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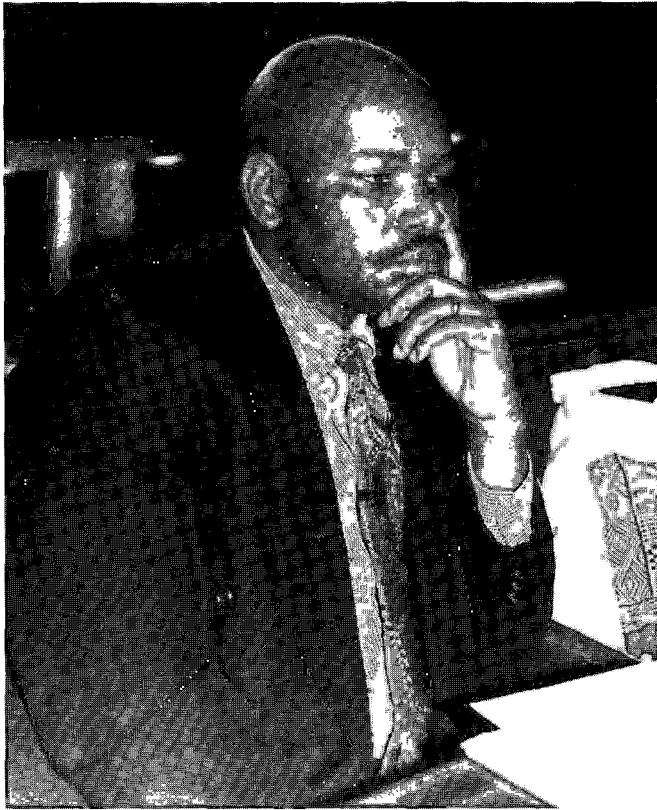


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The Rwanda Tribunal: A Critical Assessment

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Introduction

The International Criminal Tribunal for Rwanda follows the script of Nuremberg.¹ This essay argues that, as constituted, the Rwanda Tribunal was intended to achieve neither the abolitionist impulses nor the just ends trumpeted by the United Nations. The essay contends that the Tribunal is disarticulated from the political, reconstructionist, and "peace" and "normalization" processes underway in Rwanda. In the event, the Rwanda Tribunal largely legitimizes the Tutsi regime and allows the Tutsi a moral plane from which to exact their revenge on the Hutu.

I conclude that the Rwanda Tribunal would only make sense in the context of an overall solution, a comprehensive and bold

settlement addressing the foundational problems that unleashed the genocide in the first place. As it is, the Tribunal now orbits in space, suspended from political reality and removed from both the individual and national psyches of the victims as well as the victors in the Rwanda conflict.

Shame in the Creation of the Rwanda Tribunal

It is difficult not to see the creation of the Rwanda Tribunal as a cynical exercise by major powers. The events that led to its establishment were not dissimilar to those that caused the creation of the Yugoslav Tribunal. Rwanda went up in flames in April 1994 after President Juvenal Habyarimana, a Hutu, was killed in a mysterious plane crash while returning from neighboring Tanzania where he was negotiating a settlement to his country's civil war. In 1994, the Tutsi-dominated Rwanda Patriotic Front (RPF), which had been at war with the government since 1990, demanding the return of Tutsi exiles and the introduction of democracy, took power after a genocidal conflagration in which about 500,000 Tutsi and moderate Hutu were reportedly killed by Hutu government forces and militia.²

The world seemed asleep, uncaring, as ominous clouds gathered over Rwanda, igniting a murderous inferno as they touched the ground. Rwanda was punished for the failures of the international community in the Somali debacle, and the resultant big power "fatigue" from that crisis.³ Partly due to that experience and American marginalization of Africa, the United States refrained from intervening or pushing for effective international action to stop the genocide in Rwanda.⁴ American racist stereotypes of "African conflicts" became the pretext for passivity as a top American official forbade the use of the term genocide to describe the Rwandan holocaust.⁵ Thus the United States entered the region after the RFP had emerged victorious,

1 The Security Council of the United Nations established on November 8, 1994, the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring states, between 1 January 1994 and 31 December 1994. See United Nations Security Council, "Report of the Secretary General Pursuant to Paragraph 5 of Security Council Resolution 955", 1994, UN Doc. S/1995/134.

2 Human Rights Watch/Africa, "Genocide in Rwanda: April-May 1994", May 1994, at p. 2; Human Rights Watch, "World Report 1995", 1994, at p. 39-48 [hereinafter "World Report"].

3 For the failures of United States and UN efforts in Somalia see Hussein H. Adam, "Somalia: A Terrible Beauty Being Born", in William I. Zartman, ed. "Collapsed States: the Disintegration and Restoration of Legitimate Authority", 1995, at p. 69-89; and Michael Begg, "UN Withdrawal From Somalia", Irish Times, March 15, 1995, at p. 15.

4 Joyce Price, "Why Rwanda Was Ignored", Washington Times, July 31, 1994, at p. A4.

5 As powerfully put by Human Rights Watch: "Certain White House officials counseled that military intervention would be useless because they believed that the war resulted from deeply rooted 'tribal hatreds' which, 'because they had always existed,' would continue forever. A few weeks after the massacres had begun, when it had long been evident that genocide was taking place, a senior member of the Clinton administration ordered officials not to speak of 'genocide' because the term could increase the moral pressure on the President and force him to act". See "World Report 1995", supra note 2, at p. 46.

but only with the express mandate of airlifting supplies to refugee camps in Zaire where at least one million Hutu had fled.⁶

United Nations inactivity and acquiescence to genocide were equally damning. There were credible reports that the United Nations peace-keeping force in Rwanda (UNAMIR), which had been present to facilitate the peace negotiations between the Hutu government and the RPF, apparently knew that a genocide might take place but the UN took no preventive action.⁷ The April 1994 withdrawal by Belgium of its 400 UNAMIR contingent and the failure of the remaining UNAMIR forces to intervene allowed Hutu leaders to unleash genocidal massacres against the Tutsi and moderate Hutu.⁸ Later attempts by the UN to intervene were too little and too late. As put by Human Rights Watch, "Shamefully absent at the moment of the killings, the international community is now moving slowly [by establishing the Rwanda Tribunal] to bring those guilty to justice"⁹.

The RPF government, which should have welcomed the Rwanda Tribunal instead opposed it, in part because of the unwillingness of the international community to stop the genocide and the fear that such a tribunal would pre-empt its own authority to stage war crimes trials.¹⁰ Manzi Bakuramutsa, the RPF envoy to the Security Council, which cast the only dissenting vote on the creation of the Rwanda Tribunal,¹¹ objected to it on the following grounds: the Tribunal would not address crimes committed between October 1, 1990, when the war started, and July 17, 1994. The Tribunal would likely sit outside Rwanda; the Tribunal would not have the authority to impose the death penalty; judges from certain states which were involved in the war would be biased; and that those convicted would serve their sentences in countries offering prison facilities, instead of Rwandan jails.¹² The Rwandan

delegate concluded that a "tribunal as ineffective as this would only appease the conscience of the international community rather than respond to the expectations of the Rwandese people"¹³. Rwanda claimed that the absence of the death penalty against those guilty of genocide was the primary reason for its opposition to the Tribunal.¹⁴

The establishment of the "other" tribunal, the Rwanda Tribunal, was possible because the Yugoslav Tribunal had set a precedent for such action by the international community. The UN and the powerful states that control it could not reject a tribunal for Rwanda when they had set one up for the former Yugoslavia; formally, white European lives were put on the same footing with black African lives. The overlapping conflicts, which had been so brutal and barbaric, had taken place in front of the television camera, making it impossible to set up a process for prosecuting one group of perpetrators and not the other.

The Rwanda Tribunal was an afterthought, a fact underscored by its grafting to the Yugoslav Tribunal. The Rwanda Tribunal was in effect a sideshow to the Yugoslav Tribunal; the Prosecutor for both Tribunals was resident at The Hague as were the members of the Appeals Chamber. The international press and the United Nations were pre-occupied with the Yugoslav Tribunal and only seemed to give the most perfunctory attention to the Rwanda Tribunal. In the circumstances, it is not difficult to conclude that big power cynicism deflated the seriousness of the notion of international rule of law, an essential civilizational norm for a diverse world.

Assessing the Rwanda Tribunal

Some leading international scholars see the mere establishment of the Yugoslav and Rwanda Tribunals as a very significant event in the development of the enforcement of international criminal and humanitarian law. They see the importance of the Tribunals in the footprints that they make on the international law-making track and not in the substance of their performance in addressing the particular abuses with which they are charged. Theodor Meron, a leading exponent of the international criminalization of internal atrocities has written, with regard to the Yugoslav and Rwanda Tribunals, that:

*"No matter how many atrocities cases these international tribunals may eventually try, their very existence sends a powerful message. Their statutes, rules of procedure and evidence, and practice stimulate the development of the law. The possible fear by states that the activities of such tribunals might pre-empt national prosecutions could also have the beneficial effect of spurring prosecutions before national courts for serious violations of humanitarian law."*¹⁵

There is little doubt that the establishment of the tribunals affords the international community an opportunity to develop

¹³ Id.

¹⁴ Philippe Naughton, "Rwandan Minister Defends 'No' Vote on Tribunal", Reuters World Service, November 9, 1994, available in LEXIS, NEWS Library, ARCNWS File. Alphonse Nkubito, the Rwandan Minister of Justice emphasized that those guilty of genocide must suffer the death penalty since it was part of Rwandan law. He cited public pressure among the Rwandese for the death penalty as the primary reason for RPF's opposition to the Tribunal. Id.

¹⁵ Theodor Meron, "International Criminalization of Atrocities", 89 AJIL 554, 1995, at p. 555.

⁶ Craig Nelson, "Rwanda: US Keen to Prove its Concern over Refugees Plight", Independent (London), August 1, 1994, at p. 9.

⁷ "World Report 1995", supra note 2, at p. 41.

⁸ Human Rights Watch has painted the picture of a highly culpable UN and international community: "[F]ollowing the plane crash [carrying President Habyarimana], the beginning of the massacres, and the resumption of civil war, the UN and the US initially reacted with retreat, confusion, and lethargy. This apparent indifference, combined with the lack of any reaction by the international community to the massacres in Burundi in October and November 1993, made the Rwandan Hutu extremists think that they could kill with impunity". Id., at p. 45. See also Human Rights Watch/Africa, "Rwanda: A New Catastrophe", December 1994.

⁹ "World Report 1995", supra note 2, at p. 45.

¹⁰ Distrustful of the international community's ambivalence towards the killings of Tutsi, the RPF government sought to try suspected war criminals itself, and thus opposed the Rwanda Tribunal. As put by the Rwandese representative to the UN Security Council: "When the genocide began, the international community, which had troops in Rwanda and could have saved hundreds of thousands of human lives by, for example, establishing humanitarian safe zones, decided instead to withdraw its troops from Rwanda and to abandon the victims to their butchers." See U.N. SCOR, 49th Sess. 3453rd mtg., at 14, U.N. Doc. S/PV.3453 (1994).

¹¹ See Anthony Goodman, "UN Establishes Rwanda Genocide Tribunal", Reuters, November 8, 1994, available in LEXIS, News Library, ARCNWS File.

¹² Id. See also "Rwanda: Urgent", Agence France Presse, November 8, 1994, available in LEXIS, News Library, ARCNWS File. For a more comprehensive look at Rwanda's objections, see Payam Akhavan, "The International Criminal Tribunal for Rwanda: the Politics and Pragmatics of Punishment", 90 AJIL 501, 1996, at p. 504-508.

international law with respect to atrocities. While that effect is salutary, it does little to respond to the real and graphic abuses and suffering of the victims in Rwanda. Laws are less meaningful unless they can be applied or enforced without prejudice to redress transgressions or unless they have a deterrent effect such as behavior modification on the part of would be perpetrators. As Meron correctly notes, the haphazard creation of war crimes tribunals is selective and subject to the whims of states.¹⁶ "What is needed," he categorically states, "is a uniform and definite corpus of international humanitarian law that can be applied apolitically to internal atrocities everywhere, and that recognizes the role of all states in the vindication of such law."¹⁷

The enforcement of law relating to atrocities, however, is best accomplished by national courts although an international tribunal and a corpus of international humanitarian law would illuminate this uncertain terrain.¹⁸ The pitfall is that national courts may lack credibility with the group of perpetrators being prosecuted, particularly if the group is ethnic, racial or religious, and sees itself as being persecuted by the victors. It may very well be the case that such courts should be joint national and international efforts, to alleviate the credibility problem.

The Rwanda Tribunal held its first hearing in January 1997 amidst charges of corruption and mismanagement at the Tribunal.¹⁹ An investigation of the Rwanda Tribunal conducted by the United Nations was highly critical of the entire effort, from the Tribunal itself to the United Nations offices in New York.²⁰ The investigation was requested by concerned member states, UN staff, and the UN Office of Internal Oversight Services.²¹ The report found that the Tribunal's Registry had no accounting system; incomplete and unreliable financial records; unqualified staff; disregard of UN regulations; shortage of cells and courtrooms; lack of lawyers and investigators; lack of logistical, transport and office equipment; and neglect of the Tribunal by the UN headquarters in New York.²² In addition, the Office of the Prosecutor in Kigali was riddled with operational difficulties and feuded openly with the Registry in Arusha.²³ These problems, together with lack of funding, the geographical separation of the Registry from the

Prosecutor's Office and poor infrastructure, hindered the effective establishment of the Tribunal and its work.²⁴ The investigative report, which concluded that the Rwanda Tribunal was dysfunctional in virtually all areas, recommended, inter alia, that the UN provide the Tribunal with more administrative and financial support, and that more guidance and cooperation with the Yugoslav Tribunal be forged to improve its performance.²⁵ Kofi Annan, the UN Secretary General, fired the Registrar and the deputy prosecutor in February 1997 and replaced them with other UN officials.²⁶

In the last several years, since the release of the highly critical investigative report, the Rwanda Tribunal has made some impressive legal strides. It has become steadily productive and more focused. In the last four years, it has handed down a number of significant genocide convictions. Some, like *Prosecutor v. Akayesu*²⁷, have been held as important opinions. In March 2001, the UN appointed Adama Dieng, formerly the secretary general of the International Commission of Jurists, Registrar.²⁸ Dieng brings to the Tribunal unparalleled experience and knowledge of human rights, as well as managerial expertise. He has proposed a plan to restructure the Rwanda Tribunal to make it more efficient and effective.

The leadership of the Rwanda Tribunal is another point of pride. The Tribunal is now under the presidency of Judge Navanethem Pillay, a highly respected South African jurist. Educated at Harvard Law School – and reared as an anti-apartheid lawyer in South Africa – Judge Pillay brings to the Tribunal a well-developed understanding of the complex interplay among law, politics and ethnicity or race. Her impeccable record and professional diligence, as well as her commitment to human rights in Africa, is a bright spot for the Rwanda Tribunal.

I expect that Dieng's tenure as Registrar will raise the visibility of the Tribunal as well as its output. But the questions that I raise in this essay are not likely to be changed by the more effective administration of the Tribunal. They are structural and conceptual, and have to do with the purpose and nature of legal processes in national reconstruction. From a practical

16 Id.

17 Id.

18 Id.

19 See "UN Court Hears Chilling Rwanda Genocide Testimony", Reuters North American Wire, January 10, 1997, available in LEXIS, News Library, CURNWS File; "Rwanda Tribunal Reopens in Tanzania, Then Closes", Inter Press Service, January 9, 1997.

20 United Nations, "Report of the Secretary General on the Activities of the Office of Internal Oversight Services, Financing of 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 Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States Between January 1 and December 31 1994" [hereinafter "Report of Rwanda Tribunal"], February 6, 1997.

21 Id., Annex (Summary).

22 See generally Id., paragraphs 3-69. See also Craig Turner, "Rwanda War Crimes Tribunal Mismanaged, Report Says", Los Angeles Times, February 13, 1997, at p. 8. John Goshko, "UN Probe Find Mismanagement, Waste in Rwanda War Crimes Tribunal", Washington Post, February 13, 1997, at p. A20.

23 "Report of Rwanda Tribunal", supra note 20, Summary.

24 Id. See also "UN Rwanda Tribunal Head defends His Record", Reuters North American Wire, January 11, 1997, available in LEXIS, News Library, CURNWS File [Registrar Adede arguing that he had made some progress with few resources].

25 "Report of Rwanda Tribunal", supra note 20, paragraphs 75-100.

26 "Kofi Annan Weighs Rwanda Tribunal Changes", UPI, February 22, 1997, available in LEXIS, News Library, CURNWS File; "UN Chief Promises to Act on Rwanda Tribunal Report", Agence France Presse, February 13, 1997, available in LEXIS, News Library, CURNWS File; "UN Chief Summons Top Court Officials After Mismanagement Charges", Agence France Presse, February 12, 1997, available in LEXIS, News Library, CURNWS File.

27 *Prosecutor v. Akayesu*, Trial Chamber, International Criminal Tribunal for Rwanda, 1998, Case No. ICTR-96-4-T, www.ictor.org/ENGLISH/judgements/AKAYESU/akay001.htm.

28 "New Registrar Outlines Plan to Restructure the ICTR", Africa News, May 21, 2001, available in LEXIS, News Library.

standpoint, many of the suspects in Rwandan jails will never appear before the Rwanda Tribunal, and will have to be tried by the national courts of Rwanda.²⁹

Conclusion

The Nuremberg Tribunal is a bad analog for the Rwanda Tribunal. While the former represented the calculated revenge of the victors, they had little to do with justice per se, as a forum for the victims to confront their victimizers and find guilt and levy punishment. Instead, the Nuremberg Tribunal culminated a war of the titans: the Allies against the Axis, and the final closure, the entombment of the aggressors.

From a distance, it is possible to see the Rwanda Tribunal as an approximation of Nuremberg. But the temptation to equate the military defeat of the Hutu regime by the Tutsi and their removal from office with the Nazis is incorrect. Such analogy would only make sense if the targets of the Holocaust (Jews) had themselves defeated the Germans and taken control of the state. The war in Rwanda is unfinished; there is only a

temporary respite before the Hutu-Tutsi struggle for the control of the state resumes. The problem of Rwanda is rooted in the bipolarity of the state, the gulf of history, power and stereotype that divide the Hutu from the Tutsi. Fundamentally, Rwanda is a dysfunctional state, hopelessly bound for disaster.

Unless the Tutsi government organizes genuine democratic elections, which it would lose because the Hutu would come back to power, the prediction of at least one more cycle of violence is certain to be fulfilled as the Hutu, who make up ninety percent of the country, seek to reclaim control. There is little doubt that it is in this context that the Rwanda Tribunal is seen by the Hutu, namely as international punishment by the victors and the Tutsi, with the blessing and support of the United Nations. The Tutsi may themselves see the Tribunal and the war crimes they are conducting in Rwanda as their opportunity for revenge. For that reason, the Rwanda Tribunal, since it is not part of an overall political settlement of the Hutu-Tutsi struggle for political power, is virtually irrelevant to the future of Rwanda.

²⁹ Rwandan courts have started their own war crimes trials and had handed down ten death sentences by February 1997. See "Rwanda: International News", Agence France Presse, February 13, 1997, available in LEXIS, News Library, CURNWS File. A Rwandan official estimated in 1994 that national courts could try as many as 30,000 suspects. "Despite UN Tribunal, Rwanda Plans to Try Suspects for War Crimes", Chicago Tribune, November 10, 1994, at p.A6.