

The International Criminal Tribunal for Rwanda

by **Cécile Aptel**

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

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

Creation and organization of the Tribunal

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Investigations and prosecutions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Judicial activities

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

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

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

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

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

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

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

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

Conclusion

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

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

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

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

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