

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

Frederik Harhoff, LL.M. and Dr. jur. (Copenhagen University), is Senior Legal Officer at the International Criminal Tribunal for Rwanda (ICTR). The views expressed in this article are personal.

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 resumés 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.
