

The International Criminal Tribunal for Rwanda

Its role in the African context

by **Djiena Wembou**

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

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

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Original: French.

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

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

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

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

Political and legal considerations

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

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

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

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

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

Africa's preference for the conventional method

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

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

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

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

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

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

Debate on the role of the Security Council

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

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

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

The Council's competence based on Chapter VII

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

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

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

⁷ R. Degni-Ségui, *op. cit.*, p. 15.

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

Support for the Tribunal by the OAU and African States

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

Safeguards offered by the Tribunal

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

a) The Tribunal's independence

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

b) The Tribunal's competence

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

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

⁹ Mutoy Mubiala, *op. cit.*, p. 948.

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

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

OAU support for the Tribunal

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

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

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

Role of the Tribunal in the African context

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

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

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

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

Contribution to the dissemination and enforcement of humanitarian law

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

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

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

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

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

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

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

Potential role of the Tribunal in the struggle against impunity

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

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

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

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

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

Potential role in the development of humanitarian law

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

Conclusion

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

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

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

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