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NEVER AGAIN: QUESTIONING THE YUGOSLAV AND RWANDA TRIBUNALS

*Makau Mutua**

I. INTRODUCTION

Fifty years after Nuremberg, the international community has again decided to experiment with international war crimes tribunals.¹ The first such panels were the Nuremberg and Tokyo tribunals constituted after World War II to try suspected war criminals.² The stated purposes for the establishment

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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) [hereinafter S.C. 808]; S.C. Res. 827, U.N. SCOR, 3217 mtg. U.N. S/RES/827 (1993) [hereinafter S.C. 827]; United Nations Secretary General, *Report of the Secretary General Pursuant to Paragraph 2 of the Security Council Resolution 808, U.N. Doc. S/25704, Annex (1993)* (containing text of the statute of the Yugoslav Tribunal) [hereinafter *Resolution 808 Report*]; United Nations Secretary General, *Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia*, 32 I.L.M. 1159 (1993) [hereinafter *International Tribunal Aspects Report*]. For an exhaustive analysis and documentation of the Yugoslav Tribunal, see *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (M. Cherif Bassiouni & Peter Manikas, eds. 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 Paragraph 5 of Security Council Resolution 955, U.N. Doc. S/1995/134 (1994)* [hereinafter *Resolution 955 Report*]. See also Lyal S. Sunga, *The Commission of Experts on Rwanda and the Creation of the International Criminal Tribunal for Rwanda: A Note*, 16 HUM. RTS. L. J. 121 (1995). See Paul C. Szarz, *The Proposed War Crimes Tribunal for ex-Yugoslavia*, 25 NYU J. INT'L L. & POL. 405 (1993).

2. The International Military Tribunal at Nuremberg (hereinafter Nuremberg Tribunal) was established in 1945 by the Prosecution and Punishment of Major War Criminals of the European Axis (otherwise known as the London Agreement, which resulted from conferences held among the United States, Britain, France, and the Soviet Union to determine what policies the victorious allies should pursue against the vanquished Germans, Italians, and their surrogates). London Agreement, August 8, 1945, 82 U.N.T.S. 279, 59 Stat. 1544; Annex to the Prosecution and Punishment of Major War Criminals of the European Axis (London Charter), August 8, 1945, 82 U.N.T.S. 279, 59 Stat. 1544. The International Military Tribunal for the Far East at Tokyo [hereinafter Tokyo Tribunal] was established in 1946 by the Charter of the International Military Tribunal for the Far East at Tokyo, Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, T.I.A.S. No. 1589, reprinted in 4 TREATIES AND OTHER INTER-

of both the Yugoslav and Rwanda Tribunals by the United Nations are 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."³ This essay argues that both assumptions are unrealistic and that such tribunals will have little or no effect on human rights violations of such enormous barbarity. Moreover, the essay questions the motivations behind the formulation of the tribunals and posits that the tribunals served either to deflect responsibility or to assuage the consciences of states which were unwilling to take political and military measures to prevent or stop the Yugoslav and Rwandan genocides. It contends, in any case, that from the start the tribunals were intended to achieve neither the abolitionist impulses nor the just ends trumpeted by the United Nations. The essay argues that the tribunals are disarticulated, if not entirely irrelevant, to the political, reconstructionist, and "peace" and "normalization" processes underway in Rwanda and the republics of the former Yugoslavia. It concludes that such tribunals would only make sense in the context of an overall solution, a comprehensive and bold settlement addressing the foundational problems that unleashed the genocides in the first place. As it is, the tribunals now orbit in space, suspended from political reality and removed from both the individual and national psyches of the victims as well as the victors in those conflicts.

In the fifty years since Nuremberg, states have shown little stomach for the international punishment of war crimes, crimes against humanity, and genocide, although treaties and normative canon proscribing such atrocities

NATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 27 (1946); Charter dated January 19, 1946, *reprinted in* 4 TREATIES AND OTHER AGREEMENTS OF THE UNITED STATES OF AMERICA 27 (1946); Amended Charter 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).

3. See S.C. 827, *supra* note 1, at 29. 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.* pmb1. 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. 935, U.N. SCOR, 49th Sess., 3400th mtg. at 1, U.N. Doc. S/Res/935 (1994) [hereinafter Rwanda Tribunal Statute]. The Rwanda Tribunal was created with some ties to the Yugoslav Tribunal. S. C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg. at 1, 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* [hereinafter Akhavan, *Challenge to Civilization*], 8 HARV. HUM. RTS. J. 229, 240-41 (1995). 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 *Resolution 808 Report*, *supra* note 1, ¶¶ 22-23.

have increased.⁴ Since the Nuremberg and Tokyo Tribunals, only two treaties have referred to the creation of an international criminal tribunal to try suspected offenders, with respect to genocide and apartheid.⁵ The horrors in Cambodia under Pol Pot, Uganda under Idi Amin, Guatemala under the military, and Iraq under Saddam Hussein, among many others, did little to push states to national or international prosecution of heinous crimes against civilian populations.⁶ Until the establishment in 1994 of the Yugoslav and Rwanda Tribunals, the promise of Nuremberg stood as a cruel hoax, with the exception of the questionable efforts by the post-Mengistu regime of Ethiopia to prosecute former Dergue officials for genocide and crimes against humanity.⁷ Inaction cannot be blamed on the "paralysis" of the Cold War; the ad hoc nature of the Yugoslav and Rwanda Tribunals, as well as the lack of progress on the creation of a permanent international criminal court today are ample demonstrations of long-standing opposition by states to punish violators, let alone address deep-seated conditions which give rise to atrocities.⁸ It is highly doubtful that a permanent international court, were it ever

4. German extermination of Jews during the Holocaust, viewed today as one of the clearest instances of genocide, led to the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide, *approved* December 9, 1948, S. Treaty Doc. No. 1, 81st Cong. 2nd Sess., 78 U.N.T.S. 277, registered January 12, 1951 [hereinafter Genocide Convention]. The Geneva Conventions for the Protection of Victims of War, prohibiting certain atrocities, soon followed: Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention No. I), August 12, 1949, 6 UST 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (Geneva Convention No. II), August 12, 1949, 6 UST 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War (Geneva Convention No. III), August 12, 1949, 6 UST 3316, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention No. IV), August 12, 1949, 6 UST 3516, 75 U.N.T.S. 287.

5. See Art. 6, Genocide Convention, *supra* note 4; Art. 5, International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068, UN GAOR, 28th Sess., Agenda Item 53, U.N. Doc. A/RES/3068 (1973).

6. See AMNESTY INTERNATIONAL, TORTURE IN THE EIGHTIES 130 (Uganda), 158-161 (Guat.)(1984); MIDDLE EAST WATCH & PHYSICIANS FOR HUMAN RIGHTS, THE ANFAL CAMPAIGN IN IRAQI KURDISTAN (1993); JAMES D. ROSS, CAMBODIA: THE JUSTICE SYSTEM AND VIOLATIONS OF HUMAN RIGHTS 14-17 (Lawyers Committee for Human Rights, 1992).

7. AMNESTY INTERNATIONAL REPORT: 1994 131 (1994). For an account of the problems of the Ethiopian prosecutions, see ETHIOPIA IN TRANSITION: A REPORT ON THE JUDICIARY AND THE LEGAL PROFESSION, INT'L HUMAN RIGHTS L. GROUP 28-31 (1994); *Ethiopia: Accountability Past and Present: Human Rights in Transition*, AMNESTY INT'L, Apr. 1995, at 46-53. See also *Ethiopia: 'Red Terror' Detainees Finally Charged*, Amnesty International News Service, Jan. 23, 1997.

8. Since WWI, efforts to establish a permanent international criminal court have been unsuccessful. See M. Cherif Bassiouni, *Former Yugoslavia: Investigating Violations of International Humanitarian Law and Establishing an International Criminal Tribunal*, 18 FORDHAM INT'L L. J. 1191, 1191 (1995). In 1994, the International Law Commission (ILM) submitted to the United Nations' General Assembly a Draft Statute for an International Criminal Court [hereinafter Draft Statute]. *Report of the International Law Commission on the Work of its Forty-Sixth Session*, U.N. GAOR, 49th Sess., Supp. No. 10, at 29, U.N. Doc. A/49/10 (1994). Based on this report, the United Nations decided to establish an ad hoc committee to review the Draft Statute and convene an international conference to consider it. G.A. Res. 49/53, U.N. GAOR, 49th

to become a reality, would be a viable deterrent and an effective forum for punishment of offenders given the large scale of abuses and the reluctance of states to punish offenders. The main focus for the punishment of war criminals must remain at the national level, although an international tribunal would legitimize the criminalization of internal atrocities. It is the argument of this essay that the ugliness of war, the political reality of various hatreds — racial, religious, and gender — cannot be isolated into an international courtroom for resolution. Such a court would only make sense if it was part of a comprehensive domestic and international process of punishment, reconstruction, and reconciliation.

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.⁹

As noted by Anderson, "Nuremberg was fundamentally an expression of a peculiarly American legal sensibility."¹⁰ While many in the German-occupied lands wanted the trials, it was the Americans who pushed for them and brought along the skeptical British.¹¹ The other two powers, the French and the Soviets, were merely ornamental: they were "brought in later, in order to complete the 'Allies.'"¹² Thus, Nuremberg can be seen as an orchestrated and highly-manipulated forum initiated primarily to impress upon the Nazi leadership who the victors were and to discredit them as individuals, as well

Sess., Supp. No. 10, ¶¶ 2-3. See also Mark Thompson, *Panel Puts Final Touches on Plans for War Crimes Court*, L. A. DAILY J., Aug. 23, 1996, at 1; Richard J. Goldstone, *The International Tribunal for the Former Yugoslavia: A Case Study in Security Council Action*, 6 DUKE J. COMP. & INT'L L. 5 (1995); James Podgers, *The World Cries for Justice*, ABA J., Apr., 1996, at 52.

9. 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.* at x.

10. Kenneth Anderson, *Nuremberg Sensibility: Telford Taylor's Memoir of the Nuremberg Trials*, 7 HARV. HUM. RTS. J. 281, 289 (1994) (book review).

11. *Id.*

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

as discredit their particular philosophy of racial supremacy. The irony of Nuremberg, and the White men who created it, was that the adjudicating states either condoned (or practiced as official policy) 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, then, 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.¹³ While an estimated 3,000 more war criminal trials took place in the national courts of other Allied powers utilizing international law and the norms employed by the Nuremberg Tribunal, the number is still too small to account for such widespread offenses.¹⁴ 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.¹⁵ 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 extremely to see it dressed up with a false facade of legality. The best that can be said 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.

13. For a tabulation of the counts, indictments, and convictions at Nuremberg, see *INTERNATIONAL LAW AND WORLD ORDER*, *supra* note 12, at 168-69.

14. *Id.* at 171.

15. *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 *V.A. L. REV.* 679, 694 (1947); *THE ANATOMY OF THE NUREMBERG TRIALS*, *supra* note 9, at 41.

This is a little too sanctimonious a fraud to meet my old-fashioned ideas.¹⁶

The Allies found no problem in extending the reach of international law to cover the actions of the Nazis. However, they took great care to exclude their own conduct from the Tribunal's jurisdiction, conduct which did not then violate international customary or treaty law but was nevertheless horrendous, such as the massive bombing of cities with predictably high civilian casualties.¹⁷ 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 defense of *tu quoque*, which would have estopped the Allies from prosecuting the enemy for acts the Allies committed themselves.¹⁸ According to a distinguished judge at the Tokyo Tribunal, the judges and prosecutors feared that allowing the defense of *tu quoque* would have opened the door to defense arguments about the American fire-bombing of Tokyo, which killed 72,000,¹⁹ and the nuclear bombardment of Hiroshima and Nagasaki.²⁰

The lessons of Nuremberg for both the Yugoslav and Rwanda Tribunals are disturbing, to say the least. The prosecutions were sharply limited to "major war criminals," even though Germany was completely defeated and occupied, allowing the Allies access to most of the offenders and substantial evidence.²¹ Political expediency and the West's desire to get on 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.²² 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.²³ Nuremberg gave future generations a basis for talking about accountability for the most horrible crimes; but it also emphasized the cynicism of power.

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

17. INTERNATIONAL HUMAN RIGHTS IN CONTEXT, *supra* note 15, at 102.

18. INTERNATIONAL LAW AND WORLD ORDER, *supra* note 12, at 7.

19. *Id.* at 7, n.4.

20. *Id.* at 170. See also B.V.A. RÖLING, THE TOKYO TRIAL AND BEYOND: REFLECTIONS OF A PEACEMONGER (Antonio Cassese ed., 1993).

21. THE ANATOMY OF THE NUREMBERG TRIALS, *supra* note 9, at 41; Anderson, *supra* note 10, at 291.

22. Anderson, *supra* note 10, at 291.

23. *Id.* at 281; INTERNATIONAL LAW AND WORLD ORDER, *supra* note 12, at 7. See Henry T. King, Jr., *The Judgements and Legacy of Nuremberg*, 22 YALE J. INT'L L. 213 (1997) (defending the moral justness of the Nuremberg Tribunal).

III. SHAME IN THE CREATION OF THE TRIBUNALS

The atrocities in the Balkans had been predictable for some time. Since the death in 1980 of Marshal Tito, the Croat who had ruled over Yugoslavia since 1945,²⁴ the seething caldron of historical ethnic hatreds among the Croats, Serbs, Bosnian Muslims, and Slovenes had threatened to turn the Balkans into a theater of war.²⁵ Fighting in Yugoslavia broke out in 1991 when the Serbian Yugoslav Peoples' Army (JNA) attacked Slovenia and Croatia after they declared independence.²⁶ War in Bosnia-Herzegovina started in April 1992 when JNA and Bosnian Serb units attacked Bosnia.²⁷ Slobodan Milosevic, president of Serbia and Montenegro, the truncated Yugoslavia, fueled Serb nationalist sentiments with calls for Greater Serbia, and support for the secession of Serbians in Croatia and Bosnia.²⁸ Amidst the disintegration of Yugoslavia, and the ensuing war, the United Nations sent peacekeeping forces, known as the United Nations Protection Force (UNPROFOR), in Croatia and Bosnia to create conditions for a peace settlement, protect civilians in the so-called UN Protected Areas, and to assist UN humanitarian agencies.²⁹

In the meantime, the Balkans had turned into killing fields. As early as August 1991, JNA and other Serb forces had killed hundreds of civilians in Vukovar, a city in eastern Croatia.³⁰ According to a human rights report:

United Nations Personnel were aware of massive violations of human rights and humanitarian law in the former Yugoslavia soon after fighting broke out between the Yugoslav Peoples' Army (JNA) and Croatian forces in 1991 . . . When Vukovar fell to the Serbs on November 19, 1991, the UN Secretary-General's personal envoy to the former Yugoslavia, Cyrus Vance, intervened to help facilitate the evacuations of hundreds of patients from the city hospital. He later learned that just hours before the evacuation, JNA and irregular Serb forces had removed over 200 patients and staff from the hospital and executed them outside the city.³¹

UN soldiers and civilian personnel who witnessed and reported these accounts of violations to their superiors were told to be passive because they had no authority to intervene or stop the abuses.³² Whatever the reasons, initial reports of killings were never made public or condemned by the UN or

24. Roger Thurow, *Tito's Legacy: Political Drifting, An Economy in Chaos Prevail in Yugoslavia; Question is Whether Nation Will Turn More to Soviets Out of Economic Need; Sharpening Ethnic Rivalries*, WALL ST. J., May 8, 1986, available in 1986 WL-WSJ 258991.

25. *Id.*

26. PHYSICIANS FOR HUMAN RIGHTS, *MEDICINE UNDER SIEGE IN THE FORMER YUGOSLAVIA: 1991-1995* 16 (1996) [hereinafter *MEDICINE UNDER SIEGE*].

27. *Id.* at 16-17.

28. *Id.* at 15-17.

29. *Id.* at 17-18.

30. *Id.* at 23.

31. *MEDICINE UNDER SIEGE*, *supra* note 26, at 23.

32. *Id.* at 23.

any of the major Western powers.³³ To make matters worse, the UNPROFOR presence in Croatia and Bosnia had proven ineffective in protecting civilians or creating conditions for a peace settlement. Perhaps nowhere was this failure more evident than in the Bosnian Serb siege of Sarajevo and their capture of large chunks of Bosnia, events which led to UNPROFOR's evacuation of Sarajevo on May 16, 1992.³⁴ After a Bosnian Serb attack on a Sarajevo market in May 1992 killed twenty civilians, the UN Security Council voted to impose sanctions on Serbia, which controlled Bosnian Serbs.³⁵ But it was not until July 1992 that the world would learn of the scale of atrocities in the former Yugoslavia, thanks to the work of print and television journalists, and especially Roy Gutman of *New York Newsday*.³⁶ Television cameras showed pictures of "hundreds of emaciated men behind barbed wire, their eyes hollow from hunger and despair."³⁷ Killings of civilians, as many as hundreds of thousands, and the brutal rape of women became commonplace in the war.

Only after the public knew what was happening in the former Yugoslavia did the UN and powerful states start talking about a war crimes tribunal. The Yugoslav and Rwanda Tribunals were not established because of the United Nations, or the powerful states that control it. They were not established because of an intrinsic value on punishing war criminals or upholding the rule of law. Rather, the mobilization of shame by non-governmental organizations and especially the grisly pictures beamed to the world by the television camera created a public relations nightmare and made liars of the centers of Western civilization. The point is made by two writers of the Yugoslav Tribunal who were:

[c]lose observers of the Security Council reactions to published and televised reports of mass rapes, murder, and torture as part of the systematic Serbian program of "ethnic cleansing" reminiscent of the Nazi genocide. Once the political will of the major powers was mobilized by public shame and public outrage, Security Council resolutions provided the legal basis for speedy action.³⁸

In December 1992, Lawrence Eagleburger, the American Secretary of State called for the creation of a Nuremberg-type war crimes tribunal.³⁹ The

33. MEDICINE UNDER SIEGE, *supra* note 26, at 23-24.

34. *Id.* at 18.

35. Paul Lewis, *UN Votes 13-0 for Embargo on Trade with Yugoslavia; Air Travel and Oil Curbed*, N.Y. TIMES, May 31, 1992, at 1.

36. Roy Gutman, *Prisoners of Serbia's War: Tales of Hunger, Torture at Camp in North Bosnia*, N.Y. NEWSDAY, Jul. 19, 1992, at 7. Gutman exposed the horrible treatment of Croat and Muslim detainees in Serb camps in Banja Luka and Trnopolje in Bosnia as well as the Manjaca and Omarska camps. *Id.*

37. MEDICINE UNDER SIEGE, *supra* note 26, at 24.

38. 1 AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA xxi (Virginia Morris & Michael P. Scharf eds., 1995) [hereinafter INSIDER'S GUIDE VOLUME ONE]. See also David P. Forsythe, *Politics and the International Tribunal for the Former Yugoslavia*, 5 CRIM. L. F. 401 (1994).

39. INSIDER'S GUIDE VOLUME ONE, *supra* note 38, at 30.

creation of the tribunal appeared to be a pretext for military inaction either by the North Atlantic Treaty Organization (NATO), which the United States dominates, or through a United Nations-sanctioned effort, such as the American-led conquest of Iraq and its expulsion from Kuwait in 1991. NATO sat idly as genocide was committed in the center of Europe. It can be argued, as Anderson has correctly observed, that a war crimes tribunal need not exclude military action.⁴⁰ NATO or the United Nations need not have seen the tribunal as pre-empting the use of force to impose a settlement in the former Yugoslavia, after militarily defeating the aggressors, and then calling to account the defeated perpetrators before a war crimes tribunal.⁴¹ This linkage, or overlap, of military action and a war crimes tribunal, assumes that there is no justice except the "justice" of the victors.⁴² While that may be partially true, as evidenced by Nuremberg, it is one of the less desirable options. A more lasting solution would require the genuine integration of force, diplomacy, and a tribunal. All three factors are essential for the production of a fair and just outcome, one to which parties could psychologically be committed. They would also be more likely to pass it on as a lesson to their offspring to avoid a recurrence.

Be that as it may, states went along with the Yugoslav Tribunal because it was painless and temporary; a tribunal set up only with the limited mandate of prosecuting offenders in the Yugoslav conflict. The tribunal also let powerful states "off the hook;" they could no longer be accused of inaction. Bosnian Muslims, the population which was the major target of the war criminals, are European but they are not Western Europeans, white Christians, or Jews.⁴³ It is unlikely that the atrocities perpetrated against them would have been blinked at by major powers had they belonged to any of those population groups. Moreover, Bosnia is neither a major strategic spot nor an economically vital asset like Kuwait to major Western powers. In addition, the West seemed to defer to Russia because of its supposed historical and cultural links to the Serbs.

The creation of the Rwanda Tribunal was perhaps even more cynical. 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

40. Anderson, *supra* note 10, at 293.

41. *Id.* at 293. According to Anderson:

[W]hereas too many world leaders, including some in the US government, welcome the proposal for a trial because they see it as essentially a symbolic alternative to military action, they cynically understand very well how the two are linked, but linked as a reason for military inaction.

Anderson, *supra* note 10, at 293.

42. *Id.* at 292-93.

43. Sid Balman Jr., *Croat: Serbs Created Modern Holocaust*, UPI, April 8, 1994, available in LEXIS, News Library, ARCNWS File. Peter Sarcevic, Croatia's ambassador to the Washington was quoted as saying that "I personally was never expecting the Holocaust could happen again, especially so close to the heart of Europe." *Id.*

negotiating a settlement to his country's civil war.⁴⁴ 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.⁴⁵

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.⁴⁶ Partly due to that experience, and American marginalization of Africa, the United States refrained from intervening or pushing for effective international action to stop the genocide in Rwanda.⁴⁷ 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.⁴⁸ Thus, the United States entered the region only after the RPF 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.⁴⁹

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 ac-

44. HUMAN RIGHTS WATCH, *WORLD REPORT 1995* 41 (1994) [hereinafter *WORLD REPORT*].

45. *Genocide in Rwanda: April-May 1994* [hereinafter *Genocide in Rwanda*], HUMAN RIGHTS WATCH/AFRICA, May 1994, at 2; *WORLD REPORT*, *supra* note 44, at 39-48.

46. 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*, Mar. 15, 1995, at 15.

47. Joyce Price, *Why Rwanda Was Ignored*, *WASH. TIMES*, July 31, 1994, at A4.

48. *WORLD REPORT*, *supra* note 44, at 46. 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.

Id. 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. See *WORLD REPORT*, *supra* note 44, at 46.

49. Craig Nelson, *Rwanda: U.S. Keen to Prove its Concern over Refugees Plight*, *INDEPENDENT* (London), Aug. 1, 1994, at 9.

tion.⁵⁰ 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.⁵¹ Later attempts by the UN to intervene were too little and too late. 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."⁵²

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.⁵³ Manzi Bakuramutsa, the RPF envoy to the Security Council, which cast the only dissenting vote on the creation of Rwanda Tribunal,⁵⁴ 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 prison facilities,

50. WORLD REPORT, *supra* note 44, at 41. See generally JOINT EVALUATION OF EMERGENCY ASSISTANCE TO RWANDA, THE INTERNATIONAL RESPONSE TO CONFLICT AND GENOCIDE: LESSONS FROM THE RWANDA EXPERIENCE, Vols. I-V (March 1996); see also, Peter J. Rosenblum, *The United Nations and Rwanda, 1993-1996*, 10 HARV. HUM. RTS. J (forthcoming 1997) (book review).

51. WORLD REPORT, *supra* note 44, at 46. 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, 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 *Genocide in Rwanda*, *supra* note 45, at 2.

52. WORLD REPORT, *supra* note 44, at 45. See also Christopher C. Joyner, *Enforcing Human Rights Standards in the Former Yugoslavia*, 22 DENVER J. INT'L L. & POL'Y 235 (1994).

53. 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).

54. Anthony Goodman, *UN Establishes Rwanda Genocide Tribunal*, REUTERS NORTH AMERICAN WIRE, Nov. 8, 1994, available in LEXIS, News Library, ARCNWS File. 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." *Id.*

instead of Rwandan jails.⁵⁵ 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."⁵⁶ Rwanda claimed that the absence of the death penalty against those guilty of genocide was the primary reason for its opposition to the tribunal.⁵⁷

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. Under 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 norm of civilization for a diverse world.

IV. ASSESSING THE YUGOSLAV AND RWANDA TRIBUNALS

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 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:

55. *Id.* See also *Rwanda: Urgent*, AGENCE FRANCE PRESSE, Nov. 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* [hereinafter Akhavan, *Politics and Pragmatics*], 90 AM. J. INT'L L. 501, 504-08 (1996).

56. Goodman, *supra* note 54.

57. 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. *Id.*

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.⁵⁸

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 unless they can 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.⁵⁹ "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."⁶⁰ 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.⁶¹ 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.

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 subject-matter jurisdiction of the Yugoslav Tribunal is broad and covers grave breaches of the Geneva Conventions,⁶² violations of the laws

58. Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 555 (1995). See also Karl Arthur Hochkammer, *The Yugoslav War Crimes Tribunal: The Compatibility of Peace, Politics, and International Law*, 18 VANDERBILT J. TRANSNAT'L L. 119 (1995); Christopher C. Joyner, *Strengthening Enforcement of International Humanitarian Law: Reflections on the International Criminal Tribunal for the Former Yugoslavia*, 6 DUKE J. COMP. & INT'L L. 79 (1995).

59. Meron, *supra* note 58, at 555.

60. *Id.*

61. *Id.*

62. Statute of the International Tribunal for the Former Yugoslavia, *reprinted in* 14 HUM. RTS. L. J. 211 (1993) [hereinafter Statute of Yugoslav Tribunal]. See *Id.* art. 2, See also 2 AN

and customs of war,⁶³ genocide,⁶⁴ and crimes against humanity.⁶⁵ The Rwanda Tribunal has similar jurisdiction, except the internal character of that conflict required different references to international humanitarian law. The Rules of Procedure and Evidence of the Yugoslav Tribunal appear to be comprehensive and fair.⁶⁶ The major criticism of the tribunals has not been directed at jurisdictional or procedural issues but at the inability of the tribunals to apprehend suspects to stand trial. This is particularly true of leading suspects who are in positions of authority.⁶⁷

Although the Yugoslav Tribunal was established in 1993 with its 11 judges,⁶⁸ it was not until July 1994 that Richard Goldstone, a South African judge was elected chief prosecutor after an embarrassing delay in which different states jostled to have their nationals appointed.⁶⁹ Antonio Cassese, the Italian international law professor, was elected President of the Tribunal in November 1993.⁷⁰ But it was not until November 1994 that the Yugoslav Tribunal became operational, when it held its first public hearing.⁷¹ Human rights groups decried the long delay, charging the U.N. with obstruction.⁷² To date, the Yugoslav Tribunal has done little to allay the fears of its skeptics.

Several structural shortcomings have worked against the effectiveness of the Yugoslav Tribunal. One important limitation early on was the tribunal's

INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 29-38 (Virginia Morris & Michael P. Scharf eds., 1995) [hereinafter INSIDER'S GUIDE VOLUME TWO].

63. Statute of Yugoslav Tribunal, *supra* note 62, at art. 3.

64. *Id.* art. 4.

65. *Id.* art. 5.

66. See Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.3 (1995). See also INSIDER'S GUIDE VOLUME ONE, *supra* note 38, at 41-86; *Repeating Nuremberg*, ABA J., Oct. 1993, at 121; Joseph L. Falvey, *United Nations Justice Or Military Justice: Which is the Oxymoron?*, 19 *FORDHAM J. INT'L L.* 475 (1995); Daniel D. Ntanda Nsereko, *Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia*, 5 *CRIM. L.F.* 507 (1994); Alex C. Lakatos, *Evaluating the Rules of Procedure and Evidence for the International Tribunal in the Former Yugoslavia: Balancing Witnesses' Needs Against Defendants' Rights*, 46 *HASTINGS L.J.* 909 (1995). Note, however, that questions about the tribunal's sensitivity to issues of gender have been raised. See Catherine Niarchos, *Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia*, 17 *HUM. RTS. Q.* 649 (1995); Jennifer Green et al., *Affecting Rules of Procedure for the Prosecution of Rape and Other Gender-Based Violence Before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique*, 5 *HASTINGS WOMEN'S L.J.* 171 (1994).

67. Akhavan, *Challenge to Civilization*, *supra* note 3, at 243.

68. Statute of Yugoslav Tribunal, *supra* note 62, at art. 12. Three judges serve in each of the Trial Chambers while five judges sit in the Appeals Chamber. *Id.*

69. INSIDER'S GUIDE VOLUME ONE, *supra* note 38, at 161-63.

70. *Id.* at 148.

71. LAWYERS COMMITTEE FOR HUMAN RIGHTS, *PROSECUTING WAR CRIMES IN THE FORMER YUGOSLAVIA* iii (May 1995) [hereinafter *WAR CRIMES IN YUGOSLAVIA*].

72. *Former Yugoslavia: The War Crimes Tribunal One Year Later*, Human Rights Watch/Helsinki, Feb. 1994, at 1.

financial reliance on the United Nations.⁷³ In March 1995 the UN still had not resolved how the tribunal would be financed, leaving a voluntary trust fund of US \$6 million the only sure source of support.⁷⁴ Apart from its financial woes, the tribunal's greatest failure has been its inability to apprehend major suspects and bring them to trial. By March 1996, although the tribunal had only indicted 53 suspects, only two were in custody.⁷⁵ By June 1996, the tribunal had only indicted 70 suspects, although these included Bosnian Serb leaders Radovan Karadzic and General Ratko Mladic for the slaughter of 6,000 Bosnian Muslims in the Srebrenica enclave.⁷⁶ As late as February 1997, the tribunal had only indicted 74 suspects with only seven of them in custody.⁷⁷ Significantly, neither Karadzic nor Mladic were in custody although the two, regarded as the worst perpetrators, continued to live in Bosnia.⁷⁸

Since the Yugoslav Tribunal's mandate expires in the fall of 1997,⁷⁹ it is unlikely that it will bring to trial more suspects, whether low-level or senior-ranking suspects. The Prosecutor of the Tribunal largely depends on the states of the former Yugoslavia — principally Serbia, Croatia, and Bosnia — the perpetrators of war crimes themselves, for assistance to apprehend suspects and to gain access to evidence.⁸⁰ As the negligible numbers of those in

73. Statute of Yugoslav Tribunal, *supra* note 62, at art. 32. The Statute of the Yugoslav Tribunal obligates the UN to fund the tribunal. *Id.* See also Craig Topper, *And Justice for All? An Ad Hoc Tribunal for the Former Yugoslavia*, 8 N. Y. INT'L L. REV. 48 (1995).

74. LAWYERS COMMITTEE FOR HUMAN RIGHTS, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 33 (April 1995) [hereinafter CRIMINAL TRIBUNAL IN YUGOSLAVIA]. The UN Secretary General, had requested US \$38,652,900 to cover the operations of the tribunal for 1994-95 biennium, and so complained that the inability of the UN to appropriate funds for the tribunal had forced him to allocate money without the proper appropriations processes. *Id.*

75. *War Crimes Warrant Issued for Serb*, ATLANTA J. CONSTITUTION, Mar. 8, 1996, at 12A.

76. *Yugoslav War Crimes Tribunal — Indictments*, REUTERS WORLD SERVICE, Jun. 27, 1996, available in LEXIS, News Library, CURNWS File.

77. *War Criminals Must Not Go Unpunished* [hereinafter *War Criminals*], STATE J. REGISTER, Feb. 16, 1997, available in LEXIS, News Library, CURNWS File. See also Barbara Franklin, *Bosnia: the New Nuremberg; UN Tribunal Finds that Justice May be Hard to Gain in a War Zone*, NAT'L L. J., Sep. 26, 1994, at A1; Brenton L. Saunders, *The World's Forgotten Lesson: the Punishment of War Criminals in the Former Yugoslavia*, 8 TEMPLE INT'L & COMP. L.J. 357 (1994).

78. *War Criminals*, *supra* note 77.

79. *War Crimes Warrant Issued for Serb*, STATE J. REGISTER, Feb. 16, 1997, available in LEXIS, News Library, CURNWS File.

80. Statute of Yugoslav Tribunal, *supra* note 62, art. 29. The provision requires states to "cooperate with the International Tribunal in the investigation and prosecution" of suspects. *Id.* In particular, states "shall comply without undue delay" with request by the tribunal for "identification and location of persons," the "taking of testimony and the production of evidence," the "service of documents," and the "surrender or transfer" of suspects. *Id.* See also Gerry Azatta, *Keeping Up With the War Crimes Tribunal: Human Rights Research into the Twenty-First Century*, 9 HARV. HUM. RTS. J. 323, 326 (1996) (book review). See also Gary J. Bass, *War Crimes Tribunal Off to a Shaky Start*, L.A. DAILY J., Sep. 24, 1993, at 6; Doug Bandow, *War Crimes Tribunal Focuses on Politics, Not Justice*, L.A. DAILY J., Oct. 18, 1996, at 6; Mark Rice-Oxley, *Tribunal Depends on the Kindness of Foes*, NAT'L L.J., Jun. 3, 1996, at A10.

custody indicates, states have been reluctant to assist the tribunal in tracking down suspects. In some cases, states have explicitly refused to cooperate.⁸¹ Short of imposing economic or other sanctions, a course of action that is unlikely, the United Nations cannot force compliance by a recalcitrant state. Because the tribunal cannot try a suspect in absentia,⁸² some commentators have suggested that shaming through identification could turn indicted war criminals into pariahs and deprive them of the freedom of movement.⁸³

Most shocking has been the refusal of NATO and the United States to arrest war crimes suspects following the American-brokered Dayton Accords and the deployment of 60,000 troops in Bosnia.⁸⁴ Perhaps the reason lies in the American reliance on Milosevic, the Serbian President many viewed as the architect of the genocidal war, to broker the agreement.⁸⁵ In any event, the Accords largely ratified the gains of the Serbs, leaving the Bosnian Muslims with only fifty-one percent of Bosnia-Herzegovina, a Muslim-Croat federation; the rest became Republika Srpska, a separate and autonomous Serb republic, and a haven for Karadzic and Mladic.⁸⁶ The Dayton Accords charged neither the NATO forces nor the signatory states with finding and arresting indicted war criminals.⁸⁷ The Yugoslav Tribunal remains a symbolic gesture without the wherewithal to discharge its mission. The United States fears that going after suspects would upset the Dayton Accords.⁸⁸ In any event, both the United States and NATO forces have carried out a policy of appeasement towards indicted war criminals.⁸⁹

81. *Croatia Defies Tribunal*, INDEPENDENT (London), Feb. 20, 1997, available in LEXIS, News Library, CURNWS File (stating that Croatia recently refused to turn over information on suspects). See also Christopher C. Joyner, *Strengthening Enforcement of Humanitarian Law: Reflections on the International Criminal Tribunal for the Former Yugoslavia*, 6 DUKE J. COMP. & INT'L L. 79 (1995); Jeri Laber & Ivana Nizich, *The War Crimes Tribunal for the Former Yugoslavia: Problems and Prospects*, 18 FLETCHER F. OF WORLD AFF. 7 (1994).

82. Statute of Yugoslav Tribunal, *supra* note 62, art. 20. The Statute of the Yugoslav Tribunal, art. 20 requires that an accused be in custody before the commencement of a trial. *Id.* See also Ruth Wedgwood, *War Crimes: Bosnia and Beyond*, 34 VA. J. INT'L L. 267 (1994).

83. Akhavan, *Challenge to Civilization*, *supra* note 3, at 243-44. See U.N. SCOR, 48th Sess., 3217th mtg. at 13, U.N. Doc. S/PV.3217 (1993) (Madeleine Albright, then US ambassador to the UN, declaring that war crimes suspects will become international pariahs and prisoners in their own lands — Serbia, Bosnia, and Croatia — even if their own states do not hand them over for trial). See also *War Criminals to Become International Pariahs*, AGENCE FRANCE PRESSE, May 26, 1993, available in LEXIS, News Library, ARCNEWS File.

84. E. Sciolino, *Accord Reached to End the War in Bosnia; Clinton Pledges U.S. Troops to Keep Peace*, N.Y. TIMES, Nov. 22, 1995, at A1. The Dayton Accords were initialed on November 21, 1995, by the presidents of Bosnia-Herzegovina, Croatia, and Serbia in Dayton Ohio, ending the four-year war in the former Yugoslavia. *Id.*

85. *Dissembling in Serbia*, ASIAN WALL STREET J., Feb. 10, 1997, at 12, available in WESTLAW, Intlnews.

86. *MEDICINE UNDER SIEGE*, *supra* note 26, at 32.

87. *Id.* at 32.

88. *Dissembling in Serbia*, *supra* note 85.

89. *War-Crimes Hypocrisy*, WASH. POST, Feb. 2, 1997, at C6 (attacking American policy of appeasement of war crimes suspects, reconfirmed when Secretary of State Albright met with Louise Arbour, the new Yugoslav Tribunal Prosecutor). WASHINGTON POST editorial concludes war crime suspects "have not been arrested because U.S. troops have chosen not to arrest them

The Rwanda Tribunal, on the other hand, has met with a number of difficulties of its own 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.⁹⁰ But it was not until June 1995 that its judges were sworn in at The Hague although the tribunal's seat was Arusha, Tanzania.⁹¹ An administrator for the tribunal was not appointed until September 1995.⁹² The Rwanda Tribunal was given the same subject-matter jurisdiction as the Yugoslav Tribunal: genocide,⁹³ crimes against humanity,⁹⁴ and violations of article 3 common to the Geneva Conventions and of Additional Protocol II.⁹⁵

One year after it was established, the Rwanda Tribunal issued its first indictments on December 12, 1995, accusing eight Rwandans of genocide.⁹⁶ The Rwanda Tribunal, unlike its Yugoslav counterpart, has netted several high-ranking officials of the former regime. In addition to several other suspects, the Tribunal has in its custody Colonel Theoneste Bagosora, the permanent secretary in the Ministry of Defense of the former regime, thought to have been one of the masterminds of the genocide.⁹⁷ Bagosora was arrested

— because ultimately, President Clinton has failed to order their arrests.” *Id.* See also *Discussions, But No Plans Yet on Catching War Criminals: Pentagon*, AGENCE FRANCE PRESSE, Feb. 11, 1997, available in LEXIS, News Library, CURNWS File.

90. WAR CRIMES IN YUGOSLAVIA, *supra* note 71, at 36.

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

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

93. Rwanda Tribunal Statute, *supra* note 3, art. 2.

94. *Id.* art. 3.

95. *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 I-IV, *supra* note 4. See also Second Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, reprinted in 16 I.L.M. 1442 (1977). The inclusion of the Second Protocol was essential because the Rwandan conflict was internal. *Id.* See also Mark R. von Sternberg, *A Comparison of the Yugoslavian and Rwandan War Crimes Tribunals: Universal Jurisdiction and the 'Elementary Dictates of Humanity'*, 22 BROOK. J. INT'L L. 112 (1996); Mariann Meier Wang, *The International Tribunal for Rwanda: Opportunities for Clarification, Opportunities for Impact*, 27 COLUM. HUM. RTS. L. REV. 177 (1995).

96. Akhavan, *Politics and Pragmatics*, *supra* note 55, at 509. See also Melissa Gordon, *Justice on Trial: the Efficacy of the International Tribunal for Rwanda*, 1 ILSA J. INT'L & COMP. L. 217 (1995).

97. Akhavan, *Politics and Pragmatics*, *supra* note 55, at 509.

in February 1996 in Cameroon and was extradited to stand trial. Three other former high-ranking officials who are expected to stand trial with Bagosora are Colonel 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.⁹⁸ All three were extradited from Cameroon in January 1997.⁹⁹ As of February 20, 1997, their trials had not started.¹⁰⁰

The arrests of these prominent suspects have been 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 at the tribunal.¹⁰¹ 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.¹⁰² The investigation was requested by concerned member states, UN staff, and the UN Office of Internal Oversight Services.¹⁰³ 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 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.¹⁰⁴ In addition, the Office of the Prosecutor in Kigali was riddled with operational difficulties and feuded openly with the Registry in Arusha.¹⁰⁵ 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.¹⁰⁶

98. *Rwanda: International News*, AGENCE FRANCE PRESSE, Feb. 13, 1997, available in LEXIS, News Library, CURNWS File.

99. *Id.*

100. *Bagosora Plea Appearance Delayed*, AGENCE FRANCE PRESSE, Feb. 20, 1997 available in LEXIS, News Library, CURNWS File. See also *Foreign Minister Dissatisfied With Performance of Genocide Tribunal*, BBC SUMMARY OF WORLD BROADCASTS, Mar. 14, 1997, available in LEXIS, News Library, CURNWS File.

101. 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, Jan. 9, 1997.

102. See *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*, United Nations, Report of the Secretary General on the Activities of the Office of Internal Oversight Services [hereinafter Report of Rwanda Tribunal], 51st Sess., Agenda items 139, 141, at 1, U.N. Doc A/51/789 (1997).

103. *Id.*, Annex (Summ.).

104. See generally *Id.*, ¶¶ 3-69. See also Craig Turner, *Rwanda War Crimes Tribunal Mismanaged, Report Says*, L.A. TIMES, Feb. 13, 1997, at 8; John Goshko, *UN Probe Find Mismanagement, Waste in Rwanda War Crimes Tribunal*, WASH. POST, Feb. 13, 1997, at A20.

105. Report of Rwanda Tribunal, *supra* note 102, Summ.

106. *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). See also Mark Rice-Oxley, *Set-*

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.¹⁰⁷ Kofi Annan, the UN Secretary General met with senior officials from the Rwanda Tribunal in February 1997 and immediately fired Registrar Adede and Deputy Prosecutor Rakotomanana, the two senior officials identified in the investigative report as largely responsible for the Tribunal's woes.¹⁰⁸ If the UN and its officials can take the Rwanda Tribunal seriously by engaging competent staff and funding it adequately, it may at least conclude a few cases before its time expires. Even with the cooperation of the Tutsi-led Rwanda government, it is not feasible that a substantial number of the reported ninety-thousand suspects in Rwandan jails will ever be tried by the tribunal.¹⁰⁹ From a practical standpoint, many of the suspects will have to be tried by the national courts of Rwanda, although those trials raise serious questions of due process protections.¹¹⁰

V. CONCLUSION

The Nuremberg and Tokyo Tribunals are bad analogies 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. Instead, the Nurem-

backs Best Rwanda Genocide Tribunal: Administrative Woes, Official Meddling Threaten to Thwart the U.N.'s Legal Initiatives, NAT'L L. J., Dec. 30, 1996, at A12.

107. Report of Rwanda Tribunal, *supra* note 102, ¶¶ 75-100.

108. Annan then appointed Agwu Ukiwe Okali, a Nigerian UN bureaucrat based in Nairobi, Kenya, to replace Adede. See *Two Dismissed From Tribunal on Rwanda*, N.Y. TIMES, Feb. 27, 1997, at A6; Craig Turner, *2 Resign From UN Tribunal on Rwanda*, L.A. TIMES, Feb. 27, 1997, at A6; John Goshko, *Annan Fires 2 Top Aides at the Genocide Tribunal*, INT'L HERALD TRIBUNE, Feb. 28, 1997, at 2; Thalif Deen, *Two Officials Fired From UN Rwandan Tribunal*, JANE'S DEFENSE W., Mar. 5, 1997, at 6, available in LEXIS, News Library, CURNWS File; *Kofi Annan Weighs Rwanda Tribunal Changes*, UPI, Feb. 22, 1997, available in LEXIS, News Library, CURNWS File; *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.

109. Akhavan, *Politics and Pragmatics*, *supra* note 55, at 509. See also Mary Robinson, the Irish President, estimated in March 1997 that the 90,000 genocide suspects held in Rwandan jails were not being afforded due process protections. See Corinne Dufka, *Irish Leader Expresses Concern at Rwanda Justice*, REUTERS, Mar. 3, 1997, available in LEXIS, News Library, CURNWS File.

110. As of March 1997, Rwanda was reported to hold in its jails over 90,000 genocide-related suspects. Many of the suspects have not been accorded due process protections by the RPF Rwandan government. See Corinne Dufka, *Irish Leader Expresses Concern at Rwanda Justice*, REUTERS, Mar. 3, 1997, available in LEXIS, News Library, CURNWS File; *Rwanda: International News*, AGENCE FRANCE PRESSE, Feb. 13, 1997, available in LEXIS, News Library, CURNWS File. Rwandan courts have started their own war crimes trials and had handed down ten death sentences by February 1997. *Id.* See also *Despite UN Tribunal, Rwanda Plans to Try Suspects for War Crimes*, CHICAGO TRIBUNE, Nov. 10, 1994, at A6. A Rwandan official estimated in 1994 that national courts could try as many as 30,000 suspects. *Id.*

berg and Tokyo Tribunals culminated in 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 turn the world to a courtroom, to legal memoranda and pleading and paperwork, is possible only once an army sits atop the 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.*¹¹¹

An indictment of the Yugoslav Tribunal sees such trials — before the perpetrators are conquered — as an attempt to appease the killers, to ratify genocide. Anderson notes this view when he writes that “[t]o hold a war crimes trial in the former Yugoslavia today would be like holding Nuremberg after acquiescing in the German annexation of Poland, the Ukraine, and the rest of the eastern lands.”¹¹²

That is more or less what in fact has happened. The Dayton Accords ratified the crimes of the “ethnic-cleansers” and the maps that they drew with their guns. They recognized the sovereignty of the states responsible for the genocide and hence their protection of the authors of the crimes themselves. In the meantime, the Yugoslav Tribunal sits at The Hague, with its jurisdiction about to run out, and precious little to show in its justification. There have been no attempts to integrate the tribunal into the political processes of reconstruction and reconciliation. The irony, indeed paradox, of UN efforts in the former Yugoslavia is the prosecution of war criminals with whom it also seeks to make peace. As such, its teeth will never be felt by those whom it was intended to address.

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; there is only a temporary respite before the Hutu-Tutsi struggle for the control of the state resumes. 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

111. Anderson, *supra* note 10, at 292 (emphasis added).

112. *Id.* See also Dusan Cotic, *Introduction: A Critical Study of the International Tribunal for the Former Yugoslavia*, 5 CRIM. L.F. 223 (1994).

the victors, Tutsis with the blessing and support of the United Nations.¹¹³ Tutsis may themselves see the tribunal and the war crimes they are conducting in Rwanda as their opportunity for revenge.¹¹⁴ 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.¹¹⁵ Finally, the failure of both tribunals will make the establishment of a permanent international criminal tribunal that much more difficult.¹¹⁶

113. 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.

114. Akhavan, *Politics and Pragmatics*, *supra* note 55, at 508. 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." But this is only possible if the tribunal enjoys some credibility with the perpetrators. *Id.*

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

116. Christian Tomuschat, *International Criminal Prosecution: The Precedent of Nuremberg Confirmed*, 5 *CRIM. L. F.* 237 (1994).