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The Commission of Experts on Rwanda and the creation of the International Criminal Tribunal for Rwanda / A note

by Lyal S. Sunga, Geneva

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1. Background

The crisis in Rwanda was triggered by the shooting down of the presidential aircraft on 6 April 1994 which took the lives of Juvénal Habyarimana, President of the Republic of Rwanda, and Cyprien Ntuyamira, President of the Republic of Burundi, as well as those of presidential staff and aircraft crew members.

This event precipitated what the Commission of Experts came to conclude was "a pre-planned execution of severe human rights violations, including systematic, widespread and flagrant breaches of international humanitarian law, large-scale crimes against humanity and genocide".¹ The victims were unarmed and innocent civilians: men, women and children. Most estimates put the number of those killed since 6 April 1994 at least as high as 500,000.² The actual number killed may be as high as one million.³

This was not the first time Rwanda has suffered such brutality. Numerous massacres have been perpetrated in Rwanda since 1959; in particular in the years 1963, 1966, 1973, 1990, 1991, 1992 and 1993.⁴ The main victims of these massacres have been consistently individuals of the Tutsi minority which in April 1994 were estimated to have made up about 14 per cent of the Rwandan population as compared to 84 per cent Hutu and 2 per cent other, which includes the Twa minority. The atrocities that commenced on 6 April far outstripped these earlier episodes in sheer scale of number and perhaps in intent as well.

What sets the most recent violations apart from earlier massacres is that, in the period between the aircraft crash on 6 April and the inauguration of the Tutsi-dominated Rwandan Patriotic Front on 14 July, Hutu militia apparently killed Tutsis in a planned and methodical way with an intention to wipe out the entire Tutsi minority. These were not spontaneous acts of violence; the intention to destroy the Tutsi ethnic minority as such appears to be very clear, raising the issue as to whether the massacres constituted "genocide" in the legal sense of the term.

The intense trauma to the Tutsi and moderate Hutu communities and the complete destruction of large parts of the physical infrastructure of Rwanda were not the only direct consequences of the onslaught. The entire country was brought to the point of political and economic collapse as thousands upon thousands sought refuge from the horrors perpetrated by the Hutu *interahamwe* and *impuzamugambi* militias as well as the presidential guard in the months of civil war that followed.

On 14 July, after having gained effective control over most of the territory of Rwanda, the Tutsi dominated Rwandan Patriotic Front inaugurated the new government of Rwanda and put an end to the programme of mass killings perpetrated by extremist Hutu elements against the Tutsi minority and moderate Hutus.

2. Mandate and Organization of the Commission

On 1 July 1994, the Security Council adopted resolution 935 (1994) which recalls 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 requests the Secretary-General "to establish, as a matter of urgency, an impartial Commission of Experts to examine and analyse 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 international humanitarian law committed in the territory of Rwanda, including the evidence of possible acts of genocide."⁵

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¹ 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.

² See e.g. *Rwanda: Death, Despair and Defiance*, published by African Rights, September 1994, reports of Human Rights Watch/Africa, particularly its reports of June 1994; and generally, reports of Amnesty International and those of Doctors without Borders (USA) published on Rwanda around the same time.

³ See Report on the situation of human rights in Rwanda submitted by Mr R. Degni-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.

⁴ See e.g. the reports of Amnesty International *Rwanda, Persecution of Tutsi, Minority and Repression of Government Critics, 1990-1992*, of May 1992; and the Association rwandaïse pour la défense des droits de la personne et des libertés publiques, *Rapport sur les droits de l'homme au Rwanda*, September 1991-September 1992. See also the report of the Special Rapporteur of the Commission on Human Rights on extrajudicial, summary or arbitrary executions, 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. The Ndiaye report was written well before the programme of genocide that began on 6 April 1994. It examines the deteriorating situation and is all the more striking in retrospect because it is replete with clear indications that human rights violations in Rwanda were sufficiently systematic and severe that genocide could be looming on the horizon.

⁵ The full name of the Commission is "Commission of Experts Established Pursuant to Security Council Resolution 935 (1994) to Examine and Analyze the Grave Violations of International Humanitarian Law in Rwanda, including Possible Acts of Genocide".

On 26 July 1994, pursuant to Security Council resolution 935 (1994), the UN Secretary-General appointed three persons to serve on the Commission of Experts each in a personal capacity: Mr Atsu-Koffi Amega (Togo) as Chairman; Ms Haby Dieng (Guinea); and Mr Salifou Fomba (Mali). Mr Amega was a member of the African Commission on Human and Peoples' Rights. Ms Haby Dieng holds the position of Prosecutor in the Supreme Court in Guinea and Mr Fomba is currently a member of the International Law Commission, and a Professor of International Law in Mali.

The Commission of Experts relied on the Secretariat of the United Nations Centre for Human Rights for administrative support and legal expertise, in particular from the Secretary of the Commission (staffed from the United Nations Legal Office) and two staff members of the Centre for Human Rights. The Commission of Experts, which completed its activities on 30 November 1994, was funded out of the regular budget of the United Nations and was responsible to the UN Secretary-General. Further support and assistance to the Commission of Experts was provided by the Office of the High Commissioner for Human Rights, which coordinated the activities of the Commission with those of the Special Rapporteur on Rwanda. The Special Rapporteur of the Commission on Human Rights on the situation of human rights in Rwanda, Mr René Degni-Ségui of Côte d'Ivoire, was appointed pursuant to Commission resolution E/CN.4/S-3/1 of 25 May 1994 with the mandate to "investigate firsthand the situation in Rwanda" – a mandate that to a certain extent overlapped with that of the Commission of Experts.

Security Council resolution 935 also requests the Secretary-General to make a report to the Security Council within four months of the Commission's establishment. The Commission of Experts held its first meeting on 18-19 August 1994 in Geneva. In light of the urgency of the situation in Rwanda and of the need to bring the perpetrators to justice swiftly, the Commission decided to submit an interim report to the Secretary-General covering its investigations and activities up to 30 September 1994 as well as its preliminary conclusions and recommendations.⁶ The Commission of Experts submitted its final report to the Secretary-General on 29 November 1994.

3. The Commission's Preliminary Report

For the purposes of making its Preliminary Report, the Commission decided to delimit its consideration over events in Rwanda to the period between 6 April-15 July 1994.⁷

Rwanda is a party to all four Geneva Conventions of 12 August 1949 and to both 1977 Protocols additional thereto.⁸ Rwanda has also ratified the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.⁹

The Commission observed in its Preliminary Report first that the applicability of norms of international humanitarian law to the situation in Rwanda during 6 April to 15 July depends on whether the conflict itself is to be considered an "armed conflict" and second, if it was an armed conflict, whether it was of an international or non-international character. These criteria for the applicability of international humanitarian law are supplied by the four Geneva Conventions of 1949 and the 1977 Protocols additional thereto.¹⁰ The Commission took the position that Rwanda would have been bound by international

legal norms prohibiting serious breaches of international humanitarian law and genocide, even if it had not become a party to the relevant treaties on the grounds that these norms form part of international customary law binding on all States.¹¹ Moreover, the Commission maintained that the relevant legal norms most probably qualify as norms of a *jus cogens* character, therefore eliminating any possibility of derogation or exception.¹²

The Commission concluded that the conflict in Rwanda from 6 April to 15 July 1994 was definitely an armed conflict and that it was essentially of a non-international character for the purposes of the application of international humanitarian law. It followed that common Article 3 of the four Geneva Conventions of 1949, and also Protocol II of 1977¹³ which is intended to supplement but not modify the application of common Article 3, apply to the armed conflict in Rwanda. The Commission also considered that legal norms prohibiting crimes against humanity and norms prohibiting genocide apply to the situation in Rwanda in respect of the pertinent period.¹⁴

Chapters II and III of the Commission's Preliminary Report set out (on the basis of extensive evidence from many reliable sources, including governments, individual witnesses, the International Committee of the Red Cross, Human Rights Watch/Africa and Amnesty International) numerous examples of atrocities perpetrated in Rwanda between 6 April and 15 July 1994.

In the Preliminary Report:¹⁵

"The Commission of Experts concludes, on the basis of ample evidence, that individuals from both sides to the armed conflict in Rwanda during the period 6 April 1994 to 15 July 1994 have perpetrated 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

⁶ See Preliminary Report at para. 9.

⁷ The beginning point of the Commission's consideration was determined by the fact that the aircraft crash precipitating the commencement of atrocities occurred on 6 April. As for its choice of 15 July, the Commission emphasized that, although that date was a convenient termination point, it should not be taken to imply that the Commission's overall mandate would be limited to this period or that the jurisdiction *ratione temporis* of any future or existing tribunal competent to try individuals for atrocities should be circumscribed by either of these points in time. See note (a) of the Preliminary Report.

⁸ Rwanda became a party to the four Geneva Conventions of 12 August 1949 on 5 May 1964 and acceded to Protocols I and II of 1977 on 19 November 1984.

⁹ The United Nations General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide on 9 December 1948. The Convention entered into force on 12 January 1951 pursuant to Article XIII. On 16 April 1975, Rwanda acceded to the Convention.

¹⁰ See Articles 2 and 3 common to the four Geneva Conventions of 1949 and Article 1 of each 1977 Protocol additional to the Geneva Conventions.

¹¹ See Preliminary Report at para. 119 and note (e).

¹² See Article 53 of the 1969 Vienna Convention on the Law of Treaties for a formal definition of *jus cogens*.

¹³ Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, entered into force on 7 December 1978.

¹⁴ See Preliminary Report, para. 85.

¹⁵ See Preliminary Report, part VIII (A).

Protocol II additional to the Geneva Conventions and relating to the protection of victims of non-international armed conflicts, of 8 June 1977.

"The Commission of Experts concludes also that ample evidence indicates that individuals from both sides to the armed conflict perpetrated crimes against humanity in Rwanda in the period mentioned above.

"After careful deliberation, the Commission of Experts has 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.

"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."

On the basis of these conclusions, in the Preliminary Report:¹⁶

"The Commission of Experts strongly recommends that the Security Council take all necessary and effective action to ensure that the individuals responsible for the serious violations of human rights in Rwanda during the armed conflict triggered on 6 April 1994 are brought to justice before an independent and impartial international criminal tribunal.

"The Commission of Experts recommends that the Security Council take all measures to ensure that individuals shall be accorded a fair trial on the facts and law according to international standards of law and justice.

"The Commission of Experts recommends 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."

Practically speaking, the Preliminary Report proved to be more important than the Final Report. The Security Council took a decision to create an International Tribunal for Rwanda on 8 November 1994, three weeks prior to the day the Commission of Experts submitted its Final Report to the Secretary-General on 29 November 1994.

4. Action by the Security Council Pursuant to the Commission's Preliminary Report

Security Council resolution 955 of 8 November 1994 (see below at p. 124) was thus adopted on the basis of the legal analysis, conclusions and recommendations made by the Commission of Experts in its Preliminary Report and not those of its Final Report. The Secretary-General duly forwarded the Preliminary Report to the Security Council. However, when the Security Council met to consider adoption of the draft resolution to put the Commission's

recommendations into effect (i.e. to create an international tribunal for Rwanda), there arose a protracted and contentious debate.

In particular, the Rwandan Government took issue with: the proposed form the tribunal would take; the proposed temporal jurisdiction of 1 January 1994 to 31 December 1994 (which might exclude jurisdiction over certain persons who were involved in the planning of genocide prior to 1 January 1994); the proposed venue of the trial (the Government wished to have the trials held in Rwanda and not outside the country to ensure justice was not only done but seen to be done); and the proposed scale of punishment (the Government strongly favoured the death penalty to satisfy demands in Rwanda for justice commensurate with the gravity of genocide while a number of U.N. member States were strongly against). The Rwandan Government also took issue with certain other issues of lesser contention such as the right to have a measure of input into the selection of judges for the Tribunal.

Following a series of negotiations, the draft resolution was finally put to a vote in the Security Council where 13 members voted in favour, China abstained and Rwanda voted against. The Statute of the International Tribunal for Rwanda (see below at p. 125) forms the Annex to resolution 955. The Statute strikes a compromise between the Commission's recommendation to expand the jurisdiction of the International Tribunal for the Former Yugoslavia (thereby maintaining a single international criminal tribunal with competence over crimes committed both in the former Yugoslavia and in Rwanda) and creation of a completely separate international tribunal for Rwanda. In particular, the International Tribunal for Rwanda has separate trial chambers from the ex-Yugoslavia tribunal (see Articles 10, 11, 12 and 13 of the Statute), but the same appeals judges as those for the ex-Yugoslavia tribunal (see Article 12(2)), the same Prosecutor (Article 15 (3)) and the same rules of procedure and of evidence (Article 14).

5. The Commission's Final Report¹⁷

The Commission's Final Report appears to supersede its Preliminary Report. It does not dwell in as much detail on the question of criminal jurisdiction in light of the fact that by the time of the submission of the Final Report, the Security Council had already created the International Tribunal for Rwanda. However, the Final Report is of interest because it contains a fuller legal analysis of norms prohibiting genocide, and also of norms prohibiting rape, which the Commission considered to be covered within the legal definition of "crimes against humanity". Moreover, the Final Report tries to take account of developments in Rwanda since the ascent to power of the new Tutsi-dominated government and it registers concern over allegations that an increasing number of killings are being carried out by certain soldiers of the Rwandan Patriotic Army against Hutus. The Commission of Experts was unable to determine whether these killings were merely private acts of revenge carried out sporadically or whether they might have been sponsored or supported in some way by the new government.

¹⁶ See Preliminary Report, part VIII (B).

¹⁷ Final Report of the Commission of Experts established pursuant to Security Council resolution 935 (1994), S/1994/1405 of 9 December 1994.

6. Epilogue

As the first anniversary of the triggering of the genocide approaches, it is an appropriate point at which to take stock of the most recent developments in the international prosecution effort for Rwanda.

In a report dated 13 February 1995, the Secretary-General took into account various practical and political factors in concluding that "the choice of Rwanda as the location of the seat would not be feasible or appropriate" and he recommended to the Security Council that "Arusha, the United Republic of Tanzania, should be selected as the seat of the Tribunal".¹⁸

Earlier, in January 1995, arrangements were already being made for the opening of a Prosecutor's office in Kigali. On 12 January 1995, Mr Justice Honoré Rakotomanana of Madagascar was appointed Deputy Prosecutor for Rwanda. In addition, arrangements were made to transfer to the International Tribunal to assist its prosecution effort documentation that had been submitted

to the Commission of Experts, Special Rapporteur and the Special Investigations Unit of the Human Rights Field Operation in Rwanda, established by the High Commissioner for Human Rights.¹⁹

The success or failure of attempts to bring about national reconciliation in Rwanda, and a return to a just and lasting peace, depends to a significant degree on the efficacy of the International Tribunal for Rwanda. The effective functioning of this Tribunal in turn depends on whether members of the international community decide to support its work and to honour its pledge to international law and justice.

¹⁸ See Report of the Secretary-General Pursuant to Paragraph 5 of Security Council resolution 955 (1994), S/1995/134 of 13 February 1995.

¹⁹ See the Report of the United Nations High Commissioner for Human Rights, E/CN.4/1995/98 of 15 February 1995 at paras. 29-30.

United Nations Security Council, New York

Resolution 955 (1994) on Rwanda

adopted on 8 November 1994

«The Security Council. (full text)*

Reaffirming all its previous resolutions on the situation in Rwanda.

Having considered the reports of the Secretary-General pursuant to paragraph 3 of resolution 935 (1994) of 1 July 1994 (S/1994/879 and S/1994/906), and *having taken note* of the reports of the Special Rapporteur for Rwanda of the United Nations Commission on Human Rights (S/1994/1157, annex I and annex II),

Expressing appreciation for the work of the Commission of Experts established pursuant to resolution 935 (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),

Expressing once again its grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda,

Determining that this situation continues to constitute a threat to international peace and security,

Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,

Convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace,

Believing that the establishment of an international tribunal for the prosecution of persons responsible for genocide and the other above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed,

Stressing also the need for international cooperation to strengthen the courts and judicial system of Rwanda, having regard in particular to the necessity for those courts to deal with large numbers of suspects,

Considering that the Commission of Experts established pursuant to resolution 935 (1994) should continue on an urgent basis the collection of information relating to evidence of grave violations of international humanitarian law committed in the territory of Rwanda and should submit its final report to the Secretary-General by 30 November 1994,

1. *Decides* hereby, having received the request of the Government of Rwanda (S/1994/1115), to establish an international tribunal for the sole 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, between 1 January 1994 and 31 December 1994 and to this end to adopt the Statute of the International Criminal Tribunal for Rwanda annexed hereto;

2. *Decides* that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 28 of the Statute, and *requests* States to keep the Secretary-General informed of such measures;

3. *Considers* that the Government of Rwanda should be notified prior to the taking of decisions under articles 26 and 27 of the Statute;

* Doc. S/1994/1168, S/RES/955. Original: English. Adopted by 13 votes in favour, 1 against (Rwanda) and 1 abstention (China).