

National Security Law Report

Cruel Footnote to Tragedy

Democracy Training Comes Too Late for Rwanda

by CDR M.E. Rosen, JAGC, USN
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In what has become a cruelly ironic footnote to the ethnic warfare engulfing Rwanda, UN Peacekeepers escorted rebel leaders of the Rwandan Patriotic Front from the border to the capital city of Kigali to a democracy-building conference with their adversaries, members of the official Government of Rwanda Armed Forces, during January 10-24, 1994. Together, the participants in the conference discussed core democratic values, including civilian control of the military and the military's role in the protection of human rights. The Rwandan seminar was developed as part of the Department of State and the Department of Defense's congressionally-mandated program to promote democracy and cooperatively engage foreign military personnel.

In 1990, Congress amended the Foreign Assistance Act of 1961 to authorize expanded democratization training programs as part of the security assistance program. The amendment was in response to the "window of opportunity" provided by the end of the Cold War. This initiative, known as Expanded International Military Education and Training (Expanded IMET), provides three goals for education of foreign military and civilian personnel:

- (1) contributing to responsible defense resource management;
- (2) fostering greater respect for and understanding of the principle of civilian control of the military; and

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(3) improving military justice systems and procedures in accordance with internationally recognized principles of human rights.

Numerous courses given at various DoD schools qualify for Expanded IMET funding. To qualify, the course content must relate to the three congressional goals mentioned above. However, these goals have largely been fulfilled by three DoD schools. The Defense Security Assistance Agency (DSAA), the executive agent for IMET, tasked the Defense Resource Management Institute (DRMI) with the responsibility for developing Expanded IMET courses which emphasize the resource management theme. DSAA tasked the Naval Justice School (NJS), in Newport, Rhode Island, with developing Expanded IMET courses which emphasize the de-

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May 19 Breakfast

INS Commissioner Doris Meissner Addresses National Security Immigration Problems

United States Immigration and Naturalization Service (INS) Commissioner Doris M. Meissner spoke to the May 19, 1994, Standing Committee breakfast at the International Club.

Noting that "we are a nation of immigrants," she identified the four major periods of immigration to the United States—starting with "the initial peopling of the nation," a second period in the middle of the Nineteenth Century, a third in the first two decades of the Twentieth Century (the largest), and the current period, which she said began in the 1970s.

Today's immigration, she argued, is different. "Up until this current period, our immigration was almost totally European based; today, our immigration is ninety percent from Latin America and Asia."

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mocracy promotion component of the congressional initiative. Finally, the Naval Postgraduate School (NPS) in Monterey, California has developed courses stressing conflict resolution techniques which enhance civilian control of the military.

To teach the human rights courses, NJS Mobile Education Teams (METs) travel to foreign countries to educate foreign military and related civilian personnel. METs include judge advocates and line officers from all of the services. In addition to courses on human rights, NJS is developing modules as components of other, more technical, courses which the US military offers on a grant basis under the general IMET program or for sale in Foreign Military Sales cases. For fiscal year '94, NJS is planning Expanded IMET programs for more than a dozen countries in Eastern Asia, Eastern Europe, and Africa.

Even though the NJS and other DoD schools offer a variety of courses which have a high human rights or military justice content, the "Executive Seminar" is the course which is most identified with the democracy promotion goal of the Expanded IMET program. In phase I of this seminar, MET members travel to the host nations to interview military and government officials about the host nation's legal structure and constitution, the military justice system, and the relationship between the military and other civilian institutions. Problems in the human rights arena are also surveyed. In phase II, representatives from the host nation visit NJS or some other designated US site for one week to rigorously scrutinize the training module prepared by the MET members from the phase I survey. Many of the visitors will later be co-presenters of the materials with the MET team. The phase III culmination of the Expanded IMET course is a one week seminar known as the "Executive Seminar on Human Rights and Military Justice Systems." Phase III seminars are presented to civilian and military officials in the host nation.

It is difficult to empirically measure the success of the Expanded IMET initiative. There is considerable anecdotal evidence that all phases of the training have been favorably received by the nearly 450 students who have completed phase III training in eight countries. Obviously, more definitive analysis of the strengths and weaknesses of the program will be possible once the remaining half-dozen courses for fiscal year 1994 and the nearly two dozen course initiatives for fiscal year 1995 are completed.

Expanded IMET teaching teams work closely with the entire US country team (headed by the ambas-

sador). Therefore, the proof of whether Expanded IMET is making a difference can be found in the number of requests for "repeat performances" which the NJS has received in the short time it has been in business. Since the Expanded IMET program crystallized in mid-1992, the NJS has conducted repeat seminars in New Guinea, Sri Lanka, and the Philippines. Additionally, there have been informal invitations for repeat performances in Latvia, Estonia, Lithuania, Hungary, Senegal, and Sierra Leone.

The recent Executive Seminar in Rwanda is a representative Phase III seminar example, and was noteworthy in a number of respects. First, because of overwhelming interest, it was expanded from one to two weeks. Second, the seminar received support from high-level officials and was opened by the Honorable David Rawson, the US Ambassador to Rwanda, and by Brigadier General Romeo A. Dallaire, the UN Commander responsible for overseeing the UN-brokered "Arusha Peace Accord." Third, a total of 113 senior members of the military and civilian leadership of both the Government of Rwanda Armed Forces and the rebel Rwandan Patriotic Front joined together in dialogue about democratic principles as part of the nation building process then taking place.

Additionally, team members provided a block of instruction to UN peacekeepers and Rwandan military personnel on the law of armed conflict (Geneva Conventions), the need for and content of the rules of engagement, and, finally, the legal basis for UN peacekeeping operations. Throughout all the sessions, "mixed" small group sessions were held. Students were asked to draft model regulations for the expected integration of the Rwandan Armed Forces (RGF and RPF) and to prepare a speech

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Part III—Definition of Offenses

War Crimes Rules for the Former Yugoslavia

by Walter G. Sharp, Sr.

Editor's Note: This is the third and final article in a series on the proposed war crimes trials in the former Yugoslavia. Earlier parts appeared in the February and May 1994 issues.

In the preface to the Proposed Rules of procedure and Evidence for the International Tribunal, the United States volunteered to define the elements of the offenses under the jurisdiction of the tribunal. During January of 1994, the DoD working group completed a proposed Definition of Offenses. Once the interagency review is complete, the proposed Definition of Offenses will be provided to the Department of State for transmittal to the tribunal. The first two parts of this series detailed the provisions of the statute and the proposed rules (see *Report*, February & May, 1994). This final part will provide a detailed overview of the Definition of Offenses.

Articles two through five of the Statute of the International Tribunal (hereinafter the statute) generally define the crimes under the jurisdiction of the tribunal, but do not detail the elements of the offenses. The purpose of drafting elements for each crime authorized for prosecution is to identify clearly those facts that must be proven beyond a reasonable doubt before a Trial Chamber can reach a finding of guilty. This will ensure consistency in charging and that the defense has notice of the alleged offense. The proposed elements of the offenses do not attempt to create law, but are intended to reflect a codification of existing international law.

Each offense is discussed in a six-part format which includes the elements of the offense, commentary, lesser included offenses, maximum punishment, a sample charge, and closely related offenses. While the first part lists those constituent facts which must be proven by the prosecution, the commentary which follows further defines terms used in the elements and cross-references the international law from which the elements are derived. A lesser included offense is one that is included within a charged offense when the charged offense contains allegations which, either expressly or by fair implication, puts the accused on notice

to be prepared to defend against it in addition to the charged offense. This notice requirement may be met when all of the elements of the lesser offense are included in the greater offense, and the common elements are identical or legally less serious; or, when all of the elements of the lesser offense are pled and included in the greater offense charged, even though the included offense requires proof of an element not required in the greater offense charged.

Article 24 of the statute limits authorized punishments to imprisonment and the return to the rightful owners of any property and proceeds acquired by criminal conduct. The subparagraphs of the proposed definitions which define the maximum punishment for each offense only list the maximum allowable imprisonment; however, the punishment of any offense may include the return of any property or proceeds unlawfully obtained. A *Table of Maximum Punishments* for all offenses is provided at the end of the proposed definitions. The Trial Chamber should specify in its judgement whether or not the sentences for multiple offenses will be served concurrently or consecutively.

The charge is a plain, concise statement of the essential facts constituting the offense charged. It is sufficient if it alleges every element of the charged offense expressly or by necessary implication. When the name is not available, it is sufficient to describe the victim in the charge. The sample charge provided is intended to serve as a guide in drafting charges. It can be varied in form and content as necessary. To aid in charging multiple offenses that are factually related for contingencies of proof, the last subparagraph of each proposed definition lists closely related offenses which may be separately charged.

Definition one provides that any person who planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation or execution of a crime proscribed by the statute is individually responsible for the crime. A person in a position of superior authority is individually responsible for a failure to prevent a crime or to deter the unlawful behavior of his or her subordinates if the person of superior authority knew or should have known that such subordinates were about to commit or had committed crimes and yet failed to take the necessary and reasonable steps to prevent or halt the commission of such crimes or to punish the offenders. A person who commits a crime pursuant to an order of a superior is individually responsible unless the accused did not know, and a person of ordinary sense and understanding would not have known, that the order was unlawful.

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This definition also provides for attempts and conspiracies.

Definitions two through five list the substantive crimes authorized by articles two through five of the statute. Definition two provides the elements of the offenses for grave breaches of the 1949 Geneva Conventions, which include the following acts when committed against a person protected under the 1949 Geneva Conventions: willful killing, torture, inhuman treatment, biological experiments, willfully causing great suffering or serious injury to body or health, extensive destruction and appropriation of property not justified by military necessity, compelling service in the forces of a hostile power, willful deprivation of the rights of fair and regular trial, unlawful deportation or transfer or confinement, and taking of hostages. Rape was included as an offense under the definition of willfully causing great suffering.

The third definition proscribes violations of the laws or customs of war and reflects the principle that the right of belligerents to conduct warfare is not unlimited. The statute lists five examples of violations of the laws or customs of war within the jurisdiction of the tribunal, but specifically states that the list is not exhaustive. The enumerated crimes prohibit the employment of weapons calculated to cause unnecessary suffering, wanton destruction or devastation not justified by military necessity, attack of undefended areas, seizure or destruction of cultural property, and plunder of public or private property. To allow a framework for charging violations not listed as an example in the statute, a definition was included for "other violations of the laws or customs of war."

The elements of genocide found in the fourth definition were derived from the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The key distinction between genocide and similar crimes in definition two, such as willful killing or causing serious bodily injury, is that a conviction of genocide requires proof that the act was committed with the intent to take part in a plan to destroy a particular national, ethnic, racial, or religious group.

Crimes against humanity are defined in the fifth definition as those serious offenses directed against persons as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds. There is considerable overlap between these offenses and genocide, grave breaches of the Geneva Conven-

tions, and violations of the laws or customs of war. The possible victims of crimes against humanity constitute a wider class than those who are capable of being made objects of these other offenses. Although both are directed against a specific group, crimes against humanity can be distinguished from genocide in that they do not require an intent to destroy the group, only proof that the act was part of a widespread or systematic attack against a civilian population on national, political, ethnic, racial, or religious grounds.

The final definition identifies affirmative defenses, which are those that the defense must place at issue, but once at issue, the prosecution has the burden of proof to establish that the defense did not exist. These defenses include duress, coercion, and ignorance or mistake of fact. A subjective and objective standard of knowledge for persons in positions of superior authority and persons acting pursuant to superior orders is also codified.

Existing international law, as reflected and codified in the proposed definition of offenses, is more than adequate to proscribe the killings, rapes, and other atrocities that are occurring daily in the former Yugoslavia. The existing law will not, however, prevent a single crime if it is not effectively and consistently enforced. The universal condemnation of these heinous crimes is reflected in the creation of the tribunal, and the judges of the tribunal have already adopted rules of procedure and evidence that are largely consistent with the proposed rules submitted by the United States last November. The international community must now reinforce deterrence by continuing its support for the tribunal and the prosecution of these war crimes. If the international community fails to maintain their political resolve, it will erode even further the deterrent value of the rule of law.

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Calendar of Events

August 6—Luncheon to honor Heads of State and CEELI Pro Bono Participants
(ABA Annual Meeting—New Orleans)

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outlining the legal justification for UN intervention in a hypothetical country.

The UN commander charged with assisting in the implementation of the Arusha Peace Accords commended the group on its analysis of the law of peacekeeping. Likewise, the US Ambassador, who participated heavily in this democratic laboratory, remarked that "the [Expanded] IMET funded conference was conducted at a crucial time in U.S.-G.O.R. relations, allowing for military-to-military and military-to-civilian contacts." The class leader remarked that "it is clear that we have achieved some degree of consensus on several issues. Consensus is one of the important ingredients of democracy."

The current carnage in Rwanda should not in any way suggest a conceptual flaw in the Expanded IMET initiative. While the current Rwandan civil war is certainly sobering, its lesson *vis-à-vis* Expanded IMET should be merely to temper expectations to a reasonable level. Obviously, it would be naive in the extreme to expect that a short seminar standing alone is sufficient to erase deeply ingrained tribal hatreds. The seeds planted at the seminar simply did not have time to take root or to spread throughout the armed forces of either the Hutu or Tsutsi factions.

It is reasonable to expect that a pattern of gradual and measured engagements will, over time, foster democratic stability elsewhere, and maybe even again in Rwanda. As stated by Admiral Charles Larson, former Commander in Chief of the Pacific, in Senate testimony of March 2, 1994, "It is no coincidence that the countries of Asia in which democracy has taken firm hold have the longest tradition of sustained military-to-military contact with the U.S." The fact that the Expanded IMET initiative came too late in Rwanda should not deter

the United States from its course. The alternative, failing to foster democratization in emergent States and nascent nations, is untenable.

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Meissner Breakfast ...

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New York remains the "gateway to the country," but New York has now been joined by California and the Southwest as a second major center.

Indeed, she said, "Immigration is a phenomenon really only in six states in the country. Seventy-five percent of the immigrants go to either California, New York, Florida, Texas, New Jersey, or Illinois. Not only is immigration concentrated in certain specific states, but it is especially focused in a range of other social issues and challenges that are critical to the future of our society."

"We are really transforming ourselves ... from a nation that always was a diverse nation—a nation that looks at diversity as a source of our strength ... into an even more diverse nation than we have been in the past." Commissioner Meissner said it was "quite extraordinary" that these changes are occurring as smoothly as they are. "We are not a Bosnia, we are not a Rwanda—where we are at each other's throats over ethnic differences—we have not experienced the kind of social upheaval that was experienced at the turn of the century."

Nevertheless, she said there were major issues coming dramatically to the surface concerning today's immigration. Particularly in California, these issues are not only intrinsically important, but they are becoming increasingly important politically. Governor Pete Wilson, for example, "has essential-

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ly staked his reelection" in California on a campaign taking on the issue of immigration and attributing the state's fiscal ills to the immigration problem.

The current Administration is addressing the immigration issue on a variety of fronts, she said. There are a series of legislative and funding proposals on the Hill designed to significantly strengthen certain areas of immigration policy. These begin with the southwest border and a more effective effort to prevent illegal immigration; but they also address our consulates overseas, airport security, and our policies governing the granting of visas—to re-examine how we identify people that are coming into the country "so that we can have . . . better prevention of people who ought not to be coming." Much of this effort is devoted to technology, data systems, and other improved means of knowing who is coming—who the people are to whom we are granting admission.

Another serious problem she identified is that of criminal aliens. She said that the growth in the criminal alien population in this country in the past five-to-ten years is "quite dramatic," and it is especially a problem for the large "immigration states" because of the costs of incarcerating criminal aliens. One thing the Administration is trying to do, she said, is to become more effective administratively in preparing people for deportation before sentences are completed—so that deportation "occurs immediately upon release" and "people who are from other countries and ought not to remain are not released into the general population."

Another area she indicated was being addressed is the need to strengthen the asylum system—a system which at present "cannot deliver timely decisions" and thus "allows people to remain in the country for relatively long periods of time while applications are pending without resolution."

This issue has clear national security implications, as demonstrated by last year's shootings at the CIA by an individual who had had an asylum application pending for some time. We need a system to decide such applications quickly, she said, so that people who are not truly refugees no longer have a reason and a right to remain here.

Commissioner Meissner concluded her remarks by identifying three key issues that need to be addressed:

- First, she noted that several American states are raising legitimate issues of the costs and

benefits of immigration. While these concerns are understandable, Commissioner Meissner contended that, overall, "as a macro issue," immigration remains "a plus" for the country. At the same time, she acknowledged that the difficulties of immigration and the costs thereof are disproportionately borne at the local level so that, from a taxation standpoint, the revenues go into the national coffers while the costs of education and social programs are largely imposed upon the local level. This "disconnect" is becoming more apparent and more difficult to manage, she said, and the question of "who pays" is a "classic issue of federalism" that needs to be honestly addressed.

- A second key problem concerns the levels of immigration we want to have in the years ahead. Commissioner Meissner said the nation needs to address this issue in the context of a global economy and growing economic interdependence—an era in which the free movement of labor more and more accompanies the free movement of capital and goods. But we also have a serious need to restructure our own economy and to focus more aggressively upon the retraining of our own worker—something best accomplished by putting the kinds of pressure on employers associated with tight labor markets— and this creates a dilemma we need to address.

- Finally, she said, there is a growing connection between international migration and US foreign policy and national security interests. "The only real security interest that we have in Haiti is the danger of large, unregulated movements of people from Haiti to the United States," she said, and the coming demise of Castro may provide a similar immigration concern. An underlying consideration in the NAFTA decision was the anticipated effect of serious underdevelopment on our own border. By creating buffers between developed and less developed countries, some of the movement of people that is going on is at least checked across geography. Germany has a similar problem with Poland and other less prosperous Eastern European countries, and there are other examples as well.

She observed that these international concerns are likely to become "much more of a preoccupation as time goes on in this post-Cold War era."