The Rwanda Tribunal

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Abstract: The Rwanda Tribunal is an independent judicial institution established by the Security Council under Chapter VII of the UN Charter. It is the first international court having competence to prosecute and punish individuals for egregious crimes committed during an internal armed conflict. While the Government of Rwanda was a member of the Security Council and participated in the negotiations regarding the creation of the Tribunal, there were significant differences of opinion between it and the Council regarding the Tribunal's jurisdiction and competence. This article discusses the special features of the Rwanda Tribunal, as compared to the Yugoslavia Tribunal.

1. INTRODUCTION

On 8 November 1994, the Security Council decided to establish an international tribunal to prosecute and punish individuals committing egregious crimes during the internal armed conflicts in Rwanda (hereinafter referred to as the Rwanda Tribunal).[1] This is the second time within a short span of time that the Security Council has done so by using its mandatory power under Chapter VII of the UN Charter. Barely a year earlier, in 1993, the Security Council created the Yugoslavia Tribunal for the prosecution of persons responsible for serious violations of interna-

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1. The Tribunal was created by UN Doc. S/RES/955 (1994), adopted by a vote of 13 to one (Rwanda) with one abstention at the Security Council's 3453rd meeting on 8 November 1994 (*see* UN Doc. S/PV.3453 (1994)). Statements made therein represents the only official record containing the legislative history of the Tribunal. The full title 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'. The Statute of the Tribunal is annexed to the Resolution and has 32 articles (*see* UN Doc. S/RES/955 (1994)).

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tional humanitarian law committed during the armed conflicts in the territory of the former Yugoslavia.[2]

International humanitarian law has been with us for a long time. The Nuremberg and Tokyo trials were, however, the only instances of criminal prosecution of offenders at the interstate level. The creation of the Yugoslavia and Rwanda Tribunals is really the first-time international community effort in establishing institutions and devising procedures for prosecuting offenders. The Yugoslavia Tribunal has often been written about. Much less attention has been given to the Rwanda Tribunal.

Although the Rwanda Tribunal was modelled on the Yugoslavia Tribunal, significant differences exist between the two. Moreover, the Rwanda Tribunal faces different issues, unknown to the Yugoslavia Tribunal. The focus of the Yugoslavia Tribunal was the prosecution of persons responsible for serious violations of international humanitarian law, the ensemble of conflicts was treated as on-going international armed conflicts.[3] In the present case, the armed conflicts concerned were internal and were already over by the time the Tribunal was created. Acts of genocide are the main crimes; war crimes and other violations of international humanitarian law are only incidental.[4] These differences between the two Tribunals resulted in a different emphasis on competence and scope of jurisdiction and applicable law.[5]

Although both Tribunals were created pursuant to Chapter VII of the UN Charter, slightly different processes were followed. The Yugoslavia Tribunal was created in a two-stage process: the Council first created it by Resolution 808 (1993) and then, three months later, adopted the Tribunal's Statute prepared by the Secretary-General in response to the Council's request.[6] The substantive input came, therefore, from the Secretary-General and his staff, particularly the Office of Legal Affairs. In the present case, the Security Council created the Rwanda Tribunal and

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2. UN Doc. S/RES/827 (1993).
3. *See* T. Meron, *International Criminalization of Internal Atrocities*, 89 AJIL 559 *et seq.* (1995).
4. Rumours about arms delivery to and military training of elements of the former Government's army have recently persisted in some refugee camps. *See* Report of the Secretary-General on the Work of the Organization, UN Doc. A/50/1, at 115 (1995).
5. *See* Section 5, *infra*.
6. The Report, UN Doc. S/25704 (1993), was prepared in response to para. 2 of Security Council Resolution 808 (1993). The Secretary-General explained article by article the issues involved and the reasoning for the text proposed.

adopted its Statute all in one step. As mentioned, the draft resolution and Statute were prepared and negotiated by New Zealand and the United States, using the Yugoslavia Tribunal as a model. The Statute of the Rwanda Tribunal had no explanatory note, and its legislative history is confined to statements made by states at the Security Council meeting when it was adopted. The experience gained in creating the Yugoslavia Tribunal was utilized to facilitate the work of the Rwanda Tribunal in a more efficient way. The purpose of this Article is to point out these features and developments and to draw some lessons from this undertaking.

2. WHY THE ESTABLISHMENT OF THE RWANDA TRIBUNAL

To fully appreciate this extraordinary action taken by the Security Council, one needs to know what had happened in Rwanda, particularly in 1994.

Rwanda's population consists of two main ethnic groups: Hutu (approximately over 80%) and Tutsi (about 14%). Even though there have been numerous inter-group marriages, the ethnic identity is, however, determined exclusively by the father's ethnicity. Fighting for power and domination between the two ethnic groups have existed for a long time. Massacres have repeatedly taken place since 1959. Perpetrators have seldom been brought to trial for their criminal acts and Rwanda is known for this "culture of impunity".[7]

A Hutu-dominated government had been in existence since 1973. The Rwandan Patriotic Front (FPR), which is Tutsi-dominated, had been fighting for a role to play in the government. President Juvénal Habyarimana (a Hutu) of Rwanda and President Cyprion Ntymaria of Burundi and a number of entourage members and crew were killed in an aircraft incident in April 1994.[8] This disaster triggered a series of executions involving genocide, systematic, widespread, and flagrant breaches of

7. *See* Preliminary Report of the Commission of Experts established pursuasnt to Security Council Resolution 935 (1994), UN Doc. S/1994/1125, paras. 41-43 (1994).
8. *See* Statement of Rwanda, UN Doc. S/PV.3453, *supra* note 1, at 14.

international humanitarian law, and large-scale crimes against humanity.[9] By the end of October 1994, an estimated 500,000 to 1,000,000 unarmed civilians, mostly Tutsi, had been murdered.[10]

The FPR ended the war in July 1994 and created a new coalition government pursuant to the Arusha Peace Agreement.[11] The new Rwandan Government announced that a state of law and a true national reconciliation could not be arrived at unless the 'culture of impunity', which had characterized Rwandan society since 1959, was eradicated.

In July 1994, the Security Council requested the Secretary-General to establish an impartial Commission of Experts to examine and analyse information obtained from various sources on the evidence of grave violations of international humanitarian law committed in the Territory of Rwanda, including possible acts of genocide.[12] The Commission of Experts found that:

1. the extermination of Tutsis by Hutus had been planned months in advance of its actual execution;
2. there existed overwhelming evidence that acts of genocide against the Tutsi ethnic group were committed by Hutu elements in a concerted, planned, systematic, and methodical way in violation of Article XI of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948;[13] and
3. crimes against humanity and serious violations of international humanitarian law were committed by individuals of both sides of

9. *See* UN Doc. S/1994/1125, at 12, paras. 41-43 (1994).
10. *Id.*, para. 43. The massacres were said to have been described as "the most atrocious acts of genocide of this century after that of the Jews during the Second World War". *See* UN Doc. S/PV.3453, *supra* note 1, at 13. Amnesty International in its Report of September 1995 stated that as many as one million people were estimated to have been killed between April and July 1994. *See* Amnesty International, Rwanda and Burundi: A Call for Action by the International Community, SC/CC/CO/GR., mimeographed, at 2 (September 1995).
11. The Agreement provided for the creation of a state of law, the establishment of a broad-based government, the repatriation of refugees, and the establishment of a national army. *See* UN Doc. A/50/790 (1995).
12. *See* UN Doc. S/RES/935 (1994).
13. Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (1951).

> the conflict, but there is no evidence to suggest that acts committed by Tutsi elements were perpetrated with an intent to destroy the Hutu ethnic group as such, within the meaning of the Genocide Convention.[14]

In his address to the General Assembly, President Pasteur Bizimangu (Rwanda) asked for the creation of an international tribunal, which, in his view, would help national reconciliation and the reconstruction of a new society based on social justice and respect for human rights,[15] would avoid any suspicion of speedy or vengeful justice, and would make it easier to get at those criminals hiding outside Rwanda.[16] This request was then repeated to the Security Council.[17]

The Security Council was greatly concerned that:

1. genocide and other systematic, widespread and flagrant violations of international humanitarian law had been committed in Rwanda;
2. this situation, though internal by nature, continued to constitute a threat to international peace and security and there was a need to put an end to such crimes and to take effective means to bring to justice the persons who were responsible for such crimes;
3. the prosecution of persons responsible for serious violations of international humanitarian law would contribute to the process of national reconciliation and to the restoration and maintenance of peace; and
4. the establishment of a tribunal for the prosecution of responsible persons would contribute to the halting and effectively redressing of such violations.[18]

New Zealand and the United States then began preparing a draft resolution and a draft Statute of the Tribunal and conducted some six-week negotiations with the Government of Rwanda and with other members of the

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14. *See* Final Report of the Commission of Experts established pursuant to Security Council Resolution 935 (1994), UN Doc. S/1994/1405/Ann. (1994).
15. GAOR, Forty-ninth session, plenary meetings, 21st meeting held on 8 October 1994, at 5.
16. *See also* Statement of Rwanda, UN Doc. S/PV.3453, *supra* note 1, at 14.
17. UN Doc. S/1994/1115 (1994).
18. *See* UN Doc. S/RES/955, *supra* note 1.

Council. At the end, the Government of Rwanda continued to hold different views on certain basic issues regarding the Tribunal's competence and jurisdiction. The Legal Counsel was then requested by the Security Council to go to Kigali to explain to the Government of Rwanda its reasons. Meanwhile, the Security Council proceeded to take the decision. Rwanda voted against the resolution, but it did subsequently indicate that it would co-operate with the Tribunal in its activities.

The effects and consequences of the internal conflict that took place in Rwanda were deemed to be of international concern. Article 2(7) of the UN Charter, which bars UN involvement in domestic matters, was therefore not considered as an obstacle to the Council's action. Here, the Council broke new ground.

3. USING CHAPTER VII OF THE UN CHARTER AS THE LEGAL BASIS FOR THE CREATION OF THE RWANDA TRIBUNAL

In the normal course of events, the method for creating an international tribunal would be the conclusion of a multilateral treaty. A treaty would first be drawn up and then adopted by an international body following which it would be opened for signature and ratification. This kind of process would permit all states to fully participate in the negotiation of the treaty, and to determine for themselves whether they would wish to become a contracting party to the instrument. Under this approach, the instrument only binds those states which are parties to it; and there is no guarantee that the states which should be parties (e.g., the states in which genocide or war crimes have been committed) would become parties. In addition, a considerable length of time would be needed for negotiations and for obtaining the required number of ratifications for the entry into force of the instrument.[19]

19. In this connection, the establishment of an International Criminal Court (ICC), which is being considered by the General Assembly, may be mentioned here as an example of this treaty approach to creating tribunals. The International Law Commission had prepared a draft statute for the proposed court and it recommended that it be established by multilateral treaty. An inter-sessional working group was set up in 1995 to consider the technical issues involved. *See* its report, UN Doc. A/50/21 (1995).

In the present case, most of the Security Council members were in favour of invoking Chapter VII for the following reasons:

1. the conventional approach to create the Tribunal was considered to be too long for meeting the urgent need in Rwanda;
2. the offenses were regarded particularly serious and most heinous;
3. the action was based on a series of previous pronouncements and actions taken by the Council on the situation in Rwanda. These included the condemnation of the slaughter of innocent civilians in Kigali and other parts of Rwanda and of the breaches of international humanitarian law in Rwanda; the examination of the Secretary-General's report on the investigation of serious violations of international humanitarian law in Rwanda during the conflict; and the determination that the situation in Rwanda continued to constitute a threat to international peace and security. Article 41 of the UN Charter authorizes the Council to take measures "not involving the use of armed force" to give effect to its decisions. The creation of the Tribunal may thus be viewed as such a measure well within the meaning of that provision; and
4. some Council members were of the view that the Rwanda Tribunal could also provide international experience which would be useful for the establishment of the future permanent criminal court.[20]

Brazil was not convinced that the Council has this constitutional power to establish an international tribunal. Nor did it consider it appropriate to do so by resorting to a resolution of the Council under Chapter VII. It argued that the Security Council is not "self-constituted", it originates from the delegation of powers conferred upon it by the whole membership of the Organization under Article 24(1) of the Charter. For that reason, the Council's powers under the Charter should be strictly construed, and cannot be created, recreated, or re-interpreted by decisions of the Council itself. Moreover, the exercise of criminal jurisdiction was an essential attribute of statehood and such jurisdiction cannot be presumed to exist at

20. *See* UN Doc. S/RES/912 (1994); Statement of the Security Council President of 30 April 1994, UN Doc. S/PRST/1994/21; and UN Doc. S/RES/935 (1994).

the international level without the participation and consent of the competent states. Brazil did, however, vote in favour of Resolution 955 and its vote was meant to be seen as a political expression of its condemnation of the atrocities committed in Rwanda.[21]

4. THE USE OF CHAPTER VII OR EXTRADITION

Although Rwanda voted against the Security Council's decision, it did not object to the use of Chapter VII, i.e. to having the Tribunal imposed on it. Presumably, it recognized the importance of making the Tribunal legally binding on all its neighbouring states where fugitives were hiding. In the case of the Yugoslavia Tribunal, none of the former Yugoslav Republics were members of the Security Council; they were not consulted and they took no part in the negotiation of the Statute. On the assumption that they would not wish to have their own nationals tried by an external tribunal, the use of Chapter VII was the only effective way to create an obligation on the Yugoslav Republics and on all other states.

By invoking Chapter VII, the Council has created an obligation on all states to co-operate and co-ordinate with the Tribunal, including:

1. enacting domestic law to implement the provisions of the resolution and of the Statute;
2. to co-operate in the investigation and prosecution of persons accused of committing crimes prescribed in the Statute; and
3. to comply, without undue delay, with any request for assistance on such matters as: the identification and location of persons, the taking of testimony and the production of evidence, the service of documents, the arrest or detention of persons, and the surrender or the transfer of the accused to the International Tribunal.[22]

All these legal obligations are not, however, self-executing in the member states. In most cases, they need the governments concerned to adopt the necessary legislation measures to give effect to the requests from the

21. *See* Statement of Brazil, UN Doc. S/PV.3453, *supra* note 1, at 8-9.
22. Art. 28 Statute, *supra* note 1.

Rwanda Tribunal or the Yugoslavia Tribunal. It is important to note that a request for surrender or transfer of an accused from another country is equivalent to a request for extradition. Almost all national laws refuse extradition of an accused on political grounds or if the accused is a national of the requested country. Thus, the constitution of the Federal Republic of Yugoslavia, for example, would not allow the extradition of its nationals to other jurisdictions. Furthermore, many countries require special legislation to allow transferring of prisoners or suspects outside their countries. So far, few states have taken the necessary actions. Such actions are critical since some 400 suspects on the list of the Prosecutor are living outside Rwanda.[23]

Like the Yugoslavia Tribunal, the Rwanda Tribunal is a subsidiary organ of the Security Council within the meaning of Article 29 of the UN Charter. It has independent judicial status, and is to function in accordance with the Statute and its Rules of Procedure and Evidence. Even though a subsidiary organ, not even its parent organ, the Security Council, may instruct the Tribunal so far as its work is concerned. The Tribunal also has an international status: the Convention on the Privileges and Immunities of the United Nations of 1946 is applicable to it.[24] The judges, the Prosecutor, and the Registrar enjoy the privileges and immunities, exemptions, and facilities accorded to diplomatic envoys in accordance with international law.[25] Its staff are also entitled to functional privileges and immunities.

The structure of the Rwanda Tribunal is modelled on that of the Yugoslavia Tribunal.[26] It has three organs:

1. chambers composed of 11 judges who are to rotate their services in two three-member Trial Chambers and an Appeals Chamber composed of five judges;
2. the Prosecutor; and
3. the Registry.

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23. Announcement of the Prosecutor of 6 April 1995.
24. Convention on the Privileges and Immunities of the United Nations, 1 UNTS 15 (1946).
25. Art. 30 Statute, *supra* note 1.
26. The 11 Judges on the Yugoslav Tribunal are from Nigeria, Pakistan, Costa Rica, United States, Canada, Italy, Egypt, China, France, Malaysia, and Australia.

The Rwanda Tribunal shares, however, its Appeals Chamber[27] and Prosecutor[28] with the Yugoslavia Tribunal. Consequently, the General Assembly elected six members to serve the Trial Chambers.[29]

The setting up of the Yugoslavia Tribunal was long and time-consuming, partly because it was the first with no model to follow and because everything had to start from scratch and had to be built up step by step. Also, there were no defendants in custody waiting for trials. The situation was different, however, in the case of Rwanda: many suspects had already been in custody; there was a need to put the process into operation without delay; and the Prosecutor and the Appeals Chamber were already established.

A two-stage plan, a phased-in approach, was adopted to ensure the effective functioning of the Rwanda Tribunal at the earliest time.[30] The tasks of the first stage included creating an investigation/prosecutorial unit in Kigali, appointing a Deputy Prosecutor, recruiting investigators, prosecutors, and interpreters, and transferring to the new unit data and information collected by the Human Rights Special Rapporteur and by the Commission of Experts. The idea was to begin the investigative work as quickly as possible. The second stage of the plan was to set up the Registry and the Tribunal itself, since the process of making nominations and electing judges needed time. This phased-in approach also facilitated a more accurate estimate of the full financial requirements of the Tribunal. It enabled the Secretariat to have time to prepare options for selecting the Tribunal's seat, and for assessing the degree of co-operation on the part of the Rwandan authorities and the political situation in that country.

The sharing of the Appeals Chamber and the Prosecutor with the Yugoslavia Tribunal was meant to be a practical arrangement to save funds

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27. The five Appeals Chambers Judges are Antonio Cassese (Italy), George Abi-Saab (Egypt), Jules Deschênes (Canada), Haopei Li (China), and Sir Ninian Stephen (Australia). *See* Art. 12 Statute, *supra* note 1. Judges are elected to serve a term of four years, but may be re-elected.
28. The current Prosecutor is Mr Richard Goldstone (South Africa).
29. The six judges elected are: Navanethem Pillay (South Africa), Leity Karna (Senegal), T.H. Khan (Bangladesh), Lennart Aspergren (Sweden), Yalov A. Ostrovsky (Russian Federation), and William H. Sekule (Tanzania).
30. The Security Council requested the Secretary-General to implement the Resolution urgently and, in particular, "to make practical arrangements for the effective functioning of the Tribunal at the earliest time and to report periodically to the Council." UN Doc. S/RES/955, *supra* note 1, para. 5.

and to cut short preparation time. But this, in the view of the Government of Rwanda, created a physical linkage between the two Tribunals. The Rwandan Government insisted on having an institutionally independent Tribunal, and a totally separate Prosecutor and Appeals Chambers. It also wanted to increase the number of judges to deal with the expected large quantity of cases. The co-sponsors of Draft Resolution 955 were only prepared to create a Deputy Prosecutor to cope with anticipated investigations and prosecutions. They were not prepared to increase the number of judges. But they accepted that the number of judges and chambers could be expanded if needed and that proceedings could be held in Rwanda, when possible.[31] Rwanda was not satisfied with these adjustments.

Mr Honoré Rakotomanana (a national of Madagascar) was appointed as the Deputy Prosecutor in January 1995. This appointment took into account not only his professional qualifications and the need to maintain a balance in geographic, national, and linguistic representation, but also the representation of the major legal systems of the world in the Tribunal as a whole.

According to the Tribunal's Statute, before the Prosecutor issues an indictment, it must first be reviewed by the judge of the Trial Chamber.[32] The judge will confirm an indictment if he or she is satisfied that a *prima facie* case has been established by the Prosecutor. Otherwise, the indictment will be dismissed. Upon confirmation, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender, or transfer of persons, and any other orders as may be required for the conduct of the trial.[33] According to recent practice, for such orders and warrants to be effective they must be issued and addressed specifically to the country in which such orders are intended to take effect.[34]

The location of the Tribunal was a difficult issue. The Rwandan Government wanted the Tribunal to be located in Rwanda for the moral and educational value that the presence of the Tribunal would have for the

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31. Statement of New Zealand, UN Doc. S/PV.3453, *supra* note 1, at 5.
32. Art. 18(1) Statute, *supra* note 1.
33. *Id.*, Art. 18(2).
34. Thus, for example, in response to the letter of the President of the Yugoslavia Tribunal, Switzerland stated, *inter alia*, that it would arrest or detain any suspects ordered by the Tribunal, provided that the Tribunal has specifically requested Switzerland to do so.

local population. Independence and impartiality of the Tribunal was, however, the prime concern of the Council. Since the Security Council was not in a position to settle the question of the seat at the time of its creation, the Council decided to set out certain criteria to guide its subsequent decision.[35]

In February 1995, the Secretary-General recommended to the Security Council that Arusha in Tanzania be selected as the seat of the Tribunal. The decision seems to be based on the following considerations:

1. the Appeals Chamber and the Prosecutor are already located in the Hague, and the Investigative/Prosecutorial Unit headed by the Deputy Prosecutor is already located in Kigali;
2. the trial proceedings need to be conducted in a location where justice and fairness can be provided to both the victims and accused (the security risks would be very high if trials of the former leaders alleged to have committed the acts of genocide were conducted inside Rwanda);
3. premises are available in Arusha though reconstruction would be required to meet the needs of a court;
4. Arusha offers the proximity to victims, witnesses, and potential accused persons situated in Rwanda and neighbouring states, and its accessibility by air to and from all locations;
5. Arusha is located in a neighbouring state easily accessible to Rwanda; and
6. Arusha met the criteria set out in paragraph 6 of Security Council Resolution 955.

The Security Council accepted the recommendation. The Secretary-General then concluded a headquarters agreement with Tanzania setting out, *inter alia*, conditions, privileges, and immunities essential to the independent functioning of the Tribunal.

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35. These criteria are that "the seat would be determined by the Council, having regard to considerations of justice and fairness as well as administrative efficiency, including access to witnesses and economy and subject to the conclusion of appropriate arrangements between the United Nations and the State of the seat, acceptable to the Council, having regard to the fact that the Tribunal may meet away from its seat when it considers it necessary for the efficient exercise of its functions." UN Doc. S/RES/955, *supra* note 1, para. 6.

5. JURISDICTION OF THE TRIBUNAL

The jurisdiction of the Rwanda Tribunal is prescribed in its Statute in terms of time, space, and subject matter.

The temporal scope of its jurisdiction covers those categories of crimes committed from 1 January 1994 to 31 December 1994. The choice of this period was:

1. to take into account acts of planning and preparation of genocide;
2. to cover cases of violations committed after the establishment of the new government, namely July 1994.

The sponsors made clear, however, that should there be major violations after the end of 1994, the Tribunal's competence could be extended beyond December 1994, should the Council deem this necessary.[36] This serves as an important warning to those who are still planning egregious crimes in or outside of Rwanda, particularly those in the refugee camps.

Rwanda did not consider this time-frame adequate. It argued that the genocide the world witnessed was the result of a long period of planning and, therefore, insisted on setting the starting date from 1 October 1990 when a sub-group of Tutsis, the Bahimas, in Matara were exterminated.[37] Its contention was that unless those early events were covered by the Tribunal, its work would not contribute to eradicating the culture of impunity or creating a climate conducive to national reconciliation. Rwanda also preferred setting the end of the period in July 1994, when the RPF took over control of the country. The co-sponsors were only prepared to advance the beginning of the period to January 1994.

The territorial scope of the Tribunal's jurisdiction includes not only the territory of Rwanda but also "the territory of neighbouring States".[38] The latter addition was designed to cover violations committed in various refugee camps in the neighbouring countries (e.g. Zaire, Kenya, Burundi,

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36. *See* Statement of New Zealand, UN Doc. S/PV.3453, *supra* note 1, at 5.
37. It also referred to the following incidents: the extermination of the Bagogwes, a Batutsi sub-group in January and February 1991; the massacre of over 300 Batutsi in March 1992; and the massacre of over 400 Batutsi in January 1993. *See* UN Doc. S/PV.3453, *supra* note 1, at 14.
38. *See* Art. 7 Statute, *supra* note 1.

and Tanzania). According to reports, some of the camps were or are used as training bases for members of the militias.[39] In contrast to this, the territorial scope of the Yugoslavia Tribunal is limited to that of the former Yugoslavia. It has no jurisdiction over crimes committed outside Yugoslavia.

The subject matter jurisdiction of the Tribunal covers three categories of crimes: genocide (Article 2), crimes against humanity (Article 3), and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (Article 4).[40] The important point here is that all three categories of crimes are expected to be applied to *individuals* for crimes committed in *internal* atrocities.

This international criminalization of the individual's responsibility concerning crimes committed in internal atrocities must be regarded as a special feature of the Rwanda Tribunal. While there is no question of applying genocide and crimes against humanity in this case, the application of the last category of crimes (i.e. violation of Article 3 common to the Geneva Conventions and of Additional Protocol II), however, has raised the problem of whether these crimes form part of customary international law and whether they have customarily entailed the individual criminal responsibility of the perpetrator.[41] The view was advanced that these crimes provided no basis for universal jurisdiction and an uncertain basis for individual criminal responsibility.[42]

The Government of Rwanda contended that the Tribunal should concentrate only on the crime of genocide, leaving the other two categories of crimes to its national courts. This was to allow the Tribunal to devote its human and financial resources to the most important task of

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39. *See* Statements of New Zealand and the Czech Republic, UN Doc. S/PV.3453, *supra* note 1, at 6.

40. Convention for the Amelioration of the Condition of the Wounded and Sick of Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (1950); Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (1950); Convention Relative to the Treatment of Prisoners of War of 12 august 1949, 75 UNTS 135 (1950); Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (1950); and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609 (1979).

41. Meron, *supra* note 3, at 559 *et seq. See also* Report of the Secretary-General, UN Doc. S/1995/134, para. 12 (1995).

42. *Id.*

punishing acts of genocide. The Council members did not consider it appropriate to leave out the other two categories of crimes, but did place genocide in Article 2 before the other two categories (Articles 3 and 4).

5.1. Genocide

Article 2 of the Statute empowers the Tribunal to prosecute persons committing genocide and acts of genocide. The definition of genocide is reproduced, without changes, from Articles II and III of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948.[43] Accordingly, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, such as:

1. killing members of the group;
2. causing serious bodily or mental harm to members of the group;
3. deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
4. imposing measures intended to prevent births within the group; and
5. forcibly transferring children of the group to another group.

The punishable acts of genocide also include conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide.[44]

On the basis of the Genocide Convention, there seems no doubt about the individual criminality of genocide and its applicability even in internal armed conflicts. The customary law nature of genocide and acts of genocide was confirmed by the International Court of Justice (ICJ) in its 1951 case concerning *Reservations to the Convention on Prevention and Punishment of the Crime of Genocide*.[45] The Court stated, *inter alia,* that the principles underlying the Convention are principles which are recognized

43. For the text of the Convention, *see* 78 UNTS 277 (1951).
44. *See* Art. 2(3) Statute, *supra* note 1.
45. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 ICJ Rep. 23.

by civilized nations "and binding on States, even without any convention obligation."[46] Article VI of the Genocide Convention envisages the possible prosecution of the perpetrators by an international penal tribunal.

The prohibited acts listed above constitute genocide only if such acts were committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group. In the case of Rwanda, the Hutu and Tutsi are regarded as two ethical groups by the ethnicity of one's father rather than by the ethnic characteristics. From this standpoint, there seems to be ample evidence of intent to destroy, which must, however, be proven. It should be noted that certain prohibited acts may also fall within the second and third categories. Judging from the statement of the Government of Rwanda, there appeared no lack of documentary evidence on the "intent to destroy".[47]

5.2. Crimes against humanity

Crimes against humanity are referred to in Article 3 of the Rwanda Tribunal's Statute.[48] The list of inhuman acts itself is basically the same as Article 6(c) of the Nuremberg Charter[49] (or Article 5 of the Statute of the Yugoslavia Tribunal),[50] i.e. murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial, and religious grounds, and other inhuman acts. But the definition contained in Article 3 is far more demanding than that of the Nuremberg Charter or the Yugoslavia Tribunal's Statute.

The Yugoslavia Tribunal's Statute, which followed the Nuremberg Charter, made no reference to the phrase: "committed as part of a widespread or systematic attack against any civilian population on national,

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46. *Id.*
47. *See* UN Doc. S/PV.3453, *supra* note 1, at 13-14.
48. Art. 3 reads as follows: "[t]he International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts." Statute, *supra* note 1.
49. Charter of the International Military Tribunal at Nuremberg, 82 UNTS 284 (1951).
50. Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/25704 (1993).

political, ethnic, racial or religious grounds", the proof of which is now required under the Rwanda Tribunal. In other words, under the Rwanda Tribunal, the alleged crimes against humanity must meet the stringent test of "widespread or systematic attack" and a manifest motivation (i.e. on national, political, ethnic, racial, or religious grounds). During the discussion on the Rwanda Tribunal's Statute, it was explained that these additions were to reflect the interpretative statements made by certain states at the adoption of Security Council Resolution 827[51] and the commentary of the Secretary-General to Article 5 of the Statute of the Yugoslavia Tribunal.[52]

By adding expressly these requirements in the Rwanda Tribunal's Statute, the Security Council might have inadvertently made the burden of proof for crimes against humanity more difficult to meet.[53]

5.3. Violation of humanitarian law

Under the Statute of the Yugoslavia Tribunal, violations of international humanitarian law concerned "grave breaches of the Geneva Conventions of 1949" (Article 2 of the Statute of the Yugoslavia Tribunal) and "violations of the laws or customs of war" (Article 3 of the Statute of the Yugoslavia Tribunal). As generally known, these notions have been intended for *interstate* armed conflict and were deemed inappropriate for the Rwanda situation, which involves internal atrocities. Consequently, the Rwanda Tribunal's Statute made no reference to these crimes.

Instead, the third category of crimes referred to under the Rwanda Tribunal's Statute are "violations of common Article 3 of the 1949 Geneva Conventions and of Additional Protocol II thereto of June 1977."[54] The

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51. UN Doc. S/RES/827 (1993).
52. *See* Report of the Secretary-General, UN Doc. S/25074, para. 48; and Statement of the United States in the Security Council, UN Doc. S/PV.3217, at 11, 16, and 45 (1993). When the Yugoslavia Tribunal's Statute was adopted, the United States, France, and Russia expressed their understanding that Art. 5 applied to widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds.
53. Meron, *supra* note 3, at 557. In theory, this might be so. The Security Council seemed convinced that there existed widespread or systematic attacks.
54. Art. 4 reads as follows: "[t]he International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall

intention of the co-sponsors was to apply these crimes to armed conflicts between the then government forces and the RPF.

The list of (a) to (h) of Article 4 was taken from common Article 3, and Article 4(2) of the Protocol,[55] and was meant to be illustrative, not exhaustive, as indicated by the phrase "shall include, but shall not be limited to". Consequently, other violations contained in Protocol II also come under the jurisdiction of the Tribunal. This adds as a result another large category of crimes. Traditionally, all these have not meant to entail individual criminality or international prosecution.[56] Here the Security Council has broken new ground, making internal atrocities into international crimes punishable under international law.

It is not within the competence of the Security Council to legislate or create new international criminal law. In its search for existing law, the Council does have a role to play in pronouncing what it considers to be existing law. The fact that it adopted Article 4 and pronounced that the crimes of common Article 3 and of Protocol II are punishable by the Rwanda Tribunal means that these, in its view, form part of existing law. This determination by the Council should be taken as a collective pronouncement with persuasive force.

It should also be mentioned that prior to the adoption of the Statute, the Council had made a series of pronouncements and actions on the situation of Rwanda.[57] Its adoption of Article 4 of the Statute may be regarded as a logical follow-up of its previous actions.

In 1993, Belgium passed a law providing its national courts with criminal jurisdiction over violations of the Geneva Conventions and its

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not be limited to: (a) violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) collective punishments; (c) taking of hostages; (d) acts of terrorism; (e) outrages upon personal dignity, in particular, humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; (f) pillage; (g) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples; (h) threats to commit any of the foregoing acts." Statute, *supra* note 1.

55. The crime of "slavery and the slave trade in all their forms" originally contained in Art. 4(2) was excluded. Presumably, such crimes were considered irrelevant in Rwanda.

56. *See* Section 5, *supra*.

57. *See* Section 2, *supra*.

Protocols (including Protocol II regarding internal armed conflicts),[58] irrespective of the nationality of the victim or the place of the offense. Belgium then issued arrest warrants against persons involved in the atrocities in Rwanda. Following these warrants, the Rwanda Tribunal has recently asked the Belgian authorities to extradite three Hutu suspects who were indicted by the Belgians. The above actions taken by the Tribunal and by Belgium lend support to the concept of international criminalization of individual responsibility in internal atrocities.

6. PRIMACY OF JURISDICTION AND TRANSFER OF COMPETENCE

As in the case of the Yugoslavia Tribunal, the Rwanda Tribunal does not have exclusive jurisdiction over the crimes described in the Statute. National courts are also allowed to exercise jurisdiction over such crimes. A primacy is, however, given to the Rwanda Tribunal, which may request national courts of any state to defer to its competence.[59] The circumstances in which such requests may be made are left to the Tribunal's Rules of Procedure and Evidence.[60] France, the United States, and the United Kingdom, for example, expressed the view that intervention in legal proceedings before national courts would only be appropriate where the proceedings of national courts are not impartial or independent, or are used to obstruct or prevent the jurisdiction of the Tribunal.

In contrast to the case of the former Yugoslavia, the Government of Rwanda seemed anxious that its national courts should proceed before the International Tribunal. However, the Rwandan national courts have not been able to make much progress partly due to lack of judges and facilities. Nothing in the Statute prevents the Rwandan authorities to take any steps they see fit in the process of bringing criminals to trial. If, however, a trial is contemplated or is being held at the national level and the International Tribunal thinks that such trial merits being tried before it or that trial is unfair, the Tribunal has the right to ask the national court to cede in

58. Geneva Conventions and Additional Protocol II, *supra* note 40.
59. Art. 8(2) Statute, *supra* note 1.
60. Rules of Procedure and Evidence, UN Doc. IT/32Rev.2 (1994).

favour of the International Tribunal. Rwanda is under a legal obligation to assist the Tribunal in all aspects relevant to the Tribunal's work.[61]

The Genocide Convention contains a specific provision (Article VI), laying down the rule that persons charged with genocide "shall be tried by a competent tribunal of the state in the territory of which the act was committed", or by an international penal tribunal, as may have jurisdiction. Can a state party to the Genocide Convention use this provision to refuse the Tribunal's request for the transfer of an accused?

A similar question arose when the Security Council ordered Libya to hand over to the United Kingdom or the United States two suspects allegedly involved in the destruction of a Pan Am airliner over Lockerbie, Scotland.[62] Libya took the case to the ICJ, alleging that the Security Council had, *inter alia*, violated the basic rule of international law which authorizes the state concerned to choose either to punish or extradite a suspect, as embodied in the Montreal Convention.[63] The Court took the view that this was basically a conflict between legal obligations. It held that the obligations under the UN Charter entrusted to the Security Council override conventional rules. When the Security Council has acted under Chapter VII, its decisions enjoy primacy over all other obligations. In light of the ruling of the ICJ with respect to the *Lockerbie* case, it may be said that the request of the Tribunal for transfer of a suspect should prevail. It is the author's view that the Genocide Convention may not be used as an excuse to refuse the Tribunal's request.

Since concurrent jurisdiction may lead to double punishment, the principle of *non bis in idem* (no one shall be tried or punished twice for the same act) must apply.[64] Here again, primacy has been given to the Tribunal in that an accused cannot be tried again by a national court if he or she has already been tried by the Rwanda Tribunal. On the other hand, an accused may be tried again by the Rwanda Tribunal under specific circumstances.[65]

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61. *See*, in particular, Arts. 8, 9, and 28 Statute, *supra* note 1.
62. *See* UN Doc. S/RES/748 (1992).
63. *See* Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya *v.* United States of America; Libyan Arab Jamahiriya *v.* United Kingdom), Order, 1992 ICJ Rep. 3 and 114, at 15, para. 42. *See also* Montreal Convention for the Suppression of Unlawful Acts Against the Savety of Civil Aviation, 10 ILM 1151 (1971).
64. *See* Art. 9 Statute, *supra* note 1.
65. These are: 1. the act for which the accused was tried was characterized as an ordinary crime;

7. INTERNATIONAL HUMAN RIGHTS STANDARDS

Because the Rwanda Tribunal is an international institution, it must fully respect internationally-recognized standards of human rights, particularly those embodied in the International Covenant on Civil and Political Rights of 16 December 1966. The Statute thus lays down certain basic principles and authorizes the judges to adopt appropriate rules for the conduct of the various phases of its proceedings, including pre-trial proceedings, trials, evidence, protection of witnesses, appeals, and review.

Conforming to international standards, an accused is also entitled to be treated on an equal basis before the Tribunal, to have a fair and public hearing of the charges, to be presumed innocent until proven guilty, to be informed promptly and in detail of the charges in a language understood by the accused, to communicate with counsel of his or her own choosing, to be tried without undue delay, to have legal assistance, to cross-examine the witness, and not to be compelled to testify against himself or herself or to confess guilt. Special provisions are also made for the protection of victims and witnesses (e.g. to conduct proceedings *in camera*).

The difficulties are likely to be found in the implementation of those standards. The Tribunal will first need sufficient resources to finance the necessary facilities and services. It must also find the necessary human resources to provide the services.

As in the case of the former Yugoslavia, the Security Council decided from the outset that the accused has the right to be tried in his or her presence. In other words, there shall be no trial *in absentia*.[66] This issue was debated when judges of the Yugoslavia Tribunal were preparing its Rules. Different views were expressed regarding the meaning of "trial in his or her presence". In the end, it was decided to elaborate more detailed

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or 2. the proceedings of the national courts were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted. In other words, if there are reasons to believe that national proceedings were used to avoid the jurisdiction of the International Tribunal, then the Tribunal may still try the case. This is to ensure that no national courts are used to circumvent the International Tribunal. *See* Art. 9(2.a) and (2.b) Statute, *supra* note 1.

66. The Secretary-General's Report in this regard stated that there was a widespread perception that trials *in absentia* should not be allowed under the Statute, as this would not be consistent with Art. 14 of the 1966 International Covenant on Civil and Political Rights (999 UNTS 171 (1976)). *See* UN Doc. S/25704, *supra* note 6, para. 101.

rules for dealing with the failure to execute orders for arrest and transfer, instead of authorizing trials *in absentia*. These Rules set out in great detail how to handle failure to execute a warrant, including reporting to the Security Council and advertising the indictment through news media to create the maximum of publicity.[67] These same rules were also adopted by the judges of the Rwanda Tribunal.[68]

During the Council's negotiations on the Statute of the Rwanda Tribunal, several issues relating to trials, penalties, and execution of penalties arose, and most of them posed problems for the Government of Rwanda.

On the question of penalty, the Council members took the position that the death penalty should not be allowed.[69] This decision was taken to reflect the more recent developments in the field of human rights.[70] The Arusha Peace Agreement committed all parties in Rwanda to accept international human rights standards, which was interpreted by the Council members to exclude, *inter alia*, capital punishment. Council members also felt that 'an eye for an eye' was not proper in this case, no matter how horrendous the crimes the individuals concerned may have committed. The objective in Rwanda should be to establish a just and fair society based on respect for life and fundamental human rights. Moreover, ending the cycle of violence in Rwanda was another reason for the international tribunal to apply international human rights standards.

The Government of Rwanda considered that this would create a disparity in sentences because its penal code permits capital punishment: those major criminals who planned and organized the genocide would only be subject to imprisonment under the International Tribunal, whereas the lesser criminals may face a much harsher punishment under Rwanda's national courts. The New Zealand Representative expressed the expectation that domestic courts must give weight to the human rights commitments mentioned in the Arusha Agreement.[71]

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67. Rules of Procedure and Evidence, *supra* note 60.
68. *See id.*, Rules 59, 60, and 61.
69. *See* UN Doc. S/25704, *supra* note 6, at 28, para. 112, where it is noted that "the International Tribunal should not be empowered to impose the death penalty", though no reason was given.
70. *Cf.* UN Doc. A/RES/44/128 (1989); and *see*, in particular, the Second Protocol to the International Covenant on Civil and Political Rights 29 ILM 1466 (1990), which seeks abolition of the death penalty. No Council member strongly advocated death penalty.
71. *See* Statement of New Zealand, UN Doc. S/PV.3453, *supra* note 1, at 6. For the Arusha

The Government of Rwanda also disagreed with the Council on questions of where the trials should be conducted and where sentences should be served. The co-sponsors followed the approach adopted by the Yugoslavia Tribunal, and proposed that sentences be served in countries that are ready to accept the convicted criminals, and that the applicable law of those states would govern the question of pardon or commutation of sentences. The Government of Rwanda strongly objected to these proposals on the ground that they would not serve the purpose of punishment and would open a door to free the criminals. They wanted all trials and sentences to take place in Rwanda so as to have an impact on the local populace and to eradicate its 'culture of impunity'. It also insisted that either the Tribunal or Rwandan law would decide the questions of pardon or commutation of sentences. In their view, the sponsors' proposal would only lead to the turning over of the criminals to states which are friendly towards them, ending with a total denial of justice.

In response to these comments, changes were introduced into the Draft Statute: imprisonment may be served in Rwanda and in other states, but the Tribunal has the right to decide and to designate the place of imprisonment.[72] It is also made clear in the Statute that there can be no pardons or commutation of sentences unless the Tribunal so decides.[73] All these measures are intended to leave the decision to the Tribunal and to remove possible pressure on states where the convicted is imprisoned.[74] Rwanda was not totally satisfied.

Appellate proceedings are provided in the Statute to give an accused the right to have his conviction and sentence reviewed in certain cases.[75] Persons convicted by the Trial Chambers may thus present their appeals

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Agreement, *see* note 11, *supra*.

72. Art. 26 Statute, *supra* note 1.
73. Art. 27 Statute, *supra* note 1.
74. It may be noted that in September 1994, the United States circulated a draft resolution aimed at recommending and authorizing member states that were harbouring known Rwandan criminals to arrest them and to place them in preventive detention. The draft was dropped for a while but was subsequently adopted. This incident was cited by the Government of Rwanda to demonstrate that certain states are likely to take advantage of the above-mentioned provisions for their own political purposes. *See* UN Doc. S/PV.3453, *supra* note 1, at 15-16.
75. They are limited to an error on a question of law invalidating the decision; or an error of fact which has occasioned a miscarriage of justice. (*See* Art. 24(1.a) and (1.b) Statute, *supra* note 1.

to the Appeals Chamber which may affirm, reverse, or revise the decisions of the lowest instance. There are also review proceedings, which may be instituted by the convicted persons or the Prosecutor in cases of the discovery of new facts which are likely to have a decisive impact on the judgment that were unknown to the Tribunal at the time when the judgment was rendered.[76]

In short, the Rwanda Tribunal covers all trials, appeals, and revision proceedings under one system without a heavy bureaucratic set-up. In this manner, the system is designed to be judicious as well as efficient and expeditious.

8. CONCLUSIONS

For a long time, the world community has pronounced the criminality of genocide, war crimes, and crimes against humanity. The suppression of such crimes, however, has been left to the responsibility of the individual states concerned. Until recently, there has no international procedure or mechanism for the prosecution and punishment of persons committing such crimes. The establishment of the Rwanda Tribunal represents an important step forward in the direction of making international law enforceable and such crimes punishable. While the Yugoslavia Tribunal was the first true international mechanism for prosecuting criminals, the Rwanda Tribunal has extended the same mechanism to egregious crimes committed during internal armed conflicts. Here, the Security Council broke new ground.

The Rwanda Tribunal is *ad hoc* and situation-specific. Its jurisdiction is limited in terms of time, space, and subject matter. The experience acquired in formulating rules of procedure and evidence, in making the physical arrangements for the Tribunal, as well as the work of the Tribunal will no doubt contribute to the development of international criminal courts and tribunals.

The Rwanda Tribunal is a judicial organ. It also has a political goal to play, in which is to bring about national reconciliation and peace in Rwanda through the process of justice. This political goal led to the

76. Art. 25 Statute, *supra* note 1.

creation of the Tribunal and justifies taking action under Chapter VII. Because the Tribunal was created as an 'enforcement measure', all states, including Rwanda and all its neighbouring countries in which fugitives are hiding, are under a legal obligation to comply with the orders of the Tribunal. Had the conventional approach (i.e. by way of a multilateral treaty) been chosen for the creation of the Tribunal, certain states might have decided to stay away. The Tribunal's reach would have been limited. While this Chapter VII approach is definitely powerful in its reach, it can only be utilized in the context of peace enforcement and must be case specific. Chapter VII cannot be used to create an international criminal court for general purposes.

From the human rights standpoint, the most urgent issue in Rwanda is to improve the conditions of those who have been detained in over-crowded prisons and detention centers. According to reports, over 50,000 people fall within this category.[77] Meanwhile, many of them are dying due to ill health and inadequate facilities.

The judicial system in Rwanda was virtually destroyed by the war and most officials and lawyers have left the country or are in custody under accusation of involvement in the massacres.[78] The judicial system needs to be restored and this would require trained personnel, financial resources, equipment, and facilities, which are, however, beyond the Government's current ability. The international community's response in this regard has been slow and limited. The UN High Commissioner for Human Rights has established a field office to monitor the observance of human rights. But the field office needs the necessary funds and technical capability to assist the restoration of the judicial system. It is therefore imperative that a way is found to improve the human rights situation in Rwanda.

In the meantime, there is all the more urgency for the Tribunal to expedite its work so as to release the pressure at the national level.

77. *See* Amnesty International, *supra* note 10, at 2.
78. *Id.*