The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA: THE POLITICS AND PRAGMATICS OF PUNISHMENT

In empirical terms, unconscionable atrocities have been the most effective catalyst for standard setting and institution building in the international human rights system. Indeed, the introduction of human rights into the corpus of international law was the result of the unprecedented barbarity of the Second World War. The doctrine of crimes against humanity under the Nuremberg Charter, the Convention on the Prevention and Punishment of the Crime of Genocide, and the Universal Declaration of Human Rights—all owe their existence to the universal moral revulsion against the Holocaust and other excesses of Nazi Germany. In the post–Cold War era, "ethnic cleansing" in the former Yugoslavia and genocide in Rwanda have assumed a similar role, giving rise to an unprecedented experiment in institution building by the United Nations.

In May 1993, the Security Council established an ad hoc International Tribunal for the former Yugoslavia,[1] followed by the establishment of a similar International Tribunal for Rwanda in November 1994.[2] In a sense, the decision to establish these Tribunals is yet another expression of the reactive nature of the international human rights system. In the case of Rwanda in particular, there was ample opportunity, but little willingness, to take preventive action or to intervene against what is perhaps the worst genocide since the Second World War. At least one year before the massacres of April 1994, which according to some estimates took the lives of as many as five hundred thousand to one million people in just three months,[3] United Nations human rights experts and nongovernmental organizations had forewarned of an impending calamity,[4] to no avail. Furthermore, had the sequence of events between the Yugoslav and Rwanda conflicts been different, it is by no means certain that a tribunal for Rwanda would have been established. On the basis of international responses to other situations, it has been suggested 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. In view of this harsh reality, there is little room for celebration, and even less for triumphalism.

It should not be overlooked, however, that in the light of other situations where genocide was committed with complete impunity, the establishment of these ad hoc Tribunals may prove to be a significant step forward for the cause of international justice.[5] The unconscionable atrocities in former Yugoslavia and Rwanda have become

[1] SC Res. 827 (May 25, 1993), *reprinted in* 32 ILM 1203 (1993). For a comprehensive overview of the legislative history and Statute of the Yugoslav Tribunal, see James C. O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AJIL 639 (1993).

[2] SC Res. 955 (Nov. 8, 1994) (with annexed Statute), *reprinted in* 33 ILM 1602 (1994).

[3] According to the June 1994 report on the human rights situation in Rwanda, submitted by Special Rapporteur R. Degni-Ségui of the UN Commission on Human Rights:

> [T]he number of persons killed throughout the territory is to be numbered in the hundreds of thousands, estimates ranging from 200,000 to 500,000. In fact, even the latter figure is probably less than the reality. Some observers think that the figure is close to a million. It is not sure that the exact number of victims will ever be known.

UN Doc. E/CN.4/1995/7, at 7, para. 24.

[4] According to the statement of the Rwandese representative before the Security Council: "The international community, through its diplomatic representatives and international organizations in Kigali, as well as many reports by human rights organizations, was well aware of [previous] massacres and cannot claim that it became cognizant of the situation only in the wake of the tragedy of April 1994." UN Doc. S/PV.3453, at 15 (1994). In this respect, see, e.g., the report of Bacre Waly Ndiaye, Special Rapporteur on extrajudicial, summary or arbitrary executions of the Commission on Human Rights, UN Doc. E/CN.4/1994/7/Add.1. *See also* the report of Degni-Ségui, *supra* note 3, at 7–8, para. 26.

[5] *See, e.g.*, Payam Akhavan, *Enforcement of the Genocide Convention: A Challenge to Civilization*, 8 HARV. HUM. RTS. J. 229 (1995).

the twin pillars of moral outrage upon which the beginnings of a long-awaited international criminal jurisdiction can be discerned. The establishment and interrelationship of these two Tribunals is a bold and unique experiment with far-reaching implications for the development of the international legal order. The following is an overview of the circumstances leading to 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.

I. The Legislative History of the Rwanda Tribunal

As with the Yugoslav Tribunal, the establishment of the Rwanda Tribunal was preceded by an impartial commission of experts mandated by the Security Council to examine and analyze evidence of grave violations of international humanitarian law, including evidence of possible acts of genocide.[6] In its first interim report, the commission concluded that "there exists overwhelming evidence to prove that acts of genocide against the Tutsi group were perpetrated by Hutu elements in a concerted, planned, systematic, and methodical way," and that the "mass exterminations perpetrated by Hutu elements against the Tutsi group . . . constitute genocide."[7] Furthermore, the commission recommended that the Security Council take all necessary and effective action to "ensure that the individuals responsible . . . are brought to justice before an independent and impartial international criminal tribunal"[8] 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."[9]

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 January 1994 and 31 December 1994 (Rwanda Tribunal). The Yugoslav Tribunal was established in a two-stage process—proceeding from a request for a report by the Secretary-General, which was subsequently approved by the Security Council.[10] 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."[11] 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. 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.

[6] SC Res. 935 (July 1, 1994).
[7] UN Doc. S/1994/1125, at 30, para. 148.
[8] *Id.* at 31, para. 150.
[9] *Id.*, para. 152.
[10] The request was made in SC Res. 808 (Feb. 22, 1993), followed by the submission of a Report by the Secretary-General, UN Doc. S/25704 (1993), *reprinted in* 32 ILM 1159 (1993), which included a draft Statute that was approved by SC Res. 827, *supra* note 1.
[11] *See* Report of the Secretary-General pursuant to paragraph 5 of Security Council resolution 955 (1994), UN Doc. S/1995/134, at 2–3, para. 7.

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."[12] 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 "[h]e or she shall have additional staff, including an additional Deputy Prosecutor to assist with prosecutions before the International Tribunal for Rwanda."

A noticeable difference between the Rwanda and Yugoslav Tribunals relates to the scope of subject matter 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, the Rwanda Statute, in defining crimes against humanity in Article 3, does not require a nexus with armed conflict,[13] although it requires an additional link between the proscribed inhumane acts and discriminatory grounds.[14]

The most significant difference between the two Statutes relates to Article 4 of the Rwanda Statute, which includes violations of Article 3 common to the 1949 Geneva Conventions and of the 1977 Additional Protocol II within the subject matter jurisdiction of the Tribunal. Since the Rwanda conflict was noninternational in character, the grave breaches provisions of the 1949 Geneva Conventions were clearly inapplicable. Yet the Secretary-General had excluded common Article 3 and Additional Protocols I and II from the Yugoslav Statute on the grounds that they were not "rules of international humanitarian law which are beyond doubt part of the customary law."[15] In their interpretive statements following the adoption of the Yugoslav Statute, member states of the Security Council had indicated that the illustrative term "laws or customs of war" under Article 3 includes "all obligations under humanitarian law agreements in force in the territory of the former Yugoslavia at the time the acts were committed," including common Article 3 of the 1949 Geneva Conventions and the 1977 Additional Protocols.[16] The jurisprudence of the appeals chamber supports the inclusion of common Article 3 of the Geneva Conventions under Article 3 of the Yugoslav Statute, based on "the intent of the Security Council and the logical and systematic interpretation of Article 3 [of the Yugoslav Statute] *as well as customary international law.*"[17] The Report of the Secretary-

[12] *Id.* at 3, para. 9.

[13] In the seminal case of *Prosecutor v. Tadić*, the appellate chamber of the Tribunal unanimously held:

> It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, 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.

UN Doc. IT-94-1-AR72, at 73, para. 141 (1995), *reprinted in* 35 ILM 32, 72 (1996).

[14] Unlike the Yugoslav Statute (Art. 5), the Rwanda Statute expressly requires that the enumerated inhumane acts 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. On this point, see the formulation of the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, [1950] 2 Y.B. Int'l L. Comm'n 374, 377, para. 120, UN Doc. A/CN.4/SER.A/1950/Add.1.

[15] UN Doc. S/25704, at 9, para. 34 (1993).

[16] *See* statement of the United States representative, UN Doc. S/PV.3217, at 15 (1993); *see also* statement of the French representative, *id.* at 11, and the United Kingdom representative, *id.* at 19.

[17] *See Tadić*, UN Doc. IT-94-1-AR72, at 71, para. 137, 35 ILM at 71 (emphasis added).

General on the Rwanda Statute notes that the Security Council "has elected to take a more expansive approach to the choice of the applicable law than the one underlying the statute of the Yugoslav Tribunal."[18] Furthermore, contrary to the position of the appeals chamber with respect to the status of common Article 3, the Report suggests that the Council has thereby included within the subject matter jurisdiction of the Rwanda Tribunal "international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime."[19]

II. The Position of the Rwandese Government

Unlike the Federal Republic of Yugoslavia and other key parties,[20] which opposed the establishment of the Yugoslav Tribunal, the Rwandese Government supported the establishment of an ad hoc international criminal jurisdiction and—as an affected party as well as a member state of the Security Council—participated fully in the deliberations on the Statute and the negotiations leading to the adoption of Resolution 955. Indeed, Rwanda took the initiative in proposing the establishment of an international tribunal as early as September 1994, before any serious consideration was given to the matter by other states.[21] This situation resulted in part from the military defeat of the party responsible for the genocide, so that the successor government (i.e., a coalition dominated by the victorious Rwandese Patriotic Front) stood to benefit from the punishment and political isolation of its predecessors. During the Security Council's deliberations, the Rwandese representative invoked four basic arguments in support of establishing an ad hoc international criminal jurisdiction.

First, the Rwandese Government favored an international tribunal because it believed that "the genocide committed in Rwanda is a crime against humankind and should be suppressed by the international community as a whole."[22] Beyond political rhetoric or a moral desideratum, this statement recognized the universal character of international norms for the repression of genocide, which may be regarded as "the Constitution of international society, the new international constitutional law," established not "for the benefit of private interests but for that of the general interest."[23] Second, the Rwandese Government supported an international tribunal because of its desire to avoid "any suspicion of its wanting to organize speedy, vengeful justice."[24] Instead of a "victor's justice," an international presence would ensure an exemplary justice that would be seen to be completely impartial and fair.

Third, the Rwandese Government believed that "it is impossible to build a state of law and arrive at true national reconciliation" without eradicating "the culture of impunity" that has characterized Rwandese society. Making reference to the incitement to ethnic hatred and violence by extremist leaders, the Rwandese representative emphasized that those "who were taught that it was acceptable to kill as long as the victim was from a different ethnic group or from an opposition party, cannot arrive at national

[18] UN Doc. S/1995/134, at 3–4, para. 12.

[19] *Id.* For a recent discussion of the customary law status of common Article 3 and Protocol II, see Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AJIL 554 (1995).

[20] I.e., the Bosnian Serb administration in Pale and the Krajina Serb administration in Knin.

[21] *See* Letter from the Permanent Representative of Rwanda Addressed to the President of the Security Council (Sept. 28, 1994), UN Doc. S/1994/1115. Furthermore, in his address to the General Assembly in October 1994, President Pasteur Bizimungu of Rwanda emphasized that "it is absolutely urgent that this international tribunal be established." UN GAOR, 49th Sess., 21st plen. mtg., at 5 (1994), *quoted in* UN Doc. S/PV.3453, at 14 (1994).

[22] UN Doc. S/PV.3453, at 14 (1994).

[23] *See* Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 ICJ Rep. 15, 51 (Advisory Opinion of May 28).

[24] UN Doc. S/PV.3453, at 14 (1994).

reconciliation unless they learn new values"; this goal can only be achieved "if equitable justice is established and if the survivors are assured that what has happened will never happen again."[25] The Rwandese Government was convinced that, through the punishment of "those responsible for the Rwandese tragedy," the Tribunal "will help national reconciliation and the construction of a new society based on social justice and respect for the fundamental rights of the human person."[26] Therefore, consonant with the establishment of the Tribunal as a Chapter VII measure for the "restoration of peace and security," the punishment of past human rights abuses was viewed as an essential element of postconflict peace building in a society destroyed by division and strife. Fourth, the Rwandese Government wanted an international tribunal so that it would be "easier to get at those criminals who have found refuge in foreign countries."[27] This was a highly important pragmatic consideration because many of the perpetrators, especially those in positions of leadership, had fled from Rwanda.

In view of its clear and reasoned support for the establishment of an international tribunal, it is interesting to consider why Rwanda, as a member of the Security Council, eventually voted against Resolution 955.[28] In its initial proposal to establish an international tribunal, the Rwandese Government had apparently envisaged a jurisdiction that would be under its control but would enjoy international judicial assistance and cooperation. The desire to retain sovereignty was actuated in part by the perception that an international criminal jurisdiction may be manipulated or made ineffective by states with ties to the previous regime. The Rwandese delegation held several meetings with the sponsors of the initial draft resolution requesting amendments to the text, some of which it succeeded in obtaining, but was ultimately not satisfied with Resolution 955 and the Statute of the Tribunal on the following seven grounds.

First, the Rwandese Government was of the view that the temporal jurisdiction of the Tribunal was too restrictive. It covered only the period between January 1, 1994, and December 31, 1994, whereas "the genocide the world witnessed in April 1994 was the result of a long period of planning during which pilot projects for extermination were successfully tested."[29] The Rwandese representative had proposed that account be taken of the period from the beginning of the armed conflict on October 1, 1990, until July 17, 1994, when it terminated with the victory of the Rwandese Patriotic Front, arguing that an international tribunal "which refuses to consider the causes of the genocide in Rwanda and its planning . . . cannot be of any use . . . because it will not contribute to eradicating the culture of impunity or creating a climate conducive to national reconciliation."[30] From the perspective of the Security Council members, the primary issue was whether application of Chapter VII to crimes committed prior to the April 1994 genocide would be justified. During a similar discussion with respect to the temporal jurisdiction of the Yugoslav Tribunal, the French representative had pointed out that the competence of the Tribunal should not extend to "crimes predating the dissolution of the former Yugoslavia and the outbreak of the current conflicts" because, under Chapter VII, "the establishment of a tribunal would be authorized only for the purpose of maintaining or restoring peace, [and] not in order to punish earlier crimes."[31]

[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] Unlike the Yugoslav Statute, annex to UN Doc. S/25704, *supra* note 10, which was adopted unanimously by the Security Council, the Rwanda Statute was adopted with the dissenting vote of Rwanda in addition to an abstention by China. The Chinese representative stated that it is "an incautious act to vote in a hurry on a draft resolution and statute that the Rwanda Government still finds difficult to accept" and that may also have an uncertain impact on "relevant efforts in future." UN Doc. S/PV.3453, at 11 (1994).
[29] UN Doc. S/PV.3453, at 14 (1994).
[30] *Id.*
[31] UN Doc. S/25266, at 22, para. 76 (1993).

Nevertheless, the concerns of the Rwandese Government were not entirely disregarded. "Although the crash of the aircraft carrying the Presidents of Rwanda and Burundi on 6 April 1994 is considered to be the event that triggered the civil war and the acts of the genocide that followed," as the Secretary-General pointed out, the Security Council decided that the temporal jurisdiction of the Tribunal would commence on January 1, 1994, "*in order to capture the planning stage of the crimes.*"[32] Furthermore, irrespective of the temporal jurisdiction, Article 6 of the Rwanda Statute, relating to the basis for individual criminal responsibility, as well as Article 2(3), which enumerates the punishable acts of genocide, would presumably cover acts such as planning, instigating, ordering, or otherwise aiding and abetting a crime that commenced prior to January 1, 1994, so long as there was a causal nexus between those acts and the completion of the crime during 1994. That is, there is a continuum of criminal responsibility that extends from the planning and preparation phases to the execution phase of the genocide.

Nevertheless, there are certain offenses, such as "direct and public incitement to commit genocide" under Article 2(3)(c), that are punishable irrespective of a nexus with the subsequent commission of genocide.[33] Since evidence of a linkage with other acts is not required, this provision gives the prosecution a considerable advantage. However, because of the Tribunal's temporal jurisdiction, this advantage would not extend to acts of incitement completed prior to 1994. For example, it is alleged by the Rwandese Government that, in a statement made on November 26, 1992, Dr. Léon Mugesera, one of the advisers to President Habyarimana, called for the extermination of the Tutsi in what is described as a "final solution, Rwandese-style."[34] Within the confines of the Rwanda Statute's temporal jurisdiction, the incitement to genocide allegedly committed in 1992 would fall under the jurisdiction of the Tribunal (e.g., as planning, instigating, or aiding and abetting under Article 6, or incitement to genocide under Article 2(3)(c)) only if a causal nexus is established with the subsequent commission of genocide in 1994.

The second reason for the dissenting vote of the Rwandese Government was based on the view that "the composition and structure" of the Tribunal was "inappropriate and ineffective." Because of "the magnitude of the task awaiting the staff of the Tribunal and the need for speedy and exemplary action by the Tribunal," the Rwandese representative had requested that "the number of Trial Chamber judges be increased" and that the Tribunal "be given its own Appeals Chamber and prosecutor." In a strongly worded protest, the delegate suggested that "the establishment of so ineffective an international tribunal would only appease the conscience of the international community rather than respond to the expectations of the Rwandese people and of the victims of genocide in particular."[35] As discussed above, the coexistence of the Rwanda and Yugoslav Tribunals "mandated that certain organizational and institutional links be established between the

[32] UN Doc. S/1995/134, at 4, para. 14 (emphasis added).

[33] There appears to be some ambiguity in the *travaux préparatoires* of the Genocide Convention on this point. Although early versions of the draft Convention provided expressly that incitement to commit genocide was punishable "whether such incitement be successful or not," this phrase was deleted by a Belgian compromise amendment that "would allow the legislatures of each country to decide, in accordance with its own laws on incitement, whether incitement to commit genocide had to be successful in order to be punishable." UN GAOR 6th Comm., 3d Sess., 85th mtg., at 220–21, UN Doc. A/C.6/SR.85 (1948). As a general rule, common law systems recognize incitement as a crime irrespective of its outcome, whereas continental systems consider incitement as a crime only when it succeeds in achieving its objective. Nonetheless, the delegates of states with continental legal systems such as France maintained that "all national legislation treated incitement to crime, even if not successful, as a separate and independent breach of the law." *Id.* at 227.

[34] *See* UN Doc. S/PV.3453, at 15 (1994); *see also* Interim Report of the Commission of Experts, UN Doc. S/1994/1125, at 13, para. 49. Dr. Mugesera subsequently applied for and obtained residency in Canada and currently faces deportation proceedings under the Immigration Act of Canada on the grounds that he withheld information from immigration authorities that would have otherwise made his application inadmissible.

[35] UN Doc. S/PV.3453, at 15 (1994).

two Tribunals to ensure a unity of legal approach, as well as economy and efficiency of resources."[36] To address the concerns of Rwanda, however, the Security Council decided in Resolution 955 "to consider increasing the number of judges and Trial Chambers" of the Rwanda Tribunal "if it becomes necessary."[37]

Third, there was concern that, with its "meager" human and financial resources, the Tribunal would "disperse its energy by prosecuting crimes that come under the jurisdiction of internal tribunals," such as "crimes of plunder, corporal punishment or the intention to commit such crimes, while relegating to a secondary level the genocide that brought about its establishment."[38] Presumably, this statement refers to isolated violations of Article 3 common to the 1949 Geneva Conventions and of Additional Protocol II, under Article 4 of the Rwanda Statute. As discussed below, however, the first indictments of the Rwanda Tribunal concern acts of genocide involving thousands of victims, and the prosecutor has repeatedly indicated that the "essential objective" of his office is "to bring to justice those most responsible both at the national and local level for the mass killings that took place in Rwanda in 1994."[39]

Fourth, the Rwandese representative stressed that "certain countries, which need not be named," had proposed candidates for judges and participated in their election despite the fact that they "took a very active part in the civil war in Rwanda."[40] Despite these concerns, the trial chambers, in addition to the existing appeals chamber, eventually consisted of "persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices," as called for in Article 12(1) of the Rwanda Statute.

Fifth, the Rwandese delegation could not accept that "those condemned be imprisoned outside Rwanda and that those countries be given the authority to reach decisions about the detainees," arguing that this must be "for the International Tribunal or at least for the Rwandese people to decide."[41] The delegation pointed to countries "that would be inclined to let the perpetrators of the genocide go free"; undoubtedly, "it would be those very countries that would rush to have in their prisons those Rwandese that are condemned by the International Tribunal."[42] Nevertheless, under the provisions of the Statute, the Tribunal has broad authority to safeguard against such situations. Corresponding to Article 27 of the Yugoslav Statute, Article 26 of the Rwanda Statute provides in relevant part that the Tribunal shall designate the state in which imprisonment shall be served from "a list of States which have indicated to the Security Council their willingness to accept convicted persons," and that "imprisonment shall be in accordance with the applicable law of the State concerned" but always "subject to the supervision of the International Tribunal for Rwanda." Unlike the Yugoslav Statute, the Rwanda Statute in Article 26 expressly provides that sentences may be served in Rwanda, as well as other states, as designated by the Tribunal. Furthermore, unlike Resolution 827, which established the Yugoslav Statute, Resolution 955 provides that the enforcement, pardon or commutation of sentences under Articles 26 and 27 of the Rwanda Statute will be carried out only after prior notification of the Rwandese Government.[43]

The sixth point of contention was that the Statute "establishes a disparity in sentences since it rules out capital punishment, which is nevertheless provided for in the Rwandese

[36] UN Doc. S/1995/134, at 3, para. 9.
[37] SC Res. 955, *supra* note 2, operative para. 7.
[38] UN Doc. S/PV.3453, at 15 (1994).
[39] *See* Press Statement by the Prosecutor of the International Criminal Tribunal for Rwanda, Justice Richard Goldstone (Dec. 12, 1995).
[40] UN Doc. S/PV.3453, at 15 (1994).
[41] *Id.*
[42] *Id.*
[43] SC Res. 955, *supra* note 2, operative para. 3.

penal code."[44] The Rwandese representative maintained that persons in positions of leadership appearing before the Tribunal who "devised, planned and organized the genocide . . . may escape capital punishment," whereas lower-ranking perpetrators "who simply carried out their plans" and would presumably appear before Rwandese courts "would be subjected to the harshness of [the death] sentence."[45] Article 6 of the International Covenant on Civil and Political Rights provides in relevant part that the sentence of death "may be imposed only for the most serious crimes" "pursuant to a final judgment rendered by a competent court," and that "anyone sentenced to death shall have the right to seek pardon or commutation of the sentence." Notwithstanding these limitations, there is no consensus on the abolition of the death penalty under international law, although several Western[46] and other states have adopted the position that "abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights."[47] Therefore, the abolition of the death penalty under the Rwanda Statute is essentially a question of determining whether, because of moral considerations, conceptions of justice prevailing in certain societies should prevail over that of the Rwandese people.

The seventh and final disagreement related to the seat of the Tribunal, which according to the Rwandese representative should have been in Rwanda to achieve the desired effect of "teach[ing] the Rwandese people a lesson, to fight against the impunity to which it had become accustomed . . . and to promote national reconciliation."[48] It was also pointed out that "establishing the seat of the Tribunal on Rwandese soil would promote the harmonization of international and national jurisprudence."[49] The seat of the Rwanda Tribunal was eventually established in Arusha, Tanzania, close to Rwanda but in a state that would be perceived by all concerned as neutral.

It should be pointed out that, despite the dissenting vote of the Rwandese Government, many of its misgivings about the Tribunal subsequently proved to have been unwarranted. The operational phase of the Tribunal, still in its early stages, indicates that, notwithstanding the serious practical limitations, the investigations and prosecutions will be carried out with impartiality, integrity and effectivity. Accordingly, a relationship of cooperation with the Rwandese Government, indispensable to the success of the Tribunal, was eventually established.

III. The Pragmatics of Punishment

There is a great distance between the establishment of an ad hoc judicial institution through a Security Council resolution and rendering it operational at the practical level. Many difficulties are associated with such matters as the formulation and adoption of a budget, especially within the confines of the financially bankrupt United Nations; negotiations with the Rwandese and Tanzanian Governments leading to the establishment of offices in Kigali and Arusha, respectively; the recruitment and placement of qualified international staff on short notice; making appropriate logistical and security

[44] UN Doc. S/PV.3453, at 16 (1994).

[45] *Id.*

[46] Significantly, during the deliberations of the Security Council, the United States representative, acting as President of the Council, stated in reference to the position of the Rwandese Government concerning capital punishment that, "indeed, on the death penalty we might even agree [but] it was simply not possible to meet those concerns and still maintain broad support in the Council." *Id.* at 17.

[47] There are 26 states parties and 21 signatories to the Second Optional Protocol to the International Covenant on Civil and Political Rights, GA Res. 44/128 (Dec. 15, 1989), *reprinted in* 29 ILM 1464 (1990), aiming at the abolition of the death penalty. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL—STATUS AS AT 31 DECEMBER 1994, at 203, UN Doc. ST/LEG/SER.E/13 (1995).

[48] UN Doc. S/PV.3453, at 16 (1994).

[49] *Id.*

arrangements for criminal investigations in an impoverished country devastated by war; and gathering the testimony of witnesses and victims who are severely traumatized, fearful of reprisals, and often hard to find among a massive population of displaced persons and refugees. Despite these obstacles, the Rwanda Tribunal succeeded in becoming operational in a relatively short period of time. On December 12, 1995, just one year after the adoption of Security Council Resolution 955, the Tribunal issued its first indictment, in which eight individuals are accused, inter alia, of genocide and conspiracy to commit genocide in the mass killing of several thousand men, women and children in the Kibuye Prefecture of western Rwanda.[50] On February 16, 1996, following the arrest of two suspects in Zambia, two further indictments were issued with respect to massacres in the Kigali and Gitarama Prefectures of central Rwanda.[51] One of the accused, Georges Rutaganda, was vice president of the notorious Interahamwe militia, which played a leading role in the 1994 genocide. In addition to these indictments, the prosecutor has made three requests for deferral of investigations and criminal proceedings by Belgium and Switzerland to the competence of the Tribunal under Article 8(2) of the Statute, with respect to several detained individuals suspected of participating in civilian massacres in the Butare and Kibuye Prefectures of Rwanda, as well as incitement to genocide through the broadcasts of Radio Télévision Libre des Mille Collines.[52] In the coming months, other indictments and requests for deferral, as well as the commencement of the first trials, are expected.

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 neighboring countries or in exile elsewhere. Accordingly, the prospect of arresting Rwandese suspects is more feasible, although the cooperation of Rwanda and third states such as Zaire is vital and poses some difficulties. The most significant development in this regard was the arrest on March 11, 1996, of Colonel Bagosora, a leading member of the former interim Government in Rwanda during the mass killings of 1994. Despite extradition requests from Belgium and Rwanda, the prosecutor of the Tribunal has indicated that, because of his position of senior leadership in the former Rwandese Government, it is appropriate that Bagosora stand trial for his alleged crimes before the International Tribunal at Arusha.

The favorable prospect of arrests and prosecutions before the Rwanda Tribunal should not create the impression that even a significant proportion of those who participated in the 1994 genocide will be punished. At present, there are some sixty thousand suspects in Rwandese prisons. With the 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 the perpetrators, especially the leaders who planned and instigated the genocide, would have considerable impact on national reconciliation, as well as on deterrence of such crimes in the future. Furthermore, although it enjoys primacy over national courts, the Tribunal, under Article 8 of its Statute, has concurrent jurisdiction with national courts. At present, the practical significance of trials before Rwandese courts is very limited. It is estimated that, of a total of three hundred judges and lawyers in appellate courts and five hundred in provincial courts prior to April 1994, only forty magistrates survived and remained in Rwanda.[53] There are ongoing efforts on the part of international agencies and nongovernmental organizations to provide Rwandese lawyers,

[50] UN Doc. ICTR-95-1-I (1995).
[51] UN Docs. ICTR-96-3-I and ICTR-96-4-I (1996).
[52] UN Docs. ICTR-96-2-D, ICTR-96-5-D, and ICTR-96-6-D (1996).
[53] United States Institute of Peace, Special Report, Rwanda: Accountability for War Crimes and Genocide 15 (1994).

magistrates and judges with intensive training for the prosecution of genocide cases. Furthermore, the establishment of "specialized tribunals" for genocide has been proposed as a means of expediting the judicial process. In addition, prosecutions may take place in third states that have arrested suspects, based on the universality principle of jurisdiction, which clearly applies to offenses such as crimes against humanity and genocide. The cumulative efforts of the International Tribunal and national courts should ensure that the greatest possible number of the so-called *génocidaires* are brought to justice.

Despite the relatively favorable circumstances for the arrest and prosecution of suspects, the ultimate success or failure of the Rwanda Tribunal depends on the financial and political support of the international community, which, in turn, depends on a firm resolve to vindicate the most elementary norms of humanity. In view of the present deliberations on the establishment of a permanent international penal court,[54] the stakes of this experiment are very high. Here is a unique opportunity to exploit the success of ad hoc justice born of political expedience for the realization of an international order in which the rule of law shall prevail for all peoples.

PAYAM AKHAVAN*

SURRENDER OF FUGITIVES BY THE UNITED STATES TO THE WAR CRIMES TRIBUNALS FOR YUGOSLAVIA AND RWANDA

I. INTRODUCTION

On February 10, 1996, the United States enacted legislation[1] to implement two international agreements[2] concerning the surrender of suspects, entered into with the war crimes tribunal investigating atrocities in the former Yugoslavia and its counterpart investigating the genocide in Rwanda (the Tribunals). The United States thereby joined France, Germany and at least nine other states that thus far have modified their domestic law to ensure compliance with the Security Council resolutions mandating the arrest and surrender of fugitives charged with serious violations of international humanitarian law.

This paper briefly examines the United States' international legal obligation to surrender fugitives to the Tribunals and the provisions of the two executive agreements and implementing legislation by which it will discharge that obligation. The legislation attempts to strike a balance between the seemingly absolute nature of the requirement to surrender fugitives contained in the relevant Security Council resolutions and the protections provided to fugitives by the U.S. Constitution. While in theory a request for surrender could be denied under the U.S. implementing scheme as constitutionally infirm, in practice the burdens imposed under the U.S. legislation should pose no substantial impediment to surrender, and the process is generally far more favorable to the Tribunals than that employed in normal bilateral international extradition.

[54] *See* Report of the International Law Commission on the work of its forty-sixth session, UN GAOR, 49th Sess., Supp. No. 10, UN Doc. A/49/10 (1994); *see also* Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, UN GAOR, 50th Sess., Supp. No. 22, UN Doc. A/50/22 (1995).

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[1] National Defense Authorization Act, Pub. L. No. 104-106, §1342, 110 Stat. 486 (1996).

[2] *See* Agreement on Surrender of Persons, Oct. 5, 1994, U.S.–Int'l Trib. Former Yugo. [hereinafter Yugoslav Agreement]; Agreement on Surrender of Persons, Jan. 24, 1995, U.S.–Int'l Trib. Rwanda [hereinafter Rwanda Agreement] (on file with authors).