

States' Cooperation with the International Criminal Tribunal for Rwanda

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Abstract

Shortly after the 1994 genocide, an international tribunal for Rwanda has been created by the United Nations Security Council in response to grave atrocities committed where more than one million people have perished. Although judicially independent, the ICTR must rely on international cooperation in order to successfully carry out its mandate as it has no organ to enforce its decisions.

Cooperation by states or international organizations is vital to the collection of evidence as well as to the detention and transfer of accused persons. This cooperation is also required in the relocation of sensitive witnesses or the enforcement of sentences handed up down by the Tribunal. Whether states are willing to provide the necessary cooperation will largely determine the ability of the Rwanda Tribunal to fulfil its mandate.

States' cooperation with the ICTR is essential if the Tribunal has to operate properly and perform its functions. The legal basis of the obligation imposed to states has two characters, a general character stemming from their being member states of UN and the specific one stemming from the United Nations Security Council Resolution RES/955 (1995) where it states that "all states shall cooperate fully with ICTR and its organs (...)".

Unfortunately, states are still reluctant to fulfil their obligation to cooperate with ICTR. Different reasons are put forward by states to justify their refusal to cooperate. Sovereignty, domestic legislation, national interests or national security, disinterestedness of UNSC, are among others, the main reasons advanced by states.

Introduction

After the Nazi Holocaust, the world community pledged “never again”.¹ Yet, the fifty years that followed the Nuremberg trials have been a golden age of impunity as over 20 million civilians have been killed by their own governments without any hope that their killers would be brought to justice.² In 1993, after some 250,000 Muslim civilians were killed in ethnic cleansing in the former Yugoslavia. The UNSC, in response to those atrocities, decided in Resolution 808 (1993) to establish an international tribunal, to prosecute the most serious violations of international humanitarian law committed during the Yugoslavia conflict (ICTY).³

A short time later, in April 1994, the World witnessed another conflict in which provisions of international humanitarian law were blatantly disregarded. The fighting in Rwanda between the government and Rwanda Patriotic Front (RPF) escalated after the clash of the jet transporting the then Rwandan President Juvénal Habyarimana and culminating in the mass killing of more than 1 million people over the next three months. More than 2 million Rwandans became refugees, many of whom sought shelter in neighboring States.⁴ In November 1994, the Security Council responded by creating a second international tribunal. The International Criminal Tribunal for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring states between 1 January and 31 December 1994 (ICTR), come into being by virtue of Resolution 955 (1994)⁵.

Although judicially independent, the ICTR must rely on international cooperation in order to successfully carry out its mandate as it has no police or another body to enforce its decisions. Cooperation by states or international organizations is vital to the collection of evidence as well as to the detention and transfer of accused persons. This cooperation is also required in the relocation of sensitive witnesses or the enforcement of sentences handed down by the Tribunal. Whether States are willing to

¹ V. Mooris and M. P. Scharf, 1998. *The International Criminal Tribunal for Rwanda*, V1.

² R.J. Rummel, *Death by government*, cited by V. Mooris and M.P. Scharf, *supra*, p. xv.

³ S/RES/808 of 22 February 1993.

⁴ Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda, Doc, S/1999/1257 of 15 December 1999.

⁵ S/RES/955 (1994) of 8 November 1994.

provide the necessary cooperation will largely determine the ability of the Rwanda Tribunal to fulfill its mandate.

Whereas States provide cooperation in national criminal matters on an informal basis or pursuant to a bilateral or multilateral agreement, States are obliged to provide necessary cooperation to the Rwanda Tribunal as it has been established by a Security Council decision adopted under Chapter VII.⁶

All UN Member states are aware of that obligation; by signing the UN Charter, they agreed to accept and to carry out Security Council decisions pursuant to Article 25 of the UN Charter⁷ and all non-members know as well that they are required to act in accordance with such decisions to the extent necessary for the maintenance of international peace and security under article 2(6) of the UN Charter.⁸

Although the proposal for the establishment of the *ad hoc* Tribunals has been approved by almost all UN Members, states have proved to be reluctant to accord fully cooperation to those Tribunals. As stated by Hassan B. Jallow, Chief Prosecutor of the ICTR, one of the fundamental challenges faced by the Rwanda Tribunal has been the obstacles it has confronted in attaining the cooperation of states.⁹ The Tribunal has encountered and continues to meet many obstacles in securing 'states' cooperation for the arrest and surrender of indicted individuals who have been hidden or protected by states refusing to relinquish them to the jurisdiction of the Tribunal inasmuch as the Statute does not provide for a trial *in absentia*.¹⁰

⁶ This approach would have the advantage of being expeditious and of being immediately affective as all States would be under a binding obligation to take whatever action is required to carry out a decision taken as an enforcement measure under Chapter VII.

⁷ Article 25 of the UN Charter states: « The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter ».

⁸ Article 2(6) of the UN Charter states : « The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security ».

⁹ H.B. Jallow, *Challenges of International Criminal Justice: the ICTR experience*, available at [http://www. 69.94.11.53/English/Colloquium](http://www.69.94.11.53/English/Colloquium) [accessed on 3 August 2007].

¹⁰ Dagmar Stroh, *State Cooperation with the International Criminal Tribunal for the former Yugoslavia and for Rwanda*, available at <http://www.mpil.de/shared>, [accessed on 3 August 2007].

One can wonder then why this attitude of states, which had however guaranteed their full cooperation during the time of the establishment of the *ad hoc* Tribunals, proclaiming the principle that authors of grave breaches of the Geneva Conventions and other crimes were individually responsible and would be called to account.¹¹

The international Tribunal for Rwanda, like the ICTY, is facing an extraordinary crisis stemming from factors beyond its control: the Tribunal seeks to adhere to the dates of the Completion Strategies mandating it to complete all trials by 2012.¹² This challenge has triggered our interest to carry out this research as many criminals sought by the Tribunal are still at liberty, unreachable and hidden by some States.

The aim of this work is to investigate why states are refusing to fulfill their obligation of cooperation with the Rwanda Tribunal and to analyze the relevance of the reasons advanced by those States.

Material and methods

This paper was done through research facilitated by various methods. The exegetic method helped in interpretation of various legal dispositions concerning the question of the topic.

Documentation was based on books and other related sources especially those that provided required information to the problem. The paper contains various ideas from respective authors who are interested in international law. Different legal texts, conventions and decided cases especially rendered by ICTR and ICTY have been employed in order to show the seriousness of the question.

Lastly, internet resources have been useful to the draft of this paper as many conventions and statutes of ICTR and ICTY as well as their decisions are to be found on their respective websites.

Results and discussion

1. Obligation to cooperate with the ICTR

States' cooperation with the ICTR is essential if the Tribunal has to operate properly and perform its function. The legal basis of that cooperation, its

¹¹ A. Cassesse, 2003. *International Criminal law*.

¹² United Nations Security Council Resolution 1824 S/RES/1824 (2008) of 18 July 2008.

contents and its necessity are the points which are going to be dealt with in this first part of the article

1.1. Legal basis of the obligation

The legal basis of the obligation to cooperate imposed on states has two characters, general and specific. The general character of that obligation will first be addressed and after the specific one.

1.1.1. General character of the obligation

The legal obligation of States to cooperate with ICTR stems from their being member states of the UN. All Members of the UN are bound by the Principles of the UN Charter and required to “give the United Nations every assistance in any action it takes in accordance with” the Charter (Art. 2(5)).¹³ In addition, under Article 25, Members agree to accept and carry out the decisions of the SC.¹⁴

Also, Chapter VII of the UN Charter provides that the Security Council has the power to determine whether a situation constitutes a threat to or breach of international peace and security. After the SC has determined that there has been a threat to or a breach of the peace, it will make recommendations or decide what measures are to be taken to maintain or restore international peace and security (Art.39). Once it decides what measures not involving the use of armed force are to be employed, the SC may call upon Members of the UN to apply such measures (art.41). Article 48 (1) of the UN Charter provides “the action required to carry out the decisions of the SC for the maintenance of international peace and security shall be taken by all the Members of the UN or by some of them, as the SC may determine” and Article 48(2) provides that “such decisions shall be carried out by the Members of the UN directly...”. Under Article 49, Members are required to “join in affording mutual assistance in carrying out the measures decided upon by the SC”.

Besides that, all States have an obligation to cooperate and to assist in the investigation and the prosecution of persons suspected of grave breaches of

¹³ Art. 2(5): “All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action”.

¹⁴ Art. 25: “The Members of the United Nations agree to accept and carry out the decision of the Security Council in accordance with the present Charter”.

the Geneva Conventions.¹⁵ This obligation exists as a matter of conventional law for the vast majority of states which are parties to the convention and as matter of customary law for the limited number of states which are not parties thereto.¹⁶

Furthermore, the international community has affirmed that states have a general obligation to cooperate and to assist in the investigation and the prosecution of persons suspected of war crimes and crimes against humanity.¹⁷ This is consistent with the strong interest of the international community in the deterrence and the punishment of such crimes under international law. In this regard, the international community has specifically recognized that it is unacceptable for a state to provide asylum to persons suspected of war crimes or crimes against humanity.¹⁸

Moreover, the international community has affirmed that the refusal to cooperate in the arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity is contrary to the purposes and principles of the Charter of the UN and to generally recognized norms of international law.¹⁹ In some instances, the refusal of a state to cooperate in the investigation and the prosecution of a person believed to be responsible for a crime of international concern has led to serious tensions in international relations and corresponding action by the SC Council.²⁰

¹⁵ Art. 49 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 ; Art. 50 of the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949; Art. 129 of the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949; Art.146 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949.

¹⁶ V. Morris and M. P. Scharf, 1998.*The international criminal Tribunal for Rwanda*.

¹⁷ Question of the Punishment of war Criminals and of Persons who have committed crimes against humanity, G.A. Res. 2840, UN GAOR, 26th Sess., Supp. No. 29, at 88, UN Doc. A/8429 (1972).

¹⁸ Declaration on territorial Asylum, GA Res. 2312, UN GAOR, 22nd Sess. Supp. No. at 81, UN Doc. A/6716 (1968).

¹⁹ Question of the Punishment of war criminals and of persons who have committed crimes against humanity, GA Res. 2840, para. 4, UN GAOR, 26th Sess., Supp. No. 29, at 88, UN Doc. 1/8429 (1972).

²⁰ In 1992 after the SC has determined that Libya's failure to renounce terrorism and, in particular, to assist in the apprehension and prosecution of the persons responsables for the terrorist bombing of Pan Am flight 103 over Lockerbie, constituted a threat to international peace and security, sanctions against Libya

The legal obligation to cooperate with ICTR is well specified in different resolutions taken by the Security Council and in the Statute and Rules of Procedure and Evidence of the Tribunal.

1.1.2. Specific character of the obligation

On 8 November 1994, after the Security Council has determined that the circumstances in Rwanda amounted to threats to international peace and security, it established the *ad hoc* International Criminal Tribunal for Rwanda (ICTR) by the Resolution 955, and urged all states to give full cooperation to it.

In para. 2 of SC RES/955 (1994), the SC decided that:

“all states shall cooperate fully with the ICTR and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all states shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of states to comply with requests for assistances or orders issued by a Trial Chamber under Article 28 of the Statute specifying orders which the Trial Chambers may issue”.

On 27 February 1995, the SC in Resolution 978 emphasized the need for states to take as soon as possible any measures necessary under their domestic law to implement Resolution 955 and urged states “to arrest and detain, in accordance with their national law and relevant standards of international law, pending prosecution by the International Tribunal for Rwanda or by the appropriate national authorities, persons found within their territory against whom there is sufficient evidence that they were responsible for acts within the jurisdiction of the International Tribunal for Rwanda”.²¹

The obligation of states to cooperate with the ICTR is more specifically addressed in article 28 of the Rwanda Tribunal Statute. This article in its first paragraph provides that states shall cooperate with the Rwanda Tribunal investigations and prosecutions. It adds in its second paragraph that states shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber.

A reading of this article shows that there are two aspects of the obligation of a state to cooperate with the Rwanda Tribunal. First, a state has an obligation to provide any cooperation that may be required to facilitate the investigation

have been imposed by SC under Chapter VII of the UN Charter (SC Res. 784 of 1993).

²¹ SC Res. 978 of 27 February 1995.

or the prosecution of alleged perpetrators by the Rwanda Tribunal. Such obligation may include matters as identifying and locating persons, taking testimony, production of evidence, service of documents and the surrender or transfer of an accused. Second, a state has an obligation to comply, without undue delay, with formal requests or orders for cooperation or judicial assistance issued by the Tribunal.

The obligation to cooperate with the ICTR is also stated in the Rules and Procedure and Evidence of the Tribunal.²² Rule 40 of the RPE provides that in urgent situations, the Prosecutor may request any state to arrest a suspect provisionally, seize physical evidence and take all necessary measures to prevent the escape of a suspect or an accused, injury to or intimidation of a victim or witness or the destruction of evidence. The states concerned shall comply forthwith, in accordance with article 28. Rule 58 of the RPE adds on that the obligation laid down in article 28 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused to the Tribunal which may exist under the national law or extradition treaties of the states concerned.

Having illustrated the legal instruments and provisions imposing upon states the obligation to cooperate, one can wonder about the contents of that obligation.

1.2. Contents of states' obligation

The obligation to cooperate with the ICTR is very wide. As stated above, states are required to facilitate the investigation and prosecution of suspects. The list given by article 28(2) is thus not limitative. According to that article, obligation to cooperate include the identification and location of persons; the taking of testimony and the production of evidence; the service of documents; the arrest or detention of persons; and the surrender or the transfer of the accused to the ICTR. The only analyses of those considered more important will be done.

1.2.1. Arrest and transfer of persons to the Tribunal

Arrest and transfer of persons is an important obligation without which the Tribunal cannot fulfill its mandate. Procedural aspects of this obligation are regulated by Rules 55(b) of RPE of the ICTR, according to which an arrest warrant is transmitted by the Registrar of the Tribunal to the national authorities of the states in whose territory or under whose jurisdiction or control the accused was last known to reside, together with a statement of

²² www.ictr/basic_documents/rpe

rights and cautions to be read at the time of arrest, in a language the accused understands. A state receiving an arrest warrant and transfer order is obliged to ensure that national authorities execute the order promptly and effectively.²³

Immediately following the arrest, national authorities must arrange for the transfer of the accused through the Registrar of the Tribunal. Since the Statute requires that transfer is made without undue delay (art. 28), any delay can only be accepted if the reason lies within the arrangements themselves, for instance if it turns out to be difficult to get a third state's permission to allow the accused to be transferred through its territory.

As a fair trial requires both the presence of the accused and anyone who might contribute to the exploration of the accused's guilt or innocence, states have not only to surrender supposed criminals to the Tribunal but also witness who may be detained in their national prisons, if requested.²⁴

1.2.2. Deferral of national court proceedings

According to paragraph 2 of article 8 Rwanda Statute, the Tribunal has primacy over national courts. Due to this primacy, national courts may, at any stage of the procedure, be formally requested to defer the competence of the International Tribunal. When a crime that has been the subject of investigation or criminal proceedings in a court of a given State appears to fall within the jurisdiction of the Tribunal, the Prosecutor may request the forwarding of any relevant data.²⁵ Once a trial has been deferred to the Tribunal, a completely new trial begins. Any previous determination of a national court has no binding effect on the Tribunal.²⁶

1.2.3. Enforcement of sentences

Another responsibility which requires states' cooperation is the enforcement of the Tribunal's final sentences. Since the Tribunal does not operate prison facilities, sentences can only be served in national prisons. Tribunals detention units hold accused persons only before or during a trial. As soon as the time-limit for appeal has elapsed, a convicted person is transferred to the state where he has to serve his prison term.²⁷

²³ See Rule 56 RPE of ICTR.

²⁴ See Rule 90 RPE of ICTR.

²⁵ See Rule 8 RPE of ICTR.

²⁶ See Rule 12 RPE of ICTR.

²⁷ See Rule 103(B) of ICTR.

In theory, states could be compelled to carry out Tribunal sentences. However, when the Statutes were adopted, this idea of compulsion was rejected, since the execution of sentences is likely to cover a long period of time.²⁸ For this reason, the UN have resorted to the diplomatic strategies and passed agreements with states that are willing to place their prisons at the Tribunal's disposal.²⁹ Even if such imprisonment shall be in accordance with the applicable law of the State concerned, the Tribunal supervises the execution of sentences and is at liberty to intervene when enforcement states do not appropriately fulfill their duty.

1.3. Necessity of states' cooperation

The cooperation of states is indispensable if the International Criminal Tribunals are to fulfill their mandate. This is because they decide on crime committed on the territory of a state of which they are not the judicial organ and do not sit in the country where crimes falling under their jurisdiction have been perpetrated. They are not the forum *delicti commissi*.³⁰

The Statute of ICTR as the one of ICTY grants the Prosecutor power to conduct on-site investigations, gather evidence, and question witnesses, victims, and suspects in his own authority.³¹ This competence cannot be exercised without the assistance of the state in whose territory such pre-trial investigation takes place. Criminal investigation activities are sovereign acts belonging exclusively to the state on the territory of which those acts are being performed (principle of territoriality). Without permission of the respect state other states or non-state entities like the International Criminal Tribunals- are excluded, in principle, from carrying out sovereign acts on the territory of a foreign state.

²⁸ Dagmar Stroh, *State Cooperation with the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, available from <http://www.mplil.da/shared>, [accessed on 3 August 2007].

²⁹ On 12 February 1999, the Registrar of the Rwanda Tribunal and the Government of Mali signed an agreement on the enforcement of the Tribunal's sentences. This made Mali the first country to provide prison facilities for the enforcement of the Tribunal's sentences. The Republic of Benin became the second country to sign such an agreement on 26 August 1999. The Kingdom of Swaziland became the third country, on 30 August 2000. Belgium, Denmark, Norway and some African countries have also indicated their willingness to incarcerate (Fact Sheet of the ICTR N° 6).

³⁰ A. Cassesse, 2005. International law.

³¹ See art. 17 para. 2 of ICTR Statute and art 18 para. 2 of ICTY Statute.

The cooperation of Rwanda and other States in the region is of particular importance to the work of the Rwanda Tribunal. The investigators of the Tribunal need to have unimpeded access to the places in Rwanda and in neighboring states where the crimes were committed. They also need to have access to the victims and the witnesses of the crime concerned in order to enable them to gather the necessary information, to compile, if appropriate, the necessary evidence to support an indictment and to proceed with the prosecution.

Some states acknowledging that without the states' cooperation the ICTR cannot fulfill its mandate have provided an essential cooperation to the Tribunal. One example is Zambia which has been the first state in the region. It arrested three Rwandan suspects whom it had detained on immigration grounds and, at the request of the Tribunal, kept them in custody until the tribunal's own detention unit at its headquarters in Arusha was completed. Two of the suspects were among the first indicted by the Rwanda Tribunal on charge of genocide, crime against humanity and violation of common article 3 of the Geneva Conventions.³² Without Zambia's cooperation, this wouldn't be possible.

When states refuse to cooperate, the work of the Tribunal is paralyzed. When the then President of Kenya, Daniel Arap Moi, declared that persons accused of crimes by the Rwanda Tribunal would not be handed over for trial and that anyone who attempted to do so would be arrested³³, the Tribunal could not properly work considering that the large number of Rwandese including those who were sought by the Tribunal have found refuge in Kenya.

So, as the Rwanda Tribunal and its counterparts of Yugoslavia have no enforcement agencies at their disposal, they have to turn to state authorities and request them to take action. In fact, the two *ad hoc* Tribunals are like a giant who has no arms and no legs who needs artificial limbs to walk and

³² On 19 February 1996, Judge William H. Sekule confirmed indictments against Georges Rutaganda and Jean Paul Akayesu on charges of genocide, crimes against humanity and violation of common article 3 of the Geneva Conventions. Press Release: Statement of Dr. Andronico O. Adede, Registrar of the ICTR announcing the indictments of Georges Anderson Rutaganda and Jean Paul Akayesu, 19 February 1996.

³³ Daniel Arap Moi quoted by Donatella Lorch, *Kenya Refuses to Hand Over Suspects in Rwanda Slayings*, New York Times, 6 Oct. 1995, cited by V. Morris and M.P. Scharf, *supra*, p. 656.

work.³⁴ These artificial limbs are state authorities; without their help, the Tribunals cannot operate.

2. Reasons advanced by states in refusing to cooperate

There are many reasons that make states to not comply with their obligation to cooperate with International Tribunals. In the following discussion, most invoked will be examined.

2.1. Sovereignty

The concept of sovereignty has dramatically changed, from its traditional meaning to a modern one. Initially, sovereignty allowed a state the right or competence to determine the character of its own institutions, to ensure and provide for their operation, to enact laws of its own choice and ensure their respects without accountability neither to their people nor to the international community.³⁵ But the modern understanding of sovereignty embraces the notion of responsibility. State must be responsible not only towards its people but also before international community as a whole.³⁶

Although this modern concept of sovereignty, states are still reluctant to relinquish any of their sovereignty in the field of criminal law. Many states insist that their sovereignty gives them ultimate discretion on how to deal with suspects wanted by the ICTR who threaten their security. The predominance of national sovereignty in the adoption and the enforcement of criminal law limit the extent to which states are prepared to provide international cooperation and assistance in criminal justice and law enforcement matters.³⁷

This withholding of sovereignty in its traditional concept has handicapped the work of the ICTR. For instance, in the beginning, the Rwanda Tribunal had a problem to get Kenya's cooperation because of Daniel Arap Moi's concept of sovereignty. As President of Kenya at the time, Moi, indicated that Kenya as sovereign State, will not cooperate with the ICTR and any other international tribunal. He even threatened that anyone who attempted

³⁴ A. Cassesse in his speech before the UN General Assembly in 1995, quoted by Dagmar Stroh, *supra*, p. 268.

³⁵ D Geldenhuys, 'Brothers as keepers : Africa's new sovereignty regime, *Strategic Review for Southern Africa*, Vol. XXVIII, N°1, May 2006.

³⁶ *Ibidem*.

³⁷ V. Morris and M. P. Scharf, *supra*, p. 627.

to enter his country for investigation would be arrested.³⁸ Fortunately, Moi retracted his statement, but this shows the misunderstanding on the side of some state leaders of why and how the ICTR has been established. Kenya's attitude has delayed the Tribunal's work to a large extent because several suspects sought by the ICTR were hidden in that country.

Another example showing that states have several time invoked sovereignty in order to refuse their cooperation with ICTR, is offered by the case of Ntakirutimana who was hidden in Texas. In this case, Rwanda Tribunal has proven much difficult to obtain the surrender of the accused after charging him with genocide, crimes against humanity and others serious violations of Geneva Convention.³⁹ When the ICTR made a request for his arrest and transfer, the magistrate in charge of the case refused the surrender arguing that the sovereignty of the United States was not subordinated to the UN.⁴⁰

This argument of sovereignty has furthermore served some lawyers in their defense to challenge the legality of the Tribunal arguing that its establishment violated the sovereignty of states, because it was not established by means of a treaty recommended by the General Assembly.⁴¹

Sovereignty cannot serve as valid argument. Apart from current international view that sovereignty carries with it accountability, by signing international agreements such as Geneva Convention, Genocide Convention, and especially UN Charter, states have accepted certain limitations to their sovereignty and thus are obliged to carry out SC decisions. Since ICTR has been created by a decision of SC, states' compliance is required under the UN Charter.

2.2. Internal legislation

The enactment of special legislation which enables national authorities to cooperate with the *ad hoc* International Tribunals is necessary in most legal systems. This necessity has been expressed in SC Resolution 955 establishing the ICTR where it states that (...) all states shall take any necessary measures under their domestic law to implement the provisions of the Resolution and the Statute (...). However, insignificant number of states

³⁸ Donatella Lorch, *Kenya Refuses to Hand Over Suspects in Rwanda Slayings*, cited by Morris and Scharf, *supra*, p. 656.

³⁹ Prosecutor v Elizaphan Ntakirutimana & others, Case n° ICTR-96-10-1

⁴⁰ US Magistrate Marcel Notzen, quoted by J. N. Maogoto, 2003. *State sovereignty and International Criminal law*, , p. 219.

⁴¹ Prosecutor v Kanyabashi, case

has so done; and the lack of this enactment has served certain states as a pretext to refuse to cooperate.

Referring again to the Ntakirutimana Case, the magistrate held that the surrender of the suspect would be unconstitutional if it is ordered without a treaty or statute specifically authorizing extradition.⁴² In 2001, Italy refused to cooperate with the Rwanda Tribunal's request for the arrest of a Rwandan citizen claiming that its domestic legislation gives it no legal basis to carry out the arrest. Italian authorities state that their refusal to cooperate with the ICTR has as grounds that, under Italy's domestic legislation, there is no legal basis to permit arrest and that the Italian government would have to issue an *ad hoc* decree to implement the international arrest warrant.⁴³

In the Barayagwiza case, the question of national legislation has been raised again. In march of 1997, Judge Aspegren issued a transfer order requesting Cameroon to surrender Jean-Bosco Barayagwiza to the ICTR.⁴⁴ Cameroon balked in swiftly producing Barayagwiza, allegedly due to time-consuming extradition proceedings, and the Prosecutor could not bring Barayagwiza before the Court for indictment until ninety-six days later.⁴⁵ The prolonged period between the issuance of the transfer order and the indictment compelled the Judge to dismiss the indictment against Barayagwiza and order his immediate release.⁴⁶

States cannot justify their refusal for surrender of the accused as contrary to their laws whereas compliance with the Rwanda Tribunal's requests is a fundamental rule of international law. In the Vienna Convention of the Law of Treaties, Article 27 states that a "party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." So, as a multilateral treaty, UN Charter through its SC obliges all states to comply with any request of ICTR.

Also, states are not allowed to invoke domestic extradition law to refuse or to delay Tribunal's request because ICTR's Statute and Rules, distinguish

⁴² In Re Surrender of Elizaphan Ntakirutimana, Misc No L-96-5, 1997 US Dist. LEXIS 20714 (SD Texas 17 December 1997) cited by J.N. Maogoto, *supra*, p. 220.

⁴³ Press Release, Amnesty International, *Italy Must Immediately Arrest Rwandese Indicted by the International Criminal Tribunal for Rwanda*, available at http://www.amnesty-usa.org/news/2001/italy_2_07172001.html, [accessed on 5 September 2007].

⁴⁴ Prosecutor v Barayagwiza, Order and Provisional Detention, Case No: ICTR-97-19-DP, 3 March 1997.

⁴⁵ Prosecutor v Barayagwiza, Case, para. 68-72.

⁴⁶ *Id.*, para. 113.

extradition and transfer. This distinction derives from provisions of the Vienna Convention on the Law of Treaty relating to interpretation to statute and treaty.

In effect, the Vienna Convention provides guidelines to treaty interpretation and is applied to interpret the meaning of the language in the statutes and rules of international tribunals.⁴⁷ Under the Convention, the chamber interprets the statute and rules in “good faith” and in accordance with their “ordinary meaning” in light of the treaties “object and purpose”.⁴⁸ The Chamber may also consider the Statute’s drafting history or other supplementary means to interpret the meaning of the rules in conjunction with the statute, if the meaning is ambiguous or leads to an absurd result.⁴⁹

Examining Article 28, and rules 58, 40, and 41bis, the plain meaning of the language regarding transfer of suspect is apparent and unambiguous. Article 28 clearly mandates states to comply with transfer order issued by the ICTR. Moreover, Rule 58 reinforces the supremacy of Article 28 in stating that the obligation laid down in article 28 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused. Rules 40 and 41bis likewise obligate states adherence to article 28 when ICTR issues a transfer order. Nowhere in the rules or the Statute is the word “extradition” used.

The title of rule 58, “National Extradition Provisions” announces the rules’ intention to specifically address national extradition provisions that may conflict with article 28.⁵⁰ Thus, following the Vienna Convention’s ordinary meaning provision, article 28 and Rules 58, 40 and 41bis do not explicitly intend for “transfer” to be synonymous with “extradition” given that that term is never used, and the supremacy of article 28 over national extradition provisions is expressly authorized.⁵¹ So, states’ delaying or refusal based on extradition provisions is contrary to the meaning of Resolution 955, ICTR’s Statute and Rules.

⁴⁷ Prosecutor v Tadic, Case, para. 18.

⁴⁸ Article 31 of the Vienna Convention of the Law of Treaties of 23 May 1969.

⁴⁹ Article 32 of the Vienna Convention of the Law of Treaties

⁵⁰ Memorandum for the Office of the Prosecutor International Criminal Tribunal for Rwanda: Transfer v Extradition : a discussion of the interpretation and authority of the transfer provisions of the ICTR Statute and Rules, available from <http://www.nesl.ed/center/wcmemos/2002/neinhordt>, accessed on 5 September 2007.

⁵¹ V. Morris and M.P. Scharf, *supra*, p. 499.

2.3. National interests or security

States have several times invoked their interests or security to refuse to cooperate with International Tribunals. In the Barayagwiza case, when the Judge ordered the release of the accused, Rwanda decided to suspend cooperation with ICTR because it was not pleased with the Tribunal's decision.⁵²

On July 23, 2002, the ICTR Prosecutor reported to the SC that the government of Rwanda was not cooperating with the Tribunal in several areas, including facilitating the travel of witnesses and providing access to documentary materials.⁵³ According to the Prosecutor, these problems began shortly after she announced that several of the Rwanda Patriotic Army (RPA) soldiers would soon be indicted for atrocities committed in 1994. By refusing cooperation, the Rwandan government intended to pressure the Prosecutor to end or at least to suspend investigations into RPA atrocities because on-going of the investigations threatened Rwanda's security.⁵⁴

The Rwandan government's pressure to the Prosecutor has been successful because, at that time, the Prosecutor who was performing his function in the two *ad hoc* Tribunals has been replaced in his function in the ICTR.⁵⁵

The crime of genocide, war crime and crime against human constitute grave violations of international law and have to be treated like that. Fighting these crimes through prosecution of their perpetrators is the aim of international criminal law and it is in the interest of the international community. International interests must always seen as more higher than national interests; hence, states are required not to turn a deaf ear to breaches of international obligations enshrining basic values such as peace and human dignity. They are obliged to cooperate with International Tribunal regardless

⁵² X, *ICC prosecutor's battlefield: Combating atrocities while fighting states' cooperation: Lessons form the UN Tribunals applied to the case of Uganda*, available from <http://www.findarticles.com/p/articles/miqua4140>, accessed on 6 August 2007.

⁵³ Human Rights Watch, *Action urged regarding non-cooperation with ICTR and ICTY: letter to Security Council Members*, available from <http://www.hrw.org/news>, accessed on 6 August 2007.

⁵⁴ *Id.*

⁵⁵ International Crisis Group, *The International Tribunal for Rwanda: The Countdown*, available from <http://www.crisisgroup.org/home/index.cfm?id=1556&1=1>, accessed on 13 August 2007.

their own interests in order to let them fulfill their functions as it has been emphasized in the Blaski Case.⁵⁶

2.4. Disinterestedness of UNSC

Acting under chapter VII of the UN Charter, the UNSC is empowered to take any measures against a state which refuses to comply with its decisions. It may decide what measures not involving the use of force⁵⁷ or if it deems that they would be inadequate, resort to force⁵⁸ if the situation has been determined as a threat to the peace, breach of peace, or act of aggression.⁵⁹ After determining that the genocide in Rwanda constituted a breach of peace⁶⁰, it established the Rwandan Court obliging all states to cooperate fully with it. Consequently, not to cooperate with the ICTR, established in purpose of maintaining peace and security, is tantamount to the threat to peace and UNSC has right to act accordingly.

Although the SC may impose sanctions on states that fail to comply with the *ad hoc* Tribunals, it has never undertaken any action against countries that violate their obligations. Two examples can be given. In 1996 when the Yugoslavia Tribunal reported to the SC that the Federal Republic of Yugoslavia (FRY) repeatedly refused to arrest and transfer individuals that it had requested, the SC condemned the FRY's failure to comply but declined to impose any sanctions.⁶¹ The Deputy Prosecutor of the Yugoslavia Tribunal, Graham Blewitt, warned that the SC's failure to impose sanctions would encourage the FRY's refusal to cooperate.⁶² Blewitt's prediction proved to be true. Three years later, the FRY refused the Tribunal's request for the three Serb officers namely Mile Mrksic, Veselin Sljivancanin and

⁵⁶ The Appeal Chamber states that: "to allow national security considerations to prevent the International Tribunal from obtaining documents that might prove of decisive importance to the conduct of trials would be tantamount to undermining the very essence of the International Tribunal's function". See Prosecutor v Blaski, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Case n° IT-95-14 AR 108bis (Appeal Chamber) 29 October 1997.

⁵⁷ Art. 41 of the UN Charter.

⁵⁸ Art. 42 of the UN Charter.

⁵⁹ Art. 39 of the UN Charter.

⁶⁰ Resolution 955 of UNSC.

⁶¹ M.P. Schart, *The tools for enforcing international criminal justice in the new millennium: Lesson from the Yugoslavia Tribunal*, available at <http://www.nesl.ed/center/wcmemos/2002/reihhardt>, [accessed on 5 September 2007].

⁶² *Id.*

Mirslav Radic who were wanted for the killing of 260 unarmed men at a farm in Vukovar in 1991.⁶³ The Chief Judge at the Yugoslav Tribunal, Gabrielle Kirk McDonald made two personal appeals and four in writing to the SC to compel Serbia to turn over the officers. Her pleas went unanswered and no sanctions were imposed upon Serbia.⁶⁴

A second example attesting the disinterestedness of UNSC is showed by the fact that its delegation did not visit the ICTR in its annual trips to Central Africa in 2001 and 2002.⁶⁵ This sent a dangerous signal of disinterest of the mission of the UN in its role to end crises in the region.

This failure of the SC to enforce measures undermines the Tribunal's authority and poses a serious problem for the Tribunal in obtaining full cooperation from states. In fact, if states know that there will be no repercussions for their non-compliance, they will have no incentive to cooperate with the Tribunal. It has proved however that, if states are aware that sanctions are likely to be imposed in case they do not honor their international obligations, they behave correctly. After the Kenya President, Arap Moi, declared that his country would not cooperate with ICTR, the Prosecutor, Justice Richard Goldston, stated that such conduct would constitute a breach of Kenya's obligations and reminded the President that SC might impose sanctions against his country.⁶⁶

This recall of eventual sanctions in case of breach of international obligations has produced prodigious effect. Arape Moi surprisingly retracted itself quickly, and very soon after Kenya was commended by the Rwanda Tribunal for its exemplary cooperation in expeditiously arresting and handing over many suspects who were hidden in the country.⁶⁷ Moreover, Kenya provided essential cooperation in an operation code-named "NAKI" for Nairobi-Kigali thanks to it arrests and transfers to the Tribunal of several individuals who occupied positions of leadership at the time of the 1994 genocide have been possible.

All states are required to cooperate with International Tribunals regardless of whether or not they have ratified the Genocide Convention because the Tribunals have been created by UNSC Resolutions under Chapter VII. In case of failure to comply, UNSC has the power to compel states by any

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ International Crisis Group, *supra*.

⁶⁶ V. Morris and M.P. Schart, *supra*, pp. 656-657.

⁶⁷ UN Doc. ICTR/INFO-9-2-016, 23 Septembre 1996.

measures. If it doesn't impose sanctions in response to noncompliance, states will be reluctant to give their cooperation.

Conclusion

The establishment of the Rwanda Tribunal, like its counterpart of Yugoslavia, constitutes important milestones in the history of international criminal law. Not only were the Tribunals necessary responses to the atrocities that had been committed in these countries, they also fuelled the widespread belief that a permanent international criminal court was desirable.

The gross and manifest violations of human rights and international humanitarian law witnessed in Rwanda made the United Nations establish *ad hoc* Tribunal by means of a UNSC resolution. By resorting to Chapter VII, the United Nations wanted to give the Tribunal the authority to issue binding decisions with respect to states and individuals and to ensure the cooperation of all states, particularly with respect to handing over suspects or accused. Therefore, no reason can justify states' refusal to cooperate with the ICTR because the refusal would be contrary to the purposes and principles of the Charter of the UN and to general recognized norms of international law.

Because of the establishment by the Security Council Resolution, the ICTR's relationship with states is not horizontal, but hierarchically organized. This vertical organization makes the will of the Tribunal prevail to interests of states. Therefore, the term "cooperation" is inappropriate because this usually refers to a joint action which is accomplished on the same level. If several states are cooperating among themselves, none of them is subordinated to the will of another. However, in case of the ICTR, states are unilaterally obliged to carry out the Tribunal's orders and requests; they cannot invoke national law or national interests to evade an order of the Tribunal. Hence, it would be more appropriate to speak of "national assistance" instead of states' cooperation. Consequently, the SC has to take consistent action supporting the Tribunal. It should adopt language reminding all states of their obligations to assist the Tribunal fully.

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