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The *ad hoc* International Criminal Tribunal for Rwanda and National Reconciliation

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Declaration

This dissertation is my original work and has not been presented for a degree in any other university.

Signed.....

Date 14th November 2008

Janet Ouma

This dissertation has been submitted for examination with my approval as a University supervisor.

Signed.....

Date. 17th November 2008

Professor Makumi Mwagiru

Dedication

To my parents, and most importantly, to the survivors of the 1994 Rwandan genocide.

Acknowledgements

I would like to thank God almighty, for his wisdom, strength and courage as I worked on this project. Secondly, my sincere gratitude to my supervisor, Professor Makumi Mwagiru, whose insight, guidance and advice have made this work a success. Secondly, I would like to thank all my friends and family for their support and insight. To all, I say thank you very much.

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List of abbreviations

DRC.....Democratic Republic of Congo

ICTR.....International Criminal Tribunal for Rwanda

ICTY.....International Criminal Tribunal for the former Yugoslavia

ICC.....International Criminal Court

IMTFE..... .International Military Tribunal for the Far East

UN.....United Nations

RPF.....Rwandese Patriotic Front

RPA.....Rwandese Patriotic Army

OTP.....Office of the Prosecutor

UNSC.....United Nations Security Council

Chapter One

Introduction of the Study

Introduction

Armed conflicts and serious violations of human rights and humanitarian law continue to victimize millions of people throughout the world. As a result, more than 86 million civilians have died, been disabled or been stripped of their rights, property and dignity, since the end of the World War II. The world community has done very little for them or their families. Most victims have been forgotten and few perpetrators have been brought to justice. A culture of impunity seems to have prevailed. Todays conflicts are often rooted in the failure to repair yesterday's injury. The fight against impunity is not only a matter of justice, but is also inextricably bound up with the search for lasting peace in post conflict situations. Unless the injuries suffered are redressed, wounds will fester and conflicts will erupt again in the future. Accountability is therefore and indispensable component of peace building.[1]

International treaties and customs have produced a plethora of rules, laws and norms prohibiting atrocities such as genocide, war crimes and crimes against humanity, or forbidding the use of poison gas and biological and chemical weapons. But the record of the application and enforcement of these laws is not impressive. While states are competent and often legally obligated under international law to investigate, prosecute and punish such violations, states have often been either unable or unwilling to apply the law. Few perpetrators have in fact been brought to justice.[2]

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[1] R.S. Lee, *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results* (The Hague: Kluwer Law International, 1999) p 1

[2] Ibid

In the late 1940s, three important human rights projects were before the United Nations General Assembly for consideration: a Universal Declaration of Human Rights, a Convention to Prevent Genocide and an International Criminal Court. Both the Universal Declaration of Human Rights and the Genocide Convention[3] were adopted in 1948. But the proposal for a criminal court proved to be far more controversial and it would nearly be 50 years before a statute would be adopted.[4] After the end of the Second World War, the allies set up international tribunals at Nuremberg and in Tokyo to try the major war criminals. A permanent international criminal court was also mooted and a draft statute prepared.[5] This was done in accordance with a provision of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide, which envisioned an "international penal tribunal" with jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction.[6] The first step towards a permanent international criminal court was the establishment by the Security Council in 1993 and in 1994 of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) respectively.[7] In April 1994, the presidents of Rwanda and Burundi were killed in an aircraft incident. Within hours, a large scale campaign was started aimed at the destruction of mostly Tutsi civilians and moderate Hutus in Rwanda. When in July 1994, a new government was

[3] Convention on the Prevention and Punishment of the Crime of Genocide, adopted and opened for signature by General Assembly Resolution 260 A (III), of 9 December 1948, United Nations General Assembly Official Records, Third Session, 78 U. N. T. S 277

[4] R.S. Lee, *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results*, op. cit.

[5] Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, London 8 August1945, 8 U. N. T. S 279, Annex charter of the International Military Tribunal for the Far East, Proclaimed at Tokyo, 19 January 1946 and amended 26 April 1946.

[6] Convention for the Prevention and Punishment of the Crime of Genocide, adopted on 9 Dec, 1948, U. N. T. S 2777 (entered into force Jan 12, 1951), Article VI

[7] R.S. Lee, *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results*, op. cit.

created, between half a million and a million civilians had lost their lives. The Security Council, alarmed by the humanitarian disaster in Rwanda, acting again under chapter VII of the UN Charter, created a new *ad hoc* tribunal on 8 November 1994 by resolution 955. Although the violations had predominantly taken place in Rwanda itself and most atrocities had finished by the time the Security Council adopted resolution 955, Chapter VII was still considered a firm basis for this step. The reasons advanced for this approach were *inter alia* that the prosecution of persons responsible for the atrocities would contribute to the process of national reconciliation and to the restoration and maintenance of peace.[8]

Statement of the research problem

The ICTR was established by the United Nations Security Council by its resolution 955 of 8 November 1994. After reviewing various official reports which indicated that acts of genocide and other systematic, widespread and flagrant violations of international humanitarian law had been committed in Rwanda, the Security Council concluded that the situation in Rwanda in 1994 constituted a threat to international peace and security within the meaning of Chapter VII of the United Nations Charter.

Resolution 955 charges all states with a duty to cooperate fully with the tribunal and its organs in accordance with the statute of the tribunal and to take any necessary measures under their domestic law to implement the provisions of the statute, including compliance with requests for assistance or orders issued by the tribunal.[9] Thirteen years after the establishment of the ICTR and as the tribunal prepares to wind down its operations, it is necessary to appraise it in light of the reasons set forth for its

[8] H. A. M von Hebel, J. G Lammers and J. Schukking, *Reflections on the International Criminal Court* the Hague, Kluwer Law International, 1999) pp31-33

[9] The Prosecutor vs Jean Paul Akayesu (Case No. ICTR-96-4-T)

establishment. The establishment of the ICTR does not seem to have had much impact on the process of national reconciliation in Rwanda. Additionally, it has not efficiently discharged its mandate of prosecuting persons responsible for the 1994 genocide in Rwanda. The ICTR seems to have done little to deter or even prevent future atrocities in Rwanda or elsewhere. In some instances, it has had an acrimonious relationship with the government of Rwanda begging the question as to whether it will effectively discharge its mandate as expected. This study will examine the potentials and pitfalls of the tribunal, and how that impacts on its effectiveness in promoting reconciliation and in the maintenance of international peace and security. In this regard, the study will seek to critically examine the ICTR, and appraise it on whether it has fulfilled its mandate as granted by the Security Council.

Objectives of the study

The objectives of this study are as follows:

- To critically appraise the mandate of the ICTR with regard to its potentials and pitfalls in light of the reasons for its establishment as indicated by the Security Council.
- To analyze whether the ICTR has contributed to national reconciliation in Rwanda and to the maintenance of international peace.

Justification of the study

As the ICTR prepares to wind down its operation, it is important to critically examine its effectiveness, and more especially, the usefulness of international criminal tribunals in preventing and managing both national and international conflicts. The study will also indicate whether *ad hoc* tribunals should be maintained as means of addressing violations

of international criminal law or whether a more permanent mechanism, such as the International Criminal Court would be more effective. The findings from this study will be important tools and lessons in the enforcement of international criminal law, especially to the ICC which is tasked with prosecutions under international criminal law.

Literature review

Much of the literature on the ICTR focuses on its establishment, rules of procedure and general workings of the tribunal. A few give a critical appraisal, especially in light of the objectives for its formation as outlined by the Security Council. For instance, Hebel et al, give a historical background of the court by tracing its establishment to the 1994 genocide in Rwanda, following the killing of the Presidents of Rwanda and Burundi.[10] The work outlines the steps taken by the Security Council, following the genocide to establish the tribunal and the reasons behind its establishment. The work is merely descriptive of how the tribunal operates, its jurisdiction and rules, but does not critically evaluate it.

Mundis analyses the Nuremberg International Military Tribunal and draws lessons from which the *ad hoc* tribunals, the ICTY and ICTR would learn. He notes that there are substantial differences between the *ad hoc* international criminal tribunals and the legal institutions that comprised the Nuremberg process, the most obvious being the historical conditions prevailing at the time these institutions were created and the resulting legal instruments that led to their formation.[11] He further notes that due process considerations have also evolved in the nearly six decades since the Nuremberg process

[10] H. A. M von Hebel, J. G Lammers and J. Schukking, *Reflections on the International Criminal Court*, op cit.

[11] D. A Mundis, 'Completing the Mandates of the AD Hoc International Criminal Tribunals: Lessons from the Nuremberg Process', *Fordham International Law Journal*, Vol 28 pp 591-613

was completed and therefore one must be cautious in applying conclusions drawn from Nuremberg to the *ad hoc* international criminal tribunals. He further notes that many of the core issues remain and the lessons of history should be ignored only at our peril.

Singh analyses the evolution of civilian superior responsibility with particular emphasis on non governmental actors lacking *dejure* authority, and possible models in national criminal codes suggested, outside of military superior responsibility, for *jus cogens* violations.[12] He analyses the issue of superior responsibility as applied by the ICTR and concludes that the ICTR Statute extends the application of superior responsibility, not codified in Protocol II, to Rwanda, an internal armed conflict. He further indicates that the ICTR and the ICTY statutes do not distinguish between military and civilian superiors in their plain language. Degan indicates that in their efforts to establish a quite original system of procedural and material rules of international criminal law, by means of the so-called "judge-made law' the two *ad hoc* tribunals for the former Yugoslavia and Rwanda hold a peculiar approach to the sources of that law.[13]

The most controversial of all is their concept of "customary law". Uvin gives an analysis of the current situation in Rwanda, after the genocide.[14] He indicates that since the genocide, the Rwandan Patriotic Front (RPF) the new power in Kigali, largely controlled by a group of Ugandan born Tutsi, is said to have killed tens of thousand of primarily Hutu people. The violence is partly an attempt to secure its rule and to fend off continued attacks from the remnants of the genocidal militia. In addition, attacks by the

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[12] A. Singh, 'Criminal Responsibility for Non-State Civillian Superiors Lacking *De Jure* Authority: A Comparative Review of the Doctrine of Superior Responsibility and Parallel Doctrines in National Criminal Laws', *Hastings International and Comparative Law Review*, Vol 28.2 pp 267-295

[13] V-D Degan, 'On the Sources of International Criminal Law', *Chinese Journal of International law* (2005) Vol 4 No. 1 pp 45-83

[14] P. Uvin, 'Reading the Rwandan Genocide', *International Studies Review*, Vol 3, No. 3 pp 75-79

RPF and its Congolese allies on refugee camps in the Democratic Republic of Congo may have killed tens of thousands more Hutus and have devastated the economy of the region. His work will be particularly useful in this study. It will be relied upon in assessing the effectiveness of the ICTR and whether its activities have had a deterrent effect against future conflicts, especially in Rwanda. Mose observes that since trials began in 1997, the ICTR has conducted cases involving 50 accused, involving a prime minister and several ministers, prefects, bourgmestres and other leaders, who would otherwise not have been brought to justice. Judgements have been rendered in respect of 25 accused with three acquittals. During the first mandate (1995-1999), the tribunal delivered ground breaking judgements concerning genocide such as Akayesu and Kambanda.[15] In the second mandate (1999-2003), trials involving 25 accused were ongoing. He concludes that the ICTR is an efficient judicial institution which has conducted fair trials, created important jurisprudence, and made a significant contribution to the development of international criminal justice.

Zacklin observes that within one decade, the notion that crimes such as genocide, war crimes, crimes against humanity and grave breaches of the Geneva Conventions can forever remain beyond the reach of internal law has been severely challenged.[16] A new culture of human rights and human responsibility, in which there is can be no impunity for such crimes has gradually taken root and the link between an established system of individual accountability and the maintenance of international peace and security has been confirmed. He further observes that today, in addition to the ICTY, there are

[15] E. Mose, 'Main Achievements of the ICTR', *Journal of International Criminal Justice,* Vol 3 (2005) pp 920-943

[16] R. Zacklin, 'The Failings of Ad Hoc International Tribunals', *Journal of International Criminal Justice,* Vol 2 (2004), pp 541-545

international tribunals of one variety or another prosecuting and judging serious crimes that have taken place in Rwanda, Sierra Leone, Kosovo and East Timor. He asks why the Nuremberg and Tokyo tribunals entered the realm of history rather than lend themselves to the progressive development and codification of international criminal law. For generations after World War II, the promotion of an international criminal court remained the province of a handful of academics and human rights activists who were generally perceived as marginal and quixotic. The legal and political problems were deemed to be insurmountable. States would not surrender their sovereignty to an international court and in any event, there was no international criminal code on the basis of which such a court would function. He further observes that the relative success in the advancement of the ideal of international justice which is represented by the establishment of the International Criminal Court (ICC) and the existence today of several ad hoc tribunals should not however, create a false sense of achievement. The ICTY and the ICTR were established more as acts of political contrition, because of the egregious failures to swiftly confront the situations in the former Yugoslavia and Rwanda, than as part of a deliberate policy, promoting international justice.

Shraga and Zacklin observe that since its inception, the ICTR has operated in the shadow of the ICTY. He further argues that there are many reasons why the Rwanda tribunal has not achieved the same high profile as the Yugoslav tribunal.[17] They examine the legislative history of the Statute of the Rwanda tribunal and the impact of certain political considerations on some if its provisions. They further examine the background to the establishment of the tribunal, its legal basis, its jurisdiction-territorial and subject

[17] D. Shraga and R. Zacklin, 'The International Criminal Tribunal for Rwanda', *European Journal of International Law*, Vol 7 (1996) pp 501-518

matter-the system of penalties and enforcement of sentences, the financing of the tribunal and the determination of its seat. They conclude with some reflections on the progress made and the difficulties encountered, the independence of the tribunal in judicial matters, its dependency on the United Nations in matters of administration and enforcement of orders and requests and its prospects of success within given political constraints.

Casese focuses on the problems and prospects for the enforcement of international humanitarian law through the prosecution and punishment of individuals accused of violations of international humanitarian law by international or national tribunals.[18] He first examines the factors that historically prevented the development of international tribunals and then looks at recent events, namely the end of the Cold War and the subsequent unleashing of unparalleled forces of nationalism and fundamentalism in different parts of the world, which have created an increased willingness on the part of states to institute mechanisms, both at the international and domestic levels, for international criminal justice. With the establishment of the ad hoc ICTY and ICTR, the enforcement of international humanitarian law has moved into a new and more effective phase. Yet, the clear merits of individual criminal prosecution by international tribunals cannot simply override the very real problems and obstacles they face. He examines these problems, arguing that state sovereignty is a major obstacle to the effective enforcement of international criminal justice. He concludes that justice can be done at the international level and that international criminal tribunals are vital in the struggle to uphold the rule of law.

[18] A. Casese, 'On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', *European Journal of International Law*, Vol 9 (1998) pp 2-17

Akhavan examines the establishment of the Rwanda tribunal; its coexistence and parallels with, as well as differences from the Yugoslav Tribunal, and the early phase of its activities.[19] He analyses this in light of perceptions and criticisms that the plight of African victims would not generate the same outcry as the suffering of Europeans. In other words, the Rwanda tribunal was established because of the precedential effect of the Yugoslav Tribunal. Akhavan argues that the ICTY and the ICTR provide a unique empirical basis for evaluating the impact of international criminal justice on post conflict peace building.[20] The pursuit of justice may be dismissed as a well-intentioned, but futile ritualistic attempt to restore equilibrium to a moral universe overwhelmed by evil. Moreover, the measuring capacity of punishment to prevent criminal conduct is an elusive undertaking, especially when a society is gripped by widespread habitual violence and an inverted morality has elevated otherwise "deviant" crimes to the highest expression of group loyalty. Yet an appreciation of the determinate causes of such large scale violence demonstrates that stigmatization of criminal conduct may have far reaching consequences, promoting post conflict reconciliation and changing the broader rules of international relations and legitimacy. Rudolph seeks to identify and analyze the myriad political and procedural obstacles to establishing an effective atrocities regime by examining humanitarian norms, the strategic interests of powerful states, and bureaucratic factors.[21] He also determines how the emergent regime may or may not be effective in achieving its primary goal (individual convictions) as well as its secondary and perhaps

[19] P. Akhavan, 'The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment', *American Journal of International Law*, Vol 90 No. 3 (1996) pp 501-510
[20] P. Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?', *American Journal of International Law*, Vol 95, No 1 (2001) pp 7-31
[21] C. Rudolph, 'Constructing an Atrocities Regime: The Politics of War Crimes Tribunals', *International Organization*, Vol 55 No. 3 (2001) pp 655-691

more salient goal: to manage violent conflict and reduce the likelihood of future transgressions. He further argues that although liberal humanitarian ideas have created the demand for political action, the process of dealing with brutality in war has been dominated by *realpolitik* that is, furthering the strategic interests of the most powerful states. However, by understanding the political interests and procedural obstacles involved, the international community can make institutional adjustments in the design and implementation of an atrocities regime to bridge the gap between *idealpolitik* and *realpolitik.*

Writers have taken divergent views regarding the efficacy of international criminal tribunals. From the literature quoted above, some take the view that such tribunals are useful in international criminal law as they serve a deterrent role against the eruption of future conflicts and develop important jurisprudence in this area. However, others take the view that such tribunals are no longer useful; they question their rules of procedure and issues of criminal justice and fair trial before these tribunals. Some have indicated that *ad hoc* tribunals have not had a significant impact since the earliest ones in Nuremberg and Tokyo. This study will take the latter view. It will highlight the weaknesses of the ICTR, which impede its capacity to promote national reconciliation in Rwanda and in the promotion of international peace and security.

Theoretical framework

The current prominence of accountability and its emergence as a significant element of international relations is a reflection of a desire for justice, as well as utilitarian objectives of post conflict peace building and the long term prevention of mass violence. Impunity is often a recipe for continued violence and instability. The examples of the former

Yugoslavia, Rwanda, Sierra Leone, and other transitional situations demonstrate how hard it is becoming even for *realpolitik* observers and die hard cynics to deny the preventive effects of prosecuting murderous rulers. Indeed, the rules of legitimacy in international relations have so dramatically changed since the inception of the ICTY the ICTR, and the ICC during the 1990s that accountability is arguably a reflection of "new realism". International criminal justice also cannot enjoy long-term credibility if it becomes an instrument of hegemony for powerful states. Understandably, in a slightly primitive international order built on the anarchy of power and state sovereignty, the early glimmerings of international criminal justice manifest themselves in selective *ad hoc* accountability.[22]

It is reasonable to assume that the progressive internationalization of international criminal justice will gradually spread from the periphery to the center and give rise to a more inclusive universal framework, possibly through a widely ratified International Criminal Court Statute together with vigilant and invigorated national or foreign courts.[23] If the international community is to move beyond the currently fragmented assortment of jurisdiction to a coherent system of justice, a great burden falls on the shoulders of influential states to set a fitting example. The reality of widespread atrocities in Africa and elsewhere leaves little room for judicial romanticism and even less for moral triumphalism. Achieving effective prevention against an entrenched culture of impunity and fostering inhibition against widespread rape, pillage, and murder in a context of habitual violence, cannot be realized through the efforts of a few *ad hoc* tribunals and national trials here and there. International criminal prosecutions may strengthen

[22] P. Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?' op cit
[23] Ibid

whatever internal bulwarks help individuals obey the rules of war, but the general deterrent effect of such prosecutions seems likely to be modest and incremental, rather than dramatic and transformative.[24]

Hypotheses

The study will seek to test the following hypotheses:

The weakness of the ICTR have a negative impact on its capacity to foster national reconciliation and promote international peace.

The weakness of the ICTR have no impact on its capacity to foster national reconciliation and promote international peace.

Methodology

This study aims at critically appraising the ICTR. It will rely mainly on secondary data, as much has been written on ad hoc international criminal tribunals, and more especially the ICTR. Research will be carried out in Kenya's leading libraries and archives. A systematic review of treaties, conventions, decided cases, resolutions and documents published by the ICTR and other international organizations will be carried out. Original works by the most eminent publicists will also be considered. Text books will also be utilized and so will be most recent texts that discuss changes in international criminal law. Articles by authoritative sources published and unpublished will also be sourced. Articles and books on the general development of international criminal law will give a historical background to the establishment of ad hoc criminal tribunals. More focused writings on the ICTR will be relied upon to provide the legislative history of the tribunal, its organs and mode of operation, and also the critical appraisal.

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[24] D. Wippman, Atrocities, Deterrence and the Limits of International Justice *Fordham International Law Journal* Vol 23 (1999) pp 473-488

Chapter outline

Chapter One

Chapter one includes the background to the research problem, the statement of the problem, the objectives of the research, the hypotheses and the literature review.

Chapter Two

Chapter two will mainly focus on the historical background of ad hoc international criminal tribunals, starting from the Nuremberg and Tokyo tribunals. It will trace the developments in this area, leading to the formation of the ICTY and the ICTR. It will trace the formation of the ICTR to the 1994 genocide in Rwanda, and discussions, deliberations and resolutions in the Security Council that led to the creation of the tribunal.

Chapter Three

Chapter three will provide an overview of the organs of the ICTR such as the Office of the Prosecutor (OTP) and the Chambers. It will also highlight the debates surrounding the choice of its location, the mode of its operation and the general rules of procedures that govern the conduct of criminal trials.

Chapter Four

Chapter four will examine the jurisprudence of the ICTR more specifically its contribution to the development of international criminal law through the indictment, prosecution and conviction of persons responsible for the genocide in Rwanda.

Chapter Five

Chapter five will critically appraise the ICTR's mandate and analyze whether it has achieved reasons for its establishment, namely, to promote national reconciliation and international peace.

Chapter Six

Conclusions

Chapter Two

Historical Background of the ICTR

Introduction

This chapter will outline the historical background of the ICTR. It begins with the rationale for the creation of ad hoc international criminal tribunals by giving a historical background dating from the establishment of the Nuremberg and Tokyo military tribunals. It also outlines the rationale for the creation of ad hoc tribunals after the end of the cold war and gives a brief outline of the ICTY and the reasons for its establishment. The historical background of the ICTR is also highlighted and debates regarding its establishment are also captured. It concludes with an analysis of the relevance of ad hoc tribunals to the enforcement of international criminal law.

Creation of *ad hoc* international criminal tribunals

The twentieth century has witnessed the development of many norms in the field of international humanitarian law and human rights law. The well being of the individual has become a central issue in international law and has influenced many other parts of that law. States have become liable for the treatment of individuals, be it foreigners or own nationals, and concepts like national sovereignty and non-intervention have undergone a considerable adaptation. At the same time, the twentieth century has been one of the most violent and brutal in human history. Not only did the First and Second World Wars witness the death of millions of people, but also did this century witness innumerable internal armed conflicts, which were normally at least as barbaric as international conflicts. The recent conflicts in Rwanda, Burundi, Democractic Republic

of Congo, Sierra Leone, Bosnia and Kosovo are but a few examples.[1] War criminals have been prosecuted at least since the time of the ancient Greeks, and probably well before that.[2] This may come as a startling revelation to those who consider the pursuit of war criminals to be a modern phenomenon, if not one particular to the twentieth century and on. Yet, if one considers human nature, and especially the conduct of humans during times of violent conflicts, this may not seem so outlandish. The major change, which has occurred in more recent times, has been the attempt to create the conditions for the international prosecution of war criminals, and those who have committed genocide and crimes against humanity.[3]

The international community has relied on five ways of responding to violations of international criminal law: doing nothing, granting amnesty, creating a truth commission, domestic prosecutions and creating ad hoc international tribunals.[4] The process of codification, and the signing of international treaties and conventions relating to war crimes and crimes against humanity, genocide and more latterly torture was accelerated in the first half of the twentieth century primarily because of the two World Wars.[5] The Kellog-Briand Pact of 1928 renounced the use of force as a legitimate means of resolving international disputes. Similarly, the end of the Second World War resulted in a spate of treaties and conventions dealing with the control of war in general, and more specifically with the protection of individual rights in warfare and beyond. One must not exclude the

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[1] H. A. M von Hebel, J. G Lammers and J. Schukking, *Reflections on the International Criminal Court* (The Hague, Kluwer Law International, 1999) pp31-33

[2] W. A. Schabas, '*An Introduction to the International Criminal Court*', (Cambridge, Cambridge University Press, 2001) pp 21-22

[3] Sypros Economides, 'The International Criminal Court: Reforming the Politics of International Justice' *Government and Opposition* (2003) pp 30-51

[4] G. S. Yacoubian Jr, 'Evaluating the Efficacy of the International Criminal Tribunals for Rwanda and the former Yugoslavia; *World Affairs*, Vol 165 (2003) pp 133-150

[5] S. R. Ratner and J. S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford, Oxford University Press, 2001) pp 30-51

Charter of the UN from this list, especially with regard to its provisions on international peace and security. But of more direct relevance are the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1948 Universal Declaration of Human Rights, and the 1949 Geneva Conventions on the Protection of those affected by armed conflict.[6] A half a century ago, two major events helped lay the foundation for the rule of law in the postwar world. The first was the signing of the UN Charter, a state-oriented document: Nothing in the Charter focuses explicitly on the responsibility of individuals. The other event was an agreement among the victorious allies on how to bring Nazi war criminals to trial. The United States took the lead in crafting a plan for prosecuting these men. That plan, which became the International Military Tribunal at Nuremberg, was presented to America's allies in San Francisco at the same time that the UN Charter was signed.[7]

On 20 November 1945, one month after it had formally been set up in Berlin on 18 October 1945, the International Military Tribunal convened in Nuremberg to open proceedings against the major war criminals of the Third Reich. Twenty-four individuals were on trial, both holders of government and party posts and a number of industry managers, as well as some Reich authorities, in the first place the *Reich* Cabinet, furthermore the General Staff and the High Command of the *Wehrmacht*, and those organizations that had been most closely involved in the criminal policies of Third Reich. The huge trial schedule was accomplished in an astonishingly short period of time. Final sentence was pronounced on 1 October 1946.

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[6] Sypros Economides, 'The International Criminal Court: Reforming the Politics of International Justice' op cit

[7] D. Scheffer, 'International Judicial Intervention' *Foreign Policy* (1996) pp 34

The death sentence was passed on twelve of the accused, seven were sentenced to long terms imprisonment, and three others were acquitted.[8] After the defeat of Germany, the British led by Churchill stated that it was enough to arrest and hang those primarily responsible for determining and applying Nazi policy, without wasting time on legal procedures; minor criminals, they suggested could be tried by specially created tribunals.[9] However, neither President F. D Roosevelt, nor Henry Stimson, the US Defense Secretary, agreed; nor indeed, did Stalin. In the end, they prevailed, and the Nuremberg tribunal was set up. The Americans advanced various arguments to support their view, later accepted by the other Allies. First, how could a defeated enemy be condemned without due process of law. To hang them without trial would mean to do away with one of the mainstays of democracy: no one can be considered guilty until his crimes have been proved in a fair trial. To relinquish such a fundamental principle would have put the Allies on a par with the Nazis who had ridden roughshod over so many principles of justice and civilization, when they held mock trials, or punished those allegedly guilty without even the benefit of judicial process. Secondly, those who set up the Nuremberg tribunal felt that the dramatic rehearsal of Nazi crimes and of racism and totalitarianism would make a deep impression on world opinion.

The trial was designed to render great historical phenomena plainly visible, and was conceived of as a means of demythologizing the Nazi State by exposing their hideous crimes for all humanity to see.[10] The third reason was a desire on the part of the allied powers to act for posterity. The crimes committed by the Third Reich and its Nazi

[8] C. Tomuschat, 'From Nuremberg to the Hague, *Law and State*, Vol 53 (1996) pp112-132
[9] F. Smith (ed) *The American Road to Nuremberg: the Documentary Record* (Stanford, California, Hoover Institution Press, 1982) pp31-33, 155-157
[10] Ibid

officials were so appalling that some visible record had to be left. A trial held on a grand scale would allow the tribunal to assemble a massive archive useful not only in court, but also to historians and to the generations to come. The trial was seen as a method of compiling a dossier of historical documents that might otherwise vanish; it would also serve as a lesson in history for future generations. A further rationale for the Nuremberg trial was the collective character of the Nazi crimes. The massacre of civilians and prisoners of war, the persecution of Jews, gypsies and political opponents were not only large-scale phenomena but in addition, indicative of a policy pursued assiduously by the highest echelons of the Nazis and applied by the whole military and bureaucratic apparatus. The crimes commissioned by the directives of the Nazi leaders belonged to a collective or system criminality such was their nature that it would have been impossible to punish them by using the courts of the state to which the perpetrators belonged.[11] On 26 July 1945, two weeks before the conclusion of the London Conference, the "Big Four" issued the Postdam Declaration announcing to the surprise of many, their intentions to prosecute leading Japanese officials for these same crimes.[12] Subsequently, on 19 January 1946, General Douglas MacArthur, Supreme Commander for the Allied Powers in Japan, approved, in the form of an executive order, the Tokyo Charter, setting forth the constitution, jurisdiction and functions of the International Military Tribunal for the Far East (IMTFE). Like the Nuremberg Charter, the Tokyo Charter, which was issued on 26 April 1946, included the newly articulated crimes against peace and humanity.[13] By and large, the Tokyo Charter was modeled on the Nuremberg Charter. However, there were

[11] R. Cesare, A. Nollkaemper, J. K. Kleffner, *Internationalized Criminal Courts and Tribunals* (New York, Oxford Publishers 1988) pp 327-342
[12] R. Bowring and P. Kornic (eds), *Cambridge Encyclopedia of Japan* (Cambridge, Cambridge University Press, 1993) p 107
[13] B. V. A. Roling and A. Cassese, *The Tokyo Trial and Beyond* (Cambridge, Polity Press, 1993) p 2

some differences between the two texts and the way they regulated the structure of the tribunals and the charges that could be brought against the defendants. It is also notable that the bench comprised persons from newly independent countries such as India and the Philippines. The Tokyo Trial which commenced on 3 May 1946 and lasted for approximately two and a half years was the source of much controversy both during and after the event. Some have claimed that the trial was either a vehicle for America's revenge for the treacherous attack on Pearl Harbour, or a means of assuaging American national guilt over the use of atomic weapons in Japan. Others, defence counsel at the trial included, attacked the trial's legitimacy on legal grounds.[14]

The major drawback of the international tribunals was that they imposed 'victors' justice over the defeated. They were composed of judges appointed by each of the victor powers; the prosecutors too were appointed by each of those powers and acted under the instructions of each appointing state, but at Tokyo there was a chief prosecutor or Chief of Counsel as he was called namely the American Joseph B. Keenan and ten associate prosecutors. Thus, the view must be shared that the two tribunals were not independent international courts proper, but judicial bodies acting as organs common to the appointing States.[15]

Post-Cold War and the development of *ad hoc* tribunals

Various factors led to the establishment of criminal tribunals in the early 1990s. The end of the Cold War proved to be of crucial importance. It had sufficient effects. For one thing, the animosity that had dominated international relations for almost half a century dissipated. In its wake, a new spirit of relative optimism emerged, stimulated by the

[14] R. Cesare, A. Nollkaemper, J. K. Kleffner, *Internationalized Criminal Courts and Tribunals* op cit
[15] M. Lippman, "Nuremberg: Fourty-Five Years Later", *Connecticut Journal of International Law*, Vol 7 (1991) p 1

following factors: a clear reduction in the distrust and mutual suspicion that had frustrated friendly relations and cooperation between the Western and the Eastern bloc, the successor States to the USSR came to accept and respect some basic principles of international law and as a result, there emerged unprecedented agreement in the UN Security Council and increasing convergence in the views of the five permanent members, with the consequence that this institution became able to fulfill its functions more effectively.[16]

Another effect of the end of the Cold War was no less important. Despite the problems of that bleak period, during the Cold War era, the two power blocs had managed to guarantee a modicum of international order, in that each of the superpowers had acted as a sort of policeman and guarantor in its respective sphere of influence. The collapse of this model of international relations ushered in a wave of negative consequences. It entailed a fragmentation of the international community and intense disorder which, coupled with rising nationalism and fundamentalism, resulted in a spiraling of mostly internal armed conflicts, with much bloodshed and cruelty. The ensuing implosion of previously multi-ethnic societies led to gross violations of international humanitarian law on a scale comparable to those committed during the Second World War.[17] Another crucial factor contributing to an enlarged need for international criminal justice was the increasing importance of the human rights doctrine, which soon became a sort of "secular" religion. This doctrine's emphasis on the need to respect human dignity and consequently to punish those who seriously attack such dignity begot the quest for, or at least gave a robust impulse to, international criminal

[16] M.C Bassiouni, *The Statute of the International Criminal Court: A Documentary History,* (Ardsley, New York, Transnational Publishers, 1998) pp13-15
[17] Ibid

justice. This period can be characterized by the development of institutions empowered to prosecute and punish serious violations of international humanitarian law and can be subdivided into two distinct stages. The first is comprised by the establishment by the UN Security Council of the two ad hoc tribunals for the former Yugoslavia and Rwanda and the second by the eventual adoption, through the multilateral treaty-making process, of the Statute of the International Criminal Court.[18]

International Criminal Tribunal for the former Yugoslavia (ICTY)

The conflicts which erupted in amongst other places, the former Yugoslavia and Rwanda served to rekindle the sense of outrage felt at the closing stage of the Second World War.[19] Thus, the UN Security Council set up ad hoc tribunals pursuant to its power to decide on measures necessary to maintain or restore international peace and security. In 1993, the ICTY was established with powers to exercise jurisdiction over grave breaches of the Geneva Conventions, violations of the laws and customs of war, genocide, and crimes against humanity allegedly perpetrated in the former Yugoslavia since 1 January 1991. The response of the international community to the conflict in Yugoslavia had been tardy and conflicting due to impotence at the military and political levels. The establishment of a tribunal was thus seized upon during the conflict not only as a belated face saving measure but also in the pious hope that it would serve as a deterrent to further crimes. As the UN Security Council itself noted, the ICTY was established in the belief that an international tribunal would contribute to ensuring that such violations are halted

[18] R. Cesare, A. Nollkaemper, J. K. Kleffner, *Internationalized Criminal Courts and Tribunals* op cit

[19] See for example, the letters to A. Cassese of Lawrence Eagleburger of 8 May 1996 and Elie Wiesel of 28 June 1996 reprinted in *the Path to the Hague: Selected Documents on the Origins of the ICTY* (UN: ICTY, 1996) at 89 and 91 respectively.

and effectively redressed.[20] In the terms of the ICTY's establishment, the idea that an international court should be set up to try those responsible for war crimes and crimes against humanity committed in the former Yugoslavia was spontaneously mooted in various quarters: in the European Community, notably at the instigation of Germany and France, and in the United States. The proposal for the establishment of the *ad hoc* tribunals was preceded by a number of UN statements proclaiming the principle that the authors of grave breaches of the Geneva Conventions and other crimes were 'individually responsible' and would be called to account. The Security Council established the ICTY in its resolution 827 of 25 of May 1993. A striking feature of this Resolution was that the Security Council determined that the situation in the former Yugoslavia, and in particular in Bosnia and Herzegovina where there were reports of mass killings, massive, organized and systematic detention and rape of women and the practice of ethnic cleansing constituted a threat to international peace and security.[21] The setting up of the ICTY has given rise to many objections.

In brief, the principal criticisms were that: the tribunal was established to make up for the impotence of diplomacy and politics, and revealed the inability of both the Great Powers and the UN Security Council to find a swift and proper solution to the conflict in the former Yugoslavia; the tribunal was therefore conceived of a sort of 'fig leaf'; by establishing the tribunal, the Security Council exceeded its powers under the Charter, adopting an act that was patently *ultra vires* and by the same token, by creating a criminal court dealing only with crimes allegedly committed in a particular country, instead of granting the new court jurisdiction over crimes committed everywhere in the world, the

[20] G. Robertson, *Crimes against Humanity-The Struggle for Global Justice* (London, Penguin, 2000) p300
[21] D. P. Forsythe, ' Politics and the Interntional Tribunal for the Former Yugoslavia, *Criminal Law Forum* Vol 5 (1994) pp 401-422

Security Council had opted for 'selective justice'. It was also argued that the tribunal was clearly based on an anti-Serbian bias and that there was no complete separation at the tribunal of the prosecutorial function from the judicial one.[22] The subject matter of jurisdiction of the ICTY includes: the grave breaches of the Geneva Conventions of 1949 (Article 2), the violations of the laws of customs of war (Article 3), genocide, (Article 4) and crimes against humanity (Article 5). According to Article 1, the temporal jurisdiction extends to over serious violations of international humanitarian law committed in the territory of former Yugoslavia since 1991. According to Article 9 of the Statute, the tribunal and national courts have concurrent jurisdiction but with primacy for the tribunal. The tribunal consists of Trial Chambers, consisting of three judges each and an Appeals Chamber, consisting of five judges. There is one prosecutor.[23]

Historical background of the ICTR

The end of the Cold War, which paralyzed the United Nations from its inception, was a cause for celebration and hope. Following the historic Security Council Summit Meeting of January 1992, the then Secretary General of the United Nations, Boutros Boutros-Ghali spoke of a growing conviction "among large and small, that an opportunity has been regained to achieve the great objectives of the UN Charter-a United Nations capable of maintaining international peace and security, of securing justice and human rights and promoting, in the words of the Charter, "social progress and better standards of life in larger freedom."[24] He warned however, that this opportunity "must not be squandered"

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[22] J. C. O'Brien, ' The International Tribunal for Violations of International Humanitarian Law in the former Yugoslavia', *American Journal of International Law* Vol 87, (1993) pp 639-659

[23] H. A. M von Hebel, J. G Lammers and J. Schukking, *Reflections on the International Criminal Court* the Hague, Kluwer Law International, 1999) pp31-33

[24] Report of the Secretary General on the Work of the Organization, UN. GAOR, 47th Sess, para, 3, UN Doc A/47/277, S/24111 1992)

and that the United Nations "must never again be crippled as it was in the era that has now passed. In the months that followed, the international community was to experience shocking aberrations, reminiscent of a dark and seemingly remote past. Reports of "ethnic cleansing" and "death camps" surfaced from Bosnia-Herzegovina, only to be followed by the singular cataclysm of Rwanda.[25] Torn by ethnic conflict between the Tutsis and the Hutus, Rwanda experienced Africa's worst genocide in modern times. The conflict had origins in Belgium's colonial rule, which favored the minority Tutsis and fostered differences between the two groups. In 1962, when the country gained independence, Gregoire Kayibanda headed the first recognized Hutu government. Juvenal Habyarimana seized power in a military coup a decade later, following the massacre of thousands of Hutus in neighboring Burundi. For nearly twenty years under Habyarimana, ethnic relations simmered with sporadic outbreaks of violence. In 1993, Habyarimana signed a short-lived power-sharing agreement with the Tutsis, aiming to end the fighting. In April 1994, the plane carrying Habyarimana and the President of Burundi was shot down. The event triggered the notorious genocide. Extremist Hutu militia aided by the Rwandan army launched systematic massacres against Tutsis. The planned and systematic mass killing of the Tutsi minority group in Rwanda following the death of the Presidents of Rwanda and Burundi in the air crash of 6 April 1994, was the latest in a long series of massacres perpetrated against the Tutsis since the overthrow of the Tutsi royal family in 1959. Historically, massacres were committed in 1959, 1963, 1966, 1973, and since 1990 almost annually, in 1991, 1992 and 1993. On previous occasions, the Security Council had limited itself to rhetorical intervention and most

[25] P. Akhavan, 'Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda', *Duke Journal of International Comparative and International Law* (Vol 7) 1997, pp 325-348

recently, the dispatching of a fact finding commission. Over the years, a culture and climate of impunity had been allowed to grow and fester. [26] The consequences of this became horribly and tragically apparent in the months following the April air crash. The scale of the carnage and violence-between 500,000 to one million people are estimated to have perished in a period of less than four months-was unprecedented. The member states of the international community, despite desperate calls for assistance from some of its leaders, proved unable or unwilling to take the necessary measures to halt the genocide.[27]

Although the evidence that genocide had been committed in Rwanda was abundant[28] the Security Council, nevertheless decided to follow the step by step approach it had adopted in the establishment of the Yugoslav tribunal, and requested the Secretary General to establish a Commission of Experts to provide him with evidence of serious violations of international humanitarian law and acts of genocide committed in Rwanda.[29] The Commission of Experts established by the Secretary General confirmed in its Final Report the existence of overwhelming evidence that acts of genocide within the meaning of Article II of the Genocide Convention had been committed against the Tutsi ethnic group by Hutu elements in a concerned, planned, systematic and methodical way. It also concluded that although crimes against humanity and other serious violations of international humanitarian law had been committed by individuals on both sides of the conflict, there was no evidence to suggest that acts committed by Tutsi were perpetrated with an intention to destroy the Hutu ethnic group, as such, and therefore were not within

[26] D. Shraga and R. Zacklin, 'Symposium Towards and International Criminal Court, The International Criminal Tribunal for Rwanda', *European Journal of International Law*, (1996) pp 501-518
[27] Ibid
[28] Report of the Secretary General on the Situation in Rwanda UNSC, UN Doc. S/1994/640 (1994)
[29] SC Res 935, 1 July 1994, UN Doc S/RES/935 (1994)

the meaning of the Genocide Convention.[30] Furthermore, the Commission recommended that the Security Council takes all necessary and effective action to ensure that the individuals responsible are brought to justice before an independent and impartial international criminal tribunal, and suggested that the Statute of the Yugoslav tribunal be amended to ensure that its jurisdiction covers crimes under international law committed during the armed conflict in Rwanda that began on 6 April 1994. On November 8, 1994, having determined that the genocide and other systematic, widespread and flagrant violations of international humanitarian law committed in Rwanda constitute a threat to international peace and security within the scope of Chapter VII of the United Nations Charter, the Security Council adopted Resolution 955 whereby it established, as an enforcement measure, the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January1994 and 31 December 1994 (Rwanda tribunal).[31] In establishing the Rwanda tribunal, however, the Security Council decided that drawing upon the experience gained in the Yugoslav tribunal, a one-step process and a single resolution would suffice. Consonant with the recommendation of the Commission of Experts, a draft document circulated by the United States had initially proposed amending the Yugoslav tribunal's mandate to extend its jurisdiction to Rwanda.

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[30] D. Shraga and R. Zacklin, 'Symposium Towards and International Criminal Court, The International Criminal Tribunal for Rwanda', *European Journal of International Law*, (1996) pp 501-518

[31] P. Akhavan, 'The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment', *The American Journal of International Law*, Vol 90 No. 3 (Jul 1996) pp 501-510

The proposal was rejected because of the misgivings of some Council members who feared that the expansion of an existing *ad hoc* jurisdiction would lead to a single tribunal that would gradually take on the characteristics of a permanent judicial institution. Although the Security Council eventually opted to establish a separate tribunal for Rwanda, it recognized that its coexistence with the Yugoslav tribunal dictated a similar legal approach, as well as certain organizational and institutional links so as to ensure a unity of legal approach, as well as economy and efficiency of resources. Accordingly, Article 12 (2) of the Rwanda Statute provides that the members of the appeals chamber of the Yugoslav tribunal shall also serve as the members of the Appeals Chamber of the international tribunal for Rwanda. Similarly, Article 15 (3) provides that the prosecutor of the Yugoslav tribunal shall also serve as prosecutor for the Rwanda tribunal, although he or she shall have additional staff, including an additional Deputy Prosecutor to assist with prosecutions before the ICTR.[32]

The government of Rwanda expressed the hope that the trial of perpetrators of genocide and their grave violations of international humanitarian law by an external, impartial body in the short term would contribute to peace and reconciliation among the parties to the conflict. It was also its expectation, however unrealistic, that the international tribunal would undertake the investigation and prosecution of most, if not all the detainees held in Rwandan prisons. The realization that an international tribunal is not equipped to undertake a prosecution of thousands of detainees was probably one of the reasons why the Government of Rwanda eventually withdrew its support for the international tribunal. Notwithstanding its initial request that an international tribunal for Rwanda be established and its active participation in the drafting of the resolution

[32] Ibid

establishing the tribunal, at the time of its adoption, Rwanda voted against the resolution. What prompted its negative vote, quite apart from the arguments formally advanced, was the realization that the international tribunal, as it finally emerged, was not responsive to the wishes of the Government, in particular that capital punishment be imposed on the former leaders and principal planners of the of the crime of genocide.[33] At the same time, the Government of Rwanda continued to express its support and willingness to cooperate with the tribunal, which as a Chapter VII based tribunal, was the only body endowed with the power to compel states to surrender former leaders who had sought refuge in their territories.

Rwanda felt that the temporal jurisdiction of the tribunal was inadequate, the composition and structure of the tribunal inappropriate and ineffective, its subject-matter included crimes which ought to be tried by the national courts and the tribunal's seat should be in Kigali. Rwanda opposed the possibility of convicted persons serving their sentences outside its territory and the reality that convicted persons could not be sentenced to capital punishment.[34] Eighteen months after the adoption of Security Council 827 (1993) which established the International Tribunal for the Former Yugoslavia, the Council adopted resolution 955 by which it decided to establish an international tribunal for the purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in their territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States.

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[33] D. Shraga and R. Zacklin, 'Symposium Towards and International Criminal Court, The International Criminal Tribunal for Rwanda', op cit

[34] E. Mose, 'Main Achievements of the ICTR', *Journal of International Criminal Justice* Vol 3 (2005), pp 920-943

The statute of the international tribunal for Rwanda was annexed to resolution 955 adopted under Chapter VII of the United National Charter. It was drafted and negotiated by members of the Security Council, drawing heavily upon the Statute of the Yugoslav tribunal. The debate which preceded the adoption of resolution 827 on whether the Security Council had the power to establish an international tribunal by means of a Chapter VII resolution and as a measure to restore international peace and security was for all practical purposes, a moot by the time resolution 955 was adopted. Members of the Council who in the case of the Yugoslav tribunal had objected the setting up of an international tribunal, other than by means of an international treaty, on the grounds that by so doing, the Security Council had extended its constitutional powers beyond what is necessary to maintain international peace and security, reiterated their position of principle, but voted in favour, or abstained. Notwithstanding declarations and statements to the contrary, Security Council resolution 827 had indeed established a precedent for the establishment of a Chapter VII resolution- based tribunal. But while the question whether the Security Council is empowered to establish an international judicial body, if it considers that to be measure necessary to maintain or restore international peace and security appears to have been settled, the question of whether in the case of Rwanda, the establishment of an international tribunal by a Chapter VII resolution was legally justified at the time of its adoption, gave rise to some doubts.[35]

Unlike the Yugoslav tribunal which had been established while the conflict was still underway and as a measure to prevent and deter further atrocities, the Rwanda tribunal was established at a time when, although peace and national reconciliation had not yet

[35] D. Shraga and R. Zacklin, 'Symposium Towards and International Criminal Court, The International Criminal Tribunal for Rwanda', op cit

been achieved, the civil war, at least, was virtually over.[36] Sensitive to criticism that the establishment of the ICTY represented yet another illustration of the disproportionate attention paid to the problems of Europe *vis-à-vis* the developing world, the international community was also anxious to establish a tribunal for Rwanda so as to assuage its conscience and shield itself from accusations of double standards. An additional feature leading up to the establishment of the ICTR was that, in the early stages, the proposal to establish an international tribunal was an initiative of the new Rwandan government. As they set about their task of post war reconstruction, the new government had initially felt that one means of attracting international blessing for the new regime would be through a national process of self examination and judicial condemnation of the worst abuses that had occurred during the civil war.[37]

It is instructive to note that it was not the massive and systematic scale of human rights violations as such that triggered Security Council action, but rather the determination that such violations, in particular circumstances of the former Yugoslavia and Rwanda constituted a threat to international peace and security as required by Chapter VII of the UN Charter. In other words, it is conceivable that even unconscionable atrocities may fall short of the juridical threshold required for collective enforcement action by the United Nations.

However invidious this instrumentalization of human rights may be from a moral perspective, the political significance for world order of the linkage between international criminal justice and the maintenance of peace should not be disparaged. In effect, the establishment of the Yugoslav and Rwanda tribunals is an unprecedented institutional

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[36] Ibid

[37] R. Cesare, A. Nollkgempter and J. K Kleffner, *Internationalized Criminal Courts and Tribunals,* op cit

expression of the indivisibility of peace and respect for human rights. It represents a radical departure from the traditional realpolitik paradigm which has so often and for so long ignored the victims of mass murder and legitimized the rule of tyrants in the name of promoting the purported *summum bonum* of stability.[38] One promising feature of the Rwanda tribunal is that, unlike those in the former Yugoslavia, the leading Rwandese perpetrators of genocide, were defeated militarily, removed from state institutions and positions of leadership, and are either in refugee camps in neighbouring countries or in exile elsewhere. Accordingly, the prospect of arresting Rwandese subjects is more feasible, although the cooperation of Rwanda and third states such as Zaire is vital and poses some difficulties. The legislative history of the statute of the Rwanda tribunal is the history of its negotiation between members of the Security Council, who sought to apply an already existing model of international criminal jurisdiction to Rwanda, and a country ravaged by genocide seeking to adapt such a model to its own national circumstances, needs and interests, not the least of which, however, was political.

The statute of the Rwanda tribunal does not limit the personal jurisdiction of the tribunal to major criminals, as did the Nuremberg Charter, and thus, in principle, allows the Prosecutor a larger discretionary power in the choice of the accused. But while the pursuit of political and military leaders is inherent to an international criminal jurisdiction, of the twenty-one accused so far indicted by the Rwanda tribunal, only a handful were key members of the political and military leadership at the time of the events. In the Rwanda context, however, the over-all responsibility of the accused for the

[38] P. Akhavan, 'Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal of Rwanda' *Duke Journal of International Comparative and International Law* (Vol 7) 1997, pp 331-353

crimes committed cannot be determined solely on the basis of their prominence or rank in the political or military hierarchy. In a country where State sanctioned genocide was instigated and committed by and against the people, the most prominent on the list of wanted criminals were military officers, businessmen and company directors, mayors and heads of prefectures and other civil service functionaries who were not necessarily ranked in any given hierarchy.[39]

The ICTY and ICTR were convened, in part to demonstrate the potential effectiveness of modern international criminal law in action. A permanent international criminal court was considered at the end of the First World War, and again after Nuremberg, but was shelved until 1998. Modern international criminal law has established beyond any doubt that crimes as serious as genocide are the concern of the international community. The issue yet to be determined is whether the international community must act collectively to bring serious violators of genocide and other serious crimes to justice through the development of temporary or permanent international criminal courts.[40]

With the establishment of the ad hoc international criminal tribunals for the former Yugoslavia and for Rwanda, the enforcement of international humanitarian law has moved into a new and more effective phase.[41] The establishment of the ICTY was an important event because it showed that an international tribunal could, in fact work. The Statute of the ICTY, which was a subsidiary organ of the Security Council acting under Chapter VII, gave it legitimacy and credibility, while the financing of the tribunal

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[39] D. Shraga and R. Zacklin, 'The International Criminal Tribunal for Rwanda', *European Journal of International Law*, Vol 7 No 4 (1994) p 360

[40] G. S. Yacoubian Jr, 'Evaluating the Efficacy of the International Criminal Tribunals for Rwanda and the former Yugoslavia', *World Affairs*, Vol 165 (2003) pp 133-150

[41] A. Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' *European Journal of International Law* Vol 9 (1998), pp 2-17

through assessed contributions provided it with the necessary administrative and financial stability.[42]

[42] R. Zacklin, 'The Failings of *ad hoc* International Tribunals', *Journal of International Criminal Justice*, Vol 2 (2004) 541-545

Chapter Three

Structure and Organs of the ICTR

Introduction

This chapter will examine the structure and the operations of the ICTR. It begins with and analysis of the location of the ICTR, more specifically the debates regarding its location and the position of the Rwandan government. It will proceed to analyze the jurisdiction of the tribunal its structure and organs including its Judges, Office of the Prosecutor, and the general rules of procedure that govern the conduct of trials.

Location of the ICTR

The UN Security Council located the International Criminal Tribunal for Rwanda in Arusha[1], Tanzania, far from the cauldron of post-genocide Rwanda, in large part to insulate the court from political forces that could harm the integrity of this experiment in international law.[2] In its request that an international tribunal be established with the expectation that it would undertake the prosecution of thousands of Rwandan detainees, the Government of Rwanda was no doubt convinced that the international tribunal, once established, would be located in Rwanda. If for no other reason, the difficulties encountered in the transfer of hundreds of detainees across the border, let alone to The Hague, would have made it impossible to decide on any other location. Even when it became clear that the tribunal would not undertake mass prosecutions, the Government still considered it vital that the tribunal be situated in Rwanda and that its proceedings be widely and publicly disseminated so that justice could be seen to be done by the local

[1] UN Resolution 977 of February 22 1995.

[2] V. Peskin, 'Courting Rwanda, The Promises and Pitfalls of the ICTR Outreach Programme', *Journal of International Criminal Justice*, Vol 3 (2005),950-961

population. Rwanda has maintained its position notwithstanding its negative vote in the Council. Its agreement, in a spirit of cooperation, that the seat could be located elsewhere greatly facilitated the final determination of the location of the seat. Among members of the Council however, there was no unanimity of opinion. Some of the co-sponsors considered that The Hague should have been the location of the seat, with the possibility of holding trials, when necessary, elsewhere-meaning Rwanda. Others expressed the view that Rwanda should be the location of the seat of the tribunal with its Prosecutor's Office, Registry and Trial Chambers, rather than the sporadic venue of trial proceedings.

The majority of the Council's members preferred, however, an "African seat", which while not necessarily meaning Rwanda, indicated a strong preference for a location in close proximity to the witnesses, evidence and the place where genocide had occurred.[3] Since no agreement could be reached among the members on the concept of the "seat" or its location, it was decided to defer the decision until such time as the Secretary-General had had the opportunity to examine the various options on the basis of criteria established by the Council. In a spirit of compromise, therefore, and with a view to accommodate the wishes of Rwanda, the Council decided that quite independently of the formal seat of the tribunal, an Office be established and proceedings be conducted, where feasible and appropriate, in Rwanda. A symbolic presence of the tribunal was thus ensured in Rwanda. In examining the criteria for the location of the Trial Chambers in relation to Rwanda and the United Republic of Tanzania,[4] the Secretary-General focused primarily on considerations of justice and fairness and the proximity to witnesses, evidence and the

[3] D. Shraga and R. Zacklin, 'Symposium Towards an International Criminal Court; The International Criminal Tribunal for Rwanda', *European Journal of International Law*, Vol 7 (1996) pp501-518

[4] Report of the Secretary-General pursuant to paragraph 5 of the Security Council Resolution 955 (1994), UNSC, UN Doc. S/1995/134, (1995) para 36

scene of the crime. In the prevailing circumstances in Rwanda, it was clear that there could have been serious security risks in bringing in leaders of the previous regime to stand trial before the tribunal. Furthermore, justice and fairness also required that the Prosecutor, as an organ of the tribunal, enjoy full cooperation of the host country and would appear to be free in his decision to request the host country to surrender any one accused belonging to its own ethnic or political group. Reality and appearance therefore suggested that the seat of the tribunal be located in a neutral territory. Other alternative locations, in particular Nairobi were considered and rejected. The Kenyan government ultimately decided that it would not be in a position to provide a seat for the tribunal in Nairobi.[5] Arusha, in the United Republic of Tanzania, as neutral territory in close proximity and accessibility to Rwanda and with the advantage of having readily available premises, was therefore recommended, subject to appropriate arrangements between the UN and the Government of Tanzania, as the seat of the Rwanda tribunal.[6]

Mandate and jurisdiction of the ICTR

As prescribed by the Security Council, the tribunal has 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 neighboring states, between 1 January and 31 December 1994. A noticeable difference between the Rwanda and Yugoslav tribunal relates to the scope of the subject matter of jurisdiction. The provisions on genocide in both Statutes are a verbatim reproduction of Articles II and III of the Genocide Convention. Unlike the Yugoslav Statute, however,

[5] E. Mose, 'Appraising the Role of the ICTR, Main Achievements of the ICTR', *Journal of International Criminal Justice* Vol 3 (2005) pp 920-943

[6] D. Shraga and R. Zacklin, 'Symposium Towards an International Criminal Court; The International Criminal Tribunal for Rwanda', *European Journal of International Law* (1996) pp 501-518

the Rwandan Statute, in defining crimes against humanity in Article 3, does not require a nexus with armed conflict,[7] although it requires an additional link between the proscribed inhumane acts and discriminatory grounds. In the seminal case of *Prosecutor vs Tadic*, the Appellate Chamber of the Yugoslav tribunal unanimously held that it is now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 of the Yugoslav Statute more narrowly than necessary under customary international law.[8] Unlike the Yugoslav Statute (Article 5), the Rwanda Statute expressly requires the enumerated inhumane acts to be committed against a civilian population on national, political, ethnic, racial or religious grounds. Article 6 (c) of the Nuremberg Charter; however does not condition crimes against humanity as such on the existence of discriminatory grounds. It prohibits serious inhumane acts against any civilian population or persecution on political, racial or religious grounds, indicating two separate categories of crimes against humanity.[9]

The ICTR complement to the *Tadic* decision on jurisdiction came in 1997, when the former burgomaster of Ngoma commune Joseph Kanyabashi challenged the jurisdiction of the ICTR to consider charges against him. The defense argued that the ICTR was "just

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[7] P. Akhavan, 'The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment', *American Journal of International Law*, Vol 90 No. 3 (1996) pp 501-510

[8] The Prosecutor vs Tadic Case No. IT-94-1-AR72 of 2 October 1995

[9] See the formulation of the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal (1950) 2 Y. B Int' L. Comm'n 374, 377 para 120, UN Doc. A/Cn./SER.a/1950/Add.1

another appendage of an international organ of policing and coercion, devoid of independence. According to Kanyabashi, due to the tribunal's political rather than judicial character, it did not retain the power to render a legal judgment. The Trial Chamber rejected Kanyabashi's challenge, pointing to the procedural protections in place to ensure fair, legal process. However, Kanyabashi's assertions have returned to haunt the judges of the tribunals as political pressure to successfully implement the Completion Strategies has seeped into the daily workings of the institutions. In the particular case of the ICTR, which was viewed not only as an appendage of the Security Council, but also as an annex to the ICTY, Security Council's involvement in implementation of the Closing Strategies could lend credence to assertions of dependency and illegitimacy. While the Trial Chamber in *Kanyabashi* and the Appeals Chamber in *Tadic* argued that the structural protections in place fostered judicial independence in the tribunals, it can hardly be denied that a unique political dimension to the creation, operation and closure of these institutions exists.[10] The ICTR was of limited jurisdiction. It was created to deal with acts of genocide and crimes against humanity committed by individuals on Rwandan territory and by Rwandan citizens on the territory of neighbouring states, in 1994. As negotiations over the terms for establishing an ICTR proceeded, however, Rwanda objected to a number of provisions.[11] Some of these original points of tension remain as issues that may tend to limit or at least to call into question the efficacy of the ICTR. The tribunal's competencies extend to violations of international humanitarian law, including specifically genocide, crimes against humanity and violations of Article III to the Geneva

[10] Prosecutor v. Kanyabashi, Case No. ICTR-96-15-T,
[11] P. Akhavan, 'The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment', *The American Journal of International Law*, Vol 90 No. 3 (Jul 1996) pp 501-510

Conventions and Additional Protocol II.[12] First, Rwanda took exception to the time period over which the ICTR would have jurisdiction. According to the ICTR Statute then being drafted, only crimes committed between January 1 and December 31, 1994 would come within the jurisdiction of the ICTR. Manzi Bakuramutsa, then Rwandan Ambassador to the United Nations, argued that such limited temporal jurisdiction would prevent the ICTR from fully capturing within its prosecutorial scope the criminal activities that culminated in the genocide of 1994. Those activities, he observed, began with planning and sporadic massacres "pilot projects for extermination" as he called them, dating back to 1990.

In evaluating this objection, one must understand not only the ICTR's temporal jurisdiction, but also its subject-matter jurisdiction. While the ICTR was to have jurisdiction over actual killings, rapes, and other acts constituting genocide, war crimes, and crimes against humanity only if those acts were committed in 1994, it is likely that under the terms of the ICTR Statute, the planning, preparation, or aiding and abetting of those 1994 acts also can form the basis for criminal liability through complicity, even if that preparation occurred prior to 1994. Final determination of whether that form of accomplice liability will be recognized by the ICTR as coming within its temporal jurisdiction must await a judicial ruling. If the aiding and abetting prior to 1994 of crimes that were completed in 1994 is determined to come within the temporal jurisdiction of the ICTR, then not quite as much was lost by the limitation on the ICTR's temporal

[12] V. Peskin, 'Courting Rwanda, The Promises and Pitfalls of the ICTR Outreach Programme', *Journal of International Criminal Justice*, Vol 3 (2005) pp 950-961

jurisdiction as one might at first have imagined.[13] Nevertheless, even if that liberal interpretation of accomplice liability is adopted by the ICTR, there are certain crimes that the Statute's temporal limitation will indeed exclude. For example, killings and other crimes committed in massacres prior to 1994 would be excluded. In addition, significant acts of incitement would not be covered. It appears that incitement to commit genocide is punishable under the ICTR Statute even without proof that the incitement actually led to subsequent acts of genocide. Unlike planning or aiding and abetting, which form the basis for criminal liability only when they can be linked to a completed crime, it appears under the ICTR Statute that incitement to genocide is a crime in itself. Here, the temporal jurisdiction limit of the ICTR would be significant: incitements to genocide that occurred prior to 1994 (and they did) would be excluded from the prosecutorial scope of the International tribunal.[14]

Pursuant to Chapter VII of the United Nations Charter, the Security Council defined the humanitarian violations in Rwanda as a threat to international peace. Together with Articles 39 and 41 of the Charter provide the Security Council with the power to decide which enforcement measures to take to maintain international peace.[15] The tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute. The territorial jurisdiction of the tribunal shall extend to the territory of Rwanda, including its land surface and airspace as well as to the territory of neighbouring states in respect of serious violations of international humanitarian law committed by Rwanda citizens. The temporal jurisdiction of the tribunal for Rwanda shall extend to a period

[13] M. Morows, 'The Trials of Concurrent Jurisdiction: The Case of Rwanda', *Duke Journal of Comparative Law*, Vol 7 pp 349-380
[14] Ibid
[15] U. N. Charter, arts 39, 41

beginning 1January 1994 and ending on 31 December 1994.[16] Using this discretion, the Security Council concluded the tribunal was the appropriate response to the Rwandan threat. The conflict in Rwanda had both internal and international elements. Although a civil conflict originally, the flight of Rwandans into Zaire and other neighbouring countries has caused the conflict to escalate beyond Rwanda's borders. Thus, able to define this human tragedy as international, the Security Council was free to apply the entirety of The Hague Conventions, Geneva Conventions and Protocol I, which provides remedies to only international conflicts.[17] The importance of this decision must not be underestimated. The ethnic tensions in Rwanda have manifested themselves primarily in the form of an internal conflict, as opposed to Yugoslavia which developed into an international civil war. The United Nations made a monumental leap reshaping future international law by defining Rwandan violations of humanitarian law as factors determining a threat to international peace.[18] Secondly, if the United Nations had deemed the Rwandan conflict to be internal or civil, Article 3 of the Geneva Conventions would apply, but generally would not give rise to universal criminal jurisdiction. Recently, there has been a trend towards the international criminalization of common Article 3 offences of the Geneva Conventions during non international armed conflicts.

The Security Council's decision to define these conflicts as international was a deliberate attempt to expand the likelihood for an international response to non-international violations of humanitarian law in order to avoid any questions of international jurisdiction over the Rwandan criminals. Thus, through the creation of the

[16] Article 7 of the Statue of the International Tribunal for Rwanda
[17] R. Meron, 'War Crimes in Yugoslavia and the Development of International Law', *American Journal of International Law*, Vol 88 (1994) pp 78-80
[18] Ibid

Rwandan tribunal, the United National has established two precedents of law. First, it defined violations of humanitarian law in a civil, ethnic conflict as threats to international peace, thus granting the tribunal the ability to prosecute those violations. Second, the United Nations established the possibility of the international criminalization of violations of common Article 3 of the Geneva Conventions in non-international armed conflicts.[19] The scope of territorial jurisdiction of the tribunal extends, according to Article 7 of the Statue, to the territory of Rwanda, as well as to the territories of neighbouring states in respect to serious violations of international humanitarian law committed by Rwandan citizens. The extended territorial jurisdiction of the tribunal was also designed to encompass the broadcasting from Radio Television Libre des Mille and other radio stations, which throughout the conflict had incited the genocide of Tutsis, and which since the fall of the Hutu regime have reportedly broadcast from a mobile base outside Rwanda. It is implicit, however, in the extension of the territorial jurisdiction of the tribunal to neighbouring states, that serious violations of international humanitarian law committed by Rwandan citizens in those territories are regarded as committed in connection with the conflict in Rwanda.[20] The limited temporal jurisdiction applied to the ICTR is also a point of contention that initially threatened cooperation between the tribunal and the Rwandan government. In fact, the Rwandan Government opposed the establishment of the tribunal as articulated in the Security Council's resolution, even though it initially solicited Security Council action. The genocide which the world witnessed in April 1994 had been the result of a long period of planning during which pilot projects for extermination had been successfully tested before this date. Because of

[19] M. A Gordon, 'Justice on Trial: The Efficacy of the International Criminal Tribunal for Rwanda', *Ilsa Journal of International and Comparative Law*, Vol 1 (1995) pp 217-242
[20] D. Shraga and R. Zacklin, 'Symposium Towards an International Criminal Court', op cit..

this, the Rwandan government proposed that the tribunal's jurisdiction be extended back to 1 October 1990, a proposal ultimately rejected by the Security Council. While the Security Council's decision clearly helps to expedite the adjudication process by limiting its investigation, Rwandan representatives have countered that this will severely curtail its ability to achieve domestic reconciliation. An international tribunal which refused to consider the causes of genocide cannot be of any use to Rwanda it will not contribute to eradicating the culture of impunity or creating a climate conducive to national reconciliation.[21]

The Rwandan government objected to the penalties prescribed in Resolution 955. While the Rwandan penal code provides for the death penalty, Resolution 955 limits penalties to imprisonment. The more limited penalty combined with stratified concurrent jurisdiction and non bis in idem meant that those indicted by the ICTR would not face the possibility of the death penalty. This was an important issue because most individuals believed that the ICTR would be responsible for prosecuting those in the former regime and the principal planners of the genocide. This meant that those who were most culpable would not face the possibility of the death penalty. Third, the Rwandan government wanted to limit the scope of crimes solely to the act of genocide. By limiting the scope to genocide, acts perpetrated by Tutsis after July would not be subject to ICTR jurisdiction. While Resolution 955 places genocide first on the list of crimes, it also includes crimes against humanity and violations of the Geneva Conventions.[22]

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[21] C. Rudolph, 'Constructing an Atrocities Regime: The Politics of War Crimes Tribunals', *International Organization*, Vol 55 No. 3 (2001) pp 655-691.
[22] D. Shraga and R. Zacklin, 'The International Criminal Tribunal for Rwanda', *European Journal of International Law*, Vol.7 (1996), pp.501–518.

The list of crimes falling within the jurisdiction of the tribunal was another controversial issue between members of the Security Council and Rwanda, and an additional reason for its negative vote in the Council. In view of the Rwandan government, the jurisdiction of the tribunal should have been limited to the crime of genocide only. The meager human and financial resources of the tribunal it argued, should not be diverted to "lesser crimes" which could be prosecuted by national courts. In including such "lesser crimes" within the jurisdiction of the tribunal, the Government of Rwanda saw an attempt to treat on par leaders of the former regime and principal planners of the crime of genocide with other individuals who may have committed other crimes. The Security Council, which agreed to place genocide first on the list of crimes was unable to agree to limit that list to that crime alone, as the exclusion of the "crimes against humanity" and other crimes known to have been committed by the Tutsi ethnic group would have conveyed the wrong political as well as legal message.[23]

Organs of the ICTR

The framers of the Statutes created three distinct bodies within the tribunal: the Chambers, the Office of the Prosecutor (OTP) and the Registry. Mindful of the nature of their functions, the framers imbued the Chambers and the OTP with judicial and prosecutorial independence, guaranteed in the Statutes. This has created a problem of accountability on two levels. Certainly, each tribunal has a President, who nominally is the head of the institution and speaks for it in both the General Assembly and the Security Council. However, in reality, each of the three components is independent of the other. The Chambers because they enjoy judicial independence, the Prosecutor because her independence is guaranteed by the Statute and the Registry because it is accountable to

[23] D. Shraga and R. Zacklin, 'Symposium Towards an International Criminal Court', op cit..

the Secretary-General, rather than to either of the other two organs.[24] The result is that has been extremely difficult and has taken a very long time to get the three organs to work together, since each is jealous of its institutional independence, and denies that it is accountable to the others. Perhaps more troublesome still is that it has proven extremely difficult for any of the principal organs of the United Nations, including the tribunal's parent organ, the Security Council, to hold any of the organs strictly accountable. This is especially true of the OTP and the Chambers. The decentralization of power and accountability coupled with the need to respect judicial and prosecutorial independence have been chronic problems, for which no solution has been found.[25]

The Office of the Prosecutor (OTP)

The ICTY prosecutor assumed his function as the common Prosecutor for both the ICTY and ICTR, and carried out his dual functions from The Hague. He made several visits to Rwanda and the neighbouring states in order to establish the necessary cooperation with authorities there. In March 1995, the Secretary-General appointed a Deputy Prosecutor, whose main task was to build up the Prosecutor's office in Kigali and oversee the day-to-day business there. The recruitment of staff in Kigali was a long and complex process. As of August 1996, fewer than a dozen staff members were on board in Kigali, many being personnel seconded by their respective governments. A new common Prosecutor, Louise Arbour, of the two tribunals took up her functions in the last quarter of 1996.[26]

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[24] R. Zacklin, 'The Failings of Ad Hoc International Tribunals', *Journal of International Criminal Justice*, vol 2 (2004) pp 541-545

[25] Ibid

[26] E. Mose, 'Appraising the Role of the ICTR, Main Achievements of the ICTR' *Journal of International Criminal Justice* Vol 3 (2005), pp 920-943

This dual role was an overriding concern during the Prosecutor's tenure. As observed by the former Prosecutor, Louise Arbour:

> "Although I was concurrently the Chief Prosecutor of both tribunals, I was based in The Hague and could not be simultaneously in two places. Logistically, I could more easily manage ICTR issues from The Hague than I could manage ICTY issues from Arusha or Kigali. Absurdly, I was the only staff member with this dual appointment."[27]

The challenge of managing the two tribunals was exacerbated in 1998 and 1999 by the most significant difference; the ICTR's mandate was limited to 1994. The tribunal was an interested but essentially marginal and impotent observer of the aftermath of the 1994 genocide in Rwanda that continues to this day, to plague the entire Great Lakes region, and in particular, the Eastern Congo. In contrast, the ICTY's mandate was open-ended in time, making it a critical player in the ongoing regional conflict, particularly the war in Kosovo. The demands put on the ICTY were therefore of a different nature altogether. It had to position itself as a "real time" law enforcement institution and made demands on the prosecutor with which the ICTR could not complete.[28]

The first Prosecutor of the ICTR held views that are generally similar to those of many within the prosecutorial profession. He believed the fear of detection; financial penalties and indignities of guilt were at the centre of criminal justice. Like most prosecutors, he placed the judicial response at the top of the hierarchy. Yet detection and punishment are the only means by which to curb criminal conduct. Being that the ICTR prosecution office is largely focused with what to do with the evil actors, the answer is necessarily three fold; converting them to better intentions, weakening them by depriving them of

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[27] L. Arbour, 'The Crucial Years', *Journal of International Criminal Justice* Vol 2 (2004) pp 396-402
[28] Ibid

capability and/or making them more passive in general.[29] The reality though is that the trials and convictions of indictees on the ICTR list of shame will not have some kind of legal domino effect on the acts and intents on the rest of the perpetrators numbering tens of thousands, many of whom are active in guerilla-style military incursions against the Tutsi dominated government in power. The important task of the ICTR seems to have been lost in daily dysfunction and internal bureaucratic conflict. The geographic split of the office of the Prosecutor between Arusha, Kigali and The Hague has seriously impeded investigations, and the long absences of judges and defence lawyers have not assisted trial proceedings. There is now a grave risk that those in custody will be released because of the failure to bring them to trial after a period of years.[30]

The Rwandans also objected that the proposed ICTR Statute provided for so little personnel, both judicial and prosecutorial, that the ICTR could not possibly be expected to fulfill the monumental task set before it.[31] Not only was the total number of judges very small (six trial judges and five appellate judges), but the appellate judges were to be shared with the ICTY. Moreover, the ICTR and ICTY were to share one Prosecutor.[32] One can perhaps concur with the rationale behind maintaining a shared appellate chamber for the two international tribunals: the importance of developing a coherent body of international criminal law may weigh against having separate appellate courts potentially rendering conflicting statements of international law. But that rationale does not explain why a larger total number of judges could not be provided. Nor is it clear exactly what

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[29] J. N Maogoto, 'International Justice for Rwanda Missing the Point: Questioning the Relevance of Classical Criminal Law Theory', *Bond Law Review* Vol 8 (2001) pp1-28

[30] J. N. Maogoto, 'The International Criminal Tribunal for Rwanda: A Distorting Mirror; Casting Doubt on its actor-oriented approach in addressing the Rwandan genocide', *African Journal of Conflict Resolution*, (2003) pp 55-97

[31] U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/PV.3453, at 14-15 (1994).

[32] Article 15(3) of the Statute of the ICTR

benefit was to be gained by the two tribunals sharing one Prosecutor. The explanation that having one Prosecutor would ensure consistency in prosecutorial approach is less than compelling. (Indeed, exploration of a range of prosecutorial approaches might be most valuable in the nascent enterprise of international prosecutions). Those who viewed the ICTY and ICTR as important precedents for and perhaps forerunners of a permanent International Criminal Court (ICC) would presumably have favored establishment of a single prosecutorial authority.[33] One advantage, at least in the short term, of having only one Prosecutor was that a protracted selection process such as that which preceded selection of the ICTY Prosecutor was avoided in the case of the ICTR.[34]

Now having the benefit of two years' experience, some personnel at the Office of the Prosecutor for the ICTY and ICTR (ICTY/R) observe that having a single prosecutorial office fosters the development and efficient deployment of the specialized expertise required for the unique mission of international criminal tribunals. One point that seems clear is that, since the two tribunals share one Prosecutor who has substantial responsibilities for oversight and coordination of the two prosecutorial efforts and for relations with the United Nations and other international and national agencies, the prosecutorial effectiveness of the two tribunals will depend heavily on strong leadership by the Deputy Prosecutors in the day to day execution of the prosecutorial mission. Some

[33] M. Morris 'The Trials of Concurrent Jurisdiction: The Case of Rwanda' *Duke Journal of Comparative and International Law*, Vol 7 pp 349-360
[34] Ibid

commentators, within and outside the tribunals, have argued that this has not been the role, to date, of the Deputy Prosecutors.[35]

Perhaps the most dramatic illustration of the ICTR's inability to speedily complete trials has been the Barayagwiza case.[36] Jean-Bosco Barayagwiza, a former official in the Ministry of Foreign Affairs, was accused of genocide, complicity in genocide, and crimes against humanity. He had been a leader of the Coalition for the Defense of the Republic, an anti-Tutsi party that actively participated in the 1994 massacres, and a founder of Radio Television Libres des Mille Collines, the broadcast mouthpiece of Rwanda's Hutu Power factions. Barayagwiza was arrested in Cameroon on March 27, 1996, and was not transferred to Arusha for nineteen months.[37] Almost a year later, on November 17, 1998, Trial Chamber II of the ICTR rejected Barayagwiza's claim that the continued delay had violated his right to a prompt and fair trial. On appeal, however (but yet another year later), the Appeals Chamber based in The Hague found that Barayagwiza's rights had indeed been violated and ordered his release. The newly-appointed Prosecutor, Carla del Ponte, immediately appealed the decision based on "new and additional facts". Barayagwiza was held pending the outcome of the Prosecutor's appeal. The decision of the Appeals Chamber represented an unabated disaster for the Office of the Prosecutor and demonstrates the political ramifications of the ICTR's work. At the time of the decision, Carla del Ponte had just begun her tenure as the replacement for Louise Arbour, who had resigned her post as prosecutor in September to accept an appointment to

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[35] Stephen Buckley, *Arusha Tribunal Employees Say Difficulties Worsened By Racial Tensions*, WASH. POST, Jan. 29, 1997, at A15

[36] The Prosecutor v. Jean-Bosco Barayagwiza, ICTR Case No. ICTR-97-19

[37] E. Husketh, 'Pole Pole, Hastening Justice at UNICTR' *Northwestern Journal of International Human Rights*, Vol 3 (2005) pp 1-30

Canada's high court. The Appeals Chamber, cognizant of the gravity of the charges against Barayagwiza, issued a scathing condemnation of OTP's handling of the case. The government of Rwanda was incensed at the decision to release Barayagwiza, who was viewed at home as the "number one criminal."

The government immediately blasted OTP's "prosecutorial incompetence" and suspended cooperation with the tribunal, making it virtually impossible for any other cases to move forward because witnesses could not be transported from Rwanda to Arusha to testify. The Prosecutor won her appeal some five months later, with the appeals chamber finding that Barayagwiza's rights had indeed been violated but not to the point that he should be set free. Instead, if he were found guilty, his sentence should reflect proper consideration of these violations.[38]

The administration of justice in post-genocide Rwanda is rendered particularly complex by the fact that concurrent jurisdiction for the genocide-related crimes is actively exercised by two different entities, the government of Rwanda and the ICTR.[39] This concurrent jurisdiction has exposed certain difficult issues which will likely recur in future contexts in which similar structures of actively shared jurisdiction are undertaken. Concurrent jurisdiction raises complex questions regarding cooperation in investigations and sharing of evidence. Obvious advantages in efficiency and effectiveness are to be gained by close national and international cooperation in investigations and evidence-gathering. But difficulties concerning confidentiality of evidence, witness protection, due process standards, and the need to avoid any appearance of partiality of the international

[38] Ibid
[39] Article 8 (1) of the Statute of the ICTR

tribunal raise delicate questions which have yet to be systematically addressed. Discussion of these matters has been ongoing between the ICTR and the government of Rwanda.[40]

An area which has been of particular concern in the exercise of concurrent jurisdiction is the distribution of defendants between the national and international fora. The question of appropriate distribution of defendants has been the cause of uncertainty and, at times, of tension between national governments and the ICTR. On more than one occasion, the ICTR and the government of Rwanda have sought to obtain custody of the same suspect.[41]In one case, not only the ICTR and the Rwandan government, but also the Belgian government were engaged in efforts to gain custody of the same suspects who were being held in Cameroon. It is worth noting that, while many speculated that these conflicts over custody were illusory -- because no country would be willing to transfer a suspect to Rwanda -- that speculation has proven false. At least one defendant has already been transferred to Rwanda (by Ethiopia), [42]and other countries have expressed a willingness in principle to do the same. The tensions between the Rwandan government and the ICTR over distribution of defendants have resulted in part from a lack of communication over time and also in part from a more fundamental conflict of interests or, at least, of agendas. When the ICTR was established, the Rwandan government had not yet decided upon an approach to national prosecutions. The approach ultimately adopted relies heavily on plea agreements, as discussed above. That plea-agreement

[40] M. Morris 'The Trials of Concurrent Jurisdiction: The Case of Rwanda' op cit.
[41] Philip Gourevitch, *Justice in Exile*, N.Y. TIMES, June 24, 1996, at A15.
[42] Paul Cullen, *Trial Opens of Man Said to be Ringleader of Genocide*, IRISH TIMES, Jan. 15, 1997, at 12.

program turned out to be somewhat incompatible with the operation of an international tribunal that views its mandate as prosecuting the top-level leaders of the genocide.[43]

The Prosecutor of the International Criminal Tribunal for Rwanda is Mr Hassan Bubacar Jallow (Gambia). He was appointed by the Security Council on 15 September 2003. The Office of the Prosecutor is based in Arusha, Tanzania.[44]

Chambers of the ICTR

The ICTR is composed of 11 judges (three judges for each of the two trial chambers and five appellate judges). Significantly, the appellate chamber is still shared with the ICTY and therefore is located at The Hague rather than Arusha. While many have criticized the appellate chamber structure, some argue that the importance of developing a coherent body of international criminal law may weigh against having separate appellate courts potentially rendering conflicting statements of international law.[45] The three Trial Chambers and the Appeals Chamber are composed of judges elected by the General Assembly from a list submitted by the Security Council. They are initially selected from a list of nominees submitted by Member States of the United Nations. Nominations must take account of adequate representation of the principal legal systems of the world. The judges are elected for a term of four years. They are eligible for re-election. Three Trial Chambers and an Appeals Chamber are composed of 16 independent judges. No two of them may be nationals of the same State. Three judges sit in each of the Trial Chambers and five judges sit in the Appeals Chamber which is shared with the International

[43] M. Morris 'The Trials of Concurrent Jurisdiction: The Case of Rwanda' op cit
[44] See ICTR's official website at www.ictr.org
[45] L. A Barria and S. D Roper, 'How Effective are International Tribunals? An Analysis of the ICTY and the ICTR' *The International Journal of Human Rights*, Vol 3 (2005) pp 349-368

Criminal Tribunal for the former Yugoslavia. By its Resolution 1431 of 14 August 2002 the Security Council decided to establish a pool of 18 *ad litem* judges. At any one time, a maximum of four *ad litem* judges may be attached to the Trial Chambers. On 27 October 2003, the United Nations Security Council adopted Resolution 1512 and increased the number of ad litem judges who may serve on the tribunal at any one time from 4 to 9.[46]

The Registry

The Registry is responsible for the overall administration and management of the tribunal. The Registry is headed by the Registrar. He provides judicial and legal support services for the work of the Trial Chambers and the Prosecution. The Registry also performs other legal functions assigned to it by the tribunal's Rules of Procedure and Evidence, and is the tribunal's channel of communication. The Registry comprises two principal Divisions: the Judicial and Legal Services Division and the Division of Administration. The Registry is headed by the Registrar, who is the Representative of the Secretary General of the United Nations. The present Registrar, Mr. Adama Dieng (Senegal) was appointed on 1 March 2001 by the Secretary General after consultation with the President of the ICTR. The Registrar's deputy is Mr. Everard O'Donnell (UK).[47]

Operations of the ICTR

The ITCR became operational in July 1995 and issued its first indictment of eight Rwandan officials suspected of genocide in November 1995. Article 28 of Resolution 955 specifically requires all UN member-states to provide full cooperation including the extradition of individuals to the ICTR. Some of these early problems have been worked

[46] Information obtained from the Official Website of the ICTR at www.ictr.org
[47] Ibid

out, and the ICTR has lately been much more successful at apprehending and extraditing defendants. So far, 21 countries have extradited indictees to the ICTR. Significantly in 2002, the Democratic Republic of Congo, a haven for Hutu refugees, extradited its first two defendants. Approximately 75 per cent of those indicted by the tribunal have been arrested, and approximately half of those arrested have either been tried or are currently in the trial process. The ICTR has six categories for defendants. Thirteen detainees are political leaders including 11 ministers of the 1994 interim government as well as the former president of the National Assembly. There are 13 military leaders, three media leaders, 14 senior government administrators and three religious leaders The ICTR's Resolution 955 also includes language that requires that an individual be tried without delay. So far, of those trials that have been completed, it has taken an average of four and half years from arrest through appeal. One of the concerns of the ICTR is that as more individuals have been apprehended, the waiting time for detainees has increased. There are currently many detainees that could be scheduled for trial, but there is a lack of space on the trial docket. A report by ICTR President Navanethem Pillay acknowledged that the current process is unduly long. 'Despite efforts of the judges and of all support sections, trials continue to be long drawn out and often defy the best-laid plans. However, the report notes that the trial and appellate proceedings are lengthy because 'judicial proceedings at the international level are far more complicated than proceedings at the national level'. The report goes on to cite the problem of translating documents, interpretation of the trial proceedings into three languages, as well as the non-appearance of witnesses from Rwanda as the principal reasons why the process is so slow.[48]

[48] Ibid

Chapter Four

Jurisprudence of the ICTR

Introduction

This chapter will examine the jurisprudence of the ICTR more specifically its contribution to the development of international criminal law through the indictment, prosecution and conviction of persons responsible for the genocide in Rwanda. As will be shown, the ICTR has made significant contribution to the development and enforcement of international humanitarian law. The ICTR has delivered the first international prosecution pursuant to the Genocide Convention[1]. The ICTR has also passed the first international judgement convicting an individual of the crime of genocide, thus bringing the Genocide Convention back to life. The ICTR has created a clear investigation and prosecution strategy that has facilitated the arrest of high ranking accused, ensuring the prosecution of those who planned, instigated, ordered and publicly incited the 1994 Genocide. In addition, the ICTR has adopted innovative procedural techniques aimed at facilitating the gathering of evidence and expediting the cases brought before it. The work of the tribunal relies heavily on the cooperation of other states. States are obliged to cooperate with the ICTR in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law. Such assistance includes identifying and seeking suspects, producing evidence, forwarding documents, arresting and detaining persons against whom the ICTR has initiated proceedings.[2] The ICTR does its work by evaluating the evidence against the

[1] The Convention on the Prevention and Punishment of the Crime of Genocide, Adopted on 9 December 1948 and entered into force on 12 January 1951

[2] M. Humphrey, International Intervention, Justice and National Reconciliation; the Role of ICTY and

accused and punishing the convicted perpetrators. Although there is a mandate for capacity building of the Rwandan justice system, there is no mandate that the tribunal provide for broad institutional or social reconstruction in Rwanda. The most that this legal institution can do is to assist with reconciliation in limited ways, as an ancillary contribution to its main judicial function of trying the cases before it. Its search for truth and its documentation of human rights violations is limited to what is required to prove specific charges in the indictments that have been issued. The concept of individual criminal responsibility is an important element in ICTR jurisprudence that should contribute significantly to reconciliation. The accused is an individual, never an ethnic group. The accused appear before the tribunal because there was adequate evidence leading the prosecutor to conclude that they committed one of the crimes punishable under the ICTR statute. This approach by the ICTR for adjudicating genocide and other crime avoids criminalizing and stigmatizing and entire group for the actions of its members who bear individual responsibility for their illegal acts. The tribunal's judges have recognized that the fundamental purpose of holding individuals accountable for their conduct is the intent to contribute to the process of national reconciliation and to the restoration and maintenance of peace.[3]

Through its judgements and decisions, the ICTR has bequeathed highly significant case law.[4] In particular, the ICTR jurisprudence provides abundant interpretative material on the legal nature and factual realities of the crime of genocide. A number of other important themes in the ICTR's jurisprudence are also particularly significant to the

ICTR in Bosnia and Rwanda, *Journal of Human Rights*, Vol 2 No 4 (2003) pp 495-505

[3] Ibid

[4] J. Sarkin, The Tension Between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the Gacaca Courts in Dealing with Genocide, *Journal of African Law*, Vol 2 (2001) pp 143-172

development of the *corpus* of international criminal law. The ICTR's importance to the development of international criminal law – and its jurisprudential legacy – is therefore immense.

ICTR and genocide

First and foremost, the ICTR provides abundant interpretative material on the legal nature and factual realities of genocide. The comparatively fewer indictments for genocide before the ICTY mean that the ICTR jurisprudence is a particularly important source for both the definition and elucidation of the legal ingredients of this offence. The landmark case *of Jean Paul Akayesu*[5] marks the fist of several contributions the ICTR has made to the development and enforcement of international humanitarian law. Akayesu, a former mayor of the Taba commune in Gitarama in 1994, was initially charged with 13 counts relating to genocide, crimes against humanity, and violations of Article 3 Common to the Geneva Conventions of 1949 and of the Additional Protocol II of 1977. Akayesu maintained that he had tried to protect the Tutsis in his community but was unable to control the *interahamwe* who committed the killings, until he was forced to flee in May 1994. Akayesu was found guilty of one count each of genocide and incitement to commit genocide and seven counts of crime against humanity. This case provided the ICTR with the opportunity to implement the Genocide Convention, resulting in the first ever conviction of genocide. The tribunal had to consider whether the Tutsi constituted a group protected against genocide. The tribunal held that the Hutu and Tutsi were technically not separate ethnic groups as envisaged by the ICTR Statute and the Genocide Convention because they shared the same nationality, race, religion and partook of a common language, and culture. However, in adopting a more constructive approach, the

[5] The Prosecutor VS Jean Paul Akayesu (Case No ICTR-96-4-7)

tribunal interpreted what the drafters of the 1948 Genocide Convention intended, and concluded that the protection was not limited solely to the four enumerated groups but extended to any group similar in terms of its stability and permanence. The tribunal concluded that decades of discrimination had led the Tutsi to be regarded as a distinct, stable and permanent group. Victims were selected in 1994 not as individuals but because of this perceived ethnic difference. The tribunal was mindful of the possibility that such a generous definition of genocide could result in the opening of the floodgates to all sorts of groups seeking protection from genocide. Therefore, the tribunal made it clear that the decision of whether a particular group may be considered for protection from the crime of genocide would very much depend on the nature of the case taking into account both the relevant evidence proffered and the specific political, social and cultural context in which the acts allegedly took place.

In the Prosecutor v Aflred Musema[6], the tribunal went further and found that a subjective definition is not sufficient to determine the victim groups as provided for in the Geneva Convention. Political and economic groups were excluded from being classified as a protected group, as they are considered non-stable and non-mobile and are groups to which one becomes a member out of choice. The *Akayesu* judgment was also groundbreaking for its affirmation of rape as an international crime. This judgment and its successors are also notable for finding that rape may comprise a constituent act of genocide[7].

ICTR and rape

Although rape was not among the initial charges brought against Akayesu, the

[6] Case No ICTR-96-13-T
[7] S. Landsman, Those who Remember the Past May not be Condemned to Repeat it, *Michigan law Review*, Vol 6 (2002) pp 1564-1590

overwhelming evidence given by witnesses of sexual assaults resulted in the charges being amended to include crimes against humanity (rape). It was alleged that Akayesu knew of and encouraged acts of rape and sexual violence against Tutsi women who had sought refuge in the bureau communal at Taba. The tribunal was thus presented with an opportunity to determine when sexual violence constitutes an international crime. The tribunal defined rape as a physical invasion of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence was defined as any act of a sexual nature committed on a person under circumstances which are coercive. Coercion was not limited to physical force, but includes threats, intimidation, extortion and other forms of duress.[8] Thus, the tribunal adopted a broader definition of rape that is more useful to the implementation of international law. The tribunal found that sexual violence specifically targeting Tutsi women was an integral part of the process of their destruction, and to the destruction of the Tutsi group as a whole.

ICTR and accountability of state officials

From the outset, the prosecutor has concentrated on those individuals who are alleged to have been in positions of leadership in Rwanda in 1994 and bear the gravest responsibility for the crimes committed. This policy has been maintained over the years and has since become an explicit part of the Completion Strategy, as expressed in resolution 1503 of 2003. From an early date, alleged leaders of the 1994 events were arrested, in particular in Nairobi in July 1997 and as a consequence of cooperation with several West African countries in 1998. The tribunal's focus on leadership is illustrated by the fact that more than 25 persons who have received judgements so far include one

[8] J. Sarkin, The Tension Between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the Gacaca Courts in Dealing with Genocide, op cit

prime minister, government ministers, prefects, five bourgmestres, as well as media and military leaders. Most of the more than 60 accused persons who fled Rwanda in 1994, would probably not have been brought to justice had it not been for the tribunal's investigations, insistence upon their arrest and subsequent requests for transfer to Arusha. Many states are reluctant to initiate investigations to institute criminal proceedings at their own expense against individuals who may have committed crimes in other countries. Extradition to other countries is also a cumbersome process, assuming that a request is made at all. The fact that the accused will receive a fair trial by an independent tribunal has facilitated and, in many instances, probably been a condition of transfer to Arusha.[9]

Another significant contribution made by the ICTR was the decision in the *Prosecutor V Jean Kambanda*[10], former Prime Minister of Rwanda. Kambanda pleaded guilty to six counts of genocide, conspiracy to commit genocide, direct and public incitement to genocide, complicity in genocide and crimes against humanity, thereby removing the need for trial. Kambanda was convicted and given a sentence of life imprisonment for his crimes against humanity whilst he was the Head of the Rwandan state in 1994, making him the first head of state to be convicted for crimes against humanity. The Kambanda judgement availed the ICTR the opportunity to further clarify the elements that constitute genocide, war crimes and crimes against humanity. Despite the gravity of the violations of Article 3 Common to the Geneva Conventions and of the Additional Protocol II, the tribunal considered these crimes lesser crimes than genocide or crimes against humanity. The tribunal however found it difficult to rank genocide against crimes

[9] E. Mose, Main Achievements of the ICTR, *Journal of International Criminal Justice*, Vol 3 (2005) pp 920-943
[10] Case ICTR-97-23-5

against humanity in terms of their respective gravity as both crimes shocked the collective conscience of mankind. Kambanda later appealed against the judgement and sentence of the Trial Chamber. The grounds of appeal were that the Trial Chamber had failed to consider the appellant's detention outside the detention unit of the tribunal, that the Trial Chamber had failed to investigate thoroughly whether the guilty plea was unequivocal and voluntarily entered, and that the sentence was excessive. The appeal was dismissed on all grounds. The Appeals Chamber held that the crimes for which the appellant was convicted were of the most serious nature. A sentence imposed should reflect the inherent gravity of the criminal conduct[11].

The ICTR was also the first international tribunal post Nuremberg to focus its efforts on the highest echelons of leadership for serious violations of international humanitarian law. Indeed, by the time of the transfer of the former Yugoslav President Slobodan Milošević to The Hague on 28 June 2001, the ICTR had, almost three years previously, already tried and convicted the Rwandan former Prime Minister. The *Kambanda* case was also one of the earliest sentences to be meted out by the *ad hoc* tribunals following a plea of guilty.

ICTR and war crimes

Akayesu was charged with violating Article 4 of the ICTR statute by committing serious violations of Common Article 3 of the 1949 Geneva Conventions and the Additional Protocols II of 1977. The tribunal held that the provisions of Article 4 purported to protect victims of armed conflict. These provisions are designed to constrain the activities of persons who by virtue of their authority are responsible for the outbreak of,

[11] N. Z. Phiri, The Contribution of the ICTR to the development of International Humanitarian Law (Unpublished) (Accra, Ghana)

or are otherwise engaged in the conduct of hostilities, thus encompassing military personnel and some civilians. In the *Prosecutor v George Rutaganda*[12], the issue of civilian liability for violations of Common Article 3 to the Geneva Conventions was considered. Rutaganda was the former second Vice-President of the *interhamwe* militia and shareholder of RTML. He was charged with eight counts, including genocide, crimes against humanity, and violations of Common Article 3 and Additional Protocol II of 1977. The tribunal held that for one to be liable for Common Article 3, the perpetrator must belong to a party to the conflict whereas under Additional Protocol II the perpetrator must be a member of the armed forces of either the government or the dissidents. The tribunal held that too restrictive a definition of these terms would dilute the protection afforded by these instruments to the victims and potential victims of armed conflicts.[13]

The ICTR; women, genocide and rape

Pauline Nyirmasahuko[14], former Minister of Women's Development and Family Welfare in the Habyarimana government, presents the first ever indictment against a woman. Nyimasahuko was charged jointly with her son, Arsene Shalom Ntahobali with genocide, complicity in genocide, crimes against humanity, and serious violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II. This indictment was later amended to include six additional charges, which included responsibility for rape as part of a widespread and systematic attack against a civilian population on political, ethnic and racial grounds, outrages upon personal dignity, in particular, humiliating and degrading treatment, rape and enforcing prostitution and indecent assault against Tutsi women. The indictments demonstrate that the ICTR is determined to ensure that new

[12] Case Number ICTR-96-3-T
[13] Ibid
[14] Case Number ICTR-97-21-I

boundaries are set in the area of crimes against humanity, particularly in the case of rape. The ICTR has not only made significant jurisprudential contributions to the development and enforcement of international humanitarian law, but the ICTR has also adopted innovative procedural techniques aimed at expediting cases, put into place measures aimed at protecting victims and witnesses, set new procedural standards relating to international humanitarian law, and developed a clear investigation and prosecution strategy resulting in the apprehension of high ranking government officials.

ICTR and the media

The trial against "hate media" began on October 23, 2000. It was charged with the prosecution of the media which encouraged the genocide of 1994. On August 19, 2003, at the tribunal in Arusha, life sentences were requested for Ferdinand Nahimana, and Jean Bosco Barayagwiza, persons in charge for the Radio Télévision Libre des Mille Collines, as well as Hassan Ngeze, director and editor of the Kangur newspaper. They were charged with genocide, incitement to genocide, and crimes against humanity, before and during the period of the genocides of 1994. On 3 December 2003, the court found all three defendants guilty and sentenced Nahimana and Ngeze to life imprisonment and Barayagwiza to imprisonment for 35 years. The case is currently on appeal. The tribunal has failed to prosecute the founders, sponsors or anyone related to Radio Muhabura, a media whose bellicist, pro-RPF messages were broadcast throughout the country during the 1990-1994 war. The ICTR in the Media case, developed a further legacy of the post World War II case law. This is the first contemporary judgement to examine the role of the media in the context of mass crimes. This important case, which addresses the boundary between rights guaranteed under international law to freedom of

expression and incitement to international crimes, was the first pronouncement by an internaitonal tribunal on these questions since the conviction of Streicher at Nuremberg.[15]

[15] S. Lamb, The Contribution of the ICTR to International Criminal Law (2006) (Unpublished) (Kigali, Rwanda)

Chapter Five

Critical Appraisal of the mandate of the ICTR

Introduction

This chapter will critically appraise the ICTR's work, more especially its effect on national reconciliation, post conflict peace building and the preservation of international peace and security. The previous chapters have set out the historical background of the tribunal's formation, its structure and organs and concluded in an outline of its work, which is the subject of this critical appraisal. When the UN Security Council established the ICTR in 1994, it declared that the tribunal's purpose was to "contribute to the process of national reconciliation and to the restoration and maintenance of peace"[1]. This chapter will analyze whether the ICTR has achieved the objectives for its establishment as set out by the Security Council more specifically its ability to foster national reconciliation, post conflict peace building and prevention of future atrocities. A number of weaknesses have emerged in the practice of the ICTR, which have seriously undermined confidence in the tribunal and raised questions as to whether they can effectively promote respect for international justice and the rule of law. Some of these problems are structural, some administrative and financial. Some are the result of actions or inactions by the personnel of the tribunals, while others are the result of misconceptions within victim societies as to the nature of the tribunals. When the Security Council set up the two *ad hoc* tribunals, it embarked on uncharted waters. They were the first international criminal tribunals post Nuremberg and the first tribunals ever to be set up by a resolution under Chapter VII of

[1] K. Ward, Seeking Justice in Rwanda, *Christian Century*, Vol 1 (2000) pp 870-872

the Charter. There would be a need to gain experience in order to deal with issues that were unforeseen or not fully appreciated, issues that would unfold only through the often costly process of trial and error.[2]

Over a decade after the establishment of the ICTR, an assessment of its achievements with regard to its role in fostering national reconciliation among Rwandans must be undertaken. When the tribunal was set up, the Security Council stated that the prosecutions of persons responsible for serious violations of international humanitarian law would contribute to the process of national reconciliation.[3]

The ICTR and national reconciliation in Rwanda

Justice and reconciliation are essentially contested concepts. What may seem just for a community or a country may be very unjust for the individual victim. There seems to be tension between reconciliation, implying a moral compromise, and justice in the strict, prosecutorial sense it is usually used meaning . In the wake of violence on a large scale, finding the right balance between justice and reconciliation, or between retribution and forgiveness is an extremely difficult process and this is all the more so in cases of genocide. In the Great Lakes region where today's oppressors tend to perceive themselves as yesterday's victims, justice and reconciliation become even more subjective and difficult goals.[4] It is clear that reconciliation cannot be enforced from outside but must emerge from within the country concerned.

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[2] This was emphasized in the *Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda* submitted to the Secretary General on 11 November 1999 (A/54/634/) at 12 & 15.
[3] SC Res 955; 8 November 1994, Seventh and ninth preambular paragraphs
[4] E. Zorbas, Towards Justice and Reconciliation in Rwanda; Taking Stock (*Journal of International Criminal Justice*, Vol 3 (2005) pp 944-949

This said, it is certainly an aim of the tribunal to contribute to the process of reconciliation in Rwanda. In order to do achieve this, it is important that the activities of the tribunal be known by Rwandans. Admittedly, the tribunal would have been more visible in Rwanda had its seat been in Kigali and if the judicial proceedings had taken place there. For reasons of efficiency, security and impartiality, this was not considered possible in the 1990s and is not a viable option to move the tribunal.[5] Reasons for the selection of Arusha as the seat of the tribunal have been stated in previous chapters.[6]

The judicial proceedings at the tribunal represent the core element in the process of reconciliation. Whenever a judgement is delivered, an oral summary is given by the presiding judge, interpreted into the two official languages of the tribunal as well as Kinyarwanda and transmitted directly into Rwanda. It is also reasonable to believe that guilty pleas, combined with expressions of remorse, contribute to reconciliation.[7] The concept of individual criminal responsibility is an important element in ICTR jurisprudence that should contribute significantly to reconciliation. The accused is an individual, never an ethnic group. The accused appear before the tribunal because there was adequate evidence leading the prosecutor to conclude that they committed one of the crimes punishable under the ICTR statute.[8] This approach by the ICTR for adjudicating genocide and other crime avoids criminalizing and stigmatizing and entire group for the actions of its members who bear individual responsibility for their illegal acts. The tribunal's judges have recognized that the fundamental purpose of holding individuals

[5] Ibid
[6] See Chapter Two.
[7] E. Mose, 'Appraising the Role of the ICTR, Main Achievements of the ICTR', *Journal of International Criminal Justice* Vol 3 (2005) pp 920-943
[8] C. Clapham, 'Rwanda, the Perils of Peace Making' *Journal of Peace Research*, Vol 35 No 2 (1998) pp 193-210

accountable for their conduct is the intent to contribute to the process of national reconciliation and to the restoration and maintenance of peace. In equal measure, the tribunal serves as an important arbiter in establishing beyond dispute the fact that there was genocide against the Tutsi in Rwanda in 1994. By placing on the public record this undisputed fact, through taking judicial notice in its cases, the Tribunal's legal process may contribute significantly to reconciliation in Rwanda. In some respects, testimony during the process may also assist with reconciliation because it has the effect of giving voice to victims and survivors to tell their stories and to validate their experience of suffering. Testifying often has a cathartic effect that allows victims to let go of their hurt and to more easily embrace forgiveness and reconciliation with those who have harmed them.[9]

The potential contribution of the tribunal to national reconciliation in Rwanda depends on understanding the root causes of the 1994 genocide. It is obvious that an essential ingredient of this tragedy was historical rivalry and ethnic fear between the Hutu and Tutsi.[10] The Rwanda tribunal provides an impartial and authoritative judicial forum before which the culpability of such persons may be established. Only the most cynical and short sighted would accept the proposition that those who thrive on hatred and mass violence can be relied upon to build a peaceful society.[11] There is a distinction between the Bosnia-Herzegovina and Rwanda in so far as the former had to contend with the reality that the genocidal killers are still in positions of authority whereas the latter has

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[9] Ibid

[10] For an excellent overview of the historical roots of the rivalry between Hutu and Tutsi, see Gerard Prunier, *The Rwanda Crisis: History of a Genocide* (1995) pp 9-40

[11] P. Akhavan, Justice and Reconciliation in the Great Lakes Region of Africa: Contribution of the International Criminal for Rwanda, *Duke Journal of International Comparative and International Law* (Vol 7) 1997, pp 325-348

the advantage of their military defeat and exile. Even so, the Hutu extremists in the refugee camps of neighbouring countries continue to be a major source of conflict, throughout the Great Lakes region. In this respect the indictment and prosecution of Hutu extremist leaders by the Rwanda tribunal has the potential to play a vital role in contributing to lasting reconciliation. The continued displacement of some 1.1 million Rwandans who sought refuge in Zaire after RPF victory in July 1994 is a major source of instability in the Great Lakes region. Indeed, it must be remembered that the armed conflict from 1990 to 1994 between Habyarimana regime and the RPF itself was the culmination of a festering refugee problem which began with the political violence of the decolonization period between 1959 and 1963, and the consequent mass exodus of Tutsis to neighbouring countries such as Uganda and Burundi. Similarly, the continued displacement of Hutu refugees would most probably lead to a renewal of armed conflict accompanied by the massacre of civilians.[12]

More than ten years after its creation, it has become apparent that the ICTR will sit only in judgement on the genocide of Hutu against Tutsi. The conspicuous failure by the ICTR to prosecute serious violations of international humanitarian law committed during the armed conflict in 1994 by the victorious Tutsi dominated Rwandese Patriotic Front constitutes a regrettable return to the Nuremberg paradigm of international criminal justice. That paradigm stands for victor's justice and clear separation between victims and perpetrators.[13] There is no lack of authoritative reports in the public domain on the

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[12] Ibid

[13] See I. Orozco, Dealing with Symmetrical Barbarism: A Challenge for the Human Rights Movement (the Colombian Case) paper presented at the Conference of the Human Rights on Curbing Human Rights Violations by Non-State Armed Groups' organized by the Armed Groups Project of the Center of International Relations, Liu Institute for Global Issues, University of British Columbia, Vancouver, BC with the support of the Rockefeller Foundation 14-15 November 2003.

recent history of the Great Lakes region. The reports contain the most horrendous stories of massive human rights abuses. The conclusion is that the RPF/RPA is responsible for the violent deaths of tens thousands of innocent civilians. The United Nations Impartial Commission of Experts concluded in its preliminary report that individuals from both sides to the armed conflict in Rwanda during the period from 6 April 1994 to 15 July 1994 perpetrated serious breaches of international humanitarian law, in particular of obligations set forth in Article 3 common to the four Geneva Conventions and relating to the protection of victims of non-international armed conflicts of 8 June 1977 and that ample evidence indicates that individuals from both sides to the armed conflict perpetrated crimes against humanity.[14]

The consequences of a policy that many will perceive as one sided are incalculable. Moderate Hutu, whose testimony is crucial in trials of *genocidaires,* may no longer be willing to come forward. National reconciliation seems further away and millions reportedly have died in a conflict that is continuing in neighbouring countries. The fight against impunity, is high on the international community's agenda, and the very idea of international criminal justice risks being compromised. Despite its Statute and mandate, it is to be feared that prosecutorial practice at the ICTR follows the Nuremberg paradigm. The non-prosecution of RPF crimes is likely to become an important part of the legacy of a tribunal that already has attracted wide criticism. A prosecutorial policy perceived as one-sided risks being a serious obstacle to or perhaps has compromised already the stated

[14] E. Staub, Genocide, Mass Killings: Origins, Prevention, Healing and Reconciliation, *Political Psychology,* Vol 21 No. 2 (2000) pp 367-382

broader goal of the ICTR, national reconciliation and the restoration and maintenance of peace in the region.[15]

ICTR and the fight against impunity

The principal goal of prosecutions in international criminal tribunals has been to challenge impunity by bringing victims within the protection of the law and perpetrators under the scrutiny of the law. The international criminal tribunals seek to extend legal protection and rights through the prosecution of individuals accused of being responsible for crimes against humanity and war crimes. The application of criminal law to large-scale atrocity necessarily results in selective prosecution, producing a symbolic economy of justice. Usually crime is prosecuted in the context of a normative legal order and moral community. Criminal law is applied to transgressive acts in a normative context in which criminal acts are the exception. Prosecution proceeds by seeking to individualize responsibility for criminal acts, thereby establishing right from wrong and innocent from guilty for a witnessing moral public. However, in societies where large-scale atrocity occurs the normative order itself is criminal. Even the legal terminology used to describe acts of atrocity such as 'crimes against humanity' and 'genocide' seems quite inadequate to convey the cruelty and horror to which such terms refer.[16] The view that the ICTR is dealing with an event rather than a state of affairs is particularly misleading and distorts the overall vision and dialects necessary for the ICTR to contribute to the establishment of human rights culture in Rwanda. Prosecuting a case in violation of the rules to obtain a conviction may not necessarily alleviate the human rights situation. Assumptions about

[15] L. Reydams, The ICTR Ten Years On, Back to the Nuremberg Paradigm?, *Journal of International Criminal Justice* Vol 3 (2005) pp 1-12
[16] Ibid

the system's role in achieving that society's objectives underline each state's judicial system. Given that the conceptualization and operation of the ICTR falls to the UN, a complex tapestry of legal systems is implicated. Thus, there are different assumptions attempting to coexist about human behaviour and their penal system's role in regulating, modifying or augmenting values. The first prosecutor of the ICTR held views that are generally similar to those of many in the prosecutorial profession. He believed the fear of detection; financial penalties and indignities of guilt were at the centre of criminal justice. Like most prosecutors, he placed the judicial response at the top of the hierarchy. From this perspective, the ICTR prosecution office is largely focused on what to do with the evil actors, and the answers are necessarily threefold: converting them to better intentions, weakening them by depriving them of capability and /or making them more passive in general. The rude reality though is that the trials and convictions of indictees by the ICTR may not deter the rest of the perpetrators numbering tens of thousands, many of whom are active in guerilla-style military incursions against the Tutsi dominated government in power. Obviously the mass murders in Rwanda did not arise spontaneously. They were instigated by persons in positions of power who sought to gain personal advantages through violent and hideous means.[17] Unless these persons are held accountable for their crimes against humanity, the reconciliation necessary for the reconstruction of this torn society may not be possible. By assigning guilt to the leader-instigators, the tribunal may also lift the burden of collective guilt that settles on the Hutus, whose leaders directed or ordered such terrible violence. The assignment of guilt

[17] J. N. Maogoto, The International Criminal Tribunal for Rwanda, A Distorting Mirror; Casting Doubt on its Actor-Oriented Approach in Addressing the Rwandan Genocide, *African Journal of Conflict Resolution*, (2003) pp 55-97

by a tribunal also may enable the international community to differentiate between victims and aggressors. However, the international justice process must not erase the fact that the inter-ethnic conflict, while not genetically inbred, is firmly embedded in the socio-cultural structure and subconscious mind of the Rwandese society, and thus addressing these structural defects is part of the process of deterrence.[18] The focus on the ICTR indictees in unrealistic and demonstrates that the tribunal is unclear about why it exists and how it could make its modest contribution for the betterment of human rights in the region. Significant numbers of Rwandans perpetrated the bloodbath. What induced so many individuals to participate was not coercion, but rather genuine support of the idea that the Tutsi had to be eliminated, together with the pursuit of solidarity with others in attaining this goal.[19] This belief that one was doing right by killing might explain why so many of the killings were so brutal. In Rwanda, the killings were committed publicly and were known to all. Not surprising, the ICTR's existence and presence in Eastern Africa has done little to deter extremists Hutus in neighbouring countries such as the Democratic Republic of Congo from waging bloody guerilla-style excursions into Rwanda. Thousands of unarmed civilians have been killed across the border, in DRC, in an armed conflict involving several governments, including Rwanda and various armed opposition groups. The ICTR hopes to bring about a discontinuous jump by breaking the vicious cycle of human rights violations through an international presence that is little felt in Rwanda itself. The deep seated-animosity between the Hutus

[18] Ibid.
[19] T. Howland & W. Calathes, The UN's International Tribunal, Is It Justice or Jingoism for Rwanda? *Virginia Journal of International Law*, Vol 39 pp 135-148

and the Tutsis will not be dispelled easily by international criminal justice.[20] Whether the offence is tax evasion or genocide, deterrence theory presupposes a rational, utility-maximising actor. Persons commit crimes so the theory goes, when the expected value of doing so exceeds the cost of punishment. To reduce crime, society need only raise the price by imposing harsh penalties. In the real world this model is totally incorrect, hopelessly naïve, dangerously misleading and based on complete and utter ignorance of what violent people are actually like.[21] In addition to the slowness of bringing justice, the tribunal has not engaged the local population. The trials tend to be tedious, drawn-out affairs dominated by debates over the minutiae of international law. There are no juries, just judges, prosecutors, lawyers, clerks and witnesses separated from public gallery by bulletproof glass in three fish tank style courtrooms. Developments at the ICTR go mainly unnoticed in Rwanda. When the former mayor of Taba, Akayesu was convicted, his face appeared in all the major media in the USA and Europe. One place his face did not appear much was Taba, where few people had television to watch the news of his conviction.

Another criticism had to do with the leniency of international justice. The perpetrators of the genocide tried in state courts got the death penalty, while the masterminds prosecuted by the ICTR get off more lightly. A life sentence is the harshest punishment meted out in the ICTR, while around twenty two persons found guilty of the genocide in Rwanda were publicly shot before Rwanda abolished capital punishment. Lighter sentences, better prison conditions and guarantees of due process result in substantial advantages for those tried in the tribunal, certainly and unintended and unjust outcome.

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[20] J. N. Maogoto, The International Criminal Tribunal for Rwanda, A Distorting Mirror; Casting Doubt on its Actor-Oriented Approach in Addressing the Rwandan Genocide op cit

[21] J. Gilligan, *Violence, Our Deadly Epidemic and its Causes* (New York, GP Putnam, 1996) pp94-95

For instance, adhering to international standards of justice which require that defendants' rights are scrupulously protected led to the release of one leading genocide suspect, Jean-Bosco Barayagwiza, when prosecutors failed to present his case within the specified time. Victims' organizations were justifiably outraged, and survivors' groups suspended cooperation with the tribunal. Relations between the ICTR and Rwanda became so strained that eh government temporarily refused to give witnesses the proper papers to leave the country to testify.[22] The favourable prospects of arrests and prosecutions before the Rwanda tribunal should not create the impression that even a significant proportion of those who participated in the genocide will be punished. With very limited resources of the tribunal, only a fraction of these can be prosecuted. Nevertheless, the symbolic effect of prosecuting even a limited number of perpetrators, especially the leaders who planned and instigated the genocide, will have considerable impact on national reconciliation, as well as on deterrence of such crimes in the future. The prosecutions rendered by the ICTR make it clear that the concept of immunity will no longer be accepted as a defence against individual criminal responsibility for human rights atrocities. The ICTR sends a message to Rwanda, and indeed the rest of Africa that violations of international humanitarian law are the concern of the whole international community, and will no longer be tolerated. It hopes by this, to bring an end to impunity.

The most significant jurisprudential contribution to the development of international humanitarian law made by the ICTR relates to the crime of genocide. Historically, genocide went unpunished because it was generally but not exclusively committed under the direction or at the very least the complicity of the state. In the interest of state

[22] L. S. Graybill, Pardon, Punishment, and Amnesia: Three African Post-Conflict Methods, *Third World Quartely,* Vol 25 No. 6 (2004) pp 1117-1130

sovereignty, universal jurisdiction over violations of humanitarian principles failed to be exercised. The landmark case of Jean Paul Akayesu[23] which is already discussed in detail marks the first of several contributions the ICTR has made to the development and enforcement of international humanitarian law. This case provided the ICTR with the opportunity to implement the Genocide Convention, resulting in the first ever conviction of genocide. Although rape was not among the initial charges brought against Akayesu, the overwhelming evidence given by witnesses of sexual assaults resulted in the charges being amended to include crimes against humanity. The tribunal adopted a broader definition of rape that is more useful to the implementation of international law. The tribunal found that sexual violence, specifically targeting Tutsi women was an integral part of the process of their destruction, and to the destruction of the Tutsi group as a whole.[24]

The other significant contribution made by the ICTR was the decision in the Kambanda case[25], which has been discussed in previous chapters. Kambanda was convicted and given a sentence of life imprisonment for his crimes against humanity whilst he was head of the Rwandan state in 1994, making him the first head of state to be convicted for crimes against humanity. The Kambanda judgement gave the ICTR the opportunity to further clarify the elements that constitute genocide, war crimes and crimes against humanity. As the first Prime Minister to be convicted of crimes against humanity, the tribunal sent a clear message that even the highest ranking government

[23] See Chapter Four
[24] M. Humphrey, International Intervention, Justice and National Reconciliation; the Role of the ICTY and ICTR in Bosnia and Rwanda, *Journal of Human Rights*, Vol 2 (2003) pp 459-505
[25] See Chapter Four

officials will be held responsible for violations of international humanitarian law and face criminal sanctions. The judges observed thus:

> These crimes were committed when Kambanda was Prime Minister and he and his government were responsible for maintenance of peace and security. Kambanda abused his authority and the trust of the civilian population. He personally participated in the genocide by distributing arms, making incendiary speeches and presiding over cabinet and other meetings where the massacres were planned and discussed. He failed to take necessary measures to prevent his subordinates from committing crimes against the population.[26]

The ICTR faced problems not encountered by its sister tribunal in the Hague. Both the headquarters in Arusha and the investigation unit in Kigali were set up and had to function in towns with very limited infrastructure, and in area where there had never been any international court.[27] In the fight against no impunity, the ICTR has not only made significant jurisprudential contributions to the development and enforcement of international humanitarian law, but the ICTR has also adopted innovative procedural techniques for example the ICTR judges have changed their rules of procedure and evidence aimed at expediting cases, put in place measures aimed at protecting victims and witnesses, set new procedural standards relating to international humanitarian law and developed a clear investigation and prosecution strategy resulting in the apprehension of high ranking government officials.[28]

Like its sister tribunal in the Hague, the ICTR forms part of the United Nations. This raises several issues. First, the tribunal's legitimacy may be questioned, as the UN was not able to prevent atrocities in 1994. It is sometimes argued that the *ad hoc* tribunals were established more as acts of political contrition following failures to swiftly confront

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[26] Ibid
[27] R. Vokes, The Arusha Tribunal: Whose Justice? *Anthropology Today*, Vol 18 92002) pp1-2
[28] E. Mose, Main Achievements of the ICTR, *Journal of International Criminal Justice* Vol 3 (2005), pp 920-943

the situations in the former Yugoslavia and Rwanda, rather than as part of a deliberate policy promoting international justice. On the other hand, some of those involved in the drafting process have insisted that those framing international policy in the Balkans made no express linkage between the policy failures occurring during the wars and the need to address the commission of serious violations of international humanitarian law in their aftermath.[29] In relation to the ICTR, it appears that the motives in establishing the tribunal comprised a deep revulsion over the overwhelming scale of atrocities committed in Rwanda and a conviction that impunity for such crimes was no longer tolerable. There were strong incentives to act, and to do so fast. It is highly regrettable that the United Nations and its member states did not prevent the genocide. It has later been established that more should have been done. But a failure of the organization in 1994 cannot be held against the tribunal.[30]

The Statute of the ICTR by resolution 955, also gave the ICTR jurisdiction over "natural persons" which restricted cases against public and private groups or entities. Rwandans believed the influence of groups such as media and religious organizations were active and responsible for inhuman acts during the genocide and should be accordingly tried as a social unit unto themselves. The Rwandan people also felt a great dissatisfaction towards the international community after its failure to intervene and halt the genocide. Compared to the International Criminal Tribunal for the former Yugoslavia (ICTY), the ICTR has suffered from international disinterest and a lack of media attention. That is in part because the jurisdiction of the ICTR is limited to the trial

[29] D. Scheffer, Three Memories from the Year of Origin 1993, *Journal of International Criminal Justice*, (2004) 353-354
[30] E. Mose, Main Achievements of the ICTR op cit.

of crimes committed in between 1st January 1994 and 31st December 1994[31], while the ICTY's jurisdiction is not subject to any time limit. The symbolic existence of the tribunal has also not discouraged the ongoing protection in certain capitals (Kinshasa, Brazzaville, Nairobi among others) of more than a dozen powerful Rwandan Hutus who are among the principal genocide suspects.

Proceedings at the Arusha tribunal are excessively slow. Since 1997, speeding up the trials has been a constant theme in the work of judges during their plenary sessions. In November 1999, a hundred-page expert report on the operation of the *ad hoc* tribunals attempted to uncover the reasons for the logjams and concluded that those recently observed in Arusha were by far the worst[32].

Such delays seriously affect the ICTR's ability to carry out its mandate. They have caused situations of prolonged detention that give serious cause for concern. Beyond the official explanations and arguments about procedure or bad legal administration which are given ample space in the 1999 expert report, the judges are held responsible to a large extent for this unjustifiable situation. The poor output of the tribunal is linked to the mediocre productivity of judges, some of whom are incapable of running criminal trials and to their often-prolonged absences. Moreover, in their work, the tribunal chambers, which deal with the most serious crimes in cases that are often dense and complex, have relied to an abnormal extent on young legal assistants, even on interns. Given this assessment, judges should be held accountable for their work. International Crisis Group recommends, in the first instance, that the selection of judges should be more rigorously

[31] See Article 1 of the ICTR Statute

[32] Expert group report on the effectiveness of the activities and operation of the *ad hoc* tribunals, November 1999. *International Criminal Tribunal For Rwanda: Delayed Justice ICG Africa Report N° 30, 7 June 2001 Page 11*

organised and that candidates who have not had solid experience as a judge in criminal affairs should be rejected. It may be advisable in the short term to create an independent commission to attribute responsibility for the delays.[33]

To imagine that that the horrors of genocide can be contained within the confines of judicial process is to trivialize suffering that defies description. Yet the potential impact of the ICTR on political behaviour is subtle and long-term, profound and lasting. Publicly vindicating human rights norms and ostracizing criminal leaders may help to prevent future atrocities through the power of moral example to transform behaviour.[34]

ICTR and post conflict peace building

The ICTR provides a unique empirical basis for evaluating the impact of international criminal justice on post conflict peace building. The pursuit of justice may be dismissed as a well-intentioned, but futile, ritualistic attempt to restore equilibrium to a moral universe overwhelmed by evil. Moreover, measuring the capacity of punishment to prevent criminal conduct is an elusive undertaking, especially when a society is gripped by widespread habitual violence and an inverted morality has elevated otherwise deviant crimes to the highest expression of group loyalty. Yet an appreciation of the determinate causes of such large scale violence demonstrates that stigmatization of criminal conduct may have far-reaching consequences, promoting post conflict reconciliation and changing the broader rules of international relations and legitimacy. The recent arrest of leaders indicted by the ICTR provides at least a preliminary basis for appraising the preventive potential of international criminal justice in post conflict contexts. The ICTR has apprehended most of the significant leaders implicated in the 1994 genocide against the

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[33] Ibid

[34] J. N Maogoto, The International Criminal Tribunal for Rwanda: A Distorting Mirror; Casting Doubt on its Actor Oriented Approach in Addressing the Rwandan Genocide, op cit

Tutsi minority.[35] Evaluating the contribution of the ICTR to post conflict peace building depends on how prevention is defined in the context of large scale violence. It is unrealistic to suppose that the ICTR could have instantaneously deterred crimes in the midst of a particularly cruel interethnic war in Rwanda. Hastily erected bulwarks cannot be expected to save lives when the deluge has already begun. The threat of punishment-let alone an empty threat has a limited impact on human behaviour in a culture already intoxicated with hatred and violence. To expect that the ICTR would have brought immediate relief and reconciliation to their survivors of the massacres in Rwanda misapprehends the social devastation left in their wake. In Rwanda the impact to post conflict justice was diluted by unwillingness to intervene in time to stop ongoing atrocities. Against this backdrop, the first experiments in international accountability could not have been expected to instantly transform an entrenched culture of impunity into an abiding respect for the rule of law.[36]

The tribunal also endeavours, within budgetary constraints of the section for witness protection, to assist ailing witnesses who testify before the Judges in Arusha. Such assistance may seem derisory compared to the needs of survivors of the genocide, but it does provide concrete evidence of the international tribunal's concern for the victim's reparation and rehabilitation. However, even though the material request for reparation is not met, victims occupy a substantial place in proceedings before the ICTR. The greatest expectation of survivors of the genocide in Rwanda vis-à-vis the ICTR lies in the recognition of their suffering. Today, the survivors of the Rwandan genocide, as to survivors of the Nazi regime, wish to look the perpetrators in the eye and remind them

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[35] P. Akhavan, Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities? *The American Journal of International Law*, Vol 95 No 1, (2001) pp 7-31

[36] Adama Dieng, speech on 8 May 2003 in Kigali, unpublished, unofficial translation.

that they are human beings and not objects, as the perpetrators viewed them to be. Such recognition of their dignity offers solace for survivors and may contribute to the process of reconciliation. The arrest of the architects of the Rwandan genocide also rewards the efforts of Rwandan victims, victim organizations and Rwandan and international human rights organizations. Indeed the survivors of the genocide and other crimes against humanity, themselves assisted by Rwandan and international human rights organizations, survivor testimonies helped locate a number of perpetrators who had sought refuge abroad and often changed their names. The victims' perseverance bore its fruit before the ICTR and national courts in countries such as Belgium and Switzerland.[37]

The issue of the ICTR's contribution to Rwandan society cannot be stressed without also referring to the stabilization of a country whose social fabric and infrastructure were destroyed during the genocide. After the Rwandan armed forces were defeated in 1994, and the genocidal government fled into exile, thousands of refugees, for the most part Hutus, joined this government and its army in exile. From Rwandan refugee camps, mainly in the former Zaire, the previous leaders tried to destabilize the new Rwandan government who had put an end to the genocide. Several incursions were carried out in the prefectures of Gisenyi, Ruhengeri, Kibuye Gitarama and even Kigali. These forays into Rwanda targeted at survivors of the genocide, ceased with the dismantling of refugee camps by the Rwandan Patriotic Front, the very army who had defeated the genocidal forces. By arresting the architects of the genocide, the ICTR deprived the perpetrators of their main leaders. The overarching feeling among survivors is that without such arrests, the former political and military leaders involved in the genocide would have continued

[37] F. X Nsanzuwera, The ICTR Contribution to National Reconciliation, *Journal of International Criminal Justice* Vol 3 (2005) pp 944-949

to destabilize Rwanda, eliminate witnesses and aggravate the moral suffering of survivors.[38]

As a judicial body, the ICTR is independent of any one particular state or group of states, and of any other organ. However, as subsidiary organs of the Security Council, within the meaning of Article 29 of the United Nations Charter, they are subject in the conduct of their administrative and financial existence to the United Nations Financial Regulations and Rules and to the United Nations Staff Regulations and Rules. But more importantly, perhaps, then their administrative and financial links to the organization, is their dependency upon the political will of the Security Council to enforce compliance with the tribunal's orders, requests and judicial decisions. In both contexts, where major criminals, leaders, planners and organizers of the crimes falling within the jurisdiction of the tribunals are shielded by states or non state entities in whose territories they are present, it is the political will of the Security Council to enforce compliance with the decisions which will ultimately determine their success or failure. The interplay of law and politics is likely to govern the life of the international tribunals for as long as the surrender of accused depends on measures taken by a political organ which acts in this, as in all other matters, according to the political exigencies of any given situation. In the absence of a political will on the part of the Security Council to take enforcement measures in order to ensure compliance with the tribunal's orders and requests, questions of effectiveness and practicality of establishing international tribunals in similar circumstances and their prospects of success are bound to arise.[39]

Relations between the ICTR and Rwanda

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[38] Ibid

[39] D. Shraga and R. Zacklin, Symposium Towards an International Criminal Court, *European Journal of International Law* (1996) pp 501-518

Since 1994, relations between Rwanda and the ICTR have been rocky, fluctuating between a hesitant friendship and blatant suspicion and criticism on the part of Rwanda. When the first verdict of the ICTR was announced, the Rwandan Secretary of the Ministry of Justice expressed his skepticism and distrust of the tribunal stating that if Rwanda had been given one twentieth of the funds given to the tribunal, it would have gone a long way in solving its problems. The international community has attempted to alleviate some of this mistrust by issuing public apologies for their failure in preventing the genocide.[40] Relations between the ICTR and Rwanda were rocky in the tribunal's early years. This was largely because the tribunal's statute does not provide for the death penalty. There was also an initial perception based on understandable impatience for justice on the part of the victims and a lack of appreciation of the tribunal's procedures and characteristics as an international court that respects the highest human rights standards, that the tribunal was ineffective. All of these perceptions in Rwanda have recently undergone a subtle, positive shift. One major reason for this shift was the tribunals successes in apprehending the "big fish", accused persons whom most Rwandans knew were effectively beyond the reach of the domestic judicial systems.

Another reason was the tribunal's outreach programme, whose efforts have had an important impact. The ICTR has a strategic program of outreach to diverse audiences, using various communication channels. Particular attention is given to mass media and interpersonal communication in order to convey efficient and persuasive messages to targeted audiences inside and outside Rwanda. The focal point of the Outreach Program is the Information Centre *Umusanzu mu Bwiyunge* in Kigali. The Information Centre was

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[40] M. Colleen, The International Criminal Tribunal and the Rwandan Genocide, *Dartmouth College Undergraduate Journal of Law*, Vol III, Issue 3 (2005) pp 40-49

inaugurated in September 2000. The Centre provides a range of programs and opportunities to increase public understanding of the tribunal's work through briefings, lectures, workshops and films. The Information Centre facility is fully utilized by the Rwandan public, particularly students and researchers, who wish to get first-hand information about the tribunal. There remains however, a significant strain of skepticism about the ICTR in Rwanda.[41] This skeptism owes itself not so much to the performance of the tribunal, but to wider policy and popular debates about the contextual relevance of international criminal justice to the societies, in which the crimes they are adjudicating occurred. In this context, reservations about the tribunal are based on a view that its seat should have been located in Rwanda itself. Furthermore, the procedures utilized by the ICTR in its judicial proceedings differ from those in Rwandan domestic courts. Many Rwandans believe that trials at the tribunal place an excessive emphasis on respect for the rights of the accused persons and not enough on those of the victims and survivors. The prevalent viewpoint in Rwanda is that the rights of victims to direct representation in the proceedings, and to restitution from resources of the international community (in addition to the retributive justice of the tribunal that focuses on alleged perpetrators of the crimes within its jurisdiction), should be recognized by the ICTR.[42] Less often mentioned are the important political consequences of the tribunal's work. By its proceedings, the ICTR has discredited the Hutu leaders who were in power in Rwanda during the 1994 genocide. These have either been taken to court, identified and tracked down as fugitives, or reduced to silence. To this effect, the ICTR has made a decisive contribution to the task of neutralising Hutu extremism in the political arena and the radical ideology of "Hutu

[41] K. C. Moghalu, Image and Realty of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda, *The Fletcher Forum for World Affairs*, Vol 26.2 (2002) pp 21-46
[42] Ibid.

power" that it propagated. Clearly, it has not wiped out this ideology altogether. It continues to spread in the Democratic Republic of Congo, Burundi and across the region. However, as a political movement, it has for the moment disappeared from the public domain[43]. This conclusion stands out markedly in the analysis made by the former dean of the law school, Aloys Muberanziza, who argues that the ICTR cannot be seen as a simple court, confined to its role of hearing and determining cases. Its decisions and missions have great socio-political importance in Rwanda.

The stakes at the tribunal are not merely legal. It also has an impact on a political level. In the current state of affairs, it contributes to reinforcing government authority in Kigali. By tracking down the leaders of the fallen regime, the ICTR prevents them from ever claiming to play a political role in Rwanda.[44] While the International Criminal Tribunal for Rwanda (ICTR) has been highly criticized on many levels, in the long run it may be remembered for some ground-breaking precedents it has created with respect to international human rights law.

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[43] This observation is even more persuasive if compared to the former Yugoslavia. In its report of 2 November 2000, ICG stated that "only with the disappearance from public and political life, by one means or another, of the forces of extreme nationalism still determined to tear Bosnia apart at the seams, will the country and its people fully emerge from the horror of the last ten years." See ICG, "*War criminals in Bosnia's Republika Srpska : who are the people in your neighbourhood ?*", 2 November 2000.

[44] Expert group report on the effectiveness of the activities and operation of the *ad hoc* tribunals, November 1999. *International Criminal Tribunal For Rwanda: Delayed Justice ICG Africa Report* op cit.

Chapter Six

Conclusions

Predictions of the legacies of the *ad hoc* international criminal tribunals reflect far greater expectations for the impact of justice than earlier historical war crimes prosecutions. The most ambitious of these is the promise of peace and reconciliation. The inclusion of reconciliation in the Security Council's mandate for the International Criminal Tribunal for Rwanda converged with a modern discourse on war crimes prosecutions that infuses the ideals of Nuremberg with the revolutionary aspirations of the human rights movement in a new world order. Contemporary trends invest international justice with powerful assumptions about its capacity to transform post-conflict societies, as is reflected in the tribunal's own presentation of its role for the future of Rwanda.[1]

The traditional approach to criminal justice faces the challenges of balancing multiple goals, usually expressed as deterrence, incapacitation, rehabilitation, and retribution which focus on crime control. A restorative approach seems needed in all societies that have suffered massive and collective victimization, and must be kept in mind in Rwanda by the ICTR as it implements its overall strategy. The ICTR's almost exclusive focus on an actor oriented perspective[2], viewing the individual as a building block of the genocidal reality, distorts and obscures a structure-oriented perspective on the ethno-centric social reality that converted tens of thousands of Hutus into a mass of killers.[3] Although international tribunals can prosecute criminals, they can only target political leaders or

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[1] L. A Barria and S. D Roper, How Effective are International Criminal Tribunals? An Analysis of the ICTY and the ICTR, *The International Journal of Human Rights*, Vol 9, (2005) pp 349-368

[2] See Chapter Five

[3] M. Colleen, The International Criminal Tribunal and the Rwandan National Courts, *Dartmouth College Undergraduate Journal of Law*, Vol III (2005) pp 40-49

main instigators of human rights violations. This is hardly enough, there is a need for a national push as the ugliness of internal strife and the political reality of the ethnic hatred cannot be isolated in an international courtroom for resolution.[4] Reconciliation cannot be achieved by solely relying on international tribunals, there needs to be cooperation between the international and the national process. Additionally, tribunals create jurisprudence on international criminal law and as such give guidance to national courts.

The 1990s have witnessed the greatest advance of international humanitarian law since the end of the Second World War. The creation of the International Criminal Tribunal for Rwanda (ICTR) represents significant advancements in the interpretation and implementation of international law. The success of the tribunal (as well as its failures) ultimately became the basis for the debate over the need for a permanent international criminal institution which resulted in the International Criminal Court (ICC). The broader effect of criminal tribunals such as the ICTR on transforming a culture of impunity should not be overlooked. These criminal tribunals have mainstreamed accountability in international relations and thus instilled long-term inhibitions against international crimes in the global community. The establishment of the ICTR helped to revive the debates regarding the adoption a statue for an international criminal court.[5]

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[4] J. N. Maogoto, The International Criminal Tribunal for Rwanda: Distorting Mirror; Casting doubt on its actor-oriented approach in addressing the Rwandan Genocide, *African Journal of Conflict Resolution*, (2003) pp 55-97

[5] P. Akhavan, Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities? *The American Journal of International Law*, Vol 95, No. 1 (2001) pp7-31

While some of the literature has regarded these tribunals as ineffective institutions for the promotion of international justice[6], there is no accepted standard for measuring the effectiveness or success of these tribunals. Some argue that these tribunals should be judged by their ability to provide for international peace and security or to deter future atrocities or even to reintegrate societies.[7] While various authors have agreed on the importance of these tribunals[8], there has been much less agreement on what their mission is and how to measure their effectiveness. This is partly due to the fact that the Security Council saw these tribunals as having a multi-faceted mandate. The UN resolutions contain specific language that describes the international community's reasoning for establishing these tribunals. For example, Resolution 955 establishes three reasons for the creation of the international criminal tribunals. The Resolution notes that the ICTR will contribute to the maintenance of peace, will ensure that such violations are halted and effectively redressed and will lead to a process of national reconciliation.[9] While the first two mandates are similar for the ICTY, the ICTR was the first international tribunal established for the purpose of national reconciliation[10]

The goal of national reconciliation which is specifically mentioned in Resolution 955 is unique to the ICTR. In this broad goal, that the Security Council did not unequivocally address a logical link between international peace and national reconciliation through such a tribunal. In the Security Council debate over Resolution 955, the Czech

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[6] See Chapter Five

[7] Mark A. Drumb, 'Punishment, Post genocide: From Guilt to Shame to Civism in Rwanda', *New York University Law Review*, Vol.75 (2000), pp.221–326.

[8] See for instance, P. Akhavan, Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?, *The American Journal of International Law*, Vol 95 No. 1 (2001) pp 7-31, See Also, E. Mose, Main Achievements of the ICTR, *Journal of International Criminal Justice*, Vol 3 (2005) pp 920-943

[9] See Chapter two.

[10] H. Shinoda, Peace-Building by the Rule of Law: An Examination of Intervention in the Form of International Tribunals', *International Journal of Peace Studies*, Vol.7 (2002), pp.41–58.

Republic's representative argued that the ICTR is hardly designed as a vehicle for reconciliation as reconciliation is a much more complicated process'.[11]

The ICTR represents an international attempt to forge national reconciliation, because the national courts and governments are either institutionally weak or not disposed to healing the society. The international criminal tribunals are best understood as mechanisms of transitional justice that intervene to change social and political reality of post-atrocity states through prosecutions. They are involved in a process of 'legalizing' collective memories in order to change the past for the benefit of the present and the future. However, the measure of their success is the extent to which they forge a new political community through their truth and justice policies. International trials set benchmarks and establish facts which must then be taken up in national prosecutions if justice is to be consolidated and law restored in the communities traumatized by atrocities.[12] Once international tribunals have successfully completed their mandate, it will create room for national governments to establish truth and reconciliation commissions in which just policies may emerge.

International criminal trials have re-emerged as part of the international diplomacy of intervention in the relationship between states and their populations after widespread atrocities. The establishment of these criminal tribunals represents an attempt to apply international criminal law in two situations where states have failed to protect their citizens from extreme violence and atrocity and the successor state has had neither the capacity nor the will to fulfill its obligations to investigate and prosecute gross human rights abuse. The various national crises and state atrocities that occurred during the

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[11] See Chapter Two

[12] M. Humphrey, International intervention, justice and national reconciliation: the role of the ICTY and ICTR in Bosnia and Rwanda, *The International Journal of Human Rights* Vol. 9 (Sep 2005) pp 349-368

1980s and 1990s in Africa, Europe and Asia confronted international legal and political institutions with the problem of how best to intervene to stop human rights abuses and reintroduce the rule of law. These international criminal tribunals have sought to undertake what national courts could not and to provide the institutional groundwork for the establishment of a permanent International Criminal Court (ICC).[13]

International criminal tribunals have emerged in the context of political crisis in nation states in which political violence has taken the form of mass atrocity. They are part of strategies of international intervention to stop violence and help restore peace and achieve national reconciliation through justice. However, the project of justice they have set themselves is in contexts where states have failed and societies have divided. They are part of larger political projects to reverse the polarizing effects of internal strife and conflict and to construct a new political community and national identity. Although international human rights law is used to recover the universality of law, the effect of international criminal tribunals is inevitably selective. The prosecution of mass atrocity through criminal law imposes the logic of individualizing responsibility for crimes. This occurs both as a consequence of establishing the truth about specific crimes and also through the structure of trials, which makes selectivity a method of dividing the innocent and guilty. The symbolic character of international trials becomes burdened by the need to gain judicial acceptance for their prosecutions and verdicts among antagonistic communities. They face the problem of addressing the rights, grievances and fears of communities divided and displaced by war with no political community yet to embrace

[13] J. M. Maogoto, International Justice for Rwanda Missing the Point: Questioning the Relevance of Classical Criminal Law Theory, *Bond Law Review*, Vol 8 (2001) pp 1-28

them. The international criminal tribunals represent forums of transitional justice whose revelations and verdicts need to be consolidated through national prosecutions.

International tribunals can never be anything but the focus for justice after mass atrocity that establishes the 'truth' about past violence. The restoration of law and justice must be then founded and affirmed in national communities through their laws, courts and constitutions.[14] The tribunal clearly had an impact on the establishment of the ICC, as well as on its statute and rules. The principle of individual criminal responsibility for everyone, including leaders, has been firmly established. Accountability has replaced impunity in principle, if not yet in practice. New professional groups of international judges, prosecutors, defence counsel and administrators have experience that did not exist in the previous years. The ICTR has played an important role in this process. The final appraisal can only be made upon the completion of its work. But the tribunal has already made a significant contribution to the development of international criminal justice.[15]

[14] Ibid
[15] E. Mose, Main Achievements of the ICTR, Op cit