

4-28-1994

Do the Events in Rwanda Constitute a Genocide?

N/A

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4/28/94

To: AF/C - Arlene, Reed, Kevin & co.

From: L/AF - Joan Donoghue

Subject: Rwanda: is it "genocide" within the meaning of the 1948 Genocide Convention?

This morning, Mary Swann asked L to speak with the press spokesperson on the question whether the events in Rwanda are "genocide" within the meaning of the 1948 Genocide Convention. I attach a paper prepared by L/HRR David Stewart) on this issue and call your attention to three points:

(1) There are three elements of "genocide:" (1) certain prohibited acts (including killings of group members); (2) directed at certain kinds of groups (including national/ethnic groups) and (3) with the intent of destroying the group in whole or in part. The first two elements are plainly met in Rwanda. The third element apparently derives from the Holocaust, in which government "plans" made it easy to define an "intent." This element is more elusive in situations like Rwanda, although intent can sometimes be inferred from the other facts. In ratifying the Convention, the United States expressly stated its view that there must be "specific intent" to destroy a covered group.

(2) When acts are labeled "genocide," this can increase the political expectation that the USG will "do something" about them. The L lawyers who handle human rights issues have noted that, for this reason, decisions on whether to use the "genocide" label in the former Yugoslavia have been taken personally by the Secretary.

(3) As the attached paper indicates, the Genocide Convention provides four means of pursuing allegations of genocide: (1) domestic criminal prosecution (difficult in circumstances like Rwanda); (2) an international criminal court (none now exists; conceivably, one could be established, as in Yugoslavia); (3) referral to the UN (presumably, to the UNSC); and (4) proceedings against a government before the International Court of Justice (not useful where perpetrators are not from the government and only relevant here if Rwanda is a party to the Genocide Convention (I can check)).

I assume that this is not the last that we will hear of this issue. Please let me know if L can be of assistance.

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GENOCIDE

Under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, to which the United States, Rwanda and 100 other countries are Parties, "genocide" is defined to include any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group to another group. (Article II)

Thus, as a matter of international law, the crime of genocide includes three principal elements: (1) one or more of the prohibited acts (2) directed at a particular national, ethnical, racial or religious group (3) with the intent of destroying that group in whole or in part.

Persons charged with genocide may be tried by a competent tribunal of the State in which the acts were committed or by an international penal tribunal having jurisdiction accepted by the relevant States Party (no such international tribunal has been established). The Convention further provides that all persons guilty of the crime shall be punished "whether they are constitutionally responsible rulers, public officials, or private individuals." States Party to the Convention may call upon the competent UN organs to take appropriate action to prevent and suppress acts of genocide.

Forcible repression of an armed rebellion would not, in and of itself, constitute genocide, nor would indiscriminate killing of innocent noncombatants or other brutal military actions. However, acts constituting the crime of genocide would not be rendered legitimate because they were carried out in response to an armed insurrection or rebellion.

In ratifying the Genocide Convention, the United States put on record its view that, in order to meet the Convention's criteria, there must be "specific intent to destroy, in whole or in substantial part, a national, ethnical, racial or religious group as such by the acts specified in Article II."

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L PRESS GUIDANCE
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Genocide: Options

Q: What penalties are provided by international law for the crime of genocide? What can be done to those who commit genocide?

A: Allegations under the 1948 Genocide Convention can be pursued in several ways.

1. Domestic Criminal Prosecution. Article VI of the Convention provides that persons charged with an act of genocide "shall be tried by a competent tribunal of the State in the territory of which the act was committed." Each State Party is obliged to enact the necessary legislation to give effect to the Convention and to provide "effective penalties for persons guilty of genocide" (as well as conspiracy to commit genocide, direct and public incitement to genocide, attempt to commit and conspiracy in genocide) within its territory. Under this Article the country in which genocide takes place is obliged to bring a domestic prosecution under the Convention. Other States Party do not have an obligation to prosecute (they do, however, have the duty to extradite alleged offenders) and will likely not have the necessary jurisdiction. The U.S. implementing legislation provides jurisdiction only over defendants who are U.S. nationals or who committed genocidal acts on U.S. territory.

2. International Criminal Court. Article VI also provides that persons accused of genocide may be tried "by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." Although there is a long history of consideration of such a court, none has been established. The effort would be difficult and contentious, requiring agreement on a range of practical issues (such as jurisdiction, rules of procedure and evidence, funding, selecting prosecutors, determining appropriate forms of punishment, etc.). Risk of politicization could be substantial. These and other concerns led the Senate to include a declaration in its resolution of advice and consent to ratification of the Convention to the effect that the U.S. reserves its right to effect participation in such a tribunal "only by a treaty entered into specifically for that purpose with the advice and consent of the Senate."

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3. Referral to UN. Article VIII permits States Party to "call upon the competent organs of the United Nations to take such action under the Charter...as they consider appropriate for the prevention and suppression of acts of genocide" including conspiracy, incitement, attempt and complicity. The issue can be presented to the Security Council under Chapter VI or VII, to the General Assembly, or to the UN Commission on Human Rights (for example, for investigation as a "consistent pattern of gross violations of internationally recognized human rights"). A range of actions can be sought to prevent and suppress the alleged acts, but the various UN organs would not be competent to conduct criminal prosecutions themselves.

4. ICJ Proceeding. Article IX of the Convention provides for submission to the International Court of Justice "disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those related to the responsibility of a State for genocide or for any of the other acts enumerated in Article III" (e.g., conspiracy, incitement attempt, complicity). Such a proceeding could only be brought against a State Party, not against individual defendants (although the Court might be led to consider the responsibility or even culpability of individual government officials). The United States, however, subjected its ratification of the Convention to a reservation under which the U.S. may only be sued in the ICJ with its consent; since, as a matter of international law, that reservation may be invoked reciprocally against the U.S., the U.S. could initiate such an action only with the specific consent of the challenged foreign government.

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