



INTERNATIONAL REVIEW OF THE RED CROSS

SPECIAL
International criminal jurisdiction
and international humanitarian law:
the Tribunals for the former Yugoslavia
and for Rwanda



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The *ICRC*, which gave rise to the Movement, is an independent humanitarian institution. As a neutral intermediary in the event of armed conflict or unrest it endeavours, on its own initiative or on the basis of the Geneva Conventions, to bring protection and assistance to the victims of international and non-international armed conflict and internal disturbances and tension.

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Announcement

From 1998 the *International Review of the Red Cross* will be published quarterly instead of every two months. This decision has been taken as a cost-cutting measure. The editors will endeavour to make the *Review* even more interesting by offering a rich and varied selection of items and contributions by a wide range of authors.

We trust that the *Review* will continue to attract the same loyal readership.

International Committee of the Red Cross

A note from the Editor

One of the most significant developments that has marked the last decade of the twentieth century is the establishment of international criminal jurisdiction to punish grave breaches of international humanitarian law. The aim is simple: to do everything possible to prevent the most appalling crimes committed during armed conflicts from going unpunished. Putting this idea into practice, however, has proved to be a difficult task, as can be seen quite clearly from the pages of history. Today, the International Criminal Tribunal for the former Yugoslavia (ICTY) at The Hague, and its sister institution in Arusha, the International Criminal Tribunal for Rwanda (ICTR), show that the aim can be achieved. In addition, the United Nations project to establish a permanent international criminal court is already well advanced. Here, then, are three initiatives which seek to demonstrate that individual criminal liability is not an empty concept, even in times of armed conflict.

What do the creation of the two ad hoc criminal tribunals and their activities signify for international humanitarian law? Are these tribunals capable of reinforcing respect for the rules of that law, which, in wartime, is the last bastion against barbarity? Will their judgments effectively contribute to implementation of humanitarian law? The *Review* has invited a number of people to examine various aspects of the activity of the Tribunals for the former Yugoslavia and for Rwanda. Some contributors actually work there in an official capacity, or have done so in the past. The *Review* is particularly grateful to them for their articles, in which the views expressed are purely personal.

The ICRC Deputy Director of Operations has made an initial evaluation of the work done by both Tribunals from the standpoint of international humanitarian law and the ICRC, which has been mandated by the international community to strive for observance of humanitarian law in times of armed conflict. This was no simple challenge, as attitudes in the past with regard to penal repression as a means of implementing the law of Geneva have often been somewhat ambiguous. Jacques Stroun's observations show that the ICRC fully accepts penal repression both as

a means of dispensing justice and as an instrument for promoting greater respect for international humanitarian law. However, the author stresses the need for a clear distinction between the judicial function and the humanitarian role assigned to the ICRC.

The *Review* is particularly grateful to Professor Paul Tavernier for agreeing to write an introduction. This paints a broad picture of the various steps being taken to make individual criminal liability applicable at the international level in cases of armed conflict.

The contributions regarding the Rwanda Tribunal are more numerous than those relating to the Tribunal for the former Yugoslavia. This is actually no bad thing, as the Tribunal in Arusha is not as well known. More exposure is needed for the ICTR, which is taking on arduous tasks in particularly difficult conditions.

Finally, the *Review* is pleased to supplement the various contributions on international penal repression with two prefaces, one written by the former President of the ICTY, Judge Antonio Cassese, the other written by the President of the ICTR, Judge Laïty Kama.

The Review

Foreword by the former President of the International Criminal Tribunal for the former Yugoslavia

The International Criminal Tribunal for the former Yugoslavia (“the International Tribunal”) was established over four years ago in response to the mass killings, widespread and systematic rape and “ethnic cleansing” being practised in the former Yugoslavia on a scale and of a ferocity not seen on the European continent since the end of the Second World War. The United Nations Security Council considered that this situation constituted a threat to international peace and security. It therefore established the International Tribunal as a subsidiary judicial organ, in the belief that this would help halt and redress such violations.

Whether the International Tribunal has succeeded, or will succeed, in fulfilling the mission assigned to it by the Security Council will be for historians to judge. What can be said with certainty, however, is that the judicial activity of the International Tribunal — which to date consists of 19 public indictment confirmations, five Rule 61 proceedings, one completed trial (*Tadic*), two sentencing procedures (*Tadic* and *Erdemovic*) and five more trials underway or due to start in the near future (*Celebici*, *Blaskic*, *Dokmanovic*, *Kovacevic* and *Aleksovski*) — has generated much comment on its indictments, decisions and judgements, and kindled an enormous interest in international humanitarian law and international criminal law. The creation of the International Tribunal was also a factor in the Security Council’s decision to establish the International Criminal Tribunal for Rwanda and gave fresh impetus to the demand for a permanent international criminal court.

This volume of articles published by the *International Review of the Red Cross* is a welcome contribution to the growing literature on the two ad hoc international tribunals and on international humanitarian and criminal law. I would hazard to add that commentary on the jurisprudence of the International Criminal Tribunal for Rwanda is particularly needed at this stage, since the activities of this, our sister tribunal, are both under-reported and undervalued. The International Criminal Tribunal for Rwanda may have a vital role to play in defining the content and forms

of genocide, including incitement to commit genocide, conspiracy to commit genocide and complicity in genocide, as well as the commission of genocide itself. The articles on its work in this issue are therefore particularly valuable contributions to the discussion.

Needless to say, the International Criminal Tribunal for the former Yugoslavia also relies on the widespread publication of its judicial acts and commentaries thereon for the fulfilment of its mandate. In accordance with the well-known maxim, "Justice must not only be done, but must be seen to be done", it is not enough for the International Tribunal simply to administer international criminal justice impartially and with due regard for the rights of the accused. It must also carry out this activity under the scrutiny of the international community. Publications such as this greatly contribute to the effort to make the International Tribunal's work known and to ensure that the voices of the victims, on whose behalf the international community acted when it established the International Tribunal, are heard. I hope, too, that the *Review* will prompt further discussion, both of the ad hoc international tribunals and of the momentous project to establish a workable system of international criminal justice.

Antonio Cassese
former President
International Criminal Tribunal
for the former Yugoslavia

Foreword by the President of the International Criminal Tribunal for Rwanda

The decision to devote an issue of the *International Review of the Red Cross* to a series of articles on the two ad hoc International Criminal Tribunals set up by the United Nations to prosecute persons responsible for serious violations of international humanitarian law in the former Yugoslavia and in Rwanda reflects the increasing importance of these courts both for the general public and for legal experts.

The establishment of the two Tribunals — the one for the former Yugoslavia in February 1993 and the one for Rwanda in November 1994 — is a milestone in the development of international humanitarian law. It also focuses attention on the need to set up mechanisms for monitoring compliance with the law and for punishing violations. Various reports drawn up by the United Nations Secretary-General make it clear that the intention of the Security Council in establishing these Tribunals was not to create new legal standards but to set up a system whereby the implementation of customary international law could be overseen by independent international judicial bodies.

Nevertheless, this initiative, by making it possible to monitor respect for the rules of international humanitarian law and to prosecute persons responsible for serious violations, has several major implications for the evolution of this body of law.

In the first place, the judgments handed down by the Chambers of the two Tribunals will represent a substantial addition to existing case law relating to certain crimes, particularly genocide.

Secondly, the principle of direct individual criminal responsibility is now established in international law. Henceforth, international courts will be able to prosecute private individuals for violations of international law, even if those violations are committed within the internal framework of a particular State.

Thirdly, the establishment of the two Tribunals has certainly given fresh impetus to the debate on the possibility of setting up a permanent international criminal court — a step which many people would like to see taken. Indeed, only a court with universal jurisdiction and a sufficiently broad referral mechanism could have a truly deterrent and preventive effect and thus permit progress in the area of international criminal justice.

Fourthly, the decision to set up the ad hoc Tribunals will make a significant contribution to the development not only of international humanitarian law but also of international justice, by recognizing the imperative need for justice in international relations. Many people of goodwill, legal experts in the field of human rights and humanitarian workers have long thought that the impunity enjoyed by those responsible for serious violations of humanitarian law has inexorably fuelled the spiral of violence by encouraging the victims, their families and their friends to seek revenge.

There is still insufficient awareness of the major contribution which the two ad hoc Tribunals set up by the United Nations can make to justice and to the development of international humanitarian law. It is my sincere hope that the excellent articles published in this issue of the *Review* will help remedy the situation.

Laïty Kama
President
International Criminal Tribunal
for Rwanda

The experience of the International Criminal Tribunals for the former Yugoslavia and for Rwanda

by Paul Tavernier

The ancient dream of international criminal jurisdiction is gradually becoming a reality. Article 227 of the 1919 Treaty of Versailles provided that German Emperor Wilhelm II should be tried by an international court to answer charges of “flagrant offences against international morality and the sacred authority of treaties”. But since the Netherlands refused to give up the accused, the trial never took place, and Wilhelm II died in exile in Holland in 1941. Articles 228 and 229 of the Treaty providing for the prosecution of war criminals were applied in a disappointing way in the Leipzig trial. The Nuremberg and Tokyo trials after the Second World War undeniably represented progress towards the creation of a body with truly international criminal jurisdiction, but they were greatly influenced by their origins and in effect applied the law and justice of the victors rather than those of the universal community of States.

For over 45 years, the international community, represented by the United Nations, endeavoured to use the lessons drawn from Nuremberg to establish a permanent international criminal court, operating on the basis of an international criminal code, but its efforts proved to no avail.

Paul Tavernier is a professor at the University of Paris-XI and Director of the “Centre de recherches et d’études sur les droits de l’homme et le droit humanitaire” (CREDHO). He has taught international law and international relations at the Universities of Paris, Grenoble, Rouen and Algiers. His research work and publications have also focused on international humanitarian law.

Original: French

Note: all quotations from the original French are ICRC translations.

The debates of the International Law Commission, which was entrusted with the tasks of drawing up a code of offences against the peace and security of mankind and a statute for an international criminal court, became mired and seemed fated never to succeed, much to the disappointment of legal experts and certain idealists. For Mohamed Bennouna, who emphasizes the obstacle of State sovereignty, "the dialogue of the deaf between legal and political experts rolls merrily along, the former producing an inventory of the available legal techniques and the latter being neither ready nor willing to face the basic choices that need to be made".¹ His conclusions are very pessimistic: "The establishment of an international criminal court remains an academic exercise, which can even become dangerous if it is perverted by prevailing sovereignties to justify *faits accomplis* or to salve the consciences of those in power".²

It was only after the shock of the tragic events that followed the disintegration of the former Yugoslavia that the international community, at last made aware of the atrocities committed and alerted by the courageous reports of Tadeusz Mazowiecki, agreed to the establishment of an international criminal tribunal for the former Yugoslavia, which was instituted by resolutions 808 and 827 of the United Nations Security Council, adopted on 22 February and 25 May 1993. A second tribunal was subsequently set up to prosecute violations of international humanitarian law committed in Rwanda and was instituted by Security Council resolution 955 of 8 November 1994. The two courts are independent of each other, but nonetheless have many points in common and even some strong institutional ties. So far they are the only examples of criminal tribunals that have been established by the international community as a whole and have not been imposed by the victors on the vanquished in an international conflict. Before 1993, however, the idea had already been put forward of setting up an international criminal court to try war crimes committed by the United States in Viet Nam, or to prosecute Saddam Hussein for his responsibility in the Iraqi aggression against Iran.³ Since 1993-1994, proposals have been made to create new ad hoc tribunals to try war

¹ Mohamed Bennouna, "La création d'une juridiction pénale internationale et la souveraineté des Etats", *Annuaire français de droit international*, 1990, pp. 299-306, in particular p. 300.

² *Ibid.*, p. 306.

³ See Ige F. Dekker, "Criminal responsibility and the Gulf War of 1980-1988: The crime of aggression", in Ige F. Dekker and Harry G. Post (eds), *The Gulf War of 1980-1988*, Martinus Nijhoff, Dordrecht, 1992, pp. 249-268, in particular pp. 266-268.

criminals in Chechnya, Burundi and Zaire, now again called the Congo. It has even been suggested recently that Pol Pot, responsible for the genocide in Cambodia, should be brought before such a tribunal.

The establishment of ad hoc international criminal tribunals has nevertheless been severely criticized by some, on the grounds that they would serve as a cover for the policy of selectivity pursued by the Great Powers and would provide an alibi for indefinitely deferring the institution of a permanent international criminal court.⁴ We for our part shall express a more qualified judgement on the experience of the International Tribunals for the former Yugoslavia and for Rwanda. They have the merit of already being in existence and in operation.⁵ They have taken many important decisions. The Tribunal for the former Yugoslavia has passed two sentences, and the vice is tightening round the war criminals indicted by the Tribunal, as may be seen from the arrests made in the summer of 1997. The first trials should shortly open before the Tribunal for Rwanda. The experience gained from the workings of the two Tribunals admittedly remains disappointing in many respects, above all because it is incomplete and highly ambiguous. On the other hand, it has also proved extremely valuable and instructive. It will undoubtedly have a decisive impact as regards the establishment of a permanent international criminal court, which can now be regarded as a possibility, and on the application of humanitarian law, violations of which must no longer be allowed to go unpunished.

An ambiguous experience

Although legal experts had long pondered the conditions required for setting up an international criminal court, the creation of the ad hoc Tribunals for the former Yugoslavia and for Rwanda was largely improvised, with the result that numerous ambiguities arose in the procedure

⁴ See in particular Olivier Russbach, *ONU contre ONU, le droit international confisqué*, La Découverte, Paris, 1994, p. 312, and "Une justice internationale à la carte", *Politique internationale*, No. 67, Spring 1995, pp. 313-326.

⁵ Despite the criticisms it has drawn and the crisis it has undergone, the record of the Tribunal for Rwanda is not negligible. In this connection, see Cyril Laucci, "Quelques aspects de l'actualité des Tribunaux pénaux internationaux pour l'ex-Yougoslavie et le Rwanda", *L'Observateur des Nations Unies*, No. 2, 1997, pp. 119-137, at p. 136: "The results recorded by the Arusha Tribunal show that it has not done its work so badly." Of the 21 persons indicted, 13 have been arrested, whereas the Tribunal for the former Yugoslavia has indicted 74 persons, only seven of whom had been arrested and transferred to The Hague by December 1996.

that led to their establishment; these are also apparent in the legal status assigned to the two Tribunals.

Ambiguities of the procedure that led to the creation of the Tribunals

In the face of two exceptional and largely unforeseen situations, both of which had been potentially explosive for many years already, the international community was compelled to react as a matter of urgency to the horror of the events. The facts surrounding the disintegration of the former Yugoslavia are in no way comparable to the Rwandan genocide, but the need to bring criminal charges against those responsible for committing grave breaches of humanitarian law and to set up an international court for that very purpose quickly became apparent in either case. The International Criminal Tribunal for the former Yugoslavia proved a useful and easily transposable precedent for the Rwanda Tribunal.

There were two possible courses of action regarding the procedure for the establishment of these courts. Had the choice fallen on the traditional method of drawing up and concluding a treaty or an agreement, a great deal of time would have elapsed before either court could operate; in other words, it would have been too late for the proceedings to be fully effective. The urgency of the situation therefore made it necessary to opt for unilateral decisions, which, considering the present structure of international society, could emanate only from the United Nations Security Council. The two Tribunals were accordingly instituted by Security Council resolutions, on the basis of Chapter VII of the United Nations Charter.

This choice, largely imposed by the circumstances, had both advantages and drawbacks that entailed a number of consequences and raised certain questions. It proved effective in that it led to the rapid establishment of both Tribunals, which began to function immediately.⁶ On the other hand, the future of the two courts depends not only on the decisions of a small United Nations body, namely the Security Council, in which the five Great Powers have the right of veto, but also, as regards financial matters, on those of the General Assembly (the United Nations' plenary

⁶ In a completely different context, mention may be made of the International Tribunal for the Law of the Sea provided for in the Montego Bay Convention of 1982, which was established after the Convention came into force in 1994 and which has not yet had any case brought before it. In the sphere of humanitarian law, the record of the International Fact-Finding Commission provided for in Article 90 of 1977 Additional Protocol I is also indicative of the impact of State sovereignty on the functioning and effectiveness of judicial or quasi-judicial bodies and even simple investigating bodies.

body), and the inadequacy of the resources made available to the Tribunals has often been denounced.

It was, moreover, inevitable that the competence of the Security Council itself to set up such tribunals should be questioned, since no such competence is expressly assigned to it in any part of the United Nations Charter. The matter was mentioned in the *Tadic* case, but it raised the very sensitive issue of an international judicial body having control over Security Council decisions, a question currently submitted for the consideration of the International Court of Justice in the *Lockerbie* case. The Trial Chamber of the Tribunal for the former Yugoslavia evaded the issue in its decision of 10 August 1995, but the Appeals Chamber dealt with it in definitive terms in its decision of 2 October 1995.

The option chosen by the Security Council for setting up the Tribunals has had other consequences as well. The imperative of speed prevented any real discussion within the Council, and certain technical shortcomings in the texts could have been avoided if more in-depth debates had been held. Some countries admittedly drew up drafts and the United Nations Secretariat took them into account, but what is striking is the significant and perhaps excessive role played by the United Nations Department of Legal Affairs, which alone drafted the Statutes of the two Tribunals; these were not changed in any way by the Security Council (except for some minor amendments with regard to the Tribunal for Rwanda).⁷ The result was a partly incomplete text, which may seem somewhat scamped, but above all the absence of preparatory sessions was not compensated by the Secretary-General's Report, and the role of the interpreter and particularly of the judges themselves is not facilitated thereby. Conversely and paradoxically, however, the judges are often left entirely free to adopt the interpretation that they consider to be most suitable, most effective and most useful. Apart from that, the judges of the two Tribunals were assigned an important role in drawing up the rules governing their activities, being responsible for adopting "rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other

⁷ Some authors minimize the role of the UN Secretariat in drawing up the Statutes; see, for example, Philippe Weckel, "L'institution d'un tribunal international pour la répression des crimes de droit humanitaire en Yougoslavie", *Annuaire français de droit international*, 1993, pp. 232-261. For the opposite view, see Daphna Shraga and Ralph Zacklin, "The International Criminal Tribunal for the Former Yugoslavia", *European Journal of International Law/Journal européen de droit international*, 1994, pp. 360-380, in particular p. 362.

appropriate matters” (Art. 15 of the Statute of the Tribunal for the former Yugoslavia).⁸ They adopted very detailed Rules of Procedure and Evidence, which settle important issues and have been hailed as constituting a veritable international code of criminal procedure. This code is not subject to any monitoring on the part of the Security Council and has been amended on several occasions, which may give the impression of a certain amount of improvisation.

The ambiguities of the process of setting up the International Criminal Tribunals for the former Yugoslavia and for Rwanda also became apparent in connection with the question of the binding nature of Security Council decisions and the requirement of State cooperation. It was obvious from the outset that these issues should be at the centre of the debate if a truly effective international criminal jurisdiction was to be established, and this was amply confirmed by subsequent developments. The various facts of the matter are nevertheless far from clear. While all the observers and commentators indeed stressed that the Security Council had taken care to base its resolutions on Chapter VII, very few of them pointed out that the Council could use this basis for issuing decisions and also simple recommendations.⁹ The binding nature of Security Council decisions stems from Article 25, as well as Article 103, of the Charter,¹⁰ but the peremptory character of those decisions has raised questions among certain legal experts, although they are admittedly in the minority.¹¹

State cooperation is required under Article 29 of the Statute of the International Tribunal for the former Yugoslavia and under Article 28 of the Statute of the Rwanda Tribunal. The Statutes of the two Tribunals are annexed to the Report of the Secretary-General approved by the Security Council (for the former Yugoslavia) and to the relevant Security Council

⁸ The powers of the Tribunal for Rwanda are more limited, as Article 14 of its Statute provides that it is to apply the Rules of Procedure and Evidence of the International Tribunal for the former Yugoslavia, introducing any amendments to those Rules that it may deem necessary.

⁹ See Hervé Ascensio and Alain Pellet, “L’activité du Tribunal pénal international pour l’ex-Yougoslavie (1993-1995)”, *Annuaire français de droit international*, 1995, pp. 101-136, and in particular p. 119 concerning the decision of the Appeals Chamber in the *Tadic* case (2 October 1995).

¹⁰ For example, Article 103 may be invoked to invalidate the application of extradition agreements, assuming that the transfer and delivery of an accused person to either of the International Criminal Tribunals may be assimilated to extradition.

¹¹ See Paul Tavernier, “Le caractère obligatoire de la résolution 598 (1987) du Conseil de sécurité relative à la Guerre du Golfe”, *Journal européen de droit international/ European Journal of International Law*, Vol. I, No. 1-2, 1990, pp. 278-285.

resolution (for Rwanda) and therefore contribute to the legal validity of the Council's decisions. Moreover, each of the Council resolutions establishing the Tribunals contains a paragraph dealing in particularly strong terms with State cooperation (resolution 827, para. 4, for the Tribunal for the former Yugoslavia and resolution 955, para. 2, for the Rwanda Tribunal).

Confirmation of the obligation to cooperate with the Tribunals and of the binding nature of the Tribunals' decisions by no means eliminates all uncertainties and ambiguities. Since the texts refer only to States, the question has arisen as to whether they also apply to non-State entities (such as the Bosnian Serb or Bosnian Croat authorities) and even to individuals. Moreover, although these decisions are binding, their implementation often calls for the prior enactment of national legislation, even in countries, such as France, which claim to follow the monist tradition. The parliamentary debates held on such occasions have shown the difficulties that can arise when it comes to implementing a Tribunal's decisions, and these difficulties are largely due to the ambiguity of the Statutes of both Tribunals.

Ambiguity of the Statutes of the two Tribunals

The speed with which the two ad hoc Tribunals were established made it impossible to eliminate from their Statutes certain basic ambiguities, relating mainly to the very purpose of instituting such courts and to the general spirit of the legal system they apply (common law or civil law). The purpose of the International Tribunals results from the procedure chosen for their creation — or imposed by circumstances. Indeed, this procedure was not neutral, since entrusting the institution of these courts to the United Nations Security Council amounted to allowing the imperative of maintaining peace to take precedence over those of law and justice. This does not mean that the requirements of justice were automatically set aside: on the contrary, they are insistently called to mind in the Statutes, but in the final count, if a conflict were to arise, considerations linked to maintaining peace would probably prevail. In any event, there is a threat there that constantly hangs over the operation and the very survival of these ad hoc judicial bodies.

Not only does the creation of the two Tribunals stem from Security Council resolutions which were based on Chapter VII of the Charter and noted the existence of a threat to international peace and security within the meaning of Article 39, but, by virtue of the same principle, it will be for the Security Council to put an end to their activity, that is to say, to

dissolve them. That is what was feared, briefly, at the time of the conclusion of the Dayton agreements, when the work of the International Criminal Tribunal for the former Yugoslavia had barely started. The dissolution of the ad hoc Tribunals will certainly give rise to numerous problems, particularly on account of the time limits allowed for the parties to avail themselves of certain remedies (appeal, review) and of the close institutional ties that exist between the two Tribunals (in the event of the dissolution of one of the two, in particular the Tribunal for the former Yugoslavia).

The link between the Statutes of the ad hoc Tribunals and the maintenance of peace is also evident from the provisions concerning the execution of the Tribunals' decisions, which is primarily entrusted to States, but if these fail to fulfil their obligations, recourse to the Security Council is provided (see, for example, Rules 11, 59 and 61 of the Rules of Procedure and Evidence of the Tribunal for the former Yugoslavia). The Security Council thus appears to be, so to speak, the "punch" of the International Criminal Tribunals, but in actual fact the Council's action, when solicited, has never gone further than a simple reminder to States of their obligations by means of new resolutions or declarations by the President. The measures taken have hardly ever extended beyond the very limited practice observed in connection with Article 94 of the United Nations Charter, and the execution of orders of the International Court of Justice.

As has often been pointed out, focusing on the need to maintain peace entails the risk of allowing certain senior officials to go unpunished and of hampering the effectiveness of the Tribunals. Indeed, to conclude a peace treaty the international community is obliged to negotiate with the very people who held the highest positions of responsibility, including some who have been formally indicted by the Tribunals (the cases of Radovan Karadzic and Ratko Mladic, whom it has not yet been possible to arrest despite their removal from the official political scene following the Dayton agreements, are absolutely typical).

In view of this basic contradiction between the requirements of justice and that of maintaining peace, the ambiguities resulting from the uncertainty in the Statutes concerning the choice of the legal system to be applied by the Tribunals may appear unimportant, and yet they have an appreciable effect on the operation of both courts, which is hampered thereby and may seem somewhat chaotic. Where criminal procedure is concerned, two radically different systems are involved, namely the accusatorial system currently characteristic of common law countries and the inquisitorial system applied in civil law countries. The Statute of the International Tribunal for the former Yugoslavia, which served as a model

for that of the Rwanda Tribunal, was drafted by the United Nations Department of Legal Affairs and by common law experts. It is therefore greatly influenced by common law, as already applied in Nuremberg. Yet this choice was not always carried to its logical conclusion, which explains some of the ambiguities as well as the contradictory and at times highly critical comments of both civil and common law experts on the decisions of the ad hoc Tribunals — particularly on the very thorny issues of respect for the requirements of fair trial and of trial *in absentia*.

The practice of the two Tribunals, though already considerable, has not helped to clear up all these ambiguities, the more so since new ones are arising and will no doubt continue to arise in the future. Nevertheless, the experience of both courts is now authoritative and decisive in many respects.

A decisive experience

The operation of the two International Criminal Tribunals has given rise to a wide variety of questions, and their already abundant practice is highly instructive. The decisions of the Tribunal for the former Yugoslavia, which are the more numerous, have been widely commented on and criticized by the media and by legal experts. This jurisprudence, which can no longer be ignored because of its significant contribution to international and humanitarian law, should be even more broadly disseminated and studied, especially in universities. It bears witness to the determination of both Tribunals to operate efficiently and in many respects has proved constructive and capable of serving as a model for a future permanent criminal court.

An international judicial structure striving towards efficiency

When the time came to deal with violations of humanitarian law in Rwanda, the Security Council could have maintained a single judicial body by extending the competence of the International Criminal Tribunal for the former Yugoslavia to breaches perpetrated in Rwanda. This solution, which might have been justified for reasons of economy and efficiency, was discussed but not adopted. Preference went to setting up a second ad hoc tribunal, with a structure so similar to that of the first that it might be regarded as a simple copy.¹² It is nevertheless separate

¹² Mutoy Mubiala, "Le Tribunal international pour le Rwanda: vraie ou fausse copie du Tribunal pénal international pour l'ex-Yougoslavie", *Revue générale de droit international public*, 1995, pp. 929-954.

and independent, despite its many institutional links with the Hague Tribunal. The two Tribunals have the same Prosecutor (Art. 15 of the Statute of the International Tribunal for Rwanda). A Deputy Prosecutor is provided for the Rwanda Tribunal, which guarantees a certain unity of policy in conducting the investigations and prosecutions. The judges serving in the Appeals Chamber of the Tribunal for the former Yugoslavia also sit in the Appeals Chamber of the Rwanda Tribunal (Art. 12 of the Statute). Moreover, the Rules of Procedure and Evidence of the Tribunal for the former Yugoslavia apply, *mutatis mutandis*, to the Rwanda Tribunal (Art. 14 of the Statute). The similarity between the two courts arises mainly from the common composition of the Appeals Chamber,¹³ which must ensure unity of jurisprudence of the Trial Chambers of each Tribunal and also between the Tribunals themselves. The Appeals Chamber has not yet had occasion to meet in connection with cases in Rwanda, but it has handed down some important decisions in cases pertaining to the former Yugoslavia (particularly in the *Tadic* case); these augur well for a judicial system which strives to work as efficiently as possible by itself filling the gaps in the Statutes and emphasizing the indispensable cooperation of States.

The judges of the International Tribunal for the former Yugoslavia introduced some innovations regarding several provisions of the Rules of Procedure and Evidence, trying to fill certain gaps and to eliminate shortcomings in the Statute. The best-known example is that of the procedure set out in Rule 61, which has been applied on several occasions (i.e., in the cases of *Nikolic*; *Martic*; *Mrksic*, *Radic* and *Sljivancanin*: the *Vukovar Hospital* case; *Rajic*; *Karadzic* and *Mladic*).¹⁴ This procedure is intended to remedy failure to execute a warrant of arrest signed by a judge of the Tribunal and the absence of any reference to trial *in absentia* in the Statute. It provides for a public hearing and for the appearance of witnesses before a Trial Chamber, which may confirm the indictment, supplement it or modify it and issue an international arrest warrant in respect of the accused, which shall be transmitted to all States. The accused will thus become a pariah in all countries.

¹³ The composition of the Chambers, particularly that of the Appeals Chamber, might give rise to certain difficulties on account of the provisions laid down for the disqualification of judges (Rule 15 of the Rules of Procedure and Evidence of the Tribunal for the former Yugoslavia). Moreover, the composition of the Appeals Chamber should reflect more closely that of both Tribunals, and not only that of the Hague Tribunal.

¹⁴ Faïza Patel King and Anne-Marie La Rosa, "The jurisprudence of the Yugoslavia Tribunal: 1994-1996", *European Journal of International Law/Journal européen de droit international*, 1997, pp. 123-179, in particular pp. 128-142.

The absence of provision for trial *in absentia* in the Statute of either Tribunal reflects the wishes of countries of the common law tradition, which refuse, on account of their requirements in this regard (fair trial, due process of law), to allow a trial to be held in the absence of the accused. The omission has, on the other hand, greatly disappointed civil law experts (trial *in absentia* having been provided for in the French draft).¹⁵ The possibility of holding this type of trial would have guaranteed the Tribunal a certain degree of efficiency, even in the event of lack of cooperation on the part of States — a problem that was foreseeable at the time and unfortunately came to pass. The procedure set out in Rule 61 of the Rules of Procedure and Evidence appears as a kind of hybrid, a legal aberration and a substitute that satisfies no one.¹⁶ With all its faults and limitations, however, practice has shown it to be useful, since it has made it possible to maintain and even intensify pressure on the accused, with the help of the Security Council at times, pending political developments that will at last allow for their arrest and thus prevent them from enjoying impunity.

The attitude of the International Criminal Tribunals, particularly that of the Tribunal for the former Yugoslavia, to the question of cooperation with States has ultimately proved to be a realistic one, combining as it does firmness of principle with flexible and imaginative practical application. The Hague Tribunal, with the support of the Security Council, has frequently reiterated that States are under the obligation to cooperate with it. This was further emphasized by President Antonio Cassese, in a remarkable decision, handed down on 3 April 1996, concerning a request for modification in the conditions of detention of General Blaskic. The *Blaskic* case gave him occasion to explain that such an obligation was incumbent upon States even prior to the enactment of national legislation on the subject and to specify the nature of that obligation, stressing the distinction between obligations in terms of conduct, means and results.

¹⁵ S/25266 of 10 February 1993, Article XV, para. 2. On the regrettable rejection of the proposal of trial *in absentia*, see Alain Pellet, "Le Tribunal criminel pour l'ex-Yougoslavie. Poudre aux yeux ou avancée décisive?", *Revue générale de droit international public*, 1994, pp. 7-60, in particular p. 48, and Paul Tavernier, "Vers une juridiction pénale internationale?", in Cao Huy Thuan and Alain Fenet, *Mutations internationales et évolutions des normes*, PUF, Paris, 1994, pp. 137-154.

¹⁶ According to H. Ascensio and A. Pellet (*op. cit.* (note 9), p. 110), Rule 61 is "an imperfect substitute for trial *in absentia*". F. Patel King and A.-M. La Rosa stress the legal problems raised by this procedure (*op. cit.* (note 14), p. 142). André Klip severely criticizes the Rule 61 procedure both from the point of view of the accused and from that of witnesses in his article entitled "Witnesses before the international criminal tribunal for the former Yugoslavia", *Revue internationale de droit pénal*, Vol. 67, 1996, pp. 267-295.

Even though analyses of this kind are not entirely convincing,¹⁷ they bear witness to the Tribunal's considerable efforts to ensure that its task is accomplished with the greatest possible degree of efficiency.

The events of the summer of 1997, with the arrest of Slavko Dokmanovic on 27 June and that of Milan Kovacevic on 10 July, were a further illustration of the Tribunal's realistic and pragmatic approach in seeking cooperation with States. Efficiency often calls for discretion, and public opinion discovered a hitherto unknown aspect of the Tribunal's activity with these arrests, obtained with the cooperation of certain Western States which have trained commandos for this type of operation. Prosecutor Louise Arbour justified this unusual procedure on grounds of efficiency. It should be noted that Rule 53 (B) of the Rules of Procedure and Evidence provides that there may be no public disclosure of the indictment until it is served on the accused, but people did not know that that possibility had been used.¹⁸

These arrests, carried out by specially trained and equipped units, are somewhat reminiscent of the kidnapping of Eichmann by Israeli agents in Argentina, and the question arises as to whether the end justifies the means. While it is true that they allow the trials to proceed because the presence of the accused in The Hague has been ensured, recourse to such a procedure is warranted only if the Tribunal is certain of cooperation on the part of States. Otherwise, it denies itself the possibility of applying Rule 61 of the Rules of Procedure and Evidence, and, in the name of efficiency, runs the risk of prolonging the impunity of the accused. It should also be noted that in the *Vukovar Hospital* case the Tribunal combined public disclosure of the indictment and the Rule 61 procedure in respect of three of the accused and non-disclosure as regards Dokmanovic. The second operation, carried out by NATO's SFOR¹⁹ led to the death of one of the accused and to the capture of another. It should be followed by similar operations if it is not to be perceived as an alibi designed to mislead public opinion, thus enabling other war criminals,

¹⁷ See our report to the symposium of the "Société française pour le droit international", Strasbourg, May 1997, in Andrew Drzemcewski and Paul Tavernier, *L'exécution des "décisions" des instances internationales de contrôle dans le domaine des droits de l'homme* (to be published), Editions Pedone, Paris.

¹⁸ Eric David expressed doubts as regards the practical use of such absence of publicity in his article entitled "Le Tribunal international pénal pour l'ex-Yougoslavie", *Revue belge de droit international*, No. 2, 1992, pp. 565-598, in particular pp. 590-591.

¹⁹ Stabilization Force for Bosnia and Herzegovina.

including some of the most important ones, to remain sheltered from prosecution and to lead a peaceful existence.

Public opinion was rightly struck by the arrests of the summer of 1997. The ensuing trials will undoubtedly enable the Hague Tribunal to supplement and refine its already ample jurisprudence.

A constructive jurisprudence

The many decisions taken so far, especially by the International Tribunal for the former Yugoslavia, have enabled both courts to develop progressive and constructive case law in the spheres of general international law and international humanitarian law, covering different questions of procedure and competence and also some substantive issues of considerable importance. We shall confine ourselves to raising a few points which we regard as particularly significant, without claiming to offer an exhaustive analysis. These points are the question of fair trial, the distinction between international and non-international conflicts and the role of custom in humanitarian law.

The issue of respect for the rights of the defence and the right to a fair trial was at the heart of numerous debates before the Tribunal for the former Yugoslavia and had been underscored during the drafting of the Statutes of the two Tribunals. Article 21 of the Statute of the Hague Tribunal and Article 20 of the Statute of the Rwanda Tribunal essentially restate the guarantees set out in Article 14 of the International Covenant on Civil and Political Rights. Special attention was paid to the question of trial *in absentia* and to that of the anonymity of witnesses. The first issue has already been discussed in connection with the efficiency of the International Criminal Tribunals, but was viewed mainly from the angle of procedural fairness. As mentioned above, the procedure of trial *in absentia* was excluded in the interests of fair trial, although the Committee on Human Rights considered that it was not contrary to the Covenant, under certain specific conditions.²⁰ Some common law authors have even criticized the procedure set out in Rule 61 of the Rules of Procedure and Evidence on the grounds that it prejudices the rights of the accused, particularly in the event of a subsequent trial if the accused is finally brought before one of the Tribunals.

²⁰ See Paul Tavernier, "Le droit à un procès équitable dans la jurisprudence du Comité des droits de l'homme des Nations Unies", *Revue trimestrielle des droits de l'homme*, No. 25, 1996, pp. 3-22, in particular pp. 13 and 14.

The question of calling anonymous witnesses is also a highly sensitive matter.²¹ Common law experts are against the procedure, invoking the requirements of fair trial. Yet Article 22 of the Statute of the Tribunal for the former Yugoslavia (Art. 21 of the Statute of the Rwanda Tribunal) concerning the protection of victims and witnesses provides for the possibility of “*in camera* proceedings and the protection of the victim’s identity”, and Rules 69 and 75 of the Rules of Procedure and Evidence set out the details of such protection, including non-disclosure of the identity of a victim or witness. These measures indeed seem to be indispensable, as the witnesses — who are often victims — run grave risks when they leave the court and return to their countries. The Tribunal for the former Yugoslavia took such protective measures in the *Tadic* case (decision of 10 August 1995).²² The Tribunal for Rwanda, however, has taken no such decision, which may seem surprising.²³ In any event, case law has brought to light the importance of fair trial not only with respect to the accused, but also to the victims or witnesses, who are vulnerable and are entitled to assistance and protection.

Another noteworthy contribution of the jurisprudence of the International Criminal Tribunals concerns the breakdown of the barriers between international and non-international conflicts. International and internal aspects are closely intermingled in the conflicts in the former Yugoslavia and in Rwanda. It would therefore be arbitrary to attempt to separate the two types of conflict, although international and humanitarian law have established different rules pertaining to each category of situation. The problem has been approached from the point of view of competence, particularly in the *Tadic* case (decision of the Appeals Chamber of 10 October 1995).²⁴ The Hague Tribunal has also narrowed the gap between international and internal situations in connection with the obligation to cooperate that is incumbent not only on States but also on non-State entities, although

²¹ André Klip, *op. cit.* (note 16); see also Monroe Leigh, “The Yugoslav Tribunal: Use of unnamed witnesses against accused”, *American Journal of International Law*, Vol. 90, April 1996, pp. 235-238.

²² The Tribunal seeks to strike a balance between the interests of the accused and those of witnesses, setting five fairly stringent conditions for the admissibility of anonymity. The Tribunal’s decision is accompanied by the well-structured dissenting opinion of Judge Stephen, based on a strict concept of fair trial, close to the common law concept.

²³ The first hearing of witnesses before the Rwanda Tribunal was held on 17 January 1997, in connection with the *Akayezu* case.

²⁴ For a detailed analysis and critique of the problem, see H. Ascensio and A. Pellet, *op. cit.* (note 9), pp. 125 ff.

this is not mentioned in the Statute or in the Rules of Procedure and Evidence. President Cassese, in his aforementioned decision on the *Blaskic* case, did not hesitate to declare that the obligation was incumbent upon any State, and even upon “every other *de facto* government”.

The blurring of the distinction between the features characteristic of international and non-international conflicts has led to the emergence — or is the result of the appearance — of customary rules in humanitarian law, the existence and content of which the Hague Tribunal has rightly recognized and formally acknowledged. There again, the Tribunal’s decision of 2 October 1995 in the *Tadic* case has provided some very interesting lessons, which would deserve detailed comment and which have rightly attracted the attention of legal experts.²⁵ It will be noted that in its judgment of 7 May 1997 the Tribunal restated and supplemented the analyses of the Appeals Chamber. It provided a detailed discussion of the customary status of the prohibition of crimes against humanity referred to in Article 5 of the Statute of the Tribunal (paras 618 ff. of the judgment) and of the individual criminal responsibility provided for in Article 7, para. 1, of the Statute (paras 663 ff. of the judgment). The Hague Tribunal thus largely bases its decisions on custom and on the evolution of international humanitarian law, while at the same time contributing to its development.

Conclusion

In the final count, the experience of the two ad hoc International Criminal Tribunals for the former Yugoslavia and for Rwanda has proved constructive in many respects, despite the difficulties encountered and the weaknesses and flaws inherent in the two structures.

Both courts have now been confirmed as a result of their substantial, original and practically unprecedented activity (the Nuremberg and Tokyo trials having taken place under very different conditions). In their decisions, the Tribunals, and particularly the Hague Tribunal, have firmly proclaimed their autonomy, for instance with regard to the question of anonymous witnesses, which was dealt with by the Committee on Human Rights in relation to the International Covenant on Civil and Political

²⁵ See, for example, Theodor Meron, “The continuing role of custom in the formation of international humanitarian law”, *American Journal of International Law*, Vol. 90, April 1996, pp. 238-249. See also the remarks of Luigi Condorelli in his general conclusions put forward on the occasion of the Geneva Symposium of October 1995, in Luigi Condorelli, Anne-Marie La Rosa and Sophie Scherer, *Les Nations Unies et le droit international humanitaire*, Editions Pedone, Paris, 1996, pp. 445-474, in particular p. 466.

Rights and by the European Commission and the European Court of Human Rights. As mentioned above, this desire for autonomy is reflected most markedly in the Tribunals' position vis-à-vis their parent organ, the Security Council. Indeed, the Hague Tribunal has not hesitated to look into the matter of the legality of its establishment, and hence of the relevant Council resolution.

Another important point of the Tribunals' jurisprudence is the gradual convergence that has taken place, not without some difficulty, between the opposing systems of common law and civil law. This original synthesis, which is still imperfect, will undoubtedly develop in the future.

The workings of the ad hoc Tribunals for the former Yugoslavia and for Rwanda and the experience gained therefrom will undoubtedly be of great assistance in the discussions now under way with a view to setting up a permanent international criminal court with universal jurisdiction. The establishment of the two Tribunals in 1993 and 1994 gave new impetus to the debates that had become mired in the International Law Commission, and the convening of an international conference in 1998 augurs well in this respect. Numerous technical factors and points of comparison are now available.

The experience of the International Criminal Tribunals has attracted much attention from legal experts and many commentaries have appeared in specialized reviews. The particular interest shown by young jurists and students should be stressed; universities should bear such interest in mind and take care not to disappoint the hopes placed in international criminal jurisdiction, for therein lies an appreciable potential which should be fostered if we are to promote the development of international humanitarian law. It is obvious, however, that the responsibility of States remains essential in ensuring the effectiveness of international judicial bodies, as may be seen from the efforts currently being made to ensure that the accused are actually brought before their judges. Louise Arbour, the Prosecutor of the International Criminal Tribunal for the former Yugoslavia, showed optimism in this regard in a recent interview: "I am absolutely sure, above all now that the Tribunal is firmly established, that the arrest or surrender of Karadzic is only a matter of time and circumstance", she said, adding that "[s]ince the arrest of Milan Kovacevic in July, by confidential warrant, we have been most satisfied with the cooperation with SFOR"²⁶ — that is to say, with the NATO States. Even

²⁶ Interview in *Le Monde*, 30 August 1997.

so, this is a policy that needs to be firmly maintained. Indeed, it is the only way of preventing the most odious criminals from going unpunished, which would be wholly unacceptable, not only from the legal standpoint but above all from a moral point of view.

International criminal jurisdiction, international humanitarian law and humanitarian action

by Jacques Stroun

Shortly after the Second World War the community of States, still shocked by the explosion of violence that had torn the world apart for more than five years, ratified an updated version of the Geneva Conventions in the hope of acquiring a sound legal instrument which would preserve human dignity even in times of war. They undertook to respect the fundamental rights of the individual in armed conflicts, whether international or otherwise, and to limit the use of force to what was strictly necessary to place an enemy *hors de combat*. Their resolve found confirmation in the two Additional Protocols of 1977.¹

But wars have not gone away in spite of the high hopes raised by the United Nations Charter. They inflict appalling suffering on an ever-growing proportion of individuals who are not or are no longer involved in the hostilities, be they war-wounded, prisoners or the host of civilians subjected to abuse by one side or the other, and all too often forced to flee the war zone and seek an increasingly precarious refuge in a neighbouring country.

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Original: French

¹As at 15 October 1997, a total of 188 countries were bound by the four Geneva Conventions. By the same date, 148 States had ratified Additional Protocol I relating to international armed conflicts and 140 had ratified Additional Protocol II relating to non-international armed conflicts.

That is why non-governmental organizations and United Nations agencies are out there in the field, in the thick of the fighting, striving to bring immediate and practical assistance to all victims. Since the 1967 Biafran war in Nigeria, humanitarian action has gained so much ground that it has now become a parameter of international policy in situations of armed conflict, one which can no longer be circumvented.

The immediate humanitarian response to war victims and the codification of widely accepted rules of conduct have their roots in Antiquity, in the philosophical literature of several cultures and in the statements of a few enlightened monarchs. However, it was with *A Memory of Solferino*, written by Henry Dunant in 1862, and with the creation of the International Committee of the Red Cross (ICRC) that the modern version of those concepts came into being.

The international community's efforts to promote a set of rules regulating the use of violence in armed conflicts have been hampered by the inadequacy of mechanisms of repression. Article 1 common to the four Geneva Conventions of 1949 provides that the High Contracting Parties undertake «to respect and to ensure respect for [the established rules] in all circumstances», but any action taken in this regard varies widely according to the context and the method used is left to the discretion of governments.

The war crimes committed during the conflicts attending the break-up of the former Yugoslavia and during the Rwandan genocide of 1994 have been a glaring reminder of the international community's impotence to punish those responsible for violations of international humanitarian law. The outcry caused by those tragic events prompted the United Nations Security Council to set up two international criminal tribunals, one for the former Yugoslavia and the other for Rwanda, to prosecute grave breaches of international humanitarian law committed in those two territories. One year later, in November 1995, the General Assembly set up a preparatory committee to consider the creation of an international criminal court. This was the first move towards introducing a new monitoring and repression system independent of the political interests of States, its purpose being to strengthen the application of international humanitarian law.

Those decisions, which fulfilled the wishes of many humanitarian players and human rights protection agencies, still raise a number of substantive issues. This article will look at the impact that the introduction of such a legal system could have on humanitarian aid operations carried out in behalf of victims while the conflict is in progress.

Controlling violence in situations of armed conflict

The entire body of international humanitarian law is intended, in times of armed conflict, to restrict the use of violence to the lowest level compatible with military imperatives (proportionate use of force and a prohibition on indiscriminate attacks); in addition, it stipulates that respect for the dignity of the individual, even an enemy, must be preserved in all circumstances.

The application of humanitarian law involves four types of complementary action:

- preventive action to develop the law and ensure that combatants comply with it by spreading knowledge of its provisions;
- remedial action among victims to limit the consequences of any violations;
- reactive action to put a stop to ongoing violations by making immediate representations to the authorities;
- punitive action to prosecute violations already committed and punish the culprits.

Ever since its inception, the ICRC's primary objective has been to develop and disseminate rules; in the early days the institution saw itself as having a short-term role, useful only until all States adhered to the Geneva Convention of 1864. Very soon, however, the need for an aid organization capable of alleviating the suffering of victims on the spot prompted the ICRC to develop relief operations alongside its efforts to disseminate the law. A century later, from the 1960s onwards, a host of non-governmental humanitarian organizations came into being and have backed up the ICRC's assistance work in the field.

When it found that knowledge of the rules did not always guarantee that they were respected, the ICRC initiated a dialogue based on confidentiality with those in charge of regular armies and all armed groups, so as to draw their attention to offences committed by their troops. That approach, which makes it possible to solve a number of problems, has been usefully supplemented by the activities of human rights bodies which have turned the public denunciation of violations into an instrument for exerting international pressure.

Striking a balance between those different forms of action is not always easy. Public denunciation, for instance, may sometimes compromise the dialogue with the authorities concerned and jeopardize work for victims in the field.

As long as there are no mechanisms for punishing those who flout the established rules, the system will remain weak. The humanitarian agencies can appeal to the international community to put diplomatic pressure on the authorities responsible for atrocities,² but no legal system will function unless the guilty are punished. In the absence of an international court, such measures of repression are left at the discretion of each State, which is alone responsible for judging any of its nationals who have committed offences against international humanitarian law.

The setting-up of an international court is therefore an important innovation because, by increasing the means of punishing violations, it endows the existing legal texts with the credibility which is their due.

Interaction between the different approaches

The complementary tasks of preventing violations, putting a stop to them, repairing the harm done and punishing the culprits are essential for regulating the use of violence in armed conflicts. Combatants caught up in the heat of battle will heed humanitarian injunctions only if they have been duly trained to do so beforehand. While the conflict is under way, arresting and sentencing those guilty of violations is often impossible because there is no international "police" to capture them. Such was the case throughout the conflict in the former Yugoslavia and the Rwandan genocide. Only when the fighting has stopped and a political settlement has been reached can prosecution be contemplated. Meanwhile, therefore, there must be a way of taking pragmatic action to try to limit the violence and relieve the suffering of victims by other means. That is what the humanitarian organizations in the field do through their protection and assistance programmes.

During the genocide in Rwanda, the ICRC managed to provide protection for some 50,000 people, including many wounded and those accompanying them, who had found refuge in an ICRC field hospital in Kigali where they were given medical treatment as needed. In the camps of Bosnia-Herzegovina, aid in the form of food and blankets helped the detainees to survive the harsh winters while waiting for international pressure to bring about their release.

As well as taking direct action to relieve suffering, the ICRC also tries to put a stop to violations, with no means other than its own powers of

² According to common Article 1, all States party to the four Geneva Conventions are jointly responsible for ensuring application of those instruments.

conviction which it deploys in a confidential dialogue with the parties to the conflict. That may not amount to much but it is often the only possible option pending the adoption of more efficient measures by the international community. In seeking direct dialogue with the combatants, the ICRC tries to influence their conduct. This approach is sometimes misunderstood and perceived as making concessions to killers at the expense of denunciation, which is regarded as more effective. Over and above the finer points of such arguments, however, it must be admitted that simple denunciation does nothing to alleviate the immediate plight of the victims. Even the extensive media coverage of the civil war in El Salvador in the early 1980s and repeated denunciations of the violations regularly committed by the security forces failed to halt the conflict, which went on for another ten years and was marked by numerous abuses on both sides. Throughout those years, humanitarian organizations like the ICRC were out in the field bringing aid to the civilian population, visiting political detainees and engaging in regular dialogue with the military and guerrilla leaders aimed at persuading them to limit the use of violence.

Yet it would be untrue to say that denunciation played no part. It helped to stir the public conscience both at the international level and within the country itself, and this heightened awareness eventually led to peace. Meanwhile it also helped to compel all those involved in the conflict to cooperate with the humanitarian agencies. Without the pressure exerted at the international level, humanitarian organizations like the ICRC would certainly have had a harder time establishing a constructive dialogue with combatants of all stripes. So, denunciation and direct action on the spot are like two legs on the same body: they make forward motion possible by taking the weight on first one, then the other.

Generally speaking, an international court goes into action once active hostilities have ceased, or after a peace agreement has been signed, which leads one to believe that it should not interfere with humanitarian action. In order to function, however, the court needs witnesses and evidence, which it will naturally try to find among those who were working in the field and may have been eye-witnesses of the crimes committed. Even if it takes place in another time-frame, the work of a permanent international court is bound to have an impact on humanitarian action.

Justice done: a plus for victims and for the humanitarian ideal

As the saying goes, respect for the law starts with fear of the policeman. Matters are not very different in an armed conflict. While duly

acknowledging those who respect the rights of their enemies out of ethical or moral conviction, it must be admitted that most individuals are largely motivated by fear of the punishment they may incur.

The dialogue which the ICRC maintains with the warring parties is not based on any other assumption. In order to be effective, it must persuade the relevant authorities to repress any violations committed by their troops. The existence of an international court can only lend more weight to the humanitarian agencies' entreaties and strengthen their position in the field.

Furthermore, the safety of humanitarian workers has become a matter of constant concern in recent years. They are increasingly taken as targets, as shown by the many incidents in which staff of the ICRC, *Médecins sans frontières* and human rights organizations were killed in 1996 and 1997. Such crimes point up the limits of humanitarian dialogue, the borderline beyond which the power of conviction is no longer enough to deal with problems and only coercive action can hope to bring about an improvement in the situation and ensure greater respect for the law. The existence of an international court capable of punishing violations, even at a later date, should curb the use of force against those whose sole aim is to bring aid to victims.

An international court would also symbolize the determination of States to respect and ensure respect for the law in accordance with Article 1 common to the four Geneva Conventions. Until now, States alone were competent to take action in cases of failure to respect international humanitarian law. In delegating that competence to an independent court, they will be ceding a part of their autonomy for the sake of the victims and to uphold the credibility of international law. The establishment of such a court marks a watershed in the implementation of humanitarian law, because States will no longer be above justice.

Henceforth the field of international humanitarian law encompasses the three powers which Montesquieu identified in his *Spirit of Laws*, and which he said must be clearly separate from one another if institutions were to function properly. Legislative power lies with the international conferences which draft the laws; executive power devolves upon the signatory governments; and, finally, a separate judicial power is coming into being with the creation of the international court.

Coexistence of international courts with humanitarian action

If those accused of violating international humanitarian law are to be judged as objectively as possible, the court concerned needs witnesses. What could be more natural than to seek those witnesses among the staff of humanitarian organizations operating in the field, who are in direct contact with the victims and who have often already initiated a dialogue with the accused? Although such an approach seems both logical and desirable at first sight, it does raise problems for the smooth running of humanitarian operations.

The basic principles of humanitarian action and giving evidence before a court

The ambition of humanitarian action is to work among the victims so as to relieve their suffering. Going to a war zone, however, requires the agreement of the parties to the conflict. For example, it would be difficult to assist the displaced people in western Afghanistan without authorization from the Taliban who control that part of the country, and impossible to help the civilian population displaced in the Andean regions of Peru without gaining the trust of the army and the guerrilla movements fighting in the area. That is why the ICRC has always adopted a neutral and impartial approach which steers clear of political debate and is designed solely to alleviate suffering without taking sides. In addition, there is the ICRC's specific mandate as custodian of international humanitarian law, and its detention-related activities which oblige it to maintain a constant dialogue with all parties to the conflict. Indeed, gaining access to detainees is a prime example of an activity which would be impossible without the agreement of the detaining authorities.

If they are to be able to take action, therefore, the ICRC and other humanitarian organizations must establish a certain level of trust with all their contacts in the field. The security of their staff also depends on this. The ICRC has chosen confidential dialogue rather than public denunciation to achieve that aim.

A brief comparison with the medical world and its rule of professional secrecy may be drawn here. The doctor's job is to keep his individual patients healthy, but also to preserve public health. He must therefore enjoy the trust of his patients, so that they will not be afraid to approach him and confide their problems when necessary. Accordingly, the doctor must assure his patients that he will not reveal their secrets to anyone. Were he to break that rule, his patients would not come back, would no

longer receive treatment and would jeopardize not only their own health but that of their community. Take the example of tuberculosis. If a patient thought he had the disease but was not sure that his case would be treated discreetly, he would not dare to approach the health services. Not only would he be placing his own life in danger but he would also risk propagating the disease among his family and friends. Hence, medical secrecy is essential to establish a relationship of trust.

The same applies to humanitarian operations in war-torn countries. Humanitarian organizations can try to control the violence only if they are able to win the confidence of the "patients", that is, those who resort to violence. This is possible only if confidentiality is observed in their dealings. Since that is the case, it would be difficult for a humanitarian agency to appear as a witness in a trial aimed at bringing to justice those same perpetrators of violence.

That is why the ICRC asked the Presidents of the International Criminal Tribunals for the former Yugoslavia and Rwanda not to call upon its staff members to give evidence in criminal proceedings. This position would not, however, prevent the ICRC from providing an international court with all the public documents in its possession which might be useful in seeking the truth.

It may be argued that the need to protect the neutral, impartial and confidential role of humanitarian organizations is justifiable only during the conflict itself, and that the requirement would no longer exist if an international court were set up after the hostilities had ended. While that could be true for the country or countries in question, allowance must also be made for the fact that, in this era of instant information, the credibility of humanitarian organizations depends on the consistency of their approach throughout the world. Were any one of them to testify against the same individuals with whom it had negotiated access to victims, it would certainly be regarded with great suspicion by those it might subsequently have to approach in connection with some other operation.

The humanitarian organizations are thus in an uncomfortable position: on the one hand they want the international community to show more firmness in ensuring respect for international humanitarian law; but on the other they are obliged to keep a certain distance from international courts in order to preserve their ability to work in the field while a conflict is going on.

Such an attitude becomes understandable and can be accepted only if the action taken by the international community is considered as a whole

and moves in successive stages towards a single goal. Emphasis is placed on one priority or the other, depending on the time and the situation. During the fighting, when the judiciary can neither investigate nor prosecute, humanitarian action in the field seeks to limit the effects of violence. Once the worst is over, justice can proceed and, after the event, punish the guilty with a view to preventing the repetition of any such crimes, thereby eventually securing respect for humanitarian action by all parties to future conflicts.

The international community cannot place limits on the instruments at its disposal if it wants to ensure respect for the law and protect victims, so the different players involved — the international criminal court, the political world and humanitarian organizations — should get to know, understand and respect one another. They should each regard their own work as part of a whole rather than as the only solution to the problem.

When humanitarian action is paralysed — the dilemma

This argument relies on the assumption that humanitarian action genuinely benefits victims and can therefore afford to keep its distance from the machinery for punishing those guilty of violations. So what happens when it is rendered powerless, paralysed by the parties to the conflict, and when dialogue is leading nowhere? Is its reticence still justifiable in such cases?

The humanitarian organizations and the ICRC are often faced with that dilemma, and the answer is a complex one.

On the basis of Article 1 common to the 1949 Geneva Conventions, the ICRC must alert the international community whenever serious and repeated violations of international humanitarian law occur and it is unable to remedy the situation. That was the case in 1983 and 1984, during the Iran-Iraq war: the ICRC sent the States party to the Geneva Conventions a memorandum informing them that prisoners of war were being concealed from its visiting teams. Another example occurred in 1992 when the ICRC took a public stand on the treatment of Palestinian detainees in the Israeli-occupied territories. Before taking such action, however, the ICRC must carefully gauge all the consequences and ensure that there will be no negative repercussions on the victims, for its primary objective is to improve their situation, not to denounce offenders. Two factors must therefore be taken into account. On the one hand, such action must make it possible to resume talks with the authorities concerned when the dialogue has been broken off or become unproductive. On the other, it is essential to avoid the risk that the publicity given to public statements

might be misunderstood by other belligerents elsewhere in the world and might alter their perception of the ICRC's humanitarian action and its neutrality.

Even when it does take a public stance, the ICRC tries not to stir up controversy. Its statements are always sober and factual, with no value-judgements. It is up to the States which receive such information to draw their own conclusions and act accordingly.

This reserved approach becomes impossible to maintain when a court appearance is required, as arguments for the prosecution and the defence can hardly be confined to factual statements alone. So having ICRC delegates come to the witness stand might involve the institution in controversy which could tarnish its image of neutrality and, in the long term, undermine its credibility throughout the world.

Statutory role of the ICRC

In the ICRC's view, this issue cannot be considered only in terms of operational efficiency. Indeed, the ICRC occupies a special place among humanitarian organizations because the community of States has assigned it certain tasks relating to the application of international humanitarian law.

One of these tasks is to "take cognizance of any complaints based on alleged breaches of [international humanitarian] law".³ An international court responsible for punishing such breaches would obviously be the most appropriate body to assume that function.

Another of the ICRC's roles is to "work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof".⁴ There can be no doubt that the innovative jurisprudence emanating from an international criminal court would do much to disseminate and also to strengthen the law.

Finally, the ICRC is also required to "work for the faithful application of international humanitarian law",⁵ and is expressly named in the Conventions in connection with specific activities such as visiting prisoners

³ Statutes of the International Red Cross and Red Crescent Movement, Article 5, para. 2(c).

⁴ *Ibid.*, Article 5, para. 2(g).

⁵ *Ibid.*, Article 5, para. 2(c).

of war, undertaking relief actions and restoring family links through its Central Tracing Agency. The work of an international court responsible for punishing violations of international humanitarian law is bound to interfere with the ICRC's operational procedures in the area of victim protection. Indeed, in a trial, the confidential reports in which the ICRC informs the authorities of its findings during visits to places of detention or in connection with the conduct of hostilities might be used as evidence for the prosecution or the defence, and the very people to whom they were addressed might well hand them over to the judges for that purpose.

Towards stricter respect for international humanitarian law

In 1862 Henry Dunant ended his book *A Memory of Solferino* with a plea against the fatalism generated by uncertainty about the future:

“If the new and frightful weapons of destruction which are now at the disposal of the nations seem destined to abridge the duration of future wars, it appears likely (...) that future battles will only become more and more murderous. (...) And do not these considerations alone constitute more than adequate reason for taking precautions against surprise?”⁶

Unfortunately, those words are still all too relevant today. At the close of our century, wars have become even more deadly and the future more uncertain. Rejecting fatalism, the international community is seeking means of limiting suffering despite all odds. The means available are diverse but complementary, and they must include mutual understanding and respect.

Humanitarian action is designed to produce an immediate effect, either by taking direct measures to relieve suffering or, as is the case for the ICRC, by establishing a dialogue with the protagonists to convince them that they should change their behaviour and respect international law. These efforts are aimed primarily at the victims.

The judicial approach sets its sights on the long term. Punishing those who violate international humanitarian law upholds the credibility of the law, reminds the parties to conflict of their responsibilities and demon-

⁶Henry Dunant, *A Memory of Solferino*, ICRC, Geneva, 1986, p. 128.

strates the international community's determination to have the law applied. In this case, combatants are the prime target.

In an ideal world, respect for the law should be enough to protect individuals. As Henry Dunant pointed out over a century ago, however, our world is far from ideal and war is a particularly good time for abandoning illusions. In the thick of the fighting and in the prevailing climate of fear and hatred, men, women and children are subjected to atrocities which violate their fundamental rights. If they are to survive they need help, immediately and on the spot, irrespective of the possibility of punishing the culprits. That role can be fulfilled only by humanitarian action which is independent and neutral, and which is accepted by the very people committing the offences. For that to be the case, the warring parties must perceive the humanitarian agencies as being quite separate from any penal system; otherwise they will deny those agencies access to the victims. Moreover, combatants must be convinced that attacking humanitarian workers is a serious crime which will be prosecuted. It is around these two imperatives that the relationship between an international court and humanitarian players like the ICRC will have to be built.

A tremendous challenge for the International Criminal Tribunals: reconciling the requirements of international humanitarian law with those of fair trial

by Anne-Marie La Rosa

The two International Criminal Tribunals set up by the United Nations Security Council in 1993¹ and 1994² are in the process of demonstrating that international repression of serious violations of international humanitarian law is no longer a purely theoretical concept. A total of 21 persons charged with or suspected of committing such breaches have been transferred to the seat of the Arusha Tribunal, and two judgments sentencing the defendants to prison terms have been handed down by the Hague Tribunal. The two Tribunals are competent to hear cases against persons allegedly responsible for serious violations of humanitarian law, but in so doing they are also required, under their respective Statutes, to ensure that the internationally recognized rules relating to the rights of the accused are fully respected at all stages of the proceedings. Article 20 of the Statute of the Tribunal for Rwanda and Article 21 of that of the Tribunal for the former Yugoslavia, modelled on Article 14 of the International Covenant

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Original: French

¹ Resolution 827 (1993), 3217th meeting, 25 May 1993.

² Resolution 955 (1994), 3453rd meeting, 8 November 1994.

on Civil and Political Rights, enumerate in detail the rights that must be accorded to every accused person.³

Reconciliation of the requirements of international humanitarian law with those of fair trial cannot be based on past practice. The procedures adopted by the International Military Tribunals of Nuremberg and Tokyo and by the tribunals set up by the Occupying Powers after the Second World War are not very instructive. At that time, the only recognized principle of international criminal law was the vaguely defined principle of the right to a fair trial. In the German High Command case, the Tribunal in question ruled that:

“In the exercise of its sovereignty the State has a right to set up a Tribunal at any time it sees fit and confer jurisdiction on it to try violators of its criminal laws. The only obligation a sovereign State owes to the violator of one of its laws is to give him a fair trial in a forum where he may have counsel to represent him, where he may produce witnesses in his behalf and where he may speak in his own defence. Similarly, a defendant charged with a violation of International Law is in no sense done an injustice if he is accorded the same rights and privileges.”⁴

The rules of procedure adopted by the post-war military tribunals proved to be more flexible than those of national criminal courts. It was understood that procedural questions should at no time enable a guilty person to escape justice. In particular, evidence by declaration under oath (affidavit), which does not permit cross-examination and is generally inadmissible under common law, was widely used. In addition, the rules listed in the 1929 Geneva Convention relative to the Treatment of Prisoners of War⁵ were considered to be inapplicable to war criminals, even though they are the minimum generally recognized rules of justice.⁶

³ The text of Article 21 of the Statute of the International Criminal Tribunal for the former Yugoslavia is reproduced in the Annex hereto.

⁴ 1949 *Law Reports of Trials of War Criminals* (hereinafter *L.R.T.W.C.*), Vol. XII, pp. 62 and 63.

⁵ Geneva Convention of July 27, 1929, relative to the Treatment of Prisoners of War, in particular Arts 45-67.

⁶ “It is a recognised rule that a person accused of having committed war crimes is not entitled to the rights in connection with his trial laid down for the benefit of prisoners of war by the Geneva Prisoners of War Convention of 1929.” Trial of General Tomoyuki Yamashita, in *Trial of War Criminal Reports*, Vol. III, pp. 105 ff., and 1949 *L.R.T.W.C.*, Vol. IV, pp. 1 ff.; Trial of Robert Wagner, commentary in 1949 *L.R.T.W.C.*, Vol. III, at p. 50; Trial of Hans Albin Rauter, commentary in 1949 *L.R.T.W.C.*, Vol. XIV, pp. 114-118.

Moreover, the trials were held before the adoption of international instruments specifying more detailed rights for every accused person, whether under humanitarian law, with the Geneva Conventions and their Additional Protocols, or human rights law, with the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. And finally, at that time the right to a fair trial had not yet been made subject to monitoring by competent international bodies with either regional or universal jurisdiction.

The repression of serious violations of humanitarian law while respecting the basic rules that ensure fair trial, as defined and specified over the past 50 years, presents a considerable challenge for the International Criminal Tribunals. It is indeed essential to bear in mind the extreme gravity of the crimes in question. The rules guaranteeing fair trial were developed with a view to their national application to all kinds of offences, and are not necessarily adapted to repression at the international level. This article considers the possibility of reconciling the repression of serious violations of humanitarian law with full observance of the rights of the accused. Two questions are examined in this connection. The first relates to the evidence and to the scope of admissibility of the consistent pattern of conduct relevant to serious violations of humanitarian law, as provided for in Rule 93 of the Rules of Procedure and Evidence of the Criminal Tribunal for the former Yugoslavia.⁷ The second concerns the right to provisional release until the defendant is acquitted or found guilty. In each case, the article highlights the points of friction that arise between guaranteeing full respect for the rights of the accused and the requirements inherent in the prosecution of crimes under international law.

Evidence of a consistent pattern of conduct — Rule 93 of the Rules of Procedure and Evidence

Certain crimes falling within the competence of the International Criminal Tribunal for the former Yugoslavia require proof of a specific means of execution which extends in time and space, or that of a specific intent or design. The grave breach of the Geneva Conventions that consists in the extensive destruction and appropriation of property, not justified by

⁷ Rule 93 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda has the same wording. Unless otherwise indicated, this article refers to the provisions of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia and to the decisions handed down by this Tribunal.

military necessity and carried out unlawfully and wantonly, is one such example.⁸ Genocide also requires, in addition to evidence of a moral element inherent in the crimes concerned, proof of intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. Finally, some add crimes against humanity, provided that they have been committed on a large scale or in a systematic manner.

There is no denying the complexity of the evidence required to prove the perpetration of serious violations of international humanitarian law beyond all reasonable doubt. This may entail producing evidence of facts which are *a priori* unrelated to the questions at issue or are not directly connected with them. As a general rule, such evidence may be excluded on the grounds that it may unduly prolong the debates in court or may take the accused by surprise and cause him prejudice far in excess of their probative value. Yet Rule 93 of the Rules of Procedure and Evidence seems to sanction the admissibility of such evidence in the following terms:

Evidence of consistent pattern of conduct

- (A) Evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute may be admissible in the interests of justice.
- (B) Acts tending to show such a pattern of conduct shall be disclosed by the Prosecutor to the defence, pursuant to Rule 66.

This provision calls to mind the concept of “similar facts” under common law, except for the fact that it makes mention of “a consistent pattern of conduct relevant to serious violations of international humanitarian law”. Why should provision be made for the admissibility of such evidence when a Chamber may, under Rule 89 (C) of the Rules of Procedure and Evidence, admit any relevant evidence which it deems to have probative value? It may be presumed that the *raison d’être* of Rule 93 of the Rules of Procedure and Evidence is to forestall any discussion about the relevance and probative value of the evidence required to demonstrate the constituent elements of certain crimes falling within the competence of the Tribunal.⁹ The scope of this provision

⁸ Statute, Art. 2 (d).

⁹ In the first Annual Report of the Tribunal, it is specified with regard to the consistent pattern of conduct inherent to crimes against humanity that: “the Tribunal will need to look not only at the behaviour of individual defendants but also at the more general

should nevertheless be specified so as to ensure that the rights of the accused are fully respected.

Evidence of similar facts is an exception to the rule of common law providing for the inadmissibility of evidence put forth to prove the guilt of the accused on the sole grounds that he is the kind of person who could have committed the offence.¹⁰ Excluding this evidence of character is particularly warranted in the case of trial by jury, since it is liable to create an *a priori* attitude appreciably unfavourable to the accused. Since its probative value is outweighed by the requirements of fair trial, which presuppose full respect for the presumption of innocence, this type of evidence is generally not admissible. Nevertheless, evidence of similar facts is admissible to the extent that it is relevant to the matter in hand and that its probative value outweighs the prejudice caused to the person who may contest its admissibility. A rapid survey of Canadian jurisprudence, which refers to certain English decisions, shows that the highest judicial authorities of the State admit evidence of similar facts to prove intent to adopt,¹¹ or to determine the existence of, a consistent pattern of conduct¹² or of a plan or system, and to refute defence based on the good character of the accused or on an alibi. In addition, an action cited as a similar fact need not necessarily constitute an offence,¹³ and the different counts of the same indictment may serve as evidence of similar facts with respect to each of the allegations made.¹⁴

conduct of groups, or military or paramilitary units, and to establish that the mass crimes alleged to have been committed in the former Yugoslavia are not individual events but part of a wider systematic practice; hence the importance of providing for the admissibility of evidence relating to 'patterns of conduct' (Rule 93). Obviously, it will then be for the judges to determine what weight to give to such evidence in establishing the elements of the alleged offence. (...) This evidence may also prove of great significance whenever one has to establish whether one of the basic requirements of genocide, namely 'the intent to destroy, in whole or in part, a group', is present. Plainly, whenever the intent has not been expressly and specifically manifested, one of the means of ascertaining its existence may lie in investigating the consistent behaviour of groups or units, so as to determine whether that intent may be inferred from their 'pattern of conduct'." Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, *Yearbook of the International Criminal Tribunal for the Former Yugoslavia*, 1994, p. 101.

¹⁰ In this connection, see J. Sopinka, *The law of evidence in Canada*, Markham, Butterworths, 1992, pp. 431-522; J. Bellemare, L. Viau, *Droit de la preuve pénale*, Thémis, Montreal, 1991, pp. 109-151.

¹¹ *R. v. Robertson*, (1987) 1 *Supreme Court Reports* (hereinafter *S.C.R.*), p. 918.

¹² *R. v. Green*, (1988) 40 *Canadian Criminal Cases* (3d) 333 (Montreal Court of Appeal), confirmed (1988) 1 *S.C.R.*, p. 288.

¹³ *R. v. Robertson*, *op. cit.* (note 11).

¹⁴ *Sweitzer v. R.*, (1982) 1 *S.C.R.*, p. 949.

The admissibility of evidence seeking to determine similar facts nevertheless raises certain problems. If interpreted too liberally, this exception to the exclusion of character evidence runs the risk of introducing evidence which has negligible probative value but is liable to cause serious prejudice to the accused. Moreover, if this exception admits evidence of judicial antecedents, the accused runs the risk of being tried again for the same crime, in contravention of the principle *non bis in idem*. The Chambers of the International Criminal Tribunals, which are called upon to apply the above provision, must specify its scope and limit the admissible evidence to that which shows real similarity to the crime of which the defendant stands accused and is concomitant to it. Under Rule 89 (D) of the Rules of Procedure and Evidence, all evidence having the sole purpose of demonstrating the accused person's natural propensity to committing the crime in question and generally evidence, the probative value of which is substantially outweighed by the need to ensure a fair trial, must be excluded.

To what extent does reference to a consistent pattern of conduct relevant to serious violations of international humanitarian law modify the theory of similar facts? This leads us to question the nature of this consistent pattern of conduct. Is it that of the accused or of other individuals?¹⁵ In cases where evidence of a consistent pattern of conduct which is not that of the accused is admissible, Rule 93 of the Rules of Procedure and Evidence considerably widens the range of evidence admissible as similar facts; these are no longer connected to the conduct of the individual prosecuted, but rather to that of other persons who are not the subject of the indictment. Furthermore, must it be proved that the accused knew or was aware of the fact that the violation of humanitarian law with which he is charged falls within this more general context? If specific knowledge on the part of the accused is not required, proof of a general policy which translates into a consistent pattern of conduct would then be admitted, even if it has no connection with the accused. In such circumstances, it is only reasonable to wonder what kind of defence the accused could present in this regard. How could he refute the manifestations of a policy which is totally foreign to him or detach his crime from that extended context? Such an interpretation is liable to prejudice the rights of the accused, in contravention of the actual provisions of the Statute. An interpretation must therefore be devised whereby Rule 93 of the Rules of Procedure and

¹⁵ Nothing is specified in Rule 93 itself.

Evidence admits evidence of a consistent pattern of conduct which is linked to the accused, either because it is his own conduct that is concerned or because it involves a broader context of which he is aware or which he cannot ignore and which encompasses the crime with which he is charged. In such cases, it is for the Prosecution to establish and demonstrate this link. The necessary evidence must be transmitted to the Defence in advance, in accordance with Rule 93, para. (B), of the Rules of Procedure and Evidence.

Although no written decision has yet been handed down pursuant to Rule 93 of the Rules of Procedure and Evidence, the question of the admissibility of evidence seeking to establish a consistent pattern of conduct was dealt with incidentally in connection with the *Tadic* case,¹⁶ when the Trial Chamber examined the responsibility of the accused with respect to allegations of crimes against humanity. In this case, 10 of the 34 counts of the indictment related to such crimes, which consisted of acts of rape,¹⁷ murder, persecution and other inhumane acts. The Chamber found the accused guilty on all the counts alleging acts of persecution and other inhumane acts, but did not deem that those relating to murder had been proved beyond all reasonable doubt.

For the accused to be declared guilty of crimes against humanity, the Chamber considered that there had to be "some form of a governmental, organizational or group policy" and that "the perpetrator must know of the context within which his actions are taken".¹⁸ In other words, the act of the charge had to be deliberately directed against any civilian population. The existence of such a policy could nevertheless be presumed by reason of the systematic nature of the violations in question.¹⁹ With regard to the defendant's criminal intent, the Chamber took as a basis the majority opinion of the Canadian Supreme Court in the *Finta* case, its conclusion

¹⁶ *Prosecutor v. Tadic*, Opinion and Judgment, Case No. IT-94-I-T, pp. 17687-17338 (7 May 1997).

¹⁷ This count was dropped.

¹⁸ *Prosecutor v. Tadic*, *op. cit.* (note 16), p. 17439.

¹⁹ The elements of a predetermined plan or of an "administrative practice" have been examined by the judicial bodies of the Council of Europe with regard to Article 3 of the European Convention on Human Rights, which prohibits torture (see in particular *Ireland v. United Kingdom*, 18 January 1978, Series A, No. 25; *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, Decision of the Commission of 6 December 1983, *Decisions and Reports* 35, p. 143) and by the Inter-American Court of Human Rights (*Velasquez Rodriguez v. Honduras*, 29 July 1988, 1989 *International Legal Materials*, p. 294). Repetition of the acts and the tolerance of the authorities proved to be determining.

being that “the mental element required to be proven to constitute a crime against humanity is that the accused was aware of or wilfully blind to facts or circumstances which would bring his or her acts within the definition of a crime against humanity”.²⁰ Hence the mere evidence of a policy directed against a civilian population will not suffice: it must be shown that the accused himself is aware that his act was consistent with this policy, and that is indeed the evidence admitted by Rule 93 of the Rules of Procedure and Evidence.

In this connection, the Chamber summarized in the preliminary sections of the judgment the historical, geographical, administrative and military context in which the acts of which the defendant was accused were committed. It specified that it had referred solely to the evidence submitted by the parties to that end. It described in detail the pursuit of a policy of Greater Serbia and the consequences which that policy held for non-Serbs, particularly in terms of ethnic cleansing. It subsequently declared itself satisfied with the evidence presented to show that such a policy was prevalent in the region and at the time when the crimes were committed. It made sure that there was a link between that policy and the accused and that the latter was aware of the policy and even supported it. It regarded as probative the fact that the accused defended the cause of a Greater Serbia, had been involved in the nationalist policy and had become a political leader in Kozarac after ethnic cleansing had been completed in that town. The Chamber concluded that the accused had been aware of the broader context in which the crimes with which he was charged had been perpetrated.

Pre-trial detention — Rule 65 of the Rules of Procedure and Evidence

Detention of the accused during the period of investigation and trial is an institution generally recognized in penal systems. All the accused who appeared before the Nuremberg and Tokyo International Military Tribunals were kept in detention until their sentences were pronounced. Nevertheless, international instruments generally ascribe an exceptional character to pre-trial detention and recognize that, in view of the presumption of innocence, liberty should be the rule. With regard to international

²⁰ *R. v. Finta*, (1994) 1 S.C.R., p. 701. In this case, three judges entered a dissenting opinion in which they concluded that only the moral element included in the underlying offence was to be proved, without any need to establish a link between the accused and the pattern of conduct or general context of the offence with which the accused was charged.

humanitarian law, the 1929 Geneva Convention relative to the Treatment of Prisoners of War already stipulated that pre-trial detention of prisoners of war should be as short as possible.²¹ The Third Geneva Convention of 1949 relative to the Treatment of Prisoners of War²² restricts pre-trial detention exclusively to cases where the same measure is applicable to members of the armed forces of the Detaining Power, or if such confinement is essential in the interests of national security.²³

International human rights instruments, whether universal or regional, follow the same trend. The International Covenant on Civil and Political Rights provides that “[i]t shall not be the general rule that persons awaiting trial shall be detained in custody”,²⁴ while the European Convention on Human Rights recognizes that everyone has the right to liberty.²⁵ Pre-trial detention is regarded as a measure of last resort.²⁶ It should not be ordered unless it is authorized by law, unless there is reasonable suspicion that the persons concerned are implicated in the offences that have been notified and unless it may be feared that they will take flight, commit other serious offences or seriously obstruct the normal course of justice if they are left at liberty.²⁷

²¹ Art. 47, para. 2: “The judicial proceedings against a prisoner of war shall be conducted as quickly as circumstances will allow. The period during which prisoners shall be detained in custody shall be as short as possible.”

²² Geneva Convention of August 12, 1949, relative to the Treatment of Prisoners of War, in particular Arts 82-88 and 99-108.

²³ Art. 103, para. 1: “Judicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that the trial shall take place as soon as possible. A prisoner of war shall not be confined while awaiting trial unless a member of the armed forces of the Detaining Power would be so confined if he were accused of a similar offence, or if it is essential to do so in the interests of national security. In no circumstances shall this confinement exceed three months.”

²⁴ International Covenant on Civil and Political Rights, Art. 9, para. 3. See also Principle 36 of the Draft body of principles on the right to fair trial and a remedy, in *The right to a fair trial: Current recognition and measures necessary for its strengthening, Final report prepared by Mr Stanislav Chernichenko and Mr William Treat*, UN document E/CN.4/Sub.2/1994/24 (3 June 1994), publication of which the Commission on Human Rights recommended in its resolution 1995/10.

²⁵ European Convention on Human Rights, Art. 5, para. 1.

²⁶ United Nations Standard Minimum Rules for Non-custodial Measures, UN resolution A/45/110, 14 December 1990, para. 6.1. In this connection, see also Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN resolution A/43/173 (9 December 1988), Principle 39.

²⁷ Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990, *Report prepared by the Secretariat*, Chapter I, Section C, resolution 17, para. 2. The European Convention refers to “reasonable suspicion” that the person arrested has committed an offence and to the case where “it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so” (Art. 5, para. 1 (c)).

Despite this convergence of rules relating to pre-trial detention, the letter and spirit of the Statute and the Rules of Procedure and Evidence make detention the rule of law and liberty the rule of exception. The Rules of Procedure and Evidence expressly provide that the accused shall be detained,²⁸ and he may not be released except by order of a Trial Chamber.²⁹ This seeming contradiction between the international texts and the Rules of Procedure and Evidence is only apparent, since under the provisions of the Statute a person cannot be the subject of an official indictment unless such an indictment is confirmed by a judge of the Tribunal.³⁰ Now, such confirmation cannot take place unless there is sufficient evidence reasonably to maintain that a suspect has committed a crime. In other words, this relates to evidence which for the Prosecutor raises “a clear suspicion of the suspect being guilty of the crime”.³¹ This test is analogous to that of “reasonable suspicion that the accused has committed a crime” in respect of which the international instruments authorize pre-trial detention. In addition, the extreme gravity of the crimes of which the persons brought before the Tribunal are accused and the unique circumstances in which the Tribunal has to operate — absence of a police force and of territorial control — are such that the other conditions warranting pre-trial detention are fulfilled.³² It is nonetheless interesting to note that the International Law Commission, in its draft statute for an international criminal court, did not see fit to depart from the principle that liberty should be the rule, despite the gravity of the crimes falling within the competence of the future court.³³ The International Law Commission was nevertheless aware that “charges under the Statute are by definition brought only in the most serious cases, and it will usually be necessary to detain an accused who is not already in secure custody in a State”.³⁴

²⁸ Rule 64 of the Rules of Procedure and Evidence.

²⁹ Rule 65 (A) of the Rules of Procedure and Evidence.

³⁰ Statute, Art. 19.

³¹ *Prosecutor v. Mucic*, Case No. IT-96-21-T, Decision on motion for provisional release filed by the accused Zejnil Delalic, pp. 1523-1504 (1 October 1996), at p. 1510.

³² In particular, risk of flight or destruction of evidence.

³³ Draft statute of an international criminal court, *Report of the International Law Commission on the work of its forty-sixth session* (1994), General Assembly Official Records, Suppl. No. 10 (A/49/10), paras 23-209.

³⁴ *Ibid.*, comments on Art. 29.

With regard to the Rules of Procedure and Evidence, provisional release may be ordered only in “exceptional circumstances” and only if the Trial Chamber is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.³⁵ In addition, the host country must be heard.³⁶ These criteria constitute a whole in that they are cumulative and their proof is incumbent on the Defence. The Chambers of the Tribunal have interpreted these conditions strictly and, except for one case in which the accused, suffering from an incurable disease in its terminal stages, was provisionally released,³⁷ all requests filed in this connection have been rejected.³⁸

What are the “exceptional circumstances” mentioned here? Neither the Statute nor the Rules of Procedure and Evidence provide any indications in this regard, but it would be reasonable to assume that these are extremely rare cases in which, apart from proof that the accused will appear and does not constitute a danger to public safety, an additional element is to be taken into consideration. The inability of the Detention Unit to provide the necessary facilities for an accused person suffering from a specific form of physical disability might be a case in point.

The practice of the Chambers shows a different approach, however, as they have not identified situations which might present exceptional features, but have rather specified the criteria that must be taken into account to determine such situations. They have settled on three criteria, namely reasonable grounds for suspecting that the applicant for provisional release has committed the crime or crimes with which he is charged, his presumed role in the perpetration of the crimes and the length of time

³⁵ The Rules further provide that the Chamber may impose such conditions upon the provisional release of the accused as it may determine appropriate, including the execution of a bail bond (Rule 65 (C)) and, if necessary, may issue an international warrant of arrest to secure the presence of an accused who has been provisionally released (Rule 65 (D)).

³⁶ Rule 65 (B) of the Rules of Procedure and Evidence.

³⁷ *Prosecutor v. Djukic*, Case No. IT-96-20-T, Decision rejecting the application to withdraw the indictment and order for provisional release, pp. 5/220bis-1/220bis (24 April 1996).

³⁸ *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Decision rejecting a request for provisional release (25 April 1996); *Blaskic*, Case No. IT-95-14-T, Order denying a motion for provisional release, pp. 8/3047bis-1/3047bis (24 December 1996); *Prosecutor v. Mucic*, Case No. IT-96-21-T, Decision on motion for provisional release filed by the accused Zejnil Delalic, *loc. cit.* (note 31); *Mucic*, Case No. IT-96-21-T, Decision on motion for provisional release filed by the accused Hazim Delic, pp. 1689-1676 (28 October 1996); *Mucic*, Case No. IT-96-21-T, Decision on motion for provisional release filed by the accused Landzo (16 January 1997).

spent in detention. They are greatly influenced by the decisions handed down by the judicial bodies of the Council of Europe, which, it will be recalled, work on the basis of a treaty under which liberty is the rule. The reasoning followed by the Chambers calls for several observations.

As explained earlier, the reasonable grounds for suspecting that the applicant for provisional release has committed the crime or crimes with which he is charged are analogous to those justifying confirmation of the indictment. If these are lacking or are insufficient, the accused may request not only his provisional release, but also rejection of the indictment on the grounds of procedural defect or manifest lack of foundation. It is not unreasonable to believe, however, that circumstances may allow for provisional release, especially when the duration of pre-trial detention is no longer reasonable, without the validity of the indictment itself being called into question. Nonetheless, reference to "reasonable suspicion" at the stage of an application for provisional release excludes any such possibility.

A similar problem arises with regard to the presumed role of the accused in the alleged crime or crimes. The Chambers consider that the difficulties of determining the right to provisional release are directly connected with the significance of the role played by the accused.³⁹ Now, the Tribunal's jurisdiction covers only serious violations of international humanitarian law involving the criminal responsibility of the authors, by reason of their direct participation in the perpetration of such breaches or by reason of their position of authority. In either case, the presumed role of the accused is necessarily important.

Finally, it is surprising that the Chambers refer to the duration of pre-trial detention in determining whether provisional release is warranted by exceptional circumstances. The right to liberty during investigation and trial and the reasonable duration of pre-trial detention are two separate questions. The European Convention on Human Rights provides in particular that any person detained during his trial has the "right to be tried within a reasonable time or to be released during the proceedings".⁴⁰ The pre-trial detention of an accused person may be contested in all cases where it exceeds a reasonable period. According to the permanent jurisprudence of the European Court of Human Rights, provisional release

³⁹ *Prosecutor v. Mucic*, Case No. IT-96-21-T, Decision on motion for provisional release filed by the accused Zejnir Delalic, *loc. cit.* (note 31), at p. 1509.

⁴⁰ European Convention on Human Rights, Art. 5, para. 3.

must be granted as soon as maintenance in detention is no longer reasonable.⁴¹ In the context of the International Criminal Tribunal, it is essential to preserve the right for an indicted detainee to contest the duration of his custody as unreasonable. Indeed, any accused person must be presumed innocent until the sentence is pronounced, and the main purpose of monitoring the duration of pre-trial confinement is to order provisional release as soon as maintenance in detention ceases to be necessary.⁴² With regard to the actual duration of pre-trial detention, no provision of the Statute or the Rules of Procedure and Evidence stipulates a specific time limit beyond which provisional release becomes a right. The Chambers concluded that the period upon the expiry of which detention ceases to be lawful depends on the individual circumstances of each case, but nevertheless observed that detention cannot continue beyond a reasonable period.

Concluding remarks

The inherent difficulties of reconciling the requirements of international humanitarian law with those of fair trial have emerged from the judicial practice of the two International Criminal Tribunals themselves. The problem was long ignored because of the absence of an international criminal court, and discussions on crimes under international law, particularly in terms of establishing their constituent elements, have until very recently been the perquisite of experts and have been conducted at the level of theoretical debate. On the other hand, the parameters of fair judicial procedure have been the subject of many international instruments since the Second World War and have been monitored by competent bodies set up at the international level. Nevertheless, these developments generally envision application by national courts to all kinds of offences and fail to take account of the specific features of international repression of serious violations of humanitarian law.

This article has sought to identify certain points of convergence between international humanitarian law and human rights law. Two questions have been dealt with. One is procedural and concerns the admissi-

⁴¹ *Neumeister v. Austria*, 27 June 1968, Series A, No. 8. The Committee on Human Rights considers that maintenance of pre-trial detention should be not only lawful but also reasonable in all respects (No. 305/1988, *Van Alphen v. The Netherlands*, Decision of 23 July 1990, UN doc. A/45/40, Vol. II).

⁴² *Neumeister v. Austria*, *ibid.*

bility of evidence of a consistent pattern of conduct relevant to serious violations of humanitarian law. At first sight, the fact that the admissibility of such evidence is expressly provided for in the Rules of Procedure and Evidence may seem surprising, since exclusion of this type of evidence might be justified by the fact that its probative value is likely to be greatly outweighed by the prejudice caused to the accused. Evidence of a consistent pattern of conduct is nevertheless an integral part of the constituent elements of certain crimes falling within the competence of the International Criminal Tribunals. Evidence aimed at establishing the existence of a consistent pattern of conduct must be communicated to the accused, so that he can fully prepare his defence. In addition, such evidence must of necessity be linked to the accused, either by reason of his own conduct or by reason of a broader context of serious violations of which he is aware or which he cannot ignore and which encompasses the crime with which he is charged.

The other question dealt with concerns the right to provisional release during investigation and trial. In this connection, the Rules of Procedure and Evidence of the International Criminal Tribunals run counter to the international rules on this matter, in that they make pre-trial detention the rule and provisional release the exception. This contradiction is only apparent, however, since the conditions under which the Tribunals operate are in fact the circumstances that authorize pre-trial detention under the international rules in question. It should be noted, however, that the International Law Commission avoided this contradiction in its draft statute for an international criminal court, even though the nature of the crimes falling within the competence of the future court is similar to that of the crimes which the two International Criminal Tribunals have the power to prosecute.

A discussion of the criteria adopted by the Chambers to define the "exceptional circumstances" warranting provisional release showed that the Chambers were greatly influenced by the decisions handed down by the judicial bodies of the Council of Europe, which work on the basis of a treaty under which provisional release is the rule. A consequence of the restrictive interpretation of the Chambers is that provisional release can be ordered only in cases where the accused may also seek rejection of the indictment, on the grounds that it does not meet or no longer meets the conditions which authorized its confirmation by a judge of the Tribunal. The fact that an accused person would be unlikely to be granted provisional release should not be assimilated to a negation of this right. Hence it is suggested that the Chambers of the International Criminal Tribunals should specify the "exceptional circumstances" warranting provisional

release, in the light of the Tribunals' respective Statutes and Rules of Procedure and Evidence.

The thorny question of the protection of witnesses could have been dealt with in the same way. Effective repression of serious violations of humanitarian law depends on the evidence of eye-witnesses, who may, however, hesitate to appear before an international court for fear of reprisals against themselves or against those close to them. How can the International Criminal Tribunals guarantee them appropriate protection, while ensuring that the measures ordered do not detract from full respect for the rights of the accused?

The International Criminal Tribunals are in the vanguard of international repression of serious violations of humanitarian law, and their activities may serve as a basis for the work of the future permanent court. The credibility of such international action will nevertheless depend on decisions made to determine the guilt or innocence of accused persons, while ensuring that all the judicial guarantees designed to secure respect for the individual are provided. Despite all the indignation aroused by the crimes that the International Criminal Tribunals are called upon to prosecute, the accused must be accorded the right to a fair trial. Effective repression of serious violations of international humanitarian law and respect for human rights are complementary and indispensable to each other, since they both contribute to upholding the rule of law.

**Statute of the International Criminal Tribunal
for the former Yugoslavia**

Article 21 — Rights of the accused

1. All persons shall be equal before the International Tribunal.
2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to Article 22 of the Statute.
3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.
4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
 - (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - (c) to be tried without undue delay;
 - (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
 - (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;
 - (g) not to be compelled to testify against himself or to confess guilt.

Jurisdiction of the ad hoc Tribunals for the former Yugoslavia and Rwanda over crimes against humanity and genocide

by **Marie-Claude Roberge**

The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were established on 11 February 1993 and 8 November 1994 respectively by the Security Council to prosecute persons responsible for flagrant violations of international humanitarian law. The aim of the Security Council was to put an end to such violations and to contribute to the restoration and maintenance of peace, and the establishment of the ad hoc tribunals undoubtedly represents a major step in that direction. Moreover, it sends a clear signal to the perpetrators and to the victims that such conduct will not be tolerated.

The ICTY has jurisdiction over the following crimes: 1. grave breaches of the Geneva Conventions of 1949; 2. violations of the laws or customs of war; 3. genocide; and 4. crimes against humanity. The ICTR has jurisdiction over 1. genocide; 2. crimes against humanity; and 3. violations of Article 3 common to the 1949 Geneva Conventions and of Additional Protocol II. This paper will focus on two of these categories of crime, namely genocide and crimes against humanity. The aim is to provide a better understanding of such crimes and to pinpoint some dif-

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faculties they raise in criminal proceedings.¹ The first part will emphasize the inconsistent development of the definition of crimes against humanity. The second part will focus on the exact meaning of the crime of genocide when breaking the definition down into its component parts.

Crimes against humanity

When establishing the Yugoslav Tribunal, the view expressed by the Secretary General was that “the application of the principle *nullem crimen sine lege* required that the international tribunal apply rules of international humanitarian law which are beyond any doubt part of customary law.”² Therefore, although the ICTY has jurisdiction to prosecute for crimes against humanity, which are generally recognized as being covered by customary international law, the question whether the definition adopted in the Statute of the ICTY — and in that of the Rwanda Tribunal (ICTR) — reflects customary international law.

Unlike grave breaches of the 1949 Geneva Conventions or genocide, crimes against humanity have not been defined in a treaty, and throughout the relatively short history of the use of the term “crimes against humanity”, the definition has developed inconsistently. It is therefore difficult to substantiate any claim that the definition reflects customary international law. This will be illustrated by looking at the development of the concept, with particular emphasis on the Nuremberg Trials, Control Council Law No. 10 (CCL), the International Law Commission’s attempts at codification, national decisions and the Statutes of the ICTR and ICTY.

Development of the definition of crimes against humanity in international law

Concept of crimes against humanity before World War II

The term “crimes against humanity” and cognate expressions received little attention prior to World War II. The 1868 *St. Petersburg Declaration*

¹ This article in no way claims to cover all aspects of these crimes or the decisions rendered on them. Only examples have been given in order to illustrate the difficulties that might be encountered in the prosecution for genocide and crimes against humanity.

² Report of the Secretary General pursuant to paragraph 2 of Security Council Resolution 808 (1993), S/25704, para. 34. A more extensive approach to the choice of applicable law was, however, taken by the Security Council with regard to the ICTR. The ICTR included within its subject-matter jurisdiction international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime (see Report of the Secretary General pursuant to paragraph 5 of Security Council Resolution 955 (1994), S/1995/134).

limited the use in times of war of certain explosive or incendiary projectiles, since they were declared to be contrary to the laws of humanity. In 1907, the well-known *Martens clause* provided as follows: “until a more complete code of the laws of war has been issued, (...) the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages among civilized peoples, from the laws of humanity, and the dictates of the public conscience.”³

The expression “crimes against humanity” was used in the *1915 Declaration by the governments of France, Great Britain and Russia* denouncing the massacre of Armenians taking place in Turkey: “crimes against humanity and civilisation for which the members of the Turkish Government will be held responsible together with the agents implicated in the massacres.”⁴ Moreover, in the *1919 Report of the Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties for Violations of the Laws and Customs of War*,⁵ the majority of the members concluded that the German Empire and its Allies carried out the war “by barbarous or illegitimate methods in violation of the established laws and customs of war and the elementary laws of humanity” and “all persons belonging to enemy countries ... who have been guilty of offences against the laws and customs of war or the laws of humanity are liable for criminal prosecution.”⁶

Concept of crimes against humanity following World War II

The most important developments regarding the concept of crimes against humanity have taken place since World War II. A number of declarations were made during the war by several Allied governments expressing the desire to investigate, try and punish not only war criminals in the narrow sense, i.e. perpetrators of violations of the laws and customs of war on Allied territory or against Allied citizens, but also those responsible for the atrocities committed on Axis territory against nationals of non-Allied countries.⁷

³ Preamble, Hague Convention No. IV respecting the Laws and Customs of War on Land, 1907.

⁴ Cited in E. Schwelb, “Crimes against humanity”, *British Year Book of International Law*, vol. 23, no. 8, 1949, p. 181.

⁵ The Commission was established to inquire into the responsibilities of the German Empire and its Allies under international law for acts committed during World War I.

⁶ However, as a result of certain objections, no mention of the laws of humanity was made in the Peace Treaties of Versailles, St-Germain-en-Laye, Trianon and Neuilly-sur-Seine; only acts committed in violation of the laws and customs of war were referred to.

⁷ E. Schwelb, *op. cit.* (note 4), p. 183.

On 8 August 1945, the four Allied Powers (France, Great Britain, the USSR and the United States) concluded the London Agreement. Annexed to it was the Charter of the International Military Tribunal for the prosecution and punishment of the major war criminals of the European Axis, Article 6 of which provided that the Tribunal had the power

“... to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organisations, committed any of the following crimes:

(...)

b) *War Crimes*: namely, violations of the laws and customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

c) *Crimes against humanity*: namely, murder, extermination, enslavement, deportation or other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”

As a result, convictions were pronounced by the Nuremberg Tribunal on charges of crimes against humanity. Nonetheless the concept of crimes against humanity remained vague, often overlapping with that of war crimes. The former was used as an accessory crime and almost exclusively to protect inhabitants of a foreign country from the authorities of the occupying Power. The Tribunal interpreted Article 6(c) in such a way that these crimes fell under the definition of crimes against humanity only when committed in execution of, or in connection with, a crime against peace or a war crime.⁸ This does not mean that any crime committed before 1939 could not come under the category of crimes against humanity, but rather that a link (*causal nexus*) had to be found between one of

⁸ Soon after the signature of the London Charter, an agreement was concluded by the four Governments in Berlin to clarify the text of Article 6(c) and resolve the discrepancies found between the equally authentic Russian, English and French texts. Accordingly, alterations were made to the two former texts, to clarify the intention of these Governments to the effect that the meaning of crimes against humanity in the Charter was limited to such crimes committed in connection with any crimes within the jurisdiction of the Tribunal.

the acts enumerated in Article 6(c) and the war. Thus, the Tribunal considered not only the nationality of the victims and the country where the crimes were perpetrated, but also the connection with crimes against peace or traditional war crimes, to be essential elements.

Control Council Law No. 10

Control Council Law No. 10 (CCL) was enacted on 10 December 1945 by the acting legislative body for all Germany (the Allied Control Council for Germany) consisting of the commanders of the four Zones.⁹ The Law was created for the punishment of persons guilty of war crimes, crimes against peace and crimes against humanity. Each Zone commander was responsible for its implementation. Although the London Charter was made an integral part of the CCL, the definition of crimes against humanity is different from that found in Article 6. Under Article II(c) of the CCL, crimes against humanity are defined in the following terms:

“atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds, whether or not in violation of the domestic laws of the country where perpetrated.”

The differences from Article 6(c) of the London Charter are noticeable: (1) the expression “atrocities and offences, including but not limited to”: under the CCL the list of atrocities and offences is inclusive rather than exclusive as it was under Article 6(c); (2) the addition to the list of offences and atrocities of “imprisonment,” “torture” and “rape”;¹⁰ (3) the removal of the necessary connection between the specific crimes listed in Article II(c) and crimes against peace and war crimes; and (4) the CCL does not include the words “before or during the war”.

Accordingly, in interpreting the CCL, the Tribunals were not restricted to the narrow interpretation which evolved from the jurisprudence of the Nuremberg proceedings. For example, in the *Einsatzgruppen* case the Tribunal specifically declared that it was no longer limited by the *nexus*

⁹ No further trials were to be conducted by the International Military Tribunal and the task of prosecuting and punishing the remaining suspected war criminals was left to each occupying power. Howard S. Levie, *Terrorism in war: The law of war crimes*, Oceana Publications, New York, 1993, p. 71.

¹⁰ However, these differences could arguably have been absorbed by the expression “or other inhumane acts” in the Charter.

requirement with, or link between, crimes against peace and war crimes, neither was it restricted by the nationality of the victim or of the accused, nor by the location where the crimes were committed.¹¹

In the British Zone of Control in Germany, the German regular courts were given jurisdiction over crimes against humanity committed by persons of German nationality against persons of German nationality or stateless persons. In the French Zone of Control, crimes against humanity were defined as “crimes committed against any civilian population of whatever nationality, including persecutions on political, racial or religious grounds.”

More comprehensive than Article 6, the CCL is of a different character than the Charter. The CCL is primarily a national instrument, with an internal scope. Thus, the binding nature of the definition and interpretation of crimes against humanity of the CCL is more limited.¹² Nevertheless, it certainly contributed to the subsequent expansion of the concept of crimes against humanity.

Important national decisions

*a) Eichmann case*¹³

This case was the first attempt by a non-World War II-belligerent State to exercise its universal jurisdiction to punish perpetrators of war crimes and crimes against humanity.

¹¹ *United States v. Ohlendorf et al.*, Case No. 9, IV CCL Trials (1947), p. 49. Same decision in *United States v. Altstoelter et al.* (Justice Case), Case No. 3, III CCL Trials (1947), p. 974. However, such an interpretation was not unanimously applied; see findings in *United States v. von Weizsaecker et al.* (Ministries Case), Case No. 11, XIII CCL Trials (1948), p. 112, and in *United States v. Flick et al.* (Flick Case), Case No. 5, VI CCL Trials (1947), p. 1213.

¹² The legal status of the CCL, whether considered international, national, or even hybrid law, has been discussed by a number of authors as well as in the *Justice Case*. Bassiouni clearly expresses this ambiguity in the following terms: “The inconsistency is obvious, since it [the CCL] was purported to be a national law applicable only territorially but its source deriving from international law, and its formulation and enactment was by the victorious Allies acting pursuant to their supreme authority over Germany by virtue of that country’s unconditional surrender.” C. Bassiouni, *Crimes against humanity in international criminal law*, Martinus Nijhoff Publishers, Dordrecht, 1992, p. 36. See also Schwelb, *loc. cit.* (note 7), p. 218.

¹³ District Court of Jerusalem, *Attorney General of the Government of Israel v. Eichmann*, in *Israel Law Review*, vol. 36, no. 5, 1961. For a more complete discussion of the Eichmann case, see Baade, “The Eichmann trial: Some legal aspects”, *Duke Law Journal*, 1961, p. 400; Fawcett, “The Eichmann Case”, *British Year Book of International Law*, vol. 38, 1962, p. 181; Schwarzenberger, “The Eichmann judgement”, *Current Legal Problems*, vol. 15, 1962, p. 248.

Eichmann was charged under Israel's 1951 Nazi and Nazi Collaborators (Punishment) Law for the following offences: (1) Crimes against the Jewish people; (2) Crimes against humanity; (3) War crimes; and (4) Membership of hostile organizations. Crimes against humanity were punishable if "done during the period of the Nazi regime, in an enemy territory" and were defined as "any of the following acts: murder, ill-treatment, or the deportation to forced labour or for any other purpose, of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war or persons on the seas; killing of hostages; plunder of public or private property; wanton destruction of cities, towns or villages; and devastation not justified by military necessity."

Thus, the definition under Israeli law was also different from that of the Nuremberg Charter: no *nexus* was required between the commission of a crime against humanity and any of the other crimes (war crimes or crimes against peace). The definition only required the former to have been committed during the Nazi regime.

b) French trial of Klaus Barbie

In the case of Klaus Barbie, the German head of the Gestapo in Lyon, the French Court of Cassation ruled that crimes against humanity were imprescriptible and could be prosecuted in France "whatever the date and place of their commission":

"Whereas, what constitutes crimes imprescriptible against humanity, within the sense of Article 6(c) of the Charter of the International Military Tribunal of Nuremberg annexed to the London Accord of August 8, 1945 — even though they could also be characterised as war crimes according to Article 6(b) of the same text — are the inhumane acts and persecutions which, in the name of a State practising a hegemonic political ideology, have been committed in a systematic fashion, not only against persons because they belong to a racial or religious group, but also against the adversaries of this [State] policy, whatever the form of their opposition."¹⁴

The Court of Cassation adds here a new requirement for crimes against humanity: the perpetrator must carry out his crime on behalf of the "State

¹⁴ Judgement of 20 December 1985, published in *Journal de droit international*, 1986, pp. 129-142, cited in L.S. Wexler, "The interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and back again", *Colombia Journal of International Law*, vol. 32, 1994, p. 342.

practising a hegemonic political ideology” and “in execution of a common plan”. Any group or State not practising this hegemonic policy would therefore not be included in the definition.

c) *Demjanjuk v. Petrovski*

The case of *Demjanjuk v. Petrovski*¹⁵ is interesting not so much for its contribution to the definition of crimes against humanity,¹⁶ but rather for the recognition that crimes against humanity are offences for which there is universal jurisdiction. The US Circuit Court of Appeals ruled that, based on the right to exercise universal jurisdiction over offences against the law of nations and against humanity, the United States could extradite an alleged Nazi concentration camp guard to Israel or any other nation. The court recognized that the acts committed by Nazis and Nazi collaborators are “crimes universally recognised and condemned by the community of nations” and that these “crimes are offences against the law of nations and against humanity and the prosecuting nation is acting for all nations.” The Court thereby recognized the principle of universality for crimes against humanity.

The work of the International Law Commission

In 1947, the International Law Commission (ILC) was given two tasks by the United Nations General Assembly: (a) to formulate the principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgement of the Tribunal; and (b) to prepare a Code of offences against peace and security of mankind. The ILC worked on the Draft Code up to 1996, although it had to suspend its work for many years owing to the problem of defining aggression. Accordingly, at its forty-eighth session (1996) it adopted the text of, and commentaries to, draft articles 1 to 20. As stated in its report, the Draft Code was adopted with a view to reaching consensus. Thus, the Commission has considerably reduced the scope of the last version of the Draft Code, in an effort to obtain the support

¹⁵ *Demjanjuk v. Petrovsky*, 776 F. 2d 571 (6th Circ. 1985), *cert. denied*, 475 U.S. 1016 (1986).

¹⁶ The Court of Appeals addressed the definition of crimes against humanity only as defined in the 1950 Israeli statute, the Nazis and Nazi Collaborators (Punishment) Act. This was done in order to satisfy the requirement of double criminality. The Court concluded that although the crime was not described in the same way in both countries — since in the US the act of unlawfully killing one or more persons with the requisite malice is punishable as murder, not as a crime against humanity or mass murder —, it was enough that the particular act for which extradition was sought be criminal in both.

of States. The definition here is noticeably different from the above definitions. Crimes against humanity are defined in the following terms:

“A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group :

a) murder; b) extermination; c) torture; d) enslavement; e) persecutions on political, racial, religious or ethnic grounds; f) institutionalised discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population; g) arbitrary deportation or forcible transfer of population; h) arbitrary imprisonment; i) forced disappearance of persons; j) rape, enforced prostitution and other forms or sexual abuse; k) other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm.”

The list of prohibited acts is more exhaustive than in other definitions we have looked at so far. In addition, we find the requirement that the acts be instigated or directed by a government or by any organization or group.

ICTY and ICTR's Statutes on crimes against humanity

Discrepancies in the definition of crimes against humanity can also be found between the Statutes of the Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR). Article 5 of the ICTY Statute provides as follows:

“The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (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.”

The ICTR Statute, on the other hand, provides the same list of crimes although the threshold is different. Whereas the ICTR Statute — unlike the ICTY Statute — does not require the crimes to be committed in an armed conflict, each of the crimes listed in the ICTR Statute must be committed “as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.”

The interpretation of the ICTY Statute by the ICTY Appeals Chamber is, however, revealing. In the Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (*Tadic case*), the Appeals Chamber confirmed the findings of the Trial Chamber, and considered that by requiring proof of an armed conflict, the Statute had narrowed the customary concept of crimes against humanity.¹⁷ Hence, it stated that since the judgement at Nuremberg, the concept of crimes against humanity needed no longer to establish a link with crimes against peace or war crimes.

In the light of the above definitions of crimes against humanity as developed in the Nuremberg Charter and Judgement, the CCL, subsequent attempts at codification by the ILC, key national decisions on crimes against humanity and the Statutes of the Tribunals for Rwanda and the former Yugoslavia, it is obvious that there is not yet a clear, substantive and uniform definition of crimes against humanity. There is undoubtedly a consensus that crimes against humanity are crimes under international law, recognized under the general principles of law, giving rise to universal jurisdiction. Yet the exact parameters of such crimes remain unclear.

Genocide

Unlike crimes against humanity, genocide has been codified and its definition is not generally subject to debate. The Statutes of the ad hoc Tribunals for the former Yugoslavia and for Rwanda adopted verbatim the definition of genocide found in Article 2 of the 1948 Convention on the prevention and punishment of the crime of genocide:

“Genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group to another group.

¹⁷ Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-AR72, 2 October 1995, para. 141.

The following acts shall be punishable:

- (a) genocide;
- (b) conspiracy to commit genocide;
- (c) direct and public incitement to commit genocide;
- (d) attempt to commit genocide;
- (e) complicity in genocide.”

Historical background

The Genocide Convention was among the first conventions of the United Nations to address humanitarian issues. It was adopted in 1948 in response to the Nazi atrocities committed during World War II and following General Assembly Resolution 180 (II) of 21 December 1947, in which the UN recognized that “genocide is an international crime, which entails the national and international responsibility of individual persons and states.” Under Article 1 “the Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish.”

The International Court of Justice (ICJ) noted in the *Reservations to the Convention on Genocide Case*:

“The origins of the Convention show that it was the intention of the United Nations to condemn and punish Genocide as ‘a crime under international law’ ... involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96(I) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the cooperation required ‘in order to liberate mankind from such an odious scourge’ (Preamble to the Convention).”¹⁸

¹⁸ *Reservations to the Convention on Genocide Case (Advisory opinion)*, ICJ Reports, vol. 15, 1951, p. 23.

In the *Barcelona Traction Case* (second phase), the ICJ recognized the outlawing of acts of genocide as obligations *erga omnes* for which, due to the importance of the rights involved, all States can be held to have legal interest in their protection.¹⁹

Difficulties in prosecuting for genocide

When breaking down the definition of genocide, three essential elements are required: (1) an identifiable national, ethnical, racial or religious group; (2) the intent to destroy such a group in whole or in part (*mens rea*); and (3) the commission of any of the listed acts in conjunction with the identifiable group (*actus reus*).

The first requirement implies that acts of genocide can only be committed against the listed types of groups, i.e. an identifiable national, ethnical, racial or religious group. The intent to destroy, for example, a political or social group would therefore not fall under the definition of genocide. Political and cultural groups were excluded from the original General Assembly draft of the Convention because of strong opposition to their inclusion.

The second element of the definition of genocide certainly represents a challenge for the prosecutor, who will be obliged to establish the requisite state of mind (*mens rea*) of the accused, i.e. the specific criminal intent to destroy one of the enumerated groups. The ILC, in commenting on its draft Code of crimes against the Peace and Security of Mankind, stated in this regard:

“... a general intent to commit one of the enumerated acts combined with a general awareness of the probable consequences of such an act with respect to the immediate victim or victims is not sufficient for the crime of genocide. The definition of this crime requires a specific intent with respect to the overall consequences of the prohibited acts.”²⁰

Therefore the killing of one individual with such intent is genocide, but the killing of a thousand without the intent would only be homicide.²¹

¹⁹ *Barcelona Traction Case (Belgium v. Spain)*, ICJ Reports, vol. 3, 1970, paras. 33 and 34.

²⁰ 1996 ILC Report, UN doc. A/51/10, p. 88.

²¹ “...thus, one has to ask whether it is logical to have a legal scheme whereby intentional killing of a single person can be genocide and the killing of millions of persons without intent to destroy the protected group in whole or in part is not an international crime? Yet, that is the present situation.” C. Bassiouni, *loc. cit.* (note 12), p. 473.

The former type was, however, distinguished from the latter by the General Assembly in 1948 when it drafted the Convention: genocide is the “denial of the right of existence of entire human groups,” homicide is the “denial of the right to live of individual human beings.” The ultimate target is the group itself. Hence, “the *actus reus* [prohibited acts] may be restricted to one human being, but the *mens rea* or mental element must be directed against the life of the group.”²² In other words, “genocide occurs when the intent is to eradicate the individuals for no other reason than that they are a member of the specified group.”²³

Some light as to the specific intent required may also be found in the *Karadzic and Mladic case*, in which the ICTY suggested that the specific intent may also be inferred from the circumstances:

“Genocide requires that acts be perpetrated against a group with an aggravated criminal intent, namely that of destroying the group in whole or in part. The degree to which the group was destroyed in whole or in part is not necessary to conclude that genocide has occurred. That one of the acts enumerated in the definition was perpetrated with a specific intent suffices. (...)”

The intent which is peculiar to the crime of genocide need not be clearly expressed. (...) The intent may be inferred from a certain number of facts such as the general political doctrine which gave rise to the acts possibly covered by the definition in Article 4 [of the Statute], or the repetition of destructive and discriminatory acts. The intent may also be inferred from the perpetration of acts which violate, or which the perpetrators themselves consider to violate, the very foundation of the group — acts which are not in themselves covered in the list in Article 4(2) which are committed as part of the same pattern of conduct.”²⁴

The third element of the definition of genocide requires that the crime be among the listed acts. The exact scope of some of them remains however vague, i.e. “causing serious bodily or mental harm to members

²² C. Bassiouni, *International criminal law: A draft International Criminal Code*, Sijthoff and Noordhoff, Alphen aan den Rijn, 1980, p. 73.

²³ Webb, J., “Genocide Treaty — Ethnic cleansing: substantive and procedural hurdles in the application of the Genocide Convention to alleged crimes in the former Yugoslavia”, *Georgia Journal of International & Comparative Law*, no. 377, 1993, p. 391.

²⁴ *Prosecutor v. Mladic and Karadzic*, Review of the indictments pursuant to Rule 61 of the Rules of procedure and evidence, Case No. IT-95-5-R61, 11 July 1996, paras. 92 and 94.

of the group” or “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.” For the former, it is not clear what is covered by “mental harm”. It has been described by commentators as a sort of psychological damage which would lead to the destruction of the group²⁵ or bodily harm “which involves some type of impairment of mental faculties.”²⁶ Nor is it clear what is considered to be “calculated” to bring about the physical destruction in whole or in part of the group.

Conclusion

The above survey of the Nuremberg Judgement, the trials under the CCL, the work of the ILC, and the Statutes of the ad hoc Tribunals for the former Yugoslavia and Rwanda, confirm that the exact parameters of crimes against humanity — which are crucial in criminal proceedings — are unclear. Inconstancy in the definition seems to be the rule. As for the crime of genocide, the ambiguity does not rest so much in the exact parameters of the definition, since the 1948 Genocide Convention provides for it, but rather in the difficulty in criminal proceedings to prove the required elements of the crime.

In other words, international law is not yet fully equipped to answer clearly and precisely all questions relating to the prosecution and punishment of individuals for the commission of such atrocities. The tree is there and branches are slowly growing but it has not yet attained full maturity. Nonetheless, crimes against humanity and genocide are international crimes which entail individual criminal responsibility and give rise to universal jurisdiction.

What now needs to be worked at is the adoption of a more uniform, agreed definition of crimes against humanity and the interpretation of the meaning of all the elements of genocide. This is where an international criminal court would have a vital role to play in following the progress of international criminal law. In addition, a permanent court of this sort would have a contribution to make towards putting an end to impunity.

²⁵ J. Webb, *loc. cit.* (note 23), p. 393.

²⁶ 1996 ILC Report, p. 91.

The Rwanda Tribunal

A presentation of some legal aspects

by **Frederik Harhoff**

International prosecution of war crimes

If we look back to the diverse origins of the laws of warfare,¹ one basic question which seems to have occupied the early lawmakers was: why, in fact, should there be legal limitations to belligerent actions aimed at destroying a foreign foe? At first glance, any such constraints would appear to be contrary to the very purpose of warfare and thus of no value to those who were either forced to resist an armed attack or who themselves wished to wage war against an enemy.

This classic question no longer attracts much interest among today's military and political leadership, for whom the body of international humanitarian law has become a generally accepted — albeit far from always respected — framework for armed conduct. One simple answer to the question would be that such norms of restraint have become so widely accepted because they have proved to be in the best interest of both belligerent parties. These norms seek to limit the suffering and damage inflicted not only upon the victims of the other party but also on *one's own* soldiers, civilians, environment and cultural property. Fear of exposure to indeterminate danger and excessive suffering tends to demoralize

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¹ From Sun Tzu, *The art of war* (5th century BC), through Hugo Grotius, *De Jure Bellis ac Pacis Libri Tres* (1625), to Clausewitz, *On war* (1832).

and discourage troops, and military experience convincingly demonstrates that demoralized and horrified armies are much less efficient than forces who are acquainted with the risks and have confidence in the rules. There is, for this reason alone, inherent military logic to the advantage of both sides in trying to curb the means and magnitude of damage and suffering inflicted on the enemy during warfare.

Nowadays, therefore, the crucial question is not whether or not there should be legal constraints to warfare, but rather how these restrictions can be enforced and applied effectively against the perpetrators. This is why the definition of war crimes and the prosecution of war criminals has become so vitally important.

Prosecution of war criminals after World War I was largely ineffectual but it still gave the allied powers the incentive towards the end of World War II to take steps to punish the leaders of the Third Reich for crimes committed during the War, and the Nuremberg trials were the culmination of these measures.

However, the theoretical impact of the Nuremberg trials with regard to the position of individuals under international law has been interpreted very differently. By some, these trials were taken to imply that individuals were unquestionably subjects of international law and could thus face certain international legal obligations.² Others, however, asserted more cautiously that the trials were but an expression of the victorious Powers' right to assume jurisdiction over the defeated enemy's territory, and that the London Charter as well as the Nuremberg trials therefore represented a singular case of a supranational legal system, by which the victorious Powers had pooled their respective jurisdictions and done together what each of them might have done separately.³

Whatever the case may be regarding the position of the individual under international law after the Nuremberg trials, the fact remains that, by creating the two Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR), the Security Council took a great leap forward and established beyond any doubt that individuals may now, in respect of international humanitarian law, appear as subjects bound by certain legal obligations directly under international law, and that they can be held individually

² See e.g. Ian Brownlie, *Principles of public international law*, 4th ed., Oxford, 1990, p. 561, and Alfred Verdross, *Völkerrecht*, 5th ed., Vienna, 1964, p. 216.

³ Alf Ross, *Lærebog i Folkeret*, 6th ed., Copenhagen, 1984, p. 37.

responsible before an international forum for their violations of these obligations. This is a remarkable development in international law with far-reaching implications for, *inter alia*, the concept of State sovereignty.

It should be recalled, however, that the Prosecutor common to both Tribunals does not possess any of the enforceable investigative powers normally available to national authorities in criminal investigations under national jurisdictions (or, for that matter, to the victorious Powers after World War II), e.g. the powers to search for and seize evidence, arrest suspects, access public files, tap telephones, etc. In every investigation carried out by the Tribunals, the Prosecutor has to rely on the assistance, co-operation and goodwill of national authorities, who will act on behalf of the Tribunals. This fact is often overlooked by those who have criticized the Tribunals for conducting their investigations too slowly.

Crimes punishable under the ICTR Statute

The ICTR Statute establishes the Tribunal's jurisdiction to prosecute persons responsible for:

- genocide (Article 2),
- crimes against humanity (Article 3), and
- serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 and of Additional Protocol II thereto of 8 June 1977 relating to the protection of victims of non-international armed conflicts (Article 4).

In addition, Article 6, para. 1, of the Statute sets out the conditions for individual criminal responsibility by providing that anyone who at any stage “planned, instigated, ordered, committed or otherwise aided or abetted” the three categories of crime defined in Articles 2 to 4 may be held criminally responsible. Article 6, para. 2, goes on to disclaim immunity for Government officials and Heads of State, while Article 6, para. 3, provides for the criminal responsibility of superiors in respect of acts of their subordinates if the superior knew or had reason to know of such acts and failed to take the necessary measures to prevent or punish the perpetrators thereof.

Genocide

The crime of genocide is defined in the Statute in replication of the Genocide Convention of 1948 and includes a number of atrocities com-

mitted with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. The Statute further replicates the Genocide Convention by adding in Article 2, para. 3, that, apart from genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide are also punishable under that same crime.

This definition raises some fundamental questions relating to the conflict in Rwanda and to the ICTR Statute. First of all, one might ask just how or by which standards the Tutsi group can be defined so as to fit the criteria in Article 2. Hutus and Tutsis, in particular, speak the same language and share the same religion, and intermarriages through many generations between the two groups have rendered any biological or cultural distinction virtually impossible. Identity cards issued to all Rwandans did indeed indicate the cardholders' ethnicity, but the criteria according to which Rwandan citizens were originally identified as belonging to one or the other group (the basis on which these cards were issued) were by no means reliable as a truly objective yardstick for any national, ethnical, racial or religious categorization. It seems, therefore, that the most viable approach in identifying the Tutsi group is to apply a subjective standard according to which the Tutsi group is determined as composed of those who perceived themselves as being Tutsis, or who were known to be Tutsis. To apply such a subjective parameter in identifying the Tutsi group is presumably not incompatible with the Genocide Convention or the wording of Article 2 of the Statute, but it may require some additional attention during trials.

Secondly, some interesting choices are to be made between the application of Article 2, para. 3 (conspiracy, incitement, attempt and complicity in genocide), on the one hand, and Article 6, para. 1 (planning, instigation, ordering, committing, aiding or abetting), on the other. Unless the Prosecutor decides to charge persons accused of genocide under Article 2 only and thus to abstain from also referring to Article 6, para. 1, for the same acts of genocide (which she has not done so far), the Trial Chambers will be forced either to explain the difference between, say, incitement and instigation, or to assume that Article 2, para. 3, stands out as the *lex specialis* and then consequently dismiss simultaneous genocide charges raised under Article 6, para. 1. This may seem to be of mere academic interest, but since the Tribunal is commissioned with the task of providing leading jurisprudence on genocide, this exercise will require careful attention.

Crimes against humanity

Article 3 of the Statute establishes the Tribunal's jurisdiction over certain crimes (murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial and religious grounds, and other inhumane acts) when committed as part of a widespread and systematic attack against any civilian population on national, political, ethnical, racial or religious grounds.⁴

Contrary to the corresponding provision in the ICTY Statute (Article 5), crimes against humanity in the ICTR Statute are not linked to the existence of an armed conflict (international or internal). Article 3 of the ICTR Statute provides, on the one hand, for a wider scope of conflict by including one-sided attacks against non-resisting civilians rather than requiring a state of armed conflict between two armed belligerent groups. On the other hand, Article 3 of the ICTR Statute narrows the field of application by requiring a qualification of the grounds for the attack. A widespread and systematic attack on economic grounds, for example, would fall outside the ambit of Article 3 of the ICTR Statute, unless the attack was also driven by national or political grounds. An armed attack, in the words of the Appeals Chamber, "exists whenever there is resort to armed force between States or protracted armed violence between Government authorities and *organised armed groups* or between such groups within a State."⁵

This definition seems to imply that an armed conflict only exists when two armed parties fight against each other (irrespective of State involvement). In this definition, the killing of unarmed and non-resisting Tutsis would fall outside the scope of an armed conflict. It could be argued that Article 3 of the ICTR Statute was tailored to meet the particular features of the conflict in Rwanda, since this conflict consisted of two simultaneous spheres of bloodshed, one being a true state of armed conflict involving two regular armies (the FAR⁶ against the RPA⁷) fighting for power in the country, while the other took form of a systematic hunting down and

⁴ Surprisingly, this formulation is derived directly from the UN Secretary General's Report preceding the creation of the ICTY, whose Statute, nevertheless, maintained the traditional definition of crimes against humanity as being linked to an armed conflict. See UN Doc. S/25704 of 3 May 1993, para. 48.

⁵ Emphasis added. See the Appeals Chamber's decision of 2 October 1995, para. 70, p. 37.

⁶ FAR: *Forces Armées Rwandaises*, the Rwandan Army.

⁷ RPA: *Rwandan Patriotic Army*, the Tutsi-led army which came down from Uganda.

slaughter of specific unarmed civilians. Hence, by avoiding reference to an armed conflict, Article 3 of the Statute allows for prosecution of crimes committed in both spheres. This judicial circumvention of the requirement of an “armed conflict” is perfectly intelligible in the case of Rwanda, but the problem remains that the definition offered by the Appeals Chamber seems to exclude unilateral attacks directed against particular civilians *hors de combat*. This problem becomes, as we shall see, even more complicated when we turn to Article 4 of the ICTR Statute. The fact remains, moreover, that we now have two different formulations of the same crime in the two Statutes of the UN Tribunals, which may cause confusion for posterity.

Serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II thereto

Finally, Article 4 of the ICTR Statute criminalizes a wide range of serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. In contrast to what is required under the previous provisions of the ICTR Statute, Article 4 does presuppose the existence of an armed conflict. The Geneva Conventions, it is generally assumed, only apply to international armed conflicts, but common Article 3 of the Geneva Conventions specifically addresses internal (armed) conflicts.

If the Appeals Chamber definition of “armed conflicts” quoted above were to apply in the ICTR context, Article 4 of the ICTR Statute would only fit the part of the Rwandan conflict which was fought out between the FAR and the RPA (the truly “armed” part of the conflict), whereas crimes committed by, say, businessmen, doctors, priests, editors, journalists and armed groups beyond military command and control against particular unarmed civilians would not be punishable under Article 4. Yet this was probably never the intention behind that provision. It could be argued, of course, that the killing of Tutsis was just a collateral part of the armed conflict between the FAR and the RPA. In that case, however, it would be difficult to rationalize the killing of unarmed children and others who were unlikely to possess the capacity or the motive to provide active material or logistic support to the RPA. Furthermore, it might obscure the legal features of genocide if the victims were characterized merely as collateral victims of an ongoing armed conflict, on the one hand, but at the same time as victims of an attempt to destroy, in whole or in part, a national, ethnical, racial or religious group, as such, on the other.

One possible solution to this dilemma could be to reformulate the definition of an armed conflict so as to establish that an armed conflict

exists whenever there is recourse to armed force which generates the need for protection of victims under the Geneva Conventions. The main purpose of the Geneva Conventions, it should be recalled, is the protection of sick and wounded combatants, prisoners of war and civilians during hostilities. Therefore, rather than maintaining that armed conflicts only exist when there is armed violence between two (or more) armed belligerent parties, to suggest that the Geneva Conventions apply to all conflicts which produce the categories of victims protected by the Conventions would seem more in line with the humanitarian purpose of the latter.

Common law and civil law

One unique aspect of the jurisprudence of the two Tribunals, in particular the ICTR⁸, is the effort to strike a balance between the application of *common law* and *civil law* procedures in the Chambers' interpretation of the Rules of Procedure and Evidence (the "Rules") and in the rulings rendered by the Chambers.

Rule 89 of the Rules stipulates that the Chambers are not bound by national rules of evidence, and the Chambers of the ICTR have repeatedly underscored that neither of the two legal systems prevails at the Tribunal.⁹ The decisions rendered by the Chambers confirm that styles and solutions inspired by both systems have been applied. The limits of this article do not permit an extensive venture into the complexities of this aspect, but a few examples may illustrate the dilemma. In *civil law jurisdictions*, all of the prosecutor's material in a criminal case is generally provided in advance to the adverse party as well as to the Bench. On the first day of the trial, therefore, both parties and the judges are fully informed of the scope and nature of the evidence brought forward by the prosecutor. This obligation on the prosecutor to disclose all evidence in advance is then balanced by the freedom of the judges to assess independently and give credence to the evidence at hand. The question of what can and cannot

⁸ Compared to the ICTY, which seems more inclined to apply common law approaches, the ICTR Chambers have frequently included models and styling techniques from both legal systems.

⁹ See, e.g., the Decision of 6 March 1997 on the Request for reexamination of an order of the Tribunal rendered by Trial Chamber 1 in the case against Georges Rutaganda; the concluding part of the Decision of 17 April 1997 on the Probative Value of Witness Testimonies rendered by Trial Chamber 2 in the case against Clément Kayishema and Obed Ruzindana; the Decision of 18 June 1997 on the Tribunal's jurisdiction rendered by Trial Chamber 2 in the case against Joseph Kanyabashi, para. 42.

be admitted as evidence before the judges, therefore, seldom arises in civil law criminal cases.

In *common law*, on the other hand, this question is crucial. Here, in principle, the judges will find nothing but the indictment and possibly the supporting material placed before them on the first day of trial, and adversarial debates over admissible evidence will then be triggered frequently by objections made by one party as the trial goes on.

The *judicial role* of the judges, moreover, is significantly different in the two systems in that civil law judges are bound to take a more active, directive role during proceedings, whereas common law judges to a larger extent will tend to let the parties control the development of the proceedings and allow them to frame the questions and determine the evidence to be examined by the Court.

Rulings and judgments are also formulated and styled very differently in the two systems, partly due to the different importance of judicial precedents in common law and civil law, and partly because of the distinct ways in which the law-making process has developed in each system. Where common law expounds decisions and judgments argued at great length and with detailed reasons, judicial decisions in civil law tend to be more concisely worded with condensed resumé of the underlying reasons.

These differences are subject to considerable scrutiny by the judges of the ICTR and it is probably fair to say that the ICTR has not yet finalized its approach in this matter. The style is constantly being reviewed and developed by the judges as they proceed with the three trials which have commenced so far. It should be recalled, furthermore, that both civil law and common law are complex entities with no single meaning; criminal procedures and the style of judicial reasoning in France are different from those applied in, say, Germany, although both countries belong to the civil legal tradition, and the same can be said in respect of common law jurisdictions such as Australia and the United States.

Conclusion

To set up an international criminal tribunal for the first time is a complex process, not only because new and truly original solutions to the many legal and practical problems arising before the Tribunal have to be frequently devised, but also because these solutions taken as a whole have to provide a body of sensible and universally applicable jurisprudence for

posterity, while at the same time allowing the Tribunal to capture the social, cultural and historical background of the particular conflict and to reflect this background to some extent in its decisions and practices. The fact that the Prosecutor and the Appeals Chamber are common to both Tribunals (ICTR and ICTY) may be conducive to ensuring the universality of the jurisprudence of both Tribunals, but the balance to be found between the general and the transient aspects of this legal enterprise is very delicate.

The International Criminal Tribunal for Rwanda

by **Cécile Aptel**

The International Criminal Tribunal for Rwanda was created on 8 November 1994 by the United Nations Security Council, of which it is a subsidiary body. Its task is to help restore and maintain peace and bring about national reconciliation by trying persons allegedly responsible for acts of genocide and other grave breaches of international humanitarian law committed in Rwanda and Rwandan citizens suspected of committing such acts and violations in the territory of neighbouring States between 1 January and 31 December 1994.¹

The general public and even some experts still appear to know little about the Tribunal. This article does not claim to offer an exhaustive analysis, but simply to describe briefly the creation and organization of the Rwanda Tribunal, the context of its proceedings and the judicial activities now in progress.

Creation and organization of the Tribunal

The International Criminal Tribunal for Rwanda consists of three organs: the Chambers, the Office of the Prosecutor and a Registry.

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Original: French

¹ See preamble to the Statute of the International Tribunal for Rwanda (hereinafter referred to as the "Statute"), attached to Security Council resolution 955, 8 November 1994, Doc. S/RES/955 (1994).

In addition to the two Trial Chambers, each made up of three judges, there is an Appeals Chamber common to the two international criminal tribunals. All six trial judges were elected by the United Nations General Assembly in May 1995.² The five judges serving in the Appeals Chamber of the Tribunal for the former Yugoslavia are *ex officio* judges of the Rwanda Tribunal.³

The Office of the Prosecutor, which is responsible for investigations and prosecutions, is a separate and wholly independent body. The Security Council decided that the Prosecutor of the Tribunal for the former Yugoslavia should also serve as the Prosecutor of the Tribunal for Rwanda.⁴ Its decision to endow the Rwanda Tribunal with structures in common with the Tribunal for the former Yugoslavia (i.e., the Prosecutor and the Appeals Chamber) reportedly reflects a compromise reached during the negotiations that preceded the adoption of resolution 955, which brought the International Criminal Tribunal for Rwanda into being. The countries on the Security Council were unable to agree on the form to be given to the tribunal: some wanted a new ad hoc structure completely independent of the Tribunal for the former Yugoslavia, while others favoured an extension of the latter's jurisdiction. Eventually it was decided to create a second ad hoc structure, while retaining attributes common to both tribunals. The fact that two organs are shared by the two tribunals bears witness to the efforts made to ensure the consistent and concerted operation of both courts and, above all, to prevent either one of them from developing its own procedure and jurisprudence. A third aim was to see that neither tribunal would hand down decisions inconsistent with those of the other.

The International Tribunal for Rwanda has its own Registrar who, besides his responsibility for judicial administration of the Tribunal (the traditional role of that office in national courts), affords the overall administrative and diplomatic support it needs to operate.⁵

² The judges are: Laïty Kama (Senegal), President, Yakov A. Ostrovsky (Russia), Vice-President, Lennart Aspegren (Sweden), Tafazzal Hossain Khan (Bangladesh), Navanethem Pillay (South Africa) and William Hussein Sekule (Tanzania).

³ Statute, Article 12, paragraph 2. At present these are: Antonio Cassese (Italy), Li Haopei (China), Gabrielle Kirk McDonald (United States of America), Ninian Stephen (Australia) and Lal Chand Vohrah (Malaysia).

⁴ Statute, Art. 15, para. 3. Prosecutor Louise Arbour (Canada), who succeeded Richard J. Goldstone (South Africa) in October 1996, is assisted, for the Rwanda Tribunal, by Deputy Prosecutor Bernard Muna (Cameroon).

⁵ Agwu Ukiwe Okali (Nigeria) was appointed Registrar by the United Nations Secretary-General in February 1997 to replace Andronico O. Adede (Kenya).

The Rwanda Tribunal has its official seat in Arusha, Tanzania. Arusha is symbolic in that it hosted the negotiations on the political stabilization of Rwanda, which culminated in the conclusion of the Arusha Accords. In addition to having its seat in Tanzania, where the Detention Unit and trial facilities are located and the trial judges and the Registrar have their offices, the Tribunal also has an office in the Rwandan capital Kigali, where the Prosecutor's staff conduct their enquiries and institute criminal proceedings. The geographical dispersal of the Tribunal's activities is further accentuated by the fact that the Prosecutor and appeal judges common to the two international criminal tribunals are based at the seat of the Tribunal for the former Yugoslavia in The Hague, in the Netherlands. This obviously encumbers the activities of the Tribunal for Rwanda and complicates communication and coordination between the different offices and organs.⁶

Unlike the Tribunal for the former Yugoslavia, which the Security Council established on its own initiative to help restore and maintain peace in that territory, the International Criminal Tribunal for Rwanda was created in response to an official request by the Rwandan government.⁷ Yet in spite of having initially called for the Tribunal to be set up, that government subsequently voted against the adoption of resolution 955 in the Security Council,⁸ where Ambassador Bakuramutsa, the Rwandan Representative to the United Nations, whose country was serving as a non-permanent member of the Council at the time, expressed his government's dissatisfaction with the Rwanda Tribunal as constituted. He argued first that the temporal jurisdiction of the Tribunal, which was given the power to try persons responsible for violations committed between 1 January and 31 December 1994, was too limited and would not cover the lengthy period during which preparations were made for the genocide; and, second, that its composition, with only two trial chambers, would prevent it from functioning properly in view of the large number of prosecutions to be brought.⁹

⁶ The logistic problems arising from this geographical dispersal are among those which the Rwanda Tribunal has blamed for its administrative difficulties; see *Report of the Secretary-General on the Activities of the Office of Internal Oversight Services*, Doc. A/51/789 (1997).

⁷ Letter of 28 September 1994 addressed by Rwanda's Permanent Representative to the United Nations to the President of the Security Council, Doc. S/1994/1115.

⁸ Summary record of the 3453rd meeting of the Security Council (8 November 1994), Doc. S/PV.3453.

⁹ The other five arguments were the following: the scope of the subject-matter jurisdiction conferred on the Tribunal could result in a scattering of its resources, whereas its

In an effort to understand Rwanda's attitude with regard to the Tribunal, one must realize the extent to which Rwandan society as a whole was traumatized, torn as it was between the need to shed light on its past, the necessity to work towards national reconciliation, and its profound belief that it had been abandoned by the international community.¹⁰ In this connection the criticism levelled by the Rwandan government from the very inception of the International Tribunal illustrates the sensitive context in which the Tribunal is called upon to operate, in a country where the exercise of justice has significant political implications. Indeed, searching for the truth, historically recognizing responsibilities and crimes and finding out whether those crimes can really be qualified by an independent international tribunal as crimes against humanity and genocide will necessarily have direct implications as regards the veracity of different assumptions about Rwanda.

The eminently political setting in which the Tribunal for Rwanda was set up and is now operating is in that respect similar to the situation facing the Tribunal for the former Yugoslavia, whose mission of justice is also highly political, although there is one important difference between the contexts in which each international criminal tribunal was created. When the Tribunal for the former Yugoslavia was established in February 1993, an armed conflict was in progress and the territories of the countries involved had been parcelled up and were under the control of adverse parties. Conversely, the political and military situation in Rwanda was relatively stable in November 1994 and the central power of the Kigali government was effective throughout the national territory.

Once the Rwanda Tribunal had been formally created by the Security Council, it had to be endowed with at least some infrastructures so that this fledgling ad hoc tribunal could start fulfilling the duties entrusted to

priority task should be to try persons presumed responsible for the genocide; countries said to have been involved in the events of 1994 should refrain from putting forward their own nationals as candidates for the posts of judges; the problem of terms of imprisonment served outside Rwanda; the fact that those tried and found guilty by the Tribunal would escape capital punishment; and, lastly, the need for the Tribunal to be based on Rwandan territory to enable it to take part in the struggle against impunity. (*Ibid.*)

¹⁰ It is noteworthy that the United Nations Secretary-General stated on 31 May 1994 that: "The delay in reaction by the international community to the genocide in Rwanda has demonstrated graphically its extreme inadequacy to respond urgently with prompt and decisive action to humanitarian crises entwined with armed conflict. (...) We must all recognize that, in this respect, we have failed in our response to the agony of Rwanda, and thus have acquiesced in the continued loss of human lives." *Report of the Secretary-General on the situation in Rwanda*, Doc. S/1994/640 (1994), para. 43.

it. The Prosecutor was the Tribunal's first operational organ, having been installed in Rwanda in the first half of 1995.¹¹ Before any investigations could begin, he had to sort out one problem after another, from fitting out premises and recruiting qualified staff to defining a strategy and negotiating a framework of cooperation with the Rwandan government and other States.

Investigations and prosecutions

The relatively speedy installation of his Kigali office gave the Prosecutor privileged access to many witnesses, information from various government sources and documents gathered by the United Nations and non-governmental organizations that were operating on Rwandan soil in 1994. Having access to such information and documents was not enough in itself, however, and had to be incorporated in a properly defined strategy if it was to be of any use. In those days the Prosecutor, whose resources are still limited today, certainly did not have the infrastructure and staff needed for processing and analysing all the information. To give but one example, he was given recordings of programmes broadcast in Rwanda in 1994 by *Radio Télévision Libre des Mille Collines* (RTLM), some of which reportedly contained explicit public incitements to genocide. For a long time, however, he was said to have been unable to learn the exact content of the recordings for lack of transcription and translation facilities.¹²

So, one of the main problems facing the Prosecutor was how to allocate his resources effectively. The very limited means initially placed at his disposal appeared quite inadequate given the international context in which he had to work. Indeed, the Prosecutor's duty is to bring proceedings against all suspected criminals, whether on Rwandan territory or elsewhere. Now, following the political changes that occurred in Rwanda in July 1994, many political and military leaders of the former regime had fled the country together with most of those believed responsible for the events in the spring of that year. His first task was therefore to locate suspects and witnesses, who were scattered throughout Africa and, indeed,

¹¹ In August 1995 less than a dozen people, most of them detached by Member States, were stationed in Kigali. See the first annual report of the International Criminal Tribunal for Rwanda, dated 30 June 1996, Doc. ICTR/3/CRP.3 (UN Doc. A/51/399-S/1996/778).

¹² See the decision by the International Tribunal for Rwanda dated 14 August 1997, Case No. ICTR-97-32-DP.

the whole world. He then had to conduct enquiries in several countries, often simultaneously, albeit without the facilities available to the national courts' own investigators. At every such stage he needed to secure the cooperation of the authorities in the countries concerned and enlist their assistance in the arrest and transfer of suspects and persons charged.

It is worth recalling that the Security Council resolutions which set up the two tribunals, as well as their statutory and regulatory provisions, make it obligatory for States to cooperate. The Council requires them to cooperate by virtue of its authority under Chapter VII of the United Nations Charter, which has binding force in international law. The areas of such cooperation are extensive and include, *inter alia*, identifying and locating persons, placing them under arrest or in detention, gathering first-hand accounts and producing evidence, forwarding documents, and transferring the accused to or bringing them before the tribunal. Moreover, the international criminal tribunals, whose jurisdiction is concurrent with that of national courts, have primacy over the latter and can therefore request that they relinquish a case at any stage of the proceedings.

Although it has been hard to secure assistance from some States,¹³ others have "spontaneously" arrested Rwandan suspects and persons already charged. This they did because the names of the people concerned were on a list of those chiefly responsible for the events of 1994, disseminated by Kigali, or on the strength of an international arrest warrant issued by a national court,¹⁴ or within the context of proceedings brought under their own national systems.¹⁵ The Prosecutor thus had to adapt to the new circumstances and allocate some of his limited resources to conduct enquiries regarding the persons arrested; in some instances he had to retailor his initial strategy.

¹³ See in particular the statement made by the President of the Rwanda Tribunal to the General Assembly during the presentation of the first annual report of the Tribunal, 10 December 1996, Doc. A/51/PV.78, p. 7.

¹⁴ Such was the case with the arrest of Colonel Théoneste Bagosora by the Cameroon authorities, on the basis of an international arrest warrant issued by Belgium; a transfer application was then issued, and the Colonel was later charged by the International Tribunal for Rwanda before eventually being transferred to Arusha. See Rwanda Tribunal, Case No. ICTR-96-7-I.

¹⁵ For instance, the files on Joseph Kanyabashi and Élie Ndayambaje were investigated by Belgian investigating judges and on Alfred Musema by the investigating judge of a Swiss military court. The Tribunal requested deferral of all three cases. See Rwanda Tribunal, Cases Nos. ICTR-96-8-D, ICTR-96-15-T and ICTR-96-13-D.

In order to prevent such persons evading the jurisdiction of the Tribunal even though they are already being prosecuted by national courts, the Prosecutor may require one of the Chambers to request that the national courts defer to it in application of the principle that the International Tribunal has primacy.¹⁶ The procedure in Rule 40 *bis* of the Tribunal's Rules of Procedure and Evidence, providing that at the Prosecutor's request a judge may demand that a suspect be transferred to Arusha and placed in provisional detention, has also been used by the Prosecutor to gain time for issuing an indictment.¹⁷

By 30 September 1997 the Prosecutor had invoked the "40 *bis* procedure" and obtained that judges issue transfer and provisional detention orders in respect of 12 suspects. Six of those orders related to suspects apprehended in Kenya in July 1997 during a vast operation which saw the arrest of leaders of the former Rwandan regime, including the former Prime Minister of the Rwandan interim government in power from April to July 1997.

Because of the importance of those arrested, that operation certainly marked a turning point in the progress of proceedings brought by the Prosecutor of the Rwanda Tribunal, if only by giving proof of the efficiency of the Prosecutor's Office and of the fact that the focus really is on the main culprits. The advantages of an international criminal court with means to require States to cooperate, thereby ensuring that even the

¹⁶ Article 8, para. 2, of the Statute provides that: "The International Tribunal for Rwanda shall have primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda." The Tribunal has used the deferral procedure four times, in Cases Nos. ICTR-96-2-D, ICTR-96-6-D, ICTR-96-7-D and ICTR-96-5-D.

¹⁷ Rule 40 *bis* of the Tribunal's Rules of Procedure and Evidence, adopted on 29 June 1995 and subsequently amended (Doc. ICTR/3.rev.2 of 6 June 1997). According to that provision, a judge may order the provisional detention of a suspect for a period of 30 days if he considers, first, that there is a reliable and consistent body of material which tends to show that the suspect may have committed a crime over which the Tribunal has jurisdiction, and, second, that provisional detention is a necessary measure to prevent the escape of the suspect, injury to or intimidation of a victim or witness or the destruction of evidence, or is otherwise necessary for the conduct of the investigation. See Frederik Harhoff, "Consonance or rivalry? Calibrating the efforts to prosecute war crimes in national and international tribunals", *Duke Journal of Comparative & International Law*, Vol. 7, No. 2, 1997, pp. 576-578.

former political authorities do not escape justice, have thus been demonstrated.¹⁸

Judicial activities

Almost three years after its formal establishment, the International Criminal Tribunal for Rwanda already has a number of achievements to its credit. Twenty-one persons are being held in its Detention Unit, of whom 14 have been indicted and the seven others are suspects. The detainees include senior political and military figures allegedly responsible for the events of 1994, and journalists and intellectuals charged for the propaganda role they are claimed to have played. In addition, three other persons should shortly be transferred to Arusha: one accused person at present detained in the United States of America and two suspects imprisoned in Cameroon.

Three trials are in progress. The first concerns Jean-Paul Akayesu,¹⁹ a former mayor of Taba commune; the second, Georges Anderson Rutaganda,²⁰ the former Vice-President of the *Interahamwe* militia; and the third, Clément Kayishema and Obed Ruzindana (joint proceedings), who were the Prefect of Kibuye and a businessman, respectively.²¹ The case against Jean-Paul Akayesu will probably be deliberated before the end of 1997 or very early in 1998, which should enable the trial judges to deliver their first judgment within the first few months of next year.

The number of detainees held at the Detention Unit in Arusha poses the acute problem as to whether the Tribunal really has sufficient material and human resources for conducting diligent trials: at present it has only one courtroom and another room which is temporarily being used for trials, but it lacks the facilities needed for properly protecting witnesses and has not even the capacity to house a vast public gallery. Despite those shortcomings, however, both Trial Chambers sit simultaneously. Even so,

¹⁸ The Rwandan authorities often appeared to be criticizing the Prosecutor for being too slow, inefficient and failing to concentrate on those chiefly responsible. Their criticism has certainly softened since the arrests made in July 1997. On 23 July 1997, the Office of the President of the Rwandan Republic announced that: "The people of Rwanda (...) hope that the ICTR will maintain this momentum and diligently pursue and prosecute the genocide suspects, wherever they may be, as prescribed by its mandate."

¹⁹ Rwanda Tribunal, Case No. ICTR-96-4-T.

²⁰ Rwanda Tribunal, Case No. ICTR-96-3-T.

²¹ Rwanda Tribunal, Case No. ICTR-96-1-T.

a rapid calculation points up the difficulties which are bound to arise in establishing a judicial schedule. Eleven of those indicted and at present being held at Arusha are still waiting for their trials to begin. They will certainly be joined by some suspects at present being detained at the request of the Prosecutor, who should very shortly be bringing charges against them. Now, the first trials have been going on for some months and, even if those to follow make more rapid progress, a minimum of four months per trial on average is only to be expected. In such a context, the interests of justice and respect for the rights of the accused require greater resources to be made available to the Tribunal. This could take the form of back-up staff and possibly an increase in the number of judges.²²

Conclusion

The Deputy Prosecutor recently declared that conspiracy was the key to an understanding of the events in Rwanda, and that by grouping the accused it was easier to show how they were organized, which was a way of understanding what happened.²³ The Office of the Prosecutor would therefore appear to have the clear intention of filing requests for joinder, which, if the judges accept them, would enable trials to be grouped together and thus help prove the complicity of the accused.²⁴ Be that as it may, the trials in progress and those scheduled in Arusha are of historic importance. Some of Rwanda's former political and military authorities must account for the tragic events that occurred in the country in 1994.

Above and beyond the major legal developments (notably the confirmation of the principle of individual criminal responsibility for violations of international humanitarian law committed in non-international conflicts), the activities of the Rwanda Tribunal must permit the reconciliation of an entire people. Such national reconciliation will come about only if impunity is halted once and for all. Only the certainty that justice has been done will prevent feelings of revenge from developing. The Tribunal's mission has a part to play in that process by enabling the perception of collective political responsibility for crimes to be replaced by a clear identification of individual criminal responsibility.

²² The Security Council decided to consider increasing the number of the Tribunal's trial judges and chambers if necessary (resolution 955, 1994).

²³ *Ubutabera*, independent newsletter on the Rwanda Tribunal, No. 15, Arusha, 7 August 1997, p.1 (French only).

²⁴ *Ibid.* Rule 48 of the Rules of Procedure and Evidence provides that accused persons may be jointly charged and tried.

The International Criminal Tribunal for Rwanda

Its role in the African context

by **Djiéna Wembou**

In the face of the atrocities committed in Rwanda between April and July 1994,¹ the international community committed itself to ensuring respect for international humanitarian law and trying those responsible for breaches of it. Thus, on 8 November 1994, the United Nations Security Council adopted resolution 955 creating 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 of Rwandan citizens responsible for such acts committed in the territory of neighbouring States.

The Security Council thus created a particularly significant precedent, this being the very first time an international judicial organ was given competence for violations of international humanitarian law committed in the context of an internal conflict.² Since, however, the Tribunal is a

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Original: French.

¹ For a more detailed analysis of the events in Rwanda in 1994, see A. Guichaoua, *Les crises politiques au Burundi et au Rwanda (1993/1994)*, University of Science and Technology, Lille, 1995, pp. 523-531; Y. Ternon, *L'État criminel — Les génocides au XX^e Siècle*, Éditions le Seuil, Paris, 1995.

² See communication by President Laity Kama, "Le Tribunal pénal international pour le Rwanda et la répression des crimes de guerre", *The United Nations and international humanitarian law*, Actes du colloque international à l'occasion du cinquantième anniversaire de l'ONU, Éditions Pedone, Paris, 1996, pp. 249-258.

judicial organ instituted by an essentially political organ in a fast-changing international context, it is worth taking a closer look at the political and legal considerations which surrounded its creation and setting up and which subsequently determined the attitude of States and their distrust or support as the case may be.

How do the African States perceive the International Criminal Tribunal for Rwanda? What are the political and legal considerations underlying the position of those States with regard to the Tribunal? And what potential role can the Tribunal play in the African context, particularly with regard to the promotion of humanitarian law? This article will attempt to answer those questions.

Political and legal considerations

As we know, the attitude of African States to the Tribunal has evolved from non-cooperation when it began its work to active support since the last OAU Summit, held in Harare from 2 to 4 June 1997. Their initial distrust³ is partly explained by the fact that the positions of the African States and many third-world countries with regard to the way the Tribunal was created, the Security Council's competence in that area and, more generally, the legal grounds for creating the Tribunal, were not taken into consideration by the Council's members when resolution 955 was being drafted, nor when it was adopted.

The position of African States with regard to the process by which the Tribunal was created

The different debates in the United Nations leading up to the Tribunal's creation tended to concentrate on the Security Council's competence to create such an organ. Divergent opinions were expressed on the following issues: the choice of the institutional versus the conventional method advocated by many African and third-world States; the creation of the Tribunal by the Security Council and not by the General Assembly, as those States would have preferred; and the basing of competence to

³ The clear lack of cooperation with, not to say suspicion of, the Tribunal on the part of certain African States emerges from President Kama's letters calling on the OAU Secretary-General to allow him to urge African Heads of States to arrest and extradite suspected criminals and make the necessary arrangements for detaining them in African prisons. See the Report by the Secretary-General to the Sixty-fourth Ordinary Session of the OAU Council of Ministers, Yaoundé, 1996.

create the Tribunal on Chapter VII of the Charter instead of on Chapter VI, as some countries demanded.

Africa's preference for the conventional method

An analysis of the statements made by delegates of African countries to the General Assembly in the first half of October 1994 clearly shows that the African group would have preferred the Tribunal to be created by the conventional rather than by the institutional method.

The conventional or traditional approach is to create *ad hoc* courts by treaty, which doctrine regards as the normal way.⁴ Many experts on international relations support this principle on the strength of two arguments, the first being the sovereignty of States, especially in matters of penal sanctions, and the second concerning the precedent set by the London Agreement of 8 August 1945.⁵ Many African representatives stressed before the General Assembly that a judicial organ could not be created on the basis of a resolution by so political an organ as the Security Council and that a treaty was therefore indicated. However, the Security Council rejected the conventional method and took an institutional approach for reasons of expedition and political expediency:⁶ the court simply had to be set up quickly to put a stop as soon as possible to the genocide and grave breaches of international humanitarian law. And not only would the adoption of a treaty mean convening a lengthy and costly diplomatic conference, but there was nothing to indicate that the treaty concluded would secure the number of ratifications essential to its entry into force within a fairly short time.

The African delegates' second argument, which in that respect matched the position of the non-aligned group on the question of reforming the United Nations, was that the Tribunal's universality would have been better guaranteed by a founding act emanating from the General Assembly (the main organ with universal membership) than by a resolution passed by an organ of limited membership such as the Security Council, some of whose members, moreover, have a right of veto.

⁴ R. Degni-Ségui, *La création du Tribunal pénal international — Historique et enjeux*, Statement to the OAU/ICRC Seminar on the Tribunal and the implementation of international humanitarian law, Addis-Ababa, 1997 (not published).

⁵ This agreement, signed by France, the United States of America, the United Kingdom and the Soviet Union, created the Nuremberg Tribunal for judging the leading Nazi criminals.

⁶ Mutoy Mubiala, "Le Tribunal international pour le Rwanda", *Revue générale de droit international public*, Vol. 99, 1995, p. 940.

Debate on the role of the Security Council

Even while conceding that *ad hoc* courts could be created by the United Nations, the third-world States wanted to lend a democratic basis to the decision to create the Tribunal and ensure that it constituted a more accurate reflection of the will of the international community as a whole.⁷ They therefore considered it reasonable that the Rwanda Tribunal, like the Tribunal for the former Yugoslavia, should be created by the UN General Assembly. The Security Council would therefore have had but a secondary role in the entire issue of international criminal repression of genocide and war crimes.

That argument was also rejected not only for reasons of expedition but also because Article 24 of the Charter invests the Security Council with primary responsibility for international peace-keeping and security.

It is nonetheless worth noting that the issue most widely debated during informal discussions at the United Nations had been the legal grounds for the Council's decision.

The Council's competence based on Chapter VII

In resolution 955 (1994), the Security Council acted on the basis of Chapter VII of the Charter, namely Articles 39 and 41. Under the former it found that the Rwandan genocide constituted "a threat to international peace and security" and, under the second, it created the Tribunal "for the sole purpose of prosecuting persons responsible for genocide".

That decision flew in the face of the position of many third-world States in general and African States in particular, which considered that the decision to create an *ad hoc* criminal court should come not under the heading of coercive measures but rather of Chapter VI of the Charter, on the peaceful settlement of disputes.⁸

Although the arguments put forward by many African countries were rejected by the Security Council when the Tribunal was created, those States eventually cooperated with the new organ to a remarkable extent because of the safeguards it offers and the need to combat impunity on the continent.

⁷ R. Degni-Ségui, *op. cit.*, p. 15.

⁸ In this connection see C. Tomuschat, "A system of international criminal prosecution is taking shape", *Review of the International Commission of Jurists*, No. 50, 1993, p. 60.

Support for the Tribunal by the OAU and African States

Now, two years after its creation, the Tribunal enjoys the support of the Organization of African Unity (OAU) and its Member States, particularly since the Harare Summit of June 1997.

Safeguards offered by the Tribunal

The safeguards offered by both the Rwanda Tribunal and the Tribunal for the former Yugoslavia, which have led Africa to support and cooperate with the former, lie in its recognized independence and competence.

a) The Tribunal's independence

The Tribunal's independence is guaranteed by its Statute. But the main point for many third-world countries is the General Assembly's election of judges on the basis of a shortlist of candidates selected by the Security Council. Such an election by a plenary United Nations organ reflects the will for universal action embraced by the organization.

b) The Tribunal's competence

The Tribunal's competence is admittedly close to that of the post World War II tribunals but in some cases may go even beyond it. For instance, the Tribunal's competence *ratione personae* holds not only that all criminals may be brought before it, but also that it has priority over national courts.

The Tribunal's competence *ratione temporis* is not related to any specific fact such as, in this case, the accidental deaths of the Presidents of Rwanda and Burundi on 6 April 1994, which could have been considered the event which triggered the civil war and ensuing acts of genocide.⁹ Its competence is broader in that the Tribunal is required to try violations committed between 1 January 1994 and 31 December 1994, not just crimes committed after 6 April 1994.¹⁰ Its territorial jurisdiction is no less considerable: the Tribunal is competent to try serious violations of international humanitarian law committed between 1 January and 31 December 1994 not only on Rwandan territory but also on the territory of neighbouring States.

⁹ Mutoy Mubiala, *op. cit.*, p. 948.

¹⁰ Report by the Secretary-General to the Security Council, S/1995/134 of 13 January 1995.

These guarantees prompted the OAU, on the initiative of its Secretary-General, to consider the question of cooperation between African States and the Tribunal and lend the latter political and moral support.

OAU support for the Tribunal

Acting on a request made by the Tribunal's President before the Seminar on the International Criminal Tribunal and the enforcement of international humanitarian law, jointly organized by the OAU and the ICRC, the OAU Secretary-General recommended in his report of 25 May 1997 that African Heads of States discuss the difficulties encountered by the Tribunal in carrying out its mandate and give it their full cooperation.¹¹

For the first time in its history, the OAU raised the issue of penal sanctions for war crimes and serious violations of international humanitarian law committed within the context of internal conflicts in Africa. The Heads of State undertook to cooperate with the Tribunal, particularly in arresting the suspected culprits and extraditing them to the Tribunal. The United Nations Secretary-General was called upon to provide greater financial and material support for the Tribunal. Lastly, the OAU Secretary-General was invited, within the framework of the OAU/ICRC cooperation agreement,¹² to disseminate and impose respect for international humanitarian law, particularly among local communities.

That meaningful political support was subsequently matched by deeds when certain States (Cameroon, Gabon and Kenya) decided to transfer criminals sought by the Tribunal to Arusha. Cooperation between the Tribunal and African States developed further as the months went by, reflecting the potential role the Tribunal was called upon to play within the African context, notably in disseminating and enforcing international humanitarian law.

Role of the Tribunal in the African context

The Tribunal has certainly been helping to enforce international humanitarian law ever since its hearings opened. Its task, however, is above

¹¹ Introductory note to the Report by the OAU Secretary-General to the Thirty-third Ordinary Session of the Conference of Heads of States and Government and to the Sixty-sixth Ordinary Session of the Council of Ministers, Harare, Zimbabwe, 26 May-4 June 1997, p. 56.

¹² Cooperation agreement between the OAU and the ICRC, 4 May 1992 (not published).

all to play a major role in disseminating and promoting humanitarian law in Africa as part of the struggle to bar impunity and enhance national reconciliation and respect for human dignity.

Contribution to the dissemination and enforcement of humanitarian law

The start of the Tribunal's activities in 1995 sparked an in-depth discussion of humanitarian law within African universities and among its political leaders. Never more than in recent years have so many symposia been organized in Africa on the sources of humanitarian law, the rules applicable by the Tribunal, relations between States and the Tribunal and the content of the 1949 Geneva Conventions and their Additional Protocols of 1977.

National courts in Cameroon and Kenya have had to rule on the matter of Rwandan refugees in those countries and in some cases, as in Cameroon, have decided that suspects should be extradited to Arusha. This, it should be noted, is the first time that the system of grave breaches provided for in the Conventions has been applied by those countries' national courts and that criminal responsibility has been recognized in internal conflicts.

Incidentally, discussions at the last OAU Summit and the issues raised during the various national seminars on the enforcement of international humanitarian law (organized in Africa from 1996 onwards by the ICRC Advisory Service¹³) clearly demonstrate that African political leaders, officers, officials and even civilian society want to know more about such matters as war crimes, genocide, serious violations of the law of Geneva, the grounds for individual liability on the part of the perpetrators of such acts, and the areas in which their countries should cooperate with the Rwanda Tribunal.

This growing awareness definitely marks an important point of departure for African States to review their national criminal legislation, a course which should help ensure national criminal repression as an essential complement to the international community's efforts to guarantee the international repression of war crimes and grave breaches of international humanitarian law.

¹³ National seminars on the enforcement of international humanitarian law took place in the following countries in 1996: Côte d'Ivoire, Togo, Ethiopia, Nigeria, Senegal (also in 1997) and Togo; and in 1997: Benin and Mozambique.

Some African countries have already approached the ICRC about harmonizing their penal codes with the requirements of the Geneva Conventions. Others, such as Benin, Mali, Niger and Burkina Faso have requested assistance from the ICRC, notably through its Advisory Service, in revising their civil and military criminal legislation. In other words, the Tribunal's very existence and the launch of its activities are contributing to the thought-process going on in Africa in connection with humanitarian law and its dissemination and promotion. The Tribunal has also helped further dissemination efforts, as evidenced by the appeals made by senior OAU organs for international humanitarian law to be applied and respected. The Harare Summit, the Council of Ministers and the central organ of the OAU mechanism for conflict prevention, management and resolution have repeatedly called upon the African States to:

- ratify the international treaties on international humanitarian law, including the 1949 Geneva Conventions, the Additional Protocols of 1977 and the 1980 Convention on Certain Conventional Weapons;¹⁴
- respect humanitarian law and ensure its enforcement by adopting appropriate national measures;
- ensure the safety of humanitarian personnel;
- punish violations of international humanitarian law;
- cooperate with the Rwanda Tribunal and give it all the necessary assistance.

Potential role of the Tribunal in the struggle against impunity

Through its judgments in the cases submitted to it, the Tribunal will help to stem impunity in Africa because the sentences handed down will demonstrate to the political and military authorities and to the warlords that they may one day be tracked down, judged and punished for any violations of international humanitarian law they have committed in the context of an internal conflict.

As the Tribunal for the former Yugoslavia pointed out in its comments to the *Ad hoc* Committee of the International Law Commission for the creation of an international criminal court, the creation of *ad hoc* tribunals by the Security Council, such as those created for the former Yugoslavia

¹⁴ Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 10 October 1980.

and Rwanda, marks a considerable advance in the struggle against violations of human rights and meets the fundamental concern to see international justice help usher in real and lasting peace in countries torn by armed conflicts, where even dignity is being trampled on a large scale.¹⁵

In Rwanda and the other countries that have succumbed to armed conflict, national reconstruction and social and economic renewal necessarily involve reconciliation between ethnic groups which is based on impartial and neutral justice, for ethnic hatred may perpetuate itself so long as justice is withheld. In such contexts, however, any feeling of impunity will justify a rise in crime. By punishing those guilty of the atrocities perpetrated in Rwanda in 1994, the Tribunal will certainly be helping to stem impunity and facilitate national reconciliation.

Potential role in the development of humanitarian law

Although the Tribunal has no mandate to develop international humanitarian law, like any other judicial body it will be called upon as part of its work to clarify the applicable rules of law, spell out the customary rules concerning non-international armed conflicts and assess the acts of criminals in the light of the relevant provisions of the Conventions and Additional Protocol II, etc. All that will certainly help to reaffirm humanitarian law, to clarify and determine the scope and content of the rules of humanitarian law and, in some cases, gradually to develop it.

Conclusion

The creation of the International Criminal Tribunal for Rwanda marks a refusal to accept impunity. It also signals the international community's commitment to ensuring respect for international humanitarian law and trying those responsible for seriously violating it.

It is interesting to note that despite the political and legal controversy surrounding the discussions at the United Nations when the Tribunal was created, the African States now broadly support it.

If the Tribunal is to play the important role assigned to it in promoting national reconciliation in Rwanda and in the fight against impunity, both in Rwanda and in the rest of Africa, the international community must be able to provide it with the human and material resources required for the proper accomplishment of its mission.

¹⁵ Quoted by Mutoy Mubiala, *op. cit.*, p. 938

The International Criminal Tribunal for Rwanda: bringing the killers to book

by **Chris Maina Peter**

No matter how many atrocities cases these international tribunals may eventually try, their very existence sends a powerful message. Their statutes, rules of procedure and evidence, and practice stimulate the development of the law.¹

In the spring of 1994 more than 500,000 people were killed in Rwanda in one of the worst cases of genocide in history. The slaughter began on 6 April 1994, only a few hours after the plane bringing the Presidents of Rwanda and Burundi back from peace negotiations in Tanzania was shot down as it approached Kigali Airport.

It would seem that the genocide had been planned long in advance and that the only thing needed was the spark that would set it off. For months, *Radio-Télévision Libre des Mille Collines* (RTMC) had been spreading violent and racist propaganda on a daily basis fomenting hatred and urging its listeners to exterminate the Tutsis, whom it referred to as *Inyenzi* or “cockroaches”.² According to one source:

The genocide had been planned and implemented with meticulous care. Working from prepared lists, an unknown and unknowable number of people, often armed with machetes, nail-studded clubs or

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¹ Theodor Meron, “The international criminalization of internal atrocities”, *American Journal of International Law*, Vol. 89, 1995, p. 555.

² See *Prosecuting genocide in Rwanda: The ICTR and national trials*, Lawyers’ Committee for Human Rights, Washington, D.C., July 1997, p. 4.

grenades, methodically murdered those named on the lists. Virtually every segment of society participated: doctors, nurses, teachers, priests, nuns, businessmen, government officials of every rank, even children.³

In Rwanda, a person's ethnic identity became his or her death warrant or a guarantee of survival. The crusade was led by the Rwandan armed forces and the *Interahamwe* (those who stand together) and *Impuzamugambi* (those who fight together) militias. Its main targets were Tutsis and moderate Hutus. Surprisingly, these killings took place while a contingent of UN peacekeeping forces — the United Nations Assistance Mission to Rwanda (UNAMIR) — was in the country trying to facilitate the peace negotiations between the Hutu government of the time and the Tutsi-dominated Rwanda Patriotic Front (RPF). The International Criminal Tribunal for Rwanda (hereinafter referred to also as the Rwanda Tribunal or simply as the Tribunal) was set up to prosecute those involved in instigating, leading and perpetrating the genocide.

International criminal tribunals

The International Criminal Tribunal for Rwanda is not the first of its kind. In fact, it is almost a branch of the International Criminal Tribunal for the Former Yugoslavia, established in 1993.⁴ The two Tribunals share certain facilities and officers; in particular, they have the same Chief Prosecutor and Appeals Chamber. That is why some commentators argue that the Rwanda Tribunal was grafted onto the Yugoslavia Tribunal.⁵

Further examples of tribunals such as the Rwanda Tribunal can be pointed to in modern times. They include the International Military Tribunal in Nuremberg⁶ and the International Military Tribunal for the Far East in Tokyo,⁷ both of which were set up in 1945 to prosecute and punish major Axis war criminals in Europe and Japan. The main difference

³ *Ibid.*

⁴ The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia since 1991 was established by United Nations Security Council Resolution 808 of 1993.

⁵ See Makau Mutua, "Never again: Questioning the Yugoslav and Rwanda Tribunals," *Temple International and Comparative Law Journal*, Vol. 11, No. 1, 1997, p. 167.

⁶ See Hans-Heinrich Jescheck, "Nuremberg Trials", in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 4, North-Holland Publishing Company, Amsterdam/New York/Oxford, 1982, p. 50.

⁷ See Bert V. A. Röling, "Tokyo Trial", *op. cit.* (note 6), p. 242.

between those earlier tribunals and the recent ones is that while after the Second World War it was the victors who set the rules for punishing the vanquished, today it is the international community as a whole which is seeking to bring perpetrators of genocide and other crimes against humanity to justice. In doing so, the international community, acting through the United Nations, has taken into account the development of both international law and international humanitarian law since 1945. That is why, for example, the Statute of the Rwanda Tribunal takes note of both the Geneva Conventions of 1949 and their 1977 Additional Protocol II.

The International Criminal Tribunal for Rwanda

The International Criminal Tribunal for Rwanda was established by the UN Security Council Resolution 955 of 8 November 1994. The purpose was to prosecute 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 and 31 December 1994. At the same time, the Security Council adopted the Statute of the Tribunal and requested the UN Secretary-General to make political arrangements for its effective functioning.

On 22 February 1995, the Security Council passed resolution 977 designating the town of Arusha in the United Republic of Tanzania as the seat of the Tribunal. An agreement between the United Nations and Tanzania concerning the Tribunal's headquarters was signed on 31 August 1995.

The Tribunal, which has a relatively wide jurisdiction, is supposed to prosecute persons responsible for genocide and other serious violations of international humanitarian law. The Statute of the Tribunal more or less follows the Genocide Convention of 1948 in defining genocide as any act committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group. Such acts include: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures to prevent births within the group; and forcibly transferring children of the group to another group. According to the Statute, genocide itself, conspiracy to commit genocide, direct and public incitement to commit genocide, attempts to commit genocide and complicity in genocide are all punishable.⁸

⁸ Article 2 of the Statute.

In addition, the Tribunal has powers to prosecute persons charged with crimes against humanity, which include: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial or religious grounds; and other inhumane acts.⁹ Since such crimes can be committed in various circumstances, the Statute specifies that they only fall within the purview of the Tribunal when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.

Opening a completely new area for tribunals of this nature, Article 4 of the Statute empowers the Tribunal to prosecute persons who commit or order to be committed serious violations of Article 3 common to the 1949 Geneva Conventions for the protection of war victims and of 1977 Additional Protocol II relating to the protection of victims of non-international armed conflicts. Such violations include: violence to the life, health and physical or mental well-being of persons, in particular murder and cruel treatment such as torture, mutilation or any form of corporal punishment; collective punishments; the taking of hostages; acts of terrorism; outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; pillage; the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples; and threats to commit any of the foregoing acts.

To date the Tribunal has issued several indictments and arrest warrants for persons suspected of having been involved in masterminding the genocide in Rwanda in 1994. Some of these persons have been arrested in various States and brought to Arusha, where three trials are under way. First of all there is the case of Clement Kayishema, the former Prefect (Governor) of Kibuye, who is facing 25 charges related to massacres committed at various places. He is being tried jointly with Obed Ruzindana, a businessman accused of having organized massacres in western Rwanda. Then there is the case of Georges Rutaganda, from Gitarama, a senior official in the party of assassinated President Juvenal Habyarimana. As Vice-President of the *Interahamwe* militia, Rutaganda is alleged to have helped arm the militia in Kigali, placed road-blocks and ordered the militia to kill Tutsis. He is also alleged to be a shareholder in *Radio Télévision Libre des Mille Collines*, which made regular broadcasts inciting its lis-

⁹ Article 3 of the Statute.

teners to genocide. Finally, there is the case of Jean-Paul Akayesu, the former Mayor of Taba, near Gitarama, who is charged on 12 counts, including genocide and crimes against humanity.

Also indicted by the Tribunal is Colonel Theoneste Bagosora, who appeared before the Tribunal on 23 January 1997, charged with genocide and crimes against humanity and on two counts of violations of Article 3 common to the Geneva Conventions. He pleaded not guilty on all counts. According to one report, Bagosora is the "biggest fish" that the Tribunal has so far managed to catch.

The problems facing the Rwanda Tribunal

The Rwanda Tribunal has been the object of stinging criticism, which has come mainly from two sources: the current RPF-led government of Rwanda and the Western countries, led by the United States. The Rwandan government opposed the very creation of the Tribunal in the first place, citing two main reasons. To begin with, the most severe punishment to be meted out by the Tribunal would be imprisonment and not death (for the government, those proved to have been involved in the genocide deserved the death penalty, which still exists in Rwanda). Secondly, the Rwandan government argued, it was unrealistic to limit the Tribunal's temporal jurisdiction to the period 1 January to 31 December 1994 since equally serious crimes had been committed before then and these crimes were related to the ones perpetrated in 1994. Other reasons included the likelihood that judges from countries which had been in one way or another involved in the war would show bias; and the fact that those found guilty would serve their sentences in countries offering prison facilities and not in Rwandan jails.¹⁰ In the eyes of the Rwandan government, therefore, the Tribunal would be ineffective; moreover, it would serve no useful purpose since it would not meet the expectations of the Rwandan people: at most, it would be used to appease the conscience of the international community, which had stood by while the genocide took place and had made no effort to stop it. The government has continued to take a very hostile attitude towards the Tribunal, whose personnel in Kigali have reportedly been subjected to harassment and even manhandled in the course of their work.¹¹

¹⁰ At present six countries have indicated their willingness to provide prison facilities for persons convicted by the Rwanda Tribunal: Austria, Belgium, Denmark, Norway, Sweden and Switzerland.

¹¹ See *Prosecuting Genocide in Rwanda*, *op. cit.* (note 2), p. 39.

Western governments have been critical of the Tribunal as part of their broader criticism of the United Nations system as a whole. Among other things, they have alleged that it is not making any headway and that it is generally dysfunctional. As a result, Dr Adede, the Tribunal's Registrar, and Deputy Prosecutor Honoré Rakotomanana, a retired Chief Justice from Madagascar, have been dismissed.¹² In the author's view, such criticism has little, if any, basis in fact and the new appointees will not perform any miracles. The Tribunal was set up from scratch by its senior staff, with no support from the UN itself and under very difficult conditions. Their efforts have gone largely unappreciated.

The influence of the Rwanda Tribunal in Africa

In the final analysis, it is clear that the significance of tribunals like the International Criminal Tribunal for Rwanda does not lie in the number of persons who appear before them, but in the signals sent out by their creation. As Meron says:

No matter how many atrocities cases these international tribunals may eventually try, their very existence sends a powerful message. Their statutes, rules of procedure and evidence, and practice stimulate the development of the law. The possible fear by States that the activities of such tribunals might preempt national prosecutions could also have the beneficial effect of spurring prosecutions before the national courts for serious violations of humanitarian law.¹³

By creating such tribunals, the international community delivers a warning to those who do not value human life.

The establishment of the Rwanda Tribunal is even more significant in Africa itself, where its presence on the continent will help raise people's awareness of the importance and value of human life. Serious crimes have been committed against the African people by all sorts of dictators, and so far they seem to be getting away with it. Dictators like Idi Amin, the former President of Uganda, who killed hundreds, if not thousands of his people, are comfortably living in exile without being made to answer for their deeds. Others, like Mobutu Sese Seko of Zaire (now the Democratic Republic of the Congo), have died in exile, having bankrupted their

¹² Agwu Ukiwe Okali (Nigeria) was appointed as the new head of the Registry, and Bernard Acho Muna (Cameroon) as the new Deputy Prosecutor.

¹³ *Op. cit.* (note 1), p. 555.

countries by transferring huge amounts of resources abroad with the assistance of those very Western countries which day and night preach about democracy, freedom and good governance. And there are still many others on the continent who are shielded and pampered by the West. The establishment of the Rwanda Tribunal in Arusha has thus come as an unpleasant surprise for the power-hungry leadership in Africa. It is a clear signal from the international community that human life is precarious, that it should be respected and protected, and that those who abuse it will be held responsible and be sought wherever they are hiding.

Furthermore, the Rwanda Tribunal has dealt another blow to those African leaders who have violated the fundamental rights and freedoms of their peoples with impunity for many years by taking shelter behind Article 3 of the Charter of the Organization of African Unity. While this article provides for non-interference in the internal affairs of member States, it is now plain that the violation of such rights and freedoms is no long a restricted domain of the State but concerns the international community as a whole: the world has both the right and the duty to raise questions and demand satisfactory answers.

In addition, the creation of the Tribunal has reopened the debate on the possibility of establishing a human rights court on the African continent. African leaders have been adamant that the African Commission on Human and Peoples' Rights¹⁴ provides sufficient guarantees and that such a step is therefore unnecessary. Their case is slowly but surely losing ground. The fact that perpetrators of genocide are being prosecuted in Arusha argues in favour of establishing a court where victims of human rights violations might also seek redress. The very existence of the Tribunal, notwithstanding its ad hoc status, is thus a great inspiration to the African people, many of whom are looking forward to the establishment of a permanent international criminal court with the same status as that of the International Court of Justice.

Although the Rwanda Tribunal may thus be viewed as a positive development on the African continent, it has little in common with a body such as the Truth and Reconciliation Commission in South Africa.¹⁵ The

¹⁴ The African Commission on Human and Peoples' Rights was established under the African Charter on Human and Peoples' Rights, adopted in 1981 by the Organization of African Unity.

¹⁵ On this Commission see Gerhard Werle, "Without Truth, No Reconciliation: The South African *Rechtsstaat* and the Apartheid Past", *Verfassung und Recht in Übersee*, Vol. 29, No. 1, 1996, p. 58.

main difference between the two is that the Truth Commission is an internal mechanism whereby South Africa is bravely attempting to come to terms with its past and shed light on the terrible deeds committed during the apartheid era. This stage has not been reached in Rwanda, where peace has yet to be achieved on a basis that is acceptable to all. It will take time for the two warring ethnic groups — Hutu and Tutsi — to find their way towards a genuine reconciliation; meanwhile, the Rwanda Tribunal can only further the process. Whatever their shortcomings, such institutions will certainly contribute to the effort to find a lasting solution to problems of this nature facing mankind at the end of the twentieth century.

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The International Criminal Tribunal for Rwanda

Are all issues addressed?
How does it compare to South Africa's Truth
and Reconciliation Commission?

by Gerhard Erasmus and Nadine Fourie

The international response to the Rwandan problem

The response of the international community to the massacres and genocide in Rwanda was at times "reluctant" and "inadequate".¹ This can partly be explained by the amount of human and material resources that would have been required to restore peace and address the more fundamental issues of the failure of the State itself.² The Rwandan experience does, however, also raise serious questions about the adequacy of international and regional structures responsible for maintaining and restoring peace.

The principles and assumptions underpinning the Security Council appear questionable with respect to situations like Rwanda. The massive scale of human suffering and the destabilization of the whole region were acknowledged, as was the fact that the situation came under Chapter VII

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¹ In a report to the Security Council, the Secretary-General wrote that the international community's delayed reaction to the genocide "demonstrated graphically its extreme inadequacy to respond with prompt and decisive action to humanitarian crises entwined with armed conflict". In his opinion, the entire system needed to be reviewed to strengthen its capacity to react. *The United Nations and the situation in Rwanda*, UN reference paper of April 1995, p. 13.

² According to estimates of the situation in late 1994, of a total population of approximately 7 million, as many as 500,000 Rwandans had been killed, 3 million had been internally displaced and over 2 million had fled to neighbouring countries. *Ibid.*, p. 17.

of the UN Charter. Nevertheless, Rwanda could not elicit the political resolve needed to agree that the indivisibility of international peace was indeed sufficiently clear in the case of this African tragedy.

The Rwandan “problem” has not been solved. It is hoped that the International Criminal Tribunal for Rwanda (ICTR) will contribute to a process of normalization and “reconciliation” which will result in the restoration of a peaceful society and a stable State. This article aims to provide a brief discussion of its mandate and to speculate about its impact. Will the Rwanda Tribunal help to promote respect for humanitarian law? How will it contribute towards solving similar problems elsewhere?

The Tribunal was set up in the belief “that those responsible for serious breaches of international humanitarian law and acts of genocide must be brought to justice.” At the same time it is hoped that “national reconciliation” and “respect for the fundamental rights of individuals” will be restored. It seems that it is the resurrection of the Rwandan State that is indeed necessary.

This requires the “restoration of civil administration and the reconstruction of the social and economic infrastructure of the country.”³ Is this latter objective given sufficient emphasis? Can justice and reconciliation be attained at the same time? Is it not the case that a more fundamental question — namely whether Rwanda is a viable nation-state — is being avoided?

A comparison will be drawn between the ICTR and the South African Truth and Reconciliation Commission (TRC). There are some obvious differences both in the histories of the two countries and in the mandates of the ICTR and the TRC. However, on a certain level they both aim at reconciliation and the reconstruction of their respective societies. How do they compare and what are the prospects of success?

The mandate of the ICTR

The ICTR was set up after the most serious acts of genocide had already taken place. Talks for the initiation of a cease-fire started in 1994.⁴ This took place within a broader framework, namely the search for a

³ Security Council Resolution 955 (1994), 8 November 1994, which established the ICTR.

⁴ After the adoption of Security Council Resolution 918 in 1994.

political settlement and national reconciliation. It was realized that these were long-term objectives which had to be pursued within the framework of the Arusha Peace Agreement, concluded in August 1993. The talks and the subsequent measures all took place within the context of a certain degree of international involvement. Whether the “internationalization” goes far enough is a different matter altogether. The South African process differs greatly in this regard. The transition to a democratic society was a home-grown process and the TRC was set up in that context.

The Rwandan process is based on a direct concern for international humanitarian considerations and bringing the perpetrators of acts of genocide to justice. The implications of such an approach for national reconciliation have not been properly addressed. The two pillars of the broader process are justice and the reconstruction of the Rwandan society. They are directly interrelated. The latter — national reconstruction and reconciliation — is mentioned, but does not directly form part of the mandate of the ICTR.

The Security Council requested the establishment of a Commission of Experts to investigate specific violations of international humanitarian law.⁵ The Commission found serious breaches of international humanitarian law on both sides of the conflict. Acts of genocide were then found to have been committed against the Tutsi group. It was decided to set up an international criminal tribunal for the purpose of dealing with these violations.

The ICTR was set up by the Security Council, acting under Chapter VII of the UN Charter.⁶ Chapter VII allows for UN action with respect to threats to international peace, breaches of the peace and acts of aggression. Action under Chapter VII thus provides an important indication of the international standing and the seriousness of the Rwandan problem.

The decision to establish the Tribunal was made in response to a request by the government of Rwanda. Its purpose is to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and in the territory of neighbouring States. It focuses on acts committed between 1 January 1994 and 31 December 1994. The Tribunal has the power to prosecute persons who have committed genocide as defined in the Statute of the

⁵ Security Council Resolution 935 (1994).

⁶ Security Council Resolution 955 (1994).

Tribunal. Article 2 defines genocide as killing members of national, ethnic, racial or religious groups, causing serious bodily or mental harm to those members, bringing about the physical destruction of the group, preventing births and forcibly transferring children. In addition to genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempts to commit genocide and complicity therein are also punishable. Crimes against humanity and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II are also included and defined in considerable detail.

The Tribunal has jurisdiction over natural persons and individual criminal responsibility cannot be disclaimed by reliance on superior orders. Its jurisdiction extends over the territory of Rwanda as well as to the territory of neighbouring States in respect of these violations.⁷ Other States are required to cooperate with and assist the Tribunal. Although concurrent jurisdiction⁸ with respect to other fora is recognized, the Tribunal shall have primacy over the national courts of all States.⁹ The principle of *non bis in idem* is included in the Statute.¹⁰

The Tribunal consists of two Trial Chambers, an Appeals Chamber, a Prosecutor and a Registry. The Chambers are composed of eleven independent judges, with three serving in each of the Trial Chambers and five judges serving in the Appeals Chamber. The election of the judges is dealt with in considerable detail, with emphasis on the criteria of impartiality, integrity, and the necessary qualifications and experience.

The remainder of the Statute deals with powers, procedures, rights of the accused, protection of victims and witnesses, judgments, penalties, appellate proceedings, review proceedings, enforcement of sentences, pardon or commutation of sentences, and the privileges and immunities of the Tribunal itself. Its expenses are to be borne by the United Nations in accordance with Article 17 of the UN Charter.

⁷ Articles 1 and 7 of the Statute of the International Criminal Tribunal for Rwanda (hereafter "the Statute").

⁸ Article 8(1) of the Statute.

⁹ Article 8(2) of the Statute.

¹⁰ Article 9 of the Statute provides that the *non bis in idem* rule applies strictly in the case of a person already tried before an international tribunal. There are some exceptions to the rule with regard to a person previously tried before a national court — e.g. where a person was not tried diligently or where a national trial was not impartial or independent.

Imprisonment is to be served in Rwanda or any of the States on the list of States which have indicated their willingness to accept convicted persons.¹¹ Convicted persons may be eligible for pardon or commutation of sentence according to the laws of the State in which a convicted person is imprisoned. This may, however, only happen in consultation with the judges of the ICTR.

The impression created is that the ICTR is to function as a true international tribunal, even though it is not of a permanent character. This international dimension indicates an international commitment to solving the Rwandan problem, but may also constitute a weakness. The success of the work of the ICTR will depend on the cooperation of a number of independent governments. So far this has not happened to the extent originally hoped for. One of the reasons is that the region is still very much in a state of flux and the related problems of stability in those countries continue to exist. The recent takeover in Zaire is an example. Many of the refugees have still not returned to Rwanda.

Some basic tensions exist within the mandate of the Tribunal. On the one hand, it has to ensure individual responsibility and deal with the problem of “the culture of impunity”. On the other hand, there is a more basic requirement, namely to ensure reconciliation and to “reconstruct” the Rwandan society and State. Whether these aims are fully compatible is doubtful, at least given the way they are being pursued at present. The current indications are that this tension is still unresolved.

The South African reconciliation process is based on a different philosophy. It is an exercise in pragmatism and compromise that was designed by South Africans themselves.

Is the ICTR functioning successfully?

There are also indications that serious practical problems plague the Tribunal. Some of these relate to the cooperation provided currently by the Rwandan authorities. Other problems are the ineffectiveness of investigations in Rwanda itself and the limited nature of the mandate. Some crimes have been committed by those now in power in Rwanda and if these cannot be investigated by the Tribunal, the danger of “selective justice”

¹¹ Article 26 of the Statute.

poses a serious obstacle to reconciliation and reconstruction. The work of the Tribunal is also hampered by the ineffective protection of witnesses and an inadequate administrative infrastructure. One of the lawyers appointed to defend the accused has resigned and issued a statement expressing the view that the ICTR will not achieve what it is supposed to do. It is feared that justice will not be seen to be done, that the process will be viewed as partisan and that it will not be able to contribute to reconciliation and stability.¹²

An additional problem is the fact that simultaneous action with regard to the detention and conviction of suspects is being taken by the Rwandan domestic courts. One of the discrepancies that result from the dual system of prosecution is that, although the International Tribunal tries the more serious cases, the domestic courts impose more severe sentences.¹³ The first two defendants convicted of genocide and rape were both sentenced to death by a Rwandan court, even though they were seemingly minor players in the genocide.¹⁴

The signs are that these problems have been recognized and that they are being addressed. In order to be successful, the Tribunal must cooperate with the authorities in the various countries, including Rwanda. The extent of the willingness to do so is part of the current problem. It may be necessary to extend the Tribunal's mandate and investigate the actions of persons not covered at present by the Statute.

The Tribunal is not properly equipped to deal with the political complexities of the situation. It has to function in a context of widespread regional instability. The Tribunal does not operate in the type of environment which existed for the International Military Tribunal at Nuremberg¹⁵ in the sense that a war was over and conditions allowed for effective criminal investigation and punishment of offenders. In the case of the Rwanda Tribunal the more fundamental problems of stable nationhood and reconciliation are not sufficiently addressed.

¹² From a statement by a Belgian barrister who was appointed to defend some of the accused and who has subsequently resigned.

¹³ Under Article 23 of the Statute, the International Tribunal can only impose sentences of imprisonment.

¹⁴ F. Viljoen "The role of the law in post-traumatised societies: Addressing gross human rights violations in Rwanda", *De Jure*, 1997, p. 25.

¹⁵ The Nuremberg Tribunal was established under the London Agreement of 8 August 1945 to try war crimes committed during the Second World War.

The South African Truth and Reconciliation Commission

The South African exercise in reconciliation is based on a completely different premise. It is part of a process of national transformation and establishment of democratic rule. The demise of apartheid resulted from a decision of the government of that time to lift the ban on political parties and to start negotiations for the adoption of a new constitution and the holding of democratic elections. The latter took place in April 1994 and established the ANC as the new government. The negotiations also produced a new constitution of an interim nature containing 34 constitutional principles which had to be incorporated in the final constitution, to be adopted by the parliament elected in 1994.

That was achieved in 1996 and the text of that constitution was then submitted to the newly established Constitutional Court for certification. This was a unique process. The Constitutional Court had to certify that the final constitution respected and accommodated all 34 constitutional principles adopted during the negotiations which preceded the transfer of power.

One may say that the South African process was a home-grown one, in which the international community was not directly involved and which resulted in a contract being concluded between all the various groups constituting South African society. That contract is contained in the Constitution itself and various new institutions have been established in order to give effect to it. The Bill of Rights is very comprehensive and fully justiciable. A constitutional court may rule on all aspects of the constitution.

A statement on national reconciliation formed part of the interim constitution. It refers to national unity and reconciliation, the divided nature of society and the suffering and injustice of the past. It aims at creating a new society based on democracy, human rights and reconciliation. It also contains the following statement: "in order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of conflicts of the past. To this end, Parliament, under this Constitution, shall adopt a law determining a firm cut-off date ..."¹⁶

¹⁶ Postamble of the Constitution, Act 200 of 1993.

The inclusion of an amnesty provision in the interim constitution was in many ways a compromise designed to defuse national conflict in the interests of reconciliation.¹⁷ It did, however, leave many victims frustrated in their claims for justice through prosecution by the same Courts that upheld the systematic violence against them.

The TRC has since been established and is still conducting public hearings and hearing applications for amnesty. Its mandate has also been extended.

Its report will not be available until 1998. In the meantime, the exercise can be said to have been dramatic, with South Africans witnessing amazing revelations — some of them by prominent politicians who applied for amnesty — about actions of the previous government and to a lesser extent of the liberation movements. In certain quarters of society, the work of the commission has been criticized for being one-sided. It may, however, be said that the process has generally been quite successful and that it has provided a national opportunity to come to terms peacefully with a history of division and strife.

The Commission works in public and testimonies are published and reported through the media. The names of victims and perpetrators are known and a comprehensive report will eventually be issued.¹⁸ Amnesty is only granted if full disclosures have been made.¹⁹ The objective is to discover the truth in order to provide for amnesty and to heal the wounds of the past.²⁰ In that sense a national debate on the very foundations of the new society and on the need to establish and protect an effective *Rechtsstaat* [State under the rule of law] will, it is hoped, be achieved.

¹⁷ *AZAPO and Others v The President of the Republic of South Africa*, 1996(8) BCLR 1015 (CC) 1020 at para 2 per Mahomed J: "It was wisely appreciated by those involved in the preceding negotiations that the task of building such a new democratic order was a very difficult task because of the previous history and the deep emotions and indefensible inequities it had generated; and that this could not be achieved without a firm and generous commitment to reconciliation and national unity. It was realised that much of the unjust consequences of the past could never be fully reversed. It might be necessary in crucial areas to close the book on that past."

¹⁸ See section 3(1) of the Promotion of National Unity and Reconciliation Act, 34 of 1995 (hereafter "the Act"). The report will, apart from providing a comprehensive account of the activities and the findings of the Commission, also contain recommendations on the prevention of future violations of human rights.

¹⁹ Sections 3(1)b and 16 to 22 of the Act provide for the functioning of the Amnesty Committee.

²⁰ *AZAPO, supra* (note 17), p. 1028, para 17: "Without that incentive there is nothing to encourage such persons to make the disclosures and to reveal the truth which persons in the position of the applicant so desperately desire. With that incentive, what might unfold are objectives fundamental to the ethos of a new political order."

It is too early for a final evaluation. Our impression is that the TRC and the truth and reconciliation process have become accepted as part of the transition, and that it can therefore perform quite well. At least part of its success can be attributed to the personality of its chairperson, the widely respected former archbishop Desmond Tutu.

Components of the TRC include a Committee on Human Rights Violations,²¹ a Committee on Amnesty and a Committee on Reparation and Rehabilitation.²² The latter deals with applications for reparation and rehabilitation from victims of human rights violations. The work includes making recommendations on urgent interim relief and longer-term efforts aimed at “the creation of institutions conducive to a stable and fair society”. At present the work of the Amnesty Committee seems to be dominant, partly because of the dramatic revelations that are currently being made in public.

The work of the Commission has to be aligned with the requirements of the Bill of Rights, and particularly with the provision regarding fair trial contained in section 35 of the present Constitution. This has resulted in applications to the courts for the protection of the due process rights of people implicated in the public hearings on human rights violations.²³

The Constitutional Court also heard an application on the alleged unconstitutionality and incompatibility with international law of the granting of amnesty within the context of the TRC.²⁴ It was argued that it resulted in the suspension of the guarantee of having all disputes settled by a court of law or an independent tribunal. The application was rejected and the constitutionality of the TRC process was confirmed, *inter alia* on the basis that national reconciliation was provided for in the Constitution and that this was necessary in order to achieve the transition towards a democratic government.

A comparison

An outstanding feature of the Truth and Reconciliation Commission in South Africa is that it was born out of a truly national process of

²¹ Chapter 3 of the Act.

²² Chapter 5 of the Act.

²³ See *Du Preez and Another v Truth and Reconciliation Commission* 1997(4)BCLR 531(A), *Niewoudt v Truth and Reconciliation Commission* 1997(2) SA10 (SECLD).

²⁴ *AZAPO v The President of the RSA*, *supra* (note 17).

reconstruction, in which there is no direct international involvement. The reconciliation exercise forms part of a broader process of creating a stable democratic government in a divided society. Many compromises are called for in the name of long-term stability and peace, although this frustrates some in their search for more tangible retributive justice. For the whole rebuilding process to be successful, South Africans have to honour the contract which they have entered into with themselves.

Until now the process has been running relatively smoothly, despite accusations of a lack of even-handedness from some quarters. The last stage of the national debate will only occur when the final report has been completed and made public. Recently some top-ranking politicians from the previous government have testified before the Commission and indicated their personal responsibility and regret. Such actions do contribute to a spirit of reconciliation.

The Rwanda Tribunal, on the other hand, relies primarily on international support. The lack of national commitment and cooperation poses a serious obstacle to the successful implementation of its mandate. It is also unclear whether that mandate is indeed sufficiently broad and whether all the implications relating to achieving its objectives in practice have been thought through. The emphasis seems to be on prosecuting those responsible for violations of humanitarian law and on combating a culture of impunity. This is not fully compatible with the other objectives of reconciliation and reconstruction of society and of the State. Here lies a major difference with respect to the South African situation, in which qualified amnesty has been accepted in the interests of truth and national reconstruction.

Satisfying the needs of justice and national reconciliation simultaneously is a difficult task for the international community. International intervention in order to ensure reconciliation may potentially be in conflict with national sovereignty, though reliance on the latter may be undermined in cases of severe instability and ineffective rule. Reconstructing the Rwandan State and achieving true reconciliation will require a commitment and resources for which international organizations are ill-prepared. It also poses awkward questions on the very notion of statehood and the historical process preceding decolonization.

One lesson that may be learned by comparing the two cases is that processes such as these cannot be divorced from the fundamental issues of statehood, reconciliation and the reconstruction of divided societies. Rwanda is not the only African State facing the problems described above. It is not at all clear that the international community has learned the

necessary lessons from Rwanda to enable it to adopt realistic and comprehensive policies for effective action in the future.

International humanitarian law cannot be implemented effectively when there is inadequate preparation, a lack of proper infrastructure and resources, and clashes of jurisdictions.

Rwanda's national criminal courts and the International Tribunal

by **Olivier Dubois**

Questions inevitably arise about the concurrent competence and complementary nature of an international tribunal and national courts, and about cooperation between them. Those questions may well apply to any State on earth because, by virtue of the principle of universal competence, many crimes which international tribunals are competent to try may also be tried by any State irrespective of the place where they are committed or the nationality of the perpetrator.

In the case of the genocide, crimes against humanity and massacres committed in Rwanda, these questions are particularly pertinent for the International Criminal Tribunal for Rwanda and Rwanda's own courts. Rwanda has itself arrested tens of thousands of suspects and started to try them, and the Tribunal is conducting the bulk of its enquiries on Rwandan territory. The two legal systems often overlap. This article sets out to show how the structures introduced and the provisions adopted by each have or have not allowed for the existence of the other. For a proper understanding of the logic behind each system, however, it is essential to recall Rwanda's position when the Tribunal was set up.

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Original: French

Rwanda and the creation of the International Tribunal

Ever since a government of national unity was set up following the victory of the Rwandan Patriotic Front in July 1994, Rwanda has been alerting the international community to the need to internationalize the repression of those who perpetrated the genocide and massacres. The Rwandan Government wrote to the President of the Security Council calling for the earliest possible creation of an international tribunal to try the alleged criminals.¹ The idea was to associate the international community with the repression of crimes which affected it as a whole. The tribunal was intended to allay suspicions of vengeance and summary justice and, above all, to lay hands on criminals who had found refuge abroad. It might be added that one of Rwanda's objectives in drawing the international community's attention to the issue of repression was to gain the support necessary for the functioning of its own criminal justice system.

However, Rwanda voted against resolution 955 which instituted the Tribunal, subsequently explaining its vote in the following manner.²

First, Rwanda could not accept the limitation of the Tribunal's *ratione temporis* competence to acts committed in 1994. It cogently argued that the acts committed in 1994 had not occurred spontaneously but had been preceded by a planning period, and that smaller-scale massacres had occurred before 1994.³ It was told that, under its Statute, the Tribunal's jurisdiction would not be limited in time in respect of any person who had planned, instigated or otherwise aided and abetted in the execution of any of the crimes referred to in the Statute.⁴ However, that approach required delicate proof of a causal link between such acts, regarded as a form of criminal participation, and the 1994 genocide itself. Moreover, the crime of incitement to commit genocide, covered in Article 2, paragraph 3 of the Statute, does not require a link with the

¹ UN Doc. S/1994/115 of 29 September 1994. On 6 October 1994 the President of Rwanda said in his address to the UN General Assembly that it was "absolutely urgent that this international tribunal be established"; Official Records of the General Assembly, Forty-ninth Session, Plenary meetings, 21st Meeting, p. 5.

² Security Council, Forty-ninth Year, 3453rd Meeting, 8 November 1994, S/PV.3453, pp. 14 ff.

³ The international community itself recognized that serious massacres had occurred: Report of 11 August 1993 by the Special Rapporteur on his mission to Rwanda between 8 and 17 April 1993, E/CN.4/1994/7/Add.1.

⁴ Article 6, para. 1 of the Tribunal's Statute.

subsequent commission of an act of genocide but remains subject to the 1994 time-limit.⁵

Second, Rwanda stressed that the Tribunal's structure was inadequate for the task facing it. The fact that the Appeals Chamber and the Prosecutor were to be common to the Tribunals for both Rwanda and the former Yugoslavia cast doubts on the effectiveness of a body which, in the harsh words of Ambassador Bakuramutsa, "would simply appease the conscience of the international community".⁶

Third, Rwanda expressed regret that there was nothing in the Statute to establish the Tribunal's priorities with regard to the crime of genocide underlying its very inception.

Fourth, Rwanda was concerned by the fact that countries which had supported the genocidal regime would participate in the process of nominating judges.

Fifth, Rwanda could not accept that persons sentenced by the Tribunal should be imprisoned in third countries or that those countries should have powers of decision over such detainees. Here it must be pointed out that the national law of the host country fully applies only to the prison regulations. The application of national law for any pardon or commutation of sentence is a matter for decision by the President of the Tribunal. The Rwandan Government is informed by the President of any application for pardon or commutation of sentence, but no genuine consultation is involved.⁷

Sixth, Rwanda was firmly opposed to the exclusion of capital punishment from the penalties which the Tribunal could impose, since the death penalty is still in force under its own penal code.⁸ Even if the machinery of repression subsequently set up in Rwanda seriously limits

⁵ P. Akhavan, "The International Criminal Tribunal for Rwanda: The politics and pragmatics of punishment", *American Journal of International Law*, Vol. 90, 1996, p. 506.

⁶ S/PV.3453, p. 15. Ambassador Bakuramutsa stated that Rwanda still believed that the international community's interest in creating the tribunal was a face-saving measure since it had not reacted to save Rwanda from the genocide even though it was present locally. See "1945-1995: Critical Perspectives of the Nuremberg Trials and State Accountability", Fifth Ernst C. Stieffel Symposium, *New York Law School Journal of Human Rights*, Vol. 12, 1995, p. 650.

⁷ Art. 27 of the Tribunal's Statutes and Rules 124 and 125 of the Rules of Procedure and Evidence.

⁸ Arts. 26 and 312 (premeditated murder) of the Rwandan Penal Code, Decree-Law No. 21/77 of 18 August 1977, *Journal officiel de la République rwandaise*, 1 July 1978.

cases in which the death penalty may be applied, the planners tried at Arusha will nonetheless avoid paying a penalty which lesser criminals might expect at Kigali. However understandable Rwanda's wish not to rule out that penalty for such crimes, it is completely unthinkable that a United Nations body should impose the death penalty when the organization as a whole is opposing it on several other fronts.⁹

Seventh, Rwanda was insistent that the Tribunal should have its seat in Rwanda, stressing the explanatory and preventive role it was to play among the Rwandan population. Resolution 955 postponed a decision on the Tribunal's location, and it was for geographical, economic and political considerations that resolution 977 of 22 February 1995 established its seat at Arusha.¹⁰

Despite its negative vote, Rwanda has always said it will cooperate fully with the Tribunal.

Is the International Tribunal really an ad hoc tribunal?

In resolution 955, the Security Council stressed that international cooperation was necessary to strengthen Rwanda's own judicial system and courts, *inter alia* because of the large number of suspects to be arraigned before those courts.¹¹ The Tribunal might therefore logically be expected to help Rwanda's courts and tribunals try those who perpetrated the genocide. In this respect, the international community and the Tribunal appear to have missed some opportunities which might have made for closer harmony between national and international justice without fundamentally calling into question the Tribunal's impartiality and efficiency. Nowadays, the question being asked is whether the Tribunal is appropriately tailored — ad hoc — for carrying out its mission.

⁹ Second optional additional protocol to the International Covenant on Civil and Political Rights, aimed at abolishing the death penalty, adopted by the General Assembly in resolution 44/128 of 15 December 1989. On this issue see W. Schabas, *The Abolition of the Death Penalty in International Law*, 2nd ed., Cambridge University Press, Cambridge, 1997.

¹⁰ Report of 13 February 1995 by the Secretary-General pursuant to paragraph 5 of Security Council Resolution 955 (1994), S/1995/134; and Resolution 977 (1995), S/RES/977 of 22 February 1995.

¹¹ Resolution 955, ninth preambular paragraph.

Seat of the Tribunal

The arguments put forward by the United Nations Secretary-General for turning down Kigali as the seat of the Tribunal are not entirely convincing. According to his report of 13 February 1995, justice and equity required that the trials take place on neutral territory.¹² That argument sounds like both a confession of weakness and a dangerous assumption: a confession of weakness, because it means that the Secretary-General does not regard the Tribunal's international status and procedural safeguards as sufficient to ensure the integrity and equity of its action; a dangerous assumption, because it means that the Rwandan Government is perceived as the instrument of a conqueror seeking to use international justice as a means for revenge. Yet opting for headquarters in Rwanda was exactly what would have enabled the government there to be taken at its word and to match its call for equitable justice based on respect for the fundamental rights of the individual with an international tribunal whose cumbersome procedures and the time allowed the defence it regards as disproportionate in view of the crimes committed. Lastly, how to believe that a justice which is becoming alien and no longer simply international, one which does not show its face, can fulfil its own self-appointed roles as a factor for national reconciliation and peace-keeping? The symbolism of "Nuremberg 1933-1946" should have served as a precedent.

The second argument was an economic one: Rwanda lacked any infrastructure for hosting the Tribunal. Work was also needed at Arusha, however, such as the construction of a detention centre and a second courtroom.¹³ In the long term it is far from certain that the initial savings made by choosing Arusha are not being swallowed up by the cost of shuttling the Tribunal's staff between Kigali, Arusha and The Hague. The logistic and psychological problems of taking witnesses to Tanzania may also have been underestimated.¹⁴

¹² Report by the Secretary-General of 13 February 1995, *supra*, para. 42.

¹³ Report by the Secretary-General of 12 May 1997 on the Financing of the International Tribunal for Rwanda, A/C.5/51/29/Add.1, paras. 44 and 45.

¹⁴ Choosing Kigali as the seat of the Tribunal would have raised problems for certain defence witnesses living outside Rwanda, because the Rwandan justice system suspected many of them of genocide. The Tribunal would have been obliged to obtain guarantees from Rwanda to the effect that such persons would not be arrested and that their safety would be guaranteed when returning to Rwanda to testify. That would probably have created major tensions between the Tribunal and the Rwandan authorities.

Lastly, choosing Kigali would have enabled members of the Rwandan judicial system to attend genocide-related trials and draw lessons for their own benefit.

The choice of Arusha does not rule out the possibility of holding hearings and passing sentence elsewhere, including in Rwanda.¹⁵ Antonio Cassese, President of the Appeals Chamber, says he favours holding hearings in Kigali since they would make the proceedings more visible. According to him, the main difficulties are not psychological, moral or legal but simply practical problems of security.¹⁶

Applicable procedure

The procedure to be applied by the International Tribunal is modelled on that in force at the International Tribunal for the former Yugoslavia in The Hague. The Rules of Procedure and Evidence adopted by the Arusha Tribunal are only marginally different from those adopted at The Hague. The procedure itself is of a fairly accusatorial nature, of the kind which finds its fullest expression in the common-law countries. It was a perfectly plausible choice *in abstracto* because it allows both the prosecutor and the defence the fairest possible balance of weaponry. Moreover, a gradual alignment is taking place in the inquisitorial rules of procedure of countries in which the first phase of the trial does not allow for full argument on both sides.¹⁷ However, the lack of any investigative body responsible for gathering evidence for the defence and the prosecution makes the task of the defence lawyers a far more active one in that they have to identify witnesses and have them summoned, etc. This is a particularly delicate job when they have to work in such hostile environments as Rwanda and the Democratic Republic of Congo, for example.¹⁸ The misunderstandings are likely to be exacerbated because those countries have a hybrid type of criminal procedure in which the defence plays a lesser role during the investigative phase.

¹⁵ Resolution 955, para. 6; Rule 4 of the Rules of Procedure and Evidence.

¹⁶ Interview with A. Cassese, *Ubuabera* (independent newspaper reporting on the Tribunal), No. 9, 9 June 1997, available at <http://persoweb.francenet.fr/~intermed>.

¹⁷ M. Delmas-Marty (ed.), *Procédures pénales d'Europe*, PUF, Paris, 1995.

¹⁸ C. Slosser, "Changeover in Kinshasa slows trials", *Tribunal*, Institute for War and Peace Reporting, No. 9, June-July 1997, p. 7.

The choice of an accusatorial procedure by the Tribunal necessarily limits the use it can make of evidence gathered by Rwandan investigators acting in accordance with their own code of criminal procedure. What evidential value is to be attached to a report drafted by an inspector of the criminal police during the interrogation of a person who is only subsequently warned that he is suspected of having participated in the genocide? This issue of compatibility between a partially inquisitorial national procedure and an essentially accusatorial international procedure has not gone unnoticed by jurists from countries which have launched investigations into Rwandan nationals suspected of having participated in the genocide before the Tribunal itself took over the cases.¹⁹

For the sake of efficiency and out of respect for the rights of the defence, the Tribunal may nonetheless admit evidence gathered by other States in accordance with differing procedures. Rule 5 of the Rules of Procedure and Evidence appears to allow for that possibility:

“Any objection by a party to an act of another party on the ground of non-compliance with the Rules or Regulations shall be raised at the earliest opportunity: it shall be upheld and the act declared null only if the act was inconsistent with the fundamental principles of fairness and has occasioned a miscarriage of justice.”

The judges have a great deal of room for manoeuvre, but it remains to be seen how that provision is applied.

One-way cooperation

As a body created by the Security Council, the Tribunal has primacy over national courts. Accordingly, it may require States to cooperate fully in its action by identifying and seeking suspects, producing evidence, forwarding documents, and arresting and detaining persons against whom it has initiated proceedings.²⁰ It may also request a national court to defer cases to it at any time during the proceedings.²¹ The

¹⁹ A. Ribaux, “Folie meurtrière au pays des mille collines: carnet de notes d’un enquêteur suisse au Rwanda”, *Recueil de jurisprudence neuchâteloise*, 1996, p. 29; M.-A. Swartenbroekx, “Le Tribunal pénal international pour le Rwanda”, in J.-F. Dupaquier (ed.), *La justice internationale face au drame rwandais*, Karthala, Paris, 1996, p. 107; D. Vandermeersch, “La loi du 22 mars 1996 relative à la reconnaissance du Tribunal pour l’ex-Yougoslavie et du Tribunal international pour le Rwanda et à la coopération avec ces tribunaux”, *Revue de Droit pénal et de Criminologie*, 1996, p. 873.

²⁰ Art. 28 of the Statute and Rules 8, 40, 55 and 61 of the Rules of Procedure and Evidence.

²¹ Art. 8, para. 2 of the Statute.

non bis in idem principle is not fully binding on the Tribunal which, under certain conditions, may retry a person who has already been tried by a national court.²²

The Tribunal's compelling powers and primacy are essential attributes of an international court. It is unfortunate, however, that cooperation should be of a one-way nature. For instance, neither the Statute nor the Rules of Procedure and Evidence indicate how the Tribunal should respond to a request for legal assistance by the Rwandan Public Prosecutor's office or courts, and yet the very nature of the crimes committed means that some cases being tried by one court or the other are likely to be linked. It is unlikely that the structure of the Tribunal would have been fundamentally altered had such potential cooperation been formalized.²³

Caught between budgetary constraints and a desire to act quickly, the United Nations has created a tribunal which has unfortunately got off to a slow and laborious start. According to one author,²⁴ the difficulties encountered reflect the Security Council's inability to manage operational organs which require constant attention to detail. This has all too easily enabled the Tribunal's opponents in Rwanda to query its efficiency and cost, withhold their cooperation and depict it as a sop to the international community's conscience.

Repression by Rwandan courts

In terms of numbers, the trials of perpetrators of the genocide by Rwanda's own courts will be by far the most significant legal response to the wholesale slaughter, crimes against humanity and massacres committed in that country. Over 100,000 detainees are at present awaiting trial, an appallingly high figure. Not even in a highly developed country which had known neither war nor genocide could the penal system cope with such a workload without an overhaul. What is to be said of Rwanda, where the judiciary has traditionally been subordinate

²² Art. 9, para. 1 of the Statute.

²³ In this connection see D. De Beer *et al.*, *The organic law of 30 August 1966 on the organization of the prosecution of offences constituting the crime of genocide or crimes against humanity: commentary*, Alter Egaux, Kigali, 1997, p. 30, footnote 4.

²⁴ C. Bassiouni, "From Versailles to Rwanda in seventy-five years: The need to establish a permanent international criminal court", *Harvard Human Rights Journal*, Vol. 10, 1997, p. 9.

to the executive power, largely owing to the under-qualification of its staff?²⁵ In July 1994 the entire judicial system needed rebuilding, or rather just building. Buildings, equipment, personnel and finance — all were in short supply.

The search for new solutions

The Rwandan Government took a two-pronged approach to repressing the genocide. First, material reconstruction of the judicial system's infrastructures and the accelerated training of its staff, starting with those working at the beginning of the penal process (criminal police inspectors),²⁶ was intended to create minimum conditions for criminal justice to start functioning again with an eye to the coming trials. That relaunching of a penal system to try the perpetrators of genocide and massacres must be distinguished from the task of rehabilitating the judicial system as a whole, a longer-term undertaking which involves training law graduates at university, followed by further training at the Nyabisindu Judicial Training Centre.

Then, the Government and Parliament dealt with the legislative and institutional adaptations needed for holding the trials. Their exercise in collective reflection really started at an international conference organized by the Government in November 1995,²⁷ at which crucial questions were raised. For instance, how to ensure justice which respects the rights of the individual, with so many suspects, while ruling out an amnesty? What forum to choose for trying such persons: emergency courts, specialized chambers within existing courts, or assize courts? What law to apply so that the specific nature of the crimes committed can be recognized: the direct application of international law, the inclusion of the crime of genocide and crimes against humanity in the penal code, or a specific law? How to avoid being accused of violating the principle of non-retroactivity of criminal law?

²⁵ F.-X. Nsanzuwera, *La magistrature rwandaise dans l'état du pouvoir exécutif*, CLADHO, Kigali, 1993.

²⁶ For this process and its results by the end of 1995, see Réseau de Citoyens/Citizens' Network, *Aperçus du système judiciaire - Rwanda décembre 1995 — Présentation de la collaboration technique de R.C.N., R.C.N.*, Kigali, 1996.

²⁷ See *Recommendations of the Conference held in Kigali from 1 to 5 November 1995 on "Genocide, Impunity and Accountability"*, Presidency of the Republic, Kigali, 1995.

The specific law option

Rwanda opted for a specific constitutional law to institute proceedings and repress the genocide and crimes against humanity committed between 1 October 1990 and 31 December 1994.²⁸ In strictly legal terms it did not need to do this, because Rwanda could have directly applied the international law defining genocide and crimes against humanity.²⁹ Although Rwanda has not explicitly provided penalties for those crimes, it could have invoked the dual indictment mechanism whereby the same act (e.g. premeditated murder or genocide) is regarded as a crime in both national and international law but the penalty applied is the one provided solely for the criminal offence under domestic law.³⁰ There is not yet a consensus on the direct applicability of rules of international law in domestic law.

The choice of a specific constitutional law removes that ambiguity by repressing acts punishable under the Penal Code which at the same time constitute crimes of genocide or crimes against humanity. The acts committed must therefore meet both those qualifications if the law is to be applied. That requirement reflects a concern to avoid any criticism based on retroactivity of the law.³¹ Genocide and crimes against humanity are defined by reference to relevant international instruments. It is worth noting that the Rwandan legislators did not deem it expedient to mention resolution 955, which contains the most recent definition of crimes against humanity.

Categorization

Perpetrators of crimes are classified in one of four separate categories.³² This makes it simpler to indicate the degree of individual respon-

²⁸ Organic Law of 30 August 1996 on the organization of prosecutions for offences constituting the crime of genocide or crimes against humanity committed since 1 October 1990, Law No. 8/96, *Official Gazette of the Republic of Rwanda*, 30 August 1996.

²⁹ Rwanda has ratified the Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide and the Convention of 26 November 1968 on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, Decree-Law No. 8/75 of 12 February 1975, *Journal officiel de la République rwandaise*, 1975, pp. 230, 246 ff.

³⁰ D. de Beer, *The Prosecutions for Crime of Genocide and Crime against Humanity: Legal Basis*, R.C.N.-Rwanda Editor, 1995; W. Schabas, "Justice, democracy, and impunity in post-genocide Rwanda: Searching for solutions to impossible problems", *Criminal Law Forum*, Vol. 7, 1996, p. 535.

³¹ On this issue, see D. de Beer, *op. cit.*, p. 21.

³² Organic Law, Art. 2.

sibility involved and possible to limit recourse to capital punishment and imprisonment by applying a graduated scale of penalties.

The first category includes the organizers and planners of the genocide and crimes against humanity, persons who abused positions of authority within the administration, the army, political parties, religious groupings or militias to commit or encourage crimes, notorious killers who distinguished themselves by their ferocity or excessive cruelty and, lastly, perpetrators of sexual torture. Pursuant to Article 9 of the Organic Law, the Prosecutor General of the Supreme Court has published an initial list of 1,946 persons provisionally placed in Category 1.³³ Category 2 includes the perpetrators of or accomplices to intentional homicides or serious assaults against individuals which led to death. Category 3 contains persons guilty of other serious assaults against individuals, and Category 4 covers persons who committed offences against property.

Penalty reduction and the confession and guilty-plea procedure

The confession and guilty-plea procedure is the cornerstone of the Organic Law and is designed to foster confessions, elicit apologies to victims and encourage collaboration with justice. Its success is crucial if Rwanda's penal system is to cope, if only partially, with the enormous task facing it.

In exchange for a complete confession including a detailed description of the acts committed, the names of all accomplices and apologies to the victims, accused persons in Categories 2, 3 and 4 enjoy a major reduction in their sentence if they plead guilty. Accused persons whose acts place them in Category 1 may also enjoy the same benefit and be placed in Category 2 if their names have not been published in the list of Category 1 persons provided for in Article 9.

This confession and penalty-reduction mechanism is entirely new in Rwanda and may be compared with the practice of plea-bargaining widely used in the United States of America to accelerate the processing of criminal cases. By encouraging a plea of guilty, the mechanism absolves the court from having to provide evidence against the accused

³³ List published in the *Official Gazette of the Rwanda Republic*, special issue, 30 November 1996. Those figuring on the list are not there definitively. The Office of the Public Prosecutor and the Tribunal have full powers to place any listed person in another category.

and allows it simply to determine the penalty after verifying the legality and sincerity of the confession.

Penalties

It is worth stressing here the benefits which the perpetrators of the genocide and massacres may derive from the adoption of the Organic Law. Even if no confession is forthcoming, sentences are considerably reduced in relation to those that might have been expected under the Penal Code. For instance, only those in Category 1 risk the death penalty pursuant to the Penal Code,³⁴ and the judge is at liberty to reduce that sentence by allowing mitigating circumstances.³⁵ In the case of persons whose acts place them in Category 2, the death penalty is replaced where appropriate by life imprisonment. Terms of imprisonment are never served for property offences, which only give rise to civil damages determined by amicable agreement.

Furthermore, a confession and a guilty plea may have a considerable impact on the penalty. Depending when their confession is made, convicted persons in Category 2 may have their sentences reduced by 7 to 11 years, while those in Category 3 may be given only one-third of the normal sentence.³⁶

Channels of appeal

The Organic Law modifies the appeal procedure provided for under Rwanda's Code of Criminal Procedure. Under Article 24 of the Organic Law, only appeals based on questions of law or flagrant errors of fact are admissible. No appeal may be lodged against decisions based on acceptance of the confession and guilty-plea procedure. The appellate court rules on the basis of written evidence, which means that the procedure will be in writing, the parties being invited to communicate their defence statements and documentation. The appeal decision is final

³⁴ The principle of non-retroactivity of penal sanctions prohibits the imposition, by application of the Organic Law, of the death penalty on any person against whom it could not be imposed under the Penal Code.

³⁵ Art. 14 of the Organic Law. Art. 39 of the same law specifies that the Penal Code is applicable unless otherwise provided in the Organic Law. The latter makes no provision for the allowance of mitigating circumstances (Arts. 82-84 of the Penal Code); it must therefore be concluded that the judge may allow them in favour of any person sentenced, including those in Category 1.

³⁶ Arts. 15 and 16 of the Organic Law.

except in the case of persons acquitted at the trial stage and sentenced to death by the appeal court. The Public Prosecution Office is legally obliged to appeal against any death sentence by virtue of Article 99 of the Code of Criminal Procedure.

The right to appeal is therefore sharply reduced, although it should be noted that the means of appeal when the ordinary procedure is applied are comparable to those offered by Article 24 of the International Tribunal's Statute. Both make allowance for errors of law and, while the Organic Law refers to flagrant errors of fact, the Statute allows for errors of fact that have led to a denial of justice.

Defence

The right to defence is enshrined in Article 36 of the Organic Law. However, that law rules out the possibility of legal aid, a limitation which reflects Rwanda's practical and financial inability to pay lawyers for all the accused. It is not a matter of systematically denying the accused legal aid. The Ministry of Justice has authorized foreign lawyers working for *Lawyers Without Borders* to plead on behalf of accused persons and third-party plaintiffs. The passing of the law setting up the Bar,³⁷ and the appointment of the President of the Bar late in August 1997, show that Rwanda is determined to professionalize defence activities within the justice system.

The first trials

The first trials based on the Organic Law opened on 27 December 1996. They were sharply criticized because the rights of the defence had not been respected in several cases: refusal of application to adjourn in order to consult the case-file or seek a lawyer, unjustified refusal to hear a defence witness, etc. The influx of lawyers from abroad,³⁸ essentially from Africa and Europe, has helped to put across to Rwanda's inexperienced magistrates the role and importance of respect for the fundamental rights of the defence. Gradually, the procedures are being observed.

³⁷ Law No. 3/97 of 19 March 1997, *Official Gazette of the Republic of Rwanda*, 1 August 1997.

³⁸ Rwandan lawyers have to date played only a marginal part in defending those accused in the genocide-related trials. As victims, or relatives or friends of victims, it is quite understandable that they should find it hard to engage in such proceedings. The constitution of the Bar may offer them support within a better-regulated professional and ethical framework.

A report on the mission to Rwanda by the High Commissioner for Human Rights stresses the positive effects that the presence of a lawyer has on the proceedings.³⁹ According to that report, by 30 June 1997 142 judgments had been handed down by the specialized chambers of the country's trial courts. These included six acquittals and 61 death sentences, 13 of them against persons on the list of Category 1 criminals as defined in Article 9 of the Organic Law.

It is particularly interesting to note that of those 142 decisions, 25 were delivered after acceptance of a confession and a guilty plea. Here again, the positive role of the lawyer becomes patent, for he can explain to his clients the advantages available to them under the new procedure. According to the figures compiled by the High Commissioner for Human Rights, 38 percent of the accused defended by a lawyer made a confession, compared with only five percent of those receiving no advice.⁴⁰ The confession and guilty-plea procedure is essential for accelerating the proceedings of a swamped judiciary. Generalized access by lawyers to places of detention to explain how the procedure works is a practical step which should enable the submission of confessions to increase tenfold.

All those intervening in the trials for genocide and massacres express fears for their own safety, a fact which obviously constitutes a serious threat to the quality of justice rendered.

Reasonable cause for hope

The cumbersome nature of the International Tribunal's proceedings has come in for much and increasingly bitter criticism within Rwanda, usually on the grounds that the Tribunal has no prosecutor of its own and, worse still, that no new charges were brought between October 1996 and June 1997.⁴¹ The hostility even boiled over into a demonstra-

³⁹ Human Rights Field Operation in Rwanda (ed.), *Genocide trials to 30 June 1997 — Status report as of 15 July 1997*, Doc. FRFOR/STRPT/52/1/15JULY 1997/E, p. 3.

⁴⁰ *Ibid.*, p. 4.

⁴¹ See, for example, the local press: "Le TPIR a 180 yeux qui ne voient pas", *IMVAHO*, No. 1188 of 30 June 1997; "Je reviens d'Arusha et du TPIR, ce véritable nid de vipères pour le Rwanda", *Rwanda Libération*, No. 24, May 1997; "Who is Justice Louise Arbour? A "no" friend to women!", *The Central African Newsline*, No. 5, 15 May 1997.

tion against Justice Louise Arbour, organized by an association of people who escaped the genocide.⁴²

Things changed radically with the so-called *Naki* operation on 18 July 1997, in which senior political and military authorities of the "interim government", set up in Rwanda in April 1994, were arrested in Kenya and transferred to the Detention Unit at Arusha.⁴³ In Rwandan eyes, the Tribunal thus demonstrated its usefulness compared with the country's own national courts,⁴⁴ since it had been able to reach the most senior people responsible for the genocide who had sought refuge in a foreign country. Disappointment with any new delays could, however, quickly resurface in Rwanda. The Tribunal is not unaware of the problem and President Kama has asked out loud whether the Tribunal's human resources should be increased in order to deal with this influx of accused persons without undue delay. An increase in the number of judges and chambers would be feasible under Security Council resolution 955.

There is also growing hope for the national courts. The specialized chambers are following procedural rules more strictly, the confession and guilty-plea procedure is starting to win over certain detainees and the Bar has just been created. Here again, hopes are somewhat muted because it would be naive to expect the legal system to deal with all the genocide-related cases within a reasonable period of time. Moreover, the worsening of the security situation in Rwanda during 1997 poses a serious threat to the safety of those intervening in the judicial process. It is nonetheless essential that some cases be submitted to the courts and tribunals publicly if any political solutions are to emerge.

⁴² Radio Rwanda, news broadcast in Kinyarwanda at 1900 hours on Saturday, 24 May 1997 (transcribed into French for the author).

⁴³ For these arrests, see *Ubutabera*, 21 and 28 July 1997, available at <http://persoweb.francenet.fr/~intermed>.

⁴⁴ "Rwanda thanks Arusha tribunal, UN, Kenya over genocide arrest", AFP, 23 July 1997.

Recognition of the Kiribati Red Cross Society

The International Committee of the Red Cross has officially recognized the Kiribati Red Cross Society. This recognition, which took effect on 30 September 1997, brings to 172 the number of National Societies that are members of the International Red Cross and Red Crescent Movement.

Recognition of the Palau Red Cross Society

The International Committee of the Red Cross has officially recognized the Palau Red Cross Society. This recognition, which took effect on 30 September 1997, brings to 173 the number of National Societies that are members of the International Red Cross and Red Crescent Movement.

Recognition of the Tajikistan Red Crescent Society

The International Committee of the Red Cross has officially recognized the Tajikistan Red Crescent Society. This recognition, which took effect on 6 November 1997, brings to 174 the number of National Societies that are members of the International Red Cross and Red Crescent Movement.

Recognition of the Georgia Red Cross Society

The International Committee of the Red Cross has officially recognized the Georgia Red Cross Society. This recognition, which took effect on 6 November 1997, brings to 175 the number of National Societies that are members of the International Red Cross and Red Crescent Movement.

Books and Reviews

Zhu Wen-Qi, *Outline of international humanitarian law*, Peter Chan Publishers/International Committee of the Red Cross, Hong Kong/Shanghai, 1997, 182 pages — in Chinese, with an English résumé

Humanitarian concerns have traditionally occupied an important place in Chinese culture. The teachings of Confucius are displayed prominently, along with teachings from other cultures, in the International Red Cross Museum in Geneva. Mao Zedong's orders were quoted in the majority opinion of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the Tadic jurisdiction appeal as evidence of State practice in extending certain general principles of warfare to internal armed conflict.¹ And yet, for whatever reason, there is little academic literature in Chinese that systematically discusses international humanitarian law. The publication of Dr Wenqi Zhu's "Outline of International Humanitarian Law" (the *Outline*) at the invitation of the ICRC will no doubt help to fill that gap.

The first monograph ever published on this subject in China, the *Outline* aims to help disseminate the basic rules and principles of international humanitarian law in China and the Chinese-speaking world at large. Dr Zhu is well qualified for this task. He received his doctorate in international law from the University of Paris II, and had a stint doing research in the ICRC's Legal Division. Subsequently he served at the Department of Treaties and Law of the Chinese Ministry of Foreign Affairs and became a deputy division director. Currently he is a Legal Adviser in the Office of the Prosecutor at the ICTY in The Hague. Previously, he was the author of the chapter on the laws of war for the standard Chinese college textbook "International Law", under the editorship of Professor Wang Tiewa. That chapter contains a section entitled

¹ Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Prosecutor v. Tadic, Case No. IT-94-1-AR72 (ICTY, App. Ch., 2 October 1995), para. 102.

“International Humanitarian Law”, the first time such a section has ever appeared in any Chinese college textbook on international law.

As outlines go, Dr Zhu’s *Outline* is a rich one. It contains an introduction and five chapters, namely, “Historical Development of Humanitarian Law; China and Humanitarian Law”; “Basic Rules and Principles of International Humanitarian Law”; “Major Current Legal Issues related to International Humanitarian Law”; “Distinct Features of International Humanitarian Law”; and “International Humanitarian Law and International Human Rights Law.” In addition, the *Outline* is privileged to contain a foreword by H.E. Judge Shi Jiuyong of the International Court of Justice. Moreover, annexed to the *Outline* are “General Introduction to the Red Cross Society of China”² and “The International Red Cross and Red Crescent Movement: Its Origins, Structure and Mandate”,³ together with the relevant legal texts.

Conceived as an introduction to the basic principles of international humanitarian law and related issues, the *Outline* does not simply translate them into Chinese. In the course of addressing these principles and the philosophy behind them, Dr Zhu pays particular attention to the history of China and its present circumstances, and touches upon various questions with particular significance to China, such as the right of the ICRC to visit persons detained for political or security reasons, and the differences between international humanitarian law and international human rights law. This effort is admirable and will help clear up some misunderstandings regarding the basic concepts of international humanitarian law.

In his introduction, Dr Zhu first briefly outlines various concepts relating to international humanitarian law, such as international law, international humanitarian law, laws of war, Hague law and Geneva law, *jus cogens*, customary international law, as well as the notion of war and armed conflict. He also discusses the place of international humanitarian law in international law as a whole and its current significance, and then moves on to the key issues of his *Outline*. The author argues that the current standard Chinese rendition of the term “international humanitarian law” as “*Guoji Rendao Zhuyi Fa*” is incorrect. He does not find any fault

² By Li Changming and Yuan Tianyi, respectively Secretary-General and Director of the Policy Research Bureau, Red Cross Society of China.

³ By Christophe Swinarski and Alfred Michael Boll, respectively head of delegation and delegate, ICRC Regional Delegation for East Asia.

with “*Guoji*”, meaning “international”, “*Rendo*”, meaning “humanitarian”, or “*Fa*”, meaning “law”. What troubles him is “*Zhuyi*”, which in standard Chinese refers to a political, philosophical or social doctrine or theory, such as Marxism, Leninism, socialism or communism. As such, “*Zhuyi*” can hardly be placed together with “*Fa*”, which stands for law with binding force. Accordingly, Dr Zhu advocates deleting “*Zhuyi*” from the standard Chinese rendition, leaving only “*Guoji Rendao Fa*”, which corresponds better with “international humanitarian law” in English and “*droit international humanitaire*” in French. If Dr Zhu’s wording becomes generally accepted, it will contribute to clarifying the concept to the general Chinese-speaking public, although to the educated elite steeped in humanitarian issues such an issue of phraseology might not matter so much.

In Chapter I, Dr Zhu traces the origins and the development of international humanitarian law and describes how humanitarian issues and international humanitarian law figure in China. In so doing, he not only retells the familiar story of Henry Dunant, the establishment of the ICRC and its unflagging hard work, but also stresses the universality of humanitarian precepts. The concern for human dignity is shared by all nations. No one culture should claim to have a monopoly on it.⁴ Section I of this chapter summarizes the development of Geneva law and Hague law. The historical background is familiar and is related concisely in limited space.

Section II of Chapter I briefly describes the ancient Chinese theories relating to humanitarian concerns during times of war. The laws of war are as old as war itself. The roots of humanitarian law can be found in the teachings of the Chinese thinkers, rulers and military strategists who have had a profound influence throughout Chinese history. As an example, Dr Zhu cites the teachings of Sun Wu (Sun Tzu), whose famed book *The Art of War* first appeared around 500 B.C., but still commands a huge readership throughout the world today. Not interested in devising strategies for a short-lived victory, Sun Tzu advocated “trying to defeat the enemy by morality,” and asserted that a skilful strategist should be able to subdue an enemy army without engaging it, to take an enemy city without laying siege to it, and to overthrow an enemy State without

⁴ Dr Zhu draws support for this position from Jean Pictet, *Development and principles of international humanitarian law*, Geneva, 1985, p. 6; Mohammed Bedjaoui, “Humanitarian law at a time of failing national and international consensus», *Modern wars — The humanitarian challenge, A Report for the Independent Commission on International Humanitarian Issues*, London, 1986, p. 6.

bloodying swords. In other words, unnecessary suffering should be avoided. Sun Tzu also believed that a general should train his troops in reasoning and run the army with strong discipline. One of the important rules was that a soldier shall not attack civilians or damage their property. Such ideas can be said to be the forerunners of certain rules of international humanitarian law. These teachings — distinguishing between combatants and civilians, avoiding unnecessary suffering — were repeated and practised by many rulers and generals who battled with each other during the Warring States period (*Chunqiu Zhanguo*, 453-221 B.C.) in Chinese history. To these were added several more principles such as not to pursue defeated enemies; not to employ ruses in battle; not to kill those who have already surrendered. Some of these principles subsequently became prominent in Western thought, although there may not have been any causal relationship between their influence in China and their crystallization in the West. For example, it was only in 1868 that the Declaration of St. Petersburg formally recognized that the only legitimate object of war is to weaken the military forces of the enemy and this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable. Finally, the author sketches the relationship between China and international humanitarian law. The history of modern China's participation in international humanitarian law has been exemplary, with China having ratified most of the basic instruments thereof since 1904. In 1983 it became the first permanent member of the Security Council to ratify both the 1977 Protocols (I and II) to the Geneva Conventions, and is still one of the only two permanent members that have ratified both Protocols. In short, Dr Zhu provides a very good description of how humanitarian principles took root in China.

In Chapter II, Dr Zhu summarizes the basic rules and principles of international humanitarian law, concisely reiterating the basic content of international humanitarian law. In so doing, he focuses on the essential aspects of the four Geneva Conventions, the two Protocols and the seven Fundamental rules as drafted in 1978 by a group of experts convened by the ICRC. This summary of law provides an excellent starting point for further study.

In Chapter III, Dr Zhu discusses several current major issues in international humanitarian law. These include the distinction between international and internal armed conflicts, the relationship between the Martens clause and nuclear weapons, the relationship between humanitarian principles and military necessity, the right of the ICRC to visit prisoners and detainees, and sanctions for violations of international

humanitarian law. He first takes up the issue of the distinction between international and internal armed conflicts. He notes that while all the rules and principles have been inspired by humane considerations and the desire to minimize the evils of armed conflicts, the scope of application of the norms of humanitarian law depends very much on the nature of the armed conflicts. To illustrate this point, Dr Zhu analysed the *Tadic* jurisdiction appeal decision by the Appeals Chamber of the ICTY.⁵ In that decision, the distinction between international and internal armed conflicts plays an important role, but its impact is reduced by the Appeals Chamber's reading of Article 3 of its Statute as encompassing serious violations of international humanitarian law not covered under other articles of the Statute. One might venture to add that the distinction between international and internal armed conflicts, in itself, does not really adversely affect the underlying philosophy — humane consideration of suffering — of humanitarian law, as violations of humanitarian rules may still be punished under different names in the domestic legal regime. So viewed, the distinction between international and internal armed conflicts serves to distribute jurisdiction between international and domestic legal regimes. Categorizing an armed conflict as internal does not necessarily afford impunity to the perpetrators of inhuman acts. The weak point in the process is that enforcement under the domestic regime may be ineffective, although the international enforcement mechanism is itself not much stronger. The ICTY is the first such tribunal established since World War Two.

The second current issue discussed by the author is the relationship between the Martens clause and nuclear weapons. He is of the view that since nuclear weapons are capable of mass destruction, mass injury or mass poisoning, it is questionable whether they can be used in conformity with the basic principles of international humanitarian law, which prohibits parties to an armed conflict from employing any means and methods that cause unnecessary suffering or that do not distinguish between civilians and combatants. Dr Zhu is of the view that there may be room for applying in this area the Martens Clause, as a principle of international customary law providing for the application of international customs and the dictates of public conscience in the absence of a positive rule.⁶ To him, however, the Martens Clause leaves the precise content of the applicable standard to be ascertained in the light of the particular changing circum-

⁵ See note 1.

⁶ Dr Zhu cites *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, ICJ Reports, 1996, para. 84 (not yet published).

stances, thereby leading to enormous complexity, as demonstrated by the Advisory Opinion of the ICJ.⁷

The next issue that Dr Zhu tackles is the relationship between humanitarian law and military necessity. He notes that the basic rules of international humanitarian law have been adopted by sovereign States which are willing to accept the wording of the provisions as far as their military requirements permit. As a result, there exists the doctrine of military necessity, under which the existence of the latter could constitute an exception to the general rules of humanitarian law. Dr Zhu argues that this doctrine should not be interpreted broadly with the result that, whenever military necessity exists, laws of war would cease to apply. He argues that laws of war are designed specifically for all phases of war and that military necessity cannot justify the violation of a positive rule. To him, military necessity, even of the most urgent nature, cannot constitute an exception to the rules of international humanitarian law unless those rules themselves so provide.

Next Dr Zhu comes to the issue of the ICRC's right to visit political and security detainees. He recognizes that the Geneva Conventions and the Protocols do not provide a legal basis for visits to such persons when no armed conflict exists. He notes, however, that the ICRC has a broad mandate to conduct humane activities "at all times and in all circumstances" and has been universally recognized to have the right to take certain initiatives in the humanitarian sphere. He argues that visits by the ICRC to political and security detainees are within such a broad mandate and should not be questioned.

The last current issue is sanctions for violations of international humanitarian law. Dr Zhu discusses the current state of existing regimes for such sanctions and analyses various issues relating to the two international criminal tribunals currently in operation. He believes that these tribunals will boost the enforcement of international humanitarian law. As we can tell, these are hotly disputed issues and Dr Zhu poses various thoughtful questions, attempting to put forward his point of view succinctly. Controversial as they are, these issues have received fair treatment from Dr Zhu. Of course, definitive answers are not to be expected from him or anybody else. The value of such a discussion is more in raising thoughtful questions than in providing clear answers to them.

⁷ ICJ Reports, *ibid.* (note 6).

In Chapter IV, Dr Zhu analyses various special characteristics of international humanitarian law as a distinct branch of public international law. In order to help disseminate international humanitarian law in China, he describes and analyses various basic rules and principles, focusing on various aspects of those rules that are designed to maximize the protection of victims of armed conflicts. For example, common Article 2 of the Geneva Conventions provides that the Geneva Conventions shall apply to all cases of declared war or of any other armed conflict, even if one of the parties does not recognize the state of war. It also provides that if one of the parties to the conflict is not a party to the Conventions, the rules of the Conventions would still apply between those who remain parties, thus departing from the so-called “general participation clause” in traditional international law. Another such rule is that the Geneva Conventions do not permit protected persons to renounce their rights thereunder, in order to prevent their precarious, powerless status from being abused by the occupying power. Dr Zhu traces the theoretical and historical basis for these rules and emphasizes their sole purpose of providing effective protection to the victims of war.

In the final chapter, the author discusses the differences between international humanitarian law and international human rights law in an effort to dispel the prevalent confusion between the two in China. Of course, both international humanitarian law and international human rights law stem from the same concern for the protection of the individual and share many common features. It is perhaps for this reason that many people in China regard international humanitarian law as being the same as international human rights law. Dr Zhu stresses the differences between them, such as in their sources and their scope of application. He notes the political sensitivity of human rights law, compared to the clearer, more concrete and more universally recognized rules of international humanitarian law. Moreover, the monitoring mechanism for human rights is very complex, including intergovernmental organizations such as the United Nations and many non-governmental organizations. This mechanism is not perfect at present and often leads to friction. He notes that while many non-governmental organizations appear to be intent on finding fault with domestic systems, the ICRC always tries to stick to its principles of neutrality and independence, a quality that is not easy to find in a world where there is no shortage of partiality and double standards.

In summary, Dr Zhu’s *Outline* is an admirable piece of work, presenting a Chinese scholar’s thoughtful views on the basic rules and principles of international humanitarian law. H.E. Judge Shi Jiuyong of the International Court of Justice states in his foreword that the *Outline* represents

an important contribution of practical significance to the development of international humanitarian law, and will spark further research and publications on international humanitarian law in China. I would simply add that I hope there will be an English version of it.

Sienho Yee

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***Économie des guerres civiles*, edited by François Jean and Jean-Christophe Rufin, Hachette, Paris, 1996, 593 pages**

Under a rather eye-catching title that evokes a range of issues much broader than that actually addressed in their book, Jean-Christophe Rufin, François Jean and various other contributors take us into a most fascinating domain: the funding of contemporary conflicts.

Indeed, after the Cold War and its straightforward system of “political godfathers” who by one means or another covered the cost of war, we are now witnessing a type of conflict that is difficult to qualify. The apparent simplicity of the bipolar world has given way to complexity, diversity, heterogeneity, changeability and globalization, and events can no longer be interpreted from a purely ideological perspective. In an attempt to gain a better grasp of the situation the authors started from the very basis, from “the sinews of war”, to see where that would lead. Furthermore, as the title suggests, international wars are becoming rare: where, in the militia struggles of today, are the Ministers of Finance, Defence or Foreign Affairs who, on either side of the front line, were previously able to channel funds into the war effort?

It should again be underlined that the book does not deal with all the economic aspects of war, nor its possible “economic causes”, nor the way in which individuals, both economic players and those affected by their policies, try to survive in wartime. It does, however, look in some detail at the provenance of the funds that make it possible for wars to break out and persist.

Économie des guerres civiles is divided into four sections. The preface outlines the issues addressed. The next section establishes a theoretical framework for determining the type of economic dynamics at work in conflict situations. Next comes a series of case studies (Lebanon, Kurdistan, Afghanistan, Cambodia, southern Sudan, Bosnia-Herzegovina, Liberia, Mozambique, and Colombia/Peru), all written by specialists and examining different aspects of the problem. The last part comprises several “horizontal” studies (embargoes and criminalization of

the economy, territories and networks, drugs, humanitarian aid and war economies, etc.).

In quest of a theoretical framework

Wars are financed in five main ways: by using resources made available by another country; by appropriating international aid; by imposing levies on the population; by taking over exportable resources; and, finally, by taking control of all or part of the economic system that is often created by the shortages that go with war situations. The theoretical introduction classifies conflicts in terms of the origin of the system that generates the funds making the war possible. Two principal types of war economy existed side by side during the Cold War. On the one hand there were those referred to as “closed” war economies, in countries or situations where the support of the population was sought rather than foreign support; and on the other the far more common “open” war economies which relied on cross-border sanctuaries. Depending on the case, such sanctuaries — described in detail by J.-C. Rufin in another book (*Le piège humanitaire*, 1985) — were to a greater or lesser extent military or humanitarian, but they all served the same purpose: to keep a channel open for resources intended for the war effort. The authors believe that the end of the Cold War has put paid to such strategies. Yet the crisis of the Rwandan refugees in Zaire and the instability that has consequently prevailed in Rwanda since 1994, with the results that we know only too well, would suggest that the strategy of sanctuaries still has a rosy future. In any event, the “post-Berlin Wall conflicts”, which are wars without ideological stakes in the traditional sense, must be fuelled somehow: soldiers must be paid, arms and munitions have to be bought, etc. The protagonists in these conflicts have therefore developed self-financing strategies, most of which already existed but seemed insignificant in comparison with other sources. These are economies based on looting, the misappropriation of international aid, taxation (militia economies), connections with drug trafficking, the development of organized crime networks to control the flow of goods and money, control over natural resources (forests) or mining (precious stones, latex). The authors underline the renewed importance of such economic strategies for the conduct of hostilities, a subject of the greatest topical interest to the ICRC. The policy of looting civilian property, for example, is observed in situations of diffuse guerrilla activity, often relying heavily on terror (the Shining Path in Peru, RENAMO in Mozambique, etc.). If the war is financed by taking over extractable resources, it almost necessarily becomes a struggle for position, that is, for control over mines and plantations, highways and ports. When the war

economy depends on increased drug production, certain areas are declared off-limits and woe betide any humanitarian teams that venture into them! When the primary aim is the appropriation of humanitarian aid, the prize is control over the entry and distribution points, and a levy is exacted from the beneficiaries. Finally, when criminal activity becomes the driving force of the system for financing a conflict, and consequently the basis of the authority and power of its protagonists, the situation rapidly takes on certain specific characteristics and becomes highly dangerous. Novye Atagi is a stark reminder of this. The major difficulty stems from the ease with which these various means of financing a war can coalesce, a process which is dependent on three factors: the fragmentation of armed groups and the territory they control (an internal factor), networks of nationals living abroad and, finally, the globalization of trade and of organized crime.

What is missing from this excellent analysis is a look at the way in which the population and other players respond to these situations. How does the economy work at the grassroots level, and does it afford the population the wherewithal to survive? The case studies offer some new insights in that regard.

A detailed analysis of complex situations

In accordance with a didactic method that has been tried and tested (by *Médecins sans frontières* among others, and in the collection entitled *Populations en danger* edited by François Jean, one of the two editors of *Économie des guerres civiles*), a series of case studies is used to illustrate the themes outlined in the theoretical part. The cases selected cover five regions (Africa, Asia, the Middle East, Europe and Latin America); the only regret is that the former Soviet Union is not included. Each case sheds light on at least one of the topics outlined in the introduction. The study on Lebanon, for example, offers a particularly detailed description of the breakdown of State structures, the emergence of militia-controlled economies and the upsurge in drug-related activities. Kurdistan illustrates more specifically the dynamics of the process whereby loyalty is secured through dependency and of the appropriation of international aid. In Liberia, apart from the regular looting of humanitarian logistic resources, the conflict is financed through the sale of latex to major companies such as Firestone. The case of Afghanistan provides a telling example of the influence exerted by regional economic factors on the evolution of an internal conflict: in this case the godfathers are no longer motivated by ideological considerations but simply by the desire to amass wealth, and

warfare has become a means of redrawing the “commercial map”. The methods available to combatants in the chosen camp to fund the war effort include direct financing, the provision of facilities for drug production and processing networks, and the opportunity to engage in trafficking of all sorts. The case of Cambodia draws attention to the fact that although certain political and military forces continue to indulge in hard-line ideological rhetoric and even try to make political capital out of the government’s economic muddle, this does not prevent them from exploiting their own country’s resources; and it is the forests of northern and western Cambodia that are paying the price.

A view from another angle

The work very fittingly concludes with four “horizontal” studies, which are rather inappropriately entitled “Facteurs généraux” (general factors). The first seeks to clarify the link between embargoes and criminality. An initial look at some 20 cases of embargo shows the ultimate weakness of this tool of international politics. It is really effective only when the stakes are not very high and the country concerned is already weak. When a strong country is targeted, or even a weak one with abundant resources within its borders, the embargo is ineffective. The means used by the State concerned or by its neighbours to circumvent the embargo have one simple result: the emergence of parallel supply networks, which soon become criminal. Embargoes invariably have four consequences: the general impoverishment of the population (especially the most vulnerable groups); the deterioration of State structures; the enrichment of a very small number of people; and the development of organized crime. This is an alarming observation. It is this examination of embargoes that offers the best analysis of the war economy as it operates on a day-to-day basis, as compared with the war economy in the traditional sense. It ranges from the soldiers’ mess to the warlord’s treasury, from the orderly development of production and exchange rates to the dynamics of inflation and hyperinflation, from savings strategies to the pursuit of “safe” investments (dollars, gold, etc.). The approach is still largely macro-economic, however, and the student of crisis situations wonders where are the micro-economic references relating to the everyday struggle for survival: the expansion of the retail sale sector, the appearance of new or deseasonalized activities, the gradual decapitalization of production systems, etc.

The second study looks at the increasingly obvious link between internal conflicts and international drug-trafficking networks. This system

was already used to some extent during the Cold War, especially by the CIA to finance its irregulars in the mountains of Vietnam and Laos. The practice has only increased with the demise of political sponsors, which left the way clear for drug barons to come into their own. When a warring faction needs to raise easy money in large amounts and, for reasons of logistics, in a highly mobile form, it must be able to sell products with a high value per unit of weight. As not everyone has diamonds like UNITA or the RUF, some turn to poppies, coca or cannabis. From Peru (see case study) to the mountains of China, via the Middle East and Afghanistan, all factions have a finger in the pie and the end result is the large-scale international narcotics trade.

The next study, on the part played by nationals resident abroad in financing conflicts, is extremely well-documented. The pattern established, which takes a broad range of factors (ethnic, historical, economic, organizational, cultural, etc.) into account, can be applied to cases other than those included in the study and makes it possible to analyse them and to gain a better understanding of their internal dynamics and the role of particular elements in the conflict concerned. This study is thus a veritable operational tool. Finally, the last study, while undoubtedly interesting, deals with a topic already examined (at greater length by the two editors of *Économie des guerres civiles*, among others): Are conflicts prolonged by humanitarian aid? The authors issue a salutary call for vigilance. In this as in so many other spheres, there is no place for naïveté when it comes to crises.

Conclusion

This admirable work, in which theoretical reflection on various matters (such as the study of war, economics, geography or quite simply politics) is tested against a wide variety of real situations (the case studies), brings out the great diversity of such situations and prompts the reader to make a greater effort to distinguish causes from effects. Even though in some cases economic factors may have played a decisive role in triggering hostilities, in most others they have remained subordinate to other objectives, whether political, social or ethnic, or to considerations of security. In these cases the economy does no more than “fuel” the conflict. It would therefore be mistaken and even dangerous to believe — and even more so to say — that all combatants are motivated only by desire for gain. But it would be no less dangerous, for the ICRC and others working in conflict zones, if studies such as this were to overlook the fact that the “sinews of war” are multifarious and omnipresent, and that their pursuit can lead to acts of appalling barbarity.

We must be aware that organized crime, the habit of making a quick profit at the point of a Kalashnikov and para-State systems for trafficking or diverting resources, all spawned during the conflict, will cast an ominous shadow over the post-war period.

Finally, it will be clear to the reader that although wars must be financed, civil war economies go beyond the mere dynamics of funding the war effort: thousands of women and men struggle to survive from one day to the next and in so doing create “another economy within the civil war”. This is a vast and fascinating subject which remains largely unexplored, but that is another matter.

In any event, *Économie des guerres civiles* should be available to everyone involved in humanitarian work.

François Grunewald
Former ICRC delegate,
currently ICRC consultant

Simone Delorenzi, *Face aux impasses de l'action humanitaire internationale: la politique du CICR depuis la fin de la guerre froide*, International Committee of the Red Cross, Geneva, 1997, 112 pp.

What are the new problems facing international humanitarian action as a result of the disappearance of the old East/West antagonism, closely followed by the disintegration of the Soviet Union itself? With the emergence of the new world order, how has ICRC policy changed since the Cold War period? What has been the ICRC's response to the new challenges that have arisen since 1989? No comprehensive answer had been given to these questions before the publication of this book by Simone Delorenzi, who examines the issues meticulously and makes pertinent observations. This pioneering work is based on a substantial number of ICRC and United Nations documents, and on an extensive bibliography. The author has also been able to draw on a variety of contacts within the ICRC.

When the world was under the sway of two opposing blocs, the neutrality of the ICRC was challenged by the Communist side. Even though this hampered the ICRC's work, the numerous activities which it conducted at that time enabled it to gain a measure of confidence on the part of the Eastern bloc countries; this had already happened before the adoption in 1965 of the seven Fundamental Principles of the International Red Cross and Red Crescent Movement, which aimed to demonstrate the ICRC's impartiality and show that those principles were the basis of its activity.¹ From the 1950s onwards, the ICRC had to face an additional

¹ An article quoted by the author notes that the ICRC was chosen in 1962 to monitor the Soviet ships during the Cuban crisis. Moreover, during the Sino-Vietnamese conflict of 1979, "the ICRC's role as a neutral intermediary was again recognized". See François Bugnion, "From the end of the Second World War to the dawn of the third millennium: The activities of the International Committee of the Red Cross during the Cold War and its aftermath: 1945-1995", *International Review of the Red Cross*, No. 305, March-April 1995, pp. 214 and 222.

challenge resulting, on the one hand, from the emergence of conflicts of a hitherto unknown nature and, on the other, from their proliferation. Here, the ICRC was confronted with new methods of warfare which *inter alia* called into question the distinction between combatants and non-combatants. All of this prompted the drafting, in the 1970s, of the two Protocols additional to the Geneva Conventions of 1949. The author also offers a very clear presentation of the implications of the humanitarian policy adopted in the war in Biafra (Nigeria), which led the ICRC to review some of its operational methods. Soon afterwards, it had to meet the challenge of the 1970-1980 period, which saw the gigantic expansion of humanitarian action. Simone Delorenzi reflects on the ICRC's policy of discretion regarding violations of the Geneva Conventions, of which it is the custodian. She places this still eminently topical question in its historical context, referring to the debates generated by the creation of non-governmental organizations "without frontiers" and the study by Jean-Claude Favez on the ICRC's attitude during the Second World War.² Even though the ICRC has always insisted on maintaining the discretion it has observed since the time it was founded, the author points out that since the late 1960s the organization has adopted a more outspoken approach, taking a public stance on an increasing number of occasions.

The break-up of the USSR and the ensuing consequences meant that the ICRC could conduct operations in a part of the world where for a long time this had been practically impossible. The organization had to adapt its work to meet the needs of a much more urbanized population, with a higher standard of living than the people to whom it had been providing assistance since the 1950s. From 1989 on the main issue for the ICRC was, however, the emergence of a new type of conflict, in which total anarchy prevails; in such conflicts there is almost total lack of respect for the fundamental rules of international humanitarian law and for the emblem, and civilians are increasingly the issue at stake in the fighting. Indeed, the parties involved in these new conflicts are no longer really interested in lending legitimacy to their struggle, which would require them to observe at least a modicum of respect for humanitarian law. Hence the ICRC often has to work in situations of extreme insecurity for its delegates, which at times has compelled it to suspend or restrict some of its operations.

² Jean-Claude Favez, *Une mission impossible? Le CICR, les déportations et les camps de concentration nazis*, Editions Payot, Lausanne, 1988.

Having outlined the overall geostrategic situation in which the ICRC now has to operate, Simone Delorenzi describes clearly and accurately the new issues facing the institution, quoting as examples the Gulf War and the conflicts in Somalia, the former Yugoslavia and Rwanda. These conflicts are significant in particular because of their scale and the volume of resources mobilized by the ICRC to meet the challenges before it.

With respect for international humanitarian law a “political issue” in the Gulf War from the outset, the ICRC came under heavy political and media pressure, and had to engage in intense diplomatic activity. Before and after the conflict broke out, it appealed several times for respect for the law of Geneva and against the use of weapons of mass destruction. At first the ICRC refrained from giving public information on violations on either side. Just before the end of the war, it condemned Baghdad for refusing to give it access to Western prisoners. On the other hand, Iraq authorized the ICRC to take action in its two internal conflicts, and its subsequent attitude even showed that it was convinced of the ICRC’s independence and neutrality. Nevertheless, the author refers to the debate which may arise within the ICRC from the desire to denounce publicly a State violating the law of Geneva — on the strength of its role as a moral authority, which the ICRC adopted from its earliest days — and the wish to remain pragmatic so that it can continue to save war victims, which is the very purpose for which it was founded.

In Somalia the ICRC was not only a few steps ahead of Western governments (the United States and France) but also launched the largest operation since the Second World War. The fact that this was a situation of extreme insecurity, however, explains why it was obliged to call for respect for the law of Geneva and, for the first time in its history, to make use of armed escorts. It also had to scale down its activities and temporarily evacuate certain areas. But the fact remains that it stayed in Somalia, while other humanitarian organizations withdrew.

In the conflict in the former Yugoslavia, the ICRC was confronted with violations of such gravity — including one resulting in the death of a staff member — that it had to suspend all operations there. On the strength of its moral authority, it also issued repeated public statements denouncing the failure to respect humanitarian law and the emblem. Here Simone Delorenzi observes that, although the ICRC viewed its response as a break with the policy it had followed thus far, it still made a point of maintaining its independence and strict neutrality. And it was right to pursue this course, as this enabled it, unlike the UN agencies, to continue taking action on all sides. Finally, in Rwanda, the ICRC decided to maintain its presence

in the country in order to help alert public opinion to the extreme gravity of the situation, and it was able to afford protection to thousands of people. In December 1994, anxious that the international community should look beyond the short-term urgency of this tragic situation, the ICRC earnestly requested it to focus its attention on the future of the African Great Lakes region.

Following her analysis of the four conflicts, which display common features despite their difference in nature, Simone Delorenzi gives a broad outline of the ICRC's current policy. She shows that when the organization adopts a public stance, its aim is not only to condemn repeated violations of humanitarian law and of the emblem but also to help change the conduct of belligerents. Unfortunately, the latter ambition is problematic. Moreover, even with regard to conflicts covered extensively by the media, it becomes very difficult to shake public opinion out of its apathy. To maintain its role as a neutral intermediary, which is essential to its activity, the ICRC rightly seeks to reconcile its neutrality and discretion with its public appeals, the latter often being necessary to reaffirm its moral authority. In its desire to be increasingly persuasive, for a number of years now the ICRC has been couching its appeals in more specific and direct language. It also strives to convince States to shoulder their responsibilities as regards the all too many violations of international humanitarian law, especially as every Contracting Party to the Geneva Conventions has the obligation to ensure respect for their rules.

Alongside, the ICRC is making every effort to widen the scope of application of humanitarian law. It has thus used its moral authority to launch a major campaign against the proliferation of anti-personnel mines and blinding weapons. Even though it has focused on raising awareness of humanitarian law since the early 1980s, it is now broadening this objective by also delivering messages with a moral content. In this way it is working for the future, hoping that excesses of violence in conflicts will one day be a thing of the past. The ICRC has never held a monopoly in the humanitarian sphere, but today it has to contend with a large number of other organizations working in the same domain. Some are in favour of "intervention on humanitarian grounds", a concept allied to the "right to intervene" endorsed by certain States. However, the ICRC has considerable reservations towards this development. Indeed, it rightly believes that it needs to maintain a certain degree of cooperation with governments. It also comments that the "right to intervene" does not refer to the law of Geneva. Out in the field with these various players, the ICRC strives to preserve its neutrality and independence and upholds the principle of cooperation geared primarily to setting up complementary, non-compe-

titive operations. But it is essential that it keep its distance from organizations which may be perceived as not genuinely neutral. Moreover, alongside emergency operations, ICRC takes action with a view to the medium and long term in order to help the people concerned emerge from a war economy and readjust to a peace economy.

However, as the title of Simone Delorenzi's book suggests, humanitarian action today seems to be encountering a number of serious obstacles, chiefly arising from these new types of conflict in which the fundamental rules of humanitarian law appear to be forgotten. The situation is aggravated by the fact that the international community seems incapable of solving the underlying problems in all of these conflicts or of being able to offer an appropriate response for dealing with the all too frequent failure to respect international humanitarian law and the excessive insecurity which it produces on the ground.

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Media and humanitarian endeavour

Reflections on a recent book on the news media, civil war and humanitarian action

“We fed them, housed them, transported them, briefed them, let them use our sat-phone, held their hands, wiped their noses, everything... and not a line, not a mention, nothing!” These words, a fairly clear expression of pent-up resentment and frustration, were recently uttered by an ICRC head of delegation. Previously, he and his delegation had built up a wonderful reputation among the press internationally; but then, something snapped. Journalists just seemed a burdensome waste of time, money and energy. In his mind, press work had burnt down to a simple trade-off: “*We give, you show*” (implied: “*what we want you to show*”).

Unfortunately, such trade-offs rarely work. Too much “good news” is boring and promotional news stories lack credibility. Yet credibility is the axis around which all institutional communication programmes revolve. The ICRC is not, and cannot be, an exception to this rule.

The “visibility trade-off” is, however, only one of the alluring pitfalls that lie in wait for humanitarian workers dealing with the “necessary evil” of the press. The other, far more dangerous, consists in believing that one can, and should, so seduce the press as to make them objective and pliable allies in our own victim-orientated work. The honeyed tones of our siren songs sound all the sweeter to our ears since a number of respected journalists around the world have openly questioned the ethical basis of *their* work. Some such journalists have left journalism altogether, either to join humanitarian organizations or to enter into politics. Others gravitate around such initiatives as the Geneva-based International Centre for

Larry Minear, Colin Scott, Thomas G. Weiss, *The news media, civil war, and humanitarian action*, Lynne Rienner Publishers, Boulder London, 1996, 123 pages.

Humanitarian Reporting (ICHR) in the hope of improving on what they see as an objective convergence of interests between journalists and humanitarians.

Very laudable; but does this hold water? Does it work?

In an attempt to find out, three media-analysts working with the Thomas J. Watson Jr. Institute for International Studies, Brown University (USA) set their minds to defining the nature of the triangular relationship between media, humanitarian and government players. Naturally such a course of study also requires examination of the factors that affect and influence each component of what the authors dub the “crisis triangle”. Using six case studies as their point of departure (tripartite evaluations of components’ interaction in Liberia, northern Iraq, Somalia, the former Yugoslavia, Haiti and Rwanda), the authors seek to single out cause-and-effect linkages from a mass of data that would, in the eyes of others, look more like a formidable but frequently death-fraught game of spillikins.

The study sets out a bottom-line approach to relationships, yet at each step the authors admit to series of question marks, variable parameters, and qualifying conditions... Working the media, peddling influence, is not an exact science. It is an exercise that does not lend itself easily to ready-made push-button communication strategies.

If a thread runs through the book, however, it can be summarized in a single word: clarity. The authors never cease to emphasize the absolute need for all players concerned to understand what the other components can, or more to the point perhaps, cannot do; each component of the “triangle” needs to be absolutely clear about the “other’s” structural constraints, its purpose in life and society, its priorities and responsibilities. Absolute clarity on agendas and *démarches* is the kingpin of all will and work geared towards better efficiency. Unfortunately, I believe this may be wishful thinking since part of somebody’s agenda somewhere may well be the desire to compromise the others’ moves in the game (today’s version of a *Kriegspiel*!).

As such, and it will be a surprise to no one, the linkage between each component of the “crises triangle” is one characterized, at least in Western democratic societies which constitute the implied focus of the study, by interdependence and by a certain casualness. Each component implicitly feels/knows that it needs (or may one day need) the other two, but at the same time each is jealous of its zealously reaffirmed independence. Without saying so in so many words, the authors underline the fact that the triangular *quid pro quo* is determined as much by opportunism as by

more or less universally recognized principles. The question therefore is: must it, should it, always be so ?

Possibly the most pertinent observation drawn from the research affecting us as a humanitarian institution is the fact that high media coverage of a given crisis, particularly if it is channelled via television, is not likely to influence government policy (providing the said government has a policy!). Indeed such coverage is, practically by definition, cause-simplified and emotional in appeal. At most, says the study, it can precipitate domestic pressure in terms of timing and scope of a government's intentions in any given area, be they covert or declared.

On the rare occasions — illustrated by the case of Somalia — when the tyranny of the shocking image was allowed to dictate a foreign government's policy, the consequences were disastrous. Since then, governments have not only learnt to resist the emotional diktats of popular media coverage but are increasingly learning to gain control of them, notably by projecting an image of humanitarian assistance conceived by way of an alibi: people want us to be there, so let them see us *there* — helping victims. From the humanitarian point of view, visibility has become synonymous with funding; (Western) governments have become, or are in the process of becoming, politically immune to high-visibility humanitarian *tamashas*, à la Goma where, as Minear *et al* rightly point out, there was something of an NGO visibility circus. Flaunting T-shirts and logos might bring in cash to the organizations concerned, but in terms of political influence, their impact is nil.

Past experience has indeed shown that a government can no longer allow itself to be caught on the wrong foot in any high-profile humanitarian crisis. This means that the onus is on governments and administrations to include humanitarian crisis management as an integral part of their broader political objectives. Once the political course has been set, picturesque media serve only as a monitor of initiated aid programmes. In such circumstances media, particularly TV, coverage becomes at best a sensor of domestic public opinion, at worst the by now famous CNN factor. The likely consequence of this is that donor governments and those with the means to act according to peace-keeping/enforcing mandates will become increasingly impervious, if not jaundiced, to emotionally expressed utterances of humanitarian concern.

From the humanitarian point of view, the ICRC also has its reasons for wanting to keep at least the most extreme kind of emotional journalism at arm's length. Emotionally charged coverage can indeed lead to erroneous humanitarian solutions. The archetypal example of this must surely

be the flurry of adoption-seekers in the West following dramatic TV footage of orphans, or children presented as such. Such portrayals actually provoke not only family separations but a perverse humanitarian racism: Western media get mobilized to keep an “adopted” child with its adoptive parents and away from its biological ones (“*somewhere in Africa...*”) because the latter, it supposedly goes without saying but is repeatedly said, cannot possibly (!) look after the child properly. The natural, biological parent is therefore maligned by the press for the most humane reasons: the desire to give the child a decent chance in life... This is not a trend in humanitarian reporting that the ICRC should wish to encourage, either ethically or practically. And yet humanitarians must also be careful not to denigrate this very genuine and worthy formulation of human generosity as expressed by would-be adopters; somehow it must be properly, constructively channelled. This can be done by building up societies in which humanitarian considerations are adopted as a matter of governing policy, as a macro-application of human resources providing an environment in which the generous can feel at ease.

Minear and his co-researchers identify another form of pressure exerting itself on more or less accommodating media that have had, and will continue to have, implications for humanitarian work. In short, they say — and nobody will contradict them — that stories have to be short and simple mainly because print space and broadcasting time are in short supply. Professional journalists, whether in the written or audiovisual environment, quickly learn to respond to such a “story-telling” requirement. Hence, almost by definition, a certain convoluted Manichaeism is placed at the heart of all humanitarian story-telling: there is “good” and there is “bad”. There are the “good victims” and there (can be) “bad victims”. This Manichaeism often stems from the need journalists and editors (who together with media moguls are rightly called “gatekeepers” by Minear) believe link people to politicians, politicians to politics and thus all stories, especially if they deal with a humanitarian catastrophe, to real or supposed sources of guilt. A reader/viewer has to be psychologically able to assess the flow of responsibilities, if only to see the unfolding drama as something “foreign”. The media, more or less willingly, become a vehicle for stereotypes. The press coverage of the events in the former Yugoslavia and the Great Lakes region of Africa are cases in point.

The impression gained, as a reader, is that the web of contacts between media, humanitarians and authorities is a criss-cross of desire to help, powerlessness, distrust, diverging agendas, cynicism and increasingly, whether declared or not, of underlying short-, medium- or long-term

policy goals. The logical conclusion of this, is that if an organization like the ICRC wishes to influence government (or multinational) policy by providing its own input, constructed around legitimate patterns of reference, then it must do so upstream from the mass media. The proper course for our information and policy counselling is to assist in the making of serene societies in which humanitarian principles are accepted as norms of governance. In the meantime, ICRC gems of information or reflection are best kept for an elite capable of digesting them. The net result of course is the adoption by ICRC-like institutions of an audience-orientated communication policy.

Another conclusion I drew from the study, or more precisely from the complex and muddled web of media/government/humanitarian contacts, is that we — humanitarians, journalists, governments, victims even — are all learning. There was no Golden Age of perfect media-influence systems, there is no time-proven experience to draw from, no established reference manual available. So, too, are the media; they are learning new technologies and about the responses of new audiences with varying degrees of economic and educational empowerment. Communication patterns in the latter part of the twentieth century are being empirically built. The people who are probably learning fastest are those with the more pressing accountability agendas, e.g. elected governments and the ones who cultivate an “image problem” or have had one thrust upon them.

This process also means that the media themselves have to find a respectable equilibrium between so-called “infotainment” (a tendency found mainly but not exclusively in TV reporting) and a proper informing role. Most journalists, as individuals left to themselves, have a tendency to be seen as the topplers of idols — be they socialite, humanitarian or political. Yet as we all know, even the most iconoclastic journalist has to compromise with reality — namely the law and his or her salary. This does not concern humanitarian players directly, except for the fact that it is in our objective interest for the media to remain, like us, as independent as is politically and economically possible today.

This last problem is probably the one that affects humanitarian agencies the most. The media need money to function, money comes from markets, State subsidies and the euphemistically called “enlightened” private sector. In all cases, access to money hinges on audiences and what they want to read/hear/see — or what others think is fit for them to read/hear/see. Media people would love to be completely independent and tell the stories they think relevant in the manner they think the most suited. But whatever forms are agreed on in any one case are bound to be

transient. Look at the way media reporting has evolved over the past decades and you will see the structural instability of the business and the difficulties there are in wanting to pin down such a slippery cake of soap.

The media do, however, obey certain rules and there are many schools of thought about what they should do and how they should do it. Often the least relevant are those which counsel from the outside. Picture the media, and you are picturing less a science than an art. One cannot compare journalists to doctors, but to musicians, the lowest category of whom play on pavements, the highest in grand concert halls, and some to small elitist chamber music audiences. That's what the journalists' profession is, and that's how it should be. It's up to us to make do with what there is. And I do not believe we should even try to think about wanting to change it.

Too many people want to change/control the media. People we neither know nor trust. If we want humanitarian principles and practices to flourish and be respected, we need to be able not only to explain them but to underscore their relevance. One of the tools available to us to achieve this is the press, a credible press. We must not join in with those who, for whatever reasons, honourable or not, seek to subvert its inner mechanics; we cannot make the press natural allies of humanitarian action, we can make it only the truthful carrier of our stories and sentiments. As one strong-minded British media boss said "*I don't want fans with typewriters*". Indeed, by getting too involved in a story, a journalist loses his or her independence of mind and expression. I fear that any attempt to tie the press to a somewhat wispy convergence of interests may subordinate and ultimately discredit those who must always be free to call upon any one of us, individuals or institutions, to account for our actions, expenditure and policy statements. That way the press remains credible and, providing we do our job properly, so do we. Precisely that is the victims' interest. And, finally, to respond to our irate head of delegation quoted at the outset on a subject not tackled by Larry Minear & Co, I would say: "Patience, all in due course". The very fact that journalists use our institution is an acknowledgement of it as an efficient component of the "crisis triangle".

Kim Gordon-Bates
ICRC NEWS Editor

Miscellaneous

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The Paul Reuter Fund was set up in 1983 through a donation made to the ICRC by the late Paul Reuter, Professor Emeritus at the University of Paris and member of the Institute of International Law. The Fund's purpose is twofold: to encourage the publication of works on international humanitarian law or other initiatives in that field; and to finance the Paul Reuter Prize.

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The Review

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