OPEN LETTER REGARDING THE NEED TO EXPAND THE JURISDICTION OF THE INTERNATIONAL TRIBUNAL FOR RWANDA

May 18, 1995

1. Introduction

In enacting United Nations Resolution 955 and creating the International Tribunal for Rwanda, the Security Council responded to the universal recognition that "genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda." To "contribute to ensuring that such violations are halted and effectively redressed," the International Tribunal has been charged with prosecuting persons responsible for genocide or other violations of international humanitarian law. On April 5 of this year, approximately one year after the onset of the genocide in Rwanda, the Tribunal announced that it had identified 400 suspects for possible prosecution, and that the first indictments would be issued later this year.

Creation of the Tribunal has been one of the most significant international responses to the genocide in Rwanda, and the recent announcement indicates important progress. Its mission, and its accomplishments to date, deserve the highest praise. At the same time, it is vital that ways to improve the Tribunal's operation be considered. Present jurisdictional limitations on the Tribunal -- including geographic and temporal restrictions on the Tribunal's competence, limits on the class of persons subject to punishment, and the exclusive focus on imprisonment as a means of redress, to the exclusion of criminal penalties or civil damages -- may frustrate realization of the Tribunal's goal of ensuring "effective redress," in particular by hampering exploration of complicity in what may have been a carefully orchestrated campaign in Rwanda. This open letter briefly explains how these limitations on the Tribunal are unjustified as a matter of international law, and proposes reforms that, if seriously considered, may also promote the development of effective international institutions for the prevention of future Rwandas.

2. Present Limitations

While the statute governing the Tribunal describes a broad and important mission, it also places at least four significant restrictions on the Tribunal's authority. First, the statute limits the geographic competence of the Tribunal to serious violations of international law committed in Rwanda itself, or those violations committed in neighboring states by Rwandan citizens, thereby excluding consideration of other crimes directly related to the 1994 massacres but that were committed outside Rwanda and its neighboring states.

Second, the statute limits the Tribunal's competence to violations occurring within the calendar year 1994. Third, the Tribunal is foreclosed from addressing wrongdoing committed by entities commonly treated as persons before the law and subject to legal constraint -- such as international organizations, states, and public and private enterprises -- because its purview is limited to jurisdiction over "natural persons." Fourth, and finally, the statute contemplates that only criminal proceedings will be conducted, and that the only punishment the Tribunal may mete out is imprisonment.

These four restrictions are not required by the rules of international law which the Tribunal is directly or indirectly entrusted with enforcing. Following the Genocide Convention, the statute charges as punishable not only the crime of genocide per se, but also "[c]onspiracy to commit genocide," "[d]irect and public incitement to commit genocide," "[a]ttempt to commit genocide," and "[c]omplicity in genocide." Parties committing such crimes should, in theory, enjoy no safe harbor. As noted by the U.N. Commission of Experts reporting on the situation in Rwanda, the prohibition on genocide has achieved the status of jus cogens, and accordingly binds all members of the international community, regardless of whether their states have ratified the Genocide Convention.

Nonetheless, the four restrictions we have described severely constrain the Tribunal's authority to address complicity in the genocide and other crimes committed in connection with Rwanda. First, we are aware of no basis for limiting the class of defendants to persons acting in Rwanda, or to those Rwandan citizens acting within Rwanda or in neighboring countries. If Rwandans and persons of every nationality are bound by the principles of international law in question, they are so bound regardless of where their acts were committed. Accordingly, the geographic limits on the Tribunal's competence should be lifted, freeing it to investigate and prosecute acts committed anywhere that relate

directly to the 1994 massacre in Rwanda and are otherwise punishable under the statute as crimes against international law.

Second, limiting the Tribunal's competence to crimes committed in 1994 considerably handicaps its objective of punishing complicity in crimes in Rwanda. Under the statute, as under the Genocide Convention, wrongs punishable on the same terms as genocide -- including conspiracy to commit genocide, incitement to genocide, attempt to commit genocide, and complicity in genocide -- necessarily include acts committed prior to, and after, the genocide itself. With respect to Rwanda, at least, such acts may be of considerable significance. There is evidence that the recent genocide was a carefully orchestrated event, for which planning had begun as early as 1987. Indeed, the International Federation of Human Rights put the international community on notice in 1993 of "massive and systematic human rights violations," and U.N. Commission of Experts cited evidence that public and private parties were openly encouraging genocide in 1993. In this context, limiting the Tribunal's competence to events immediately proceeding or following the Rwanda genocide inappropriately pretermits the scope of complicity that should be explored.

The third restriction, the exclusion from liability of entities other than "natural persons," is also unjustified. Under the traditional view of international law, to be sure, neither states nor legal persons could be held criminally liable. However, such thinking is increasingly obsolete. States have long been held responsible for breaches of international obligations, as well as for assisting others in the commission of wrongful acts. Where the international obligation in question is one of essential importance, such as the prohibition against genocide, many authorities, including the International Law Commission, consider a serious breach of that obligation by a state to constitute an international crime. While states have been reluctant to acquiesce in the jurisdiction of any international court to consider such charges, and have interposed sovereign immunity defenses in national courts, the assertion of state prerogatives in the face of universally-recognized norms is increasingly dubious. In light of allegations that states permitted the sale and transit of arms to Rwanda despite evidence of their intended purpose, it seems entirely appropriate to consider anew the possibility of state criminal liability.

For their part, corporations and other legal organizations are frequently subject to criminal liability under national legal systems, and international law is increasingly recognizing the

role such legal persons can play in international affairs -- and the need to subject them to the constraints, as well as the advantages, of legal personality under international law. Nearly fifty years ago, the Nuremberg Tribunal was deemed competent to declare groups or organizations "criminal," which facilitated the prosecution of members of such groups before national courts. The gap between that authority and the right to punish criminally the organizations themselves is not so great as it may first appear. Given alleged wrongdoings by some entities -- including arms merchants, and banks and other financial institutions aiding in the purchase or sale of arms, whose complicity in the Rwandan genocide has been documented by a number of respected international groups, including the Arms Project of Human Rights Watch -- the Tribunal should not be prevented from even considering the prospect of their criminal liability.

Concluding that states and legal persons should potentially be subject to criminal liability does not, of course, resolve the question of how they might be punished. That issue, however, should be considered together with the fourth restriction we have highlighted -- that is, whether imprisonment is the only criminal sanction that should be available to the Tribunal, and indeed whether it should be limited to criminal sanctions at all.

The underlying instruments and principles of international law do not suggest that imprisonment, or even criminal sanctions, must be the exclusive remedy for the crimes that the Tribunal is presently charged with investigating. Under Article I of the Genocide Convention, for example, parties to the Convention confirmed that they undertook to "prevent and punish" genocide, and under Article V further pledged to "provide effective penalties" for persons found guilty of acts proscribed under the Convention. In addition to enacting national penalties, parties may call upon the competent organs 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 such acts.

Although the Tribunal's work to date has been quite promising, its present tools appear inadequate to the prevention and suppression of crimes like those committed in Rwanda. The limits of imprisonment as a remedy are perhaps clearest with respect to states and other legal persons, which cannot be imprisoned as such. It is possible, of course, to simply prosecute high-ranking officials responsible in part for the conduct of such entities. Following World War II, for example, a corporate executive was convicted of being an accessory to war crimes for supplying Zyklon B gas to German concentration camps, and

Japanese officials were found criminally negligent for failing to insist on an immediate end to atrocities committed by troops in Nanking. By itself, however, the imprisonment of top executives or leaders may not adequately deter their organizations, particularly if the economic or political motives for the conduct are powerful. And deterring such conduct is particularly critical, since in contrast to many of the Rwandans who may be prosecuted, these organizations repeatedly play important roles in international affairs.

More generally, there is reason to be concerned that criminal prosecution, within the constraints imposed on the Tribunal, may be insufficient. The task confronting the Tribunal is staggering. It is commonly estimated that at least half a million Tutsis were killed in the Rwandan genocide, and that the number of Rwandans guilty of crimes under international law may number in the thousands. Given restrictions on its budget and personnel, the Tribunal cannot possibly assume responsibility for prosecuting more than a fraction of that number, and there are equally serious restrictions on the ability of the Rwandan authorities to prosecute the remainder.

Moreover, even when prosecution is initiated, the apprehension of those indicted may be difficult or impossible, further delaying the measure of justice. While the Nuremberg Tribunal was permitted to proceed to judgment against criminals who refused to appear, the Tribunal is barred from conducting trials in absentia. The Security Council has properly insisted that states are obliged to surrender accused persons to the Tribunal for Rwanda, but the Tribunal may have little recourse if an accused criminal continues to enjoy the protection of its own or a host state.

3. A Proposal to Expand the Tribunal's Competence

For reasons we have discussed, several changes could substantially improve the ability of the Tribunal to address complicity in the crimes committed in Rwanda. First, geographic and temporal restrictions on the Tribunal's competence should be lifted, so that it could address conduct outside Rwanda, and conduct transpiring before 1994, that relates directly to the 1994 massacres and otherwise constituted a crime under the Tribunal's statute. Second, all parties should be made accountable for such acts, regardless of whether they are natural persons, organizations, corporations, or states. It is clear that this will render the task of the Tribunal more complex, but in time it will contribute to the success of its objectives and avoid establishing a dangerous precedent that such acts are effectively immune from prosecution.

The final reform we have indicated, that the Tribunal should be empowered to provide monetary relief, is more complicated but by no means radical. A wide variety of national judicial systems presently supplement the sanction of imprisonment with criminal fines or civil damages, or both, since such relief serves both as a valuable means of deterring crime and offers the possibility of at least partial compensation for the victims of the genocide.

If criminal fines are imposed in addition to imprisonment, the funds could be used for defraying the Tribunal's costs and for the reconstruction of Rwanda.

Civil claims, in contrast, might be presented by members of the international legal community on behalf of Rwandans injured by the commission of criminal acts, or still more appropriately, in the form of class claims for those similarly situated with any damages employed for the benefit of that class. While a civil damages remedy would pose difficult and novel procedural issues, such as the rules governing class representation, it would also possess some unique advantages. For one, it would afford a possible remedy against parties who might take advantage of the present bar on trials in absentia and frustrate criminal prosecution by evading custody or defeating extradition. Moreover, a damages remedy would permit members of the international legal community to assist the Tribunal in gathering and presenting evidence concerning events in Rwanda, which could be of considerable help in accomplishing an enormous and extremely time-sensitive undertaking.

We recognize that the changes we propose may require that the Security Council revisit the issue of the Tribunal's jurisdictions but such changes may be necessary to safeguard the Tribunal and its mission. As Resolution 955 states, the Council remains actively seized of this matter, and is "[d]etermined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them." For the reasons stated above, we believe that the Tribunal should actively consider the proposals contained in this letter, and respectfully urge that it convey a proposal for expanding its jurisdiction as part of its annual report.

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