

Judicial Responses to Genocide: The International Criminal Tribunal for Rwanda and the Rwandan Genocide Courts

PAUL J. MAGNARELLA

Abstract: Following Rwanda's 1994 appalling eruption into genocide, the UN Security Council, having created an international criminal tribunal for humanitarian law violators in the European States of the former Yugoslavia, decided it could do no less for African Rwanda. Because the Rwandan conflict was internal rather than international, the statute for its tribunal complements rather than replicates that of its Yugoslavian counterpart. The statute for the UN's International Criminal Tribunal for Rwanda contains a number of legal innovations; as a result, it will contribute significantly to the development of the humanitarian law of internal armed conflict. In addition to analyzing these innovations and the creation of the Tribunal, this article briefly discusses the background to the genocide and Rwanda's own attempts at judicial justice.

Background

Following the assassination of Rwandan President Juvenal Habyarimana by unknown assailants on April 6, 1994, Rwanda burst into horrifying violence resulting in the murder of about 800,000 people (mostly Tutsi), the uprooting of about two million within Rwanda's borders, and the exodus of over two million (mostly Hutu) to the neighboring countries of Zaire, Burundi, Tanzania, Kenya and Uganda¹. Soon after Habyarimana's death, extremist Hutu militias, the Presidential Guard, and the Hutu-dominated national army unleashed a systematic campaign of murder and genocide against hundreds of moderate and opposition Hutu and all Tutsi.

Rwanda had been Africa's most densely populated country, with rural peasants constituting the bulk of its inhabitants². It had a pre-genocide population of approximately 8 million, all speakers of *Ikinyarwanda*, a Bantu language³. About 85% of the people were Hutu, 14% Tutsi, and 1% Batwa or Pygmies⁴. Generations of intermarriage had reduced but not eliminated inter-population physical differences⁵.

Pre-colonial rule by the minority but aristocratic Tutsi, as well as indirect rule later by Belgian colonialists through Tutsi royalty, had created resentment among the majority Hutu⁷. Rwanda became independent of Belgium in 1962, and various Hutu factions controlled the government and military until July of 1994. Throughout the period of independence there were periodic outbreaks of inter-ethnic violence, resulting in the flight of Tutsi to surrounding countries, especially to Uganda where they formed the Rwandan Patriotic Front (RPF) and the Rwandan Patriotic Army (RPA). In the 1960s, some exiled Tutsi invaded Rwanda in unsuccessful attempts to regain power.

Major-General Juvenal Habyarimana, a Hutu, seized power in 1973, by a military coup. During his 21 years of rule (1973-1994), there were no Tutsi mayors or governors, only one Tutsi

<http://www.africa.ufl.edu/asq/v1/1/2.pdf>

military officer, just two Tutsi members of parliament, and only one Tutsi cabinet minister⁸. In addition, Hutu in the military were prohibited from marrying Tutsi, and all citizens were required to carry ethnic identity cards⁹. Habyarimana promoted a policy of internal repression against Tutsi. In the 1990s, especially, his government indiscriminately interred and persecuted Tutsi, solely because of their ethnic identity, claiming they were actual or potential accomplices of the RPF¹⁰. From 1990 to 1993, Hutu ultra-nationalists killed an estimated 2,000 Tutsi; they also targeted human rights advocates, regardless of their ethnicities¹¹.

The genocide campaign following Habyarimana's death ended in July, 1994 when the RPA routed the Hutu militias and army. The RPF and moderate Hutu political parties formed a new government on 18 July 1994, but the country was in chaos¹². The government pledged to implement the Arusha peace agreement on power sharing previously reached by Habyarimana's regime and the RPF on August 3, 1993¹³. On 10 August 1995, the UN Security Council called upon the new Rwandan government to ensure that there would be no reprisals against Hutu wishing to return to their homes and resume their work. The Council reminded the government of its responsibility for a national reconciliation, and emphasized that the Arusha peace agreement constituted an appropriate framework for reconciliation¹⁴.

The new Rwandan government was a coalition of 22 ministers drawn from the RPF (with nine ministers) and four other political parties¹⁵. Both Tutsi and Hutu were among the top government officials. Pasteur Bizimungu, a Hutu, was named president, while Paul Kagame, a Tutsi, was appointed vice-president and minister of defense. Faustin Twagiramungu, a Hutu, was prime minister until late August 1995, when he was replaced by Pierre Claver Rwigema, also a Hutu¹⁶. The government publicly committed itself to building a multiparty democracy and to discontinuing the ethnic classification system utilized by the previous regime¹⁷.

Shortly after the new regime established itself, the prime minister reportedly stated that his government might prosecute and execute over 30,000 Hutu for murder, genocide and other crimes committed during Rwanda's holocaust¹⁸. The US government, fearing that such a prospect would amount to a new cycle of retribution and keep Hutu refugees from returning home, sent John Shattuck, US Assistant Secretary of State for Human Rights, to the Rwanda capital of Kigali to encourage the government to delay its plans for prosecution in favor of judicial action by an international tribunal¹⁹.

Creating the Tribunal

On 1 July 1995, the UN Security Council adopted resolution 935 in which it requested the Secretary General to establish a commission of experts to determine whether serious breaches of humanitarian law (including genocide) had been committed in Rwanda²⁰. In the fall of 1995 the commission reported to the Security Council that genocide and systematic widespread and flagrant violations of international humanitarian law had been committed in Rwanda, resulting in massive loss of life²¹. On November 8, 1995, the UN Secretary-General submitted to the Security Council a statute for the International Criminal Tribunal for Rwanda (hereafter, ICTR or Rwanda Tribunal), stating that he was "convinced" that "the prosecution of persons responsible for serious violations of international humanitarian law [in Rwanda] ...would contribute to the process of national reconciliation and to the restoration and maintenance of

peace."²² He recommended that this Tribunal, like the one created by the Security Council in 1993 for the former Yugoslavia (hereinafter ICTY), be established under Chapter VII of the United Nations Charter²³. Given the urgency of the situation, the Secretary-General did not involve the General Assembly in the drafting or review of the statute. Subsequently, however, the General Assembly passed its own resolution welcoming the Tribunal's establishment²⁴.

The Security Council adopted the Secretary-General's report and the Statute of the ICTR without change. Ironically, Rwanda was the only Security Council member to vote no²⁵. Rwanda expressed three objections. It wanted the Statute to contain a provision for capital punishment; it preferred that the temporal jurisdiction of the Tribunal extend back to 1990 to cover earlier crimes; and it wanted the Tribunal to be based in Rwanda itself. The Statute, as accepted by the Security Council, does not allow for capital punishment; its temporal jurisdiction covers the year 1994 only; and the Security Council preferred that the Tribunal be located in a neighboring state²⁶. Furthermore, the Security Council rejected Kigali's proposal that Rwandan judges sit on the Tribunal²⁷. Initially, Rwandan President Bizimungu publicly criticized the Security Council vote saying it would only lead to a "secret" court that would "exonerate" the true organizers of the genocide²⁸. Later, however, a Rwandan spokesperson said his government would cooperate fully with the UN court²⁹. Rwanda's only realistic hope of bringing most of the major instigators of the genocide to justice is through the Tribunal. Most of those chiefly responsible had fled the country, and Rwanda lacks the political leverage, the necessary extradition treaties, and the resources necessary to gain custody and to try them³⁰.

One of the most innovative and expeditious recommendations in the Security-General's report was that of establishing the Tribunal through the exercise of the Security Council's powers under Chapter VII of the UN Charter³¹. As Antonio Cassese, the eventual President of the International Criminal Tribunal for the Former Yugoslavia (ICTY), explained, "the traditional approach of establishing such a body by treaty was discarded as being too slow (possibly taking many years to reach full ratification) and insufficiently effective as Member States could not be forced to ratify such a treaty against their wishes"³². By invoking Chapter VII, the Security Council obliges all UN member states to cooperate with the Tribunal and to honor any lawful requests it makes for assistance under its Statute. Specifically, Articles 39, 41 and 48 of Chapter VII of the UN Charter provide the legal basis for the Security Council's establishment of the Tribunal. Article 39 states that the Security Council shall determine when threats to peace exist, and shall, in accordance with Articles 41 and 42, determine what measures shall be taken to maintain or restore international peace and security³³. While Article 42 addresses military actions, Article 41 provides that "[t]he Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures." The article goes on to list the kinds of actions (e.g., interruptions of economic and communication ties) that these measures "may include." Although Article 41 does not expressly include judicial measures in its list, it does not preclude them. And, the use of the phrase "may include" denotes that the list is not exhaustive.

Article 48 obligates UN member states to support the Security Council's decision by cooperating in its implementation. The Article provides that "[t]he action required to carry out the decisions of the Security Council for the maintenance of international peace and security

shall be taken by all Members of the United Nations or by some of them, as the Security Council may determine."

Composition of the Tribunal

The Tribunal consists of two trial chambers with three judges each, an appeals chamber with five judges, the office of the prosecutor and a registry. In January 1995, the UN appointed Honore Rakotomanana, the former president of the Supreme Court of Madagascar, as deputy chief prosecutor for the Tribunal³⁴. He works out of an office in Kigali, under the supervision of Louise Arbour, who is also the chief prosecutor for the ICTY located in The Hague, The Netherlands. In June 1995, the six trial judges and five appeals judges took their oaths and held their first plenary session in The Hague. All were elected and appointed by the United Nations. The trial judges are from Sweden, Senegal, Bangladesh, Russia, South Africa, and Tanzania. The appeals chamber of the Rwanda Tribunal is comprised of judges from the ICTY and includes judges from Egypt, Italy, Canada, China, and Australia. The justices elected Judge Laity Kama of Senegal as the Tribunal's president. The Tribunal's registrar and chief administrative officer is Andronido Adede, a Kenyan attorney, who has served as Deputy Director of the Codification Division in the UN Office of Legal Affairs³⁵.

The Tribunal's Jurisdiction

Article 1 of the Tribunal's Statute limits the ICTR's temporal jurisdiction to the year 1994 only³⁶. That Article also states that the ICTR "shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighboring states, . . ." Consequently, the Statute gives the Tribunal both personal and territorial jurisdiction in Rwanda as well as limited personal and territorial jurisdiction in surrounding states. By contrast, the Statute of the International Criminal Tribunal for the Former Yugoslavia grants that Tribunal jurisdiction "in the territory of the former Yugoslavia" only (Article 1).

By granting the ICTR the competence to prosecute Rwandans who allegedly committed certain crimes abroad, the Security Council has added a new dimension to the humanitarian law of non-international armed conflict. Rwanda formally requested the creation of a tribunal, and thereby voluntarily surrendered some of its jurisdiction to the Security Council's judicial creation. By contrast, according to the Statute, Rwanda's neighbors must surrender some of their jurisdiction to the Tribunal without choice. All States, of course, have the competence to prosecute Rwandans for crimes committed on their territories. However, because the Tribunal by its Statute has primacy over the national courts of all States, it may formally request that any neighboring State's court defer certain cases to its competence³⁷. This request carries with it the threat of a penalty for non-compliance. Should any State notified of a deferral request not respond satisfactorily within sixty days, "the [Tribunal's] Trial Chamber may request the President to report the matter to the Security Council," which presumably will consider sanctions³⁸. Requiring States to surrender to a UN Security Council creation their competence to prosecute persons for criminal acts committed on their own territories is another novel use of

UN Charter Chapter VII. Whether surrounding States will voluntarily accept or protest this demand on their sovereignty remains to be seen. State action and reaction, claims and responses will determine whether this kind of measure, taken by the Security Council under Chapter VII, will become an accepted principle of international law to be applied again in the future.

Subject Matter Jurisdiction

Because the Security Council is not a legislative body, it had no competency to enact substantive law for the Tribunal. Instead, it authorized the Tribunal to apply existing international humanitarian law applicable to non-international armed conflict. The humanitarian law included in the Tribunal's Statute consists of the Genocide Convention, (ratified by Rwanda), crimes against humanity (as defined by the Nuremberg Charter), Article 3 Common to the Geneva Conventions, and Additional Protocol II (also ratified by Rwanda)³⁹. Both the prohibition and punishment of acts of genocide and crimes against humanity are part of customary international law imposing legal obligations on all States⁴⁰.

Article 2 of the Statute replicates Articles 2 and 3 of the Genocide Convention. Statute Article 2² defines genocide as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group; killing group members; causing serious bodily or mental harm to group members; deliberately inflicting on the group conditions calculated to bring about its complete or partial physical destruction; imposing measures intended to prevent birth within the group; and forcibly transferring children to another group. Persons who commit genocide or who attempt, conspire, or incite others to commit genocide are punishable⁴¹.

Similar to the Geneva Conventions, the Genocide Convention (Article 5 obligates States Parties to enact the legislation necessary to provide effective penalties for persons guilty of genocide. Article 6 of the Genocide Convention also requires that persons charged with genocide be tried in the territory where the act was committed, "or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." Consequently, the surrounding states of Zaire and Tanzania, as ratifying parties to the Genocide Convention, undertake to charge persons responsible for genocide in Rwanda and to extradite them for prosecution either back to Rwanda or to a competent international tribunal that they recognize. Since the Convention's entrance into force in 1951, the only international tribunals competent to prosecute those accused of genocide in limited geographic areas have been the ones established by the Security Council for the Former Yugoslavia and Rwanda. By virtue of Chapter VII obligations under the UN Charter, all UN members (including Burundi, Uganda, and Kenya, which have not ratified the Genocide Convention) are required to recognize these Tribunals and send indicted suspects to them. Non-UN members, however, can decide for themselves whether they wish to recognize these international tribunals for purposes of surrendering indictees.

Obligations to prevent and punish acts of genocide are not confined merely to the 107 States that have ratified the Genocide Convention⁴². Because the prevention and punishment of genocide have become part of international customary law, the International Court of Justice has noted that "the principles underlying the [Genocide] Convention are principles which are

recognized by civilized nations as binding on States, even without any conventional ratification"⁴³.

Statute Article 3, "Crimes against Humanity," follows Article 6(c) of the Nuremberg Charter⁴⁴. It empowers the Tribunal to prosecute persons responsible for the following crimes when committed as part of a widespread and systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions, and other inhumane acts.

Employing the Nuremberg concept of crimes against humanity in Rwanda constitutes an important legal development. The Nuremberg Charter was established to prosecute "war criminals," and it explicitly defined crimes against humanity as specified inhumane acts committed "before or during the war; . . ." ⁴⁴. Traditionally, war was defined as a state of armed conflict between two or more States, but legal experts debated about the legal criteria of war, e.g., whether a formal declaration of war is required, whether there can be domestic war, whether the parties must be recognized States, etc.⁴⁵. Some legalists may now wonder whether applying the Nuremberg Charter to Rwanda's internal conflict is appropriate. Although the Charter is explicitly included in the Statute of the ICTY, that conflict did involve more than one State, and consequently meets the war criterion of the Charter⁴⁶. The Statute for the Rwandan Tribunal characterizes the situation there as an internal armed conflict. Hence, it does not include the "grave breaches" sections of the 1949 Geneva Conventions, which apply to international armed conflict and are regarded as customary international law⁴⁷. By containing the Nuremberg concept of crimes against humanity in its Statute, the Rwandan Tribunal represents an important extension of international humanitarian law to internal conflicts. The UN Security Council, the Tribunal's creator, has ignored the ambiguity of the war concept, and with its authoritative voice has made crimes against humanity an internal as well as an international offense of customary international law.

Article 4 of the Statute empowers the Tribunal to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 1949 and of the Additional Protocol II thereto of 1977. These violations include: (a) violence to life, health and physical or mental well-being of persons, in particular murder, torture, or mutilation; (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) sentences or executions rendered extra-judicially or without due process; and (h) threats to commit any of the foregoing acts.

Both Article 3 common and Protocol II apply to non-international conflicts. Rwanda's neighbors--Burundi, Tanzania, Uganda and Zaire (but not Kenya)--have ratified both the Geneva Conventions and Protocol II⁴⁸. However, unlike the grave breaches sections of the Geneva Conventions, Article 3 common and Protocol II do not require ratifying parties to criminalize the above acts or to prosecute or extradite alleged violators either to the State on whose territory their acts occurred or to a competent international tribunal. As noted above, each UN member State is obligated under Chapter VII of the UN Charter to cooperate with Security Council measures taken to maintain international peace. Article 28 of the Rwandan Tribunal's Statute specifies that States shall cooperate with the Tribunal and comply without undue delay with any request for assistance, including the arrest or detention of persons and

the surrender of the accused to the Tribunal. Consequently, the UN Security Council, through its creation of this Tribunal, has added a compulsory arrest and surrender requirement to acts that the Geneva Conventions and Protocol II had previously conceptualized as being governed by domestic discretion. This represents another important extension of humanitarian law.

The Security Council's and the General-Secretary's decision that the Tribunal should have jurisdiction over natural persons and not juridical persons, such as associations, is reflected in Statute Article 5. Accordingly, membership alone in a criminal organization would not be sufficient to subject someone to the Tribunal's jurisdiction. Article 6 addresses "individual criminal responsibility." It states that any person who planned, instigated, ordered, committed or aided and abetted in the planning, preparation or execution of any crime mentioned in Articles 2 to 4 of the Statute shall be individually responsible for the crime. An accused's official position, even as president or prime minister, shall not relieve him of responsibility or mitigate punishment. Furthermore, superiors are criminally responsible for the criminal acts of their subordinates if they knew of the acts and did not take reasonably necessary measures to prevent or stop them. Although following government orders will not relieve subordinates of criminal responsibility, it may mitigate their punishment if the Tribunal determines that justice so requires. The doctrine of individual responsibility for violations of humanitarian law was emphasized in the post-World War II Nuremberg and Tokyo trials⁴⁹. It was also codified in the Geneva Conventions of 1949⁵⁰.

Concurrent Jurisdiction and Tribunal Primacy

Given the magnitude of the crimes committed in Rwanda, the successful prosecution of all those responsible would greatly exceed the resource capacity of the Tribunal⁵¹. Therefore, Statute Article 8 states that "[t]he International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of neighboring States, . . ." (Article 8[1]). However, the Statute goes on to state that the Tribunal "shall have primacy over national courts of all States," such that it may formally request national courts to defer to its competence. (Article 8[2])⁵².

To respect the principle of non-bis-in-idem and to avoid the potential for double jeopardy, Statute Article 9 states that no person tried by the Tribunal shall be retried by a national court for the same acts. However, persons tried by a national court for crimes covered by Articles 2 to 4 of the Statute may be retried by the Tribunal if: (a) the litigated acts had been characterized as ordinary crimes; (b) the case was not diligently prosecuted; or (c) the national court proceedings were neither impartial nor independent or were designed to shield the accused from international responsibility.

Rules of Procedure

The Tribunal's Rules of Procedure are based on those of the Tribunal for the Former Yugoslavia. They incorporate the fundamental due process guarantees to a fair and speedy trial found in Article 14 of the International Covenant on Civil and Political Rights (ICCPR). Consequently, this Tribunal, like its counterpart for the Former Yugoslavia, will become a

medium whereby international human rights standards will have significant influences on the development of international criminal law. Its due process guarantees include: the right to the presumption of innocence (Rule 62); the right against self-incrimination (Rule 63); the right to counsel of choice or to free legal assistance if indigent (Rule 42); the right to inspect prosecution's incriminating and exculpatory evidence (Rules 66-68); the right to privileged communication with counsel (Rule 97); the right to public proceedings (Rule 78); the right to challenge the prosecution's evidence and to present evidence in one's defense (Rule 85); and the right of appeal (Rule 108).

Only the prosecutor or his duly delegated deputy may commence a proceeding by submitting an indictment supported by evidence to a designated Tribunal judge for confirmation (Rule 47). Neither victims, States nor Non-governmental Organizations (NGOs) may initiate proceedings before the Tribunal.

Once a judge confirms an indictment, he or she may issue arrest and search warrants (Rule 54-55). The Tribunal's registrar transmits the arrest warrant to the national authorities of the State having jurisdiction over the accused "together with instructions that at the time of the arrest the indictment and statement of the rights of the accused be read to him in a language he understands" (Rule 55). The arresting State authorities shall notify the Registrar and arrange to transfer the accused to the seat of the Tribunal where the President will arrange for his detention (Rules 57 & 64). The accused will be detained in a UN-supervised prison in Arusha.

If the notified State has been unable to arrest the accused, and if the registrar has, at the prosecutor's request, published notices of the arrest warrant in widely circulated newspapers, a trial chamber may, after finding the prosecutor's evidence sufficient, issue an international arrest warrant that shall be transmitted to all states (Rule 61). The President of the Tribunal has the authority to notify the Security Council of any State that refuses to honor the Tribunal's arrest warrant or that impedes the execution of such a warrant (Rule 61[E]).

Soon after his arrest, the accused is brought before a trial chamber and formally charged (Rule 62). The trial chamber shall satisfy itself that the accused's right to counsel is respected and that he understands the indictment (Rule 62). It shall call on the accused to enter a plea, and should the accused fall silent, it shall enter a plea of not guilty on his behalf (Rule 62). The trial chamber then instructs the Registrar to set a date for trial (Rule 62). There are no provisions for trials in absentia.

The Tribunal is not authorized to impose the death penalty in deference to the Second Optional Protocol to the ICCPR of 1989. This, however, leads to an ironic situation. Owing to its limited resources, the Tribunal is expected to go after, what prosecutor Goldstone called the "big fish."⁵³ Consequently, those chiefly responsible for the genocide would receive, if convicted by the Tribunal, a sentence of years, up to life, whereas lesser figures tried and convicted in Rwandan courts could be sentenced to death.

The Situation in Rwanda

As it was successfully routing the Hutu army and various Hutu militias, the RPF Army began rounding up Hutu suspected of participating in the genocide and committing other

crimes. The International Committee of the Red Cross claimed that by August 1996, Rwanda had about 80,000 Hutu (mostly followers, rather than leaders) crammed into antiquated, putrid prisons, detained indefinitely while awaiting formal charges⁵⁴. Reportedly, over two thousand had died under these conditions⁵⁵. Before the detainees could be tried, Rwanda had to rebuild its judicial system. As of February 1, 1995, Rwanda had only a few surviving judges, but not a single functioning court⁵⁶. The trials of those suspected of involvement in the genocide had been repeatedly postponed due to a lack of resources.

In September 1996, Rwanda's parliament approved a genocide law designed to expedite the trials of the thousands held in prison and to encourage Hutu refugees to return from abroad. The government hopes that once the judiciaries identify and prosecute those primarily responsible for the genocide, Rwanda's Tutsi will believe justice is being served and will be less likely to seek revenge on returning Hutu refugees. The legislation covers offenses committed between 1990 and 1994 (versus only 1994 for the ICTR) so as to deal with the massacres that occurred during the civil war prior to President Habyarimana's death⁵⁶. It also distinguishes genocide planners and mass murderers from others, and offers reduced prison sentences to the last if they confess.

According to the law, those who planned, instigated or supervised the genocide will face the death penalty. Ordinary murderers are liable to life imprisonment, while those who committed physical assaults will serve three years or less. In addition, courts will treat property crimes as civil offenses, offering victims the opportunity to sue for damages. In June 1996, Rwanda's Ministry of Justice offered a crash training course for magistrates, who began adjudicating cases later that year.

The Rwandan government pledged to guarantee the safe return of refugees living abroad in sprawling and unsanitary camps⁵⁷. However, it was concerned about Hutu extremists waging an insurgency campaign from the camps located in Tanzania and Zaire, where Hutu militias reportedly were forcibly inducting young men into their units and threatening to invade Rwanda to retake power. According to UN observers, from May to June of 1996 Hutu extremists had killed 99 witnesses to the genocide in order to prevent them from testifying before either Rwandan courts or the ICTR⁵⁸. Many of those murdered had lived in Rwanda's Gisenyi province, located just across the Zairian border from Hutu refugee camps⁵⁹. Because there is so little documentary evidence of much of the 1994 killing, prosecutors will have to rely on eyewitness accounts. Hence, the murder of key potential witnesses will hamper the prosecutorial process.

By January 1997, Rwandan courts in Kigali, Byumba, Gikongoro, Kibuye, Nyamata and Kibungo were trying cases and applying the genocide law. As of January 20, the courts had convicted nine persons (all Hutu) of genocide and had sentenced them to death by firing squad. All those convicted had appealed their sentences. The trials were generally brief. The first, involving three defendants, lasted only four hours⁶⁰. Most, if not all, of those convicted, could not find lawyers willing to represent them; consequently, they had to defend themselves⁶¹. These procedures raised serious concerns on the part of the UN High Commissioner for Human Rights and Amnesty International⁶².

On January 7, Jean Flamme, secretary general of *Avocats sans Frontières* (Lawyers without Borders) announced that three members of his organization would soon go to Kigali to establish

a permanent office to carry out a project entitled "Justice for all in Rwanda" ⁶³. They plan both to provide assistance to the Rwandan judiciary and to defend those being tried for genocide.

Among those convicted by the Rwandan courts were a former official of the National Republican Movement for Democracy and Development (Habyarimana's ruling party), three school teachers, a hospital aide, a low-level local official, and a Burundian Hutu, reportedly one of many who participated in the genocide⁶⁴. As of mid-January, the court's major defendant was Froduald Karamira, the former deputy head of the Hutu ruling party, who in 1994 allegedly made daily radio broadcasts urging Hutu to kill Tutsi⁶⁵. When the Rwandan government successfully negotiated his extradition from Ethiopia, Karamira became the highest ranking official of the former Hutu government in custody. His trial resumed at the end of January after a two week suspension to allow his attorney, a member of *Avocats sans Frontieres*, time to prepare a defense.

In addition to expediting genocide trials, the Rwandan government is exploring the idea of establishing a South African-style truth commission. In January 1997, a Rwandan delegation, including the Labor and Social Affairs Minister, went to South Africa to inquire about the policies and operations of that country's truth and reconciliation commission⁶⁶.

Tribunal Indictments

Approximately one year after the genocide, the Tribunal had 400 suspects as a result of ongoing investigations⁶⁷. Most of these were officials and military leaders of the former Hutu-dominated regime who had fled to other countries. As noted above, all States are obligated to cooperate with the Tribunal by arresting and transferring to it suspects and indicted persons. In early January 1995, the heads of government from Kenya, Burundi, Tanzania, Rwanda, Uganda, Zaire, and Zambia met in Nairobi, the Kenyan capital, and agreed to hand over to the Tribunal those who took part in the genocide⁶⁸. Subsequently, however, Kenyan President Daniel Arap Moi stated that he not only would not cooperate with the Tribunal, he would prevent it from seeking out suspects in his country⁶⁹. According to human rights officials, some Kenyans have benefited financially from wealthy Rwandans from the former government who fled to Kenya after the war broke out⁷⁰.

Immediately after Moi's remarks, Tribunal Prosecutor Goldstone sent him a letter, asking for clarification and warning that Kenya's refusal to cooperate with the Tribunal would be regarded as a breach of Kenya's obligations under international law, a matter for the Security Council to consider⁷¹. President Moi soon retracted his statement, but human rights watchers doubted his sincerity⁷². More recently, Tribunal Judge Navanethem Pillay has stated that African States, especially Zaire and Kenya, were hampering efforts to bring criminals to justice⁷³. An observer explained that the Presidents of Zaire and Kenya are more concerned about the regional balance of power than about crimes against humanity⁷⁴. They support Rwanda's former rulers because they regard the successor RPF-led government as a client of Uganda's President Yoweri Museveni, their rival for leadership in East and Central Africa⁷⁵. If any African State refuses to cooperate with the Tribunal, as is required under the UN Charter, it may become a sanctuary for some suspected criminals, but it may also be sanctioned by the UN

Security Council. Sanctions could include a moratorium on international economic aid, something no African country can afford to lose.

Initially, the work of the ICTR had been slowed by a lack of facilities in Arusha and by UN budgetary constraints⁷⁶. Later, however, some employees and consultants complained that the Tribunal's top administrative officers had given jobs to unqualified relatives and friends; had discriminated against non-Africans; had misused resources; and had unduly delayed the purchase of essential equipment and services⁷⁷. These charges led to an internal investigation by the U.N. Fortunately, none of the judges were accused of any wrongdoing.

On December 12, 1995, the Tribunal issued its first indictments against eight Hutu, charging them with genocide, crimes against humanity, and violations of the Geneva Conventions⁷⁸. As of January 1997 the Tribunal had indicted 21 people and held eleven in custody. Of the remaining ten indictees, one was being held in the United States, one in Switzerland, and eight were at large⁷⁹.

Those being held in Arusha included Colonel Theoneste Bagosora, who has been called the mastermind of the genocide. He had assumed de facto control of military and political affairs in Rwanda after the death of former president Habyarimana. Bagosora had been arrested in Cameroon under an international arrest warrant issued by Belgium in connection with the murder of ten Belgian UN Peace Keepers in April 1994⁸⁰. In July 1996, however, Belgium dropped its request for extradition in deference to the ICTR and its Statute Article 8², addressing concurrent jurisdiction and Tribunal primacy (discussed above)⁸¹. Cameroon authorities handed over Bagosora and three others to the ICTR on January 23, 1997⁸². The three others are Andre Ntagerura (the former transport minister), Ferdinand Nahimana (a founder of Radio Television Milles Collines, which had been used to incite the genocide), and Colonel Anatole Nsengiyumva (former military intelligence chief and alleged death squad member)⁸³.

Other indictees being held in Arusha include Georges Rutaganda, a vice president of the national committee of Interahamwe ("those who work together"), the Hutu youth militia of the National Revolutionary Movement for Development, the political vehicle of former President Habyarimana's single party state⁸⁴. Some observers regard members of the Interahamwe as the main perpetrators of the genocide⁸⁵. A second indictee is Jean-Paul Akayesu, the former mayor of Taba, in the Gitarama district of central Rwanda, where at least 2,000 Tutsi were killed⁸⁶. Also being held is Clement Kayishema, the former governor of Kibuye, who allegedly helped organize the slaughter of 90% of the Tutsi residing there⁸⁷. All three had been arrested by national authorities in Zambia and then transferred to the ICTR in May 1996.

The Tribunal's first trial, against Jean-Paul Akayesu, opened in October 1996. After winning three delays, two by changing lawyers, Akayesu took the stand on January 9, 1997⁸⁸. At the rate the Tribunal is proceeding, it may only be able to try one person a month.

Conclusion

The ICTR and its predecessor for the former Yugoslavia represent the first attempts by the international community to create international judicial organs to enforce the Geneva Conventions, the Genocide Convention, and laws proscribing crimes against humanity. The Rwandan Tribunal is unique in that it is the first international court to apply crimes against

humanity to a non-international conflict and to enforce Article 3 common and Protocol II of the Geneva Conventions. The extension of its territorial jurisdiction to States not party to the Rwandan conflict represents another new development in international law.

The exact impact that the ICTR will have on the application of international humanitarian law and the legal prerogatives of the UN Security Council acting under Chapter VII of the UN Charter will be determined by actual political and judicial experience, by the reactions of States and the ability of the Tribunal to gain custody over and prosecute a significant number of major criminals. Both Tribunals will influence the way many States view the causes of grave humanitarian crimes and possible strategies for achieving peace and national reconciliation.

The mass murders in Rwanda and the former Yugoslavia did not arise spontaneously. They were instigated by persons in positions of power who sought to gain personal advantage through violent and hideous means. Unless these persons are made to account for their crimes against humanity, the reconciliation necessary for the reconstruction of these torn societies may not be possible. By assigning guilt to the leader-instigators, the Tribunals may also lift the burden of collective guilt that settles on societies whose leaders have directed or ordered such terrible violence. The assignment of guilt by neutral Tribunals may also enable the international community to differentiate between victims and aggressors. It may help erase the belief that interethnic conflicts are genetically inbred and therefore insoluble.

The success of the Tribunals is essential if future crimes against humanity are to be prevented. If human rights can be massively violated with impunity in Rwanda and the former Yugoslavia, we can expect new Hitlers to appear whenever and wherever political advantages can conceivably be gained by committing crimes against humanity. Should the Tribunals not accomplish their main prosecutorial objectives, their creation will still have a lasting effect on the application of humanitarian law to both international and domestic conflicts. They also will have accomplished, as Prosecutor Goldstone has stated, the significant task of putting international humanitarian law and human rights squarely on the international agenda⁸⁹.

Notes

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2. Rwanda, *Collier's Encyclopedia* 20, 1980, p. 308. For a study of clientship and shifting ethnicity in Rwanda, see Newbury, Catharine. *The Cohesion of Oppression: Clientship and Ethnicity in Rwanda: 1860-1960*, New York: Columbia University Press, 1988.
3. Prunier, *op. cit.* p. 4.
4. Rwanda, *Collier's Encyclopedia*, *op. cit.*
5. For a description of physical differences among these peoples, see Prunier, *op. cit.*, p. 5; Nyrop, Richard F., et al., *Area Handbook for Rwanda*, Washington, D.C.: US Government Printing Office, 1969. pp. 44-47.
6. The political history of Rwanda and its important relations with surrounding countries, especially Burundi, are beyond the scope of this article. For these important topics, the readers is referred to the above sources as well as to Lemarchand, Rene. *Rwanda and*

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 8. Prunier, *op. cit.*, p. 75.
 9. *Ibid.* For purposes of these identity cards, ethnicity was determined by patrilineal descent. Hence, even the children of mixed marriages were classified Hutu, Tutsi, Twa, etc. depending on the identity cards of their fathers. See US Department of State. *Rwanda Human Rights Practices*. Lexis-Nexis News Library, 1994, no pages given.
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 12. Prunier, *op. cit.*, p. 299.
 13. *Ibid.*, p. 329.
 14. UN Doc. S/PRST/1994/42.
 15. These and the following facts about the new government are based on U.S. Department of State, *Rwanda Human Rights Practices*, *op. cit.*
 16. Reuters, "Rwanda's Prime Minister Leaves Office Suddenly," *New York Times*, August 29, 1995, p. 2.
 17. Bonner, Raymond. "Rwanda's Leaders Vow to Build a Multiparty State for Both Hutu and Tutsi." *New York Times*, September 7, 1994, p. A10.
 18. Burkhalter, Holly. "Ending the Cycle of Retribution in Rwanda." *Legal Times*, August 22, 1994, p.19.
 19. *Ibid.* The US government most probably underestimated the enormity of the judicial task. Thousands of people were directly involved in acts of genocide, but the UN Tribunal will be able to prosecute only about 50 persons a year. Kahl, Hubert. "Rwanda Traumatized by Images of Death." *Deutsche Presse-Agentur*, April 4, 1995, Lexis News Library.
 20. UN Doc. S/935/1944.
 21. Referred to in the Secretary General's letter of 1 October 1994. UN Doc. S/1994/1125.
 22. UN Doc. S/Res/955, 1994 (hereinafter, Statute).
 23. *Ibid.* For a discussion of the establishment of the International Tribunal for the Former Yugoslavia, see Bassiouni, M. Cherif. "Former Yugoslavia: Investigating Violations of International Humanitarian Law and Establishing an International Criminal Tribunal." In *Fordham International Law Review* 18, 1995, pp. 1191-1210. For a description and analysis of that Tribunal's legal structure, see Magnarella, Paul J. "Trying for Peace through Law: The UN Tribunal for the Former Yugoslavia," in *Human Peace*, 10, 1995, pp. 3-8; Meron, Theodor. "War Crimes in Yugoslavia and Development of International Law," in *American Journal of International Law* 88, 1994, pp. 78-87; and Wedgwood, Ruth "War Crimes in the Former Yugoslavia: Comments on the International War Crimes Tribunal," in *Virginia Journal of International Law* 34, 1994, pp. 267-75.
 24. UN Doc. A/Res/49/206, 1994.

25. The Security Council adopted the resolution sponsored by the United States and New Zealand by a vote of 13 to one, with China abstaining. Preston, Julia "Tribunal Set on Rwanda War Crimes; Kigali Votes No on U.N. Resolution." *Washington Post*, November 9, 1994, p. A44.
26. It was subsequently placed in Arusha, Tanzania. UN Security Council Resolution 977, 21 February 1995.
27. Preston, *op. cit.*
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29. Thomas, Anni. "Rwandan Government Promises to Work with War Crimes Court," *Agence France Presse, International News*, November 24, 1994, Lexis-Nexis News Library.
30. See Marie, Alphonse. "Statement by the Minister of Justice of Rwanda to the First Public Hearing of the First Session of the International Criminal Tribunal for Rwanda," *The Hague*, June 27, 1995.
31. Charter of the United Nations. San Francisco, June 26, 1945.
32. UN Doc. A/49/342, S/1994/1007, 29 August 1994.
33. Presumably, the Security Council regarded the massive flow of refugees and remnants of the Hutu militias to neighboring countries as a threat to international peace.
34. "UN Appoints Prosecutor for Rwandan Tribunal," in *New York Times*, January 15, 1995, p. A6.
35. "UN Package," September 11, 1995, Lexis-Nexis News Library.
36. UN Doc. S/Res/955, 1994.
37. Article 8(2), discussed below.
38. "ICTR Rules of Procedure and Evidence." Adopted on June 29, 1995.
39. "Convention on the Prevention and Punishment of the Crime of Genocide." December 9, 1948. U.N.T.S. 277, (hereinafter, Genocide Convention). Charter of the International Military Tribunal. Done at London, August 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279. Geneva Conventions No. 1-4, August 12, 1949, 75 UNTS 31, 85, 135, 287. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict, December 12, 1977, 1125 UNTS 609, (hereinafter, Protocol II).
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42. "Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide," *International Court of Justice*, 15, 1951
43. For the lists of States that had ratified the Genocide Convention and other human rights/humanitarian law conventions as of January 1, 1994, see "International Instruments Relating to Human Rights," in *Human Rights Journal* 15, 1994, pp. 51-67.
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47. See "Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution" 808 (1993). S/25704, May 3, 1993, para. 37 & 38.
48. "International Instruments Relating to Human Rights," in *Human Rights Journal* 15, 1994, pp. 51-67.
49. de Lupis, *op. cit.*, pp. 353-4.
50. *Ibid.*, p. 354.
51. One Africanist estimates that the number of Rwandans directly involved in the acts of killing amounted to between 75,000-150,000. Jefremovas, *op. cit.*, p. 28.
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