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## 1. ARTICLES

## THE FIRST INDICTMENTS OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

by Lyal S. Sunga, Geneva

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## 1. Political Exploitation of Ethnic Identity in 20th Century Rwanda

The area of Rwanda-Burundi has been ruled by kingly clans, from the 15th century until 1961 when monarchy in Rwanda was abolished. The population of Rwanda is comprised roughly of 85% Hutu, 14% Tutsi and 1% Twa and other.<sup>1</sup> Ethnic hostility between these groups was not particularly pronounced before the onset of the colonial era; wars were fought for other reasons. Indeed, a clear-cut distinction between the two main groups on a "racial" basis is probably even untenable. For several centuries, the two groups shared the same religion, spoke a common language and lived in the same area. Moreover, intermarriage is not uncommon in Rwanda.

Despite their shared experiences and history, the differentiation between Hutu, Tutsi and Twa, traditionally has carried much socio-economic significance. Tutsi clans have generally benefitted much more from privileged access to education, wealth and power than their Hutu or Twa counterparts. The patron-client social system that developed over the centuries became reinforced by inequalities among the different ethnic groups.

"Basically, *ubuhake* was a form of unequal clientship contract entered into by two men, the *shebuj* (patron) and the *mugaragu* (client). In the classical form of *ubuhake* ... a Tutsi patron gave a cow to his Hutu client. Since the Hutu were in theory not allowed to have cattle, which were a sign of wealth, power and good

breeding, it was not only an economic "gift" but also a form of upward social mobility. For the cow could reproduce, and the future calves would be shared between *shebuj* and *mugaragu*. This could be the beginning of an upward social climb where, once endowed with cattle, the Hutu lineage would become *icyihutur*, de-hutuised, i.e. tutsified."<sup>2</sup>

Thus, a change in a family's relation to the mode of production would bring not only a change in socio-economic status, but could alter the community's perceptions of the family's ethnicity, playing a stronger role than even physiognomic traits.

The Hutu/Tutsi differentiation acquired even greater political and economic significance in the 20th century once reinforced by colonial law. Germany (which first controlled "German East Africa"), and then Belgium dominated the area through "divide and rule" policies. The Germans exerted political influence in the region from 1897 to 1916 with only a very small presence in Rwanda by manipulating ruling elites and maintaining a tight grip over the territory and people through indirect rule.<sup>3</sup>

However, during the First World War, Germany lost control over the territory to Belgium which then ruled Rwanda from 1916 to 1962. Both colonial Powers reinforced the centuries-old Tutsi monarchy in Rwanda and collaborated with the ruling classes to maintain control through the patron-client system.

Belgium administered Rwanda as a League of Nations mandate pursuant to Article 22 of the Covenant.<sup>4</sup> In 1933-34, the colonial administration carried out a census and introduced mandatory identity cards for each Rwandan citizen, indicating ethnic origin. The Belgians also found it convenient to turn the existing system of socio-economic exploitation to their own advantage, using the Tutsi rulers as clients and patronizing them with certain benefits.

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The views expressed in this article are advanced in a purely personal capacity.

<sup>1</sup> The indigenous Twa minority was the first people to populate the area of Rwanda as far back as 2,000 B.C. Around 3,000 years later, a migration of Hutu to the area began. People of Tutsi extraction began to migrate to the area around 1,500 A.D. Traditionally, the Hutu have been agrarian and sedentary whereas the Tutsi have been cattle-owners and nomadic.

<sup>2</sup> Gérard Prunier, *The Rwanda Crisis 1959-1994: History of a Genocide* (1995), London, Hurst and Co. at 13-14.

<sup>3</sup> See generally, Alain Destexhe, *Rwanda and Genocide in the Twentieth Century* (1994), New York, New York Univ. Press.

<sup>4</sup> When the League of Nations was dissolved on 18 April 1946, Rwanda was administered by Belgium as a United Nations Trust Territory.

"The Belgian reforms of 1926-31 had created "modern" Rwanda: centralized, efficient, neo-traditionalist and Catholic – but also brutal. Between 1920 and 1940, the burden of taxation and forced labour borne by the native population increased considerably. Men were constantly under mobilization to build permanent structures, to dig anti-erosion terraces, to grow compulsory crops (coffee for export, manioc and sweet potatoes for food security), to plant trees or to build and maintain roads. These various activities could swallow up to 50-60% of a man's time. Those who did not comply were abused and brutally beaten."<sup>5</sup>

Thus, the distinction between Hutu and Tutsi became the cornerstone of Belgium's rule. In the '30s and '40s, Belgium continued the policy of Germany, favouring leaders of the minority Tutsi people reinforcing their position as the ruling class, partly on the grounds that Tutsis originated from the Nile River region and were somehow "more European" than and superior to Hutus.<sup>6</sup> This favouritism and supporting ideology pervaded the feelings, attitudes and political culture of Rwandans with all sorts of notions of superiority and inferiority.

Following the end of the Second World War, peoples of Asia and Africa fought to realize their right to self-determination. As the vastly more populous group in Rwanda, Hutus could only gain from any moves towards a more democratic system, whereas the minority Tutsis could only lose their privileged position. Although Belgian patronage of the Tutsis continued, relations became strained with an intensified Tutsi movement for independence and strong opposition to the introduction of democratic reforms.

In 1957, Grégoire Kayibanda led a social movement to voice Hutu feelings of political and social alienation in Rwanda, which in October 1959 gave rise to the formation of "Parmehutu" (Party for the Emancipation of the Hutu People). While Tutsis agitated for independence from Belgium, many Hutus looked upon Tutsis as the oppressor class, and given the racist ideology of Tutsis as a superior Nilotic race, even as foreign tyrants. If Tutsis originated from the Nile, then in the eyes of some Hutus, they were as foreign and as unwelcome as the Belgians.

By 1959, the Belgian Government had become sufficiently apprehensive of the increasing momentum of the Tutsi independence movement to introduce a number of reforms in Rwanda between 1959 and 1961 in order to augment the power of local government. Belgium announced that 1962 was the intended date for the independence of Ruanda-Urundi following local and national elections to be held. In 1959, a minor incident touched off mass killings in which Tutsis were the main victims. Violence exploded throughout the country as ethnic hatred, pent up over years, was unleashed. Many Hutus had felt excluded from public decision-making and they resented not only the privilege but the comparative wealth of the Tutsis. Thousands, mostly Tutsis, were killed in 1959 and thousands more took refuge in Zaire, Burundi, Tanzania and Uganda. By 1964, there were some 150,000 Rwandan refugees in neighbouring countries.<sup>7</sup>

On 26 October 1961, Kayibanda was formally elected President of the newly formed Parliament of the Republic of Rwanda, maintaining political control until 1973. In 1961, the centuries old monarchy was abolished by overwhelming popular demand through a national referendum and replaced by a republican form of government. On 1 July 1962, Rwanda achieved independence. In the 1960's, political instability and internal strife were never absent from the scene. Large-

scale massacres were perpetrated in 1963 and 1966, mainly against Tutsis.

On 5 July 1973, President Juvénal Habyarimana, a Hutu from the north of Rwanda, seized control of the Government. The coup d'état was accompanied by large-scale massacres and, as the minority ethnic group no longer wielding the main power in Government or Army, Tutsis ended up figuring as the main victims. Despite the brutality, some optimism, both inside and outside Rwanda, could flower in the first days of President Habyarimana's rule, nourished by his many pronouncements that Tutsis should not continue to suffer from recurring carnage. He promised to create a fair balance between the two groups. The newly installed Habyarimana Government ushered in a climate of relative stability, but banned all opposition political parties except the National Revolutionary Movement for Democracy and Development (MRND), founded in 1975 and represented by Habyarimana himself, later renamed Mouvement républicain national pour la démocratie et le développement (also MRND). In 1978, a new constitution in Rwanda formally established a one-party State.

Many Tutsis continued to feel systematically discriminated against in all walks of Rwandese life and that they had become impoverished, compared to their relatively privileged position prior to 1959. The doors to income, wealth and opportunity seemed ever more difficult for Tutsis to pry open. In response to waves of violent attacks on Tutsis, and no doubt motivated to reinstate Tutsis to their former position of prestige in the country, Tutsi paramilitary forces launched small-scale incursions from neighbouring countries into Rwandese territory in hopes of aiding their brothers and sisters from the recurrent violence, which in turn met with further reaction from Government forces. On 1 October 1990, the armed insurgency movement, the Rwandese Patriotic Front (RPF), crossed the Ugandan border and launched several military operations in the north of Rwanda ostensibly to move President Habyarimana towards power-sharing. Out of revenge, Hutus killed some 300 Tutsis in the ensuing weeks.<sup>8</sup>

Thus, the cycle of violence deepened, and in 1990, 1991, 1992 and 1993, Rwanda suffered increasingly severe human rights abuses, including large-scale massacres. By 1992, over 350,000 persons had fled the north of Rwanda to get away from the ongoing RPF insurgency and Hutu reprisals.

On the other side, extremist Hutus felt that President Habyarimana had become a puppet of the Tutsi minority

<sup>5</sup> Gérard Prunier, *supra* note 2 at 35.

<sup>6</sup> See e.g. Pierre Ryckmans, *Dominer pour servir* (1931) at 26: "The Batutsi were meant to reign. Their fine presence is in itself enough to give them a great prestige vis-à-vis the inferior races which surround ... It is not surprising that those good Bahutu, less intelligent, more simple, more spontaneous, more trusting, have let themselves be enslaved without ever daring to revolt", as quoted in Gérard Prunier, at 9.

<sup>7</sup> United Nations, *The United Nations and Rwanda: 1993-1996* (1996), New York, United Nations, at para. 23.

<sup>8</sup> See generally François Misser, *Vers un nouveau Rwanda ?* (1995), for a series of interviews conducted with Major-General Paul Kagame, the Government of Rwanda's Vice-President and Minister of Defense, who led the Tutsi-dominated RPF insurgency to victory, halted the genocide and forced the former Government from power.

and that Hutu grievances against the legacy of Tutsi privilege were likely to be ignored by the Government. During this period, the extremist Hutu *interahamwe* militia became active perpetrators of political violence and began to stoke the embers of hatred and revenge.

A number of cease-fires were concluded between the Habyarimana Government and the RPF, but each was shattered with the sound of gunfire and in February 1993, RPF forces launched a major attack, but were repelled by the Rwandese Armed Forces before they could reach Kigali. On 22 June 1993, the Security Council adopted resolution 846, creating UNOMUR (the United Nations Observer Mission Uganda-Rwanda) for an initial six months period.

## 2. Arusha Accords, 4 August 1993

Negotiations between the Government of Rwanda and the Rwandese Patriotic Front commenced at Arusha, Tanzania, on 10 August 1992. The Habyarimana Government probably felt it expedient to negotiate a lasting cease-fire with the Rwandese Patriotic Front, whose increasingly successful insurgency campaign threatened to destabilize Rwanda and bring about the downfall of the incumbent Government. On the other side, RPF commanders may have been motivated to negotiate with the Government to try to translate military successes into political settlement.

Among the stated aims of the Arusha peace negotiations were: coaxing the Habyarimana Government towards multi-party elections and power-sharing; trying to bring about peace and respect for the rule of law to Rwanda; and, an end to the RPF insurgency. These negotiations did not bear fruit immediately. However, further meetings were convened in August 1993 to try to reach a settlement and these eventually met with success.

On 4 August 1993, the Arusha Accords were signed between the RPF and the Government of Rwanda, sponsored by the Governments of Tanzania, Belgium and Germany and by the United Nations.

The Arusha Accords require: both sides to respect basic human rights and the rule of law; power-sharing to accommodate the Tutsi minority in public institutions; promotion of measures to ease repatriation and resettlement of refugees and displaced persons; integration of the RPF into the Rwandese armed forces to 40% of the lower ranking officers and half the number of senior officers; the positioning of six hundred RPF troops in Kigali to enforce the power-sharing arrangement; and the deployment of UNAMIR (United Nations Assistance Mission to Rwanda) to oversee implementation of the agreement.<sup>9</sup>

On 11 August 1993 the Special Rapporteur of the Commission on Human Rights on extrajudicial, summary or arbitrary executions,<sup>10</sup> indicated that the human rights violations in Rwanda were sufficiently serious as to raise the question as to whether genocide was in fact occurring there. In a section of the report entitled "The genocide question", the Special Rapporteur stated that:

"It is not for the Special Rapporteur to pass judgement at this stage, but an initial reply may be put forward. ... The cases of intercommunal violence brought to the Special Rapporteur's attention indicate very clearly that the victims of the attacks, Tutsis in the overwhelming majority of cases, have been targeted solely because of their membership of a certain ethnic group, and for no other objective reason. Article II, paragraphs a) and b) [of the Genocide Convention, 1948] might therefore be considered to apply to these cases. ... The violations of

the right to life, as described in this report, could fall within the purview of Article III of the [Genocide] Convention ..."<sup>11</sup>

On 24 September 1993, the UN Secretary-General laid before the Security Council a plan to empower an international military force to ensure compliance with the Arusha Accords and recommended that UNOMUR be folded into a "United Nations Assistance Mission in Rwanda" (UNAMIR). On 5 October 1993, the Security Council adopted resolution 872 creating UNAMIR for an initial period of six months.

The Arusha Accords were hailed by many as the first effective power-sharing pact. However, the agreement also gave further impetus to extremist Hutu elements who had always viewed the Habyarimana régime as an appeaser of dominant Tutsi interests. In the final months of 1993, these extremist Hutu elements began to plan the genocide by training groups of 300 persons in methods of systematic slaughter.

By 6 April 1994, international pressure was building up on President Habyarimana to apply the provisions of the Arusha Accords in good faith. On 4 April, the UN Secretary-General had submitted a report to the Security Council which stated that if the Arusha Accords were not implemented quickly, the Security Council would have to reconsider whether to maintain UNAMIR. President Habyarimana flew to Dar-es-Salaam to attend a meeting with President Ali Hassan Mwinyi of Tanzania, Kenyan Vice-President George Saitoti, Cyprien Ntuyamira, President of Burundi, and President Yoweri Museveni of Uganda. Following the closure of the conference, the Presidents of Rwanda and Burundi flew to Kigali on 6 April. The President of Burundi had decided to accompany the President of Rwanda instead of taking his own aircraft, intending to continue on home to Bujumbura.

## 3. Serious Human Rights Violations, including Genocide, Committed During the Rwandese Civil War (6 April-15 July 1994)

On 6 April 1994, the presidential aircraft was shot down as it approached Kigali airport killing all aboard, including Juvénal Habyarimana, President of the Rwandese Republic and Cyprien Ntuyamira, President of the Republic of Burundi, several ministers and their entourages. This disaster triggered mass killings which mounted to between 500,000 and 1 million mainly Tutsi, as well as moderate Hutu, men, women and children.<sup>12</sup>

On 7 April, Prime Minister Agathe Uwilingiyimana was raped and murdered by soldiers of the Rwandese Government and ten Belgian peace-keeping soldiers assigned to protect her were tortured and killed.

The main perpetrators of the massacres were Hutu militia associated with President Habyarimana's MRND party and the Coalition for the Defense of the Republic as well as members of the Presidential Guard and regular army forces of the former Government of Rwanda.

<sup>9</sup> 2,500 UNAMIR troops were deployed on 1 November 1993.

<sup>10</sup> See the report of Mr. Bacre Waly Ndiaye on his mission to Rwanda from 8-17 April 1993, E/CN.4/1994/7/Add.1 of 11 August 1993.

<sup>11</sup> *Id.* at paras. 78-80.

<sup>12</sup> See the report on the situation of human rights in Rwanda submitted by Mr. R. Dégni-Ségui, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 20 of Commission resolution E/CN.4/S-3/1 of 25 May 1994, doc. E/CN.4/1995/7 of 28 June 1994, para. 24.

Hutu *interahamwe* and *impuzamugambi* militias broadcasted extensive radio messages clearly indicating their intention to "eliminate the Tutsi ethnic minority" and, while the massacres were being perpetrated, further incited civilians to join in on the slaughters, even indicating where Tutsi survivors of the attacks were still hiding.<sup>13</sup> This intention indicated clearly to the Commission of Experts on Rwanda and to the international community at large that the massacres, contrary to certain initial misperceptions, constituted "genocide" by the extremist Hutu elements against the Tutsi minority within the meaning of Article 2 of the Convention on Genocide. The programme of mass killings was also designed to eliminate political dissent which accounts for the fact that too prominent Hutu individuals, perceived too moderate or too conciliatory to Tutsi power factions, were also targeted.

Tutsi families throughout the country, fearing the advancing extremist Hutu militia, sought sanctuary in churches and parishes, which in earlier periods of civil strife had provided sites of relative safety. In April and May 1994, however, perpetrators of the genocide went systematically to these churches and parishes where defenceless civilians had gathered, and thus were able to massacre large numbers of persons in a relatively short time, using hand grenades, machine-guns, machetes, axes, clubs, hammers and even common farming implements, such as hoes. Contrary to the portrayal many newspaper and television reports offered at the time, the mass killings were not spontaneous outbreaks of inter-ethnic violence stemming from "inter-tribal rivalry", but rather a determined effort by extremist Hutu elements to wipe out the entire Tutsi minority as well as politically moderate Hutu leaders who might have hindered consolidation of extremist Hutu political power throughout Rwanda.

Extensive administrative and logistical planning went into the slaughter as evidenced by the chillingly calculated and thorough way in which it was carried out and by the fact that the greater number of victims were killed over a relatively short period – mostly in April and the first three weeks of May 1994. These massacres were far worse than any of the others that had been perpetrated before, not only in the sheer number of victims, but also in the highly methodical and systematic way in which they were executed.

"If we consider that probably around 800,000 people were slaughtered during that short period ... the daily killing rate was at least five times that of the Nazi death camps."<sup>14</sup>

The Rwandan Patriotic Front undertook a military offensive that began shortly after hostilities broke out in early April. By mid-July 1994, they had put a stop to the genocide and gained effective control over Rwanda, forcing the former Government from the country and inaugurating a new one on 14 July.

Most of the individuals responsible for the massive violations fled the country amongst the over 2 million who sought refuge in the neighbouring countries of Burundi, Tanzania and Zaire out of fear of Tutsi reprisals and revenge. Another 2 million persons fled their homes to other parts of Rwanda, becoming internally displaced persons (IDPs). In total, more than two-thirds of the Rwandese population became displaced. A number of criminal suspects fled to francophone West African countries as well as to Kenya and as far away as Belgium, Canada, France, Switzerland and the United States.<sup>15</sup>

The new Government took a conciliatory stance and accepted offers of international cooperation from

the UN High Commissioner for Refugees, UN High Commissioner for Human Rights, other concerned international organizations as well as the International Committee of the Red Cross and numerous non-governmental organizations. It pledged to abide by the main elements of the Arusha Accords, including integration of the Rwandan Patriotic Army with the Armed Forces of the former Rwandese Government. The Government also undertook to cooperate fully with the International Criminal Tribunal for Rwanda (ICTR), once established, in spite of certain objections it maintained as regards jurisdiction and structure over which it cast the sole dissenting vote when the Security Council adopted the Statute of the Tribunal on 8 November 1994 (see 16 HRLJ 124 (1995)).

The Security Council eventually decided that Rwanda had passed the emergency phase and on 8 March 1996 withdrew UNAMIR from the country.<sup>16</sup>

#### 4. The Question of Individual Criminal Responsibility in International Law for Serious Human Rights Violations Committed in Rwanda

Concerned about the massive violations in Rwanda, the Security Council adopted resolution 935 (1994) on 1 July 1994, which recalled that "all persons who commit or authorize the commission of serious violations of international humanitarian law are individually responsible for those violations and should be brought to justice" and requested the Secretary-General "to establish, as a matter of urgency, an impartial Commission of Experts to examine and analyze information submitted pursuant to the present resolution, together with such further information as the Commission of Experts might obtain, through its own investigations or the efforts of other persons or bodies, including the information made available by the Special Rapporteur on Rwanda, with a view to providing the Secretary-General with its conclusions on the evidence of grave violations of

<sup>13</sup> See generally, Jean-Pierre Chrétien, *Rwanda: Les médias du génocide* (1995) which describes the role of the media prior to and during the genocide.

<sup>14</sup> Gérard Prunier, *supra* note 2 at 261.

<sup>15</sup> See generally, Jean-François Dupaquier (ed.), *La justice internationale face au drame rwandais* (1996), Editions Karthala, Paris.

<sup>16</sup> The United Nations Human Rights Field Operation in Rwanda, conducted under the auspices of the High Commissioner for Human Rights, became the largest UN presence in the country. By 31 December 1996, the Operation had grown to 138 monitors, but by the end of 1997, this number dropped to around 77. The Report of the United Nations High Commissioner for Human Rights on the Human Rights Field Operation in Rwanda (HRFOR), submitted to the General Assembly by the UN Secretary-General – A/50/743 of 13 November 1995, para. 9 – states that: "In the Agreement between the High Commissioner for Human Rights and the Government of Rwanda, the objectives and functions of the operation are defined as follows:

(a) carrying out investigations into violations of human rights and humanitarian law, including possible acts of genocide; (b) monitoring the ongoing human rights situation, and helping to prevent such violations through the presence of human rights field officers; (c) cooperating with other international agencies to re-establish confidence and facilitate the return of refugees and IDPs and the rebuilding of civil society; and (d) implementing programmes of technical cooperation in the field of human rights, particularly in the area of the administration of justice, to help Rwanda rebuild its shattered judiciary and to provide human rights education to all levels of Rwandese society."

international humanitarian law committed in the territory of Rwanda, including the evidence of possible acts of genocide.”

Resolution 935 requests the Secretary-General to report to the Security Council within four months of the Commission's establishment. However, the Commission decided to submit an interim report in advance of the four-month deadline to avoid unnecessary delay in the submission of its recommendations. The Commission's role was to present an indication of which parties were mainly responsible for the violations of human rights and humanitarian law, what norms of international law would be applicable, and before what forum should such persons be tried and sentenced. Accordingly, the Commission of Experts submitted two reports: a Preliminary Report on 29 September 1994<sup>17</sup> and a Final Report on 29 November 1994.<sup>18</sup> Following the completion of its functions, the Commission of Experts on Rwanda was duly dissolved on 30 November.

The Commission of Experts concluded that both sides to the armed conflict in Rwanda during the period 6 April 1994 to 15 July 1994 were responsible “for serious breaches of international humanitarian law, in particular of obligations set forth in article 3 common to the four Geneva Conventions of 12 August 1949 and in Protocol II additional to the Geneva Conventions and relating to the protection of victims of non-international armed conflicts, of 8 June 1977”.<sup>19</sup>

The Commission concluded that individuals from both sides were also responsible for crimes against humanity. However:

“[a]fter careful deliberation, the Commission of Experts [...] 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. Abundant evidence shows that these mass exterminations perpetrated by Hutu elements against the Tutsi group as such, during the period mentioned above, constitute genocide within the meaning of article II of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted on 9 December 1948. To this point, the Commission has not uncovered any evidence to indicate that Tutsi elements perpetrated acts committed with intent to destroy the Hutu ethnic group as such during the said period, within the meaning of the Genocide Convention of 1948.”<sup>20</sup>

The Commission therefore recommended that the persons responsible be tried for these crimes under international law and that:

“the Security Council amend the Statute of the International Criminal Tribunal for the former Yugoslavia to ensure that its jurisdiction covers crimes under international law committed during the armed conflict in Rwanda that began on 6 April 1994.”<sup>21</sup>

On 8 November 1994, the Security Council adopted resolution 955 (1994) creating the ICTR, the Statute of which forms the resolution's annex. The resolution “expresses appreciation for the work of the Commission of Experts<sup>22</sup> established pursuant to resolution 935 (1994) of 1 July 1994, in particular its preliminary report on violations of international humanitarian law in Rwanda transmitted by the Secretary-General's letter of 1 October 1994 (S/1994/1125)”, reiterates the Council's “grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda”, determines “that this situation continues to constitute a threat to international peace and security” and

determines “to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them”.

Resolution 955 underlines the Security Council's conviction that prosecution of individuals responsible for serious violations of international humanitarian law “would contribute to the process of national reconciliation and to the restoration and maintenance of peace.”

As in resolutions creating the International Criminal Tribunal for the Former Yugoslavia,<sup>23</sup> the Security Council referred expressly to the armed conflict as “a threat to international peace and security”, invoking Chapter VII of the UN Charter authorizing the Council to avail itself of a wide range of enforcement measures. As such, the maintenance of “international peace and security” forms both the *raison d'être* and legal basis for the creation of the ICTR and its continued existence, as a subsidiary organ of the Council under Article 29 of the UN Charter. In his first report to the Security Council on the implementation of resolution 955 (1994),<sup>24</sup> the Secretary-General also cited practical reasons<sup>25</sup> for founding the ICTR on the basis of Chapter VII, namely, to ensure the cooperation of Rwanda throughout the duration of the Tribunal's existence as well as that of all States the territory in which perpetrators may be seeking safe-haven and to ensure “a speedy and expeditious method of establishing the Tribunal”.

One could argue that the duration of Security Council jurisdiction as well as that of its subsidiary organs ceases with respect to Rwanda once the “threat to international peace and security” has dissipated. On this basis, one could argue that the Security Council's jurisdiction and of the ICTR is no longer valid because: a) the civil war in Rwanda ended in mid-July 1994 following the insurgents' successful halting of the genocide; b) the new Government of Rwanda has successfully assumed effective control over the entire territory of Rwanda and human rights violations have diminished; c) Rwanda has moved past the emergency stage towards a climate in which rehabilitation of Government administration and effective steps towards national reconciliation can be, and are being, undertaken; and d) there has been a fundamental change in

<sup>17</sup> Preliminary Report of the Independent Commission of Experts established in accordance with Security Council Resolution 935 (1994), U.N. Doc. S/1994/1125 of 4 October 1994, para. 42.

<sup>18</sup> Final Report of the Commission of Experts established pursuant to Security Council resolution 935 (1994), S/1994/1405 of 9 December 1994.

<sup>19</sup> See *supra* note 17 at paras. 146-149.

<sup>20</sup> *Ibid.* at para. 148.

<sup>21</sup> *Ibid.* at para. 152.

<sup>22</sup> For a description of the establishment and work of the Commission, see Lyal S. Sunga, “The Commission of Experts on Rwanda and the creation of the International Criminal Tribunal for Rwanda / A note”, 16 HRLJ 121-124 (1995).

<sup>23</sup> See Morten Bergsmo, “International Criminal Tribunal for the Former Yugoslavia: Recent Developments”, 15 HRLJ 405-410 (1994).

<sup>24</sup> Paragraph 5 of Security Council resolution 955 (1994) of 8 November 1994 requests the Secretary-General “to report periodically to the Council” on implementation of the resolution.

The text of resolution 955 (1994) is reproduced in 16 HRLJ 124 (1995).

<sup>25</sup> See paragraph 6 of S/1995/134 of 13 February 1995, entitled the Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994).

circumstances as indicated by the Security Council's own decision to withdraw UNAMIR from Rwanda.<sup>26</sup>

On the other hand, aside from all appearances that by the end of 1997, the civil war continued to be waged by *interahamwe* and associated armed groups and that the Government's hold in the northwestern prefectures remained tenuous, two main arguments can be marshalled in favour of extending Chapter VII jurisdiction of the Security Council and that of its subsidiary organs beyond the duration of the national emergency stage in Rwanda.

First, "threat to international peace and security" should be construed broadly enough in terms of applicability to cover factual situations not only of international or non-international armed conflicts *in corso*, but also for a certain period following cessation of hostilities in which resumption of the armed conflict is still present.

Second, "threat to international peace and security" should be construed broadly in a normative sense. Successful prosecution of crimes under international law for violations of human rights and humanitarian law may take considerable time. The prosecution effort cannot be allowed to dwindle away once political will fades. On the contrary, international criminal justice requires that every effort must be made to ensure perpetrators of serious human rights violations are brought to justice, tried and convicted, even if this may take many years.<sup>27</sup> The UN Charter is designed to provide the Security Council with sufficient authority to take effective measures with a view to resolving a breach or threat of international peace and security, and therefore, the Council's authority to maintain the Tribunal lasts as long as it takes to make prosecution efforts effective.

It should be noted that the ICTR could have been created through the adoption of a multilateral convention of the UN General Assembly. Exercise of this option might have increased the legitimacy of the Tribunal because the Assembly, in effect, the plenary rule-making organ of the UN, can translate a broader political will into practical implementation. On the other hand, this admittedly wider consensus would likely have been very difficult to achieve on a matter so sensitive as creation of an organ for the effective implementation of international criminal law. If such a consensus could have been achieved through the General Assembly, it would likely have reflected the lowest common denominator among States, and moreover, have taken years to attain. Such a process could have been self-defeating; by the time the process of consensus-building met with success, the pressure of public opinion to translate political will into effective implementation with the necessary funds, personnel and resources, probably would have long disappeared, jeopardizing the whole effort.

### 5. Statute of the ICTR

Article 1 of the ICTR Statute<sup>28</sup> (containing 32 articles), delimits the Tribunal's temporal jurisdiction to cover acts committed only in the period from 1 January 1994 to 31 December 1994. This is considerably narrower than the competence of the International Criminal Tribunal for Former Yugoslavia.<sup>29</sup> During the drafting of the Statute by the Security Council, the delegate of the Government of Rwanda, sitting as a Member of the Council, objected strenuously to the delimitation of the Tribunal's jurisdiction to the 1994 calendar year, concerned that it would preclude prosecution of precisely those persons who planned and instigated the genocide as far back as late 1993. Arguably, the standard of fair and impartial justice requires all the serious violations committed in Rwanda to be prosecuted, past, present and future, not only

those committed within the arbitrary confines of the 1994 calendar year. Not surprisingly, a number of leaders of the Rwandese Hutu community have called for broader temporal competence, perhaps to equalize the responsibility of the Hutu militia who carried out the genocide with the responsibility of the Tutsi-dominated Rwandese Patriotic Front (RPF) for crimes committed during its many insurgent campaigns prior to the civil war, during the civil war, and following its take-over of the Government.

As finally decided, the Statute's temporal reach reflects the will of the international community to enforce international criminal justice specifically as regards the genocide and related violations rather than over human rights violations committed in Rwanda generally. However, the Statute does not preclude adduction of evidence tending to prove the planning element of the programme of genocide and as such, does not, and should not, *a priori*, rule out evidence on events that took place prior to 1 January 1994. The admissibility of evidence has to be evaluated according to the degree of relevance and probative value, etc., i.e. the connection of the evidence to an element of the crime perpetrated anytime between 1 January and 31 December 1994. Indeed, it is likely much crucial evidence can and will be adduced by the Prosecution proving the concerted, planned, systematic and methodical way in which the massacres were carried out. The evidence might take any one of a number of forms, such as documents or tape recordings of radio broadcasts such as those disseminated in the latter months of 1993, designed to whip up hatred against the Tutsi minority and which indicate a clear intention to eliminate the group as such. Such sources of evidence may be particularly important since the definition of "genocide" in Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, 1948,<sup>30</sup> places

<sup>26</sup> Initially, UNAMIR's mandate was to expire on 8 December 1995, but was extended until 8 March 1996 to ensure a smooth transition of administrative and logistical support to UN agencies, such as to the UN High Commissioner for Refugees and to the UN Human Rights Field Operation in Rwanda.

<sup>27</sup> Neither technical impediments nor statutory time limitations ought to prevent prosecution of suspects of serious human rights violations from being properly prosecuted. This principle is enshrined in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 1968, which entered into force on 11 November 1970. However, by 31 December 1995, there were only 41 signatories to the Convention, including Rwanda.

<sup>28</sup> The full name of the Tribunal is the "International Criminal 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, established by Security Council resolution 955 of 8 November 1994".

<sup>29</sup> Article 1 of the Statute of the International Criminal Tribunal for the Former Yugoslavia states that: "The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the present Statute."

The full text of the Statute of the ICTY is reproduced in 14 HRLJ 211 (1993).

<sup>30</sup> The Convention on the Prevention and Punishment of the Crime of Genocide was adopted on 9 December 1948 by the United Nations General Assembly. It entered into force on 12 January 1951 pursuant to Article XIII. Rwanda acceded to the Convention on 16 April 1975.

considerable emphasis on the Prosecutor to establish the requisite *mens rea* to commit the crime of genocide, i.e. the intent "to destroy, in whole or in part, a national, ethnic, racial, or religious group, as such", in addition to proving *actus reus*.

One of the more significant developments brought about by the ICTR Statute is its enforcement of individual criminal responsibility for breaches of common Article 3 of the Geneva Conventions, 1949, and Protocol II. Prior to the adoption of the Statute, there was some doubt as to whether the breach of common Article 3 could give rise to individual criminal responsibility at the international level. However, the Security Council's treatment of this issue seems to signal a welcome recognition of the need for effective repression of serious violations of international humanitarian law and in effect, to consider a violation of common Article 3 as a "grave breach" of the Geneva Conventions of 1949. Articles 2, 3 and 4 of the Statute specify the applicable international legal norms to the question of individual criminal responsibility for the atrocities in Rwanda and authorizes the Tribunal to prosecute individuals on this basis. The Security Council agreed with the reasoning of the Commission of Experts on Rwanda that the fighting between 6 April and 14 July 1994 constituted a "non-international armed conflict" and therefore that the applicable human rights and humanitarian legal norms were those applicable to situations of armed conflict not of an international character, in particular those prohibiting genocide and crimes against humanity as well as those provided for in Article 3 common to the four Geneva Conventions of 1949 and supplemented by Article 4 of Protocol II additional to the Geneva Conventions of 1949.

The Preliminary Report of the Commission of Experts on Rwanda stated:

"The Commission considers that to enhance the fair and consistent interpretation, application and adjudication of international law on individual responsibility for serious human rights violations and to effect the most efficient allocation of resources, the jurisdiction of the International Criminal Tribunal for the former Yugoslavia should be expanded to permit cases concerning the situation in Rwanda to be brought under it."<sup>31</sup>

It therefore recommended that:

"the Security Council amend the Statute of the International Criminal Tribunal for the former Yugoslavia to ensure that its jurisdiction covers crimes under international law committed during the armed conflict in Rwanda that began on 6 April 1994."<sup>32</sup>

Perhaps the Commission of Experts felt that by unifying the two *ad hoc* tribunals fully it would strengthen both and also clear the way for the solidification of international criminal jurisdiction, which would in turn augur in favour of a permanent international criminal court. However, France and Russia, although traditional supporters of the development of international criminal jurisdiction, opposed this proposal, perhaps out of certain loyalties to traditional allies in Rwanda and the former Yugoslavia.

Serious disagreement among Security Council Members threatened to deadlock the Council from creating a tribunal for Rwanda at all, however, a compromise solution brought forward by the Security Council's New Zealand delegate gained the approval of the Council which ended up creating a sort of hybrid. The ICTR Statute provides for two separate trial chambers for Rwanda,<sup>33</sup> a common Prosecutor but an additional deputy Prosecutor to that already appointed for ex-Yugoslavia,<sup>34</sup>

a common Appeals Chamber<sup>35</sup> and the same rules of procedure and of evidence as those for the International Criminal Tribunal for the Former Yugoslavia.<sup>36</sup>

This in-between approach could possibly impede fairness and consistency in the interpretation, application and adjudication of international criminal law norms. Given the complexities of international criminal law as an emerging normative field and the inevitable diversity in the predilections, qualifications and backgrounds of the trial judges, palpable inconsistencies are bound to arise in the Judgements of the two Trial Chambers, increasing the confusion in international criminal law.

On the other hand, such inconsistencies could become blessings in disguise. Discrepant even opposing positions can strengthen and refine development of pertinent legal norms over the longer term. A lack of consensus in the judiciary may produce decisions that employ greater conceptual precision and display an effort on the part of individual judges to defend their positions with greater care and thoroughness than otherwise might be felt necessary. Incompatible philosophic viewpoints can sharpen international criminal law jurisprudence like dull knives through force and friction striking away the rough edges of each. The development of distinct jurisprudential positions can broaden the available array of alternative doctrinal approaches for Trial and Appeal judges in later cases enhancing the coherence as well as the flexibility of international criminal law as a developing normative system.

## 6. Functioning of the ICTR

Resolution 955 states that the Security Council decides "all States shall cooperate fully with the International Tribunal and its organs" and "shall take any measures necessary under their domestic law to implement the [Statute's] provisions"; urges States, inter-governmental organizations and NGOs "to contribute funds, equipment and services to the International Tribunal, including the offer of expert personnel"; requests the Secretary-General to make the necessary practical arrangements urgently to implement resolution 955 itself; decides that the site of the Tribunal shall be determined by the Council, taking account of considerations of justice, fairness, administrative efficiency (including access to witnesses and economy) and the requirement of conclusion of the necessary arrangements between the United Nations and the State in which the Tribunal would be situated; and "decides to remain actively seized of the matter".

The Secretary-General announced, on 24 January 1995, the creation of a Voluntary Fund for the ICTR.<sup>37</sup> It was intended that the Voluntary Fund would ensure the sending of teams of Tribunal investigators to Rwanda and neighbouring countries to collect information that could lead to the opening of a file on suspects and the eventual building of the Prosecution's case.

<sup>31</sup> See Preliminary Report, part VIII (B).

<sup>32</sup> *Ibid.* at para. 152.

<sup>33</sup> See Articles 10, 11, 12 and 13 of the Statute. 16 HRLJ 126 (1995).

<sup>34</sup> Article 15(3) of the Statute.

<sup>35</sup> Article 12(2) of the Statute.

<sup>36</sup> Article 14 of the Statute.

<sup>37</sup> See Press Release of the Secretary-General L/2691 of 24 January 1995.



The Judges for the ICTR were appointed on 26 April 1995 by the Security Council.<sup>38</sup> For the Trial Chambers, the following persons were appointed: Mr. Lennart Aspergen (Sweden); Mr. Laity Kama (Senegal); Mr. Tafazzal Hossain Khan (Bangladesh); Mr. Yakov A. Ostrovsky (Russia); Ms. Navanethem Pillay (South Africa) and Mr. William H. Sekule (Tanzania). With regard to the Appeals Chambers, on 2 October 1995, Mr. Fouad Riad replaced Mr. Georges Abi-Saab (Egypt) whose resignation from the Court took effect the same day. Mr. Antonio Cassese (Italy), Mr. Jules Deschênes (Canada), Mr. Haopei Li (China) and Sir Ninian Stephen (Australia) remain in the Appeals Chamber.

The ICTR officially began work on 26 June 1995 with the opening of its first Plenary Session during which all eleven appointed judges met for one week in The Hague.

In a press release of 5 April 1995, Prosecutor Justice Richard Goldstone stated that:

"[b]ased on our investigations to date, we have identified approximately 400 suspects who may be prosecuted for acts of genocide and crimes against humanity. Some are still in Rwanda. Others are in several African countries, in Europe and North America. We will seek the cooperation of various countries to surrender the suspects for trial. It is my objective to issue the first indictments in the second half of this year."

These indictments were indeed issued in December 1995, but were not made public until custody over the criminal suspects could be acquired.

In October 1995, some hostility towards the ICTR was shown by the Kenyan authorities. On 5 October, Mr. Justice Goldstone sent a letter to the President of Kenya, Mr. Daniel arap Moi, pressing for clarification or dismissal of press reports which quoted the President as having said on 4 October that "any member of the International Tribunal who comes to Kenya to pursue those people they claim participated in the genocide will be arrested on arrival." According to an undated press release of the Tribunal: "The Prosecutor stresses in his communication to the Kenyan head (sic) of State that a refusal of cooperation with the Tribunal would constitute an extremely serious setback for the work of his Office and such an action would be regarded as a breach of Kenya's obligations under international law, a matter for the Security Council of the United Nations."

On 17 October 1995, the President of the Security Council called on Member States to cooperate with the ICTR in accordance with its Statute.<sup>39</sup> Some weeks later, the President of Kenya dismissed the matter as a misunderstanding and pledged his Government's cooperation.

In his report to the Security Council of 13 February 1995, the Secretary-General recommended that the seat of the Tribunal's Trial Chambers be situated in Arusha, Tanzania and that one office be established in Arusha, and another in Kigali.<sup>40</sup> In a further report of 30 June 1995, the Secretary-General registered his observations on the difficulties and delays entailed in the setting up of the Tribunal, and stated that:

"For a variety of reasons ... the Office in Kigali has yet to become fully operational. The uncertain budgetary situation made it difficult to attract and recruit qualified personnel; the core staff of the investigation section of the Office expressed concerns about the safety of personnel and the security of documents; and premises for both accommodation and office needs were either unavailable or inadequate. The establishment of the Office in the first 10 weeks has, therefore, been more difficult than anticipated and until very recently it had no permanent presence in Kigali."<sup>41</sup>

## 7. The First Indictments of the ICTR

In a press release of 19 October 1995, Justice Goldstone stated that the indictments to be issued on Rwanda "will reflect the policy of investigating and indicting the persons who held positions of authority in relation to the mass killings in Rwanda in mid-1994." In the same press release, Justice Goldstone mentioned that the Governments of The Netherlands, Germany, Denmark, Switzerland, the United Kingdom and the United States contributed experts to work with Tribunal staff already recruited by the United Nations.

The press release also stated that "The Zambian authorities have announced that they have arrested 14 persons suspected of violations of international humanitarian law in Rwanda in 1994" and that the Prosecutor's Office was in the process of making arrangements with the Zambian authorities to allow investigation into the alleged violations. The same press release announces the appointment of a new Director of Investigations, Mr. Alphonse Breaux, former Assistant Commissioner of the Royal Canadian Mounted Police.

On 10 January 1996, the ICTR named three persons suspected of having committed acts of genocide in Rwanda in 1994: a former Minister of the Government of Rwanda and two former mayors,<sup>42</sup> detained in Belgium. On 11 January, the ICTR then formally requested Belgium to hand over these suspects so the first steps of the trial process could commence. In a response of the same day, the Government of Belgium said that it was giving "top priority" to the Tribunal's request and that its Ministry of Justice had received a request to defer to the jurisdiction of the Tribunal and to take the necessary legal and administrative measures to transfer the cases of the three men. The legal framework to comply with the request was being created with the introduction of a draft law to the Parliament of Belgium on 10 January 1996.

On 29 February 1996, the Security Council accepted the resignation of Mr. Richard Goldstone from the position of Prosecutor of the two international criminal tribunals and appointed Ms. Louise Arbour (Canada) who took up these responsibilities on 1 October 1996, the date Mr. Goldstone's resignation took effect.<sup>43</sup>

By the end of 1997, the ICTR had issued a number of indictments.

The substance of each is summarized briefly below.

<sup>38</sup> See Note by the Secretary-General of 26 April 1995 (A/49/894) submitting to the General Assembly the *Curricula Vitae* of candidates selected by the Security Council from nominations received from Member States of the UN and non-Member States maintaining permanent observer missions at UN Headquarters; see also UN Doc. A/49/893.

<sup>39</sup> Statement by the President of the Security Council expressing the Council's willingness to study further recommendations that the Secretary-General might make on the issue of force reductions in relation to the fulfilment of UNAMIR's mandate; S/PRST/1995/53, 17 October 1995.

<sup>40</sup> Report of the Secretary-General on Practical Arrangements for the International Tribunal for Rwanda; S/1995/134 of 13 February 1995.

<sup>41</sup> Further report of the Secretary-General on Practical Arrangements for the International Tribunal for Rwanda; S/1995/533 of 30 June 1995 at para. 4.

<sup>42</sup> The three persons were Mr. Alphonse Higaniro (former Government Minister and manager of a match factory); Mr. Elie Ndayambaje (former Mayor of Muganza); and Joseph Kanyabashi (former Mayor of Ngoma).

<sup>43</sup> S/RES/1047 (1996).

In addition, there was a decision of the Trial Chamber on the motion of accused Gérard Ntakirutimana requesting that the counsel assigned to him by the Tribunal's Registrar be replaced and an important decision on a motion by accused Joseph Kanyabashi on the jurisdiction of Tribunal. Both of these decisions appear in the present issue of this Journal (below at pp. 340 ff.).

#### Jean-Paul Akayesu

Mr. Akayesu held the position of *bourgmestre* of Taba commune, Gitarama Prefecture, from April 1993 until June 1994. Rwanda is broken down territorially into twelve Prefectures (recently a new prefecture was created raising the number from eleven) which serve as the main regional administrative units. Each prefecture is composed of communes. In each commune, the *bourgmestre* wields considerable political power. As *bourgmestre*, Mr. Akayesu was responsible for the maintenance of law and order in Taba commune where the Prosecutor alleges that at least 2000 Tutsis were killed between 7 April and the end of June 1994 while Akayesu was still in office.

Akayesu is charged with failure to attempt to prevent the massacres of Tutsis and to fail to call "for assistance from regional or national authorities to quell the violence."<sup>44</sup> He is alleged also to have taken measures to arrest the killers of one Sylvere Karera in spite of the fact that one of the alleged killers was turned over to him. Following an alleged speech by Mr. Akayesu in which he exhorted over 100 persons in attendance to kill accomplices of the Rwandese Patriotic Front, massacres of Tutsis in Taba commune began. Among other things, Akayesu is charged with having conducted house-to-house searches in order to interrogate, torture and kill particular targets, ordering "local people and militia to kill intellectual and influential people as well as failing to take any action to stop female displaced persons who were taken by militia or communal police and sexually assaulted".

Lending clarity and specificity to the charges, Article 10A of the "General Allegations" section of the amended Indictment states specifically that in the Indictment "acts of sexual violence include forcible sexual penetration of the vagina, anus or oral cavity by a penis and/or of the vagina or anus by some other object, and sexual abuse, such as forced nudity". The charges explain that:

"Many women were forced to endure multiple acts of sexual violence which were at times committed by more than one assailant. These acts of sexual violence were generally accompanied by explicit threats of death or bodily harm. The female displaced civilians lived in constant fear and their physical and psychological health deteriorated as a result of the sexual violence and beatings and killings."

Jean-Paul Akayesu is alleged to have known of the sexual violence being perpetrated and at certain points was present during their commission. He stands charged of having committed genocide, complicity in genocide, incitement to commit genocide, and various crimes against humanity, including murder, rape and torture as well as the corresponding violations of Article 3 common to the four Geneva Conventions of 1949.

#### Théoneste Bagosora

Among criminal suspects, Mr. Bagosora must be considered a "big fish". In a Press Statement of 17 May 1996,<sup>45</sup> the ICTR in Arusha indicated that the Prosecutor submitted to the Trial Chamber an application for a formal request to be made to the Government of Belgium

to defer to the ICTR "all investigations and criminal proceedings currently being conducted against Théoneste Bagosora". At the time, Bagosora had been detained in Yaounde, Cameroon, since 9 March 1996 in conformity with an international warrant of arrest, issued by the Belgian authorities and was also the subject of a request for extradition by both the Governments of Belgium and Rwanda. On 17 May 1996, the Trial Chamber granted the Prosecutor's request.

Mr. Bagosora was Director of Cabinet at the Ministry of Defense and served in this capacity during the entire duration of the 1994 Rwandese civil war. As paragraph 2.6 of the Indictment indicates, Mr. Bagosora "assumed official and *de facto* control of military and political affairs in Rwanda."<sup>46</sup> Following the death of President Habyarimana and the Chief of the General Staff in the shooting down of the aircraft on 6 April 1994, and in the absence from the country of the Minister of Defense and a number of other high-ranking military commanders, Bagosora is alleged to have led military operations and to have held meetings in which he expressed his intention to take power.

The Indictment states that in one such meeting, held on 7 April, Bagosora "was informed that some Belgian soldiers from UNAMIR were threatened with death at a Kigali military camp, a hundred meters away". The Indictment alleges that Bagosora "neither ordered the officers involved not to cause physical harm to the UNAMIR Belgian soldiers and to free them, nor did he take any other necessary steps to protect them" despite his position of responsibility over his subordinates and his capacity to contact commanders with functioning radio communications. During the nights of 6 and 7 April members of the Presidential Guard in Kigali "tracked down, arrested, and killed prominent figures of the Tutsi community and the main leaders of the political opposition".

Bagosora is charged with the crime of genocide, crime against humanity, the murder of the ten Belgian UNAMIR soldiers constituting a breach of Article common to the four Geneva Conventions of 1949, and Article 4 of Protocol II.

#### Clément Kayishema, Ignace Bagilishema, Charles Sikubwabo, Aloys Ndimbat, Vincent Rutaganira, Mika Muhimana, Ryandiko, and Obed Ruzindana

Mr. Kayishema, having exercised considerable authority as Prefect of Kibuye, allegedly conspired with other persons to kill Tutsis in Kibuye Prefecture. Kayishema is alleged to have ordered persons seeking refuge to go to the Home of St. Jean Complex knowing that an attack at this location had been planned to take place. Once these persons arrived at the Complex, it is alleged that the area was surrounded by persons under Kayishema's control who were then ordered to attack. The Indictment alleges that the:

"attack resulted in thousands of deaths and numerous injuries to the people within the Complex ... During the two weeks following the attack, members of the

<sup>44</sup> Para. 9 of the Indictment, Prosecutor of the International Criminal Tribunal for Rwanda against Jean-Paul Akayesu, dated 13 February 1996, subsequently amended on 17 June 1996; Case No. ICTR-96-4-I.

<sup>45</sup> See ICTR/INFO-9-2-07.

<sup>46</sup> Indictment, Prosecutor of the International Criminal Tribunal for Rwanda against Théoneste Bagosora, dated August 1996.

Gendarmerie Nationale, Interahamwe and armed civilians searched for and killed injured survivors of the attack."<sup>47</sup>

The Prosecutor alleges that Kayishema took no measures to prevent the attack and none to punish the perpetrators afterward. Kayishema is also alleged to have played a similar role in other massacres, described in the Indictment, including that involving the slaughter of "thousands of men, women and children from various locations [who] had sought refuge in the Stadium located in Kibuye town" as well as the 14 April 1994 massacre, conducted over a period of several days, at the Church in Mubuga, Kibuye Prefecture.

Clément Kayishema is charged with the crime of genocide, crimes against humanity and violations of common Article 3 and Protocol II.

On 29 April 1996, the Court issued an amended indictment against Clément Kayishema.<sup>48</sup> The indictment joins the following persons as co-accused: Ignace Bagilishema (*Bourgmestre* of Mabanza Commune until the end of July 1994); Charles Sikubwabo (who served as *Bourgmestre*, Gishyita Commune until the end July 1994); Aloys Ndimbati (*Bourgmestre* of Gisovu Commune until the end of July 1994); Vincent Rutaganira (Counsellor of Mubuga Sector, Gishyita Commune); Mika Muhimana (Counsellor of Gishyita Commune); Ryandikayo<sup>49</sup> (a restaurant manager); and Obed Ruzindana (a commercial trader).

Ruzindana and Sikubwabo figure also in what appears to be another Indictment of 17 June 1996 with two other co-accused: Elizaphan Ntakirutimana and Gerard Ntakirutimana, charged with genocide, complicity in genocide, conspiracy to commit genocide and crimes against humanity in connection with an attack on Mugonero Complex in Gishyita commune, Kibuye Prefecture in April 1994 during which hundreds were murdered or wounded.<sup>50</sup> An ICTR document in the form of an indictment against these four was signed by the former Deputy Prosecutor Honoré Rakotomanana, but oddly enough, is not dated.

#### *Joseph Kanyabashi*

Mr. Kanyabashi became *Bourgmestre* of Ngoma commune, Butare prefecture in April 1974 until 4 July 1994 when he fled. Kanyabashi allegedly provided false assurances to members of the Tutsi minority they would be safe at Butare University Hospital from the slaughters being perpetrated against Tutsis at the time. It is also alleged that in May 1994 he drove through the city of Butare and, speaking through a megaphone, incited members of the local population to systematically kill the enemy. He also attended meetings where he allegedly issued similar incitements to commit acts of genocide. Allegedly, he acted as an escort for some bus loads of Tutsis seeking refuge, then betrayed them, following which they were reportedly killed.

The Indictment charges that Mr. Kanyabashi, between March and June 1994, distributed military weapons and ammunition to local public officials in the commune. Mr. Kanyabashi has been charged with genocide, complicity in genocide, crimes against humanity, violations of Article 3 common to the Geneva Conventions of 1949 and of 1977 Protocol II additional thereto, as well as direct and public incitement to commit genocide. At the time the Indictment was issued, Mr. Kanyabashi was being detained in Belgium.<sup>51</sup>

#### *Alfred Musema*

The Indictment describes Mr. Musema as having been the Director of the Gisovu Tea Factory in Kibuye

Prefecture. The Indictment alleges that, on numerous occasions in April, May and June 1994, Mr. Musema personally attacked and killed persons who were seeking refuge in Biserero commune, Kibuye Prefecture. He has been charged with having committed acts of genocide, conspiracy to commit genocide, crimes against humanity, and serious violations of Article 3 common to the Geneva Conventions of 1949 and of Protocol II. At the time the Indictment was issued, Mr. Musema was being detained in Switzerland. On 18 November 1997, Mr. Musema was brought before Trial Chambers 1 where he entered a plea of not guilty.

#### *Ferdinand Nahimana*

Mr. Nahimana is alleged to have acted as one of the more important intellectual leaders responsible for the policy of genocide and, as a senior representative of Radio Télévision Libre des Mille Collines (RTLM), alleged to have been instrumental in spreading racist propaganda before and during the genocide. According to the Indictment, he exercised control over programming, operations and finances of the station. The Indictment states that:

"Between 1 January 1994 and approximately 31 July 1994, RTLM was used to broadcast messages designed to achieve inter-ethnic hatred and encourage the population to kill, commit acts of violence and persecutions against the Tutsi population and others on political grounds."

Mr. Nahimana has been charged with conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide and crimes against humanity.

#### *Elie Ndayambaje*

Mr. Ndayambaje, a *bourgmestre* of Muganza Commune, is charged with genocide, crimes against humanity and violations of Article 3 common to the four Geneva Conventions, 1949, and Protocol II of 1977. He is alleged, together with communal police, gendarmerie, soldiers and armed civilians, to have attacked Tutsis who were fleeing to Burundi on or about 22 April 1994, as well as to have provided support and protection to a systematic attack in the region targeting Tutsi civilians on 23 and 24 April 1994.<sup>52</sup>

#### *Eliezer Niyitegeka*

Mr. Niyitegeka was the Minister of Information in the interim Government of Rwanda. The Prosecutor alleges that "At various locations and times throughout April, May and June 1994, and often in concert with others, Eliezer Niyitegeka brought to the area of Bisesero armed individuals and directed them to attack the people seeking refuge there", and that he "personally attacked and killed" these persons resulting in "thousands of deaths and numerous injuries to the men, women and children within the area of Bisesero".<sup>53</sup>

<sup>47</sup> Indictment, Prosecutor of the International Criminal Tribunal for Rwanda against Clément Kayishema, date unknown.

<sup>48</sup> See Case No. ICTR-95-1-I.

<sup>49</sup> Ryandikayo has no first name.

<sup>50</sup> Case No. ICTR-96-10-I of 17 June 1996.

<sup>51</sup> Case No. ICTR-96-15-I of 11 July 1996.

<sup>52</sup> Case No. ICTR-96-8-I of 17 June 1997.

<sup>53</sup> See The Prosecutor of the Tribunal against Eliezer Niyitegeka, of 11 July 1996, paras. 4.5-4.7.

The Indictment charges Mr. Niyitegeka with genocide in connection with killing or the causing of serious bodily harm or mental harm to members of the Tutsi population for his alleged plans to eliminate Tutsis in Gisovu and Gishyita communes, Kibuye Prefecture, as well as crimes against humanity and violations of Article 3 common to the four Geneva Conventions, 1949, and of Protocol II.

#### *Anatole Nsengiyumva*

The Indictment alleges that during the genocide, Mr. Nsengiyumva was formerly Chief of Intelligence of the Rwandan Army before becoming lieutenant-colonel in the Rwandan Armed Forces and that he served as commander of military operations in Gisenyi Prefecture since his appointment to that position on 13 June 1993.

It is alleged that on 7 April 1994, Colonel Nsengiyumva called upon army soldiers and members of militia groups in Gisenyi Prefecture to kill Tutsis, that he urged civilians to kill Tutsis and that he failed to take necessary or reasonable measures to prevent attacks on civilians perpetrated in his presence. Moreover, the Indictment alleges that:

"During the months of April through June 1994, Colonel Anatole Nsengiyumva presided over meetings of several hundred interahamwe militia at Umuganda stadium in Gisenyi prefecture, where he urged those in attendance to resume the killing of Tutsis."<sup>54</sup>

Mr. Nsengiyumva is charged with direct and public incitement to commit genocide, crimes against humanity, and violations of Article 3 common to the Geneva Conventions of 1949 and Protocol II. At the time the Indictment was issued, Mr. Nsengiyumva was being detained in Cameroon.

#### *Ladislav Ntaganzwa*

In an Indictment of 17 June 1996,<sup>55</sup> the Prosecutor charges Mr. Ntaganzwa – a *bourgmestre* of Nyakizu commune, Butare Prefecture – with genocide, direct and public incitement to genocide, crimes against humanity and violations of Article 3 common to the four Geneva Conventions, 1949.

According to the Indictment, in his capacity as *Bourgmestre*, Ntaganzwa wielded authority over the communal police and was responsible for a number of governmental functions in the commune. Ntaganzwa is alleged to have delivered a speech inciting civilians to wipe out Tutsis in the locale and of having directed the distribution of weapons to the Gendarmerie Nationale on or about 15 April and of having personally participated in an armed attack on persons gathered in Cyahinda Parish complex in Nyakizu Commune, which resulted in numerous persons killed or wounded.

#### *André Ntagerura*

Mr. André Ntagerura was Minister of Transport and Communications of the Mouvement républicain national pour la démocratie et le développement. Ntagerura was alleged to have:

"allowed and/or authorized the use of government vehicles, specifically buses, for the transport of the Interahamwe militia, as well as for the transport of arms and ammunition to and throughout Cyangugu prefecture and elsewhere."<sup>56</sup>

The indictment alleges that Ntagerura also encouraged and participated in the training of these militia. The Indictment, signed by Deputy Prosecutor Honoré Rakotomanana rather than Judge Goldstone, is noticeably lacking in a full statement of supporting facts.

It charges André Ntagerura with the crime of genocide, crimes against humanity and violations of common Article 3 and Protocol II.

#### *Elizaphan Ntakirutimana and Gérard Ntakirutimana*

In an Indictment of 7 September 1996, the Prosecutor charges the co-accused with genocide, complicity to commit genocide, conspiracy to commit genocide, crimes against humanity and serious violations of Article 3 common to the four Geneva Conventions, 1949, and of Protocol II, in connection with massacres committed in Gishyita and Gisovu communes, Kibuye Prefecture, from April to June 1994.

Interestingly, Elizaphan was a Pastor of the Seventh Day Adventist Church in Kibuye Prefecture, and at the time the Indictment was issued, was believed to be in the United States. Gérard was a physician, and at the time the Indictment was issued, believed to be in Ivory Coast. The charges concern the alleged involvement in an attack perpetrated on 16 April 1994 on unarmed Tutsi men, women and children who had sought refuge in Mugonera Complex as well as attacks subsequently perpetrated against Tutsis in the area from April to June 1994.

In September 1996, Elizaphan was seen by US federal agents near Laredo, Texas. Apparently, he had been staying with one of his sons who resided in this area. However, in December 1997, a federal magistrate decided that, under the US Constitution, the Government of the United States could not lawfully transfer Elizaphan to the ICTR in Arusha, arguing that there were no applicable extradition treaties in force.

#### *Pauline Nyiramasahuko and Arsene Shalom Ntahobali*

According to the Indictment,<sup>57</sup> Nyiramasahuko was the Minister of Women's Development and Family Welfare in the Habyarimana Government, and subsequently held the same post in the Sindikubwabo Government which installed itself following the death of President Habyarimana until being driven from power by the advancing Rwandan Patriotic Army. Ntahobali, a store manager, was the son of Ms. Nyiramasahuko and Maurice Ntahobali.

The co-accused stand indicted for allegedly having committed a number of violations of international humanitarian law between 1 April and 31 July 1994. One such violation concerned the alleged control by the co-accused of a roadblock in Butare town used, "with the help of soldiers and other unknown accomplices, to identify, kidnap and kill members of the Tutsi population as they attempted to pass this obstacle."<sup>58</sup>

The co-accused are also indicted with having taken part in the kidnapping, assault and murder of a number of persons identified as Tutsis on a number of occasions. According to the Indictment, the behaviour of the two accused was particularly aggressive, in particular, that Ntahobali:

"scoured the Prefecture of Butare seeking Tutsi victims. Once these individuals were located [he] would then forcefully kidnap them and transport them to various locations where they were murdered."<sup>59</sup>

<sup>54</sup> Case No. ICTR-96-12-I of 22 July 1997 at para. 4.8.

<sup>55</sup> Case No. ICTR-8-13-I.

<sup>56</sup> Indictment, Prosecutor of the International Criminal Tribunal for Rwanda against André Ntagerura, dated 9 August 1996.

<sup>57</sup> Case No. ICTR-97-21-I of 26 May 1997.

<sup>58</sup> *Id.* at para. 3.8.

<sup>59</sup> *Id.* at para. 3.11.

These and other acts are alleged by the Prosecutor to constitute genocide, complicity in genocide, crimes against humanity, violations of Article 3 common to the four Geneva Conventions, 1949, and Protocol II.

#### *Georges Anderson Nderubumwe Rutaganda*

Another "big fish", Mr. Georges Rutaganda was a high ranking member of the MRND as well as a shareholder in the Radio Télévision Libre des Mille Collines which was used as an instrument to incite and direct the genocide.

Rutaganda was also second Vice-President of the National Committee of the *interahamwe*. In this capacity, he is alleged to have distributed weapons to *interahamwe* members and to have ordered the killings of thousands of Tutsis who had sought safe haven in the Ecole technique officielle, Kicukiro commune. This school, protected by Belgian UNAMIR troops, suddenly became exposed when Belgium withdrew its UNAMIR contingent from Rwanda around 11 April 1994. Rutaganda allegedly ordered members of the Government of Rwanda's armed forces and *interahamwe* to attack and kill persons hiding in the school. It is alleged that he directed the forcible transfer of survivors to a gravel pit near a primary school where other conspirators killed all those unable to demonstrate they were not Tutsi.

Mr. Georges Rutaganda stands charged with the crime of genocide, crimes against humanity and violations of common Article 3 and Protocol II.

## 8. Conclusions

In one sense, the ICTR shows brighter prospects than the International Criminal Tribunal for the Former Yugoslavia for the more effective application of international criminal law. As indicated above, the persons indicted by the ICTR are alleged to have held major official rank and to have played not insignificant roles in the former Government's policy of genocide. In contrast, Mr. Dusan Tadić seems to have held only a minor position in the official chain of command.

The first verdicts of the ICTR may be handed down by the end of 1998. However, even in the case of the Rwanda Tribunal, the number of persons indicted constitutes a group negligible in size compared to the thousands who must have participated in the genocide and associated violations of international human rights and humanitarian law.

As steps towards the possible creation of a permanent international criminal court, the two *ad hoc* International Criminal Tribunals show both the potential and the limitations in the practical implementation of international criminal law. One of the more difficult challenges for the international community is to ensure that a permanent international criminal court is extended full cooperation from all States, particularly to enable the swift arrest and transfer of suspected or indicted offenders.

## 2. DECISIONS and REPORTS

### International Criminal Tribunal for Rwanda (ICTR), Arusha

Decision of 11 June 1997 – Cases Nos. ICTR-96-10-T and ICTR-96-17-T – Chamber 1 – The Prosecutor versus Gérard Ntakirutimana – On the motions of the accused for replacement of assigned counsel

#### Second request made by the accused for the replacement of counsel not granted /

#### No absolute right for the indigent accused to be assigned the legal representation of his choice / Ntakirutimana case

#### ◀The Tribunal

(full text)\*

*Sitting* as Trial Chamber 1 of the International Criminal Tribunal for Rwanda (the "Tribunal"), composed of Judge Laïty Kama as Presiding Judge, Judge Yakov Ostrovsky and Judge Lennart Aspegren;

*Whereas*, through numerous letters addressed to the President of the Tribunal, the accused Gérard Ntakirutimana is requesting that the counsel assigned to him by the Registrar on 10 March 1997, in the person of Mr. N.K. Loomu-Ojare of the Tanganyika Bar Association, be replaced on the grounds of having lost confidence in said counsel, and subsequently that the Registrar assign to him a particular counsel of his choice;

*Whereas*, on this last point, he cites the provisions of Article 20 (4) of the Statute of the Tribunal<sup>1</sup> ("the Statute"), which supposedly entitles him, though indigent, to freely choose his counsel and submits that the Registrar should never have imposed Mr. Loomu-Ojare on him;

*Whereas* it should be recalled that this is the second request made by the accused for replacement of counsel;

*Whereas* in fact, during a hearing on this matter on 4 March 1997, taking into account the crisis situation that had developed between the accused Gérard Ntakirutimana and his counsel at the time Ms. Ghislaine Moïse-Bazie of the Côte d'Ivoire Bar Association, who

had asked to be withdrawn from the case, the Tribunal considered that there existed, on that occasion, an exceptional case as a condition for the change of assigned counsel, as required by Article 19 (D) of the Directive on Assignment of Defence Counsel ("the Directive"), and, for that reason, decided to withdraw Ms. Moïse-Bazie and instructed the Registrar to immediately assign a new counsel to the accused;

*Whereas* it was therefore at the instruction of the Tribunal that the Registrar assigned Mr. N.K. Loomu-Ojare to replace Ms. Moïse-Bazie;

*Whereas* it is, however, worth pointing out that it was at a time when the accused was fearing his immanent arrest by the Côte d'Ivoire authorities, at the request of the Prosecutor of the Tribunal, that he instructed Ms. Moïse-Bazie to represent him at his own expense, particularly during his detention in Côte d'Ivoire, Ms. Moïse-Bazie having even declared that she had received the sum of CFA 500,000 in legal fees from the accused and his family;

*Whereas* it was later that Ms. Moïse-Bazie requested that her name be placed on the Registrar's list of counsel eligible for assignment and that request was granted;

\* Original: French.

<sup>1</sup> For the Statute of the Tribunal, see 16 HRLJ 125 (1995).