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EXPANDING THE FRONTIERS OF HUMANITARIAN LAW: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

*Paul J. Magnarella**

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I. INTRODUCTION

In 1994, Rwanda erupted into one of the most appalling cases of genocide that the world had witnessed since World War II. The United Nations (UN) Security Council, having recently created an international criminal tribunal for humanitarian law violators in the European States of the former Yugoslavia, decided it could do no less for African Rwanda. Since the Rwandan conflict was internal rather than international, the statute for its tribunal complements rather than replicates that of its Yugoslavian counterpart. Because the statute for the International Criminal Rwandan Tribunal (ICTR) contains a number of legal innovations, it will contribute significantly to the development of the humanitarian law of internal armed conflict. This article analyzes these innovations. It also discusses the background of the genocide, the creation of the tribunal, and its substantive and procedural law,

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The author dedicates this article to all those Rwandans who have suffered during the 1994 tragedy and its aftermath.

as well as its initial activity.

II. BACKGROUND

Following the assassination of Rwandan President Juvenal Habyarimana in a plane shot down by unknown assailants on April 6, 1994, Rwanda burst into horrifying violence, which resulted in the murder of about 800,000 people (mostly Tutsi), the uprooting of about two million within Rwanda's borders, and the exodus of over two million (mostly Hutu) to the neighboring countries of Zaire, Burundi, Tanzania, Kenya, and Uganda.¹ Soon after Habyarimana's death, extremist Hutu militias, the Presidential Guard, and the Hutu-dominated national army unleashed a systematic campaign of murder and genocide against hundreds of moderate and opposition Hutu and all Tutsi.²

Rwanda had been Africa's most densely populated country, with rural peasants constituting the bulk of its inhabitants.³ It had a pre-genocide population of approximately eight million,⁴ all speaking Ikinyarwanda, a Bantu language.⁵ About 85% of the people were Hutu, 14% Tutsi, and 1% Batwa or Pygmies.⁶ Generations of intermarriage had reduced, but not eliminated, inter-population physical differences.⁷

Pre-colonial rule by the minority but aristocratic Tutsi, as well as indirect rule later by Belgian colonialists through Tutsi royalty, had created resentment among the majority Hutu.⁸ Rwanda became independent of Belgium in 1962, and various Hutu factions controlled the government and military until July 1994.⁹ Periodically throughout the period of independence there were outbreaks of inter-ethnic violence, resulting in the flight of Tutsi to surrounding countries, especially to Uganda where they formed the

1. See GÉRARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* (1995); COLETTE BRAECKMAN, *RWANDA: HISTOIRE D'UN GÉNOCIDE* (1994) (describing in detail the Rwandan events related in this article).

2. PRUNIER, *supra* note 1, at 192-257.

3. Theodor Hanf, *Rwanda*, in 20 COLLIER'S ENCYCLOPEDIA 308 (Bernard Johnston ed., 1980).

4. PRUNIER, *supra* note 1, at 4.

5. Hanf, *supra* note 3.

6. *Id.*; see also CATHARINE NEWBURY, *THE COHESION OF OPPRESSION: CLIENTSHIP AND ETHNICITY IN RWANDA: 1860-1960* (1988) (discussing clientship and shifting ethnicity in Rwanda).

7. See PRUNIER, *supra* note 1, at 5; RICHARD F. NYROP ET AL., *AREA HANDBOOK FOR RWANDA* 44-47 (1969).

8. The political history of Rwanda and its important relations with surrounding countries, especially Burundi, are beyond the scope of this article. For these important topics, see generally BRAECKMAN, *supra* note 1; DIXON KAMUKAMA, *RWANDA CONFLICT: ITS ROOTS AND REGIONAL IMPLICATIONS* (1993); RENÉ LEMARCHAND, *RWANDA AND BURUNDI* (1970); PRUNIER, *supra* note 1.

9. PRUNIER, *supra* note 1, at 54, 74-213.

Rwandan Patriotic Front (RPF) and its army.¹⁰ In the 1960s, some exiled Tutsi invaded Rwanda in unsuccessful attempts to regain power.¹¹

Major-General Juvenal Habyarimana, a Hutu, came to power in 1973 as the result of a military coup. During his twenty-one years of rule (1973-1994), there were no Tutsi mayors or governors, only one Tutsi military officer, two Tutsi members of parliament, and one Tutsi cabinet minister.¹² In addition, Hutu in the military were prohibited from marrying Tutsi,¹³ and all citizens were required to carry ethnic identity cards.¹⁴ Habyarimana promoted a policy of internal repression against Tutsi. In the 1990s, especially, his government indiscriminately interned and persecuted Tutsi, solely because of their ethnic identity, claiming they were actual or potential accomplices of the RPF.¹⁵ From 1990 to 1993 Hutu ultra-nationalists killed an estimated 2000 Tutsi; they also targeted human rights advocates, regardless of their ethnicity.¹⁶

The genocide campaign following Habyarimana's death ended in July 1994 when the RPF army routed the Hutu militias and army. The RPF and moderate Hutu political parties formed a new government on July 18, 1994, but the country was in chaos.¹⁷ The government pledged to implement the Arusha peace agreement on power sharing, previously reached by Habyarimana's regime and the RPF on August 3, 1993.¹⁸ On August 10, 1995, in a presidential statement, the UN Security Council called upon the new Rwandan government to ensure that there would be no reprisals against Hutu wishing to return to their homes and resume their work, reminded the government of its responsibility for a national reconciliation, and emphasized that the Arusha peace agreement constituted an appropriate framework for reconciliation.¹⁹

The new Rwandan government was a coalition of twenty-two ministers

10. *Id.*

11. *Id.* at 93-95.

12. *Id.* at 75.

13. *Id.*

14. *Id.* For purposes of these identity cards, ethnicity was determined by patrilineal descent. U.S. DEP'T OF STATE, RWANDA HUMAN RIGHTS PRACTICES (1994), available in LEXIS, News Library. Hence, even the children of mixed marriages were classified, for example, as Hutu, Tutsi, Twa, depending on the identity cards of their fathers. *Id.*

15. Villia Jefremovas, *Acts of Human Kindness: Tutsi, Hutu, and the Genocide*, 23 ISSUE 28, 29 (1995); Catharine Newbury, *Background to Genocide in Rwanda*, 23 ISSUE 12, 14 (1995).

16. Newbury, *supra* note 15, at 14.

17. PRUNIER, *supra* note 1, at 299.

18. *Id.* at 329.

19. U.N. SCOR, *Statement by the President of the Security Council*, 3414th mtg. at 1, U.N. Doc. S/PRST/1994/42 (1994).

drawn from the RPF (with nine ministers) and four other political parties.²⁰ Both Tutsi and Hutu were among the top government officials. Pasteur Bizimungu, a Hutu, was named President, while Paul Kagame, a Tutsi, was appointed Vice-President and Minister of Defense.²¹ Faustin Twagiramungu, a Hutu, was Prime Minister until late August 1995, when he was replaced by Pierre Claver Rwigema, also a Hutu.²² The government committed itself to building a multiparty democracy and to discontinuing the ethnic classification system utilized by the previous regime.²³

Shortly after the new regime had established itself, the prime minister reportedly stated that his government might prosecute and execute over 30,000 Hutu for murder, genocide, and other crimes committed during Rwanda's holocaust.²⁴ The U.S. government, fearing that such a prospect would amount to a new cycle of retribution and keep Hutu refugees from returning home, sent John Shattuck, U.S. Assistant Secretary of State for Human Rights, to Kigali (Rwanda's capital) to encourage the government to delay its plans for prosecution in favor of judicial action by an international tribunal.²⁵

III. CREATING THE ICTR

On July 1, 1994, the U.N. Security Council adopted Resolution 935 in which it requested the Secretary General to establish a commission of experts to determine whether serious breaches, including genocide, of humanitarian law had been committed in Rwanda.²⁶ In the fall of 1994, the commission reported to the Security Council that genocide and systematic, widespread, and flagrant violations of international humanitarian law had been committed in Rwanda, resulting in massive loss of life.²⁷ On November 8, 1994, the U.N. Secretary General submitted the ICTR Statute to the Security Council, stating that he was "convinced" that "the prosecution of persons responsible

20. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1994, S. Print 12, 104th Cong., 1st Sess. 200 (1994).

21. *Id.*

22. *Rwanda's Prime Minister Leaves Office Suddenly*, N.Y. TIMES, Aug. 29, 1995, at 2.

23. Raymond Bonner, *Rwanda's Leaders Vow to Build a Multiparty State for Both Hutu and Tutsi*, N.Y. TIMES, Sept. 7, 1994, at A10.

24. Holly Burkhalter, *Ending the Cycle of Retribution in Rwanda*, LEGAL TIMES, Aug. 22, 1994, at 19.

25. *Id.* The U.S. government probably underestimated the enormity of the judicial task. Thousands of people were directly involved in acts of genocide, but the U.N. ICTR will be able to prosecute only about 50 persons a year. Hubert Kahl, *Rwanda Traumatized by Images of Death*, Deutsche Presse-Agentur, Apr. 4, 1995, available in LEXIS, News Library; see also Burkhalter, *supra* note 24, at 19-20.

26. S.C. Res. 935, U.N. SCOR, 3400th mtg. at 2, U.N. Doc. S/RES/935 (1994).

27. *Letter Dated 1 October 1994 from the Secretary-General Addressed to the President of the Security Council*, U.N. SCOR, at 1, U.N. Doc. S/1994/1125 (1994).

for serious violations of international humanitarian law [in Rwanda] . . . would contribute to the process of national reconciliation and to the restoration and maintenance of peace."²⁸ He recommended that this tribunal, like the one created by the Security Council in 1993 for the former Yugoslavia, be established under Chapter VII of the U.N. Charter.²⁹ Given the urgency of the situation, the Secretary General did not involve the General Assembly in the drafting or review of the statute. Subsequently, however, the General Assembly passed its own resolution welcoming the ICTR's establishment.³⁰

The Security Council adopted the Secretary General's report and the ICTR Statute without change.³¹ Ironically, Rwanda was the only Security Council member to vote no.³² Rwanda expressed three objections.³³ It wanted the ICTR Statute to contain a provision for capital punishment.³⁴ It also preferred that the temporal jurisdiction of the ICTR extend back to 1990 to cover earlier crimes, and it wanted the ICTR to be based in Rwanda itself.³⁵ The ICTR Statute, as accepted by the Security Council, excludes capital punishment and limits temporal jurisdiction to 1994. The Security Council preferred to locate the ICTR in a neighboring state.³⁶ Furthermore, the Security Council rejected Kigali's proposal that Rwandan judges sit on the ICTR.³⁷ Initially, Rwandan President Bizimungu publicly criticized the Security Council vote saying it would only lead to a "secret" court that

28. S.C. Res. 955, U.N. SCOR, 3453rd mtg. at 1, U.N. Doc. S/RES/955 (1994) [hereinafter ICTR].

29. *Id.* at 3; see M. Cherif Bassiouni, *Former Yugoslavia: Investigating Violations of International Humanitarian Law and Establishing an International Criminal Tribunal*, 18 FORD. INT'L L. J. 1191 (1995) (discussing the establishment of the International Tribunal for the Former Yugoslavia); see also Paul J. Magnarella, *Trying for Peace Through Law: The UN Tribunal for the Former Yugoslavia*, 10 HUMAN PEACE 3-8 (1995) (describing and analyzing of the ICTR's legal structure); Theodor Meron, *War Crimes in Yugoslavia and Development of International Law*, 88 AM. J. INT'L L. 78 (1994); Ruth Wedgwood, *War Crimes in the Former Yugoslavia: Comments on the International War Crimes Tribunal*, 34 VA. J. INT'L L. 266 (1994).

30. *Situation of Human Rights in Rwanda*, U.N. GAOR, 49th Sess., Agenda Item 100(c) at 4, U.N. Doc. A/RES/49/206 (1995).

31. See ICTR, *supra* note 28.

32. The Security Council adopted the resolution sponsored by the United States and New Zealand by a vote of thirteen to one, with China abstaining. Julia Preston, *Tribunal Set on Rwanda War Crimes: Kigali Votes No on U.N. Resolution*, WASH. POST, Nov. 9, 1994, at A44.

33. *Id.*

34. *Id.*

35. *Id.*

36. The ICTR was subsequently placed in Arusha, Tanzania. S.C. Res. 977, U.N. SCOR, 3502nd mtg. at 1, U.N. Doc. S/RES/977 (1995).

37. Preston, *supra* note 32, A44.

would “exonerate” the true organizers of the genocide.³⁸ Later, however, a Rwandan spokesperson said his government would cooperate fully with the U.N. court.³⁹ Rwanda’s only realistic hope of bringing the major instigators of the genocide to justice is through the ICTR. Most of those chiefly responsible for acts of genocide have fled the country, and Rwanda lacks the political leverage, the extradition treaties, and the resources necessary to gain custody of and try them.⁴⁰

One of the most innovative and expeditious recommendations in the Secretary General’s report was that of establishing the tribunal through the exercise of the Security Council’s powers under Chapter VII of the U.N. Charter.⁴¹ As Antonio Cassese, the eventual President of the International Criminal Tribunal for the Former Yugoslavia, explained, “The traditional approach of establishing such a body by treaty was discarded as being too slow (possibly taking many years to reach full ratification) and insufficiently effective since Member States could not be forced to ratify such a treaty against their wishes.”⁴² By going the Chapter VII route, the Security Council obliged all U.N. member states to cooperate with the ICTR and to honor any lawful requests it makes for assistance under its Statute.

Specifically, Articles 39, 41, and 48 of Chapter VII of the U.N. Charter provide the legal basis for the Security Council’s establishment of the ICTR.⁴³ Article 39 states that the Security Council shall determine when threats to peace exist, and shall, in accordance with Articles 41 and 42, determine what measures shall be taken to maintain or restore international peace and security.⁴⁴ While Article 42 addresses military actions, Article 41 provides that “[t]he Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures.”⁴⁵ Article 41 goes on to list the kinds of actions, for example, interruptions of economic and communication tie, that these

38. *Rwandan President Says UN Wants “Secret” Trials on Rwanda*, Agence France Presse, Nov. 9, 1994, available in LEXIS, News Library.

39. Anni Thomas, *Rwandan Government Promises to Work with War Crimes Court*, Agence France Presse, Nov. 24, 1994, LEXIS, News Library.

40. See Alphonse Marie Nkubito, *Statement by the Minister of Justice of Rwanda to the First Public Hearing of the First Session of the International Criminal Tribunal for Rwanda at The Hague (June 27, 1995) (transcript)*.

41. See U.N. CHARTER arts. 39, 41, 48.

42. U.N. Doc. A/49/342, S/1994/1007 (1994).

43. U.N. CHARTER arts. 39, 41, 48.

44. U.N. CHARTER art. 39. Presumably, the Security Council regarded the massive flow of refugees and the remnants of the Hutu militias to neighboring countries as a threat to international peace.

45. U.N. CHARTER art. 41.

measures “may include.”⁴⁶ Although Article 41 does not include judicial measures in its list expressly, it does not preclude them.⁴⁷ Further, the use of the phrase “may include” denotes that the list is not exhaustive.⁴⁸

Article 48 obligates U.N. member states to support the Security Council’s decision by cooperating in its implementation.⁴⁹ The Article provides that “[t]he action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all Members of the United Nations or by some of them, as the Security Council may determine.”⁵⁰

IV. COMPOSITION OF THE ICTR

The ICTR consists of two trial chambers with three judges each, an appeals chamber with five judges, the office of the prosecutor, and a registry.⁵¹ In January 1995, the United Nations appointed Honore Rakotonanana, the former President of the Supreme Court of Madagascar, as Deputy Chief Prosecutor for the ICTR.⁵² He works out of an office in Kigali, under the supervision of Louise Arbour, Chief Prosecutor for the U.N. Criminal Tribunal for the Former Yugoslavia located in The Hague, The Netherlands.⁵³ In June 1995, the six trial judges and five appeals judges took their oaths and held their first plenary session in The Hague. All were elected and appointed by the United Nations. The trial judges are from Sweden, Senegal, Bangladesh, Russia, South Africa, and Tanzania. The ICTR appeals chamber is comprised of judges from the U.N. Tribunal for former Yugoslavia in The Hague. Its judges are from Egypt, Italy, Canada, China, and Australia. The judges elected Judge Laity Kama of Senegal as the ICTR’s President. The ICTR’s registrar and chief administrative officer is Andronido Adede, a Kenyan attorney, who has served as Deputy Director of the Codification Division in the U.N. Office of Legal Affairs.⁵⁴

46. *Id.*

47. *Id.*

48. *Id.*

49. U.N. CHARTER art. 48.

50. *Id.*

51. ICTR, *supra* note 28, arts. 10-11.

52. *U.N. Appoints Prosecutor for Rwandan Tribunal*, N.Y. TIMES, Jan. 15, 1995, at A6.

53. Barbara Crossette, *Canadian to Lead Panels on Atrocities in Yugoslavia and Rwanda*, N.Y. TIMES, Feb. 23, 1996, at A7. Canadian judge Louise Arbour replaced prosecutor Richard Goldstone in Oct. 1996. *Id.*

54. *Friday Highlights*, Fed. News Serv., § U.N. Package, Sept. 11, 1995, available in LEXIS, News Library.

V. THE ICTR'S JURISDICTION

Article 1 of the ICTR Statute⁵⁵ limits the ICTR's temporal jurisdiction to the year 1994 only. Article 1 also states that the ICTR "shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighboring states."⁵⁶ Consequently, the Statute gives the ICTR both personal and territorial jurisdiction in Rwanda as well as limited personal and territorial jurisdiction in surrounding states. By contrast, the Statute of the International Criminal Tribunal for the Former Yugoslavia grants that Tribunal jurisdiction "in the territory of the former Yugoslavia" only.⁵⁷

By granting the ICTR the competence to prosecute Rwandans who allegedly committed certain crimes abroad, the Security Council has added a new dimension to the humanitarian law of non-international armed conflict. Rwanda formally requested the creation of a tribunal, and thereby voluntarily surrendered some of its jurisdiction to the Security Council's judicial creation. By contrast, according to the Statute, Rwanda's neighbors must surrender some of their jurisdiction to the ICTR without choice.⁵⁸ All states, of course, have the competence to prosecute Rwandans for crimes committed within their territories. However, because by its Statute the ICTR has primacy over the national courts of all states,⁵⁹ it may formally request that any neighboring state's court defer certain cases to its competence. This request carries with it the threat of a penalty for non-compliance.⁶⁰ Should any state notified of a deferral request not respond satisfactorily within sixty days, "the [Tribunal's] Trial Chamber may request the President to report the matter to the Security Council,"⁶¹ which presumably will consider sanctions. Requiring states to surrender their competence to prosecute persons for criminal acts committed on their own territories to a U.N. Security Council creation is another novel use of U.N. Charter Chapter VII. Whether surrounding states will voluntarily accept or protest this demand on their sovereignty remains to be seen. State action and reaction, and claims and responses will determine whether this kind of measure, taken by the Security

55. ICTR, *supra* note 28, at 1.

56. *Id.*

57. *Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993)*, S/25704 art. 1 (1993) (statute establishing Former Yugoslavia Tribunal art. 1).

58. ICTR, *supra* note 28, arts. 7-8.

59. *Id.* art. 8(2).

60. *Rules of Procedure and Evidence*, U.N. Int'l Crim. Trib. for Rwanda, ITR/3/Rev.1, Rules 59, 61 (1995) [hereinafter ICTR Rules].

61. *Id.*

Council under Chapter VII, will become an accepted principle of international law to be applied again in the future.

VI. SUBJECT MATTER JURISDICTION

Because the Security Council is not a legislative body, it had no competency to enact substantive law for the ICTR.⁶² Instead, it authorized the ICTR to apply existing international humanitarian law applicable to non-international armed conflict.⁶³ The humanitarian law included in the ICTR's Statute consists of the Genocide Convention,⁶⁴ which was ratified by Rwanda, crimes against humanity as defined by the Nuremberg Charter,⁶⁵ Article 3 Common to the Geneva Conventions,⁶⁶ and Additional Protocol II⁶⁷ also ratified by Rwanda. Both the prohibition and punishment of acts of genocide and crimes against humanity are part of customary international law, imposing legal obligations on all states.⁶⁸

Article 2 of the Statute⁶⁹ replicates Articles 2 and 3 of the Genocide Convention.⁷⁰ Article 2(2) defines genocide as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group: killing group members; causing serious bodily or mental harm to group members; deliberately inflicting on the group conditions calculated to bring about its complete or partial physical destruction; imposing measures intended to prevent birth within the group; and forcibly transferring children to another group.⁷¹ Persons who commit genocide or who attempt, conspire, or incite others to commit genocide are punishable.⁷²

Similar to the Geneva Conventions, the Genocide Convention obligates States Parties to enact the legislation necessary to provide effective penalties

62. U.N. CHARTER arts. 24-26.

63. ICTR, *supra* note 28, art. 1.

64. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

65. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, Charter of the International Military Tribunal, 59 Stat. 1544, 1546, 82 U.N.T.S. 279, 284 [hereinafter IMT Charter].

66. Geneva Conventions Nos. 970-73, Aug. 12, 1949, 75 U.N.T.S. 31, 85, 135, 287.

67. Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of Non-International Armed Conflict, Dec. 12, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

68. HILAIRE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW 140 (1990); Meron, *supra* note 29, at 79.

69. ICTR, *supra* note 28, art. 2.

70. Genocide Convention, *supra* note 64, at 280.

71. ICTR, *supra* note 28, art. 2(2).

72. *Id.* art. 2(3).

for persons guilty of genocide.⁷³ Article 6 of the Genocide Convention also requires that persons charged with genocide be tried in the territory where the act was committed, “or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”⁷⁴ Consequently, the surrounding states of Zaire and Tanzania, as ratifying parties to the Genocide Convention, undertake to charge persons responsible for genocide in Rwanda and to extradite them for prosecution either back to Rwanda or to a competent international tribunal that they recognize.

Since the Convention’s entrance into force in 1951, the only international tribunals competent to prosecute those accused of genocide in limited geographic areas have been the ones established by the Security Council for the former Yugoslavia and Rwanda. By virtue of Chapter VII obligations under the U.N. Charter, all U.N. members, including Burundi, Uganda, and Kenya, which have not ratified the Genocide Convention, are required to recognize these tribunals and send indicted suspects to them.⁷⁵ Non-U.N. members, however, can decide for themselves whether they wish to recognize these international tribunals for purposes of surrendering indictees.

Obligations to prevent and punish acts of genocide are not confined merely to the 107 states that have ratified the Genocide Convention.⁷⁶ Because the prevention and the punishment of genocide have become part of customary international law, the International Court of Justice has noted that “the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional ratification.”⁷⁷

Article 3, “Crimes against Humanity,” of the ICTR Statute⁷⁸ resembles Article 6(c) of the Nuremberg Charter.⁷⁹ Article 3 empowers the ICTR to prosecute persons responsible for the following crimes when committed as part of a widespread and systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds: murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial, and religious grounds, and other inhumane acts.⁸⁰

73. Genocide Convention, *supra* note 64, art.5.

74. *Id.* art. 6.

75. See U.N. CHARTER art. 48.

76. See *International Instruments Relating to Human Rights*, 15 HUMAN RIGHTS J. 51-67 (1994) (listing states that had ratified the Genocide Convention and other human rights/humanitarian law conventions as of January 1, 1994) [hereinafter *International Instruments*].

77. Advisory Opinion No. 12, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. (May 28), at 15.

78. ICTR, *supra* note 28, art. 3.

79. IMT Charter, *supra* note 65, art. 6(c).

80. ICTR, *supra* note 28, art. 3.

Employing the Nuremberg concept of crimes against humanity in Rwanda constitutes an important legal development. The Nuremberg Charter was established to prosecute "war criminals,"⁸¹ and it explicitly defined crimes against humanity as specified inhumane acts committed "before or during the war."⁸² Traditionally, war was defined as a state of armed conflict between two or more states,⁸³ but legal experts debated about the legal criteria of war, for example, whether a formal declaration of war is required, whether there can be domestic war, and whether the parties must be recognized states.⁸⁴

Some legalists may now wonder whether applying the Nuremberg Charter to Rwanda's internal conflict is appropriate. Although the Charter is explicitly included in the Statute for the International Criminal Tribunal for the Former Yugoslavia,⁸⁵ that conflict did involve more than one state, and consequently meets the war criterion of the Charter. The ICTR Statute characterizes the situation in Rwanda as an internal armed conflict.⁸⁶ Hence, it does not include the "grave breaches" sections of the 1949 Geneva Conventions, which apply to international armed conflict and are regarded as customary international law.⁸⁷ By containing the Nuremberg concept of crimes against humanity in its Statute, the ICTR represents an important extension of international humanitarian law to internal conflicts. The U.N. Security Council, the ICTR's creator, has ignored the ambiguity of the war concept, and with its authoritative voice has made crimes against humanity an internal as well as an international offense of customary international law.

Article 4 empowers the ICTR to prosecute persons committing or ordering to be committed serious violations of Article 3 Common to the Geneva Conventions of 1949 and of the Additional Protocol II thereto of 1977.⁸⁸ These violations include: (1) violence to life, health, and physical or mental well-being of persons, in particular murder, torture, or mutilation; (2) collective punishments; (3) taking of hostages; (4) acts of terrorism; (5) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution, and any form of indecent assault; (6) pillage; (7) sentences or executions rendered extra-judicially or without due

81. IMT Charter, *supra* note 65, art. 6.

82. *Id.* art. 6(c).

83. 2 LASSA OPPENHEIM, INTERNATIONAL LAW, A TREATISE: DISPUTES, WAR, AND NEUTRALITY 202 (Hersch Lauterpacht ed., 7th ed. 1952).

84. INGRID D. DE LUPIS, THE LAW OF WAR 5-23 (1987).

85. *Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993)*, U.N. SCOR, art. 1(a) at 9, U.N. Doc. S/25704 (1993) [hereinafter *Report*].

86. ICTR, *supra* note 28, at 2.

87. *Report*, *supra* note 85, ¶¶ 37-38.

88. ICTR, *supra* note 28, art. 4.

process; and (8) threats to commit any of the foregoing acts.⁸⁹

Neither Article 3 Common nor Protocol II applies to conflicts of an international nature. Rwanda's neighbors, Burundi, Tanzania, Uganda, and Zaire, but not Kenya, have ratified both the Geneva Conventions and Protocol II.⁹⁰ However, unlike the grave breaches sections of the Geneva Conventions, Article 3 Common and Protocol II do not require ratifying parties to criminalize the above acts or to prosecute or extradite alleged violators either to the state on whose territory their acts occurred or to a competent international tribunal.⁹¹ As noted above, each U.N. member state is obligated under Chapter VII of the U.N. Charter to cooperate with Security Council measures taken to maintain international peace.⁹² Article 28 of the Tribunal's statute specifies that states shall cooperate with the ICTR and comply without undue delay with any request for assistance, including the arrest or detention of persons and the surrender of the accused to the ICTR.⁹³ Consequently, the U.N. Security Council, through its creation of the ICTR has added a compulsory arrest and surrender requirement to acts that the Geneva Conventions and Protocol II had previously conceptualized as being governed by domestic discretion. This represents another important extension of humanitarian law.

The Security Council's and the Secretary General's decision that the ICTR should have jurisdiction over natural persons and not juridical persons, such as associations, is reflected in Article 5.⁹⁴ Accordingly, membership alone in a criminal organization would not be sufficient to subject someone to the ICTR's jurisdiction. Article 6 addresses "individual criminal responsibility."⁹⁵ It states that any person who planned, instigated, ordered, committed, or aided and abetted in the planning, preparation, or execution of any crime mentioned in Articles 2 to 4 of the Statute shall be individually responsible for the crime.⁹⁶ An accused's official position, even as president or prime minister, shall not relieve him of responsibility or mitigate punishment.⁹⁷ Furthermore, superiors are criminally responsible for the criminal acts of their subordinates if they knew of the acts and did not take reasonably necessary measures to prevent or stop them.⁹⁸ Although following government orders will not relieve subordinates of criminal

89. ICTR, *supra* note 28, art. 4.

90. *International Instruments*, *supra* note 76, at 63.

91. *See* ICTR, *supra* note 28, art. 28.

92. U.N. CHARTER ch. VII.

93. ICTR, *supra* note 28, art. 28.

94. *Id.* art. 5.

95. *Id.* art. 6.

96. *Id.* art. 6(1).

97. *Id.* art. 6(2).

98. *Id.* art. 6(3).

responsibility, it may mitigate their punishment if the ICTR determines that justice so requires.⁹⁹ The doctrine of individual responsibility for violations of humanitarian law was emphasized in the post-World War II Nuremberg and Tokyo trials.¹⁰⁰ The doctrine was codified in the Geneva Conventions of 1949.¹⁰¹

VII. CONCURRENT JURISDICTION AND ICTR PRIMACY

Given the magnitude of the crimes committed in Rwanda, the successful prosecution of all those responsible would greatly exceed the resource capacity of the ICTR.¹⁰² Therefore, Article 8 states that “[t]he International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of neighboring States.”¹⁰³ However, the ICTR Statute goes on to state that the ICTR “shall have primacy over national courts of all States,” such that it may formally request national courts to defer to its competence.¹⁰⁴

To respect the principle of *non-bis-in-idem* and to avoid the potential for double jeopardy, Article 9 states that no person tried by the ICTR shall be retried by a national court for the same acts.¹⁰⁵ However, persons already tried by a national court for crimes covered by Articles 2 to 4 may be retried by the ICTR if the litigated acts had been characterized as ordinary crimes, the case was not diligently prosecuted, or the national court proceedings were neither impartial nor independent or were designed to shield the accused from international responsibility.¹⁰⁶

VIII. RULES OF PROCEDURE

The ICTR’s Rules of Procedure are based on those of the Tribunal for the Former Yugoslavia.¹⁰⁷ They incorporate the fundamental due process guarantees to a fair and speedy trial found in Article 14 of the International Covenant on Civil and Political Rights (ICCPR).¹⁰⁸ Consequently, the

99. *Id.* art. 6(4).

100. DE LUPIS, *supra* note 84, at 353-54.

101. *Id.* at 354.

102. One Africanist estimates that the number of Rwandans directly involved in the acts of killing amounted to between 75,000 and 150,000. Jefremovas, *supra* note 15, at 28.

103. ICTR, *supra* note 28, art. 8(1).

104. *Id.* art. 8(2).

105. *Id.* art. 9(1).

106. *Id.* art. 9(2).

107. *Id.* art. 14.

108. *Id.* arts. 19-20.

ICTR, like its counterpart for the former Yugoslavia, will become a medium whereby international human rights standards will have significant influence on the development of international criminal law. Its due process guarantees include: the right to the presumption of innocence,¹⁰⁹ the right against self-incrimination,¹¹⁰ the right to counsel of choice or to free legal assistance if indigent,¹¹¹ the right to inspect prosecution's incriminating and exculpatory evidence,¹¹² the right to privileged communication with counsel,¹¹³ the right to public proceedings,¹¹⁴ the right to challenge the prosecution's evidence and to present evidence in one's defense,¹¹⁵ and the right of appeal.¹¹⁶

Only the prosecutor or his duly delegated deputy may commence a proceeding by submitting an indictment supported by evidence to a designated ICTR judge for confirmation.¹¹⁷ Victims, states, or non-governmental organizations may not initiate proceedings before the ICTR.¹¹⁸

Once a judge confirms an indictment, he or she may issue arrest and search warrants.¹¹⁹ The ICTR's registrar transmits the arrest warrant to the national authorities of the state having jurisdiction over the accused "together with instructions that at the time of the arrest the indictment and statement of the rights of the accused be read to him in a language he understands."¹²⁰ The arresting state's authorities shall notify the Registrar and arrange to transfer the accused to the seat of the ICTR where the President will arrange for his detention.¹²¹ The accused will be detained in a U.N.-supervised prison in Arusha.¹²²

If the notified state has been unable to arrest the accused, and if the registrar has, at the prosecutor's request, published notices of the arrest warrant in widely circulated newspapers, a trial chamber may, after finding the prosecutor's evidence sufficient, issue an international arrest warrant that shall be transmitted to all states.¹²³ The President of the ICTR has the authority to notify the Security Council of any state that refuses to honor the

109. ICTR Rules, *supra* note 60, Rule 62.

110. *Id.* Rule 63.

111. *Id.* Rule 42.

112. *Id.* Rules 66-68.

113. *Id.* Rule 97.

114. *Id.* Rule 78.

115. *Id.* Rule 85.

116. *Id.* Rule 108.

117. *Id.* Rule 47.

118. *Id.*

119. *Id.* Rules 54-55.

120. *Id.* Rule 55.

121. *Id.* Rules 57, 64.

122. *Id.*

123. *Id.* Rule 61.

ICTR's arrest warrant or that impedes the execution of such a warrant.¹²⁴

Soon after his arrest, the accused is brought before a trial chamber and formally charged.¹²⁵ The trial chamber shall satisfy itself that the accused's right to counsel is respected and that he understands the indictment.¹²⁶ It shall call on the accused to enter a plea, and should the accused fall silent, it shall enter a plea of not guilty on his behalf.¹²⁷ The trial chamber then instructs the Registrar to set a date for trial.¹²⁸ There are no provisions for trials in absentia.

The ICTR is not authorized to impose the death penalty in deference to the Second Optional Protocol to the ICCPR of 1989.¹²⁹ This, however, leads to an ironic situation. Owing to its limited resources, the ICTR is expected to go after, what Prosecutor Goldstone called the "big fish," and try at most fifty persons a year.¹³⁰ Consequently, those chiefly responsible for the genocide would receive, if convicted by the ICTR, a sentence of years, up to life, whereas lesser figures tried and convicted in Rwandan courts could be sentenced to death.

IX. THE SITUATION IN RWANDA

As it was successfully routing the Hutu army and various Hutu militias, the RPF army began rounding up Hutu suspected of participating in the genocide and other crimes. The International Committee of the Red Cross claimed that by August 1996, Rwanda had about 80,000 Hutu (mostly followers rather than leaders) crammed into antiquated, putrid prisons, and detained indefinitely while awaiting formal charges.¹³¹ Reportedly, over 2000 people had died under these conditions.¹³² Before they could be tried, Rwanda had to rebuild its judicial system. As of February 1, 1995, Rwanda had only a few surviving judges and not a single functioning court.¹³³ The trials of more than 30,000 Hutu suspected of involvement in the genocide

124. *Id.* Rule 61(E).

125. *Id.* Rule 62.

126. *Id.*

127. *Id.*

128. *Id.*

129. *See* ICTR, *supra* note 28, art. 23.

130. Kahl, *supra* note 25.

131. *More than 80,000 Prisoners in Rwanda*, Agence France Presse, Aug. 12, 1996, available in LEXIS, News Library; *Rwanda Conference Recommends Genocide Courts*, Reuters World Serv., Nov. 6, 1995, available in LEXIS, News Library [hereinafter *Rwanda Conference*]; Ruth Wedgwood, *Retaliation in Rwanda*, CHRISTIAN SCI. MONITOR, Dec. 20, 1995, at 20.

132. *Rwanda Conference*, *supra* note 131.

133. Tom Ashbrook, *Rwanda's Fate Lies with Refugees*, BOSTON GLOBE, Feb. 1, 1995, at 1.

had been put off indefinitely because of lack of resources.¹³⁴

In August 1996, Rwanda's parliament approved a draft genocide law designed to expedite the trials of the thousands held in prison and to encourage Hutu refugees to return from abroad.¹³⁵ The draft legislation, which had yet to be endorsed by the constitutional court and signed by the President before it could become law, covers offenses committed between 1990 and 1994, versus only 1994 for the ICTR, so as to deal with the massacres that occurred during the civil war prior to President Habyarimana's death.¹³⁶ It distinguishes genocide planners and mass murderers from others and offers reduced prison sentences to the latter if they confess.¹³⁷

According to the draft law, architects of the genocide and those responsible for murdering fifty or more people will face the death penalty.¹³⁸ Persons confessing to the murder of fewer than fifty people will serve only seven to twelve years in prison.¹³⁹ Those confessing to rape or other violent crimes will serve three years or less.¹⁴⁰ In addition, courts will treat property crimes as civil offenses, offering victims the opportunity to sue for damages.¹⁴¹ By proposing such lenient penalties for such serious crimes, the new government is trying to convince its Hutu citizens and the world community that it is not bent on revenge. In June 1996, Rwanda's Ministry of Justice offered a crash training course for magistrates, who should begin adjudicating cases once this new legislation is approved.¹⁴²

The Rwandan government has pledged to guarantee the safe return of the approximately two million refugees¹⁴³ living abroad in sprawling and unsanitary camps.¹⁴⁴ However, it is concerned about Hutu extremists waging an insurgency campaign from the camps located in Tanzania and Zaire, where Hutu militias are reportedly forcibly inducting young men into their units and threatening to invade Rwanda to retake power.¹⁴⁵ According

134. *Rwanda Opens the Trial of 14 in the Military*, N.Y. TIMES, May 3, 1995, at A12.

135. Iain Guest, *For Rwandan Genocide Survivors, It's Pragmatism vs. Revenge*, CHRISTIAN SCI. MONITOR, Aug. 30, 1996, at 19; *OU Human Rights Officials Express Support for Rwandan Genocide Courts*, BBC Summary of World Broadcasts, Aug. 13, 1996, available in LEXIS, News Library.

136. Guest, *supra* note 135, at 19.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Rwanda May Institute Truth Commission*, Africa News Serv., June 1996, available in LEXIS, News Library.

143. Elif Kaban, *Rwanda Pledges to Do More to Heal Ethnic Rifts*, Reuters N. Am. Wire, Nov. 2, 1995, available in LEXIS, News Library.

144. *U.N. Council Urges Rwandan Tribunal to Begin Trials*, Reuters N. Am. Wire, Oct. 17, 1995, available in LEXIS, News Library [hereinafter *U.N. Council*].

145. Kaban, *supra* note 143.

to U.N. observers, from May to June of 1996 Hutu extremists had killed ninety-nine witnesses to the genocide in order to prevent them from testifying before either Rwandan courts or the ICTR.¹⁴⁶ Many of those murdered had lived in Rwanda's Gisenyi province, located just across the Zairian border from Hutu refugee camps.¹⁴⁷ Since there is so little documentary evidence on much of the 1994 killing, prosecutors will have to rely on eyewitness accounts. Hence, the murder of key potential witnesses will hamper the prosecutorial process.

The governments of Rwanda and Zaire announced an agreement in August 1996 to repatriate Hutu refugees living in Zaire, to disarm former Rwandan soldiers there, and to take serious measures against those who prevent the repatriation.¹⁴⁸ However, the parties will most probably experience great difficulty implementing this agreement. Should the refugees return en masse, most will not find homes and work, because many houses and fields belonging to Hutu refugees have been confiscated by Tutsi, who themselves had returned to Rwanda after years of exile in Uganda.¹⁴⁹ In addition, many Hutu refugees refuse to go home for fear of revenge. In February 1996, a Hutu, who had been invited by U.N. officials to return to see how safe it was in Rwanda, was nearly lynched by a Tutsi mob when he arrived in Kigali.¹⁵⁰ With respect to the revenge factor, international organizations and western governments have been pressuring both Rwanda and the ICTR to begin prosecuting suspects immediately, arguing that justice is necessary for the country to move towards reconciliation.¹⁵¹ They hope that once the judiciaries identify and prosecute those primarily responsible for the genocide, Rwanda's Tutsi will believe justice is being served and will be less likely to seek revenge on returning Hutu refugees.

X. ICTR INDICTMENTS

Approximately one year after the genocide, the ICTR had 400 suspects as a result of ongoing investigations.¹⁵² Most of these were officials and

146. *365 People Killed in Rwanda: UN*, Agence France Presse, Aug. 22, 1996, available in LEXIS, News Library.

147. *Id.*

148. *Rwanda, Zaire Reach Agreement on Programme for Return of Refugees*, BBC summary of World Broadcasts, Aug. 24, 1996, available in LEXIS, News Library.

149. Kahl, *supra* note 25.

150. *Hutu Tester Nearly Lynched*, Deutsche Presse-Agentur, Mar. 1, 1996, available in LEXIS, News Library.

151. *Id.*; *U.N. Council*, *supra* note 144. U.S. Assistant Secretary of State for Human Rights, John Shattuck, has stated that "we are convinced that peace and reconciliation will come to Rwanda only if justice comes first." *U.S. Commitment to Restoring Justice in Rwanda*, 6 DEP'T OF STATE DISPATCH No. 24, June 12, 1995, at 499.

152. *Rwanda War Crimes Tribunal Holds First Session*, AP, June 29, 1994, available in LEXIS, News Library.

military leaders of the former Hutu-dominated regime, who had fled to other countries.¹⁵³

As noted above, all states are obligated to cooperate with the ICTR. Such cooperation includes arresting and transferring suspects and indicted persons to the ICTR.¹⁵⁴ In early January 1995, the heads of government from Kenya, Burundi, Tanzania, Rwanda, Uganda, Zaire, and Zambia met in Nairobi, the Kenyan capital, and agreed to hand over to the ICTR those who had taken part in the genocide.¹⁵⁵ Subsequently, however, Kenyan President Daniel Arap Moi stated that not only would he refuse to cooperate with the ICTR, but he would also prevent the ICTR from seeking out suspects in his country.¹⁵⁶ According to human rights officials, some Kenyans have financially benefited from wealthy Rwandans from the former government who fled to Kenya after the war broke out.¹⁵⁷ Immediately after Moi's remarks, ICTR Prosecutor Goldstone sent Moi a letter asking for clarification and warning that Kenya's refusal to cooperate with the ICTR would be regarded as a breach of Kenya's obligations under international law, a matter for the Security Council to consider.¹⁵⁸ President Moi soon retracted his statement,¹⁵⁹ but human rights watchers were doubtful about his sincerity.¹⁶⁰

More recently, ICTR Judge Navanethem Pillay has stated that some African states, especially Zaire and Kenya, were hampering efforts to bring criminals to justice.¹⁶¹ An observer explained that the Presidents of Zaire and Kenya are more concerned about the regional balance of power than about crimes against humanity.¹⁶² They support Rwanda's former rulers because they regard the successor RPF-led government as a client of Uganda's President Yoweri Museveni, their rival for leadership in East and Central Africa.¹⁶³ If any African State refuses to cooperate with the ICTR, as the U.N. Charter requires, it could be sanctioned by the U.N. Security

153. *Rwanda War Crimes Tribunal Holds First Session*, *supra* note 152.

154. ICTR, *supra* note 28, art. 28.

155. Paul Chintowa, *Rwanda — Politics: Tanzania to Repatriate Refugees*, Inter Press Serv., Jan. 10, 1995, available in LEXIS, News Library.

156. Donatella Lorch, *Kenya Refuses to Hand Over Suspects in Rwanda Slayings*, N.Y. TIMES, Oct. 6, 1995, at A3.

157. *Id.*; Louis Tunbridge, *Kenya "Sheltering Suspects in Rwandan Atrocities,"* DAILY TELEGRAPH, Nov. 3, 1995, at 20.

158. Statement by Justice Richard Goldstone, ICTR, at The Hague, Oct. 5, 1995.

159. *Kenyan Will Not Protect Rwandan Killers: Moi*, Agence France Presse, Oct. 10, 1995, available in LEXIS, News Library.

160. Tunbridge, *supra* note 157, at 20.

161. Barbara Crossette, *War Crimes Judge Says Rwanda Probes Being Hampered*, INT'L HERALD TRIB. (New York), Dec. 30, 1995, available in LEXIS, News Library.

162. Lindsey Hilsum, *Rwanda Justice Grinds to a Halt*, THE OBSERVER, Nov. 12, 1995, at 25.

163. *Id.*

Council. Sanctions might include a moratorium on international economic aid, something no African country can afford to lose.

The work of the ICTR had been slowed by a lack of facilities in Arusha and by U.N. budgetary constraints.¹⁶⁴ Finally, on December 12, 1995, the ICTR issued its first indictments against eight Hutu, charging them with genocide, crimes against humanity, and violations of the Geneva Conventions.¹⁶⁵ By the end of August 1996, the ICTR had indicted twenty suspects and was holding three of them in its Arusha jail.¹⁶⁶ Those in custody included the following:

(1) Georges Rutaganda, a vice president of the national committee of the Interahamwe ("those who work together"), which is the Hutu youth militia of the National Revolutionary Movement for Development and the political vehicle of former President Habyarimana's single party state.¹⁶⁷ Some observers regard members of the Interahamwe as the main perpetrators of the genocide.¹⁶⁸

(2) Jean-Paul Akayesu, the former mayor of Taba, in the Gitarama district of central Rwanda, where at least 2000 Tutsi were killed.¹⁶⁹

(3) Clement Kayishema, the former governor of Kibuye, who allegedly helped organize the slaughter of ninety percent of the Tutsi residing there.¹⁷⁰

All three had been arrested by national authorities in Zambia and then were transferred to the ICTR in May 1996.¹⁷¹ Their trials, the first for the ICTR, were scheduled to begin in September 1996, but were subsequently postponed.¹⁷²

Another indictee was Colonel Theoneste Bagosora, called the mastermind of the genocide.¹⁷³ He had assumed de facto control of military and political affairs in Rwanda after the death of former president

164. *Cash-Strapped UN Cuts Costs in Rwanda*, Reuters World Serv., Oct. 2, 1995, available in LEXIS, News File, REUWLD FILE.

165. Matt Bigg, *Tribunal on Rwanda's Genocide Names First Suspects*, Reuters N. Am. Wire, Jan. 10, 1996, available in LEXIS, New Library, REUNA File.

166. *Id.*

167. Peter Smerdon, *UN Tribunal Charges First Rwandan Genocide Accused*, Reuters, Ltd., May 30, 1996, available in LEXIS, News Library.

168. PRUNTER, *supra* note 1, at 76, 368.

169. Smerdon, *supra* note 167.

170. *Rwanda and Zaire: The Situation Grows More Complicated*, Africa News Serv., July 1996, available in LEXIS, News Library.

171. *Rwanda Human Rights: Tribunal Gears Up for First Trials*, Inter Press Serv., Aug. 6, 1996, available in LEXIS, News Library.

172. *Id.*; Francine Cunningham, *Wheels of Justice Turn Slowly in Genocide Cases*, SCOTSMAN, Nov. 21, 1996, available in LEXIS, News Library.

173. *Rwandan Colonel Indicted on Suspicion of Masterminding Genocide*, Agence France Presse, Aug. 15, 1996, available in LEXIS, News Library [hereinafter *Rwandan Colonel*].

Habyarimana.¹⁷⁴ Bagosora had been arrested in Cameroon under an international arrest warrant issued by Belgium in connection with the murder of ten Belgian U.N. peacekeepers in April 1994.¹⁷⁵ In July 1996, however, Belgium dropped its request for extradition in deference to the ICTR and Article 8(2), which addresses concurrent jurisdiction and ICTR primacy.¹⁷⁶ Three other ICTR indictees held by Cameroon authorities were Andre Ntagerura (the former transport minister), Ferdinand Nahimana (a founder of Radio Television Milles Collines, which had been used to incite the genocide), and Colonel Anatole Nsengiyumva (former military intelligence chief and alleged death squad member).¹⁷⁷ The Cameroon authorities agreed to transfer all four to the ICTR in Arusha, where they will stand trial.¹⁷⁸

As of August 1996, three indictees were being detained by national authorities in Switzerland, Belgium, and Burkina Faso.¹⁷⁹ Eight others, not in custody, were believed to be living in Zaire.¹⁸⁰ In each case, the ICTR had asked national authorities to transfer the indictees to Arusha, and prospects for their doing so appeared good.

XI. CONCLUSION

The ICTR and its predecessor for the former Yugoslavia represent the first attempts by the international community to create an international judicial organ to enforce the Geneva Conventions, the Genocide Convention, and laws proscribing crimes against humanity. The ICTR is unique in that it is the first international court to apply crimes against humanity to a non-international conflict and to enforce Article 3 Common and Protocol II of the Geneva Conventions. The extension of its territorial jurisdiction to states not party to the Rwandan conflict represents another new development in international law.

The exact impact that the ICTR will have on the application of international humanitarian law and the legal prerogatives of the U.N. Security Council acting under Chapter VII of the U.N. Charter will be determined by actual political and judicial experience, by the reactions of states, and by the

174. *Rwandan Colonel*, *supra* note 173.

175. *Id.*

176. *Belgium Defers to Rwanda Tribunal in Bagosora Case*, Reuters World Serv., July 9, 1996, available in LEXIS, News Library.

177. *Rwandan Colonel*, *supra* note 173.

178. *Id.*

179. *UN Tribunal Indicts Two More Suspects*, Reuters, July 16, 1996, available in LEXIS, News Library; *Burkina Prosecutor Calls for Extradition of Rwanda Suspect*, Agence France Presse, Aug. 29, 1996, available in LEXIS, News Library.

180. *United States and Africa: Shattuck Outlines US Support for Rwandan Tribunal*, Africa News Serv., June 1996, available in LEXIS, News Library.

ability of the ICTR to gain custody over and prosecute a significant number of major criminals. Both Tribunals will influence the way many states view the causes of grave humanitarian crimes and possible strategies for achieving peace and national reconciliation.

The mass murders in Rwanda and the former Yugoslavia did not arise spontaneously. They were instigated by persons in positions of power who sought to gain personal advantages through violent and hideous means. Unless these persons are held accountable for their crimes against humanity, the reconciliation necessary for the reconstruction of these torn societies may not be possible. By assigning guilt to the leader-instigators, the tribunals also may lift the burden of collective guilt that settles on societies whose leaders have directed or ordered such terrible violence. The assignment of guilt by neutral tribunals also may enable the international community to differentiate between victims and aggressors. It may help erase the belief that interethnic conflicts are genetically inbred and therefore insoluble.

The success of the Tribunals is essential if future crimes against humanity are to be prevented. If human rights can be massively violated with impunity in Rwanda and the former Yugoslavia, we can expect new Hitlers to crop up wherever political advantages can conceivably be gained by committing crimes against humanity. Even if the Tribunals do not accomplish their main prosecutorial objectives, their creation will still have a lasting effect on the application of humanitarian law to both international and domestic conflicts. They also will have accomplished, as Prosecutor Goldstone has stated, the significant task of putting international humanitarian law and human rights squarely on the international agenda.¹⁸¹

181. Christian Tyler, *Bloodhound in Pursuit of the Dogs of War: Christian Tyler Meets Richard Goldstone, Chief Prosecutor of the UN War Crimes Tribunal*, FIN. TIMES, Mar. 2, 1996, at xx.

