Responding to Rwanda: Accountability Mechanisms in the Aftermath of Genocide

Michael P. Scharf

After the Nazi Holocaust, the world community pledged “never again.” Yet the 50 years that have followed the Nuremberg trials have been a golden age of impunity, as over 170 million civilians have been killed by their own governments without any hope that their killers would ever be brought to justice.1 Due to Cold War politics, no steps toward international accountability were pursued when two million people were butchered in Cambodia’s killing fields, 30,000 disappeared in Argentina’s Dirty War, 200,000 were massacred in East Timor, 750,000 were exterminated in Uganda, 100,000 Kurds were gassed in Iraq or 75,000 peasants were slaughtered by death squads in El Salvador.2

There was a simple truth to the situation in Rwanda: until the masterminds of the genocide could be brought to trial and punished, killings would continue.

The world’s most recent genocide occurred in the small central African country of Rwanda, where from April to July 1994, members of the Hutu tribe murdered over 800,000 members of the Tutsi tribe.3 Comparing the scale of the international crimes committed in Rwanda to those committed in Nazi Germany, the exiled prime minister-designate of Rwanda asked, “Is it because we’re Africans that a court has not been set up?” In November


Journal of International Affairs, Spring 1999, 52, no. 2. © The Trustees of Columbia University in the City of New York.

This content downloaded from 203.10.59.73 on Wed, 22 May 2019 07:02:33 UTC
All use subject to https://about.jstor.org/terms
1994 the United Nations Security Council, which had been criticized for failing to take action to prevent or halt the slaughter, responded by creating the International Criminal Tribunal for Rwanda with jurisdiction over the genocidal acts committed in Rwanda between 1 January and 31 December 1994.4

This article addresses the question of whether the creation of an international tribunal was the best available choice for responding to the 1994 genocide in Rwanda. By using Rwanda as a case study, it analyzes the range of potential accountability mechanisms and examines the problems and challenges presented by international criminal trials.

**ASSESSING THE ACCOUNTABILITY OPTIONS IN RWANDA**

Historically, the international community has relied on five alternative ways of responding to violations of international humanitarian law: (1) doing nothing, (2) granting amnesty, (3) creating a truth commission, (4) assisting in domestic prosecutions and (5) creating an ad hoc international criminal tribunal to try the offenders.5

The most frequent response of the international community to genocide, crimes against humanity and war crimes has been to do nothing. Very few of the perpetrators of such crimes have ever been brought to justice, and the basic truth of what happened has seldom been exposed by governmental bodies or governmental organizations.6 Sometimes this has resulted from international indifference or paralysis. On other occasions, justice and truth were bartered away to achieve short-term peace. Rwanda was somewhat unusual in that the victims of the genocide—the Tutsis—emerged victorious from the civil war, but the country was so decimated that the new Tutsi government sought international assistance to achieve accountability for the genocide.7 Given the international community’s failure to head off or halt the Rwandan genocide, there was tremendous pressure for the U.N. Security Council to do something in response to the

---


atrocities in order to shore up its credibility.  

The granting of amnesty\(^9\) can be useful in settling civil conflicts or facilitating the exit of a dictator and a transition to democracy. These short-term benefits render the use of amnesty an attractive tool to the international community.\(^10\) In the past few years, the United Nations, in order to bring an end to abuses and restore peace, has embraced de jure or de facto amnesties for perpetrators of attacks on U.N. peacekeepers in Somalia,\(^11\) apartheid crimes in South Africa and torture and disappearances in Central America.\(^12\) The most recent example concerned the military leaders in Haiti, who in 1992 had murdered some 3,000 civilians perceived as enemies of the regime.\(^13\) In order to induce the Haitian military leaders to relinquish power to the democratically elected government, the U.N. Secretariat helped negotiate an

---

8 The U.N. secretary-general stated in a report to the Security Council that the United Nations had reacted with "extreme inadequacy" to the situation in Rwanda; while the president of the General Assembly said that he had reached the “horrible conclusion that the international community’s ability to respond to massive human tragedies had evaporated” in light of its inaction in Rwanda. See ibid., p. 48.


10 The first amnesty agreed to by the international community concerned the Turkish perpetrators responsible for the massacres of a million Armenians during the First World War. Initially, the Allied Powers sought the prosecution of those responsible for the massacres. The Treaty of Sevres, signed on 10 August 1920, would have required the Turkish Government to hand over those responsible to the Allied Powers for trial. The Treaty of Sevres was, however, not ratified and did not come into force. It was replaced by the Treaty of Lausanne, which not only did not contain provisions respecting the punishment of war crimes, but was accompanied by a "Declaration of Amnesty" of all offenses committed between 1914 and 1922. See Treaty of Peace between the Allied Powers and Turkey [Treaty of Sevres], 10 August 1920, in American Journal of International Law, 15 (1921) p. 179; and Treaty of Peace between the Allied Powers and Turkey [Treaty of Lausanne], 24 July 1923, in American Journal of International Law, 18 (1924) p. 1.


12 Roht-Arriaza, pp. 299-300.

amnesty for the military leaders, and the Security Council later endorsed the peace accord containing the amnesty provision as the “only valid framework for the solution of the crisis in Haiti.” In the short run, the amnesty achieved more for the restoration of human rights in Haiti than what would have resulted by insisting on punishment and risking political instability; President Jean Bertrand Aristide was permitted to return to Haiti and reinstate a civilian government, the military leaders left the country, much of the military surrendered their arms and most of the human rights abuses promptly ended—all with practically no bloodshed or resistance.

Yet amnesty would not have been a valid option for Rwanda. The provision of amnesty to the Hutus responsible for the 1994 genocide would have been in violation of the Genocide Convention, which provides an absolute obligation for states parties to prosecute persons responsible for genocide as defined in the convention. Indeed, this was one of the reasons the U.S. government and the other members of the Security Council were initially reluctant to use the “genocide” label for the atrocities in Rwanda. In addition to this legal obstacle, there are several reasons why an amnesty would not have made sense under the circumstances. Failure to prosecute genocidal crimes in Rwanda, which has suffered from repeated cycles of ethnic violence and abuse for 30 years, would have served as a virtual license to repeat

17 Article 4 of the Genocide Convention states: “Persons committing genocide or any of the acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.” Article 5 requires states to “provide effective penalties” for persons guilty of genocide. (Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 [New York: United Nations, 9 December 1948] arts. 3-5).
18 The term “genocide” was specifically struck from the text of Security Council resolutions adopted during the first two months of the Rwanda crisis. It was not until the special rapporteur for Rwanda issued a detailed report on 25 May 1994, documenting the extent of the Rwandan killings, that the Security Council finally acknowledged, in the Preamble to Resolution 925 adopted in June 1994, that “acts of genocide have occurred in Rwanda.” (Morris and Scharf, 1 (1998), pp. 62-63).
the crimes.\textsuperscript{19} As it was, Tutsis who had suffered at the hands of the Hutu extremists had already begun seeking personal revenge since no prompt effort seemed to be imminent to bring those responsible for their suffering to justice.

Finally, given the scale of the atrocities in Rwanda, if the international community had encouraged or merely condoned an amnesty for the perpetrators, it would have sent a signal to other rogue regimes throughout the world that they have nothing to lose by engaging in such acts. For instance, history records that the international amnesty given to the Turkish officials responsible for the massacre of more than 1 million Armenians during the First World War encouraged Adolph Hitler some 20 years later to conclude that Germany could pursue his genocidal policies with impunity. In a speech to his commanding generals, Hitler dismissed concerns about accountability for acts of aggression and genocide by stating, “Who after all is today speaking about the destruction of the Armenians?”\textsuperscript{20} Similarly, the failure of the international community to prosecute Pol Pot, Idi Amin, Saddam Hussein and Mohammed Aideed, among others, likely encouraged the Hutu extremists to launch their genocidal campaign against the Tutsis in Rwanda with the expectation that they would not be held accountable for their international crimes.

A third alternative was to set up a truth commission, as was done in South Africa in 1996\textsuperscript{21} and El Salvador in 1992.\textsuperscript{22} Truth commissions can establish a historic record of international crimes,


\textsuperscript{21} See Promotion of National Unity and Reconciliation Act, No. 34, 1995, (South Africa).

thereby "preventing history from being lost or re-written, and allowing a society to learn from its past in order to prevent a repetition of such violence in the future." Moreover, by acknowledging the suffering of victims and their families, helping to resolve uncertain cases and allowing victims to tell their story, a truth commission can serve as a sort of "historical group therapy session" for an entire country, facilitating national reconciliation and individual rehabilitation and imparting to the citizenry a sense of dignity and empowerment that can help them move beyond the pain of the past. In addition, truth commissions can promote justice by imposing moral condemnation and laying the groundwork for other sanctions and victim compensation. Finally, truth commissions can contribute to the future by offering specific recommendations for reform. Past truth commission reports have included recommendations covering military and police reform, the strengthening of democratic institutions, measures to promote national reconciliation and reform of the judicial system.

Although truth commissions can play an important role, they are a poor substitute for prosecutions. Unlike courts of law, they do not have prosecutory powers such as the power to subpoena witnesses or punish perjury. They are inherently vulnerable to politically imposed limitations and manipulation; their structure,

---


24 Studies of torture victims suggest that production of a written document systematizing and summarizing their experiences is therapeutic because it helps the victims integrate the traumatic experience into their lives by placing their individual histories in a more meaningful context of political and social events. In addition, psychologists have found that the process of testifying about traumatic events before an investigative body helps channel victims’ anger into socially constructive action and provides a form of catharsis. See Roht-Arriaza, p. 19.


626
mandate, resources, access to information, willingness or ability to take on sensitive cases—even the wording of the final report—are all largely determined by political forces at play when they are created. When truth commissions name perpetrators, they impose the moral punishment of public condemnation, sometimes combined with the sanction of lustration—the disqualification from public office. Yet because of their institutional limitations, truth commissions do not first provide those named as perpetrators with the panoply of rights available to a criminal defendant.  

The fourth option was for the international community to have assisted the government of Rwanda in launching domestic prosecutions as the exclusive means of bringing the perpetrators of the genocide to justice. The most authoritative rendering of the truth is possible only through the crucible of a trial that accords full due process. Such trials can generate a comprehensive record of the nature and extent of violations, how they were planned and executed, the fate of individual victims, who gave the orders and who carried them out. Supreme Court Justice Robert Jackson, the U.S. Chief Prosecutor at Nuremberg, underscored the logic of this proposition when he reported that one of the most important legacies of the Nuremberg trials following the Second World War was that they documented the Nazi atrocities "with such authenticity and in such detail that there can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders can arise among informed people." By way of contrast, critics of the South African Truth Commission have asked "what will be the quality of the truth that is established? Will one be forced to make negative comparisons between the commission's truth and judicial truth or historical truth?"

Ethiopia, where the international community recently provided funding, attorneys and judges to facilitate the prosecution of some 3,000 officials of the fallen Mengistu regime, serves as a model for this approach. Like Ethiopia, the new Rwanda coalition

---

27 For a criticism of truth commissions, see Hayner in Kritz, 1, pp. 225-262.
government had expressed its willingness to institute domestic prosecutions against those responsible for the genocide. In contrast, domestic prosecutions would not have been feasible for the former Yugoslavia, where Serb leaders could not seriously be expected to prosecute diligently someone like Dusko Tadić for allegedly murdering and torturing prisoners at the Omarska prison camp in the Serb-controlled area of Bosnia.

The Rwandan domestic trials that have been held to date indicate why the creation of an international tribunal, the fifth option available to the international community, may be viewed as a necessary adjunct to assisting in-country prosecutions. The first domestic genocide trials held during the early part of 1997 have been severely criticized by international trial observers. According to Amnesty International, these trials lasted an average of only four hours, the defendants were not represented by legal counsel, nor were they able to call witnesses on their behalf or cross-examine prosecution witnesses, and the atmosphere in the courtroom was openly hostile to the defendants, with spectators frequently booing the defendants and applauding the prosecutors. At the time of this writing, the domestic courts of Rwanda have found more than 100 defendants guilty of genocide and sentenced them to death; twenty-two were publicly executed on 24 April 1998.

The fear of unfair domestic trials conducted by the Tutsi-dominated government prompted several of the countries to which the Hutu leaders had fled to refuse their extradition to the government of Rwanda. The members of the Security Council believed, with good reason, that the creation of an international tribunal would make it more likely that the responsible Hutu leaders would be apprehended and surrendered by host countries. In addition, prosecutions before an international tribunal would be less likely to be perceived by the Hutus as revenge and would

---

therefore facilitate political reconciliation and the return of thousands of refugees.36

This, then, is why the establishment of an international tribunal was viewed by the Security Council as the best response to the genocide in Rwanda. When the world community fails to prevent genocide from occurring, it should at least seek to prosecute the alleged perpetrators in an institution that is—and is perceived to be—fair.37 In this way, the Rwanda tribunal "serves as the conscience of the international community. It is the manifestation of the moral outrage of humanity over the transgressions of civilizational norms and ethics."38 After the scale of atrocities in Rwanda became known, the Security Council, recently freed of its Cold War paralysis,39 was ready to respond; and the existence of the Yugoslavia tribunal that had been created in 1993 provided a handy blueprint for action.

PROBLEMS AND PROSPECTS FOR SUCCESS

The stakes are high for the success of the Rwanda tribunal, both for Rwanda and the neighboring countries of central Africa. Since 1994, more than half of Rwanda’s population has been displaced by massacres or exile. There are 400,000 orphaned Rwandan children and 500,000 widowed women, many of whom were the victims of rape and sexual abuse during the genocide.40 The new Tutsi-led government is confronted with the daunting task of gaining the confidence of the Tutsi victims while at the same time enticing Hutu refugees to return in peace. With more than a million Hutu refugees—including thousands of members of the genocidal Interahamwe militia—streaming back into Rwanda, ethnic tension remains high and insecurity continues to prevail.

37 The Nuremberg and Tokyo tribunals have been criticized for the application of ex post facto law and procedural shortcomings. Accordingly, the International Tribunal has recognized that it must do better than its predecessors; to achieve success—and to continue to receive international support—it must be seen as scrupulously fair. Its detailed rules of procedure were designed to meet that goal. See Michael P. Scharf, “Have We Really Learned the Lessons of Nuremberg?” Military Law Review, 149 (Summer 1995) p. 65; Annual 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, U.N. Doc. A/49/342 (New York: United Nations, 29 August 1994) p. 24.  
The power struggle between the Hutu and Tutsi that ignited the 1994 genocide in Rwanda is spreading to other countries in the region, most notably the Democratic Republic of the Congo (formerly Zaire [hereinafter the DRC]), Burundi, Uganda and Tanzania. In this context, international judicial proceedings before the Rwanda tribunal offer hope of breaking the cycle of ethnic violence and retribution that has engulfed the region. As the president of the Rwanda tribunal told the General Assembly in December 1996:

Political and social stabilization in Rwanda depends on whether all citizens, regardless of their ethnic origin, can be reconciled. Such national reconciliation would imply the due administration of justice, first of all to ensure that the guilty parties no longer feel they can act with impunity, which would act as a deterrent. Secondly, it would enable victims and their families to feel that justice was being done and that the real perpetrators were being punished, which would dampen any feelings of revenge. If justice is not done, there may be no end to hatred, and atrocities could go on and on...

If it achieves its aims, the Rwanda tribunal will do far more to secure lasting peace in the region than would the placement of thousands of U.N. peacekeepers or foreign troops.

Yet the limited temporal and territorial jurisdiction of the tribunal may impede that goal by giving the impression that the warring ethnic groups can commit new crimes with impunity throughout the region. When voting on Resolution 955, which established the Rwanda tribunal, members of the Security Council suggested that if genocidal acts were repeated in Rwanda after the end of 1994, the Security Council would extend the tribunal's jurisdiction.

---

44 The tribunal’s jurisdiction is limited to crimes committed in Rwanda and by Rwandan citizens in neighboring states between 1 January 1994 and 31 December 1994. Rwanda Tribunal Statute, art. 1, in Morris and Scharf, 2 (1998).
The Commission of Experts for Burundi, established by the Security Council in 1995, subsequently recommended "that international jurisdiction should be asserted" with respect to the acts of genocide against the Tutsi minority committed in Burundi in October 1993. In light of the explosive situation in the Great Lakes region of central Africa, a strong case can be made for amending the tribunal's statute to expand its temporal and territorial jurisdiction to cover serious violations of international humanitarian law throughout Burundi, Rwanda, Uganda, the DRC and Tanzania beginning in October 1993 and extending to a date to be decided by the Security Council.

Unlike the situation in the former Yugoslavia, the leading Rwandan perpetrators of genocide were defeated militarily, removed from positions of leadership and forced to flee to refugee camps in neighboring African countries or take refuge in Europe. Consequently, the prospect of apprehending and trying the major perpetrators is arguably more feasible. As of the date of this writing, 31 of the 43 persons indicted by the Rwanda tribunal had been surrendered to it. Among the first to be transferred to the tribunal's custody for trial were Jean Kambanda, the prime minister of the genocidal Hutu government; Theoneste Bagosora, the alleged coordinator of the genocide; Andre Ntagerura, the Minister of Transport and Communications, who implemented Bagosora's genocidal policies; Ferdinand Nahimana, manager of an extremist radio station that encouraged Hutus to kill Tutsis; Georges Anderson Nderubumwe, leader of the Interahamwe militia, which was responsible for the majority of killings; and Clement Kayishema, former governor of Kibuye province, who allegedly encouraged more than ten thousand Tutsis to seek shelter in a stadium and church by promising protection before firing the shot that launched their mass murder. These are not minor players like Dusko Tadic, the first person tried before the Yugoslavia tribunal; these are some of the masterminds of the Rwanda tribunal.

---

genocide. Thus, the Rwanda tribunal's chief prosecutor, Judge Louise Arbour of Canada, said the transfer of these men to the tribunal "marked a capital turning point" in the effort to prosecute the principal perpetrators of the 1994 genocide.50

The continuing success of the Rwanda tribunal will depend on the cooperation of states on three levels. The first is the provision of voluntary contributions of funds, personnel and material assistance, which so far has played a critical role in the operation of the tribunal. The second is cooperation in the collection of evidence and the arrest and detention of persons indicted. The third level is the modification of national legislation to allow for this kind of cooperation. In his address to the General Assembly in December 1996, the president of the tribunal, Judge Laity Kama of Senegal, noted with regret that no African state had yet enacted legislation to enable their national courts to cooperate with the Rwanda tribunal.51 Notwithstanding the absence of such legislation, the governments of Zambia, Cameroon, Kenya and the Ivory Coast have surrendered indicted persons to the Rwanda tribunal. The DRC, on the other hand, has failed to take any steps to arrest and surrender several indicted persons present in its territory;52 but this situation may change depending on the outcome of its ongoing civil war. The U.N. Special Rapporteur for Rwanda has noted that the circle of states cooperating with the Rwanda tribunal is widening.53

The favorable prospect of arrests and prosecutions before the Rwanda tribunal does not mean that a large number of those who participated in the 1994 genocide will face international justice. At present, there are over one hundred thousand suspects in Rwandan prisons.54 With the very limited resources of the Rwanda tribunal, only a tiny fraction of these can be prosecuted


632
Michael P. Scharf

before the trial chambers in Arusha. “Nevertheless, the symbolic
effect of prosecuting even a limited number of the perpetrators,
especially the leaders who planned and instigated the genocide,
would have considerable impact on national reconciliation, as well
as on deterrence of such crimes in the future.”55 Moreover, the
precedent that emerges from the Rwanda tribunal’s judgments
will be useful in national trials both in Rwanda and other countries
in which the perpetrators of the genocide may be located.

EVALUATING THE TRIBUNAL’S WORK

The Rwanda tribunal’s road toward success has not been
without bumps, potholes and an occasional detour. These were
highlighted in a February 1997 report prepared by Karl Pashke,
the U.N. Inspector General and head of the Office of Internal
Oversight Services, which was requested by the General Assembly
to perform an audit and investigation of the Rwanda tribunal.56
The Inspector General’s report was withering in its conclusions:

The review disclosed that not a single administrative
area of the Registry (Finance, Procurement,
Personnel, Security, General Services) functioned
effectively: Finance had no accounting system and
could not produce allotment reports, so that
neither the Registry nor United Nations
Headquarters had budget expenditure information;
lines of authority were not clearly defined; internal
controls were weak in all sections; personnel in key
positions did not have the required qualifications;
there was no property management system;
procurement actions deviated from United Nations
procedures; United Nations rules and regulations
were widely disregarded; the Kigali office did not
get the administrative support needed; and
construction work for the second courtroom had
not even started.57

55 Arkhavan, pp. 501, 509.
Nations, 11 December 1995). The inspection was conducted at Arusha and Kigali
from the end of September to November 1996. Report of the Secretary-General on the
Activities of the Office of Internal Oversight Services, paras. 1-2, in Morris and Scharf,
The report also exposed bureaucratic infighting, detailing that "[t]he Deputy Prosecutor reports that his relationship [with the Registrar] has been 'strained and testy' and that 'the Registrar has never failed to remind us of his pre-eminence rather than his readiness to carry out the mission which has brought all of us together.'" Moreover, the report said the tribunal had been handicapped by weak support from the U.N. headquarters in New York and lack of supervision from the prosecutor at The Hague.

In addition, the tribunal's leadership found itself soundly criticized in the report. One charge was that, regardless of the prosecutor's directive that the prosecution strategy should focus on "national figures," the deputy prosecutor continued to pursue a geographical strategy that sent investigative teams into the field and permitted them to set their own plans and strategies. Richard Goldstone, who had traveled to Kigali 11 times in his 18 months as prosecutor, was blamed for failing to take affirmative steps to ensure that the limited resources of the office in Kigali were redirected to pursue key figures in the genocide. "The absence of a revitalized prosecution strategy and leadership," the report continued:

...will not allow the Office of the Prosecutor to achieve its objectives. This is the single most significant failing. Unless that is corrected, the Tribunal will have been created to little effect; the Rwandans will be right to suspect that justice delayed is justice denied; and the United Nations will have failed in its promise to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them.

The uproar from these findings resulted in the replacement of the Rwanda tribunal's deputy prosecutor, registrar, and the heads of the tribunal's administration, personnel and finance sections, as well as a host of administrative reforms. Yet despite these

---

58 ibid., para. 42.
59 The report concludes that "once a few key administrators were selected, the Secretariat failed to take responsibility for providing essential support for the Tribunal until it could become functional." (ibid., paras. 55-59, 73).
60 ibid., para. 59.
setbacks, the tribunal seems to have overcome its early problems, and has successfully completed its first trial, while several others are nearing conclusion.62 Perhaps the greatest failing of the Rwanda tribunal has been the amount of time it has taken to bring those responsible for the 1994 genocide to justice. Echoing the sentiments of many of the survivors of the genocide, a 24-year old Rwandan woman told a news reporter in December 1996: “Every day, they say, ‘Justice will be here, justice will be here.’ But it’s been such a long time, and nothing has happened.”63 Swift justice may well have prevented the spread of the Hutu-Tutsi conflict to neighboring countries and stemmed the recent outbreaks of violence between Hutu and Tutsi in Rwanda.

In August 1994 U.S. Assistant Secretary of State for Human Rights John Shattuck said, “The wheels must turn quickly. Successful prosecution [before an international tribunal] will remove instigators of genocide from the scene, deter vigilante justice and acts of revenge, and help give Rwandans—and their neighbors in Burundi—the confidence to restore wounded societies.”64 Yet it was not until November 1994 that the Security Council decided to establish the Rwanda tribunal and not until January 1997 that the first indicted Hutus came to trial before the international tribunal. For the victims of the Rwanda genocide, for the witnesses who have been killed by returning Interahamwe militia members and for the returning Hutu refugees who have died in overcrowded and unsanitary prisons or have been killed by Tutsi authorities,65 justice delayed has amounted to justice denied. There was a simple truth to the situation in Rwanda: until the masterminds of the genocide could be brought to trial and punished, killings would continue.

---

62 On 2 September 1998 the Rwanda tribunal found Jean Paul Akayesu, the bourgmestre of Taba Commune, guilty of genocide and sentenced him to life in prison. Jean Kambara, the prime minister of the genocidal Hutu government, who pleaded guilty to genocide in May 1998, was also sentenced to life in prison two days later. Elizabeth Neuffer, "Amid Tribal Struggles, Crimes Go Unpunished," Boston Globe, 8 December 1996, p. A34.
64 A second genocide of sorts is occurring in Rwanda as over 100,000 Hutus have been suffering in severely overcrowded Rwandan prisons, described by one journalist as “medieval pit[s] of hopelessness,” where an average of seven prisoners die each day from the unsanitary conditions. To date, only about a third of the incarcerated Hutus have been charged with a crime, and only a handful have been brought to trial. Tony Freemantle, “Crying for Justice,” Houston Chronicle, 17 November 1996, p. 1.
The creation of the Rwanda tribunal showed that the machinery designed for the recently established Yugoslavia tribunal could be employed for other specific circumstances and offenses, thereby avoiding the need to reinvent the wheel in response to each global humanitarian crisis. It also confirmed the authority of the Security Council to respond to violations of humanitarian law even in a purely internal conflict. Building upon the experience of the Yugoslavia tribunal, the two years after the adoption of Security Council Resolution 955 saw the establishment of the Rwanda tribunal; the election of its six judges; the appointment of a deputy prosecutor, registrar and staff; and the negotiation of a Headquarters Agreement. In addition, within two years the Office of the Prosecutor was set up in Kigali; the offices of the Trial Chambers and Registry were established in Arusha, Tanzania; a courtroom and detention unit were constructed; Rules of Procedure, Rules of Detention and a Directive for the Assignment of Defense Counsel were promulgated; indictments and arrest warrants were issued for 21 persons; and the first trials commenced.

Nevertheless, in the context of Rwanda, two years was still far too slow. While some of the delays were perhaps avoidable, the major problem was that an entire international institution had to be built from the ground up. Officials had to be appointed; staff had to be recruited and trained; funds had to be appropriated; offices, courtrooms and detention facilities had to be erected; international agreements had to be negotiated; and legal documents had to be promulgated before investigations, indictments and trials could commence. That such a complex institution could be operational in such a relatively short time was due only to the fact that a blueprint existed in the form of the Yugoslavia tribunal.

PRELUDE TO A PERMANENT INTERNATIONAL CRIMINAL COURT

The problems faced by the tribunal, especially regarding the amount of time it took to organize and streamline operations, could have been avoided altogether if there had existed a permanent international criminal court. Such an institution could have immediately launched investigations when the Hutu were defeated in July of 1994, and begun prosecutions within months, not years. When voting on Resolution 955, many of the members of the Security Council said that the establishment of the ad hoc tribunal only underlined the continuing need for a permanent international criminal court.68

In addition to the matter of timing, the Rwanda crisis demonstrated the need for a permanent international criminal court in other ways. Since the establishment of the Rwanda tribunal, the members of the Security Council have experienced what has come to be called “tribunal fatigue.”69 The process of reaching a consensus on the tribunal’s statute, electing judges, selecting a prosecutor and appropriating funds has turned out to be extremely time-consuming and politically exhausting for the members of the Security Council.70 At least one permanent member of the Security Council—China—has openly expressed concern about using the Yugoslavia and Rwanda tribunals as precedent for the creation of other ad hoc criminal tribunals,71 despite the existence of a host of other atrocities being committed around the world, each of which cry out for an international judicial response.72 Moreover, the expense of establishing ad hoc tribunals, each with its own staff and facilities, is seen as excessive for an organization whose budget is already stretched too thin.73

---

68 Statement of the Russian Federation in ibid., p. 298; Statement of France, in ibid., p. 4; and Statement of Spain in ibid., p. 13.
69 See David J. Scheffer, “International Judicial Intervention,” Foreign Policy, 102 (22 March 1996) p. 34.
70 ibid.
72 For a discussion of seven such situations, see Morris and Scharf, 1 (1995), pp. 344-351.
73 Scheffer, p. 34.
Thus, the creation of the Rwanda tribunal has fueled the momentum toward the creation of a permanent international criminal court. A huge step in that direction was taken on 17 July 1998, when 120 countries voted in favor of the Statute for a Permanent International Criminal Court, which had been negotiated at a diplomatic conference in Rome. Unfortunately, having failed to achieve what would amount to an iron-clad veto of jurisdiction over U.S. personnel and officials, the United States felt compelled to join China, Libya, Iraq, Israel, Qatar and Yemen as the only countries voting to oppose the Rome Treaty—thus leaving the fate of the International Criminal Court in question.

Both the successes and failures of the Rwanda tribunal will be useful to the international community as it moves toward the establishment of such an institution, so that mistakes and shortcomings can be prevented in the future.74 “Perhaps the real yardstick for assessing the success of the Yugoslavia and Rwanda tribunals,” says the tribunals’ former Chief Prosecutor Richard Goldstone, “is whether it leads to the establishment of a permanent international criminal court.”75

---

75 Interview with Justice Richard Goldstone (Brussels, 20 July 1996).