

Symposium

Towards an International Criminal Court

The International Criminal Tribunal For Rwanda

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I. Introduction

Formally in existence since November 1994, the International Tribunal for Rwanda has operated in the shadow of the International Tribunal for the Former Yugoslavia since its inception. Following the first of its indictments in November 1995 and the prospect of trial proceedings in the near future, the Rwanda Tribunal may, at last, emerge as an actor in its own right and confound the sceptics and critics who argue that the international community is incapable of addressing, in a serious and committed manner, the crime of genocide and other egregious violations of international humanitarian law.

There are many reasons why the Rwanda Tribunal has not achieved the same high profile as the Yugoslav Tribunal. This in itself would be a subject worthy of examination but it is not the province of the lawyer or of this article. It is true that, in many respects, the Rwanda Tribunal is a derivative of the Yugoslav Tribunal – indeed it is questionable whether the Rwanda Tribunal would have been established without the Yugoslav precedent – but, as the present article will demonstrate, it has many individual and innovative characteristics which merit an examination and exposition. Not only does the Rwanda Tribunal possess an independent character both formally and in substance, it also differs from the Yugoslav Tribunal in its political setting, that is to say in regard to the nature of the conflict which gave rise to it and in its relationship to the Government most closely concerned. These factors may militate in favour of the Rwanda Tribunal overcoming the political difficulties which have so far hampered the Yugoslav Tribunal.

In the context of the Rwanda genocide of 1994, the international community has an unprecedented opportunity to bring to justice the perpetrators of international

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crimes. The crimes are well documented and whereabouts of those responsible are known. If the Rwanda Tribunal fails the culture of impunity which has developed and now permeates many parts of the world will remain the legacy of the twentieth century.

The present article examines the legislative history of the Statute of the Rwanda Tribunal and the impact of certain political considerations on some of its provisions. It is in many respects complementary to a previous article published in this Journal on the International Tribunal for the Former Yugoslavia.¹ For this reason, and because of the similarities between the Statutes of the Tribunals, it will focus principally on those Statutory provisions which are Rwanda-specific. We shall examine successively the background to the establishment of the Tribunal, its legal basis, its jurisdiction – territorial, temporal and subject-matter – the system of penalties and enforcement of sentences, the financing of the Tribunal, and the determination of its seat. The article will 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.

II. The Establishment of the Rwanda Tribunal

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 recently, the dispatching of a fact-finding Commission. Over the years, a culture and climate of impunity had been allowed to grow and fester. 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.

Although evidence that genocide had been committed in Rwanda was abundant,² the Security Council, nevertheless decided to follow the step-by-step approach it had

1 Shraga and Zacklin, 'The International Criminal Tribunal for the Former Yugoslavia', 5 *EJIL* (1994) 360.

2 In his report on the situation in Rwanda of 31 May 1994, the Secretary-General observed that: 'The magnitude of the human calamity that has engulfed Rwanda might be unimaginable but for

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.³

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 concerted, 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 the meaning of the Genocide Convention.⁴

The establishment of an international tribunal had almost certainly been the intention of the Security Council from the very beginning. Both the Special Rapporteur of the Commission on Human Rights,⁵ and the Commission of Experts in its interim report submitted to the Council on 1 October 1994⁶ had recommended the establishment of a tribunal. But more important was the position of the Government of Rwanda which already in August 1994 had urged the Secretary-General to establish an international tribunal along the lines developed for the former Yugoslavia. The Government of Rwanda expressed the hope that the trial of perpetrators of genocide and other 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,

its having transpired. On the basis of the evidence that has emerged, there can be little doubt that it constitutes genocide, since there have been large-scale killings of communities and families belonging to a particular ethnic group.' (*Report of the Secretary-General on the situation in Rwanda*, UNSC, UN Doc. S/1994/640 (1994) para. 36.) Similarly, in resolution 925 (1994) of 8 June 1994, the Council noted with the gravest concern the reports on acts of genocide that have occurred in Rwanda, and recalled that genocide constituted a crime punishable under international law (SC Res. 925, 8 June 1994, UN Doc. S/RES/925 (1994)).

- 3 SC Res. 935, 1 July 1994, UN Doc. S/RES/935 (1994). The mandate of the Commission was further elaborated by the Secretary-General to include the drawing of conclusions on the evidence of specific violations of international humanitarian law and in particular acts of genocide, on the basis of which identification of persons responsible for these violations could be made, and to examine the question of jurisdiction, whether international or national, before which such persons could be brought to trial (*Report of the Secretary-General on the establishment of the Commission of Experts pursuant to paragraph 1 of Security Council resolution 935 (1994)*, UNSC, UN Doc. S/1994/879 (1994) para. 10).
- 4 *Final Report of the Commission of Experts established pursuant to Security Council resolution 935 (1994)*, UNSC, UN Doc. S/1994/1405 (1994), Annex (hereinafter: 'Final Report').
- 5 *Report on the situation of human rights in Rwanda prepared by the Special Rapporteur of the Commission on Human Rights in accordance with Commission resolution S-3/1 and Economic and Social Council decision 1994/223*, UNSC, UN Doc. AJ/49/508-S/1994/1157 (1994), Annex I, para. 75.
- 6 *Preliminary Report of the Independent Commission of Experts established in accordance with Security Council resolution 935 (1994)*, UNSC, UN Doc. S/1994/1125 (1994) Annex.

that the International Tribunal would undertake the investigation and prosecution of most, if not all, the detainees held in Rwandan prisons.⁷ The realization that an international tribunal is not equipped to undertake a prosecution of thousands of detainees was probably one of the reasons for which the Government of Rwanda eventually withdrew its support for the International Tribunal.

Eighteen months after the adoption of Security Council resolution 827 (1993) which established the International Tribunal for the Former Yugoslavia, the Council adopted resolution 955 (1994) 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 the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States.

The Statute of the International Tribunal for Rwanda was annexed to resolution 955 (1994) adopted under Chapter VII of the United Nations Charter. It was drafted and negotiated by Members of the Security Council, drawing heavily upon the Statute of the Yugoslav Tribunal. The fact that the resolution and its annexed Statute were negotiated among Members of the Council, in which Rwanda as a non-permanent Member actively participated, explains many of the legal and political choices made, regarding, in particular, the temporal jurisdiction of the Tribunal, the number of judges and Trial Chambers, enforcement of sentences, pardon and commutation and the establishment of an Office, although not the seat, of the International Tribunal in Kigali. Resolution 955 (1994), was thus in many respects a 'Chapter-VII-negotiated resolution'.

Notwithstanding its initial request that an international tribunal for Rwanda be established and its active participation in the drafting of the resolution 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,⁸ 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 crime of genocide. 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.

7 Letter of 6 August 1994 addressed to the Secretary-General from the Minister of Justice of Rwanda, Mr. Nkubito (unpublished). See also *Letter from the Permanent Representative of Rwanda to the President of the Security Council, 28 September 1994*, UNSC, UN Doc. S/1994/1115 (1994).

8 See Statement of the Permanent Representative of Rwanda following the voting, UNSC, *Provisional Verbatim Record, 3453 mtg.* UN Doc. S/PV.3453 (1994) (hereinafter: 'Verbatim Record').

III. The Legal Basis for the Establishment of the Rwanda Tribunal

The debate which preceded the adoption of resolution 827 (1993), 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, moot by the time resolution 955 (1994) was adopted. Members of the Council who in the case of the Yugoslav Tribunal had objected to the setting up of an international jurisdiction, 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.⁹ Notwithstanding declarations and statements to the contrary, Security Council resolution 827 (1993) had indeed established a precedent for the establishment of a Chapter VII resolution-based Tribunal.

But while the question of whether the Security Council is empowered to establish an international judicial body, if it considers that to be a 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.

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 been achieved, the civil war, at least, was virtually over. In a marked contrast to the Republics of the former Yugoslavia, Rwanda declared its willingness to cooperate with the Tribunal and continued to do so, even after its negative vote in the Council, and on the face of it, therefore, there was no need for an enforcement measure against a willing State.

The establishment of the Tribunal by means of a Chapter VII resolution, was nevertheless necessary to ensure Rwanda's continued cooperation in all circumstances. It was also necessary to ensure the cooperation of third States, and those, in particular, in whose territories former leaders and principal planners of the genocide have sought refuge. As a practical matter and quite apart from the question of whether the establishment of a Tribunal by means of a Chapter VII resolution was the most appropriate mode of establishing an international jurisdiction, at issue was whether in the circumstances of Rwanda, there were any other viable alternatives which could offer an expeditious mode of establishment and powers to enforce compliance. The answer clearly was no.

9 Brazil voted in favour of the resolution, notwithstanding its serious reservations (*ibid.* 9); China abstained because in its view the Council should have engaged in further consultation with the Government of Rwanda (*ibid.* 11).

IV. The Jurisdiction of the International Tribunal

A. Territorial Jurisdiction

The scope of territorial jurisdiction of the Tribunal extends, according to Article 7 of the Statute, to the territory of Rwanda, as well as to the territories of neighbouring States in respect of serious violations of international humanitarian law committed by Rwandan citizens. In extending the jurisdiction of the Tribunal to the territories of neighbouring States, the Council envisaged first and foremost, the refugee camps situated in adjoining territories where remnants of the defeated Hutu army, including units responsible for the massacres, intermingled with some two million refugees, and where serious violations of international humanitarian law were reportedly taking place.¹⁰ The extended territorial jurisdiction of the Tribunal was also designed to encompass the broadcasting from 'Radio-Télévision Libre des Mille Collines' and other radio stations, which throughout the conflict had incited the genocide of Tutsis,¹¹ 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.

B. Temporal Jurisdiction

Article 7 of the Statute limits the temporal jurisdiction of the Tribunal. Its commencement date was fixed at 1 January 1994, its closing date at 31 December of that year. In determining the commencement date to be 1 January 1994, rather than 6 April 1994, which, as the immediate date that triggered the civil war and the genocide which followed might have been the obvious choice, the Security Council intended to encompass the planning stage of the crime of genocide, and thus ensure that the leaders and principal planners of the genocide were caught within the temporal jurisdiction of the Tribunal.

The specific choice of 1 January 1994, however, was arbitrary. It did not convey any symbolic meaning or political connotation, and was decided upon as a compromise between the position of some Members of the Council who wished to establish the commencement date as close as possible to 6 April, and the position of the Rwandan Government, who wished to back-date the temporal jurisdiction of the Tribunal to cover a period of time wherein they considered the foundations for the subsequent genocide to have been laid. The Rwandan Government suggested that 1 October 1990 be determined as the commencement date, to ensure that the ensuing

10 *Verbatim Record*, France and the Czech Republic, 3 and 7, respectively.

11 'Direct and public incitement to commit genocide' is punishable under Article III of the Genocide Convention.

massacres of 1991, 1992 and 1993, or what the Rwandan Ambassador termed 'the pilot projects which preceded the major genocide of April 1994'¹² be included in the temporal jurisdiction of the Tribunal.

The formula which in the context of the Yugoslav Tribunal allowed for an open-ended temporal jurisdiction, or as would be determined by the Security Council upon restoration of peace, was obviously inappropriate in the circumstances of Rwanda. The choice of 31 December 1994 as the ending date, like that of 1 January 1994, was arbitrary. It conveyed, however, the wish of the Council to include within the jurisdiction of the Tribunal serious violations of international humanitarian law which reportedly continued after the Tutsi Government seized power in July of 1994, and which, although they did not amount to genocide, nevertheless fell within the subject-matter jurisdiction of the Tribunal.¹³ For the same reasons, the Government of Rwanda wished to limit the temporal jurisdiction of the Tribunal and fix its ending date on 17 July 1994, with the result that only acts of genocide and other crimes against humanity committed by the previous Hutu regime would have been included in the jurisdiction of the Tribunal.

The end date of 31 December 1994 was thus established as a compromise between the limited approach of the Rwandan Government, which was unacceptable to Members of the Council, and the open-ended formula which was not appropriate in the context of Rwanda. The end date was fixed, however, on the understanding that if more serious violations of international humanitarian law occurred thereafter, the Council would be entitled to extend the temporal jurisdiction of the Tribunal beyond 31 December 1994.¹⁴

C. Subject-matter Jurisdiction

The non-international character of the Rwanda conflict warranted that the subject-matter jurisdiction of the Tribunal be more limited in scope. For this reason, it includes the core international humanitarian law provisions applicable to non-international armed conflicts, i.e., common Article 3 of the Geneva Conventions and Additional Protocol II,¹⁵ the crime of genocide, which may be committed in times of war – of any kind – as in times of peace, and crimes against humanity whose applicability to armed conflicts of a non-international character has already been recognized in the Statute of the Yugoslav Tribunal.

12 *Verbatim Record*, 15.

13 In its final report the Commission of Experts established pursuant to Security Council resolution 935 (1994), expressed concern at the ongoing violence committed by some RPF soldiers and recommended that investigation of violations of international humanitarian law attributed to the Rwandese Patriotic Front be continued by the Prosecutor. *Final Report*, paras 100, 186.

14 *Verbatim Record*, France, 3.

15 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, of 8 June 1977, 1125 UNTS, 609.

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 the view of the Government, the jurisdiction of the Tribunal should have been limited to the crime of genocide only. The meagre human and financial resources of the International 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 a 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 (Article 2 of the Statute), was unable to agree to limit the list to that crime alone, as the exclusion of '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.

The Statute of the Rwanda Tribunal, like that of the Yugoslav Tribunal, explicitly spells out the crimes falling within the jurisdiction of the Tribunal. Article 2 which defines the crime of genocide replicates Article II of the Convention on the Prevention and Punishment of the Crime of Genocide, 1948, and Article 4 of the Yugoslav Statute. Article 3 reproduces the list of crimes against humanity provided for in Article 5 of the Statute of the Yugoslav Tribunal, as originally established in Article 6 (c) of the Nuremberg Charter and Article II of Control Council Law No. 10 for Germany. Article 3 of the Rwandan Statute differs, however, from Article 5 of the Yugoslav Statute in the definition of crimes against humanity. The Statute of the Yugoslav Tribunal defines crimes against humanity as crimes committed 'in armed conflict, whether international or internal in character, and directed against any civilian population'. The Statute of the Rwanda Tribunal defines the crimes as those committed 'as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds'. Notwithstanding the difference between them, both definitions are mutually inclusive. However, the omission from Article 3 of the Statute of the words 'committed in armed conflicts, whether international or national in character' gave rise to the suggestion that the Rwandan Statute extended the scope of application of crimes against humanity, from times of war – whether international or internal – to times of peace. Although that may very well be an arguable interpretation, nothing indicates that this was the express intention of the Council.

The Rwanda Tribunal which has not yet had the opportunity to pronounce itself on questions of jurisdiction, is most likely to follow in this respect the decision in the *Tadic* case, rendered by the Appeals Chamber of the Yugoslav Tribunal.¹⁶ Al-

16 *The Prosecutor v. Dusko Tadic a/ka/ 'Dule'*, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1-AR72 of 2 October 1995 (hereinafter '*Decision on jurisdiction*').

though not strictly binding on the Rwanda Tribunal, decisions of the Appeals Chamber of the Yugoslav Tribunal on points of principle are nevertheless of a persuasive authority. The *Tadic* decision is likely to affect the subject-matter jurisdiction of the Rwanda Tribunal in two respects: in extending the scope of application of crimes against humanity to peace time, and in extending the core international humanitarian law provisions applicable in international armed conflicts to non-international conflicts.

The applicability of 'crimes against humanity' in times of peace followed, in the view of the Yugoslav Tribunal, from breaking the link, established in the Nuremberg Charter, between 'crimes against humanity' and 'war crimes' or 'crimes against peace'. Such applicability was supported, in its view, by the fact that the Genocide Convention had been expressly created as applicable in time of peace as in time of war.¹⁷ Although we doubt whether such an express provision in the Genocide Convention definitively supports applicability or not, 'crimes against humanity' were already delinked from 'war crimes' and 'crimes against peace' in Control Council Law No. 10 for Germany. As such, however, they were only recognized as a separate category of crime, not as a category unrelated to *any* armed conflict. Rather, 'crimes against humanity' were customarily recognized as applicable in *international* armed conflicts until, in the Statute of the Yugoslav Tribunal, they were extended to apply also to *non-international* armed conflicts. In omitting any reference to an armed conflict, of any kind, from the Statute of the Rwanda Tribunal, the Security Council may have further extended their application to time of peace. But in so doing, it advanced the law, and did not declare it, in the words of the Tribunal, to be 'a settled rule of customary international law'.

Article 3 of the Statute of the Yugoslav Tribunal on violations of the laws and customs of war, has been interpreted by the Appeals Chamber as a general clause covering all violations of international humanitarian law, including: violations of the Hague Law on international conflicts, infringements of provisions of the Geneva Conventions other than 'grave breaches', violations of common Article 3 and other customary rules on internal conflicts,¹⁸ and violations of any international agreements binding upon the parties regardless of whether they have yet become part of customary international law.¹⁹ The sweeping interpretation of Article 3 of the Yugoslav Statute, and in particular, the determination that violations of common Article 3 of the Geneva Conventions and other customary international law rules applicable in internal armed conflict are considered violations of the laws and customs of war, has some far-reaching implications.

17 *Decision on Jurisdiction*, paras. 140-142.

18 These, according to the Tribunal, include rules relating to the protection of civilians from hostilities and indiscriminate attacks, protection of civilian objects, in particular, cultural property, and protection of all those who do not (or no longer) take active part in hostilities, as well as prohibitions of certain means and methods of warfare (*ibid.* para. 127).

19 *Ibid.* para. 89.

Such a determination implies not only that violations of common Article 3 are now considered war crimes, but that war crimes which are customarily regarded as applicable in international armed conflicts will now be interpreted as applicable also in internal armed conflicts.²⁰ If taken as a persuasive authority by the Rwanda Tribunal, the *Tadic* decision will extend the subject-matter jurisdiction of the Tribunal far beyond the provisions of Article 3 common to the Geneva Conventions or Article 4 of the Second Additional Protocol, to include all violations of customary international law rules applicable in internal armed conflicts, which according to the Yugoslav Tribunal, now includes the core international humanitarian law provisions applicable in international armed conflict, and any 'serious violation thereof' whether it 'has occurred within the context of an international or non-international armed conflict'.²¹

Article 4 of the Statute of the Rwanda Tribunal groups together violations of common Article 3 of the Geneva Conventions and of Article 4 of Additional Protocol II. It includes violence to life, health or physical or mental well-being of persons, in particular, murder, as well as cruel treatment; collective punishment; taking of hostages; acts of terrorism; outrages upon personal dignity, in particular humiliating and degrading treatment; rape and enforced prostitution; pillage; the passing of sentences and the carrying out of execution without previous judgment pronounced by a regularly constituted court, and threats to commit any of the foregoing acts.

In empowering the Rwanda Tribunal to prosecute persons responsible for violations of Article 3 common to the Geneva Conventions and Article 4 of Additional Protocol II, the Council has elected to follow less strict criteria for the choice of the applicable law than that which it adopted in the Statute of the Yugoslav Tribunal. Unlike the Yugoslav Tribunal which was empowered to apply provisions of a customary international law nature entailing the criminal responsibility of the perpetrator of the crime, the Rwanda Tribunal is empowered to apply provisions of Additional Protocol II which as a whole has not yet been recognized as part of customary international law, and of common Article 3 which for the first time has been read as founding criminal responsibility.²²

V. Penalties and Enforcement of Sentences

The cluster of provisions dealing with penalties and the enforcement of sentences, and notably the death penalty, imprisonment and pardon and commutation, raised particularly difficult issues of a political, moral and legal nature.

20 See Separate Opinion of Judge Li, *ibid.* paras. 5-13.

21 *Ibid.* para. 94.

22 In that respect the Council has adopted the position of the United States, one of the original sponsors of resolution 955 (1994), which, already at the time resolution 827 (1993) was adopted, declared that the laws and customs of war in Article 3 of the Yugoslav Statute - for which individual criminal responsibility is entailed - include Article 3 of the 1949 Geneva Conventions and the 1977 Additional Protocols to their Conventions (UNSC, Provisional Verbatim Record, 3217 mtg. UN Doc. S/PV 3217 (1993) 15).

Following the precedent of the Statute of the Yugoslav Tribunal, the Statute of the Rwanda Tribunal excludes the death penalty from the list of penalties the Tribunal is empowered to impose. Members of the Security Council, and in particular signatories of the Second Optional Protocol to the International Convention on Civil and Political Rights, who have undertaken to abolish the death penalty within their national jurisdiction, quite obviously could not have supported its introduction in an international jurisdiction.²³

For the Government of Rwanda, however, the death penalty was the only punishment befitting the crime of genocide, and a condition *sine qua non* for its agreement to vote for the resolution establishing the Tribunal. In its view, the exclusion of the death penalty from the list of penalties the International Tribunal is empowered to impose and its continued existence under national law, created a situation whereby the leaders and the principal planners of the crime of genocide could be prosecuted by the International Tribunal and sentenced to life imprisonment, while thousands of common civilians, who for the most part were manipulated by their leaders, could be subject to the death penalty. Furthermore, it was maintained, persons convicted by the International Tribunal would enjoy relatively comfortable conditions of detention in territories of third States and a prospect of pardon or commutation as might be permitted under the laws of the detaining State.

While recognizing that such a discrepancy is a dilemma, the Council could not compromise on the principled issue of the death penalty. It was ready, however, to modify the provisions on enforcement of sentences and pardon and commutation to take account of the Government's concerns. Thus, whereas the Statute of the Yugoslav Tribunal implicitly excludes the former Yugoslavia as the place where prison sentences may be served, Article 26 of the Statute of the Rwanda Tribunal provides that imprisonment shall be served in Rwanda, as a first priority, or in any of the States on the list of States which have indicated to the Security Council their willingness to accept convicted persons. The provision on pardon and commutation was also slightly modified to emphasize that although the process of pardon and commutation is triggered by the law of the State in whose territory the convicted person is imprisoned, the decision on pardon and commutation can only be made by the President of the Tribunal, in consultation with the other judges. The Council had furthermore decided in its resolution 955 (1994) that the Government of Rwanda should be notified prior to the taking of decisions under Articles 26 and 27 of the Statute.

Nevertheless, for the Government of Rwanda the idea of imprisonment of Rwandan citizens in third States and the latitude given to these States in matters pertaining to their pardon and commutation was considered unacceptable.²⁴

23 *Verbatim Record*, New Zealand, 5.

24 *Ibid.* 15.

VI. Financing and Other Institutional Aspects of the Tribunal

Article 30 of the Statute of the Rwanda Tribunal provides that:

The expenses of the International Tribunal for Rwanda shall be expenses of the organization in accordance with Article 17 of the Charter of the United Nations.

It differs from Article 32 of the Statute of the Yugoslav Tribunal which provides that:

The expenses of the International Tribunal shall be borne by the *regular budget* of the United Nations in accordance with Article 17 of the Charter of the United Nations' (emphasis added).

What could seem a minor textual difference between two otherwise identical texts, reflects, in fact, a constitutional debate over the respective powers and competences of the Security Council and the General Assembly in financial matters. In determining that the expenses of the Yugoslav Tribunal be borne by the regular budget of the Organization, the Security Council was seen by the General Assembly to exceed its competence and pre-empt the authority of the Assembly in financial matters, which under Article 17 of the UN Charter, is exclusive. The UN Secretariat maintained its position of principle that the regular budget is the only appropriate mode of financing the International Tribunal.²⁵ Its arguments that the Tribunal could not be financed from voluntary contributions, which are unpredictable, or from a peace-keeping account, as the International Tribunal could not be considered a peace-keeping operation, were rejected by the General Assembly.

In its resolution 47/235 of 14 September 1993, the General Assembly re-affirmed its role as set out in Article 17 of the Charter, as the organ to consider and approve the budget of the Organization, as well as the apportionment of its expenses among the member States. The General Assembly severely criticized the Secretariat saying:

[T]he advice given to the Security Council by the Secretariat on the nature of the financing of the International Tribunal did not respect the role of the General Assembly as set out in Article 17 of the Charter.²⁶

At the heart of the debate over the mode of financing, however, lay the difference between the scale of assessment for regular budget and for peace-keeping operations, and the concerns of the developing countries that their share in the financing of the International Tribunal under the regular budget scale of assessment would be far greater than it would be under a peace-keeping formula.

The lesson of the debate was learned and applied in the Statute of the Rwanda Tribunal. The Security Council itself did not take a stand on the mode of financing of the Tribunal and reverted to the traditional formula of 'expenses of the organization in accordance with Article 17', used in peace-keeping operations.

25 Note by the Secretariat, UNGA, UN Doc. A/47/1002 (1993).

26 GA Res. 47/235, 14 September 1993, UN Doc. A/RES/47/235.

Following a series of commitment authorities authorized by the Advisory Committee on Administrative and Budgetary Questions, a budget for both International Tribunals was finally adopted in July 1995. In its resolution 49/251 on the financing of the Rwanda Tribunal, the General Assembly decided that:

...the expenses of the Tribunal shall be met through additional resources on the basis of assessed contributions and that they shall be financed through a separate special account outside the regular budget.

As an *ad-hoc* measure it had decided that the appropriation to a Special Account for the International Tribunal for Rwanda of a total amount of \$13,467,300, should be split between the peace-keeping account for UNAMIR, and the regular budget. In subsequent General Assembly resolutions this *ad hoc* methodology of appropriation in accordance with two different scales of assessment was adopted as the mode of financing of the Tribunal.²⁷

The establishment of the Rwanda Tribunal at the time when the Yugoslav Tribunal was in existence, dictated that some administrative and institutional links be established between the two Tribunals. In order to ensure a uniformity of legal approach at the level of the Prosecutor's Office and the Chambers, as well as efficiency and economy of resources, the Statute of the Rwanda Tribunal provided for a common Prosecutor²⁸ and a common Appeals Chamber.²⁹ It also provided that the Rules of Procedure and Evidence of the Yugoslav Tribunal be adopted by the Judges of the Rwanda Tribunal with the necessary modifications,³⁰ and thus ensured that disparities between the two Tribunals in the procedures for investigation, prosecution and trials, be minimized.

The legal and institutional linkage between the two International Tribunals raised some concerns among members of the Security Council that the newly established Tribunal with a common Appeals Chamber, prosecutorial staff, material and means of operation would not be Rwanda-specific. Hence the importance of the location of its seat.

27 GA Res. 49/251, 20 July 1995, UN Doc. A/RES/49/251. See also, GA Res. 49/242, 20 July 1995, UN Doc. A/RES/49/242, paras. 20-23.

28 Article 15, paragraph 3, of the Statute of the Rwanda Tribunal provides that the Prosecutor of the International Tribunal for the former Yugoslavia shall also serve as the Prosecutor of the International Tribunal for Rwanda. The commonality envisaged, however, is not only in the person of the Prosecutor but also in the staff of the Prosecutor's Office.

29 Article 12, paragraph 2, of the Statute provides that the members of the Appeals Chamber of the International Tribunal for the Former Yugoslavia, shall also serve as the members of the Appeals Chamber of the International Tribunal for Rwanda. In order to avoid a situation where more than one judge of the Rwanda Tribunal would have the same nationality, and given the five already elected Appeals judges, the Statute of the Rwanda Tribunal provides in Article 12, paragraph 3 (b) that when nominating candidates for judges of the Rwanda Tribunal States may put forward two candidates, 'no two of whom shall be of the same nationality and neither of whom shall be of the same nationality as any judge in the Appeals Chamber'. In the letter inviting nominations from States, the five nationalities of the then Appeals judges were specifically excluded.

30 Article 14 of the Statute of the Rwanda Tribunal. The Rules of Procedure and Evidence of the Rwanda Tribunal were adopted at the close of the first plenary session of the Tribunal on 29 June 1995 (*Rules of Procedure and Evidence (Adopted on 29 June 1995)*, UN Doc. ITR/3/Rev.1 (1995)).

VII. The seat of the International Tribunal: The Choice of its Location

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 International 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 population. Rwanda has maintained its position notwithstanding its negative vote in the Council.³¹ 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 be 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. 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 accommodating 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 International Tribunal was thus ensured in Rwanda.

31 In its explanation of vote, the Permanent Representative of Rwanda indicated that the Council's reluctance to pronounce itself on the question of the seat, was one of the reasons for its negative vote. Accordingly: '[M]y Government called for the establishment of an international tribunal to prosecute those guilty of genocide because the international community is deeply concerned in this respect, but also and above all we requested the establishment of this Tribunal to teach the Rwandese people a lesson, to fight against the impunity to which it had become accustomed since 1959 and to promote national reconciliation. It therefore seems clear that the seat of the International Tribunal should be set in Rwanda; it will have to deal with Rwandese suspects responsible for crimes committed in Rwanda against the Rwandese. Only in this way can the desired effects be achieved. Furthermore, establishing the seat of the Tribunal on Rwandese soil would promote the harmonization of international and national jurisprudence' (*Verbatim Record*, 16).

Entrusted with the implementation of the resolution and the practical arrangements for the effective functioning of the Tribunal, the Secretary-General was requested by paragraph 5 of resolution 955 (1994) to make recommendations as to possible locations for the seat, taking into account considerations of justice and fairness, as well as administrative efficiency, including access to witnesses, and economy. In elaborating the concept of the 'seat' in the particular circumstances of the Rwanda Tribunal, where the common Appeals Chamber and the Prosecutor were already located in The Hague, and an Office was mandated by the Security Council in Rwanda, the Secretary-General interpreted the 'seat' to mean the place where hearings are conducted and Trial Chambers are located.³²

In examining the criteria for the location of the Trial Chambers in relation to Rwanda and the United Republic of Tanzania,³³ the Secretary-General focused primarily on considerations of 'justice and fairness' and the proximity to witnesses, evidence and the scene of the crime. Having interpreted the criterion of 'justice and fairness' to mean the conduct of trial proceedings in an environment ensuring justice and fairness both to victims and accused, it was clear that in the circumstances then prevailing in Rwanda, there could have been serious security risks in bringing in leaders of the previous regime to stand trial before the International Tribunal. Furthermore, justice and fairness also required that the Prosecutor, as an organ of the Tribunal enjoying full cooperation of the host country would be, 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. Arusha, in the United Republic of Tanzania, as a 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 United Nations and the Government of Tanzania, as the seat of the Rwanda Tribunal.

VIII. Conclusions, or; The Rwanda Tribunal – Two Years Later

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,

32 *Report of the Secretary-General pursuant to paragraph 5 of Security Council resolution 955 (1994)*, UNSC, UN Doc. S/1995/134, (1995), para. 36.

33 Kenya which was considered a possible venue, was discarded following an indication by the Government that it would not be in a position to provide a seat of the Tribunal.

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 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. The composition of the nineteen accused charged with genocide, crimes against humanity and other violations of common Article 3 of the Geneva Conventions, is illustrative of this reality.

With the exception of Théoneste Bagosora, the Director of Cabinet of the Ministry of Defence under President Habyarimana and effectively in control of the military and political affairs in Rwanda throughout April 1994, André Ntagerura, the Minister of Transport and Communications and a prominent member of the ruling party, and Anatole Nsengiyumva, the Chief of Intelligence of the Rwandan Army and the Commander of military operations of the Prefecture of Gisenyi (all of whom are presently detained in Cameroon), all other accused are mid-level, communal leaders. They include: a director of a tea factory in Gisovu, Kibuye prefecture (Alfred Musema, presently detained in Switzerland), an agricultural engineer and businessman and the second Vice-President of the National Committee of the Interahamwe, the youth militia of the 'Mouvement Republicain National pour le Développement et la Démocratie' ('MRND') (Georges Anderson Nderubumwe Rutaganda, presently awaiting trial), the Bourgmestre of Ngoma (Joseph Kanyabashi, presently detained in Belgium), the Prefect of Kibuye (Clément Kayishema) the Bourgmestre of Taba Commune (Jean-Paul Akayesu, presently awaiting trial) and the director and senior administrative officer of the Radio Télévision Libre des Mille Collines ('RTL') (Ferdinand Nahimana, presently detained in Cameroon).

The Rwanda Tribunal, like the Yugoslav Tribunal was established as a subsidiary organ of the United Nations, but a 'subsidiary organ', in the words of the Yugoslav Tribunal, 'of a special kind'.³⁴ As judicial bodies, both International Tribunals are independent of any one particular State or group of States, and of any other organ, including their parent 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, than their administrative and financial links to the Organization, is their dependency upon the political will of the Se-

34 *Decision on Jurisdiction*, para. 15.

curity 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 of the Tribunal which will ultimately determine their success or failure.³⁵ Rule 61 of the Rules of Procedure and Evidence of both Tribunals provides the trigger for such enforcement mechanism. Accordingly, in case of failure of a State or other entity to execute a warrant of arrest and surrender an accused, and upon a decision of a Trial Chamber, the President of the Tribunal shall notify the Security Council in order for the latter to take the necessary action. The President of the Yugoslav Tribunal has availed himself of this procedure in the cases of *Nikolic, Karadzic and Mladic* and *Rajic*, and informed the Security Council of the refusal of the so-called Republika Srpska, the Federal Republic of Yugoslavia and Croatia, respectively, to cooperate with the Tribunal and surrender the accused.³⁶ In response, the Council has demanded that all parties to the conflict cooperate fully with the International Tribunal and comply with its requests. In the case of *Karadzic and Mladic* it condemned the failure to execute the warrants of arrest and transfer to the Tribunal indicted persons. It also condemned any attempt to challenge the authority of the Tribunal, and declared its readiness to consider the application of economic enforcement measures to ensure compliance by all parties with their obligations under the Peace Agreement, of which the obligation to cooperate with the Tribunal forms part.³⁷ The Council fell short, however, of imposing sanctions, of any nature, to enforce compliance.

- 35 In the Rwanda context, press reports that Kenya would refuse access to prosecutors and investigators of the Rwanda Tribunal, have been denied by the President of Kenya. His letter of clarification to the President of the Security Council on the position of his Government, falls, however, short of committing Kenya to full and unconditional cooperation with the Tribunal. In his transmittal note the Permanent Representative of Kenya to the United Nations informed the Council that "Kenya will cooperate with the Tribunal". (Statement by H.E. President Daniel Arap Moi on the Rwanda Tribunal, *Letter from the Permanent Representative of Kenya to the President of the Security Council, 11 October 1995*, UNSC, UN Doc. S/1995/861 (1995) Annex).
- 36 The Decision in the *Nikolic* case was transmitted to the Council in a *Letter from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia to the President of the Security Council, 31 October 1995*, UNSC, UN Doc. S/1995/910 (1995); the Decision in the *Karadzic and Mladic* case was transmitted to the Council in the *Letter dated 11 July 1996 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 Addressed to the President of the Security Council*, UNSC, UN Doc. S/1996/556 (1996); the Decision in the *Rajic* case was transmitted to the Security Council by *Letter dated 16 September 1996 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 addressed to the President of the Security Council* (UNSC UN Doc. S/1996/763 (1996)).
- 37 SC Res. 1019, 9 November 1995, UN Doc. S/RES/1019 (1995); Statement by the President of the Security Council, UNSC UN Doc. S/PRST/1996/34; Statement by the President of the Security Council, UNSC UN Doc. S/PRST/1996/39.

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 success³⁸ are bound to arise. For members of the General Assembly who are called upon to finance a \$40 million annual-budget-Tribunal, it would also be a question of cost-effectiveness.

Two years after the adoption of the Statute of the Rwanda Tribunal and one year after it has become fully operational, it remains premature to draw up general conclusions. With only three accused presently awaiting trial, the judicial activities of the Tribunal do not, as yet, permit a careful analysis of its contribution to the development of international humanitarian law. Several more years will be necessary in order to fully evaluate the role of the Tribunals in bringing major criminals to justice, in deterring further violations of international humanitarian law and crimes against humanity, in eradicating a culture of impunity and in contributing to peace and national re-conciliation in countries ravaged by civil wars and ethnic conflicts.

38 In recognition of the impracticality of establishing yet another international tribunal for prosecuting persons responsible for genocide, the Burundi Commission established to investigate the assassination of the President of Burundi and the massacres that followed, did not recommend the assertion of international jurisdiction in the circumstances then prevailing in Burundi. In its report to the Security Council submitted by letter dated 25 July 1996 from the Secretary-General to the President of the Security Council (S/1996/682), the Commission concluded that:

a. Acts of genocide were committed against the Tutsi minority on 21 October 1993 and the following days, at the instigation and with the participation of certain Hutu FRODEBU functionaries and leaders on the communal level;

b. An indiscriminate killing of Hutus by members of the Burundian Army and Gendarmerie, and by Tutsi civilians followed suit. Although no evidence exists that repression was centrally planned or ordered, it is an established fact that no effort was made by the military authorities at any level of command to prevent, stop, investigate or punish those responsible for such acts. This failure engages the responsibility of the military authorities.

On the basis of these conclusions and its analysis of the situation in Burundi, the Commission recommended, *inter alia*, that an international jurisdiction should be asserted with respect to acts of genocide committed against the Tutsi minority in Burundi, but that such international jurisdiction would be impractical as long as the present situation persists in Burundi.