

LEGAL MEMO

TO: The International Criminal Tribunal for Rwanda, Office of the Prosecutor

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RE: Asylum or refugee status to witnesses of the Tribunal

DATE: May 15, 1998

FACTS:

A number of Tribunal witnesses fled Rwanda after the Genocide and are presently in other countries where their legal status differ and some may not have any legal status at the moment (illegal immigrants). Some of these witnesses may have been implicated in the Genocide in Rwanda in 1994. Such persons may seek protection under the witness protection provisions of the Rules of Procedure and Evidence, for example by moving for order obliging relevant countries and/or United Nations High Commissioner for Refugees (UNHCR) to grant asylum or refugee status to its witnesses.

ISSUES:

- 1) What is the relevant international human rights and refugee law.
- 2) Does the Tribunal have jurisdiction to issue orders countries or the UNHCR to grant asylum or refugee status.

ANALYSIS:**I Possible Diplomatic Solution**

The best solution for protecting potential refugee witnesses would be a regional diplomatic agreement coupled with either a Security Council resolution or an amendment to the ICTR statute. The protections offered by the international treaty regime contain too many exceptions, and lack sufficient enforcement for protecting witnesses. Likewise, it is extremely unlikely that the ICTR has the institutional authority to grant immunity to witnesses.

The biggest problem with proceeding with a strictly legal option is political. The treaty rules are too open to differing interpretations. While the ICJ or even UNHCR might eventually resolve a dispute concerning treaty obligations, it would most likely prove too late to adequately protect many refugee witnesses. Similarly, claiming implied powers from the ICTR statute could prove disastrously controversial. Objecting to the ICTR claiming a broad range of implied powers to protect witnesses, States could curtail their co-operation with the Tribunal. While legally obligated to assist the ICTR under the Security Council Resolution, States would justify refusals of co-operation by claiming the Tribunal was acting *ultra vires*. Because many potential witnesses are guilty of past involvement with human rights abuses, it would be difficult to mobilise public opinion to support the Tribunal.

Only a diplomatic solution can provide the necessary legal authority to sufficiently protect refugee witnesses combined with the political consensus needed for enforcement. Because their co-operation is the most crucial, the Tribunal should first negotiate an agreement within the region. To extend

protection beyond the region, the Security Council should issue a resolution incorporating the terms of any agreement. A resolution by itself would be legally binding, but it would not enjoy the political support arising from the active involvement of all the regional States in the drafting process.

II International Human Rights and Refugee Law

The international and regional legal regimes governing the treatment of refugees will not provide sufficient protection for many potential witnesses. First, many of the protections and rights afforded by the existing treaties are denied to persons reasonably suspected of committing serious non-political crimes or human rights abuses.¹ Because, the organisers of the Rwandan genocide successfully compelled a large segment of the general population to participate in the killings, these exclusions will leave many potential refugee witnesses vulnerable.

Second, international law grants all persons a right to seek asylum and heavily regulates expulsions or returns.² However, States have no international legal obligation to grant asylum, the matter firmly remains a

¹ African Charter on Human and Peoples Rights, October 21, 1986, 21ILM 58, Art. 23 (*herein* African Charter); Convention Governing the Specific Aspects of Refugee Problems in Africa, June 20, 1974, 1000 U.N.T.S. 46, Art. 1(4), 3 (*herein* OAU Convention); United Nations Declaration on Territorial Asylum, December 14, 1967, UNGA resolution 2312 (XXII) Art. 1(2), 3(2) (*herein* UN Declaration); Convention Relating to the Status of Refugees, April 22, 1954, 189 U.N.T.S. 150, Art. 1, 32, 33 (*herein* UN Convention).

² Universal Declaration of Human Rights, December 10, 1948, UNGA resolution 217A (III), Art. 13(2); OAU Convention, *Supra* Note 1, Art. 12(3).

matter of sovereignty under national jurisdiction.³ State practice regularly refuses asylum to persons who have found protection elsewhere.⁴ As a result, States might refuse the return of refugee witnesses after they have testified before the ICTR without violating any international legal obligations. A refusal of entry would not constitute expulsion or illegal return since the witnesses would already be outside State territory and under the protection of the Tribunal.

Third, both the international and regional treaties governing the treatment of refugees lack hard enforcement measures. The UNHCR and similar regional bodies monitor State compliance with the treaty law, and can call attention to violations. However, they do not possess the capability to force State compliance. As a result, a State may decide to ignore its treaty obligations to serve national interests. More likely, States may interpret their treaty obligations differently than the ICTR or international community.

The ICTR's only immediate measure against either violations or differing interpretations of treaty obligations would be public opinion. However, this tool has already been proven ineffective within the region. The regime in Congo has defied efforts by the UN and international community, despite serious financial consequences.⁵ In a different context, the public outcry against the recent executions of war criminals in Rwanda

³ UN Declaration, *Supra* Note 1. Art. 1(3); Goodwin-Gil, *Principles of International Refugee Law*, 176 (1996).

⁴ *Id.* at 88.

⁵ *Congo Spurns the World*, *The Economist*, May 2, 1998, at 41.

was similarly ineffectual.⁶ Given that some potential refugee witnesses will remain vulnerable due to their involvement with human rights abuses. It may be impossible to motivate public opinion on their behalf.

The 1951 UN Convention and 1967 Declaration

Article 1(A)(2) of the 1951 UN Convention Relating to the Status of Refugees (*herein* UN Convention) defines refugees as persons who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or unwilling to avail himself of the protection of that country.⁷ This definition should apply to almost any potential refugee witnesses before the Tribunal. Even if Rwanda's tribal identities do not constitute a separate "race" for purposes of the UN Convention, they certainly qualify as particular social groups. However, Article 1(F) excludes persons guilty of certain acts from the UN Convention's refugee definition.⁸ Exclusion from the refugee definition removes a person from almost all of the protection afforded by the UN Convention.

⁶ *Politics this Week*, The Economist, April 25, 1998, at 6.

⁷ UN Convention, *Supra* Note 1.

⁸ *Id.* Art. 1(F). While not relevant to the problem of refugee witnesses, Article 1(C) removes persons from the refugee definition who have: 1) voluntarily re-availed themselves of the protection of their country of origin, 2) voluntarily re-acquired nationality of the country of origin, 3) acquired a new nationality, 4) voluntarily re-established themselves in the country of origin, or 5) are no longer in danger because the situation making them refugees has ceased to exist. *Id.* Art. 1(C). Grahl-Madsen contends that "physical presence in the territory of the home country does not per se constitute revailment of protection..it is the conscious subjection under the government of that country...the normalisation of the relationship between state and individual that matters." Goodwin-Gil, *Supra* Note 3, at 81. Goodwin-Gil writes that involuntary re-availment of home country protection- for example, using of the home country's passport to get residence permit in the country of asylum- can not end refugee status. *Id.*

Article 1(F) excludes persons for whom there are serious reasons to consider he has committed serious non-political crimes or acts contrary to the purpose of the United Nations.⁹ In addition to murder, rape, burglary, theft, embezzlement, assault, and dealing narcotics, this includes war crimes, crimes against peace and crimes against humanity.¹⁰ These crimes are defined by the standards established by international treaties, including the Convention on the Prevention and Punishment of the Crime of Genocide, Geneva Conventions, and Nuremberg Charter.¹¹ Acts contrary to the purpose of the United Nations are defined in reference to the UN Charter. The UN Charter's Preamble lists the organisation's main objectives as the prevention of war, reaffirming faith in fundamental human rights, and promoting social progress and better standards of life in larger freedom. As noted above, the organisers of the 1994 genocide successfully utilised large segments of the population in carrying out the killings. Because of this involvement, Article

⁹ "The provisions of the Convention shall not apply to any person with respect to whom there are serious reasons for considering that: a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; c) he has been guilty of acts contrary to the purposes and principles of the United Nations." UN Convention, *Supra* Note 1. Art. 1(F).

¹⁰ According to Goodwin-Gil, the text of Article 1(F) suggests that serious reasons to believe a person is guilty of substantial apolitical crimes, not a well grounded fear, is all that is needed to exclude that person from the refugee definition. However, state practice supports the contention that a well grounded fear is required. Likewise, authorities regularly weigh supportive and mitigating factors in evaluating whether an act is a serious crime. Supportive factors are the use of a weapon, injury to victims, value of property affected, and evidence of habitual criminal conduct. Mitigating factors include whether five years have passed since the completion of a criminal sentence imposed for the crime in question, the person has received parole, the person was a minor, the person was a mere accomplice, the crime was a singular event, there was provocation, or the person's actions were in self-defence. Goodwin-Gil, *Supra* Note 3, at 106.

¹¹ Geneva Conventions Nos. 970-73, Aug. 12, 1949, 75 U.N.T.S. 31, 85, 135, 287; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, Charter of the International Military Tribunal, 59 Stat. 1544, 1546, 82 U.N.T.S. 27, 284.

1(F) will exclude many potential witnesses from the UN Convention's protections.

If defined as a refugee, a person is entitled to the protections afforded by the UN Convention. The most important protections for our purposes are the restrictions governing expulsion and return to a refugees' country of origin. However, both of these protections include exceptions that could prove quite dangerous to potential refugee witnesses. Under Article 32 of the UN Convention, Contracting States may not expel a refugee who is lawfully in its territory except on grounds of national security or public order.¹² Section 2 of Article 32 guarantees due process for expulsions.¹³ This includes a right of the refugee to present evidence, appeal decisions, and be represented before competent designated authorities. Section 3 obligates Contracting States that decide to proceed with an expulsion to allow a reasonable period for the refugee to seek legal admission into another state.¹⁴

Unfortunately, Article 32 only applies to refugees who are lawfully in a Contracting States territory. According to UNHCR and Amnesty International Reports, this applies to few prospective witnesses¹⁵. Under Article 31, Contracting States shall not impose penalties for illegal entry or presence upon refugees directly fleeing from a territory where their lives were

¹² UN Convention, *Supra* Note 1. Art. 32

¹³ *Id.* Art. 32(2).

¹⁴ *Id.* Art. 32(3)

¹⁵ *Rwanda: Civilians Trapped in Armed Conflict*, Amnesty International Report- AFR 47/43/97, <http://www.amnesty.org>, December 19, 1997, accessed February 25, 1998; *Amnesty International Report 1997: Rwanda*, <http://www.amnesty.org>, accessed February 25, 1998; *Rwanda*, UNCHR Country Profile, <http://www.unchr.ch/world/afri/rwanda.htm>, accessed February 25, 1998.

endangered.¹⁶ But Article 31 does not shield refugees from expulsion. The protection against penalties for illegal entry is conditioned on refugees presenting themselves before authorities without delay and showing good cause for the illegal entry.¹⁷ Having fled directly from a territory where their life or freedom was threatened seems like good cause. However, many potential refugee witnesses may have waited too long in notifying authorities to enjoy Article 31 protection.

While Article 32 promises due process, it does not create any guarantee preventing expulsion. Article 32(1) allows expulsion of refugees legally in the territory of the asylum state on grounds of national security and public order.¹⁸ The national security and public order exception is very vague, and dangerously broad.¹⁹ Furthermore, it is unlikely that a person expelled under either the national security or public order exceptions would be admitted to another state.²⁰ Finally, although States must provide time for refugees facing expulsion to seek legal sanctuary elsewhere, 32(3) allows Governments to apply any internal measures it deems “necessary”.²¹

Article 33 of the UN Convention bars Refoulement (expulsion or return) to the territory where a refugee’s life or freedom would be threatened on account of race, religion, nationality, or membership in a social or political

¹⁶ UN Convention, *Supra* Note 1. Art. 31(1).

¹⁷ *Id.*

¹⁸ “The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.” *Id.* Art. 32(1).

¹⁹ In 1977 the UNHCR Executive Committee recommended that States limit expulsion to exceptional circumstances. Goodwin-Gil, *Supra* Note 3.

²⁰ *Id.*

group.²² According to the UNHCR Executive Committee, the UN Convention's non-refoulement principle applies to asylum seekers without other protection even if they are otherwise excluded from the Article 1 refugee definition.²³ Likewise, these persons are protected whether they entered the asylum country legally or illegally.²⁴

However, the non-refoulement protection is still not absolute. Article 33, Section 2 revokes protection against refoulement from refugees who are reasonably considered dangerous to the security of the Contracting State.²⁵

Protection against refoulement is also withdrawn from those who have been

²¹ UN Convention, *Supra* Note 1. Art. 32(3).

²² "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." *Id* Art. 33(1). The general prohibition against refoulement may constitute an independent rule of Customary International Law. In addition to the UN Convention, refoulement is barred by several other international treaties and conventions. Article 45 of the 1949 Geneva Convention states "protected persons shall not be transferred to power not Party to this Convention... In no circumstances shall protected person be transferred to country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs. Note that, unlike the UN Convention, Article 45 does not include race or membership in a social group. Not only does Article 3 of the UN Convention Against Torture prohibit refoulement, it applies even to non-refugees. Regional treaties and conventions also include the non-refoulement principle. In addition to the Organisation of African Unity Convention (see below), these include the Article 22(8) of the 1969 American Convention on Human Rights and Article 3 of the European Convention on Human Rights. 9 ILM 99; 3 Sept. 1953 ETS No. 5. The non-refoulement principle is also included in both UN and regional declarations including the 1967 Declaration on Territorial Asylum (see below), and Article III(3) of the 1966 Bangkok Principles Concerning Treatment of Refugees. The 1984 Organisation of American States' Cartagena Declaration refers to the non-refoulement principle as *jus cogens*, though it also includes a different definition of refugees than the UN Convention. Cartagena Declaration on Refugees III,5 OAS/Ser. L IV, II 66, doc. 10, rev. 1. Despite this abundance of treaty, convention, and declaration articles, academics remain divided as to whether this State practice constitutes sufficient *opinio juris* for a non-refoulement rule in Customary International Law. Goodwin-Gil, *Supra* Note 3. at 132.

²³ Goodwin-Gil, *Supra* Note 3, at 137.

²⁴ *Id.*

²⁵ "The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country." UN Convention, *Supra* Note 1. Art. 33(2).

convicted of a "particularly serious crime" and are therefore a danger to the community of the asylum country.²⁶

In some ways, the limitations in Articles 33(2) and 32 may affect more potential witnesses than either Article 1(F). First, the involvement of a large segment of the population with the genocide will exclude many witnesses. Second, the refugee camps throughout the region have been used as a base for paramilitary operations. Obviously, the leaders of these operations will not likely serve as voluntary witnesses before the Tribunal. However, future potential witnesses may served forced conscripts at some time. States might use their involvement with these activities as grounds for exclusion under the security exception. Third, the genocide displaced massive populations, placing a heavy burden on the entire region. States may exclude a refugee witness based on a perceived threat to their security and community arising from the mass migration.

The language establishing the exclusion from non-refoulement protection in 33(2) differs from the exclusion from refugee status in Article 1(F).²⁷ This suggests different legal standards. Still, State practice applies the same standard and nothing in the records of the UN Convention's drafting suggests a desire for 2 separate tests.²⁸ But how can Article 33 continue to protect persons not qualifying for refugee status if the standard for exclusion under Article 1(F) and 33(2) are the same?

²⁶ *Id.*

²⁷ *Id.* Art. 1(F), Art. 33(2).

²⁸ Goodwin-Gil, *Supra* Note 3, 138.

Determining whether a refugee is a security risk appears to have been left to the judgement of the asylum state's authorities.²⁹ The Convention does not impose any requirements of due process upon either the original conviction or the asylum state's assessment of what is a "serious crime". Goodwin-Gil claims principles of justice demand that this assessment can't be a mechanical application that automatically withdraws protection for any conviction.³⁰ Instead, asylum states must engage in evaluating the proportional balance of the serious nature of the offence with the danger to the refugee should refoulement occur. Goodwin-Gil also believes that a refugee must pose a grave threat to the community if refoulement would place that person's life in danger.³¹ Jurisprudence on this point is scarce. However, while not universal in its application, State practice generally follows Goodwin-Gil's principles of proportionality.³²

Some States have interpreted the non-refoulement principal in a very limited restrictive way. In 1991, several states re-affirmed the non-refoulement rule, but limited it to protection against persecution. These states rejected any international law obligation to not return refugees to areas of general unrest or violence.³³ That same year, Turkey returned Kurdish refugees to Northern Iraq despite widespread persecution based on their ethnicity, claiming the non-refoulement principal was inapplicable because

²⁹ *Id.* at 140.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at 131.

the area was part of a UN protection zone.³⁴ Turkey has also repeatedly claimed that refoulement resulting from a too heavy burden placed on the asylum country reflects a failure of the international community, not the State ordering the return.³⁵ In 1988, the United Kingdom claimed that the non-refoulement did not prohibit returning “failed asylum seekers” or expulsion to “safe” 3rd countries.³⁶ Argentina claimed that “refusal of refugees at the border for purely administrative reasons vitiated the principle of non-refoulement.”³⁷

Although the Tribunal has primacy of jurisdiction over the events of 1994, concurrent jurisdiction may create conflicts between the non-refoulement principle and extradition requests from national courts seeking to prosecute witnesses for past human rights abuses. In 1980, the UNHCR Executive Committee concluded that states should protect refugees from extradition to countries where there are well-founded reasons to fear persecution on the grounds listed in Article 1(A)(2) of the UN Convention. But how does one distinguish if State practice applies the same standard to Article 33 and Article 1? It seems unclear how the Executive Committee’s principals are to be applied.

The 1967 UN Declarations on Territorial Asylum (*herein* UN Declaration) is not legally binding since it is not a Security Council

³⁴ *Id.* at 130.

³⁵ *Id.* at 129.

³⁶ *Id.* 131.

³⁷ *Id.*

Resolution.³⁸ However, the UN Declaration could represent an international consensus regarding the interpretation of the 1951 Convention.³⁹ Likewise, the Declaration could be binding if it represented a consensus combined with sufficient state practice to form rules of Customary International Law.⁴⁰ Nonetheless, even if the UN Declaration constituted customary international law, it would prove insufficient for the protection of refugee witnesses. Like the UN Convention, Article 3 of the UN Declaration prohibits rejection, expulsion, or refoulement.⁴¹ The UN Declaration's preamble also quotes Article 14 of the Universal Declaration of Human Rights which grants everyone the right to seek asylum.⁴²

Yet Article 14(2) of the Universal Declaration of Human Rights does not allow persons to invoke the right to seek asylum if they have engaged in acts contrary to the purposes and principles of the United Nations-- such as genocide.⁴³ Article 1(2) of the UN Declaration includes this same principle.⁴⁴ Like the UN Convention, Article 3 of the UN Declaration allows rejection, expulsions, and returning refugees for overriding reasons of national security or to safeguard the population.⁴⁵ The Article explicitly lists preventing a "mass influx of persons" - as has occurred in Congo, Burundi, and Tanzania

³⁸ UN Declaration, *Supra* Note 1.

³⁹ Ian Brownlie, *Principles of Public International Law*, 626-632, 4th ed. (1990).

⁴⁰ *Id.* at 1-30.

⁴¹ UN Declaration, *Supra* Note 1, Art. 3.

⁴² Universal Declaration of Human Rights, *Supra* Note 2, Art. 14.

⁴³ *Id.*

⁴⁴ UN Declaration, *Supra* Note 1, Art. 1(2).

⁴⁵ *Id.* Art. 3.

since the 1994 massacres- as a safeguard measure exempt from the Declaration's protections.⁴⁶

The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the African Charter on Human and People's Rights

In many ways the regional legal regime is more generous in protecting refugees. However, like the UN regime, these protections are subject to numerous limitations for persons reasonably suspected of having committed human rights abuses. As a result, the regional legal regime also does not provide sufficient protection for many potential refugee witnesses.

Rwanda, Congo, Burundi, and Tanzania have all ratified both the African Charter on Human and Peoples' Rights and the Organisation of African Unity (OAU) Convention. Both the OAU Convention and the Charter are legally binding and in effect. Like the International Declaration of Human Rights, Article 12 of the African Charter grants every individual the right to seek asylum.⁴⁷ Under Article 12(3), mass expulsions- defined as those targeting national, ethnic, or religious groups- are prohibited.⁴⁸ Likewise, the expulsion of any legally admitted refugee can only occur after a decision taken in accordance with the law.⁴⁹ However, Article 23 also obligates States to

⁴⁶ *Id.*

⁴⁷ African Charter, *Supra* Note 1, Art. 12.

⁴⁸ *Id.*

⁴⁹ *Id.*

ensure that persons enjoying asylum on their territory do not engage in subversive activities against any Contracting State.⁵⁰

The OAU Convention has a more expansive definition of refugees than the UN Convention.⁵¹ Article 1(1)'s definition of refugees is similar to that of the UN Convention. Refugees are persons who, owing to well-founded fears of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of their nationality and is unable or unwilling to return.⁵² In contrast, Article 1(2) also includes persons who are compelled to leave their country of origin due to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or all of the country of origin.⁵³ Thus a person need not show a well founded fear of persecution to obtain refugee status, but merely the need to flee one of the aforementioned calamities.⁵⁴ In addition to expanding beyond the UN Convention's scope, the OAU Convention's broad definition of the term refugee also marked a departure from regional practice. The refugee

⁵⁰ *Id.* Art. 23

⁵¹ OAU Convention, *Supra* Note 1.

⁵² "For the purposes of this Convention, the term 'refugee' shall mean every person who, owing to well-founded fears of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a results of such events is unable or, owing to such fear, is unwilling to return to it. *Id.* Art. 1(1).

⁵³ "The term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part of 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." *Id.* Art. 1(2).

⁵⁴ Sweden has suggested a similar expansion of the UN Convention definition by classifying those fleeing conflict or natural disasters as refugees. Goodwin-Gil, *Supra* Note. at 131.

definition included in the 1966 Bangkok Principles Concerning Treatment of Refugees mirrored the UN Convention formulation.⁵⁵

Article 2 of the OAU Convention governs asylum, and is also more expansive than the UN Convention. The Article obliges Member States to use their best efforts to receive refugees.⁵⁶ Article 2(2) stipulates that granting asylum is a peaceful humanitarian act, which can not be construed as aggression by the refugee's country of origin.⁵⁷ More importantly, like the UN Convention, Article 2(3) prohibits rejection, expulsion, or refoulement to territories where their life or liberty is threatened.⁵⁸ If a Member State experiences difficulty in granting asylum, it may appeal to either the OAU or other Members for assistance.⁵⁹

Unlike the UN Convention, the Article does not include any exceptions to these protections afforded the refugee. This also represents another reversal of the Bangkok Principles which, like the UN Convention, had included specific exceptions for "overriding principles of national security and safeguarding populations."⁶⁰ However, unlike the UN Convention, Article 2 of the OAU Convention does not apply to persons who fail to qualify as refugees.

⁵⁵ Bangkok Principles, *Supra* Note. Art. 1(a)(b).

⁵⁶ OAU Convention, *Supra* Note. Art. 2(1).

⁵⁷ *Id.* Art. 2(2).

⁵⁸ "No person shall be subjected by a Member State to measures such as rejection at the frontier or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2." *Id.* Art. 2(3).

⁵⁹ OAU Convention, *Supra* Note 1. Art 2(4).

⁶⁰ Bangkok Principles, *Supra* Note. Art. 3.

The expansive language of the refugee definition and asylum protections found in the OAU Convention and African Charter can be deceptive. In some ways, the OAU Convention provides less security than the UN Convention. Persons who have “seriously infringed the purposes and objectives” of the Convention, or committed serious non-political crimes outside their country are excluded from the OAU’s definition of refugees.⁶¹ The restrictions in Article 1(4) of the OAU Convention are stricter than those found in Article 1(F) of the UN Convention. The limitations in the OAU Convention not only exclude persons from refugee status, but the protection of all the treaty’s provisions.⁶² Finally, Article 3 of the OAU Convention explicitly prohibits subversive activities.⁶³ Every refugee has the duty to conform to the laws of the country granting asylum.⁶⁴ Every Contracting State has a duty to prevent refugees engaging in subversive activities against any OAU Member.⁶⁵

III Institutional Authority of the ICTR to Protect Refugee Witnesses

⁶¹ “This Convention shall cease to apply to any refugee if:...(f) he has committed a serious non-political crime outside his country of refuge after his admission to that country as a refugee, or, (g) he has seriously infringed the purposes and objectives of this Convention.” *Id.* Art. 1(4).

⁶² *Id.*

⁶³ *Id.* Art. 3.

⁶⁴ “Every refugee has duties to the country in which he finds himself, which require in particular that he conforms with its laws and regulations as well as with measures taken for the maintenance of public order. He shall also abstain from any subversive activities against any Member State of the OAU.” *Id.*

⁶⁵ “Signatory States undertake to prohibit refugees residing in their respective territories from attacking any State Member of the OAU, by any activity likely to cause tension between Member States, and in particular by use of arms, through the press, or by radio.” *Id.*

If the international and regional regimes prove insufficient, does the Tribunal possess the power to protect refugee witnesses? As a UN entity, the ICTR's powers are limited to those delegated by the Security Council through the Tribunal's charter. Because they are delegated, these powers can not exceed those of the Security Council itself. However, the Tribunal can derive authority from both explicit and implied powers in the charter.

There are no explicit provisions granting the Tribunal the power to grant amnesty, and there is nothing to suggest that the ICTR can grant immunity from national immigration laws. Still, many witnesses will become vulnerable to prosecution of their involvement in 1994. This vulnerability will foster a reluctance to testify. Therefore, the issue becomes whether the Tribunal possesses an implied power to grant amnesty for the offences included in its subject matter jurisdiction.

The Tribunal enjoys primacy of jurisdiction over national courts.⁶⁶ This does not equal exclusive jurisdiction, national courts have a right to prosecute those suspected of violations of international humanitarian law. However, because the Tribunal enjoys primacy of jurisdiction, it may formally ask national courts to defer to its competence at any stage during trial procedures.⁶⁷ To prevent multiple prosecutions for the same offences (and the embarrassing possibility of differing verdicts) by both the Tribunal and national authorities, Article 9 of the ICTR Charter incorporates the

⁶⁶ Charter of the International Tribunal for Rwanda, November 8, 1994, UNSC resolution 955, 33 ILM 1598, Art. 8.

⁶⁷ *Id.* Art. 8(2).

principle of non bis in idem.⁶⁸ The Charter explicitly forbids the prosecution by national courts of persons who have already been tried by the ICTY.⁶⁹ The problem is that the witnesses have not been tried. They have testified, and, one way or another, their involvement with human rights violations has been revealed. As a result, they will remain vulnerable to prosecution by national courts even if allowed to return to their country of asylum.

It is almost certain that the Security Council did not intend to give the Tribunal any implied power to grant amnesty, even to witnesses. Article 21 of the Charter compels the ICTR to provide for the protection of victims and witnesses in its rules of procedure:

The International Tribunal for Rwanda shall provide for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victims identity.⁷⁰

Although the article specifically mentions in camera proceedings and protection of the victim's identity, it also allows the ICTR to adopt protective measures not listed in the Statute. If the Tribunal enjoys an implied right to grant amnesty, it would be found in the open ended language of Article 21.

⁶⁸ *Id.* Art. 9.

⁶⁹ *Id.*

⁷⁰ *Id.* Art. 21.

Unfortunately, no evidence shows any intention of the Security Council to extend this power to the Tribunal under Article 21. Article 22 of the Statute of the ICTY uses almost the exact same language as Article 21 of the ICTR Statute.⁷¹ Academic commentaries tend to take an expansionist view of the ICTY's power to protect victims and witnesses.⁷² Still, I have not read even any mention of suggestions that either Tribunal has an implied right to grant amnesty.⁷³ Moreover, NGO delegates inform me that the question of a power to grant amnesty is among the most controversial issues being debated during the prepcoms for the proposed ICC. This suggests a lack of sufficient consensus within the international community, if not outright hostility, for an implied power to grant amnesty. Thus, even if the ICTR could justify the granting of amnesties legally, the practice could create serious political difficulties.

Could the Tribunal create an informal amnesty by requesting States abstain from prosecuting witnesses? Doubtful. Under the Security Council resolution, States are obligated to co-operate fully with the ICTR, including compliance with requests for assistance or orders issued by the Tribunal.⁷⁴ Article 28 of the Charter further details this obligation.⁷⁵ Specifically, Article

⁷¹ Charter of the International Tribunal for the former Yugoslavia, 23 ILM 1203, Art. 22.

⁷² M. Cherif Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, 844-848 (1996); Virginia Morris, Micheal P. Scharf, *The International Criminal Tribunal for the Former Yugoslavia*, 242-246 (1995).

⁷³ *Id.*

⁷⁴ UNSC resolution, *Supra* Note 66, §2.

⁷⁵ *Id.* Art. 28. The Secretary-General Boutros-Boutros Ghali contended that State failure to comply with Tribunal decisions constituted a violation of a Security Council resolution. Some Academics are less sure, given that the Tribunal's power was delegated by the Council. Furthermore, it is unclear whether this extends to procedural orders, much less requests. Bassiouni, *Supra* Note 72, at 775-779.

28(2) includes a list of the types of State assistance the Tribunal can request.⁷⁶ Granting amnesty to potential defendants is not included. However, Article 28(2) specifically notes that State obligations of assistance are not limited to the those enumerated in the list.

Nonetheless, it is unlikely that Article 28(2) obligates States to forsake the prosecution of suspects in deference to amnesty's granted by the Tribunal. In drafting the similarly worded provisions of the ICTY Charter, the Security Council included interpretative statements that sought to circumscribe the Tribunal's primacy of jurisdiction.⁷⁷ These comments recommended avoiding any arbitration of assertion of primary or unnecessary encroachment upon the sovereignty of States exercising their criminal jurisdiction.⁷⁸ The Security Council attempted to preserve the sovereign prerogative of national jurisdictions, implying the absence of any State obligations to honour amnesties granted by the Tribunal.

There is one final option. The Charter grants the Tribunal, its judges, prosecutor, and their staffs privileges and immunities.⁷⁹ These are governed by the 1946 Convention on Privileges and Immunities of the United Nations. The staff of the Prosecutor, and Registrar enjoy the privileges and immunities under Articles V and VII of this Convention.⁸⁰ The ICTR could attempt to incorporate witnesses under these protections by designating them experts on

⁷⁶ UNSC resolution, *Supra* Note 66, Art. 28.

⁷⁷ Morris, Scarf, *Supra* Note 72, at 127.

⁷⁸ *Id.*

⁷⁹ Charter for the International Tribunal for Rwanda, *Supra* Note 66.

⁸⁰ *Id.*

mission. This might be done under Article 29(4) of the Charter which grants privileges and immunities to "other persons" as is necessary.⁸¹

I believe the political fallout resulting from the over extension of immunities would be immense. First, classifying witnesses as personnel, even if only experts on mission, would undermine their independence. This would adversely affect the credibility of both the witnesses and the trial process. There might also be contractual employment issues that I am not aware of. Second, and more importantly, these witnesses require immunity because they are suspected of violating international humanitarian law. It is reasonable to entice the testimony of minor actors in order to mete out justice to major criminals. But these people hardly have clear consciences. Some States would attack the Tribunal for harbouring the very war criminal it was created to prosecute.

⁸¹ "Other persons, including the accused, required at the seat or meeting place of the International Tribunal for Rwanda shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal for Rwanda." *Id.*