is its truth-seeking function. ¹⁰⁶ However, it has also been recognized that this function does not occur without the constraints of a fair trial. Such constraints include *inter alia*, a

¹⁰³ IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 304 (4th ed. 1990). See also, e.g., Eric S. Kobrick, *The ex post facto Prohibition and the Exercise of Universal Jurisdiction Over International Crimes*, 87 COLUM. L. REV. 1515, 1524 (1987).

¹⁰⁴ Kobrick, *supra* note 103, at 1519-1524.

¹⁰⁵ Norms of *jus cogens* have been defined as "peremptory norms of general international law." Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, U.N. Doc. A/Conf. 39/27, 8 I.L.M. 679, 699. The Vienna Convention describes these as norms "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Id.* The Restatement (Third) of International Law provides that a state violates a norm of *jus cogens* if it "practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights." Restatement (Third) § 702.

¹⁰⁶ See, e.g., *Swidler & Berlin v. United States*, 524 U.S. 399, 410 (1998); *James v. Illinois*, 493 U.S. 307, 311 (1990).

presumption of innocence,¹⁰⁷ notice of criminality and jurisdiction,¹⁰⁸ formal evidentiary rules,¹⁰⁹ the “beyond a reasonable doubt” burden of proof,¹¹⁰ the accused’s right to an impartial judiciary,¹¹¹ competent counsel,¹¹² the right to face his

¹⁰⁷ See, e.g., ICTY Statute, Rule 87(a); ICTR Statute, Rule 87(a).

¹⁰⁸ See, e.g., ICC Statute, Article 22, reiterating the customary international law principle of *nullem crimen sine lege* (no criminal responsibility unless the conduct was criminal at the time it took place). See also, e.g., *Smith v. Goguen*, 415 U.S. 566 (1974).

¹⁰⁹ See, e.g., David Leonard, *Perspectives on Proposed Federal Rules of Evidence 413-415: The Federal Rules of Evidence and the Political Process*, 22 *FORDHAM URB. L. J.* 305, 310 (1995). Formal evidentiary rules exist to ensure the ordered flow of justice, free of surprise, and as a buffer against unreliable evidence. Rules also exist to protect areas of privacy customarily protected in common law. See, e.g., Robert J. Araujo, *International Tribunals and Rules of Evidence: The Case for Respecting and Preserving the “Priest-Penitent” Privilege Under International Law*, 15 *AM. U. INT’L L. REV.* 639 (2000). To date, the ICC, ICTR, and ICTY do not *per se* recognize such privileges.

¹¹⁰ Under customary international law, the burden of proof for guilt in trial appears to be similar to the “beyond a reasonable doubt” standard enunciated in United States courts. See ICC, Article 66(3). Article 66, Presumption of innocence, subsection (c) reads, “In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.” *Id.*

¹¹¹ For instance, the ICCPR provides: “In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” ICCPR, at Art. 14(1). See also, e.g., *Tumey v. Ohio*, 273 U.S. 510 (1927); *Piersack v. Belgium*, 53 *Eur. Ct. H.R. (ser. A)* at 174 (1982) (European Court of Human Rights decreeing impartial judges as essential to justice). See also European Convention on Human Rights, art. 6 (1); and, Article 8(1) of the American Convention on Human Rights which provides: “Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law.” ACHR, Art 8(1). See also, e.g., Sam Ervin Jr., *Separation of Powers: Judicial Independence*, 35 *LAW & CONTEMP. PROBS.* 108, 121 (1970);

or her accusers,¹¹³ and the right to present a complete defense.¹¹⁴ Swiss criminal law, both military and civilian, appears to provide each of these safeguards of a fair trial. For instance, an

Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 DAYTON L. REV. 565, 567 (1996). Cox writes that the concept of an independent, impartial judiciary dates at least to Lord Coke's defense of common law judges against King James I in 1603, followed by the 1701 Act of Settlement protecting judges against undue influences from the crown. Cox at 568-70. *Finally see* Allen N. Sultan, *Autonomy under International Law*, 21 DAYTON L. REV. 585, 659 (1996). Professor Sultan surveys the Roman, Greek, Hebrew, Islamic, and Christian legal traditions and concludes that the failure to provide an impartial judiciary rises to a *jus cogens* violation. Sultan at 659.

¹¹² See, e.g., Convention III Relative to the Treatment of Prisoners of War, signed at Geneva August 12, 1949, Art. 99; ICTR Art. 20.

¹¹³ See, e.g., UNITED STATES CONSTITUTION, SIXTH AMEND. See also *Lilly v. Virginia*, 527 U.S. 116 (1999) (explaining: "In all criminal prosecutions, state as well as federal, the accused has a right, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, 'to be confronted with the witnesses against him.'") See also *Pointer v. Texas*, 380 U.S. 400 (1965) (applying Sixth Amendment to the States). The Court has also stated that, "[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig*, 497 U.S. 836 (1990). It should be noted that the United States places upon its government a higher threshold to show the right to confront witnesses as non absolute than do most other jurisdictions. Exceptions have been carved out for cases involving national security and child witnesses. See, e.g., *Craig*, 497 U.S. 836; see also *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989). The ICTR, ICTY, and ICC permit adult witnesses to testify anonymously or via affidavit. See, e.g., ICTR-96-4-T, appeal of Akayesu.

¹¹⁴ For a discussion on the right to present a complete defense, see *United States v. Scheffer*, 523 U.S. 303 (1998) (holding the right is not without limits and is subject to rules of evidence).

independent and impartial judiciary is guaranteed.¹¹⁵ Likewise, Swiss criminal law mandates a beyond a reasonable doubt burden of proof upon the prosecution.¹¹⁶ Moreover, standard defenses such as mental responsibility, mistake of fact, and notice are recognized.¹¹⁷

In terms of the right to a fair trial, this article primarily centers on notice and the right to competent counsel. These two issues are related to universal jurisdiction because where a court exercises universal jurisdiction, it is imperative that internationally recognized safeguards exist to ensure a fair trial. Moreover, a defendant's representation by competent counsel, in theory, provides a mechanism for ensuring the other "fair trial" safeguards that are noted above.

A. Universal Jurisdiction

International law recognizes five general principles granting a state jurisdiction over crimes: territorial; nationality (or national); protective; universal; and, passive personal.¹¹⁸ Territorial jurisdiction is based on the place where the offense is committed.¹¹⁹ It is the oldest accepted form jurisdiction under customary international law.¹²⁰

National jurisdiction is based on the nationality or national character of the offender.¹²¹ For example, where one United States citizen commits a crime against another United States citizen while both are in Canada, the crime may still be

¹¹⁵ Treschel, *supra* note 59, at 247.

¹¹⁶ *See id.*

¹¹⁷ *Id.* at 226-229.

¹¹⁸ *United States v. Smith*, 680 F.2d 255, 257 (1st Cir. 1982). *See also*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW sec. 421 (1986); and, Kobrick, *supra* note 103, at 1519 (1987).

¹¹⁹ *See, e.g.*, *Smith* 680 F.2d., at 257.

¹²⁰ Patrick L. Donnelly, *Note: Extraterritorial Jurisdiction Over Acts of Terrorism Committed Abroad: Omnibus Diplomatic Security and Antiterrorism Act of 1986*, 72 CORNELL L. REV. 599, 602 (1987).

¹²¹ *Smith*, 680 F. 2d., at 257.

prosecuted in the United States.¹²² Additionally, citizens residing abroad who consort with the enemy in wartime or violate tax obligations may be prosecuted under this principle.¹²³

Protective jurisdiction is based on whether a national interest is injured.¹²⁴ Such interests include national security or protection against severe economic manipulation.¹²⁵ Universal jurisdiction, covered throughout this article, amounts to a physical custody of the offender, despite a lack of direct nexus between the state and the offense or victim.¹²⁶ Finally, 'passive-personal' jurisdiction is based on the nationality or national character of the victim.¹²⁷ Where a national becomes a victim abroad, a state may exercise jurisdiction over the offender even though the offense occurred outside the state's territory.¹²⁸ For example, French law permits jurisdiction over foreigners who assault and injure French nationals on foreign soil.¹²⁹

A sixth principle, called the objective territorial principle, now exists.¹³⁰ This principle allows a state to prosecute

¹²² See, e.g., BROWNLIE, *supra* note 103. See also Wade Esty, *Note: The Five Bases of Extraterritorial Jurisdiction and the Failure of the Presumption Against Territoriality*, 21 HASTINGS INT'L & COMP. L. REV 177, 182 (1997).

¹²³ Esty, *supra* note 122, at 182-186, citing *Chandler v. United States*, 171 F.2d 921 (1st Cir 1948) and *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159 (1983).

¹²⁴ *United States v. Columba-Colella*, 604 F.2d 356, 358 (5th Cir 1979); Zephyr R. Teachout, *Note: Defining and Punishing Abroad: Constitutional Limits on the Extraterritorial Reach of the Offenses Clause*, 48 DUKE L. J. 1305, 1311 (1999).

¹²⁵ Teachout, *supra* note 124, at 1311.

¹²⁶ *Smith*, 680 F. 2d., at 258.

¹²⁷ *Id.*

¹²⁸ Brigitte Stern, *International Decision: French Tribunal de grande instance (Paris)*, 93 A.J.I.L. 696, 697 (1999).

¹²⁹ *Id.* at 696. Stern writes that passive personality jurisdiction exists in French law. Article 113-7 of the Penal Code establishes jurisdiction over criminal acts committed abroad by a foreigner against a French victim. *Id.* at 697.

¹³⁰ *Smith*, 680 F. 2d 255, at 257-258.

offenses that occur outside of its territory, but have a detrimental effect to the state.¹³¹ United States courts have recognized this type of prescriptive jurisdiction.¹³² The Restatement of Foreign Relations defines prescriptive jurisdiction as the authority of a state "to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court."¹³³

Based on the facts surrounding Niyonteze's apprehension and prosecution, it is clear that Switzerland exercised universal jurisdiction in prosecuting him. Some scholars conclude that "universal jurisdiction fills a gap where other, more basic doctrines of jurisdiction provide no basis for national proceedings."¹³⁴ Universal jurisdiction occurs where a state exercises jurisdiction over criminal offenses regardless of whether any party to the offense, or the offense itself, has a geographic nexus to the state. Often universal jurisdiction is confused with a state's exercise of its "long arm" jurisdiction over offenders.¹³⁵ However, universal jurisdiction may be seen as an evolutionary growth of the "long-arm" jurisdictional exercise over crimes.

As World War II ended, allied representatives met in London to conclude a charter detailing the "constitution, jurisdiction and functions of the International Military Tribunal (IMT), which conducted the Nuremberg trials."¹³⁶ The concept

¹³¹ *Id.* at 258; Donnelly, *supra* note 120, at 611.

¹³² See Pizzarusso, 388 F.2d., at 10-11. See also Teachout, *supra* note 124, at 1311.

¹³³ RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 401(a) (2002).

¹³⁴ Bruce Broomhall, *Symposium: Universal Jurisdiction: Myths, Realities, and Prospects: Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law*, 35 NEW ENG. L. REV 339, 400 (2001).

¹³⁵ *Id.*

¹³⁶ See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and the Charter of the International Military Tribunal, 59 Stat. 1544, 82 U.N.T.S. 279 (Aug

of universal jurisdiction for certain offenses gained initial acceptance through the IMT and the International Military Tribunals for Asia,¹³⁷ as well as the 1968 Israeli trial of Adolph Eichmann.¹³⁸ Universal jurisdiction concepts developed in the

8, 1945). In the course of World War II, the Allied Governments issued several declarations concerning the punishment of war criminals. On October 7, 1942, it was announced that a United Nations War Crimes Commission would be set up for the investigation of war crimes. It was not until October 20, 1943, however, that the actual establishment of the Commission took place. In the Moscow Declaration of October 30, 1943, the United States, the United Kingdom, and the Soviet Union issued a joint statement that the German war criminals should be judged and punished in the countries in which their crimes were committed, but that "the major criminals whose offenses have no particular geographic localization" would be punished "by the joint decision of the Governments of the Allies." SCHINDLER & TOMAN, *THE LAWS OF ARMED CONFLICTS* (1988), 911.

¹³⁷ Schindler, *supra* note 136, at 911. "The International Military Tribunal for the Far East (Tokyo 1948) was established by a special proclamation of General Douglas MacArthur as the Supreme Commander in the Far East for the Allied Powers." *Id.* See also, Henry T. King, Jr., *Universal Jurisdiction: Myths, Realities, War Crimes and Crimes Against Humanity: The Nuremberg Precedent*, 35 *NEW ENG. L. REV.* 281, 283 (2001). Professor King writes:

In today's world, universal jurisdiction is a vital legacy of Nuremberg. We should never forget that until Nuremberg it was only national courts that could prosecute criminals for crimes committed in that particular country. This concept was bypassed by Nuremberg when it obliterated traditional aspects of national sovereignty in its approach towards crimes against peace and war crimes and when it articulated for the first time the concept of crimes against humanity.

Id.

¹³⁸ *State of Israel v. Eichmann*, Criminal case No. 46/61, (36 I.L.R. 5 (J.M.D.C. 1968)). In *Eichmann*, the court recognized universal jurisdiction to prosecute an offense against the Jewish people that occurred prior to the formation of the State of Israel. The court specifically held:

Eichmann trial have been accepted by other national or state courts. For example, in the 1989 Ontario High Court of Justice case, *Regina v. Finta*,¹³⁹ a Canadian Court accepted the principle that state courts can exercise criminal law jurisdiction "with respect to acts which occurred outside its territory."¹⁴⁰ In the field of tort law, the United States exercises universal jurisdiction over some claims through the Torture Victim Protection Act of 1991.¹⁴¹ These acts also added to the growing

The State of Israel's "right to punish," the Accused derives, in our view, from two cumulative sources: a universal source (pertaining to the whole of mankind) which vests the right to prosecute and punish crimes of this order in every state within the family of nations; and a specific or national source which gives the victim nation the right to try any who assaults its existence.

Id., at para. 30.

¹³⁹ 1 S.C.R. 701 (Can. 1994); 1994 CarswellOnt 1154, Cour Suprême du Canada.

¹⁴⁰ *Id.*, (quoting the Permanent Court of International Justice in the *Steamship Lotus* (1927)).

It does not, however, follow that international law prohibits a state from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a rule would only be tenable if international law contained a general prohibition in states to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory.

Id.

¹⁴¹ 28 U.S.C. 1350 et seq. This statute is also commonly known as the Alien Tort Statute, the Alien Tort Claims Act and the Alien Tort Act. *See also, e.g., Doe v. Unocal* __ F.3d __ (9th Cir. (Cal) 2002), 2002 WL 31063976; *Kadic v. Karadzic*, 70 F.3d 232 (2nd Cir. 1996) (stating, the Alien Tort Claims Act "validly creates federal court jurisdiction for suits alleging torts committed anywhere in the world against aliens in violation of the law of nations."); and, *Filartega v. Pena Irala*, 630 F.2d 876 (2d Cir 1979).

acceptance that some offenses, such as genocide, constitute crimes against humanity that can be prosecuted at any location by any recognized court complying with basic procedural rights.

Additionally, international instruments exist which recognize the efficacy of universal jurisdiction. For instance, the 1949 Geneva Conventions grant universal jurisdiction on the part of all nations to prosecute alleged perpetrators of “grave breaches of those conventions.”¹⁴² The Conventions oblige a state that is not prepared to prosecute a *bona fide* crime against humanity, to hand over the suspect to another state that is prepared to prosecute.¹⁴³ Likewise, the International Covenant

¹⁴² King, *supra* note 137, at 283. See also Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, 6 U.S.T. 3114, 75 U.N.T.S. 31, Article 49 (Aug 12, 1949). Grave breaches include “wilful killing, torture or inhumane treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” when such acts are “committed against persons or property protected by the Convention.” *Id.* at Article 50. See also Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, 6 U.S.T. 3217, 75 U.N.T.S. 85, Articles 50-53; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, Articles 129-131 (Aug 12, 1949); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, 75 U.N.T.S. 28, Articles 146-148 (Aug. 12, 1949).

¹⁴³ King, *supra* note 137, at 283. See also, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, 6 U.S.T. 3114, 75 U.N.T.S. 31, Article 49 (Aug 12, 1949); Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, 6 U.S.T. 3217, 75 U.N.T.S. 85, Articles 50-53; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, Articles 129-131 (Aug 12, 1949); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, 75 U.N.T.S. 28, Articles 146-148 (Aug. 12, 1949).

on Civil and Political Rights (ICCPR), opened for signature in 1966, appears to give some recognition of universal jurisdiction in Article 15.¹⁴⁴

Jurisdiction for *jus cogens* offenses, such as war crimes, has been established for the *ad hoc* international tribunals involving Yugoslavia and Rwanda, as well as the International Criminal Court (ICC).¹⁴⁵ National courts, however, “have increasingly taken the lead in prosecuting foreigners for international crimes committed outside of their borders.”¹⁴⁶ Prior to 1999, several other countries exercised jurisdiction over crimes for which there was no geographic or nationality nexus. For instance, in 1991, Australia prosecuted a Ukrainian immigrant for crimes he committed against specific Jewish individuals during World War II.¹⁴⁷ Likewise, Belgium has asserted universal jurisdiction over war crimes and crimes against humanity.¹⁴⁸

Spain has argued for jurisdiction over General Augusto Pinochet before the British courts based on atrocities committed during his tenure as president of Chile.¹⁴⁹ It has been

¹⁴⁴ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976. Article 15(2) reads as follows: “Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which at the time it was committed, was criminal according to the general principles of the law recognized by the community of nations.” *Id.*

¹⁴⁵ Leila Nadya Sadat, *Redefining Universal Jurisdiction*, 35 NEW ENG. L. REV. 241, 242-243 (2001).

¹⁴⁶ *Id.* at 243.

¹⁴⁷ *Polyukhovich v. Commonwealth*, 172 C.L.R. 501 (Austl. 1991).

¹⁴⁸ See, e.g., Luc Reydam, *International Decisions: Belgian Tribunal of First Instance of Brussels (Investigating Magistrate)*, November 8, 1998, 93 AM. J. INT'L L. 700, 703 (1999) (finding universal jurisdiction over crimes against humanity, under customary international law and *jus cogens*, in case involving criminal complaints against Chile's General Pinochet).

¹⁴⁹ National Tribunal, Criminal Chamber in Plenary, Appellate no. 173/98 -first section, sumario 1/98, Order, Madrid, 5 Nov. 1998

commented, however, that Spain's jurisdictional exercise over General Pinochet was based on passive personality jurisdiction.¹⁵⁰ This is because among Spain's jurisdictional arguments, it was recognized that ninety-three victims listed in the indictment against General Pinochet were Spanish.¹⁵¹ Furthermore, the Netherlands has attempted to obtain jurisdiction over persons accused of crimes against humanity in its former colony, Suriname.¹⁵² Each of these states possesses advanced legal systems considered to embody the procedural and substantive rights contemplated in international law, as discussed below. However, none of these states utilized a military court in their prosecution attempts.

B. The Right to a Fair Trial: The Issue of Competent Counsel and Notice

For reasons previously articulated, the right to competent defense counsel and the principle of notice are endemic to the

(confirming Spanish jurisdiction to try former Chilean head of state Augusto Pinochet for genocide, including torture, and terrorism committed against Spanish nationals in Chile). *See e.g.*, Ex Parte Pinochet, Appeal, 24 March 1999.

¹⁵⁰ *See, e.g.*, Siegfried Weissner and Andrew R. Williard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*, 93 A.J.I.L. 316, 330 (1999).

¹⁵¹ *Id.*

¹⁵² *See, e.g.*, Douglass Cassell, *Empowering United States Courts to Hear Crimes Within the Jurisdiction of the International Criminal Court*, 35 NEW ENG. L. REV. 421, 426 f.n. 19 (2001) (citing Court Amsterdam, Order of Nov. 20, 2000 (Bouterse case), accessible at <<http://www.rechtspraak.nl/gerechtshof/amsterdam>> (visited Feb. 17, 2001)); Marlise Simons, *Dutch Court Orders an Investigation of '82 Killings in Suriname*, N.Y. TIMES, Nov. 26, 2000, at A12. The Dutch Court found jurisdiction to investigate torture leading to death, allegedly committed by former Surinamese military leader Desi Bouterse against Surinamese citizens in Suriname, based on a retrospective application of the 1989 Dutch statute implementing the Convention Against Torture. *Id.*

concept of a fair trial. The concept of a fair "international trial" dates to the postwar IMT at Nuremburg.¹⁵³ There are two international understandings that bear on the general concept of a fair trial for all persons, the Universal Declaration of Human Rights (UDHR)¹⁵⁴ and the ICCPR.¹⁵⁵ Additionally, there are

¹⁵³ The IMT Rules regarding Fair Trial are found in Section IV of the London Charter. This section reads as follows:

Section IV: Fair Trial for Defendants.

Article 16. In order to ensure fair trial for the Defendants, the following procedure shall be followed:

(a) The Indictment shall include full particulars specifying in detail the charges against the Defendants. A copy of the Indictment and of all the documents lodged with the Indictment, translated into a language which he understands, shall be furnished to the Defendant at a reasonable time before the trial.

(b) During any preliminary examination or trial of a Defendant he shall have the right to give any explanation relevant to the charges made against him.

(c) A preliminary examination of a Defendant and his Trial shall be conducted in, or translated into, a language which the Defendant understands.

(d) A Defendant shall have the right to conduct his own defense before the Tribunal or to have the assistance of Counsel.

(e) A Defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defense, and to cross examine any witness called by the Prosecution.

¹⁵⁴ G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948), available at <http://www.unhchr.ch/uchr/> (last visited 2/23/04).

¹⁵⁵ G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (no. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm. The preamble of the ICCPR states the purpose of the Covenant, including the statement that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" and that "these rights derive from the inherent dignity of the human person." *Id.*

regional agreements, such as The American Convention on Human Rights,¹⁵⁶ The European Charter on Human Rights,¹⁵⁷ and the African Charter on Human and People's Rights,¹⁵⁸ all of

For a brief summary of the history of the ICCPR, see David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations*, 42 DEPAUL L. REV. 1183 (1993).

¹⁵⁶ Nov 22, 1967, 9 I.L.M. 673, article 8, available at <http://www.oas.org/juridico/english/Treaties/b-32.htm>. See e.g., Article 8(2)(d) and Article 8(2)(e) which read in full:

(d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;

(e) the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law.

Id.

¹⁵⁷ See Charter of Fundamental Rights of the European Union, as currently codified at 2000/C 364/01, available at <http://ue.eu.int/df/docs/en/CharteEN.pdf>. See Article 47 which, in part, reads: "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented." *Id.* This Charter is different than the earlier 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, codified at 312 UNTS 221 (Nov 4, 1950). In the European Convention, Article 6 provides the right to a fair trial. The right to counsel is enumerated at Article 6(3)(c) which reads:

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

Id.

¹⁵⁸ Banjul Charter at 21 I.L.M. 59, 27 June 1987, available at http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocol

which recognize a right to counsel as part of the right to a fair trial.

As noted above, the UDHR envisions a fair trial for all accused persons. While the UDHR is an aspirational document rather than binding law, it is central to the goal of achieving universal justice.¹⁵⁹ Within the UDHR are two articles that directly bear on the right to a fair trial. Article 10 enumerates the right to a "fair and public hearing by an independent and impartial tribunal...of any criminal charge against him."¹⁶⁰ Likewise, Article 11 specifies the right to a presumption of innocence, a prohibition against false imprisonment, as well as protection from unjust punishment.¹⁶¹

The ICCPR, on the other hand, is the primary international law guarantor of the right to a fair trial.¹⁶² Initially opened for state signature in 1966, the ICCPR is composed of 51 articles and covers a wide array of basic individual rights such as freedom of religion, liberty of movement, privacy rights, and the right to a fair trial.¹⁶³ Under Article 14, an accused is provided the "minimum guarantee" of the right to be tried in his own presence.¹⁶⁴ Additionally the same article guarantees an accused person the right to legal assistance and to be informed of this

s/Banjul%20Charter.pdf.

See Article 7(1)(c) which reads in full:“(c) the right to defence, including the right to be defended by counsel of his choice.” *Id.*

¹⁵⁹ See, e.g., A EIDE ET AL. (eds) *The Universal Declaration of Human Rights: A Commentary* (1992). “The UDHR is not a treaty. It was adopted by the United Nations General Assembly as a resolution having no force of law. Its purpose, according to its preamble is to provide a ‘common understanding’ of human rights and fundamental freedoms.” BUERGENTHAL ET AL. *International Human Rights in a Nutshell* 39 (West Group, 3rd Ed. 2002).

¹⁶⁰ Eide, *supra* note 159, at 159.

¹⁶¹ *Id.* at 175.

¹⁶² See, e.g., Stewart, *supra* note 155, at 1183.

¹⁶³ *Id.*

¹⁶⁴ ICCPR, Art. 14(3)(d).

right.¹⁶⁵ Moreover, an accused is entitled to have legal assistance without payment where the accused is indigent.¹⁶⁶ ICCPR Article 15 provides a threshold for notice.¹⁶⁷

In international practice, the right to competent counsel exists in statutes. For instance the ICTR guarantees an accused competent counsel of choice.¹⁶⁸ The ICTY makes the same guarantee.¹⁶⁹ Article 67 of the Rome Statute also envisions competent counsel, with adequate time to prepare for trial.¹⁷⁰

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ ICCPR, Article 15(a) reads:

No one shall be held guilty of any criminal offence on account of any act or omission, which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

Id.

¹⁶⁸ ICTR Registry, Article 20(4)(b), *available at* <http://www.ictr.org/ENGLISH/basicdocs/statute.html>.

¹⁶⁹ Statute of the International Criminal Tribunal for the former Yugoslavia, sec. 21 (4)(d), which reads:

In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: . . . to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

Id., *available for viewing at* <http://www.un.org/icty/basic/statut/stat11-2003.htm>.

¹⁷⁰ ICC Stat. Art. 67 [Rights of the Accused]. Subsections 67(1)(b) and 67(1)(d) read:

In the determination of any charge, the accused shall be

However, persons exercising this right have met some difficulties. For instance, in *Prosecutor v. Tadic*,¹⁷¹ the ICTY Appellate Chamber appeared little concerned that one of Tadic's counsel was under investigation for ethics violations at the same time he was defending Tadic.¹⁷² In *Akayesu*, covered in greater detail below, the ICTR Appellate Chamber appeared to gloss over real deficiencies in defense counsel performance.

Finally, under United States federal and military law, an accused is guaranteed the right to competent counsel.¹⁷³ The

entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence.

(d) Subject to article 63, paragraph 2, to be present at trial, to conduct the defense in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it.

Id.

¹⁷¹ *Prosecutor v. Tadic*, IT-94-1-T (1994) (Hereafter IT-94-T).

¹⁷² *See, e.g., Prosecutor v. Tadic, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin* (hereafter Contempt Proceeding), January 31, 2000. Available at

<http://www.un.org/icty/tadic/appeal/vujin-e/index.htm>. Tadic's counsel, Milan Vujin was determined to have obstructed justice, threatened witnesses, and suborned perjury. He investigated for these offenses during his representation of Tadic. It did not occur to the Appellate chamber that Vujin might have conflicting interests at this point. In United States courts, attorneys with such conflicting interests are generally prohibited from representing defendants, absent the defendant's waiver. *See, e.g., Cuyler v. Sullivan*, 446 U.S. 335, 64 L.Ed.2d 333, 100 S.Ct. 1708 (1980); and *United States v. Levy*, 25 F.3d 146, 153 (2d Cir. 1994).

¹⁷³ *See, e.g., Gideon v. Wainright*, 372 U.S. 335, 9 L.Ed.2d 799, 83

right to counsel, however, does not confer an unfettered right to “choice of counsel.”¹⁷⁴ In *Powell v. Alabama*,¹⁷⁵ the Court determined that an accused has the right to “a fair opportunity to secure counsel of his own choice,” provided such counsel is available.¹⁷⁶ Availability of counsel has been expanded to include affordability as well as scheduling availability.¹⁷⁷ Additionally, competency to practice restricts the right to counsel.¹⁷⁸ Thus, the right to choose a specific counsel is not absolute.

III. Different Systems and Due Process: The International Criminal Tribunal for Rwanda and the Swiss Military Court: A Study in Comparative Law

Analysis as to the efficacy and legitimacy of *Prosecutor v. Niyonteze* may also be conducted in a comparative law analysis within the dissection of specific cases. A natural trial for comparison is the ICTR case of *Akayesu*, because of the factual similarities between the two. Unlike Niyonteze, Akayesu was sentenced to confinement for life. His trial lasted longer than the *Niyonteze* trial, and substantial arguments were raised

S.Ct. 792 (1963); and *Strickland v. Washington*, 491 U.S. 617, 105 L.Ed.2d 528, 109 S.Ct. 2646 (1989). Gideon established the right to counsel. *Strickland* extended this right to a guarantee of competent counsel. However, it must be noted that this right does not provide for flawless counsel. For military cases, *see also* *United States v. Travels*, 47 M.J. 83 (CAAF 1997); and, *United States v. King*, 30 M.J. 59 (1986).

¹⁷⁴ *See, e.g.,* *Flanagan v. United States*, 465 U.S. 259, 79 L. Ed. 2d 288, 104 S. Ct. 1051 (1984); and *Wheat v. United States*, 486 U.S. 153, 108 S. Ct. 1692, 100 L. Ed. 2d 140, (1988).

¹⁷⁵ 287 U.S. 45, 77 L.Ed. 158, 53 S.Ct. 55 (1932).

¹⁷⁶ *Id.* at 53.

¹⁷⁷ *See, e.g.,* *Wheat*, 486 U.S. 153, 160.

¹⁷⁸ *Id.* *See also, e.g.,* Daniel R. Hansen, *Note: Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. LAW. REV. 1191 (1995).

regarding the competency of counsel, production of evidence, and fairness of the proceedings. *Niyonteze*, on the other hand, raised few of these arguments. Instead, he primarily argued lack of jurisdiction, lack of notice, and sufficiency of evidence during his appeal.

Prior to analyzing the strengths and weaknesses of each trial, it is important to briefly explain how the *ad hoc* ICTR came into being, and then analyze its effectiveness in upholding "fair trial standards." While the ICTR is not a court of universal jurisdiction, it is similar in that the offenses covered are of the same very egregious nature as offenses that various national statutes envision obtaining jurisdiction over.

A. International Criminal Tribunal for Rwanda

1. Rules and Procedure

The ICTR was established by the United Nations Security Council in Resolution 955 on November 8, 1994.¹⁷⁹ In Resolution 955, the Security Council determined that the situation in Rwanda "constitute[d] a threat to international peace and security" within the meaning of Chapter VII of the United Nations Charter.¹⁸⁰ As a result, it established an *ad-hoc* tribunal for prosecuting persons committing genocide, crimes against humanity, and violations of Article 3 common to the Geneva Convention and Additional Protocol II.¹⁸¹

¹⁷⁹ UN Document S/RES/955 of 8 November 1994. For more information about the incorporation of the ICTR visit: <http://www.ictt.org/default.htm>.

¹⁸⁰ *Id.*

¹⁸¹ Articles 1 through 4 read as follows:

Article 1: Competence of the International Tribunal for Rwanda. 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 neighboring States between 1 January 1994 and 31 December 1994, in accordance with the

provisions of the present Statute.

Article 2: Genocide

1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

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.

3. 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.

Article 3: Crimes against Humanity. The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds:

- a) Murder;
- b) Extermination
- c) Enslavement;
- d) Deportation;
- e) Imprisonment;
- f) Torture;

Rules governing the ICTR were promulgated on October 1, 1994 by the Security Council. These rules are found in the Annex to Resolution 955.¹⁸² The ICTR rules govern, *inter alia*: jurisdiction, trial and appellate procedure, selection and qualification of judges, recognized defenses, prosecution, organization of the ICTR, and rules of evidence and procedure.

Critics of the ICTR have argued its charging process

- g) Rape;
- h) Persecutions on political, racial and religious grounds;
- i) Other inhumane acts.

Article 4: Violations of Article 3 common to the Geneva Convention and of Additional Protocol II. The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

- a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
- b) Collective punishments;
- c) Taking of hostages;
- d) Acts of terrorism;
- e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- f) Pillage;
- g) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;
- h) Threats to commit any of the foregoing acts.

Id.

¹⁸² *Id.*

lacked notice and tended to reflect ex-post facto charging.¹⁸³ However, this argument lacks merit in that summary execution, genocide, and crimes against humanity were recognized as criminal in the aftermath of the post World War II tribunals. The primacy of the international tribunal has also been criticized. The ICTR is designed to prosecute only a fraction of the 90,000 persons suspected in contributing to the genocide.¹⁸⁴ It is with some irony that the genocide's leadership avoids a possible death penalty in the international tribunal, while smaller criminal actors will face it under Rwandan law.¹⁸⁵ Since neither Akayesu nor Niyonteze faced the potential of such a sentence, the death penalty is not analyzed in any detail in this article.

2. Case Example: *Prosecutor v. Jean Paul Akayesu*

a. Facts, Allegations, and Trial Difficulties

During the Rwandan Genocide, Jean-Paul Akayesu served as the bourgmestre (mayor) of the Taba Commune.¹⁸⁶ This was an appointed, rather than elected, position.¹⁸⁷ In this capacity, he was responsible for maintaining the law and public order.¹⁸⁸ The trial court found that at least 2,000 Tutsis were killed in the Taba commune between April and June of 1994.¹⁸⁹ The trial court characterized the killings in Taba, as "openly committed and so widespread that, as bourgmestre, [Akayesu] must have known about them."¹⁹⁰ The court further held, "although he had the authority and responsibility to do so,

¹⁸³ See, e.g., Alvarez, *supra* note 18, at 392-403. Alvarez discusses criticisms of the ICTR charging process.

¹⁸⁴ *Id.* at 393.

¹⁸⁵ *Id.* at 410.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

[Akayesu] never attempted to prevent the killing of Tutsis in the commune in any way or called for assistance from regional or national authorities to quell the violence."¹⁹¹

Akayesu's role in the charged offenses was not merely passive acquiescence. Several beatings, murders, and sexual degradations occurred at and near his place of work.¹⁹² Moreover, on at least one occasion he participated in ferreting out Tutsis and suspected Tutsi sympathizers in house to house searches.¹⁹³ He further ordered the beatings of Tutsis to obtain intelligence and ordered the local militia to kill several others.¹⁹⁴ On April 19, 1994, he ordered the Hutu residents of Taba to kill intellectual and influential people.¹⁹⁵ Based on these instructions, five secondary school teachers were hacked to death by locals wielding machetes and agricultural implements.¹⁹⁶ On several other occasions, he personally used threats of death and torture to obtain information on the whereabouts of Tutsi intellectuals.¹⁹⁷

Akayesu was originally charged under several specifications of genocide, crimes against humanity, and violations of Article 3 Common to the Geneva Conventions and of Article 4(2)(e) of Additional Protocol II.¹⁹⁸ Within the ambit

¹⁹¹ *Id.* The court further listed specific offenses which Akayesu took part in or encouraged.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Akayesu was specifically charged as follows:

Count 1: Genocide, punishable by Article 2(3)(a)

Count 2: Complicity in Genocide, punishable by Article 2(3)(e)

Count 3: Crimes Against Humanity (extermination), punishable by Article 3(b)

Count 4: Direct and Public Incitement to Commit Genocide, punishable by Article 2(3)(c)

Count 5: Crimes Against Humanity, punishable by Article

of each, he was specifically charged with murder, torture, rape, incitement to commit genocide, cruel treatment, and other inhumane acts. During trial, the prosecution was permitted to amend its indictment and add the crime of rape under the aegis of genocide and crimes against humanity.¹⁹⁹ The tribunal convicted him of genocide, direct and public incitement to commit genocide, and crimes against humanity.²⁰⁰ The trial was conducted on-site, in Arusha, with easy access to witnesses and evidence. On several occasions during the fourteen-month trial and subsequent appeals, Akayesu expressed dissatisfaction with

3(a)

Count 6: Violations of Article 3 Common to the Geneva Conventions as incorporated by Article 4(a)

Count 7: Crimes Against Humanity, punishable by Article 3(a) of the Statute of the Tribunal

Count 8: Violations of Article 3 Common to the Geneva Conventions as incorporated by Article 4(a)

Count 9: Crimes Against Humanity (murder) punishable by Article 3(a) of the Statute of the Tribunal

Count 10: Violations of Article 3 Common to the Geneva Conventions as incorporated by Article 4(a).

Count 11: Crimes Against Humanity (torture) punishable by Article 3(f)

Count 12: Violations of Article 3 Common to the Geneva Conventions as incorporated by Article 4(a).

Count 13: Crimes Against Humanity (rape), punishable by Article 3(g)

Count 14: Crimes Against Humanity (other inhumane acts), punishable by Article 3(i)

Count 15: Violations of Article 3 Common to the Geneva Conventions and of Article 4(2)(e) of Additional Protocol 2 (outrages upon personal dignity, in particular rape, degrading and humiliating treatment and indecent assault).

ICTR 96-4-T Judgment, at 147-148.; U.N. Res. 955, U.N. SCOR, Nov. 8, 1994, U.N. Doc. S/RES/955 (1994) at 4-5.

¹⁹⁹ ICTR 96-4-T, Judgment, *supra* note 198, ¶ 6.

²⁰⁰ *Id.* at 147-148.

his defense counsel.²⁰¹

b. The Trial and Appellate Chamber's Decisions Regarding the Right to Competent Counsel

Akayesu raised several "fair trial" issues both during trial and on appeal. Issues important to the analysis in this paper are his dual claims of ineffective assistance of counsel and that the tribunal denied him of his choice of counsel.²⁰² Initially, Akayesu argued his inability to afford a counsel. The Tribunal found Akayesu indigent, and, in accordance with the Directive on Assignment of Defense Counsel, the Registrar of the Tribunal assigned a Western European attorney, Mr. Johan Scheers as his defense counsel.²⁰³ However, Mr. Scheers withdrew from the tribunal due to financial disagreements with the tribunal, and the Tribunal then found Scheers' unavailable.²⁰⁴ Akayesu was then

²⁰¹ ICTR 96-4-T, Appeals Chamber Judgment, June 1, 2001, ¶ 45-49, 67.

²⁰² *Id.* ¶ 44, 67.

²⁰³ *Id.* ¶ 45. *See also* ICTR 96-4-T, Appeals Chamber Judgment Annex B, 1 June 2001 at A(a). In his second notice of appeal, Akayesu charged:

The Court and the registrar deprived the Appellant of his right to choose his Defence Counsel. He could not have his first choice, Johan Scheers because... the Registrar's Office. On 31 October 1996, Michael Karnavas, Mr. Scheers' assistant who had contacted Scheers in Belgium, illegally coerced the Appellant to "choose" him as defence Counsel in replacement of Mr. Scheers. The Appellant dropped Michael Karnavas because of his deceitful maneuvers. (sic)Moreover, it has been discovered that Karnavas had been a candidate to work as Prosecutor and that he has already written and stated that he could never defend a "genocider."

Id., at A(2d)(a).

²⁰⁴ ICTR 96-4-T, Decision Concerning a Replacement of an Assigned

appointed Michael Karnavas.²⁰⁵ This substitution occurred on October 31, 1996, and it resulted in a scheduled delay of trial until January 9, 1997.²⁰⁶ However, on November 20, 1996, Akayesu requested a further change in defense counsel.²⁰⁷ He specifically requested a Canadian attorney named Mr. Michael Marchand.²⁰⁸ The Tribunal denied this request, and, on January 9, 1997, the Registrar appointed Mr. Nicolas Tinagaye and Mr. Patrice Monthe, over Akayesu's objection.²⁰⁹ Akayesu then attempted to represent himself.²¹⁰ However, the Tribunal did not permit this and kept Tiangaye and Monthe in their capacity as his defense counsel.²¹¹

On appeal, Akayesu contended that in denying him his

Defense Counsel and Postponement of the Trial, October 31, 1996 at 2.
²⁰⁵ *Id.* at 3.

²⁰⁶ *Id.*

²⁰⁷ ICTR 96-4-T, Decision on the Request of the Accused for the Replacement of Assigned Counsel, 20 Nov. 1996 at 1-3.

²⁰⁸ ICTR 96-4-T, Appeals Chamber Judgment Annex B, *supra* note 203, at A(a). In his second notice of appeal, Akayesu complained:

Appellant's second choice was Mr. Marchand from Montreal, Canada, who was present at the opening of his trial on 9 January 1997. The prosecutor knew he was present as recognized... in the New York Times on 8 September 1998. The Court and the Registrar illegally refused requests by Mr. Marchand to address the Court and meet his client.

Id., at A(2d)(a). It appears, however, that Akayesu's arguments were contrary to the Tribunal's understanding. The Tribunal asserted it denied Mr. Marchand because Akayesu was already represented. Therefore, if Akayesu desired Marchand, he would have to be represented by Marchand *pro bono*. Marchand found this requirement untenable. Moreover, at the time of Akayesu's request, Mr. Marchand's credentials could not be verified by the trial chamber. *See, e.g.*, Appellate Chamber Judgment, Akayesu's Ground of Appeal ¶ 51.

²⁰⁹ ICTR 96-4-T, Appeals Chamber Judgment Annex B, *supra* note 206, at A(a). *See also* ICTR 96-4-T, Appeals Chamber Judgment, *supra* note 201, ¶ 51.

²¹⁰ *Id.* ¶ 48.

²¹¹ *Id.*

choice of counsel, the Tribunal denied him the right to a fair trial.²¹² He further complained of ineffective assistance of counsel.²¹³ In response to these claims, the Appeals Chamber held that an indigent person's right to counsel of his own choosing requires the balancing of the right to choose against ensuring "proper use of the Tribunal's resources."²¹⁴ Moreover, the Appellate Chamber held, "in principle, the right to free legal assistance of counsel does not confer the right to counsel of one's own choosing."²¹⁵ The Appeals Chamber concluded that the right to choose a specific counsel applies only to an accused who can afford to pay for counsel.²¹⁶ The Chamber found it

²¹² *Id.* ¶ 49-51.

²¹³ *Id.* ¶ 67; ICTR 96-4-T, Appeals Chamber Judgment Annex B, *supra* note 203, at B. The underlying basis for this complaint involved several factors. First, neither defense counsel contacted Mr. Scheers for his prior case-work and advice, despite the fact Akayesu gave both counsel permission. Second, the defense counsel called as an expert witness, General Romeo Dallaire, the United Nations commander who testified that a genocide had taken place. Thirdly, Akayesu alleged his defense counsel disclosed privileged statements. Fourth, Akayesu charged that his attorneys made no effort to secure expert assistance to rebut the Prosecution's main expert, Dr. Alison DeForges. Fifth, Akayesu averred his defense counsel failed to probe for bias against any of the Prosecution's witnesses. Finally, Akayesu argues that in not advising Akayesu of his right to testify, or encouraging testifying, his defense counsel were ineffective. *Id.*

²¹⁴ ICTR 96-4-T, Appeals Chamber Judgment, *supra* note 201, ¶ 60.

²¹⁵ *Id.* ¶ 61.

²¹⁶ *Id.* The Appeals Chamber relied on a past decision, *Prosecutor v. Kambanda*, in holding,

. . . in the light of textual and systematic interpretation of the provisions from the Human Rights Committee and the organs of the European Convention for the Protection of Human Rights and Fundamental Freedoms, that the right to free legal assistance by counsel does not confer the right to choose one's counsel.

Id. (citing *Prosecutor v. Kambanda*, ICTR 97-23, Appeals Judgment, 19 Oct. 2000 at 11-12).

compelling that Akayesu was permitted to release counsel on two separate occasions.²¹⁷ In terms of not permitting Akayesu the right to defend himself, the Appeals Chamber noted that at several occasions, "his attitude toward the [Trial] Chamber suggested otherwise."²¹⁸

In determining whether Tiangaye and Monthe were competent counsel, the Appeals Chamber noted that the ICTR standard of review is "gross incompetence."²¹⁹ As a starting point, the Appeals Chamber presumes counsel is competent,²²⁰ placing the burden of proof on the defendant. In order to establish "gross incompetence," an accused would have to demonstrate that there is "reasonable doubt as to whether a miscarriage of justice resulted."²²¹ In establishing this standard, the Appeals Chamber adopted the ICTY's holding in *Prosecutor v. Tadic*.²²² In *Tadic*, the ICTY held the standard of determining effectiveness is a "fact-based determination" where the Appeals

²¹⁷ *Id.* ¶ 63.

²¹⁸ *Id.* ¶ 65.

²¹⁹ *Id.* ¶ 77. The Appeals Chamber noted the right to competent counsel is guaranteed under Article 14 of the ICCPR, Article 6 of the European Convention on Human Rights, and, Article 8 of the American Convention on Human Rights. *Id.*

²²⁰ *Id.* ¶ 78.

²²¹ *Id.* ¶ 77.

²²² *Id.*, citing *Prosecutor v. Tadic*, ICTY, IT-94-1, Appeals Chamber Judgment, Oct. 15, 1998 ¶ 65. In that case the ICTY Appeals Chamber held:

When evidence was not called because of the advice of defence counsel in charge at the time, it cannot be right for the Appeals Chamber to admit additional evidence in such a case, even if it were to disagree with the advice given by counsel. The unity of identity between client and counsel is indispensable to the workings of the International Criminal Tribunal. If counsel acted despite the wishes of Appellant, in the absence of protest at the time, and barring special circumstances which do not appear, the latter must be taken to have acquiesced.

Id.

Chamber is unwilling to "second-guess" the tactical decisions of defense counsel.²²³ On a final note, it should appear troubling that so little due process analysis was conducted regarding Akayesu's complaints.

B. Specific Right to a Fair Trial and Switzerland's Exercise of Universal Jurisdiction

Thus far, this article has provided an overview and comparative analysis of *Prosecutor v. Niyonteze*. The article has also analyzed the evolution and uses of universal jurisdiction, as well as a defendant's right to a fair trial in international law. Next, this paper will apply selected fair trial concepts, such as the right to competent counsel and notice and other procedural rights to this case.

1. Swiss Military Law

a. Overview of Procedure and Basic Rights

Swiss military law permits a tribunal to exercise universal jurisdiction over individuals accused of war crimes.²²⁴ Under the CPM, jurisdiction over war crimes extends both to declared wars and undeclared conflicts.²²⁵ The code was first

²²³ *Id.*

²²⁴ CPM Art 2, sec 9. *See also, e.g.,* Treschel, *supra* note 59, at 221. It should be noted that the Swiss Penal Code recognizes universal jurisdiction for a limited number of offenses. These include counterfeiting money, narcotics distribution, and certain acts of terrorism. *Id.*

²²⁵ CPM, Article 108 – scope of application reads:

1. The provisions in this section shall be applied in the event of declared wars and other armed conflicts between two or more states violations of neutrality and resistance to them by force are equated with such events.

Id. CPM Article 109 – Violation of the laws of war, reads:

enacted in 1927.²²⁶ However, this exercise has occurred only twice since the rule's inception. As noted above, Niyonteze was not the first foreign defendant to face charges before a Swiss military court. In the 1997 trial of *In re G*,²²⁷ the accused was charged with war offenses under the CPM.²²⁸ Like Niyonteze, G was apprehended while in Switzerland.²²⁹ While the military tribunal found it had jurisdiction over G, he was fully acquitted based on insufficiency of evidence against him.²³⁰

1. Whosoever acts contrary to the provisions of international agreements on the conduct of hostilities and the protection of persons and property, whosoever violates other recognized laws and customs of war, shall, unless more severe penalties apply, be punished by imprisonment and, in serious cases, by imprisonment with hard labor.

Id.

²²⁶ See, e.g., M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 144 (2001). Bassiouni states that Switzerland's Code Penal Militaire, enacted by the Federal law of June 13, 1927 and amended up to February 29, 2000, contains a jurisdictional basis for universal jurisdiction in Article 9, which states in paragraph 1: "Le present code est applicable aux infractions commises en Suisse et a celles qui ont ete commises a l'etranger." Chapter 6, Articles 108-109 are also a basis for universal jurisdiction for "infractions commises contre le droit des gens en cas de conflit arme." *Id.*

²²⁷ *In re G*, Military Tribunal, Division 1, Lausanne, Switzerland, April 18, 1997, reported in 92 AM. J. INT'L. L. 78 (1998).

²²⁸ *Id.* G was accused of beating and injuring civilian prisoners in Omarska and Keraterm between May 30, 1992 and August 15, 1992. He was also accused of forcing prisoners to perform degrading acts such as licking the boots of camp guards. *Id.*

²²⁹ *Id.* ¶ 36.

²³⁰ *Id.* The tribunal considered the charges to fall within the scope of the 1949 Geneva Conventions relative to the Treatment of Prisoners of War, and to the Protection of Civilian Persons in Time of War, as well as the Protocols Additional to the Geneva Conventions of August 12, 1949 and relating to the Protection of Victims of International Armed Conflicts and Relating to the Protection of Victims of Non-

Before further analyzing the tribunal's exercise of universal jurisdiction, it is important to take note of both Switzerland's military organization and basic Constitutional rights of accused persons before Swiss courts. The Swiss military is comprised of conscripted males. The Constitution decrees universal service, with the possibility of conscientious objection, for all men.²³¹ Women who serve do so on a strictly volunteer basis.²³² The Swiss military has a separate criminal code.²³³ The current code has its roots in a code of war developed in 1393.²³⁴ This criminal code, however, embodies the same Constitutional guarantees found in Swiss penal law.²³⁵ The CPM applies primarily to persons in the army.²³⁶ However, during times of war, the jurisdiction (*ratione personae*) of the CPM expands considerably.²³⁷

The Swiss military is governed by the central government rather than independently commanded by the various Canton governments.²³⁸ However, each canton is responsible for maintaining a militia and implementing the Swiss military

International Armed Conflicts of 1977.

²³¹ CONST. SWITZ., art. 59.

²³² *Id.*

²³³ *See, e.g.,* Treschel, *supra* note 59, at 215-218. The military penal code was first drafted in 1927. *Id.*

²³⁴ *See, e.g.,* Office of the Armed Forces Attorney General of Switzerland, at www.vbs.admin.ch/internete/OA/e/urteile.htm, (last viewed March 23, 2003).

²³⁵ Treschel, *supra* note 59, at 215-218. The current national penal code has its roots in the first penal code of 1853. In 1982, the Federal Government incorporated war crimes into the penal code. *Id.*

²³⁶ *Id.* at 218, citing S.R. 321.0.

²³⁷ *Id.* *See also* CPM, Article 2 sec 9 which reads: "Those subject to military law are: Civilians who, in the event of armed conflict, commit violations of international law." *Id.*

²³⁸ Swiss Constitution, *supra* note 209, at Article 58(3). It should be noted, however, that the Army is mobilized on a militia principle and the independent Cantons may maintain their militia's beyond the Confederation's supervisory control dates.

criminal procedure. Under the CPM, where an individual is suspected of a crime and a decision for trial is reached, a preliminary procedure is ordered.²³⁹ This preliminary procedure is mandated in cases of murder and war crimes. It is somewhat similar to the preliminary investigation held by the United States military under the Universal Code of Military Justice (UCMJ) Article 32. If the CPM preliminary proceeding determines that *prima facie* evidence exists for trial, a military tribunal is established for the accused.²⁴⁰ An accused is generally tried in a military court located in the Canton in which he is found.²⁴¹ Trials are primarily initiated through the order of a regimental commander under normal conditions. However, where a war crime is alleged, the Military Attorney General takes jurisdiction of charging.²⁴²

Military courts are comprised of five members.²⁴³ This includes a president who is an “officer of the military justice.”²⁴⁴ The other four members are usually two officers and two non-commissioned soldiers from the same unit as the accused. The president of the court usually has no prior contact with the other four members.²⁴⁵ In this setup, the Swiss military courts appear similar to United States military court-martials prior to the post World War II reforms. However, unlike United States court-martials, military trials in Switzerland are rarely held. Indeed, since 1988, only one hundred and thirteen trials have been conducted.²⁴⁶

The Swiss Constitution provides a right of speedy trial

²³⁹ Swiss Military Procedure, *compare* UCMJ Article 32.

²⁴⁰ CPM 15.

²⁴¹ CPM 16.

²⁴² CPM 17.

²⁴³ CPM 18.

²⁴⁴ CPM 19.

²⁴⁵ CPM 20.

²⁴⁶ This statute is available on the Office of the Armed Forces, Attorney General website at www.vbs.admin.ch/internete/OA/e/urteile.htm (last viewed Mar. 21, 2003).

where a detention occurs.²⁴⁷ Additionally, once in detention, all persons accused must be informed, in a language the individual understands, of the reasons for their detention and notice of the charges against them.²⁴⁸ Where both the Swiss Constitution and CPM differ from international law norms is in the right to counsel.²⁴⁹ Prior to 1982, Switzerland did not *per se* recognize a right to defense counsel in criminal cases.²⁵⁰ This lack of recognition was premised on the active and impartial role of judges.²⁵¹ However, because Switzerland is a party to the European Convention on Human Rights, defense counsel are appointed in all criminal cases.²⁵² Swiss law recognizes that the defense counsel's sole task "is the legitimate interest of the client in watching over the legality of the proceedings."²⁵³ Although appointment of counsel is now mandated through other means, the Swiss Constitution remains silent on the issue.

Article 32 of the Swiss Constitution enumerates the presumption of innocence as an inherent right.²⁵⁴ This right

²⁴⁷ Article 31, Constitution of Switzerland, 1999.

²⁴⁸ *Id.* at Article 31(b). This article reads:

Everyone deprived of their liberty has the right to be informed immediately, and in a language they understand, of the reasons for their detention and the rights they enjoy. They must have the opportunity to assert their rights. In particular, they have the right to have their close friends and relations informed.

Id.

²⁴⁹ *Id.*

²⁵⁰ *Id.* See also, Francis William O'Brien, *Why Not Appointed Counsel in Civil Cases? The Swiss Approach*, 28 OHIO ST. L.J. 1 PASSIM (1967). Criminal defendants are not provided counsel for numerous reasons including the active participation and differing responsibilities of Swiss judges in the trial. *Id.* (citing, Judgment of Oct. 8, 1937, BGE 63 I 209 (Switz.)).

²⁵¹ *Id.*

²⁵² *Id.*; CONST. SWITZ., art. 32.

²⁵³ Treschel, *supra* note 59, at 240.

²⁵⁴ *Id.* Article 32 specifically reads:

(1) Everyone is presumed innocent until they are found guilty and sentenced.

extends to the Swiss military courts.²⁵⁵ Switzerland does not permit capital punishment for any offense.²⁵⁶ Moreover, it will not extradite criminals to a country where “cruel and inhuman treatment or punishment” is permitted.²⁵⁷ It was on this basis, the possibility of a capital sentence, that Niyonteze was not extradited to Rwanda.

Defenses recognized under both Swiss penal law and the CPM include necessity (self-defense), duress, and “soundness of mind” (insanity).²⁵⁸ The “mistake of fact,” defense is accepted in some cases.²⁵⁹ Ignorance of the law is a defense to a crime where criminal intent is based on knowledge of the law.²⁶⁰ Such ignorance is not a defense where the offense is based on negligence.²⁶¹ All Swiss courts employ the reasonable doubt standard, and there are substantial rights of appeal through the

(2) All those who are accused have the right to be informed as soon as possible, and in full detail, of the accusations against them. They must be able to exercise their rights of legal defense.

(3) All those who have been sentenced have the right to have their judgment reviewed by a higher court. This does not apply to cases where the Federal Tribunal sits as the court of first instance.

CONST. SWITZ., art. 32.

²⁵⁵ See Treschel, *supra* note 59, at 242, 244, 254.

²⁵⁶ *Id.* at 233. The CPM, which until 1992 allowed the administration of capital punishment, enabled the execution of seventeen persons during World War II. *Id.* (citing PETER NOLL, *Landsverräter. 17 Lebensläufe und Todesurteile, 1942-1944*, Frauenfeld/Stuttgart, (1980)).

²⁵⁷ SWITZ. CONST., art. 25, available at: the website of the “Federal Republic of Switzerland,”

<http://www.admin.ch/ch/itl/rs/1/c101ENG.pdf>.

²⁵⁸ Treschel, *supra* note 59, at 223-225.

²⁵⁹ *Id.* at 227-228.

²⁶⁰ *Id.* at 228.

²⁶¹ *Id.* at 227.

Federal Court.²⁶² Additionally, in the CPM there is a court of cassation to determine issues of law.²⁶³ Thus, the Swiss system meets basic internationally recognized requirements of ensuring a fair trial.

b. Notice of Criminality and Jurisdiction

As noted above, Niyonteze sought asylum in Switzerland in late 1994. In essence, he became a stateless person willing to accept the jurisdiction of Switzerland.²⁶⁴ States of asylum have prosecuted refugees for war crimes and crimes against humanity committed before the grant of asylum occurred.²⁶⁵ However, there is no widespread agreement as to the criminal jurisdiction status of refugees.²⁶⁶ *Prosecutor v. Niyonteze* may establish, amid a corpus of international law, that asylum is not a bar to prosecution. Nor should it be a bar. Niyonteze sought asylum in Switzerland, in part, to avoid prosecution. He certainly left Rwanda to avoid retribution. Clearly, his post-offense actions indicated a knowledge of wrongfulness. Interestingly, Niyonteze did not raise the issue of extradition to the ICTR at his trial, nor did he seek extradition to Rwanda. Since World War II, there has existed a developed corpus of law indicating the severity of war crimes. By

²⁶² *Id.* at 254, 263.

²⁶³ *Id.* at 263-264.

²⁶⁴ See Zsuzsanna Deen-Racsmany, *The Nationality Principle of the Offender and the Jurisdiction of the International Criminal Court*, 95 AM. J. INT'L. L. 606, 619 (2001).

²⁶⁵ *Id.* at 619 (citing, RUTH WEDGWOOD, *National Courts and the Prosecution of War Crimes*, in 1 SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW 390, 401 (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000). *But see* Brigitte Stern, *International Decisions: In re Javor, In re Munyeshyaka*, 93 AM. J. INT'L. L. 525, 527-528 (1999) (reporting prosecution of a Hutu residing in France for crimes committed before his residence in France).

²⁶⁶ Deen-Racsmany, *supra* note 264, at 619-620.

exercising jurisdiction over Niyonteze, Switzerland did not violate either notice of criminality or notice of jurisdiction.

**c. Other Fair Trial
Considerations: Competent
Representation**

Niyonteze appears to have been ably represented by his defense counsel through the entire trial and appellate process. At no stage in the proceedings was an ineffective assistance of counsel claim raised. Although the record of trial is not verbatim, it also appears that significant issues of law were argued. This fact provides some basis for a belief that Niyonteze was competently represented. Certainly, his assigned lawyers had competent criminal law backgrounds in defending him. Mr. Assael has previously taught criminal law at the University of Geneva.²⁶⁷ Mr. Spira practiced criminal law as a partner in an established Geneva law firm.²⁶⁸ In contrast with the *Akayesu* defense team, neither attorney representing Niyonteze was called into question for ethical breaches or ineffective counsel.

**2. Historic Reasonableness in
International Law for Exercising
Universal Jurisdiction in *Prosecutor v.
Niyonteze***

As a starting point in analyzing Niyonteze, a question arises as to whether Switzerland violated any international law norms in exercising universal jurisdiction. As noted in the discussion and analysis above, universal jurisdiction has gained acceptance for the most heinous (*jus cogens*) offenses. Indeed, several states now exercise universal jurisdiction through their civil courts. Niyonteze's role in the Rwandan genocide constituted crimes against humanity. Yet Switzerland was under no

²⁶⁷ See Biography for Robert Assael, at <http://www.ptan.ch/eng/partners/assael-robert.htm>. (last visited Sept. 28, 2003).

²⁶⁸ See Biography for Vincent F. Spira, at <http://www.avocats-sld.ch/cvE.htm> (last visited Sept. 28, 2003).

obligation to prosecute Niyonteze because of the existence of the ICTR. While Switzerland was not a member of the United Nations until this year, this fact did not appear to be the reason for the exercise of jurisdiction. Switzerland could have extradited Niyonteze to the ICTR. For instance, the United States extradited a Seventh Day Adventist Pastor, Elizaphan Ntakirutimana, to the *ad hoc* tribunal in 2002.²⁶⁹ Switzerland's reason to prosecute Niyonteze appears to rest in the government's confidence in its military justice system over that of the ICTR's ability to ensure due process.²⁷⁰ Additionally, Niyonteze did not argue for extradition to the ICTR.²⁷¹

Switzerland's exercise of universal jurisdiction, unlike Belgium's, might be more acceptable to the international community for another, equally important reason. Switzerland was never a colonial power in Africa. Its financial ties to either the Hutu or Tutsi appear to be minimal, if any. During Belgium's conquest and occupation of the Congo and occupation of Rwanda, that nation's military and civilian administrative officers engaged in what can easily be labeled today as "war crimes."²⁷²

Belgium is not the only European state claiming a right to universal jurisdiction. France, for example, envisions that courts try war crimes, although with greater jurisdictional

²⁶⁹ See *Ntakirutimana v. Reno*, 184 F.3d 419 (5th Cir 1999), *cert denied* 528 U.S. 1135, 120 S. Ct. 977, 145 L. Ed. 2d 929 (2000).

²⁷⁰ Notes from personal interview with Mr. Spira, conducted via email, March 12, 2003.

²⁷¹ *Id.*

²⁷² Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. J. INT'L L 1, 64 (1999) (citing, M.F. LINDLEY, *The Acquisition and Government of Backward Territory in International Law: Being a Treatise on the Law and Practice Relating to Colonial Expansion*, 112-13 (photo reprint 1969)(1926). Professor Anghie writes of Belgian colonial settlers committing mass atrocities during the reign of Leopold.

hurdles than Belgium.²⁷³ For jurisdiction, there must be some connection to France, such as the defendant being found within France.²⁷⁴ However, France could be accused of selective prosecution. During the Franco-Algerian War (1955-1962) it is estimated, that between 250,000 and 500,000 civilians were killed.²⁷⁵ In 1968, France granted a general amnesty for infractions during the Franco-Algerian war, including war crimes.²⁷⁶ Amidst this amnesty are continuing allegations that the French military and civilian administration employed torture and other inhumane actions to subdue the Algerians.²⁷⁷ ,There

²⁷³ See, e.g., Bassiouni, *supra* note 226, at 139-42, 145.

²⁷⁴ See, e.g., *id.*, (citing GILBERT AZIBERT, CODE DE PROCEDURE PENAL 2000, AT 459 ET SEQ. (12th ed. LITEC 2000), where he comments on extraterritorial jurisdiction, but does not refer to universal jurisdiction. The Code permits universal jurisdiction if it is included in an international convention that France has ratified, provided that the crime in question is also a crime under French law).

²⁷⁵ See, e.g., Amnesty International Report, France 2002; see also General Paul Aussaresses, *Services SPECIAUX ALGERIE 1955-1957* (Paris: Perrin, 2001) at 44-45. General Aussaresses biographical account in his book, *SERVICES SPECIAUX, ALGERIE 1955-1957*, of tortures and other methods has caused considerable uproar and led to his prosecution. He, along with other soldiers, were previously granted immunity from prosecution in the mid-1960's as part of an amnesty program enacted by President de Gaulle. However, his recent prosecution was for glorifying war crimes, and not the actual commission of such crimes. See, e.g., CNN report/Law Center/ 6 Feb 2002 at

www.cnn.com/2002/LAW/columns/fl.mariner.torture.law.02.06/ (last visited Mar. 28, 2003).

²⁷⁶ See, e.g., *Former General Faces Algeria Charges*, CNN.com, at <http://www.cnn.com/2001/WORLD/Europe/05/17/france.algeria.inquiry/index.html> (last visited Oct. 7, 2003).

²⁷⁷ For example, French Paul Aussaress has been convicted of only "justifying war crimes" in his biography, which records his, as well as other soldiers', torture of Algerians during the 1957-1962 Franco-Algerian war. See GENERAL PAUL AUSSARESSES, *THE BATTLE OF THE CASBAH*, viii, 49-50 (Enigma Books 2002)(2001). See also Judy Scales-Trent, *African Women in France: Immigration, Family, and*

are persons responsible for these offenses in both Belgium and France today. Yet none have ever been brought to trial. In part, this resulted from general amnesties being granted to likely classes of defendants in the late 1960's and 1970's.²⁷⁸ However, there is a growing argument that domestic amnesty laws should not bind courts exercising jurisdiction over *jus cogens* offenses.²⁷⁹

Likewise, where Belgium has contemplated prosecuting foreign individuals, the country appears to have vested financial or historic interests in the regions that the individuals originate from. Thus, Switzerland appears a better candidate to exercise universal jurisdiction as it is situated to withstand otherwise valid criticisms of politically motivated and selective prosecution that a country like Belgium may not be able to resist. Additionally, this issue directly impacts the concept of an impartial tribunal, as state appointed judges are directed to preside over such trials.

IV. Conclusion

Prosecutor v. Niyonteze met or surpassed international standards of the right to a fair trial. It also was a reasonable exercise of universal jurisdiction. Indeed, the prosecution may have created a higher standard for other domestic prosecutions of war crimes and crimes against humanity. That Switzerland utilized a military tribunal to achieve justice in this case in no way lessened the value of the prosecution.

Yet, increased domestic prosecutions should be a troubling concept. While it is true most Western European

Work, 24 BROOK. J. INT'L L., 705, 706 (1999) (referring to a massacre of hundreds of Algerian peaceful demonstrators by French military).

²⁷⁸ See, e.g., Amnesty International Report, France/Algeria: France must now face up to judicial obligations (May 3, 2001).

²⁷⁹ Naomi Roht-Arriaza, *The Pinochet Precedent and Universal Jurisdiction*, 35 N.ENG. L. REV. 311, 313 (2001) (reporting that a Spanish Appeals Chamber used domestic law to uphold jurisdiction over Augusto Pinochet, despite his grant of amnesty in Argentina).

courts adhere to fair trial standards in the ICCPR and other human rights agreements, the exercise of universal jurisdiction is open to charges of selective prosecution and post-colonial paternalism. Certainly, France and Belgium are open to allegations of paternalism, selective prosecution, and denial of the right to a fair trial.

Additionally, such prosecutions potentially deprive domestic courts of reforming respect for human rights from within. Likewise, international tribunals, while currently slow and cumbersome in their infancy, should be given a chance to develop a usable corpus of law and procedure. This may, in turn, spark an interest in states not currently accepting the ICC's jurisdiction, to reconsider their absence.

Finally, while Switzerland should be commended for its prosecution of Niyonteze, it must be noted that few states are capable of prosecuting war crimes in the rarified and disinterested atmosphere of the Swiss courts. Thus, such a prosecution should occur rarely, and only in instances where an international tribunal or domestic court is incapable of both pursuing a reasonable exercise of jurisdiction and ensuring a fair trial.