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***RWANDA EVALUATION***

***PROMOTING HUMAN RIGHTS AND BUILDING  
A FAIR JUDICIAL SYSTEM***

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## PROMOTING HUMAN RIGHTS AND BUILDING A FAIR JUDICIAL SYSTEM

### A. Introduction

The international community's human rights initiatives in Rwanda are being undertaken amidst an enormous catastrophe. Between April 6th and mid-July 1994, from 500,000 to one million persons were killed, and up to two million persons fled to neighboring countries such as Burundi, Tanzania and Zaire.<sup>1</sup> Another one million persons were displaced inside Rwanda. As a result of the massacres and the ensuing conflict between the Hutu-dominated former Rwandan government and the Tutsi-led Rwandese Patriotic Army (RPA),<sup>2</sup> millions of Rwandans have been traumatized by violence; many have suffered severe injuries, lost their homes, and have seen family members and friends raped and murdered.

In addition, the country's governmental infrastructure has collapsed, and along with it the framework of the nation's legal system. Court facilities have been damaged, and only 40 of the 800 magistrates who were in office prior to April 1994 are currently working inside Rwanda;<sup>3</sup> the rest have been killed or have left the country. There are few police officers to

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<sup>1</sup>Estimates as to the number of persons killed vary substantially. The lower estimate, 500,000, was cited in the testimony of Townsend Friedman, Special Coordinator for Rwanda, before the Senate Foreign Relations Committee. See *Prepared Testimony of Townsend Friedman Before Joint Hearing of the Senate Foreign Relations Subcommittee on Africa and the House International Relations Subcommittee on Africa on Rwanda and Burundi*, April 5, 1995, Federal News Service, p. 2. The 500,000 figure has also been used in numerous newspaper articles. See e.g. Annie Thomas, *Rwanda outwardly normal but deeply troubled a year after the massacres*, AGENCE FRANCE PRESSE, April 5, 1995. The one million figure has been used by the Special Rapporteur of the U.N. Commission on Human Rights and others. See e.g. *Report on the situation of human rights in Rwanda submitted by Mr. René Degni-Séqui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of resolution S-3/1 of 25 May 1994*, para. 8.

<sup>2</sup>For a description of the RPA offensive see *African Rights, RWANDA: DEATH, DESPAIR AND DEFIANCE* (1994), at 628-631.

<sup>3</sup>United States Department of State, *Country Reports on Human Rights Practices for 1994: Report Submitted to the Committee on Foreign Relations, U.S. Senate and the Committee on*

enforce the laws and almost no defense attorneys to protect the rights of the accused. Prisons are so overcrowded that prisoners have died from asphyxiation.<sup>4</sup> Three out of the eleven courts of First Instance do not have a functioning prosecutor's office.<sup>5</sup> The violence has also led to the disruption of traditional law, called *gachacha*, that was often applied outside urban areas.<sup>6</sup>

The genocide, itself a massive human rights violation, has left in its wake many serious human rights concerns. The United Nations General Assembly has recognized the needs for victims of crime and of the state-sponsored abuse of power to have access to justice and to receive various forms of support and assistance.<sup>7</sup> The surviving victims of the genocide, who are largely members of Rwanda's minority Tutsi population, have yet to have these needs

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*International Relations, U.S. House of representatives*, February 1995, at 202. However, not all of these 800 magistrates had received formal legal training.

<sup>4</sup>Twenty-four prisoners died from asphyxiation in a detention facility near Kigali, Rwanda in April 1994. There are currently over 9000 prisoners in Kigali's prison which has the capacity to hold only 2,000 persons.

In April 1994, it was estimated that 1,500 additional persons were being arrested each week. See, U.N. Office of the Humanitarian Coordinator, *Rwanda: Humanitarian Situation Report*, 15 April 1995, at 6. Nationwide, approximately 30,500 persons are being held in 11 major facilities with the collective capacity of 12,550. Nations Unies, Haut Commissaire Aux Droits De L'Homme, *Report No. 1, Sur L'Etat De La Justice Au Rwanda* .2 Mai 1995.

<sup>5</sup> *Rwanda: Humanitarian Situation Report*, supra note 4, at 5.

<sup>6</sup>For a brief description of Rwanda's traditional legal system, see Marcel D'Hertefelt, *The Rwanda of Rwanda*, in James L. Gibbs, Jr. (ed.) *PEOPLES OF AFRICA* (1966), at 428-430.

<sup>7</sup>See *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, adopted in U.N. General Assembly resolution 40/34, 29 November 1985. Para. 4 provides that victims "are entitled to access to the mechanisms of justice and to prompt redress, as provided by national legislation, for the harm that they have suffered." Para. 14 states that "[v]ictims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means." The declaration is the first major United Nations pronouncement on victims. The declaration does not, however, provide victims with an enforceable "right". For a discussion of the background to the declaration's adoption see M. Cherif Bassiouni, (ed.), *International Protection of Victims*, 7 *NOUVELLES ÉTUDES PÉNALES* (1988).

addressed. If the victims are to be provided access to justice, the nation's legal system must be rebuilt. The legal system must be capable of administering justice by identifying perpetrators, investigating alleged crimes, taking the accused into custody, conducting trials, and administering the sentences of those who are convicted. The human rights of those who have fled the country,<sup>8</sup> and of persons who have been internally displaced, must also be protected. Within the camps in Rwanda and in neighboring countries, persons alleged to have committed crimes must be separated from those who are not suspected of wrongdoing. Those who return should be confident that an effective justice system will protect them from false accusations. In addition, judicial, or other dispute resolution mechanisms, should be established to resolve property disputes involving the returnees.

Constructing a viable system of justice and ensuring the protection of human rights are critical for several reasons. The United Nations, as well as states, have an obligation under the

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<sup>8</sup>Several international instruments establish and define the basic standards for the treatment of refugees. The most important are the 1951 United Nations Convention relating to the Status of Refugees and its 1967 Protocol. In 1969, the Organization of African Unity (OAU) adopted what is generally considered to be the most comprehensive regional treaty dealing with refugees. The OAU convention expands the definition of a refugee to include:

every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

African states felt that the requirement in the 1951 Convention that a person must be outside his country "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion" was not sufficiently broad. For a discussion of these international instruments, see Maryellen Fullerton, *The International and National Protection of Refugees*, in Hurst Hannum (ed.), *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE* (2d.ed. 1992), at 211-227.

Genocide Convention to take action "for the prevention and suppression of acts of genocide."<sup>9</sup> In addition, those who have been displaced, and who did not participate in the crimes that occurred, must be assured that it is safe to return to their communities. Demonstrating that conflicts can be resolved through the rule of law and by peaceful means may also help prevent a renewed outbreak of hostilities. The conviction and punishment of those who participated in the massacres by regularly constituted courts could also alleviate the desire to exact revenge on persons returning to their villages. Perhaps most important, the *failure* to act is likely to reinforce the perpetrators' sense of impunity and spur further acts of violence. That may, in turn, lead to another cycle of refugee flight and the need for further humanitarian assistance.

The international community's response to the genocide is taking place in a complex political environment. The former government's army (*Forces Armee Rwandese, or F.A.R.*) remains largely intact in neighboring countries, situated in refugee camps on Rwanda's borders. The F.A.R., according to a recent Human Rights Watch report, is being armed by the governments of France, and Zaire, and to a lesser extent by South Africa, the Seychelles and China.<sup>10</sup> Thus, there is a continuing threat to regional security. Within Rwanda, civilian

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<sup>9</sup>Article VIII of the Genocide Convention provides that "[a]ny Contracting Party may call upon the competent organ of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III." *Convention on the Prevention and Punishment of the Crime of Genocide* 78 U.N.T.S. 277, adopted by General Assembly resolution 260 A (III) on 9 December 1948. Similarly, the U.N. General Assembly has proclaimed the principle that all states [and presumably international bodies through which they act] have an obligation to trace, arrest and try persons accused of crimes against humanity, and, if found guilty, to punish them. *See Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity*. G.A. Res. 3074 (XXVIII) of 3 December 1973, at para. 1, U.N. GOAR, 28th Sess., Supp. No. 30, at 78, U.N. Doc. A/9030 (1973).

<sup>10</sup>As reported in the CHICAGO TRIBUNE (May 30, 1995), at 7. The newspaper article also quotes the Human Rights Watch report as stating that "[a]dditional money and assets in foreign countries (including

authority has not been fully established. Most arrests are performed by the RPA, and prosecutors have complained of the army's interference in the judicial process ( these issues are discussed further, *infra*). In any case, the role that military authorities will play in a newly constructed Rwandan society is not yet clear. A non-elected, transitional National Assembly has exhibited some degree of independence in its deliberations over Supreme Court nominations. However, the legislature's legitimacy-- as a body without an electoral base or an obvious constituency--is uncertain.<sup>11</sup> Many of Rwanda's leaders have only recently returned to the country after many years in exile. Few of them have any experience in governance. They are in the process of nation-building and are faced with the practical tasks of constructing institutions, establishing their legitimacy, and consolidating political power. At the same time, Rwanda's leaders must resolve a more abstract, but over-riding, issue: what is justice for genocide? These and other factors are shaping the political landscape in which the reconstruction of Rwanda's legal system is to take place.

The following discusses three areas in which human rights initiatives have been taken in Rwanda by the international community: the United Nations' human rights field operation, efforts to reconstruct the nation's system of justice, and the establishment of an international criminal tribunal for Rwanda. These mechanisms are discussed with respect to several concerns that have been raised, such as their mandates and the obstacles delaying or hindering their

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at least Kenya, Tanzania, Zaire and the Netherlands) controlled by the Ousted Rwandan government continue to be available to its leadership in exile." *Id.*

<sup>11</sup>Articles 60 through 79 of the Arusha Accords provide for a Transitional National Assembly. The deputies are appointed by their political parties. The parties and the numerical distribution of seats in the National Assembly are identified in Article 62 as follows: MRND: 11 seats; RPF: 11 seats; MDR: 11 seats; PSD: 11 seats; PL: 11 seats, and PDC: 4 seats. The Arusha Accords, an agreement between the RPF and former Government of Rwanda in 1993 is discussed *infra*.

performance. The objective of this evaluation is to improve the delivery of international assistance relating to the administration of justice and human rights in the short term, and to draw lessons that are relevant to other complex emergencies.

## B. Background

In 1959, three years before Rwanda's independence from Belgium, the majority Hutu population rebelled against the minority Tutsis, who had exercised power on behalf of Belgium's colonial administrators since the end of the First World War.<sup>12</sup> By 1960, the Hutu's Parmehutu party<sup>13</sup> had achieved political control over the country. Ethnic violence erupted again in 1963 when up to 20,000 Tutsi were killed and over 100,000 fled into exile. It has been estimated that between 40 to 70 percent of the Tutsi population left the country between 1959 and 1964, primarily to Uganda.<sup>14</sup> The exiled Tutsi attempted to invade Rwanda on several occasions between the mid 1960s and 1990. After each unsuccessful attempt, Rwanda's minority Tutsi

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<sup>12</sup>Rwanda, a German colony from 1890 to 1916, was mandated (along with Burundi) to Belgium by the League of Nations after the First World War. *See generally*, African Rights, RWANDA: DEATH DESPAIR AND DEFIANCE (1994), at 5-14. Under Belgium rule, Tutsi's held all of the nations' 43 chiefdoms, 549 out of 559 subchiefdoms and over 80% of government positions in fields such as the judiciary, agriculture and veterinary sciences. *See* U.S. Committee for Refugees, EXILE FROM RWANDA: BACKGROUND TO AN INVASION (February 1991), at 4. It has been estimated that during this period Tutsi comprised approximately 15% and Hutu 85% of Rwanda's population. The Tutsi and Hutu are subgroups of the Banyarwanda, a Bantu people who are East African's largest ethnic group. U.S. Committee for refugees, *id.* at 2.

The relationship between the Tutsi and Hutu during the period of Belgium rule has been termed "ranked ethnic subordination," characterized by clientage relationships and an ideology of inferiority for the subordinate group. *See* Donald L. Horowitz, ETHNIC GROUPS IN CONFLICT 29-30 (1985). *Also see* René Lemarchand, *Revolutionary Phenomena in Stratified Societies: Rwanda and Zanzibar*, CIVILIZATIONS 18 (March 1968).

<sup>13</sup>Party for the Emancipation of the Hutu People [partie de l'Emancipation du peuple Hutu.].

<sup>14</sup>The U.S. Committee for Refugees, *supra* note 10, at 6.

population faced severe reprisals.<sup>15</sup>

In 1973, Juvenal Habyarimana, a Hutu, seized power and retained it for the following twenty-one years.<sup>16</sup> Despite promised reforms in the 1970s and 1980s, government discrimination against the Tutsi population persisted. On October 1, 1990, the Rwandan Patriotic Army (RPA), the military arm of the Rwandan Patriotic Front (RPF),<sup>17</sup> invaded Rwanda from military basis in Uganda.<sup>18</sup> The Rwandan government responded by arresting between 8,000 to 10,000 persons, primarily political opponents of the Habyarimana regime.<sup>19</sup> The conflict, which lasted through 1992, resulted in thousands of deaths.

The Rwandan government and the RPF entered into negotiations in late 1991,<sup>20</sup> and a cease-fire agreement was signed in July 1992. Fighting erupted again, however, in February 1993 after the RPF alleged that the government had massacred 300 Tutsi in northwestern Rwanda. A new cease-fire agreement was signed on March 9, 1993 culminating in a peace

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<sup>15</sup>United States Institute of Peace, RWANDA: ACCOUNTABILITY FOR WAR CRIMES AND GENOCIDE (1994), at 4.

<sup>16</sup>*Id.*

<sup>17</sup>The RPF was founded in 1979 by Tutsi exiles in Nairobi, Kenya. It was first known as the Rwandese Alliance for National Unity. Donnatella Lorch, *Rwanda Rebels: Army of Exiles Fights for a Home*, NEW YORK TIMES (June 9, 1994), at A10.

<sup>18</sup>According to some estimates, up to 200,000 Rwandan refugees and their descendants were living in Uganda in the late 1980s. Several members of the Tutsis' military leadership who invaded Rwanda in 1990 served in Uganda's army. See William E. Schmidt, *Rwanda Puzzle: Is Uganda Taking Sides*, NEW YORK TIMES (April 18, 1994).

<sup>19</sup>*Id.* Also see Amnesty International, RWANDA: PERSECUTION OF TUTSI MINORITY AND REPRESSION OF GOVERNMENT CRITICS, 1990-1992 (May 1992).

<sup>20</sup>See THE N'SELE CEASEFIRE AGREEMENT BETWEEN THE GOVERNMENT OF THE RWANDESE PATRIOTIC FRONT, AS AMENDED AT GBADOLITE, 16 SEPTEMBER 1991, AND AT ARUSHA, 12 JULY 1992.

accord signed in Arusha, Tanzania in August 1993.<sup>21</sup> The agreement provided for the establishment of a transitional government, demobilization, the creation of an integrated military structure, and multi-party elections to be held at the end of the transitional period.<sup>22</sup> On June 22, 1993, the U.N. Security Council established the United Nations Observer Mission to Uganda-Rwanda (UNIMOUR) to help monitor the accord.<sup>23</sup> An Organization of African Unity (OAU) team of 50 military observers from Nigeria, Senegal and Zimbabwe had been deployed in August 1992 to help police the earlier peace agreement.

The U.N. Security Council integrated UNIMOUR with the newly established United Nations Assistance Mission for Rwanda (UNAMIR) on October 5th, 1993.<sup>24</sup> UNAMIR's

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<sup>21</sup>See U.S. Institute of Peace, *Id. See also* PEACE AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF RWANDA AND THE RWANDESE PATRIOTIC FRONT, done at Arusha, 4 August 1993 (English translation obtained from the Embassy of Rwanda, Washington, D.C., USA). (Hereinafter, PEACE AGREEMENT.)

<sup>22</sup>The Accords were seen by many within the ruling MNRD party (Mouvement national pour la révolution et le développement) as making too many concessions to the RPF. According to René Lemarchand, "the decisions made by the parties represented were never fully endorsed by the MNRD rank-and-file, and only reluctantly by the leadership." René Lemarchand. *Managing Transition Anarchies: Rwanda, Burundi, and South Africa in Comparative Perspective*, 4 Journal of Modern African Studies 584 (1994).

<sup>23</sup>Security Council Resolution 846 (22 June 1993). The resolution provided for a U.N. observer mission to be deployed on the Ugandan side of the border for an initial period of six weeks. A compilation of U.N. Security Council resolutions on Rwanda can be found in Dick A. Leurdijk's and Lilian van Zandbrink's, *Decision-making by the Security Council: The Case of Rwanda, 1993-1994*. (Netherlands Institute voor Internationale Betrekkingen, November 1994.)

Article 2 of the Accord provides that "[i]n case of conflict between ...provisions of the constitution and those of the Peace Agreement, the provisions of the Peace Agreement shall prevail." The Accords also provide that the N'sele Ceasefire Agreement and five Protocols of Agreement regarding the Rule of Law (18 September 1992), Power Sharing (30 October 1992), Repatriation of Refugees (9 June 1993), the Integration of Armed Forces (3 August 1993) and Miscellaneous Issues (3 August 1993) are integral parts of the peace agreement. PEACE AGREEMENT, Article 2.

<sup>24</sup>Security Council Resolution 872 (5 October 1993). UNAMIR was established for a period of six months, and its extension was contingent upon continued progress in implementing the peace agreement. On 6 January 1994, the Security Council reaffirmed UNAMIR's mandate in Security Council Resolution

mandate was to contribute to the establishment and maintenance of peace by securing the capital, Kigali, and monitoring the cease-fire agreement.

The incumbent head of state was sworn in as President of Rwanda on January 5th, 1994, pursuant to the peace agreement. A transitional cabinet and National Assembly, which had been provided for in the Accords, however, were not installed. After January 1994 the cease-fire generally held, but violent demonstrations, assassinations of political figures, and the politically motivated murder of civilians increased.<sup>25</sup> On April 5th, the Security Council expressed its concern over the escalating violence and extended UNAMIR's mandate until the end of July.<sup>26</sup> The following day, April 6th, a plane carrying the presidents of Rwanda and Burundi crashed as it approached Kigali. The systematic killing of Tutsi and Hutu political moderates began almost immediately.<sup>27</sup> Several reports concluded that the killings were planned, well-organized and fueled by radio broadcasts of hate propaganda.<sup>28</sup> Many of the killings were carried out by militias, known as *Interhamwe* ("Those who attack together") and *Impuzamugambi* ("Those who

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<sup>25</sup>See, Secretary-General of the United Nations, *Building Peace and Development, 1994: Annual Report on the Work of the Organization (1994)*, at 226 (hereinafter Secretary-General's report). Since the conflict began in October 1991 several NGOs published reports detailing human rights abuses. See e.g. Amnesty International, *Rwanda: Persecution of Tutsi minority and repression of government critics, 1990-1992* (May 1992); Human Rights Watch, *Rwanda, Talking Peace and Waging War: human rights since the October 1990 invasion*, (February 1992); Human Rights Watch, *Beyond the Rhetoric: continuing human rights abuses in Rwanda*, (June 1993); Human Rights Watch, *Arming Rwanda: the arms trade and human rights abuses in the Rwandan war*, (January 1994).

<sup>26</sup>Security Council Resolution 909 (1994). The mandate was extended until 29 July 1994.

<sup>27</sup>For a detailed description of events during this period see Africa Rights, *supra* note 2.

<sup>28</sup>See e.g. Final report of the Commission of Experts established pursuant to Security Council resolution 935 (1994), S/1994/1405 (9 December 1994) at paras. 58 and 64.

have the same goal"). These militias were established in 1992 by the ruling MRND party and its allied party, the COR,<sup>29</sup> as well as by the presidential guard.

On April 21, the Security Council decided to reduce UNAMIR forces to a minimal level because of the risk posed to the U.N. troops by the increasing violence. The withdrawn troops were evacuated to Nairobi.<sup>30</sup> A supplement to the remaining UNAMIR contingent, however, was authorized on May 17th, eventually increasing the U.N. forces to 5,500 troops. UNAMIR's mandate was expanded to include reporting on human rights violations.<sup>31</sup>

RPA forces broke out of their barricades in Kilgali, where they had been situated pursuant to the Ausha peace agreements, on April 7th. Almost simultaneously, RPA units which had been stationed in northern Rwanda opened several fronts. By May, RPF forces had captured the international airport and encircled Kilgali.

On June 23rd, the French launched "Operation Turquoise with the approval of the U.N. Security Council.<sup>32</sup> The stated purpose of the intervention was to save civilian lives by establishing a "safe zone" in southwest Rwanda. The RPF opposed the French initiative because of France's role in arming the former government.

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<sup>29</sup>On the formation of three militias *see* Human Rights Watch Arms Project, *Arming Rwanda*, *supra* note 23, at 11-12. Habyarimana's Presidential Guard was also reportedly involved in forming the militias. René Lemarchand, *Managing Transition Anarchies: Rwanda, Burundi, and South Africa in Comparative Perspective*, 4 THE JOURNAL OF MODERN AFRICAN STUDIES 581-604, at 600 (1994).

<sup>30</sup>Security Council Resolution 912 (21 April 1994). *Also see* Secretary General's report, *supra* note 25, at 228-229.

<sup>31</sup>Security Council Resolution 918 (17 May 1994). *Also see*, Secretary-Generals' report *Id.*

<sup>32</sup>The vote in the Security Council was 10 in favor of the intervention and 5 abstentions. For a critical assessment of French intervention, *see* AFRICAN RIGHTS, *supra* note 2, at 698-711. *Also see*, GUY VASSAU-ADAMS [Oxfam], RWANDA: AN AGENDA FOR INTERNATIONAL ACTION (1994) at 45-47.

The capital was taken by the RPA during the first week of July. On July 18th the RPF declared a victory and implemented a cease-fire. In the following days the mass flight of Hutus, led by leaders of the former government, occurred. One U.N. official described the scene as "an exodus of biblical proportions."

**C. The Protection of Human Rights and the United Nations Field Operation**

**1. The Special Rapporteur of the Human Rights Commission and the Commission of Experts.**

One of the first acts of the newly appointed U.N. High Commissioner for Human Rights<sup>33</sup> was to request that the Commission on Human Rights convene a special session on the human rights situation in Rwanda.<sup>34</sup> The request was made after the High Commissioner's trip to Rwanda on May 11th and 12th. The Commission convened a special session on Rwanda on May 24th and 25th. As a result of that meeting, a Special Rapporteur was appointed and charged with investigating the human rights situation and submitting a report within four weeks. The Commission also provided for the Special Rapporteur to be assisted by a team of human rights field officers.<sup>35</sup> Specifically, the Special Rapporteur's mandate was:

- (a) To investigate at first hand the human rights situation in Rwanda and to receive relevant and credible information on the human rights situation there from Governments, individuals, intergovernmental and non-governmental organizations, including on root

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<sup>33</sup>The position of High Commissioner for Human Rights was established by the General Assembly in General Assembly Resolution 48/141 of 20 December 1993. The General Assembly approved the appointment of José Ayala Lasso of Ecuador on 14 February 1994. See Secretary-General's report, *supra* note 25, at 134-135. The newly appointed High Commissioner did not assume his responsibilities until the first week of April 1994.

<sup>34</sup>In 1990, new procedures were established whereby a majority of Commission members can call for special sessions. The first two special sessions dealt with the situation in the former Yugoslavia. *Id.* at 136 and 234.

<sup>35</sup>*Id.* at 136.

causes and responsibility for atrocities committed on a continuing basis; (b) To gather and compile systematically information on possible violations of human rights and acts that may constitute breaches of international humanitarian law and crimes against humanity, including acts of genocide, in Rwanda and to make that information available to the Secretary-General.<sup>36</sup>

The Advisory Committee on Administrative and Budgetary Questions (ACBQ) approved the appointment of six persons to help the Special Rapporteur implement the mandate. The Special Rapporteur submitted his first report to the Commission in June 1994.<sup>37</sup>

On July 1, 1994 the Security Council adopted resolution 935 requesting the Secretary-General to appoint an impartial Commission of Experts (COE).<sup>38</sup> The commission would review and analyze information concerning violations of international law in Rwanda. The COE was asked to provide the Secretary-General, no later than November 30th, 1994, with its conclusions regarding the evidence of specific violations of international humanitarian law and acts of genocide. Furthermore, the COE was "to determine whether and to what extent certain individuals might be held responsible for having committed those violations."<sup>39</sup>

The Secretary-General established the COE on July 26, 1994. The Commission was composed of three members from francophone Africa. The members of the COE were: Mr. Atsu-Koffi Amega (Togo), chairman; Ms. Habi Dreng (Guinea); and Mr. Salifou Fomba (Mali). The commissioners served in their individual capacities rather than as representatives of states.

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<sup>36</sup>The Special Rapporteur issued four reports between June 1994 and January 1995. See E/CN.4/1995/7 and Corr. 1 of 28 June 1994; E/CN.4/1995/12, of 12 August 1994; E/CN.4/1995/70 of 11 November 1994; and E/CN.4/1995/71 of 17 January 1995.

<sup>37</sup>See E/CN.4/1995/7 and Corr. 1 of 28 June 1994.

<sup>38</sup>Secretary-Generals report, *supra* note 25, at 235.

<sup>39</sup>See the Commission of Experts' preliminary report which was submitted to the Security Council by the Secretary-General as an Annex to S/1994/1125, on 4 October 1994.

Since the mandates of the Special Rapporteur and the COE overlapped, the human rights field operation that was supporting the work of the Special Rapporteur was also placed at the service of the COE.

Both the Special Rapporteur and the COE called for the establishment of a war crimes tribunal.<sup>40</sup> The COE preliminary report, submitted to the Secretary-General on October 4th, 1994, found that both the RPF and Rwandan government forces had perpetrated serious breaches of international humanitarian law and crimes against humanity. The forces of the former Hutu dominated government were found to have also committed acts of genocide. The COE, however, stated that it had "not uncovered any evidence to indicate that Tutsi elements perpetrated acts committed with the intent to destroy the Hutu ethnic group as such."<sup>41</sup>

## **2. The High Commissioner For Human Rights Field Operation-Rwanda (HRFOR)**

The field operation conducted under the direction of the High Commissioner's office (HCHR) was the first to be undertaken under the auspices of the HCHR. It was also the first to be administratively supported by the U.N.'s Centre for Human Rights in Geneva.

During his second visit to Rwanda in late August 1994, the HCHR reached an agreement with Rwandan officials to deploy 147 human rights field officers -- one for each of the country's communes.<sup>42</sup> As outlined in the HCHR's operational plans,<sup>43</sup> the field operation had four

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<sup>40</sup>See the Special Rapporteur's second report. E/CN.4/1995/12 of 12 August 1994; and the COE's preliminary report submitted by the Secretary-General to the Security Council on 4 October 1994.

<sup>41</sup>S/1994/1125, 1 October 1994.

<sup>42</sup>Office of the High Commission for Human Rights. *Human Rights Field Operation in Rwanda, Operational Plan*, 18 January 1995. Also see *Preliminary Operational Plan* of 15 September 1994.

objectives:

(a) to carry out investigations into violations of human rights and humanitarian law; (b) to monitor the on-going human rights situation and, through its presence, prevent future human rights violations; (c) to cooperate with other international agencies in establishing confidence, and thus facilitate the return of the refugees and displaced persons and the rebuilding of civic society; and (d) to implement programmes of technical cooperation in the field of human rights, particularly in the area of the administration of justice.

The substantive units<sup>44</sup> of the field operation are the Monitoring Unit (MU), Technical

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<sup>43</sup>*Id.* The statement of the field operations' mandate is slightly different from that stated in the Agreement Between the United Nations and the Government of Rwanda on the States of the Human Rights Mission in Rwanda (undated), signed by Rwanda's Prime Minister Faustin Twagiramungu, and the High Commissioner for Human Rights, José Ayala Lasso. The Agreement states that the objectives of the filed operation are:

(a) To carry out investigations into violations of human rights and humanitarian law including possible acts of genocide, in accordance with directives given by the Special Rapporteur on the situation of human rights in Rwanda and the Commission of Experts; (b) To monitor the ongoing human rights situation and, through their presence help redress existing problems and prevent possible human rights violations from occurring; (c) To cooperate with international agencies in charge of re-establishing confidence and thus facilitate the return of refugees and displaced persons and the rebuilding of civic society; (d) To implement programmes of technical co-operation in the field of human rights, particularly in the area of the administration of justice.

As quoted in African Rights, *A Waste of Hope: The United Nations Human Rights Field Operation* (March 1995). The reformulation in the operational plan omits mentioning that the investigations into genocide and humanitarian law are for the purpose of supporting the work of the COE and Special Rapporteur.

<sup>44</sup>The operational plan of 18 January 1995 describes the field operation's administrative structure as follows:

The HRFOR is directed from its headquarters in Kigali by the Chief, under the authority and direction of the High Commissioner for Human Rights. The Chief of the HRFOR: coordinates and implements policies for the operation; ensures the effective overall functioning of the entire operation through his supervision; represents the High Commissioner to the Government of Rwanda; coordinates the activities of the HRFOR with the Special Representative of the Secretary-General, other United Nations agencies, intergovernmental and non-governmental organizations; represents the HRFOR at meetings and with the press; and, in close cooperation with UNAMIR, provides for the security of the operation. The Deputy Chief is responsible for providing assistance to the Chief in all these matters; in particular he directs the work of the administrative

Cooperation Unit (TCU), and the Legal Analysis and Coordination Unit (LACU).<sup>45</sup> The office of the HCHR estimated that for the period between February and June 1995, approximately \$U.S. 6.5 million would be required.<sup>46</sup>

The Human Rights Centre in Geneva was responsible for recruiting field officers and providing logistical support for the operation. Eventually, field officers were also provided by the European Union (EU) and the U.N.'s Volunteer program (UNV). Overall management support for the operation, however, remained in the hands of the Centre.

The first investigators who arrived in Rwanda came in late October 1994 as part of the Special Investigations Unit (SIU), the forerunner of the LACU. The evolution of this unit reveals several serious weaknesses in the international community's human rights response.

### **3. Findings Regarding the Field Operation**

This first group of investigators included highly qualified experts who were seconded by their governments to the Centre in Geneva. The core group, which never totalled more than eight persons, was occasionally supplemented by other experts, such as a team of Spanish forensics experts who examined the remains of victims found at several massacre sites. This unit, although detailed to the Centre, was to work in support of the Special Rapporteur and the

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cell that handles personnel, finance and procurement matters. The Deputy Chief is considered Acting Chief during the Chief's absence.

<sup>45</sup>The LACU replaced the former Special Investigations Unit (S.I.U.). Prior to the establishment of the International Tribunal, experienced investigators were seconded to the S.I.U. to gather evidence of violations of international humanitarian law. Their report was turned over to the Tribunal's investigators after the Tribunal was established. The S.I.U. was thereafter dismantled. This unit is discussed further, *infra*.

<sup>46</sup>This does not include an additional 4.8 million dollars (US) for technical assistance for the administration of justice.

Commission of Experts. The Special Rapporteur and the COE had already submitted initial reports before the SIU was formed.

Former members of the unit report that from the very beginning their undertaking lacked a well defined purpose and direction. They knew that they were to investigate violations of international humanitarian law, but, as one former S.I.U. member put it, "for whom or for what purpose was unclear." The unit, for example, was to "work in support of" the COE and the Special Rapporteur, but report to the Centre in Geneva, and -- in Rwanda-- to report to the HRFOR mission chief. However, since neither the Centre nor the mission chief in Kilgali were supervising investigations, they could not offer any direction. According to a former SIU investigator, these problems were exacerbated by a lack of cooperation between UN officials in Geneva and Kilgali who often refused to communicate directly with each other.

The investigators were further hampered by uncertainty over their legal authority. They did not know, for instance, whether they had the authority to request official records and papers from government officials, both within and outside of Rwanda. As a result, their investigative work focused on collecting witnesses' statements and physical evidence at 25 massacre sites. These investigative activities are critical initial steps in the investigative process. However, to establish that crimes against humanity were committed evidence of state involvement in the crimes must also be produced. Furthermore, in establishing individual guilt for war crimes, the chain of command is relevant in determining criminal responsibility. In determining whether genocide occurred, evidence of the perpetrators' specific intent to destroy the Tutsi as an ethnic group is required. Thus, official documents relating to the internal military structures, plans, and preparations of the parties to the conflict could prove essential to successful prosecutions for

violations of international humanitarian law.

The SIU was disbanded in November 1994, after the establishment of the International Tribunal. Its findings were turned over to the tribunal's investigators. HRFOR's Operational Plan of 18 January 1995, states that rather than focusing on criminal investigations of violations of international humanitarian law, "[a]s the operation enters its next phase, field officers will emphasize monitoring of [sic] the ongoing human rights situation and cooperation with other international agencies in the re-establishment of confidence to facilitate the voluntary return of refugees and displaced persons." The newly established LACU, however, would "...continue to carry out investigations for the purposes of the Special Rapporteur and with his guidance, will serve as liaison with the tribunal for the cases it is investigating and with the national trials initiated by the government of Rwanda.... " As of late May, the LACU did not have a permanent unit chief and the tribunal has made it clear that its investigators would handle the tribunal's evidence gathering process. The Rwandan government has no active investigations of the genocide underway.

This initial investigative effort revealed several flaws in the U.N.'s human rights approach to the crisis in Rwanda. The Special Rapporteur and the COE were given overlapping mandates, broad responsibility, and few resources to carry them out. For the field officers, or investigators, there were no discernable operational objectives, and no clear chain of command. The early investigative effort demonstrated the value of having governments second experts. The experts, however, were generally detailed for only a few weeks, and only a small number of states responded to the High Commissioner's request for help. Experts from Finland, Spain, Switzerland, and the United States, for example, staffed the SIU. None of the SIU investigators,

who had developed a familiarity with the evidence and the territory, subsequently went to work for the Prosecutor.

Many of the problems that plagued the SIU regarding leadership and the lack of clearly defined objectives emerged in other aspects of the field operation, and new issues surfaced as well. Throughout late 1994 and early 1995, HCHR's field operation was subject to substantial criticism. Reports by African Rights and the Congressional Hunger Center,<sup>47</sup> for example, were critical of the operations' leadership and recruitment policies. Such reports found that the U.N. human rights field officers (sometimes referred to as "monitors") were recruited in a seemingly haphazard manner, often on the basis of a single telephone interview. The field officers who were initially deployed received little or no training. Nor were they provided with any administrative and logistical support. One report stated that the "monitors" are "confused, complaining, [and] suffer low morale" and that "many inexperienced and insecure" monitors had been deployed "in one of the most dangerous and demanding environments on earth."<sup>48</sup>

To some extent, the criticisms of the field operation were inconsistent. One report, for example, criticized the field operation for ignoring the genocide, and instead focusing on the human rights problems confronting the returning Hutu.<sup>49</sup> On the other hand, some criticisms focused on the field officers' inability to deal with abuses by the current government, and the failure of the field operation to provide a human rights environment conducive to the repatriation of the majority Hutu population.

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<sup>47</sup>See African Rights, *A Waste of Hope: The United Nations Human Rights Field Operation* (March 1995); Congressional Hunger Center, December 6, 1994 (1994).

<sup>48</sup>Congressional Hunger Center, *id.*, at 3,5.

<sup>49</sup>See generally African Rights report, *supra* note 47.

There is little doubt that the field operation experienced substantial delays in getting underway. The Centre for Human Rights in Geneva had no experience in supporting a field operation of this nature and did not have the capacity to undertake such an operation. Besides the delays in providing logistical support, such as vehicles and communications equipment for the field officers, there were also delays in deploying personnel. In June 1994, as previously mentioned, six field officers had been authorized, and this number was expanded to 147 in August (one officer, on average, for each of the nation's communes). Nevertheless, in mid-September the six officers who had been authorized in June had not yet been deployed. This delay was apparently not due to a lack of funding. By mid-September several nations had pledged approximately \$U.S. 2.5 million in support of the field operation.<sup>50</sup>

During interviews conducted by this team in May 1995, many of the criticisms of the Monitoring Unit voiced in previous reports were confirmed. One U.N. monitor, for example, reported that when the first group of field officers arrived in Rwanda they had no means of transport and no communications equipment. When vehicles were provided, they were equipped with snow tires which quickly blew out when they came into contact with the sharp rocks of the rugged mountain terrain. The haste with which recruitment occurred was also confirmed. One field officer, for instance, stated that procedures were so lax, she "could have been a convicted axe murderer." The field officers we interviewed, who had been recruited through the Centre, uniformly reported that they were not interviewed, or had only a brief conversation with someone at the Centre. Several persons described their interactions with Centre personnel as

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<sup>50</sup>In response to HCHR's appeal of 2 August 1994, several governments, including Belgium, Finland, France, Norway, the Netherlands, New Zealand, Sweden, United Kingdom and the United States, had pledged contributions of \$2,463,881 (US dollars).

"unprofessional."

The problems of recruitment resulted mainly from the Centre's inexperience in managing a field operation. A portion of the problem, however, is also due to the insistence by donor governments that personnel be placed in the field as rapidly as possible. The Centre simply did not have the expertise nor the resources to meet the demands that were being placed upon it.

While previous reports noted low morale on the part of the field officers, this study team found that many field officers are enthusiastic and committed to doing the best job possible. They appear, however, to be confused about their responsibilities. In late May, the field operation still lacked focus and direction. In Gisenyi, for example, monitors still speak of conducting "genocide investigations" although, as previously mentioned, the responsibility for investigating the massacres of April-July 1994 was removed from the High Commissioner's jurisdiction in November 1994, after the international tribunal was established. Monitors in Gisenyi also reported that they conducted investigations into the killing of local residents by exiled Hutu who infiltrated the area from nearby refugee camps in Zaire. The Gisenyi monitoring team includes no professional investigators, and the team leader readily admitted that investigations into murders by returning Hutu refugees had no apparent connection to their human rights mandate.<sup>51</sup> Such investigations, however, were viewed as necessary to obtain the good will of local officials.

There does not appear to have been any effort to match the backgrounds of the field

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<sup>51</sup>In this regard, the supervisor's interpretation of the mandate may have been too narrow. Investigations of killings by members of the exiled FAR, for example, might be considered necessary to prevent a renewed outbreak of violence and violations of common article 3, which applies to civil conflicts and to non-governmental parties to a conflict. This potential application is discussed further, *infra*.

officers with the skills required by the mandate. If, for example, field officers were to gather evidence that could be used in support of the prosecution of those accused with violations of international humanitarian law, crimes against humanity or genocide, professional investigators would be needed. The evidence would have to be obtained in a manner consistent with the International Tribunal's Rules of Evidence.<sup>52</sup> If used in support of domestic prosecutions, the evidence would have to be gathered in compliance with Rwandan law and the standards contained in various international instruments, such as the International Covenant on Civil and Political Rights,<sup>53</sup> the Basic Principles for the Treatment of Prisoners,<sup>54</sup> and the Code of Conduct for Law Enforcement Officials.<sup>55</sup>

The criticisms of the field officers' performance may, at least in part, be due to the operation's broad and ambiguous mandate. The mandate, for example, encompasses tasks that include investigating, monitoring, organizing civic development, and providing technical assistance to the Rwandan Government in the field of criminal justice. To implement this mandate, then, a considerable range of skills on the part of the field officers are required.<sup>56</sup>

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<sup>52</sup>See Rules 89 through 98, International Criminal Tribunal for the Former Yugoslavia, *Rules of Procedure and Evidence*, IT/32/Rev.3/Corr.1 (6 February 1995).

<sup>53</sup>999 U.N.T.S. 171 (entered into force March 23, 1976).

<sup>54</sup>G.A. Res. 45/111, 14 December 1990, 45 U.N. GAOR Supp. (No. 44A) 199, U.N. Doc. A/RES/45/11.

<sup>55</sup>G.A. Res. 34/169, 17 December 1979, 34 U.N. GAOR Supp. (No. 46) 185, U.N. Doc. A/34/46. For a compilation of the relevant international standards see M. Cherif Bassiouni (ed.), *THE PROTECTION OF HUMAN RIGHTS IN ADMINISTRATION OF JUSTICE* (1994).

<sup>56</sup>These skills, of course, could be performed by different individuals, and by different units within the same organization. The diverse range of the skills that are required, however, substantially complicates the task of organizing the managing the field operation.

Moreover, the mandate required that field officers both monitor the current government to prevent human rights abuses and develop close working relationships with government officials in the area of the administration of justice. The field officers would, then, have to be a partner and a critic of the government. The tension between these two objectives has not been reconciled.

There are indications that the field operation improved by February 1995. A training program for field officers, for example, was initiated. Pursuant to a grant of \$110,000 from the U.S. Office of Transition Initiatives to the U.N. Centre at Geneva, the National Peace Corps Association organized training programs in Geneva and in Kilgali. The training began in December 1994, and by April a total of 152 HRFOR personnel, including 114 field officers had participated. The training program focuses on preparing the field officers to work in a foreign environment and is similar to the training received by Peace Corps Volunteers. Therefore, there is little emphasis on the operational aspects of a field officers' work. Nor is there much focus on the content of the major international human rights instruments and international and domestic enforcement mechanisms. These elements, however, could readily be incorporated into the curriculum.

Recruitment also was enhanced with the participation of EU monitors (as part of the 147 field officers), who tended to be more mature and experienced than the others. But problems developed here as well. The EU monitors were not effectively absorbed into the field operation, and maintained a separate chain of command through an EU coordinator assigned to the HRFOR's Kilgali office.

The conceptual confusion that has surrounded the Monitoring unit is understandable. It

was launched under unique circumstances. The genocide itself radically transformed the society. The victims--largely the Tutsi minority population--are now politically dominant. The government in power views itself as the saviours and guardian of the victims. The government and army that perpetrated the massacres are encamped on Rwanda's borders, posing a continuing threat to the nation's security. In this context, an approach to human rights, which relies principally on observing, investigating and reporting current government abuses, has been viewed by the government as being impartial and unfair. An approach, better suited for post-genocide Rwanda, would give priority to ensuring that those responsible for the massacres are punished and that the victims are compensated.

A comprehensive approach is needed which stresses the reconstruction of the judicial system, and includes human rights education and training, as well as monitoring activities. Such an approach could also promote human rights by emphasizing the need to protect minority rights through equal access to health care and other social services. It could help to develop non-violent dispute resolution programs in the schools. It also might involve projects that encourage political participation and governmental accountability in the process of rebuilding communities. Some of these activities could be incorporated into various community rehabilitation efforts. They need not be considered solely the preserve of the human rights field operation. If a more comprehensive approach were taken monitoring activities that focus on current abuses by the present government and by returning refugees would more likely be viewed as impartial.

Other troublesome aspects of the field operation have emerged. Although field officers file weekly reports, and the chief of mission in Kilgali submits a bi-monthly report to the High Commissioner, it is unclear that these reports have formed the basis for any action or decisions.

Although the Special Rapporteur is supposed to be staffed by the field operation, there is no mention in his reports of field operation findings. Communications between the Kilgali-based field operation and the Special Rapporteur have always been difficult because they had to be directed from Kilgali to Geneva and then on to Abidjan, where the Special Rapporteur's office is located. This is the case even though the Special Rapporteur has a representative stationed in Kilgali. In late May, new procedures were worked out to remedy this problem.

Interviews with local Rwandan officials in Gisenyi and Kibuye indicated that they had not received any reports on the human rights situation in their areas. Interviews with Rwandan NGO's also indicated there was little contact between them and the Monitoring Unit. Although it is difficult to evaluate the impact of the monitoring operation on the human rights situation in Rwanda, it appears--from the points of view of the Rwandans with whom we spoke-- to be minimal.

HRFOR's Technical Assistance Unit (TCU) is responsible for training and education programs. The TCU is engaged in recruiting and deploying experts to help process the 40,000 cases relating to the massacres, and experts who will assist in the training of police personnel and engage in other human rights educational activities. These programs, however, appear to be largely duplicative of those initiated by the UN Development Programme (UNDP). While the UNDP has the disadvantage of being hampered by a rigid bureaucratic structure, it is experienced in coordinating training and technical assistance programs. It also has a network of relationships with international agencies, NGO's, the host government, and others that facilitate the implementation of programs.

#### **4. Conclusion and Recommendations**

Several problems have impeded the effective implementation of the human rights field operation, including: 1.) a broad and ambiguous mandate that has proven difficult to operationalize; 2) leadership in Geneva and Kilgali who have no experience in managing a human rights field operation (in Kilgali, the top leadership<sup>57</sup> has no experience in human rights, law enforcement, judicial administration, or other relevant experience; 3) the failure to recruit field officers with the relevant skills and experience to meet the program's objectives; 4) overlapping authority between the High Commissioner and Special Rapporteur (and previously among the COE and the others); and 5) an unclear chain of command (eg., the EU monitors and those assigned to assist the Special Rapporteur). It seems unlikely that all of these problems can be remedied by a mid-term correction.

The general objectives of HRFOR's mandate are still in need of fulfillment; the questions are: how and by whom? Rwanda suffered one of the most traumatic human rights tragedies of the post World War era. The seeds of genocide were planted by Rwanda's former leaders over the course of decades and it will take time to uproot them. Rwanda's current government has expressed a commitment to protecting human rights. The government, for example, permits free access to prisons and has launched human rights training programs for some government officials. Nevertheless, in the aftermath of the Kibeho incident it would be a mistake for the international community to send the message that it is unconcerned about current human rights abuses. Monitoring and reporting, if conducted in a fair and impartial manner, can help deter human rights abuses by the government and by the former government now in exile. Human

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<sup>57</sup>This refers to the chief and deputy chief of mission. Only the director of the TCU unit has a background in the aforementioned areas.

rights training and educational programs are needed to help prevent such incidents, such as that which occurred at Kibeho, from recurring. Furthermore, technical assistance is needed to help initiate criminal prosecutions (assistance to the national justice system is discussed further, *infra.*). The central human rights concern should be to ensure that the victims of genocide have access to justice.

Therefore, the following steps should be taken: 1.) As discussed in section D, *infra.*, priority should be given to rebuilding Rwanda's justice system by providing material assistance and personnel. Emphasis should be placed on developing a schedule for the commencement of criminal proceedings with Rwandan officials;<sup>58</sup> 2.) The High Commissioner's field operation, should be dramatically redesigned. A small group of between ten and fifteen experts, under the auspices of the High Commissioner's office, should work with Rwandan officials and NGO's to design and initiate human rights training and education programs. These programs should introduce human rights curricula in local schools and develop other educational materials and programs, and formulate programs for law enforcement and military personnel; 3.) Human rights monitoring should be conducted under the auspices of the Special Rapporteur. Such monitoring should consist of documenting abuses by both the current government and by returning refugees. This is especially important in areas along the border with Zaire where there has been a rise in

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<sup>58</sup>While the International Tribunal (ICTR) is expected to try up to 400 of the top leaders of the former government, most of the leaders the ICTR will try are located in other countries. Several former government officials, however, are in custody within Rwanda. While they do not constitute the top tier of the former government's leadership, they held positions that may have involved them in directing others to commit violations of international humanitarian law. It is this "second tier" of leadership that should be the focus of national prosecutions.

the number of armed incursions in Spring 1995.<sup>59</sup> The purpose of the monitoring should be clear; it is to deter further acts of violence on both sides and to ensure that the rule of law is adhered to.<sup>60</sup> The monitors should be deployed only after a clear understanding is reached with the Rwandan government regarding their mandate. While the monitors, or field officers, should cooperate with local and national law enforcement officials they must be very careful not to place victims and witnesses in jeopardy by revealing confidential information. They should not conduct criminal investigations for the purpose of producing evidence that would be admissible at criminal trials unless extensively trained to do so. This emphasis should be on observing and reporting in a fair and impartial manner. A training program for the field offices should focus in their operational responsibilities, including instruction regarding the major international human rights instruments. They must receive training regarding methods for ensuring that victims and witnesses who provide them with information will be protected from reprisals. 4.) Funds should be channelled through Rwandan human rights NGO's to assist the surviving victims of the genocide; and 5.) Assistance to the justice system, as discussed further in a following section of this report, should be channelled through UNDP, or be distributed directly to an administrative cell within the Ministry of Justice.

Several other human rights concerns remain to be addressed. These include problems

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<sup>59</sup>Reports of armed incursions across the Zairian border are especially troublesome. According to a recent NEW YORK TIMES article, there are unconfirmed reports that "the exiled Hutu military hopes to open a major offensive in the southwest and declare it a 'liberated zone'" Donetella Lorch, *As Rwanda Trials Open, a Nation Struggles*, NEW YORK TIMES, (April 7, 1995) at A1-A7.

<sup>60</sup>Investigations of violence by the returning exiles can be considered within the mandate of the field operation because they are measures designed to prevent violations of common article 3 of the Geneva conventions. A similar approach was taken by The United Nations Observer Mission in El Salvador (ONUSAL). See *Report of the Commission on the Truth for El Salvador*, Annex, S/25500 (1 April 1993), at 20-21 (discussing the applicable law).

of returning refugees, as well as the conditions in prisons and other detention facilities. These areas, however, are being addressed, at least on a limited basis, by NGO's such as the ICRC and organizations that are focusing on refugee assistance. Donor assistance for these human rights activities is also needed.

## **The International Criminal Tribunal for Rwanda**

### **1. Background and Structure of the Tribunal**

The International Criminal Tribunal for Rwanda (ICTR), along with the Tribunal established to prosecute international crimes in the former Yugoslavia (ITFY),<sup>61</sup> represent the first attempts of the international community to prosecute violations of international humanitarian law since the close of the Second World War. The ITFY and ICTR are the only international criminal tribunals to be established by the United Nations.<sup>62</sup> The attention of the world community is understandably focused on their progress. Their effectiveness may well determine whether similar *ad hoc* efforts will be made again, or if a permanent international criminal court

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<sup>61</sup>The International Tribunal for the former Yugoslavia was established in Security Council Resolution 808, February 22, 1993.

<sup>62</sup>The International Military Tribunal (IMT) at Nuremberg was established by the Allied powers which exercised sovereignty over occupied Germany. Accounts of the Nuremberg trials are numerous. For relatively recent descriptions, see e.g. Robert E. Conot, *JUSTICE AT NUREMBERG* (1983); Matthew Lippman, *Nuremberg: Forty-five Years Later*, 7 *Conn.J. of Int'l. L.* (1991); TELFORD TAYLOR, *AN ANATOMY OF THE NUREMBERG TRIALS* (1992); Jonathan A. Bush, *Book Review Essay, Nuremberg: The Modern Law of War and Its Limitations*, 93 *Col.L.Rev.* (1993), (reviewing Telford Taylor's, *THE ANATOMY OF THE NUREMBERG TRIALS*).

Following World War II, in addition to the 24 defendants tried before the IMT, several thousand Nazi War criminals were tried by the Allies in their respective zones under Control Council Law No. 10, by military courts under national laws. For a Brief review of this background see, Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, *FOREIGN AFFAIRS* (Summer 1993), at 122.

will be established.<sup>63</sup>

The ICTR was established by the Security Council in November 8, 1994,<sup>64</sup> in the exercise of its powers under Chapter VII of the United Nation's Charter.<sup>65</sup> The Tribunal consists of eleven judges, including six trial judges and five appeals judges. The ICTR and ICTFY will share an appellate chamber, located at the Hague. The same prosecutor<sup>66</sup> will also serve both Tribunals. The ICTR, however, will have a separate registry and trial chambers. The ICTR statute provides that the judges shall adopt the same rules of procedure and evidence used by the ITFY "with such changes as they may deem necessary."

On February 23, 1995, the Security Council decided that the ICTR would have its seat in Arusha, Tanzania.<sup>67</sup> Rwandan officials stated that they believed that the seat of the Tribunal should be in Rwanda. The Rwandan government, however, said that it would cooperate with the

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<sup>63</sup>There have been several efforts to establish a permanent international criminal court since the end of the First World War. In the early 1950s, two projects were developed by a special committee of the United Nations' General Assembly. The committees work resulted in the Draft Statutes, neither of which have been acted upon. See Draft Statute for an International Criminal Court (Annex to the Report of the Committee on International Criminal Jurisdiction, 31 August 1951], 7 G.A.O.R. Supp. 11, U.N. Doc. A/2136 (1952) at 23; and Revised Draft Statute for an International Court (Annex to the Report of the Committee on International Criminal Jurisdiction, 20 August 1953), 9 G.A.O.R. Supp. 12, U.N. Doc. A/2645 (1954), at 21.

<sup>64</sup>Security Council Resolution 955 (1994), 8 November 1994.

<sup>65</sup>Chapter VII of the United Nations Charter relates to "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression." *Charter of the United Nations*, June 26, 1945, 59 Stat. 1031, T.S.No. 993, 3 Bevans 1153.

<sup>66</sup>A Deputy Prosecutor, however, has been appointed for Rwanda. The Deputy Prosecutor, Honore Rakotomanana (of Madagascar), heads an investigations/prosecutorial unit in Kigali, Rwanda.

<sup>67</sup>Security Council Resolution 977 (1995), 23 February 1995.

Tribunal to ensure that the persons responsible for genocide are brought to justice.<sup>68</sup>

## 2. Substantive Provisions

The ICTR Statute contains three provisions dealing with substantive offenses. Article 2 restates the provisions of the 1948 Genocide Convention.<sup>69</sup> Article 3, dealing with crimes against humanity, reformulates a provision with the same title that was included in the IMT Charter at Nuremberg; still another variation of this provision is included in the ITFY Statute.<sup>70</sup> Article 4 of the ICTR Statute contains provisions of common article 3 (1949) and of Additional Protocol II (1977) of the Geneva Conventions.

In his commentary that accompanied the proposed statute for the ICTFY, the Secretary-General stated that the Statute's substantive provisions (dealing with grave breaches of the Geneva Conventions of 1949,<sup>71</sup> violations of the laws and customs of war,<sup>72</sup> genocide,<sup>73</sup> and crimes against humanity)<sup>74</sup> must reflect "rules of international humanitarian law which are

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<sup>68</sup>LEXIS/NEXIS, Federal News Service, "Security Council Decides Arusha to be Seat of Tribunal for Rwanda," February 23, 1995.

<sup>69</sup>*Convention on the Prevention and Punishment of the Crime of Genocide*, December 9, 1948, 78 U.N.T.S. 277.

<sup>70</sup>Article 5 of the ITFY Statute, for example, requires that "crimes against humanity" apply in the context of an "armed conflict." No such requirement is contained in the ICTR Statute. Since the ICTR and the ICTFY can only apply customary international law, the Appellate chamber of the Tribunal will probably have to try to reconcile these different formulations. Which, if any of them, represents customary international law?

<sup>71</sup>*See* S/25704, 3 May 1993, paras. 37-40 (Article 2 of the ICTFY Statute).

<sup>72</sup>*Id.*, paras. 41-44 (Article 3 of the ICTFY Statute).

<sup>73</sup>*Id.*, paras. 45-46 (Article 4 of the ICTFY Statute).

<sup>74</sup>*Id.*, paras. 47-49 (Article 5 of the ICTFY Statute).

beyond any doubt part of customary law..."<sup>75</sup> This is required so that "the problem of adherence of some but not all states to specific conventions does not arise."<sup>76</sup>

A similar commentary by the Secretary-General did not accompany the Statute for the ICTR. The substantive provisions of the Statute for the ICTFY are confined to international customary law.<sup>77</sup> Regarding the ICTR, however, this issue may prove to be problematic. Whether, for instance, criminal sanctions can be applied for violations of the ICTR's Article 4 (dealing with common article 3 of the Geneva Conventions and Additional Protocol II) is an issue that is unresolved.<sup>78</sup> Since the ICTFY and ICTR share an appellate chamber,

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<sup>75</sup>*Id.*, para. 34.

<sup>76</sup>*Id.* International customary law is binding on all states regardless of their ratification of particular treaties or other instruments. For a discussion of customary law in the human rights context, see THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS ON CUSTOMARY LAW* (1989). It is important that the Statutes of the ICTFY and ICTR conform to customary international law for another reason as well. If they do not reflect international customary law, they may be considered retroactive, and violative of the principle of *nullum crimen sine lege* [there is no crime without prior law]. This principle was raised as a defense by the defendants during the Nuremberg trials. Although it was rejected at Nuremberg, a considerable body of scholarly work has focused on its importance. See e.g., Judith N. Sklar, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* 157-58 (1986).

<sup>77</sup>They do not, however, reflect all of customary international law that the Tribunal might apply. A full discussion of the legal issues with respect to the Tribunal is beyond the scope of this report.

<sup>78</sup>Strong arguments can be made, however, for imposing criminal sanctions through common article 3. For discussions of the applicability of common article 3 in the context of the former Yugoslavia, see e.g. James C. O'Brien, *Current Development: The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 *Am.J. of Int'l L* 639 at 646-647 (discussing the need to apply common article 3 and Additional Protocol II to the conflict in the Former Yugoslavia).

For a general discussion of the law to be applied to the conflict in the Former Yugoslavia, see Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, *FOREIGN AFFAIRS* 122-135 (Summer 1993); also see e.g., Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 *Am.J. Int'l L* 78, 82 (1994); Christopher C. Joyner, *Enforcing Human Rights Standards in the Former Yugoslavia: The Case for an International War Crimes Tribunal*, 22 *Denv.J. Int'l L & Pol'y* 253 (1994); Jordan J. Paust, *Applicability of International Criminal Law to Events in the Former Yugoslavia*, *Am.J. of Int'l L and Pol'y* 499; Charles Lewis Nier III, *The Yugoslavian Civil War: An Analysis of the Applicability of the Laws of War Governing Non-International Armed Conflicts in the Modern World*, 10 *Dick.J. Int'l L* 303 (1992); Payam Akhavan, *Punishing War Crimes in the Former Yugoslavia: A Critical*

inconsistencies between the two Statutes can, at least, be authoritatively resolved.

### 3. Concurrent Jurisdiction and *Non bis in idem*<sup>79</sup>

Article 8 of the ICTR Statute states that both the ICTR and national courts have jurisdiction over offenses committed in Rwanda, or by Rwandan citizens in neighboring states, for violations of international humanitarian law committed between January 1, 1994 and December 31, 1994. The ICTR has "primacy" over national courts, and may request that they

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*Juncture for the New World Order*, 15 Hum.Rts.Q. 262 (1993).

<sup>79</sup>The ICTR's Statute provides:

#### Article 8

1. The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.

2. 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.

#### Article 9

##### Non bis in idem

1. No persons shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal for Rwanda.

2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal for Rwanda only if:

(a) The act for which he or she was tried was characterized as an ordinary crime; or

(b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal for Rwanda shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

33 ILM 1598, 1605.

defer to the international tribunal. Article 9 prohibits national courts from retrying persons who have already been tried by the ICTR. Article 9, however, permits the ICTR to try persons who have already been tried by national courts under specific circumstances.

The ICTR does not have the personnel or other resources to try all of the cases growing out of the genocide. Nor should the ICTR necessarily attempt to exercise preemptive jurisdiction even if it could. Where national authorities are willing to undertake these responsibilities, and where trials by national authorities would be perceived as impartial and fair, domestic prosecutions could contribute to rehabilitation and reconstruction efforts. There remains, however, the practical question as to how responsibilities for the investigation and prosecution of violations of international humanitarian law should be divided between the ICTR Prosecutor and national authorities.

Following the precedent established by the IMT at Nuremberg, the ICTR should prosecute high-ranking civilian and military officials who were involved in planning and organizing the genocide.<sup>80</sup> These may be a small portion of the 40,000 defendants being detained by the Rwandan government. While no precise figures are available, a recent report by the United States Institute of Peace has classified the potential defendants, as follows:

1. The central core--a tightly organized group of an estimated 100 to 300 persons. These were the people who planned and organized the genocide. In Kigali, this core, known as the "zero network," included many close associates of the late President Habyarimana as well as political, military, and economic elites; beyond the capital, it included regional and local relays--mayors, political party heads, and militia leaders. This first tier would likely also include the leadership of Radio de Milles Collines.

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<sup>80</sup>Article 6 of the ICTR's Statute provides for the imposition of criminal responsibility on "[a] person who planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation and execution of a crime referred to in Articles 2 to 4 of the present Statute...." 33 I.L.M. 1598 at 1604.

2. Local leaders who were not part of the zero network but who were able to personally order local killings, including a number of municipal officials and administrative authorities; this second tier may comprise 1,000 to 3,000 individuals.
3. All those who have killed, including many who were themselves victimized and were forced to kill or be killed. This last tier of culpability could far surpass the 20,000 to 30,000 number that has been mentioned by officials of the new Rwandan government.<sup>81</sup>

The ICTR does not have the authority to impose the death penalty,<sup>82</sup> which is authorized under Rwanda's law. Thus, if the ICTR focuses on the planners and organizers of the genocide, the persons who are most culpable for atrocities may receive a less severe penalty than those who were acting at their direction.

#### **4. Extradition and the Cooperation of States with the ICTR's Investigations and Prosecutions**

Many of the persons sought for investigation and prosecution by the ICTR may be residing outside Rwanda. Some will likely be located in neighboring states, such as Zaire. According to ICTR officials, several suspects are located in Western Europe and in North America. The Tribunal's ability to obtain custody of these persons will, in effect, determine the success or failure of the ICTR in bringing those who have committed genocide or other violations of international humanitarian law to justice.<sup>83</sup>

The ICTR's Statute requires states to cooperate with the Tribunal's operations. Article

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<sup>81</sup>United States Institute of Peace, *Rwanda: Accountability for War Crimes and Genocide, a Report on a United States Institute of Peace Conference* (undated, Conference held on September 16, 1994).

<sup>82</sup>See Article 23 of the ICTR Statute 33 I.L.M. 1598, at 1610. Article 23 states that "[t]he penalty imposed by the Trial Chamber shall be limited to imprisonment."

<sup>83</sup>For a discussion of the problem of extradition in the context of the ITFY, see Kenneth S. Gallant, *Securing the Presence of Defendants in the International Tribunal for the Former Yugoslavia: Breaking with Extradition*, paper delivered at the International Experts Conference on International Criminal Justice, December 408, 1994, Siracusa, Italy.

28 states that:

1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
  - (a) The identification and location of persons;
  - (b) The taking of testimony and the production of evidence;
  - (c) The service of documents;
  - (d) The arrest or detention of persons;
  - (e) The surrender or the transfer of the accused to the International Tribunal for Rwanda.<sup>84</sup>

The failure of national authorities to cooperate with the Tribunal could result in the matter being referred to the Security Council.<sup>85</sup> Since the establishment of the Tribunal is considered an enforcement mechanism under Chapter VII of the U.N. Charter, cooperation in transferring defendants to the Tribunal is an international obligation of all states. The obligation is superior to provisions of domestic law that may hinder compliance with Article 28.

## 5. The Current Situation and the Problem of Delay

There are currently five prosecutors and investigators serving the ICTR.<sup>86</sup> Five months after the ICTR was established<sup>87</sup> -- and over nine months after a cease-fire was declared<sup>88</sup> --

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<sup>84</sup>Several of the rules adopted by the ITFY also relate to extradition and state cooperation in securing the custody of an accused. *See e.g.*, Rules 55, 56 and 59, IT/32.Rev.1 (5 May 1994).

<sup>85</sup>*See* Rules 59(B) and 61 (E), *id.*

<sup>86</sup>This does not include Prosecutor Richard Goldstone, who acts as chief prosecutor for both the ICTFY and the ICTR. In May, it was announced that 31 investigators, seconded from several governments -- including the United States and The Netherlands-- would supplement the investigative staff.

<sup>87</sup>November 8, 1994.

<sup>88</sup>July 18, 1994.

there is no operating registry. The judges of the Trial Chambers were not appointed by the Security Council until May 1995. These delays might have been expected, for very substantial delays plagued the ICTFY from its inception. The ICTFY, which was established on February 22, 1993, issued its first indictments in November 1994, and a Trial Chamber held its first hearing in April 1995. Thus, two years after having been established, the ICTFY has yet to hold its first trial.

Since the ICTR will benefit to some extent from the prior existence of the ICTFY's institutional apparatus, the time from start-up to its first trial may be shorter. Nevertheless, many of the problems that led to the ICTFY's delay are also being experienced by the ICTR.<sup>89</sup> Problems relating to logistics, funding, and staffing, for example, are recurring. Five investigators, for instance, fall far short of the number needed to conduct investigations within Rwanda and in other countries where suspects and witnesses may be located. The Tribunal's chief investigator has said that 100 investigators are needed. Hindered by an inadequate budget, the Prosecutor has been unable to establish a visible presence within Rwanda.

The Tribunal received \$2.9 million to cover the period of 1 January through 31 March 1995. In May 1995, an additional 7 million dollars was pledged by donor nations. As a result of the Tribunal's low budget, restrictions were initially imposed on its contracts. The Tribunal, for example, could hire staff for only a three month period. When the Tribunal's trust fund was established, the Tribunal was allowed to use the fund as collateral. Thus, it was permitted to hire

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<sup>89</sup>For a discussion of several of the bureaucratic problems relating to the ICTFY, see its First Annual Report, IT/68.28 July 1994, paras. 28-38. One important reason for delay with the ICTFY, however, was the problem relating to the appointment of a prosecutor. A prosecutor-designate withdrew in February 1994, and a five month delay ensued in the appointment of another Prosecutor, Mr. Goldstone.

persons for up to 12 months. Additional administrative problems, however, continue to impede the Tribunal's work. The Prosecutor has no authority to hire staff without the approval of the UN's office of Legal Counsel in New York. As a result, there is currently a three month delay between the time of an applicant's interview and selection, and when the applicant is actually hired. Additional delays and inconveniences impede the Tribunal's work. In order to receive permission to travel out of the country, for example, the Deputy Prosecutor must ask the Chief Prosecutor to call the Legal Counsel's office in New York. Permission is then relayed back to Kilgali. Because of such problems and the resulting delays, high ranking Rwandan officials have expressed doubt concerning the international community's commitment to prosecute those persons most responsible for violations of international humanitarian law.

Acting under Chapter VII of the UN Charter, the Security Council's justification for exercising jurisdiction is the threat the current situation poses to international peace and security. In establishing the Tribunal, the Security Council also stated that its aim was, in part, to "contribute to the process of national reconciliation and to the restoration and maintenance of peace." The adoption of a Security Council resolution alone raised expectations that some effective action would be taken promptly to ensure that the major violators of international humanitarian law would be prosecuted. Those expectations are far from being met.

#### **6. Witnesses and Victims**

Several issues have emerged regarding the handling of witnesses and victims in the context of the ICTR's relationship with national authorities. Just as national authorities will have information that will be of value to the ICTR, the Tribunal's prosecutors will also have information that will be helpful in national prosecutions. To what extent should the information

be shared?

Problems of sharing information may arise when witnesses provide the ICTR with evidence of abuses by the current government. These witnesses may not want their identities revealed to Rwandan authorities. In addition, persons providing information to the Tribunal may fear retaliation by those who participated in the genocide.

## **7. Conclusions and Recommendations**

1. The UN Security Council should emphasize that all member states have an obligation under the Charter to cooperate with the Tribunal, and that the Council is willing to use its powers of sanction when cooperation is not forthcoming.

2. A special representative of the Security Council, or another appropriate party, should communicate with officials in Zaire, Burundi, and Uganda where large refugee populations are located and negotiate arrangements to separate persons suspected of crimes in connection with the massacres of April-July 1994 from those who are not suspected of wrongdoing. The F.A.R. in Zaire should be disarmed and arms shipments to the refugee camps in Zaire should be halted.

3. UN member states should ensure that the Tribunal has an adequate budget to enter into long term financial arrangements and hire adequate staff. The Prosecutor should be given the authority to hire staff, without the approval of the Legal Counsel's office in New York.

4. UN donor nations should second qualified prosecutors and investigators to the ICTR to bring staffing levels up to the estimated 100 persons needed.

5. The Tribunal should act immediately to establish a functioning registry in Arusha, or

to temporarily locate the registry in Kilgali.<sup>90</sup>

6. The Prosecutor should communicate with other UN agencies, including the High Commissioners for Human Rights and for Refugees, as well as the Special Rapporteur to discuss what specific measures are needed to ensure cooperative relationships regarding the investigations.

#### **D. Administration of Justice**

##### **1. Justice System Needs**

Reestablishing Rwanda's judicial system is widely considered to be essential to national rehabilitation and reconstruction efforts. As mentioned previously,<sup>91</sup> it is inextricably tied to efforts to repatriate those who were exiled and to resettle persons who were internally displaced. The ability to achieve and maintain public order is also needed to establish the legitimacy of the government. It has been widely reported that false accusations have resulted in the arrest of thousands of innocent Hutu's. The government lacks the resources to properly investigate the vast majority of these cases to determine if a lawful basis for continued detention exists.<sup>92</sup> Most critically, national authorities as well as the international community, have a responsibility to ensure that the victims of the genocide have access to justice.

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<sup>90</sup>ICTR officials have stated that the registrar's facilities in Arusha, as well as the Trial Chambers, must be rehabilitated before they can be occupied. This construction is expected to take at least ten months.

<sup>91</sup>See the Introduction of this report.

<sup>92</sup>The nation's first national trials were scheduled for April 6, 1995. However, the trials were postponed *sine die*. The government stated that it could not complete the investigations of the accused. U.N., *Rwanda: Humanitarian Situation Report* (15 April 1995), at 5.

Rwanda's legal system, as stated earlier, essentially collapsed following the massacres of April-May 1994. The nation's justice system, however, has long experienced severe problems in the area of human rights. The pre-April 1994 judicial system, for instance, was subject to manipulation by executive branch officials despite constitutional provisions ensuring an independent judiciary.<sup>93</sup> Defendants were often not represented by counsel, and other rights related to arrest, detention and trial were frequently ignored. Several factors, including the inadequate education and training of judicial personnel, as well as budgetary constraints, further eroded the functioning of the judicial system.<sup>94</sup> If Rwanda is to establish a legal system that complies with international standards, then, it must construct a justice system that substantially improves on the system which previously existed.

Rwandan governmental officials have identified several short-term and long-term needs for the justice system. These include: (1) repairing buildings and obtaining office equipment for courts and prosecutors; (2) receiving the assistance of foreign judges and lawyers; (3) obtaining expert assistance and training for police and prosecutors; (4) obtaining assistance to the Ministry of Justice; and (5) receiving assistance for judicial system organizations such as the bar association, and help in establishing alternative dispute mechanisms.<sup>95</sup>

Assistance, then, is needed to all components of the justice systems: courts, police, prosecutors, and prisons. The help needed includes personnel, equipment and supplies as well as physical repair. In short, the answer to what is needed is: "everything".

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<sup>93</sup>See, U.S. State Department, *Country Reports*, *supra* note 3, at 202.

<sup>94</sup>*Id.*

<sup>95</sup>See United Nations Development Programme (UNDP), *Draft Programme of the Government of Rwanda: Rehabilitation of the Justice System*, (December, 1994), at 17-18.

In December 1994, the United Nations Development Programme (UNDP) and the Government of Rwanda estimated that it would cost \$U.S. 66 million over a two year period for the "re-start" of the justice system.<sup>96</sup> Nevertheless, the UNDP stated that "[c]urrently, there is relatively little assistance to the Government of Rwanda. Most international assistance is being channelled to the refugee camps in neighboring countries."

In May 1995, approximately ten months after a cease-fire was declared, there was still very little assistance being distributed in a coordinated fashion for the administration of justice. Several bilateral assistance programs were underway. These programs, however, did not approach the level of assistance that was broadly recognized as being required to "restart" the justice system. The UNDP reports that a total of \$44.6 million had been pledged by donor nations for human rights and the administration of justice.<sup>97</sup> In mid-May 1995, the projects being executed totaled \$5 million.

## 2. **Bilateral Assistance Programs**

In May 1995, the programs underway or planned included:

- (a) recruiting foreign magistrates to serve in Rwanda's judicial system;
- (b) training of judicial police by Citizens Network, a Belgian NGOs; Thus far, 150 IPJ's (*inspectors de police judiciaire*) have been trained. Another 120 IPJ's and 30 army personnel entered the program in April;
- (c) salary support to Rwanda's Ministry of Justice (MOJ) by the European Union

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<sup>96</sup>*Id.* at 32. UNDP's Programme Support Document states the cost to be \$U.S. 56 million, but the total does not equal the combined subtotals. U.N.D.P. identifies \$U.S. 40.5 million in short-term emergency measures and \$U.S. 25.5 million in long-term capacity. *Id.* at 24-25.

<sup>97</sup>This does not include \$500,000 being spent on prison rehabilitation.

- (EU) and the Belgian and Canadian governments;
- (d) establishing a Legislation Review Commission to adopt Rwanda's legal structure to the Arusha Accords; the government of Germany has funded this program through the M.O.J.;
  - (e) training of magistrates through a program funded by the Belgian government;
  - (f) the Belgian and Swiss governments, along with Citizens Network, are providing assistance to the law school in Butare;
  - (g) the Swiss and Norwegian governments are involved in the physical repair of court facilities; and
  - (h) the United States government had provided over \$1 million in supplies and equipment and evaluations were underway of justice system needs.

### **3. The Triage Commission**

A National Triage Commission was established in January 1995 by the Ministry of Justice. Its purpose is to review the documentation of persons in detention and releasing those whose arrest is not supported by legally sufficient evidence.<sup>98</sup> The Commission consists of persons representing the police, army, and prosecutor's office.<sup>99</sup> There are now similarly constituted triage commissions in each of the nation's prefectures, although they are not all functioning. The Triage Commissions do not appear to contribute substantially to either facilitating trials or to alleviating prison overcrowding. In Kilgali, for example, the Commission

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<sup>98</sup>A similar commission was established after the 1990 RPF invasions, which was followed by the arrests of thousands of Tutsi who had no connection to the RPF's action. The Triage commissions also appear to violate international standards concerning judicial independence.

<sup>99</sup>It has also been reported that a member of the intelligence service (Service du Renseignement) participates in the meetings.

has met ten times and reviewed approximately 150 cases. On April 15, 1995, it reviewed 24 cases and dismissed 8 of them. In late April, however, approximately 200 new cases were being filed per week.

The triage commissions were established as a means of insulating judges, who dismissed cases due to a lack of evidence, from RPA criticism. In the aftermath of the massacres, the army made a number of arrests, although it did not have the legal authority to do so.<sup>100</sup> As a result, magistrates released over 20 persons without consulting the police or the military. The Minister of Justice established the Triage Commission so that all of the agencies that had been involved in detaining suspects would participate in reviewing their possible release. The Triage Commission has no basis in Rwandan law.

The efforts described above have not "re-started" Rwanda's justice system, although several of them should contribute to the longer term development of the legal system. The international community's assistance has focused almost exclusively on increasing resources and training, which are necessary but insufficient conditions for initiating trials.

The failure to commence criminal proceedings is not solely the result of a logistical or an administrative quagmire. The Rwandan Government has not yet resolved several threshold issues. These include: 1.) What law, international or domestic will be applied? Rwanda has not

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<sup>100</sup>Under Rwandan law, prosecutors, IPJ's, bourgmestres (a local official), and members of the National Gendarmerie, which is part of the army and appointed by the Minister of Defense, among others, can make arrests. In practice, it is sometimes unclear whether an arrest has been made by the army or the gendarmerie.

The procedure for making an arrest is generally as follows: the arresting officer prepares a *proces-verbal d'arrestation* (PVA), and detains the suspect in a facility of a brigade or a commune. The suspect may be held for 48 hours while the case is investigated and a dossier prepared. The suspect is transferred to the prefecture prison and the *officer de police judiciaire*, forwards the dossier to the *parquet*, or prosecutor's office. See Ana Marie Linares, *Procedures for the Trial of Genocide Cases*, prepared for USAID, 4 May 1995.

yet passed legislation implementing the Genocide Convention. It may do so soon, but application of the newly enacted law would, according to several Rwandan jurists, violate the principle of *nullum crimen sine lege* (no crime without prior law) as interpreted under Rwandan law. Nevertheless, many of the persons who have been detained have "genocide" entered as the charge on their records. 2.) Will foreign judges be allowed to participate in the proceedings, and if so, in what capacity? 3.) Will foreign lawyers be permitted to participate? Rwandan law permits each defendant to be represented by counsel, but does not require the government to provide a lawyer to indigents. In addition, the government has not yet constituted its Supreme Court, and the members of the *Conseil national de la Magistrature*, who fill lower court vacancies have not yet been appointed.

Interviews with several magistrates indicated that prosecutions are not likely to go forward until they receive a clear message from higher-ranking officials. The role that the RPA is playing in the prosecutions is also unclear. Prosecutors in some districts have had to obtain RPA approval before dismissing cases. The departure of the chief prosecutor for Kigali, who alleged interference by the RPA, raises further concerns regarding the role of the army in the judicial system. One judge who was interviewed expressed concern over his personal safety if prosecutions resulted in the dismissal of defendants who were arrested by the RPA. He indicated that the Government would have to provide judges with security before trials could commence.

#### **4. Recommendations**

1. The donor community should arrange for a special emissary to meet with the Minister of Justice and other appropriate government leaders and discuss the actions needed to break the current impasse. A plan should be developed for delivering further assistance with the

understanding that the first trials will begin on a date certain. Further funding should be contingent on the progress made in conducting the trials.

2. Several previous reports for USAID have detailed the particular assistance required to address specific problems or bottlenecks in Rwanda's justice system (see, e.g., Ana Marie Lineres', *Procedures for the Trial of Genocide Cases* ). While the justice systems' needs are literally all-encompassing, priority should be given to the actions that are critical to jump-starting trials. These include expert assistance to prosecutors for help in developing trial strategies, the recruitment of francophone defense attorneys, training programs for IPJs, and material and supplies needed for the routine operation of the court system.

#### **E. Lessons to be learned**

Each human rights emergency situation has its own peculiarities, and the response of the international community should be tailored to the specific circumstances of particular crises. The situation in Rwanda is unique in that it the perpetrators of a massive human rights abuse fled the country. Consequently, conventional human rights responses focusing on current abuses and protective measures -- such as monitoring, reporting and advocacy -- have not been adequate remedial strategies. The compelling human rights need of the victims of genocide is to have access to justice. This is a need that the human rights field operation in Rwanda was ill-equipped to meet.

While the situation in Rwanda is unique, it nevertheless suggests lessons for future crises. Many of the problems that have emerged are the result of operational procedures and organizational structures that must be addressed if the performance of international human rights agencies is to improve. The following observations are designed to be a guide in responding to

future emergencies.

1. Human rights field operations appear to have a greater chance of success when they are incorporated into a comprehensive strategy for bringing peace to the region.<sup>101</sup> In the context of Rwanda, this means that a human rights field operation should be incorporated into an overall regional approach that would focus on a 1.) disarming the F.A.R. who are in refugee camps located in Rwanda's borders; 2) separating those who are suspected of having committed violations of international humanitarian law from those who are not suspected; 3) providing an environment conducive to repatriations for refugees who want to return (who may be relatively few in number); and 4) policing Rwanda's borders to deter violent incursions on the part of the current government and the F.A.R. When seen as part of an overall settlement, human rights activities are most likely to be viewed as being impartial and fair.

2. Mandates for Human Rights field operations should be drafted carefully by persons who are familiar with the details of the crisis. In Rwanda, for example, several problems might have been avoided if the mandate had been drafted after a study team went to the country, became familiar with the internal political dynamics of the current regime, and consulted with leaders of the current government regarding their views on what an appropriate mandate should contain.

While a mandate may be broad so as to provide those responsible for carrying it out with flexibility, it must not include potentially conflicting responsibilities. Where monitoring, investigating and reporting are required, they should be performed by an agency that is separate

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<sup>101</sup>For a description of previous peacekeeping missions that incorporated human rights components into their field operations, see Human Rights Watch, *THE LOST AGENDA: HUMAN RIGHTS AND U.N. FIELD OPERATIONS*(1993).

from activities that involve training, education and other projects that require establishing a confidential relationship with one side to a conflict (i.e., the current governments).

3. In establishing a field operation, there should be a clear chain of command and overlapping reporting requirements should be avoided. For instance, persons conducting a criminal investigation should report only to the prosecutor or another person directly responsible for the investigation. Furthermore, persons should be required to report to only one authority; for example, investigators should not be required to report to a Special Rapporteur, a Commission of Experts, and the Centre for Human Rights in Geneva.

Reporting requirements should be clearly established. Periodic reports should be filed and circulated to national, as well as international officials. Reports, or a portion of them that does not contain confidential information should be available to the public. The purpose of such reports should be made clear; that is, the reports should form the basis for the decisions of the High Commission or the Special Rapporteur.

4. The experiences in Rwanda, the former Yugoslavia, and in other countries show that the demand for justice comes early in the aftermath of a crisis; even, in some cases, as the crisis continues. The mere adoption by the UN Security Council of a resolution establishing a criminal tribunal raises expectations that the international community will provide justice promptly. The organizational structures and operational procedures of the UN in the areas of human rights and international criminal justice however, are incapable of delivering justice in a timely and efficient fashion.

The early prosecution of serious violations of international humanitarian signals the concern of the world community and can deter further abuses. Delays will inevitably occur in

bringing the first cases to trial. The early establishment of an effective investigative effort, indictments and the apprehension of suspects, however, can help to establish the credibility of the Tribunal's response to a crisis.

The delays that the ICTR and ICTFY have encountered principally relate to problems of funding and staffing the prosecutors' office. These problems must be remedied if the response in dealing with future crises is to be improved. The Tribunal must have the budgetary resources to make long-term financial commitments for hiring staff, renting office space and purchasing equipment.

These problems must be addressed whether international prosecutions remain *ad hoc* or whether a permanent international criminal court is established. If a permanent tribunal is established by treaty, for example, it may not act any more expeditiously than the ICTR or ICTFY if it operates under the same administrative and budgetary restrictions.

An early agreement is needed between the Tribunal's prosecutors and national authorities regarding how the prosecutorial tasks will be divided and how, and to what extent, information will be shared. If national authorities are willing and have the resources to undertake prosecutions for violations of international law -- and if such domestic prosecutions would be viewed as impartial and fair -- the tribunal should defer to them.

The cooperation of states in assisting the Tribunal in its investigations and transferring defendants to the Tribunal's custody is critical to its success. States should adopt the legislation needed to ensure that they are able to comply with their international obligations.

5. The leadership of human rights field operations is critical to their success. It is not sufficient for the leadership to be selected on the basis of general experience in emergency

relief work or because they possess the requisite foreign language skills. They must have substantive knowledge of and experience in the areas involved in their work.

This substantive knowledge is needed for three central reasons: a) the leadership of the field operation must be able to think strategically about implementing human rights, thus they must be familiar with the institutions and procedures involved in protecting and promoting human rights; b) they must be familiar with the content of major human rights instruments and with international humanitarian law so that they are knowledgeable about the applicable international obligations of the parties involved in a conflict; c) their knowledge and experience effects the credibility of the field operation with the parties involved in a conflict and it also effects their ability to recruit and retain highly skilled and knowledgeable assistants.

6. The U.N.'s Centre for Human Rights capacity to provide administrative and logistical support for field operations must be strengthened. This requires that it be staffed with persons experienced in managing field operations, such as in the areas of disaster relief or emergency refugee assistance.

7. The Centre for Human Rights should maintain a data bank of persons experienced in human rights field work, and should develop a protocol regarding how such operations will be staffed in the future. This includes developing procedures for identifying, recruiting, interviewing and training field officers.

8. The leadership of a human rights field operation must be able to assess and deal with political as well as administrative obstacles that arise. Political problems do not readily yield to technocratic solutions. If, for example, a major obstacle to the commencement of trials in Rwanda is political in nature (i.e., the delay of the National Assembly in appointing members

of the Supreme Court and Counsel of Magistrates), high level political negotiations may be needed to break the impasse.

9. An early warning system is needed to trigger the deployment of peacekeeping troops and U.N. human rights monitors. Some studies suggest that three factors are present in most states in which genocides or mass killings have occurred.<sup>102</sup> These factors are the existence of sharp internal cleavages, a history of intergroup conflict, and the lack of foreign power's interest in or constraints on the ruling elites. All of these factors were present in Rwanda.<sup>103</sup> In Rwanda, moreover, the withdrawal of U.N. forces when violence broke out probably signalled to the leaders of Rwanda's former government that few or no constraints would be imposed on how the civil conflict could be waged. Communal conflict, such as inter-ethnic conflict, may follow a dynamic which differs from revolutionary violence. Some studies suggest, for instance, that several factors make intense communal conflict more likely. These are: 1) the presence of two or more ethnic groups with deep historically-based hostilities; 2) ethnic identifications that have not been diluted by other identifications, such as those based on class or other group associations; 3) economic inequalities that reinforce discriminatory patterns of behaviour; and 4) where disadvantaged groups are relatively large compared to advantaged

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<sup>102</sup>See e.g. Barbara Harff, *The Etiology of Genocide* in Michael N. Dobkowski and Isidor Williams (eds.), *ESSAYS ON GENOCIDE* 41-59 (1986). Also see Leo Kuper, *GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY* (1981). These works are discussed in relation to Africa in Ted Robert Gurr, *Theories of Political Violence and Revolution in the Third World*, in Frances M. Deng and I. William Zartman, *CONFLICT RESOLUTION IN AFRICA* 153-189, at 174 (1991). For other discussions of genocide, see FRANK CHALK AND KURT JONASSOHN, *THE HISTORY AND SOCIOLOGY OF GENOCIDE: ANALYSES AND CASE STUDIES* (1990); ROBERT JAY LIFTON AND ERIK MARKUSEN, *THE GENOCIDAL MENTALITY* (1990); AND ERVIN STAUB, *THE ROOTS OF EVIL, THE ORIGINS OF GENOCIDE AND OTHER GROUP VIOLENCE* (1989).

<sup>103</sup>A test of this theory, however, would also require a showing that these factors were absent in nations where genocides did not occur.

groups.<sup>104</sup> Such indicators, when coupled with an event that threatens to exacerbate inequalities or disrupt the *status quo*, such as the 1990 RPA invasion, appear to be strong predictive factors.

Models for predicting genocides or mass killings are clearly in need of refinement. There appears, however, to be sufficient information on which to structure an early warning system on which the deployment of large numbers of peace keepers or human rights monitors could be based.

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<sup>104</sup>Robert Ted Gurr, *supra* note 102, at 184. Also see Donald L. Horowitz, ETHNIC GROUPS IN CONFLICT 597-99 (1985).