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FROM NUREMBERG TO THE RWANDA TRIBUNAL: JUSTICE OR RETRIBUTION?

*Makau Mutua**

I. INTRODUCTION

In the early 1990s, five decades after Nuremberg, the United Nations set up two ad hoc war crimes tribunals.¹ In 1998, the U.N. went further, and adopted the Rome Statute for the International Criminal Court.² The Nuremberg and Tokyo tribunals were the first such panels.³ The United Nations stated that the Yugoslav and Rwanda Tribunals were de-

* Professor of Law, State University of New York at Buffalo Law School; Director, Human Rights Center at SUNY Buffalo. This essay is based on a talk the author gave in December 1997 at the conference on Peace and Human Rights in the Great Lakes Region of Africa at Makerere University in Kampala, Uganda.

¹ In 1993 the Security Council of the United Nations established on an ad hoc basis the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991 (hereinafter Yugoslav Tribunal). *See* S.C. Res. 808, U.N. SCOR, 3175th mtg. U.N. Doc. S/RES/808 (1993); S.C. Res. 827, U.N. SCOR, 3217 mtg. U.N. S/RES/827 (1993); REPORT OF THE SECRETARY GENERAL PURSUANT TO 2 OF THE SECURITY COUNCIL RESOLUTION 808, U.N. Doc. S/25704, Annex (1993) (containing text of the statute of the Yugoslav Tribunal). For an exhaustive analysis and documentation of the Yugoslav Tribunal, see M. Cherif Bassiouni & Peter Manikas, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (1996). In the case of Rwanda, the Security Council of the United Nations established on November 8, 1994, the International 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 1994 and 31 December 1994 (hereinafter Rwanda Tribunal). *See* United Nations Security Council, *Report of the Secretary General Pursuant to ¶ 5 of Security Council Resolution 955*, U.N. Doc. S/1995/134 (1994).

² *Rome Statute for the International Criminal Court*, U.N. Doc.A/Conf.183/9 (1998) (visited Apr. 21, 2000) <<http://www.un.org/law/icc/statute/contents.htm>>.

³ The International Military Tribunal at Nuremberg (hereinafter Nuremberg Tribunal) was established in 1946 by the Charter of the International Military Tribunal for the Far East at Tokyo, Jan. 19, 1946 (amended Apr. 26, 1946), T.I.A.S. No. 1589, 4 *Bevans* 20; Charter dated January 19, 1946, reprinted in 4 *Treaties and Other Agreements of the United States of America* 27 (1946); Amended Charter

signed to “put an end” to serious crimes such as genocide and to “take effective measures to bring to justice the persons who are responsible for them.”⁴ This essay argues that, at least with regard to the Rwanda tribunal, both assumptions are deeply flawed; such a tribunal will have little, if any, effect on human rights violations of such enormous barbarity. Moreover, the essay questions the motives behind the creation of the Rwanda tribunal and argues that the tribunal serves to deflect responsibility, to assuage the consciences of states which were unwilling to stop the genocide, or to legitimize the Tutsi regime of Paul Kagame, Rwanda’s strongman. It contends, in any case, that from the start the tribunal was intended to achieve neither the abolitionist impulses nor the just ends trumpeted by the United Nations. The essay argues that the tribunal is marginal, if not entirely irrelevant, to the political, reconstructionist, and “peace” and “normalization” processes underway in Rwanda. In the event, the Rwanda tribunal largely masks the illegitimacy of the Tutsi regime and allows Tutsis a moral plane from which to exact their revenge on the Hutus. The article concludes that such a tribunal would only make sense in the context of an overall solution, a compre-

dated April 26, 1946, T.I.A.S. no. 1589, *reprinted in 4 Treaties and Other International Agreements of the United States of America* 27 (1946).

⁴ See S.C. Res. 827, *supra* note 1, at 1. The Security Council expressed its belief that the creation of the Yugoslav Tribunal for the “[p]rosecution of persons responsible for the above-mentioned violations [mass killings, massive and systematic detention, killings, and rape of women, and ‘ethnic cleansing’] of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed.” *Id.*, at 1. The International Criminal Tribunal for Rwanda was established after the commission of experts formed by the Security Council to investigate violations in that civil war recommended such a tribunal. S. C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/Res/955 (1994). The Rwanda Tribunal was created with some ties to the Yugoslav Tribunal. S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., Annex, Art. 12(2), U.N. Doc. S/Res/955 (1994) (adopting and annexing the tribunal statute). The members of the Appeals Chamber and the Prosecutor of the Yugoslav Tribunal serve the same functions for the Rwanda Tribunal. See also, Payam Akhavan, “Enforcement of the Genocide Convention: A Challenge to Civilization,” 8 HARV. HUM. RTS. J. 229, 240-241. The Security Council resolutions establishing the Yugoslav and Rwanda tribunals were binding on states because they were taken under Chapter VII of the United Nations Charter. The deployment of Chapter VII of the UN Charter was preferable to the creation of such tribunals by treaty because it “[w]ould have the advantage of being expeditious and of being immediately effective 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.” See *Report of the Secretary General*, *supra* note 1, ¶¶ 22-23.

hensive and bold settlement addressing the foundational problems that unleashed the genocide in the first place.⁵ As it is, the tribunal now orbits in space, suspended from political reality and removed from both the individual and national psyches of the victims as well as the victors in the Rwanda conflict.

II. HYPOCRISY AND THE LEGACY OF NUREMBERG

Nuremberg was a patchwork of political convenience, the arrogance of military victory over defeat, and the ascendancy of American, Anglo-Saxon hegemony over the globe. Telford Taylor, the chief deputy prosecutor in the American team at Nuremberg, provides a partial silhouette of this construction:

The initial pressure for post war trials came from the peoples of the German-occupied nations, but the assemblage of all the concepts in a single package was the work of a handful of American lawyers, all but Cutter (who was from Boston) from New York city. Some of them (Stimson, McCloy) were what today we call "moderate" Republicans; several (Rosenman, Chanler, Herbert Wechsler) were Democrats. Elitist and generally accustomed to personal prosperity, all had strong feelings of noblesse oblige.⁶

As noted by Anderson, "Nuremberg was fundamentally an expression of a peculiarly American legal sensibility"⁷ beginning with the fact that although many in the German-occupied lands wanted the trials, it was the Americans who pushed for them and brought along the skeptical British.⁸ The other two powers, the French and the Soviets, were merely ornamental: they were "brought in later, in order to complete the 'Allies'".⁹ Thus, Nuremberg can be seen as an orchestrated and highly manipulated forum in-

⁵ For a good discussion about the place of judicial intervention in genocidal conflicts, see Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons of Rwanda*, 24 YALE J. INT'L L. 365 (1999).

⁶ Telford Taylor, *THE ANATOMY OF THE NUREMBERG TRIALS* 41 (1992). Taylor himself was a graduate of Harvard Law School who had held senior appointments within the legal profession. *Id.*

⁷ Kenneth Anderson, *Nuremberg Sensibility: Telford Taylor's Memoir of the Nuremberg Trials*, 7 HARV. HUM. RTS. J. 281, 289 (1994) (reviewing TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* (1992)).

⁸ *Id.* at 289.

⁹ *Id.* The Tokyo Tribunal, which tried Japanese civil and military leaders for waging a war of aggression, was a naked American affair. It was dominated by

tended primarily to impress on the Nazi leadership who the victors were and to discredit them as individuals as well as their particular brand of the philosophy of racial supremacy. The irony of Nuremberg, and the White men who created it was that their states either practiced as official policy or condoned their own versions of racial mythologies: Britain and France violently put down demands for independence in “their” colonies in Africa and Asia while the United States denied its citizens of African descent basic human rights.

It is not surprising therefore that Nuremberg did not demonize the German people as a whole, although many Germans participated in, acquiesced to, and supported the Holocaust and the countless horrible abominations of the Third Reich. It mattered to the Allies that Germany be recast, shorn of its ability to make aggressive war, because the West needed it in the reconstruction of Europe. This purpose would have been difficult to accomplish had the trials satanized the German people as a whole and painted the evils they committed as symptomatic of a national, genetic pathology.

The paltry numbers of those tried and convicted at Nuremberg — twenty-two indictments and nineteen convictions — made a mockery of criminal liability for the massive killings, torture, and other barbarities committed by the Nazis.¹⁰ Even the number of the estimated 3,000 trials of war criminals in the national courts of other Allied powers utilizing international law and the norms employed by the Nuremberg Tribunal is too small for such widespread offenses.¹¹ Prosecution was thus selective and the creation of applicable law inventive, if not convenient. The concepts of individual responsibility for international crimes was a departure, an innovation, from existing customary or treaty law, as were the notions of crimes against peace and crimes against humanity.¹² Chief Justice Harlan Fiske Stone attacked the Nuremberg trials in a most searing language:

So far as the Nuremberg trial is an attempt to justify the application of the power of the victor to the vanquished because the vanquished made aggressive war, . . . I dislike

American judges, prosecutors, and attorneys. See INTERNATIONAL LAW AND WORLD ORDER 170 (Burns H. Weston et al. eds., 2d ed. 1990).

¹⁰ For a tabulation of the counts, indictments, and convictions at Nuremberg, see INTERNATIONAL LAW AND WORLD ORDER, *supra* note 9, at 168-69.

¹¹ *Id.* at 171.

¹² INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 100-02 (Henry J. Steiner & Philip Alston eds., 1996); see also, Francis Biddle, *The Nuremberg Trial*, 33 VA. L. REV. 679, 694 (1947).

extremely to see it dressed up with a false facade of legality. The best that can be said is that for it is that it is a political act of the victorious States which may be morally right. . . .It would not disturb me greatly. . . .if that power were openly and frankly used to punish the German leaders for being a bad lot, but it disturbs me some to have it dressed up in the habiliments of the common law and the Constitutional safeguards to those charged with crime.

Jackson [Robert H. Jackson, Associate Justice of the Supreme Court of the United States, chief prosecutor at Nuremberg] is away conducting his high-grade lynching party in Nuremberg. . . .I don't mind what he does to the Nazis, but I hate to see the pretense that he is running a court and proceeding according to common law. This is a little too sanctimonious a fraud to meet my old-fashioned ideas.¹³

While the Allies found no problem with extending the reach of international law to cover the actions of the Nazis, they took great care to exclude from the jurisdiction of the Nuremberg Tribunal their own conduct which did not then constitute the violation of international customary or treaty law but which was nevertheless horrendous, such as the massive bombing of cities with extremely high civilian casualties.¹⁴ The Tokyo Tribunal was even more blatant in excluding the culpable acts of the Allies. It forbade any attempt by the lawyers for the Japanese defendants to argue the defence of *tu quoque*, which would have estopped the Allies from prosecuting the enemy for acts the Allies committed themselves.¹⁵ According to a judge at the Tokyo Tribunal, the judges feared that allowing the defence of *tu quoque* would have opened the door to defence arguments about the American fire-bombing of Tokyo, which killed 72,000, and the nuclear bombardment of Hiroshima and Nagasaki.¹⁶

The lessons of Nuremberg for both the Yugoslav and Rwanda Tribunals are disturbing to say the least. Even though Germany was completely defeated and occupied, allowing the Allies access to most of the offenders and substantial evidence, the prosecutions were sharply limited to "major war criminals." Political expediency and the West's desire to get on

¹³ ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 715-16 (1956).

¹⁴ See Steiner & Alston, *supra* note 12, at 102.

¹⁵ INTERNATIONAL LAW AND WORLD ORDER, *supra* note 9, at 7.

¹⁶ *Id.* at 170; See particularly B.V.A. ROLING, THE TOKYO TRIAL AND BEYOND: REFLECTIONS OF A PEACEMONGER (Antonio Cassese ed., 1993).

with the reconstruction of Europe and Germany appeared to have militated against the prosecution of more offenders. It is considerably more difficult to try any suspects — major or minor — where the conflict is inconclusive, without clear victors and losers, or where there are political and logistical difficulties in apprehending suspects. Despite its contribution to the international criminalization of internal atrocities, Nuremberg serves as the model of the triumph of convenience over principle, the subordination of justice to politics, and the arrogance of might over morality. Nuremberg gave future generations a basis for talking about accountability for the most horrible crimes; but it also emphasized the cynicism of power.

III. SHAME IN THE CREATION OF THE RWANDA TRIBUNAL

It is difficult not see the creation of the Rwanda Tribunal as a cynical exercise by major powers. The events that led to its establishment were not dissimilar to those that caused the creation of the Yugoslav Tribunal. Rwanda went up in flames in April 1994 after President Juvenal Habyarimana, a Hutu, was killed in a mysterious plane crash while returning from neighboring Tanzania where he was negotiating a settlement to his country's civil war. In 1994 the Tutsi-dominated Rwanda Patriotic Front (RPF), which had been at war with the government since 1990, demanding the return of Tutsi exiles and the introduction of democracy, took power after a genocidal conflagration in which about 500,000 Tutsis were reportedly killed by Hutu government forces and militia.¹⁷

If the former Yugoslavia suffered from international inaction, the world seemed asleep, uncaring, as ominous clouds gathered over Rwanda, igniting a murderous inferno as they touched the ground. Rwanda was further punished for the failures of the international community in the Somali debacle, and the resultant big power "fatigue" from that crisis.¹⁸ Partly due to that experience, and American marginalization of Africa, the United States refrained from intervening or pushing for effective international ac-

¹⁷ Human Rights Watch Africa, *Genocide in Rwanda: April-May 1994*, HUMAN RIGHTS WATCH AFR., May 1994, at 2; HUMAN RIGHTS WATCH, WORLD REPORT 1995 39-48 (1994).

¹⁸ For the failures of United States and UN efforts in Somalia see Hussein H. Adam, *Somalia: A Terrible Beauty Being Born*, in COLLAPSED STATES: THE DISINTEGRATION AND RESTORATION OF LEGITIMATE AUTHORITY 69-89 (William I. Zartman, ed. 1995); Michael Begg, *UN Withdrawal From Somalia*, IRISH TIMES, March 15, 1995, at 15.

tion to stop the genocide in Rwanda.¹⁹ American racist stereotypes of “African conflicts” became the pretext for passivity as a top American official forbade the use of the term genocide to describe the Rwandan holocaust.²⁰ Thus the United States entered the region after the RFP had emerged victorious, and then only with the express mandate of airlifting supplies to refugee camps in Zaire where at least one million Hutus had fled.²¹

United Nations inactivity and acquiescence to genocide was equally damning. There were credible reports that the United Nations peace-keeping force in Rwanda (UNAMIR), which had been present to facilitate the peace negotiations between the Hutu government and the RPF, apparently knew that a genocide might take place but the UN took no preventive action.²² The April 1994 withdrawal by Belgium of its 400 UNAMIR contingent and the failure of the remaining UNAMIR forces to intervene allowed Hutu leaders to unleash genocidal massacres against Tutsis and moderate Hutus.²³ Later attempts by the UN to intervene were too little and too late.

¹⁹ See generally, PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES* (1998). See also, Joyce Price, *Why Rwanda Was Ignored*, WASHINGTON TIMES, July 31, 1994, at A4.

²⁰ As powerfully put by Human Rights Watch:

Certain White House officials counseled that military intervention would be useless because they believed that the war resulted from deeply rooted “tribal hatreds” which, “because they had always existed,” would continue forever. A few weeks after the massacres had begun, when it had long been evident that genocide was taking place, a senior member of the Clinton administration ordered officials not to speak of “genocide” because the term could increase the moral pressure on the President and force him to act. See World Report, *supra* note 17, at 46.

Even if one could grant part of the argument that the tensions between Hutus and Tutsis were in a sense historical, one could still not justify inaction on that basis. If that were a valid premise for viewing conflicts with racial, ethnic, or religious dimensions, it would be senseless to expend resources on peace efforts between Arabs and Jews in the Middle East or Protestants and Catholics in Northern Ireland. That is why such views and policies must be exposed for what they truly are: racist excuses for inaction.

²¹ See, Craig Nelson, *Rwanda: US Keen to Prove its Concern Over Refugees Plight*, INDEPENDENT (London), August 1, 1994, at 9.

²² See, *World Report 1995*, *supra* note 17, at 41.

²³ *Id.* Human Rights watch has painted the picture of a highly culpable UN and international community:

[F]ollowing the plane crash [carrying President Habyarimana], the beginning of the massacres, and the resumption of civil war,

As put by Human Rights Watch, "Shamefully absent at the moment of the killings, the international community is now moving slowly [by establishing the Rwanda Tribunal] to bring those guilty to justice."²⁴

The RPF government, which should have welcomed the Rwanda tribunal instead opposed it, in part because of the unwillingness of the international community to stop the genocide and the fear that such a tribunal would preempt its own authority to stage war crimes trials.²⁵ Manzi Bakuramutsa, the RPF envoy to the Security Council, which cast the only dissenting vote on the creation of Rwanda Tribunal,²⁶ objected to it on the following grounds: the tribunal would not address crimes committed between October 1, 1990, when the war started, and July 17, 1994, instead of only the 1994 calendar year; the tribunal would likely sit outside Rwanda; the tribunal would not have the authority to impose the death penalty; judges from certain states which were involved in the war would be biased; and that those convicted would serve their sentences in countries offering

the UN and the US initially reacted with retreat, confusion, and lethargy. This apparent indifference, combined with the lack of any reaction by the international community to the massacres in Burundi in October and November 1993, made the Rwandan Hutu extremists think that they could kill with impunity. *Id.*, at 45; see also *Rwanda: A New Catastrophe*, HUMAN RIGHTS WATCH/AFRICA (Human Rts. Watch Africa, New York, N.Y) Dec. 1994.

²⁴ *Id.* at 45.

²⁵ Distrustful of the international community's ambivalence towards the killings of Tutsis, the RPF government sought to try suspected war criminals itself, and thus opposed the Rwanda Tribunal. As put by the Rwandese representative to the UN Security Council:

When the genocide began, the international community, which had troops in Rwanda and could have saved hundreds of thousands of human lives by, for example, establishing humanitarian safe zones, decided instead to withdraw its troops from Rwanda and to abandon the victims to their butchers. See U.N. SCOR, 49th Sess. 3453rd mtg., at 14, U.N. Doc. S/PV.3453 (1994).

²⁶ The vote for the creation of the Rwanda Tribunal in the 15-member Security Council was 13 in favor, one (Rwanda) against, with China abstaining. China abstained because it felt that it was not a "cautious act to vote in a hurry on the draft resolution and statute [establishing the Rwanda Tribunal] that the Rwandan government still finds difficult to accept." See Anthony Goodman, *UN Establishes Rwanda Genocide Tribunal*, Reuters, November 8, 1994, available in LEXIS, News Library, ARCNWS File.

prison facilities, instead of Rwandan jails.²⁷ The Rwandan delegate concluded that a “tribunal as ineffective as this would only appease the conscience of the international community rather than respond to the expectations of the Rwandese people.”²⁸ Rwanda claimed that the absence of the death penalty against those guilty of genocide was the primary reason for its opposition to the tribunal.²⁹

The establishment of the “other” tribunal, the Rwanda Tribunal, was possible because the Yugoslav Tribunal had set a precedent for such action by the international community. The UN and the powerful states that control it could not reject a tribunal for Rwanda when they had set one up for the former Yugoslavia; formally, white European lives were put on the same footing with black African lives. The overlapping conflicts, which had been so brutal and barbaric, had taken place in front of the television camera, making it impossible to set up a process for prosecuting one group of perpetrators and not the other. Nevertheless, the Rwanda Tribunal was an afterthought, a fact underscored by its grafting to the Yugoslav Tribunal. The Rwanda Tribunal was in effect a sideshow to the Yugoslav Tribunal; the Prosecutor for both tribunals was resident at The Hague as were the members of the Appeals Chamber. The international press and the United Nations were pre-occupied with the Yugoslav Tribunal and only seemed to give the most perfunctory attention to the Rwanda Tribunal. In the circumstances, it is not difficult to conclude that big power cynicism deflated the seriousness of the notion of international rule of law, an essential civilizational norm for a diverse world.

IV. ASSESSING THE RWANDA TRIBUNAL

Some leading international scholars see the mere establishment of the Yugoslav and Rwanda Tribunals as a very significant event in the development of the enforcement of international criminal and humanitarian

²⁷ *Id.*; see also *Rwanda: Urgent*, Agence France Presse, November 8, 1994, available in LEXIS, News Library, ARCNWS File. For a more comprehensive look at the Rwanda’s objections, see Payam Akhavan, *The International Criminal Tribunal for Rwanda: the Politics and Pragmatics of Punishment*, 90 AM. J. INT’L L. 501, 504-08 (1996).

²⁸ *Id.*

²⁹ Philippe Naughton, *Rwandan Minister Defends “No” Vote on Tribunal*, Reuters World Service, Nov. 9, 1994, available in LEXIS, NEWS Library, ARCNWS File. Alphonse Nkubito, the Rwandan Minister of Justice emphasized that those guilty of genocide must suffer the death penalty since it was part of Rwandan law. He cited public pressure among the Rwandese for the death penalty as the primary reason for RPF’s opposition to the tribunal. See *id.*

law. They see the importance of the tribunals in the footprints that they make on the international law-making track and not in the substance of their performance in addressing the particular abuses with which they are charged. Theodor Meron, a leading exponent of the international criminalization of internal atrocities has written, with regard to the Yugoslav and Rwanda Tribunals, that:

No matter how many atrocities cases these international tribunals may eventually try, their very existence sends a powerful message. Their statutes, rules of procedure and evidence, and practice stimulate the development of the law. The possible fear by states that the activities of such tribunals might preempt national prosecutions could also have the beneficial effect of spurring prosecutions before national courts for serious violations of humanitarian law.³⁰

There is little doubt that the establishment of the tribunals affords the international community an opportunity to develop international law with respect to atrocities. While that effect is salutary, it does little to respond to the real and graphic abuses and suffering of the victims in Rwanda and the former Yugoslavia. Laws are less meaningful if they cannot be applied or enforced without prejudice to redress transgressions or unless they have a deterrent effect such as behavior modification on the part of would be perpetrators. As Meron correctly notes, the haphazard creation of war crimes tribunals is selective and subject to the whims of states.³¹ "What is needed," he categorically states, is "a uniform and definite corpus of international humanitarian law that can be applied apolitically to internal atrocities everywhere, and that recognizes the role of all states in the vindication of such law."³² The ICC, when established, may be a significant step in this direction. The enforcement of such law, however, is best accomplished by national courts although an international tribunal and a corpus of international humanitarian law would illuminate this uncertain terrain.³³ The pitfall is that national courts may lack credibility with the group of perpetrators being prosecuted, particularly if the group is ethnic, racial, or religious, and sees itself as being persecuted by the victors. It may very well be the case that such courts should be joint national and international efforts, to alleviate the credibility problem.

³⁰ Theodor Meron, *International Criminalization of Atrocities*, 89 AM. J. INT'L L. 554, 555 (1995).

³¹ *Id.*

³² *Id.*

³³ *See id.*

While the Yugoslav and Rwanda tribunals respond to the lawyer's gradualist approach to institutional and normative development, thus far they have failed to successfully address the basic purposes for which they were established. They have been hampered by logistical, structural, and political considerations. Their lofty mandates have been tempered by the political contexts in which they were set and the climates in which they operate.

The Rwanda Tribunal has met with a number of difficulties and has not, as result, done much better than its Yugoslav counterpart. What should be clear at the outset, however, is that the Rwanda Tribunal, no matter how successful it becomes, will never compensate for the inaction of the international community as the genocide took place in 1994. The tribunal was established in November 1994 with investigative and prosecutorial units in Kigali, and the appointment of Honore Rakotomanana, a retired chief justice from Madagascar as its the deputy prosecutor to serve under Richard Goldstone.³⁴ But it was not until June 1995 that its judges were sworn in at The Hague although the tribunal's seat was Arusha, Tanzania.³⁵ An administrator for the tribunal was not appointed until September 1995.³⁶ The Rwanda Tribunal was given the same subject-matter jurisdiction as the Yugoslav Tribunal: genocide,³⁷ crimes against humanity,³⁸ and violations of article 3 common to the Geneva Conventions and of Additional Protocol II.³⁹

³⁴ LAWYERS COMM. FOR HUM. RTS., THE INT'L CRIMINAL TRIBUNAL FOR THE FORMER YUGO. 36 (1995).

³⁵ Julian Bedford, *Judges to Set Rules for Rwanda Genocide Tribunal*, Reuters, June 26, 1995, available in LEXIS, News Library, LEGNEW, ARCNEWS File. Judge Laity Kama of Senegal and Judge Yakov Ostrovsky of Russia were elected president and vice-president of the tribunal respectively. See *UN Panel Opens Inquiry on Rwanda*, N.Y. TIMES, June 28, 1995, at A5.

³⁶ Andronico Adede, *A Kenyan UN bureaucrat was appointed the tribunal's register* on September 12, 1995. See *Kenyan Appointed to Top Job on War Crimes Tribunal*, Reuters, available in LEXIS, News Library, CURNWS File.

³⁷ *Rwanda Tribunal Statute*, S.C. Res. 955, U.N. SCOR, 49th Sess., Annex, Art. 2, U.N. Doc. S/RES/955 (1994), *supra* note 4.

³⁸ *Id.* at Art. 3.

³⁹ *Id.*, Art. 4. Article 4 requires the tribunal to apply international humanitarian law, particularly the Geneva Conventions of August 12, 1949, for the Protection of Victims of War, and the 1977 Second additional Protocol to the Geneva Conventions. See Geneva Conventions, *supra* note 4. See also Second Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *reprinted* in 16 I.L.M. 1442 (1977).

One year after it was established, the Rwanda Tribunal issued its first indictments on December 12, 1995, accusing eight Rwandans of genocide.⁴⁰ The Rwanda Tribunal, unlike its Yugoslav counterpart, has netted several high-ranking officials of the former regime. As of February 2000, the Tribunal was reported to have had in its custody 38 suspects, a number of them senior officials of the previous regime, several of them thought to be masterminds of the genocide.⁴¹ Some of these included Col. Theoneste Bagosora, a former permanent secretary in the Ministry of Defence, Col. Anatole Nsengiyumva, head of the military intelligence, Ferdinand Nahimana, head of the Rwanda Information Office and co-founder of Radio Mille Collines which urged the genocide, and Andre Ntagerura, minister for transport.⁴² All three were extradited from Cameroon in January 1997.⁴³

The arrest of these prominent suspects was, however, overshadowed by the tribunal's financial and administrative difficulties. The tribunal's first hearing was held in January 1997 amidst charges of corruption and mismanagement.⁴⁴ An investigation of the Rwanda Tribunal conducted by the United Nations was highly critical of the entire effort, from the tribunal itself to the United Nations offices in New York.⁴⁵ The investigation was requested by concerned member states, UN staff, and the UN Office of Internal Oversight Services.⁴⁶ The report found that the tribunal's Registry had no accounting system; that the tribunal had incomplete and unreliable financial records; unqualified staff; disregard of UN regulations; shortage of

The inclusion of the Second Protocol was essential because the Rwandan conflict was internal.

⁴⁰ Akhavan, *supra* note 27, at 509.

⁴¹ *Id.* at 509; *see also*, *Strange Justice*, THE NEW REPUBLIC, Dec. 20, 1999, at 11.

⁴² *See Rwanda: International News*, Agence France Presse, Feb. 13, 1997, available in LEXIS, News Library, CURNWS File.

⁴³ *See id.*

⁴⁴ *See UN Court Hears Chilling Rwanda Genocide Testimony*, Reuters North American Wire, Jan. 10, 1997 available in LEXIS, News Library, CURNWS File; "Rwanda Tribunal Reopens in Tanzania, Then Closes," Inter Press Service, January 9, 1997.

⁴⁵ United Nations, Report of the Secretary General on the Activities of the Office of Internal Oversight Services, *Financing of 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 January 1 and December 31 1994* [hereinafter Report of Rwanda Tribunal], February 6, 1997.

⁴⁶ *Id.*, Annex (Summary).

cells and courtrooms; lack of lawyers and investigators; lack of logistical, transport, and office equipment; and neglect of the tribunal by UN headquarters in New York.⁴⁷ In addition, the Office of the Prosecutor in Kigali was riddled with operational difficulties and feuded openly with the Registry in Arusha.⁴⁸ These problems together with lack of funding, the geographical separation of the Registry from the Prosecutor's Office, and poor infrastructure have hindered the effective establishment of the tribunal and its work.⁴⁹

The investigative report, which concluded that the Rwanda Tribunal was dysfunctional in virtually all areas, recommended, inter alia, that the UN provide the tribunal with more administrative and financial support, and that more guidance and cooperation with the Yugoslav Tribunal be forged to improve its performance.⁵⁰ Kofi Annan, the UN Secretary General fired the registrar and the deputy prosecutor in February 1997 and replaced them with other UN officials.⁵¹

By February 2000, the Tribunal had handed out seven genocide convictions.⁵² Even with the cooperation of the Tutsi-led Rwanda government, it is not feasible that a substantial number of the reported sixty-thousand suspects in Rwandan jails will ever be tried by the tribunal.⁵³ From a practical standpoint, many of the suspects will have to be tried by the national courts of Rwanda.⁵⁴

⁴⁷ See generally *id.*, ¶ 3-69. See also Craig Turner, *Rwanda War Crimes Tribunal Mismanaged, Report Says*, LOS ANGELES TIMES, Feb. 13, 1997, at 8; John Goshko, *UN Probe Find Mismanagement, Waste in Rwanda War Crimes Tribunal*, WASHINGTON POST, Feb. 13, 1997, at A20.

⁴⁸ See *Report of Rwanda Tribunal*, *supra* note 45.

⁴⁹ *Id.*; see also *UN Rwanda Tribunal Head defends His Record*, Reuters North American Wire, Jan. 11, 1997, available in LEXIS, News Library, CURNWS File (Registrar Adede arguing that he had made some progress with few resources).

⁵⁰ See *Report of Rwanda Tribunal*, *supra* note 45, ¶ 75-100.

⁵¹ See *Kofi Annan Weighs Rwanda Tribunal Changes*, UPI, Feb. 22, 1997, available in LEXIS, News Library, CURNWS File; see also *UN Chief Promises to Act on Rwanda Tribunal Report*, Agence France Presse, Feb. 13, 1997, available in LEXIS, News Library, CURNWS File; *UN Chief Summons Top Court Officials After Mismanagement Charges*, Agence France Presse, Feb. 12, 1997 available in LEXIS, News Library, CURNWS File.

⁵² See *Rwanda: the Musema Judgement Raises Questions at the International Tribunal*, AFRICA NEWS, Feb. 14, 2000, available in LEXIS, News Library, CURNWS File.

⁵³ Akhavan, *supra* note 27, at 509.

⁵⁴ Rwandan courts have started their own war crimes trials and had handed down ten death sentences by February 1997. See *Rwanda: International News*, Agence

V. CONCLUSION

The Nuremberg and Tokyo Tribunals are bad analogs for the Yugoslav and Rwanda Tribunals. While the former represented the calculated revenge of the victors, they had little to do with justice per se, as a forum for the victims to confront their victimizers and find guilt and levy punishment. Instead, the Nuremberg and Tokyo Tribunals culminated a war of the titans: the Allies against the Axis, and the final closure, the entombment of the aggressors. That is why, as Anderson states, the Allies were able in Nuremberg to turn the ugly war into court proceedings about two-dozen defendants, a crowning ceremony of their victory. As he writes:

[t]o reduce the world to a courtroom, to legal memoranda and pleadings and paperwork, is possible only once an army sits atop its vanquished enemy. Otherwise, the enormity of the crimes left unaddressed out in the hills of Bosnia so dwarf those raised before the tribunal that it mocks justice. A trial, Nuremberg taught, puts the symbolic seal of justice on what armies have rectified with force.⁵⁵

From a distance, it is possible to see the Rwanda Tribunal as different from the Yugoslav Tribunal and as an approximation of Nuremberg. The temptation to equate the military defeat of the Hutu regime by the Tutsi RPF and their removal from office with the Nazis is incorrect. Such analogy would only make sense if the targets of the Holocaust — Jews — had themselves defeated the Germans and taken control of the state. The war in Rwanda is unfinished. The Hutu-Tutsi struggle for the control of the state continues. The problem of Rwanda is rooted in the bipolarity of the state, the gulf of history, power, and stereotype that divides the Hutu from the Tutsi. Fundamentally, Rwanda is a dysfunctional state, hopelessly bound for disaster. Unless the Tutsi RPF government organizes genuine democratic elections, which it would lose because Hutus would come back to power, the prediction of at least one more cycle of violence is certain to be fulfilled as Hutus, who make up ninety percent of the country, seek to reclaim control. There is little doubt that it is in this context that the Rwanda Tribunal is seen by Hutus: as international punishment by the victors, Tutsis

France Presse, Feb. 13, 1997, available in LEXIS, News Library, CURNWS File. A Rwandan official estimated in 1994 that national courts could try as many as 30,000 suspects. See *Despite UN Tribunal, Rwanda Plans to Try Suspects for War Crimes*, CHICAGO TRIBUNE, Nov. 10, 1994, at A6.

⁵⁵ Anderson, *supra* note 7, at 292.

with the blessing and support of the United Nations.⁵⁶ Tutsis may themselves see the tribunal and the war crimes they are conducting in Rwanda as their opportunity for revenge.⁵⁷ For that reason, the Rwanda Tribunal, since it is not part of an overall political settlement of the Hutu-Tutsi struggle for political power, is virtually irrelevant to the future of Rwanda.⁵⁸ One can only hope that the ICC, once established, would draw valuable lessons from prior international criminal tribunals.

⁵⁶ Credibility of the Rwanda Tribunal is unlikely to materialize among Hutus because they are its main targets. The prosecution of Tutsis is essential for the tribunal's legitimacy. In the case of the Yugoslav Tribunal, the prosecution of Bosnians and Croats — and not just Serbs — would enhance that tribunal's legitimacy in the eyes of perpetrators across the board.

⁵⁷ It is interesting to note that the RPF government wanted the Rwanda Tribunal situated in Rwanda so that it would teach the "Rwandese people a lesson, to fight against the impunity to which it had become accustomed. . . and to promote national reconciliation. See Akhavan, *supra* note 27, at 508. But this is only possible if the tribunal enjoys some credibility with the perpetrators.

⁵⁸ See Abbe David Lowell, *Nuremberg in Rwanda: Not Enough*, LEGAL TIMES, Apr. 3, 1995, at 23-25.

