

JUSTICE ON TRIAL: THE EFFICACY OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

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I. INTRODUCTION

There can be no peace without justice, no justice without law, and no meaningful law without a court to decide what is just and lawful under any given circumstance. The process of codification, adjudication and enforcement is as vital to a tranquil international community as it is to any independent national state.

-Benjamin B. Ferencz**

The success of the Yugoslavian and Rwandan War Crimes Tribunals will determine the future of international criminal law. Whether the Tribunals are able to command the attention and respect of the world remains to be seen.

The situation in the former Yugoslavia has deteriorated to the point where it resembles Nazi-era Europe. The media has bombarded our living rooms with reports of "ethnic cleansing,"¹ mass graves, torture, and reports of concentration camps virtually identical to those of World War II.² As we saw the destruction, the initial public outrage was strong. However, as with most crises, the international community successfully avoided taking affirmative action for three years while the atrocities continued unhindered. When the international community finally took

** BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT, A STEP TOWARDS WORLD PEACE: A DOCUMENTARY HISTORY AND ANALYSIS, 30, 31 (1980).

1. The idiom "ethnic cleansing" has been often used to analogize the Serbian's weapon of mass rape. Feryal Gharahi related one story to the Commission on Security and Cooperation in Europe in February of 1993. In Milivania, Serbian forces converted the local gymnasium to a rape camp. There, the women were repeatedly gang-raped in order to assure impregnation, thus ridding Bosnia of all non-Serbs. If the women resisted, their throats were slit. After impregnation, the women were kept in the camps until it was too late to terminate the pregnancy. *War Crimes in the Former Yugoslavia: Hearings Before the Commission on Security and Cooperation in Europe*, 103d Cong., 1st Sess. 7-8 (1993) (testimony of Feryal Gharani) [hereinafter *Security In Europe*]; see generally Danise Aydelott, Comment, *Mass Rape During War: Prosecuting Bosnian Rapists Under International Law*, 7 EMORY INT'L L. REV. 585, 596 (1993). This ethnic cleansing policy, part of the Serbian war plan, did not end there. While women were in the rape camps, men were sent to concentration camps. Several men died after being castrated in the attempt to end all non-Serbian blood-lines. Catherine Toups, *Atrocity Probes Home in on Serbia; U.N. Requests Case For War Crime Trial*, WASH. TIMES, Nov. 8, 1994, at A11.

2. Steve Coll, *War Crimes and Punishment*, WASH. POST MAG., Sept. 25, 1994, at 25 (describing the similarities between Bosnia and Nazi Germany as chilling: ethnic hatred, the old European setting, and specific acts of barbarity are indicative of the Nazi-era overtones).

action, via the International Tribunal, the next human tragedy was already underway.

The slaughter of the Tutsi minority orchestrated by the Hutus in Rwanda occurred as the Yugoslavian Tribunal was gaining momentum. The Tutsi genocide in Rwanda has been faster than any other episode in the last fifty years.³ In the first three months of 1994, one million Tutsis were slaughtered, as compared to Bosnia where 200,000 were killed over a period of two years.⁴ Hutu militias have been savage and barbaric in their pursuit of the Tutsi minority.⁵

As evidence of these atrocities mounts, there exists a desire to punish those responsible. However, this seemingly logical urge is overshadowed by the practicalities of prosecuting criminals across borders. This comment contends that the anticipated Rwandan War Crimes Tribunal has been ill-conceived. With zeal that stems from the promulgation of honor, morality, and good intentions, various segments of the international community⁶ have laid the foundations for justice, while overlooking its virtual impossibility in this situation.

Part I will list a brief chronology of the War Crimes Tribunal, the United Nations' response to the Rwandan nightmare. Next, the Tribunal's basis for authority will be examined. This is followed by an analysis of the potential problems under the Tribunal's current structure. Jurisdictionally, many argue that the tribunal will conflict with state sovereignty, as well as interfere with the protection of individual liberties.⁷ Additionally, this section will discuss the administrative difficulties in gathering evidence⁸ and procuring extradition.⁹

3. Tom Masland, *Will It Be Peace or Punishment?*, NEWSWEEK, Aug. 1, 1994, at 37.

4. *Id.*

5. Lindsey Hilsum, *Settling Scores*, AFR. REP., May-June, 1994, at 14 (Rwanda's radio broadcasts prior to the massacres defining the Tutsis as "cockroaches" which need to be exterminated).

6. Prior to the creation of the Tribunal, the Ambassadors representing Turkey, Denmark, Austria, and the Head of the Delegation of the Commission of the European Community all testified to the importance of forming an international tribunal, and urged the United States to support it. *European Perspective on Bosnian Conflict: Hearing Before the Commission on Security and Cooperation in Europe*, 103d Cong., 1st Sess. 3, 8, 16, 20 (1993) [hereinafter *European Perspective*].

7. Christopher L. Blakesley, *Obstacles to the Creation of a Permanent War Crimes Tribunal*, 18 FLETCHER F. WORLD AFF. 77, 91 (1994).

8. Francoise J. Hampson, *War Crimes Fact-Finding in the Former Yugoslavia*, 1 INT'L LAW & ARMED CONFLICT COMMENTARY, 28, 29 (1994). Often there is a degree of political control over the fact-finding activities of these tribunals.

9. Jeri Laber & Ivana Nizich, *The War Crimes Tribunal for the Former Yugoslavia: Problems and Prospects*, 18 FLETCHER F. WORLD AFF. 7, 12 (1994). The difficulty of extradition of a person

Part II affirms the Rwandans' duty to prosecute these human rights violations. The model used by other emerging democracies for punishment is applied to the Rwandan situation. Ultimately, this model's utility is superseded by the need for an International Criminal Court.

Finally, Part III will show that the Tribunal's failures demonstrate the need for a permanent International Criminal Court. Various proposals for a permanent court have been recommended, but none have been adopted due to problems that exist in each model. Nevertheless, this comment concludes that the creation of a permanent criminal court, which enforces a permanent code of crimes, would benefit the international community overall. More specifically, an established court potentially could have saved countless Rwandan lives.

II. THE WESTERN IMPOSITION

A. *Historical Summary*

Without mechanisms for individual nations to control international crime, the need for a tribunal to prosecute serious violations of humanitarian law has emerged in various areas of the world.¹⁰ In response to the Yugoslavian crisis, the United Nations has created the "International Tribunal for the sole purpose of Prosecuting Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia."¹¹ Since the organization of the Yugoslavian Tribunal, Richard Goldstone, the chief prosecutor for the Tribunal, has sought concurrent jurisdiction for the prosecution of crimes committed in Rwanda.¹²

On June 28, 1994, the Commission on Human Rights of the United Nations reported on the gravity of the Rwandan situation.¹³ Two days later, the United Nations Security Council adopted Resolution 935 requesting the establishment of an impartial Commission of Experts to further examine and analyze evidence of grave violations of humanitarian law in Rwanda.¹⁴ By the end of July, the Secretary-General issued a report

indicted for war crimes is well recognized. In fact, sanctions against parties who refuse to cooperate with the tribunal have been proposed.

10. Thomas R. Kleinberger, Note, *The Iraqi Conflict: An Assessment of Possible War Crimes and the Call for Adoption of an International Criminal Code and Permanent International Criminal Tribunal*, 14 N.Y.L. SCH. J. INT'L & COMP. L. 69, 70 (1993).

11. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993).

12. John Shattuck, *War Crimes First*, WASH. POST, Aug. 23, 1994, at A19.

13. See U.N. ESCOR, 51st Sess., at 5-8, U.N. Doc. E/CN.4/1995/7 (1994) [hereinafter *Escor*], for a detailed accounting of the Hutu militia slaughter of the Tutsi minority.

14. S.C. Res. 935, U.N. SCOR, 49th Sess., 3400th mtg., U.N. Doc. S/RES/935 (1994).

stressing that the Commission of Experts was actively gathering and documenting evidence of these violations, especially acts of genocide, in the hopes of pursuing prosecution.¹⁵

The Commission's preliminary report¹⁶ suggested either the creation of a new international criminal tribunal¹⁷ or that the jurisdiction of the International Criminal Tribunal for the former Yugoslavia be expanded to cover Rwandan crimes.¹⁸ This suggestion was heeded, but without the support of Rwanda, whose government voted against the resolution.¹⁹

On November 8, 1994, the Security Council established the International Tribunal for Rwanda through Resolution 955.²⁰ With Rwanda as the sole dissenting vote, the Security Council established an independent tribunal whose sole objective is to "prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring states" ²¹ The final vote on the establishment of the tribunal had thirteen votes in favor, one vote against the tribunal from Rwanda and an abstention from China.²² Although Rwanda initially urged the United Nations to take action against the Hutus who had organized this genocide, they had several reasons for rejecting the United Nations' plan. First, the tribunal only has jurisdiction over crimes committed after January 1, 1994.²³ Secondly, the

15. *Report of the Secretary-General on the Establishment of the Commission of Experts Pursuant to Paragraph 1 of Security Council Resolution 935 (1994) of 1 July 1994*, 49th Sess., at 2-3, U.N. Doc. S/1994/879 (1994).

16. *Preliminary Report of the Independent Commission of Experts Established in Accordance with Security Council Resolution 935 (1994)*, Commission of Experts on Rwanda, 49th Sess., Annex to the Letter, U.N. Doc. S/1994/1125 (1994).

17. *Id.* at 31.

18. *Id.* at 32.

19. Julia Preston, *Tribunal Set on Rwandan War Crimes; Kigali Votes No on U.N. Resolution*, WASH. POST, Nov. 9, 1994, at A44.

20. S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994).

21. *Id.*

22. Preston, *supra* note 19, at A44. *But cf. U.N. Genocide Tribunal Wins Rwanda's Support*, BALTIMORE SUN, Nov. 10, 1994, at A22. (Rwanda's U.N. Ambassador Manzi Bakurmuta stated that while Rwanda is not in complete agreement with the United Nations' Tribunal, they will nonetheless cooperate with all United Nations efforts.)

23. Raymond Bonner, *Top Rwandan Criticizes U.S. Envoy*, N.Y. TIMES, Nov. 8, 1994, at A11 (noting that the crimes occurred long before January 1, 1994, therefore many of the worst perpetrators will be overlooked with the proposed time limitation). See William Schabas, *Atrocities and the Law*, CANADIAN LAW., Aug./Sept. 1993, at 33-36. The dispute in Rwanda is not new. Rwanda has been a battlefield for two major ethnic groups, the Tutsi's and Hutu's for centuries. *Id.* at 34. In January of 1993, a Canadian-based organization, International Centre for Human Rights and Democratic Development, sent a 10-member fact-finding commission to Rwanda. *Id.* This

government strongly opposed the United Nation's Tribunal because the procedural rules do not include the death penalty.²⁴ To a lesser degree, the Rwandan government is also dissatisfied with the slow pace of the United Nations bureaucratic method²⁵ and the Tribunal's decisions not to use Rwandan judges²⁶ nor to hold the trials in Rwanda.²⁷

B. *The Tribunal's Authority?*

Noting the Rwandan opposition to the Tribunal, it is important to examine the justification for the United Nations' authority to act in this situation. Two ground-breaking determinations were made. First, pursuant to Chapter VII of the United Nations Charter,²⁸ the United Nations Security Council defined the humanitarian violations in Rwanda as a threat to international peace.²⁹ Together Articles 39 and 41 of the Charter provide the Security Council with the power to decide which enforcement measures to take to maintain international peace.³⁰ Using this discretion, the Security Council concluded the tribunal was the appropriate response to the Rwandan threat.³¹

group was one of many over the years who experienced the genocide and crimes against humanity. Because there has been documentation of the horror in Rwanda over the past several years, the Tutsi government had lobbied unsuccessfully to extend the Tribunal's jurisdiction to the time prior to January, 1994.

24. Preston, *supra* note 19, at A44. Rwanda has repeatedly complained about the double standard which it sees developing. The more minor criminals in the Rwandan conflict will be prosecuted under Rwandan law; therefore, they will be subject to the death penalty. However, the major offenders will be subjected to the punishment of the Tribunal. Thus, those guilty of planning and organizing this mass genocide will be condemned only to life sentences.

25. Keith B. Richburg & Stephen L. Buckley, *Rwandan Premier Bitter Over Delay of U.N. Crimes Trials, Foreign Aid*, WASH. POST, Oct. 21, 1994, at A30. Senior officials within the Rwandan government are becoming increasingly impatient. The Rwandan Patriotic Front has already surrendered enough documents to bring some cases to trial. Unless the United Nations acts quickly, many leaders are promising to create their own courts to try various Hutu leaders.

26. Toups, *supra* note 1.

27. Bonner, *supra* note 23. Criminals are actually benefitted by Rwandan prosecution. If the criminals are imprisoned in Europe, their standard of living would be significantly higher than if they were in Rwanda. *Id.* Innocent people would be willing to live in European prisons rather than in Rwanda. *Id.*

28. Chapter 7 is titled "*Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.*" U.N. CHARTER ch. VII.

29. S.C. Res. 955, *supra* note 20, at 2.

30. U.N. CHARTER arts. 39, 41.

31. *Id.* See Monroe Leigh, et al., *Report on the International Tribunal to Adjudicate War Crimes in the Former Yugoslavia*, A.B.A. SEC. INT'L L. & PRAC. 10 (1993) [hereinafter *A.B.A. Report*]. The ABA report noted that although Article 41 of the United Nations Charter does not specify a Tribunal as one of the measures to deal with a threat to international peace, it is certainly within their discretion to use this means.

The conflict in Rwanda has both internal and international elements. Although a civil conflict originally, the flight of the Rwandans into Zaire and other neighboring countries has caused the conflict to escalate beyond Rwanda's borders. Thus, able to define this human tragedy as international, the Security Council is free to apply the entirety of the Hague Conventions, Geneva Conventions, and Protocol I, which provides remedies only to international conflicts.³² The importance of this decision must not be underestimated. The ethnic tensions in Rwanda have manifested themselves primarily in the form of an internal civil conflict, as opposed to Yugoslavia which has developed into an international civil war.³³ The United Nations Security Council has made a monumental leap reshaping future international law by defining Rwandan violations of humanitarian law as factors in determining a threat to international peace.³⁴

Secondly, if the United Nations had deemed the Rwandan conflict to be internal or civil, Article 3 of the Geneva Conventions would apply, but generally would not give rise to universal criminal jurisdiction.³⁵ Recently, there has been a trend toward the international criminalization of common Article 3 offenses of the Geneva Conventions during non-international armed conflicts.³⁶ For example, the 1991 Draft Code of Crimes Against the Peace and Security of Mankind expressly recognizes that penal sanctions may reach the non-international armed conflicts contemplated by Article 3.³⁷ However, the Draft Code has not yet been adopted, and it is still a matter of debate whether common Article 3 violations give rise to individual penal responsibility.³⁸ Therefore, the

32. Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 AM. J. INT'L L. 78, 80 (1994).

33. *Id.* Cf. Winston P. Nagan, *Yugoslavia: A Case Study of International Consequences of Independence Movements*, AM. SOC'Y INT'L L. PROC. 205, 218-19 (1993) [hereinafter *Case Study*]. In Yugoslavia, even after the United Nations Commission of Experts had recognized the crisis was of an international character, reasonable minds differed on the nature of the conflict. *Id.* at 218. Many Slavs such as Nebojsa Vujovic, of the United States Embassy of the Federal Republic of Yugoslavia, claimed this was a religious, ethnic, and civil war. *Id.* This distinction between international and civil conflicts was essential to determining what body of law to apply to these criminals and was the subject of much debate. *Id.*

34. Meron, *supra* note 32, at 79-80.

35. *Id.* at 80.

36. *Id.* at 82.

37. Jordan J. Paust, *Applicability of International Criminal Law to Events in the Former Yugoslavia*, 9 AM. U. J. INT'L L. & POL'Y 499, 512 (1994).

38. Meron, *supra* note 31, at 82. Although common Article 3 does not follow the letter of the Hague Regulations or the Geneva Conventions, common Article 3 is part of the body of law which is identified as humanitarian law. Therefore, it is arguably covered under statute 3 of the Tribunal's statute.

Security Council's decision to define these conflicts as international was a deliberate attempt to expand the likelihood for an international response to non-international violations of humanitarian law in order to avoid any questions of international jurisdiction over the Rwandan criminals.³⁹

Thus, through the creation of the Rwandan Tribunal, the United Nations has established two precedents of law. First, it defined violations of humanitarian law in a civil, ethnic conflict as threats to international peace, thus granting the Tribunal the ability to prosecute those violations. Second, the United Nations established the possibility of the international criminalization of violations of common Article 3 of the Geneva Conventions in non-international armed conflicts. Unfortunately, unless the Tribunal is able to overcome the vast number of obstacles which currently impede its success, these precedents may be quickly forgotten.

C. Problems of the Tribunal

1. First Problem: A Lack of Precedent

In the absence of an established international criminal court, or even an international criminal code, the international community has accorded little credence to the proposed prosecutions.⁴⁰ Referring to both Nuremberg and the Far East Trials for guidance, the United Nations has attempted to fashion an international tribunal in their likeness.⁴¹ However, neither Nuremberg nor the Far East Tribunal provide the proper precedent. Nuremberg itself was ultimately a facade of authority stemming from the victor's right to justice⁴² and in reality lacked the necessary precedent to withstand serious scrutiny. Even assuming that the deficiencies of the World War II tribunals could be resolved, the situations

39. *Id.* at 81.

40. *Security In Europe*, *supra* note 1, at 15. At the CSCE hearings on war crimes in February of 1993, Representative Frank McCloskey stated that the top echelon of military leaders who have been accused of committing war crimes, had already been assured amnesty. *Id.* He credited "high ranking military sources in Croatia and our own State Department" as relaying that information. *Id.* Belief in the integrity of the Tribunal is not high.

41. See Steven Fogelson, *The Nuremberg Legacy: An Unfulfilled Promise*, 63 S. CAL. L. REV. 833, 834, 836 (1990). Despite Nuremberg's shortcomings, it is generally considered a landmark in international law. See generally Matthew Lippman, *Nuremberg: Forty Five Years Later*, 7 CONN. J. INT'L L. 1 (1991) (justifying the legitimacy of the trials with a complete legal and moral arguments).

42. Blakesley, *supra* note 7, at 80. The victor's justice is often criticized for making biased decisions. *Id.* But see Elizabeth Pearl, *Punishing Balkan War Criminals: Could the End of Yugoslavia Provide an End to Victors' Justice?*, 30 AM. CRIM. L. REV. 1373, 1399 (1993) (arguing that prosecution by the victors is standard because only the victors can project the moral superiority required for a war crime tribunal).

vary too dramatically for Nuremberg to be the proper legal basis for today's tribunal.

Initially legal experts wavered in classifying Nuremberg as legal precedent for the present Tribunals, a clear sign of its lacking authority.⁴³ First, the timing is different. Unlike Nuremberg, the United Nations has decided not to wait until the end of the conflict before attempting to prosecute.⁴⁴ Indeed, the victors of the conflict may be indicted while the conflict rages.⁴⁵ This will not only complicate the outcome of the war, but also the stability of the nation after the conflict.⁴⁶

Secondly, the Yugoslavian and Rwandan situations are fundamentally different from that of Nazi Germany or Japan. The Germans proudly kept meticulous records of their crimes.⁴⁷ After the war, each captured Nazi soldier and liberated building provided the evidence necessary to complete the trials.⁴⁸ In Yugoslavia, soldiers move constantly between units⁴⁹ and there are no simple means to gather evidence.⁵⁰ In Rwanda, the criminals have long since fled.⁵¹ There is a tremendous degree of variance between the circumstances of the two situations.

Nuremberg and Tokyo are of poor precedential value not only because of the differences between World War II and today's situations, but also because Nuremberg and Tokyo were preceded by several failures. The Nuremberg Trials took place in the wake of a failed attempt to convict German officials of war crimes following World War I.⁵² International law

43. Coll, *supra* note 2, at 23. Lawrence Eagleburger, former Acting Secretary of State, recalled that State Department attorneys were constantly admonishing him to be cautious about Bosnia. *Id.* "The lawyers would say, as Eagleburger remembers, 'For God's sake, don't do it. We don't have the right legal background. Nuremberg isn't quite the right thing, as legal precedent.'" *Id.* (The situation in Rwanda and Yugoslavia is easily distinguishable from that following World War II.)

44. Pearl, *supra* note 42, at 1402.

45. *Id.*

46. *Id.* at 1413.

47. *Case Study, supra* note 33, at 21.

48. Coll, *supra* note 2, at 14. The surrender of the German buildings which housed the records of their plan of destruction was direct evidence of the atrocities committed. In many instances, the Germans had authored the evidence which was subsequently used against them.

49. *Case Study, supra* note 33, at 21.

50. Coll, *supra* note 2, at 14.

51. Dilip Ganguly, *Tanzania Sees More Refugees; Zaire Tells Them To Go Home*, WASH. TIMES, Sept. 2, 1994, at A14.

52. BENJAMIN B. FERENCZ, *AN INTERNATIONAL CRIMINAL COURT, A STEP TOWARDS WORLD PEACE: A DOCUMENTARY HISTORY AND ANALYSIS*, 30-33 (1980). The Allied powers were forced to compromise Article 227 of the Treaty of Versailles which conceded that the

never addressed issues such as a nation's treatment of its citizens prior to World War I.⁵³ Previously, human abuse was only prosecutable in the state in which the abuse took place. Furthermore, states themselves were rarely reviewed.⁵⁴ Thus, the Allies quest for retribution, rather than legal precedent, provided the basis for the Nuremberg Trials.

Furthermore, both the Nuremberg, and especially the Tokyo trials, have been sternly criticized for violations of due process, judicial bias, and unconventional procedural mechanisms.⁵⁵ For example, the defendants at the Nuremberg and Tokyo Trials were often found guilty of committing "crimes against the peace" and "crimes against humanity." However, these crimes were not part of international law prior to the trials.⁵⁶ Thus, the Nuremberg trial's use of *ex post facto* laws violated the defendant's due process.⁵⁷

Finally, at Nuremberg and Tokyo only the victorious nations took part in assigning the punishments. Neither Germany nor Japan⁵⁸ were permitted to participate in the activities of the Tribunals.⁵⁹ The potential for abuse is obvious where the victor is trying the defeated enemy.⁶⁰ Citing this potential, the United Nations has chosen not to allow Rwandan judges on the Tribunal.⁶¹ Thus the United Nations' Tribunal will have the benefit of being adjudicated by impartial parties, and the decision will not be plagued by accusations of bias. However, there remains the problem of the hypocrisy associated with the Nuremberg Trials.

Kaiser would be charged with merely a political crime, thereby indirectly preserving his immunity. *Id.* at 30. In return, the rest of the accused were to be brought before military tribunals. *Id.* However, the Germans refused to recognize the provisions of the Treaty which involved foreign adjudication, and the war crimes trials were conducted in Leipzig after continuous German opposition to the Versailles mandates. *Id.* at 32. Not surprisingly, the German courts exonerated or minimized the defendants' liabilities, and reduced the number of cases from over 900 to less than 50, with only a handful being convicted. *Id.* at 33.

53. Diane F. Ortenlicher, *Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2555 (1991).

54. *Id.*

55. Michael P. Scharf, *The Jury Is Still Out on the Need for an International Criminal Court*, DUKE J. COMP. & INT'L L. 135, 138 (1991).

56. Laber & Nizich, *supra* note 9, at 13.

57. *Id.*

58. Ann M. Prevost, *Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita*, 14 HUM. RTS. Q. 304, 328 (1992). Not only has the Yamashita case been characterized as a case of victors' justice but also of racial prejudice. The command responsibility theory employed against Yamashita was not applied at Nuremberg against the Germans. *Id.* at 305.

59. Scharf, *supra* note 55, at 138.

60. Pearl, *supra* note 42, at 1399.

61. Toups, *supra* note 1, at A11.

Following World War II, allied actions such as the bombings of Dresden, Tokyo, Hiroshima, and Nagasaki went unreviewed.⁶² If the victor's actions are dismissed, then justice is being distributed arbitrarily.⁶³ To avoid this hypocrisy, every attempt must be made to prosecute all violations of humanitarian law in this conflict. The situation in Rwanda is complicated further because many organizations, such as Amnesty International,⁶⁴ and even the United Nations, are beginning to collect evidence of the reprisal killings by the Tutsis against the Hutus.⁶⁵ In fact, the conditions in which the Hutu prisoners are currently being detained have been likened to concentration camps themselves, and possibly are in violation of humanitarian laws.⁶⁶ To protect the credibility of the Tribunal, individuals on both sides of the conflict must be prosecuted.⁶⁷

The United Nations must remember that "the law must apply to leaders of every nation."⁶⁸ Furthermore, the importance of universal enforcement cannot be underestimated. In order to avoid the taint of hypocrisy associated with Nuremberg and Tokyo, justice must not be distributed arbitrarily.⁶⁹ In other words, the law must be enforced against the Rwanda Patriotic Front as well as the Hutu extremists, and Bosnians as well as Serbians.⁷⁰ Thus, the initial hurdle for the Tribunal will be to overcome any questions of propriety to which it is subjected by virtue of its basis in Nuremberg.

62. Blakesley, *supra* note 7, at 80.

63. *Id.*

64. Bonner, *supra* note 23, at A11.

65. Keith B. Richburg, *New Accusations of Rwandan Reprisals*, PHILADELPHIA INQUIRER, Sept. 26, 1994, at A2.

66. Robert Press, *In Rwanda's 'Slave Ship' Prisons, Life Is Grim for Suspected Killers*, CHRISTIAN SCI. MONITOR, Nov. 18, 1994 at 1. (Currently 15,000 to 20,000 Hutu prisoners, including children, are packed into tightly cramped prisons.)

67. General Kagame has assured the Tribunal authorities that it will assist the Tribunal in the prosecution of Rwandan Patriotic Front soldiers accused of breaking humanitarian laws. Bonner, *supra* note 23.

68. TELFORD TAYLOR, ANATOMY OF THE NUREMBERG TRIALS 641 (1992). Telford Taylor, who took part in the Nuremberg prosecutions, is of the opinion that international criminal law will have no justification until the victorious nations' behavior is examined as well. Unlike what the proponents of victor's justice would argue, winning the battle does not place the conqueror above reproach.

69. Blakesley, *supra* note 7, at 80.

70. Robert F. Drinan, *Is a Permanent Nuremberg on the Horizon?*, 18 FLETCHER F. WORLD AFF. 103, 107 (1994).

2. Second Problem: Jurisdictional Difficulties

a. State Sovereignty

Article 8 of the Rwandan Tribunal statute establishes the concurrent jurisdiction of the International Tribunal with the national courts in Rwanda.⁷¹ However, this is limited by Article 8(2) which gives the Tribunal primacy over the national courts. These provisions, which are corollaries to Articles 9 and 10 of the Yugoslavian Tribunal Statute, have been questioned for their infringement of national sovereignty.⁷² In response, countries such as the United States have asked the United Nations and the Security Council to recognize the domestic action needed before complying with the International Tribunal, and to allow extra time before compliance.⁷³

In Rwanda, the primacy of this Tribunal may cause conflict with the domestic courts anxious to prosecute all the culprits. Furthermore, the government already objects to the Tribunal's limited jurisdiction of 1994, and its prohibition of the death penalty.⁷⁴ The Western Tribunal has not been openly accepted by the Rwandans, and the ultimate control resting with the Tribunal will not ease the strain between the competing interests.

b. Subject Matter Jurisdiction

Article 1 of the statute for the International Tribunal for Rwanda gives the tribunal jurisdiction over "serious violations of international humanitarian law."⁷⁵ These serious violations are described in Article 2 as genocide,⁷⁶ in Article 3 as crimes against humanity,⁷⁷ and in Article 4 as violations of common Article 3 to the Geneva Conventions and Protocol II.⁷⁸ While the subject matter is relatively straight-forward, defendants still may be able to challenge this jurisdiction.

71. *Despite UN Tribunal, Rwanda Plans To Try Suspects for War Crimes*, CHI. TRIB., Nov. 10, 1994, at A6. Ambassador Manzi Bakuramuta estimated the number of Rwandans to be prosecuted in national courts at 30,000.

72. Blakesley, *supra* note 7, at 79.

73. *Case Study*, *supra* note 33, at 165. The United States, for example, has several due process procedures which must be implemented before turning a person over to the Tribunal. *Id.* There remains a significant concern on the part of several nations that national laws will be ceded to international laws. *Id.*

74. Bonner, *supra* note 23, at A11.

75. S.C. Res. 955, *supra* note 20, at 1.

76. *Id.* at 3.

77. *Id.* at 4.

78. *Id.* at 5.

The Statute for the Rwandan Tribunal does not preclude defendants from challenging the Tribunal's authority.⁷⁹ Defendants may successfully argue that they were involved in a civil war, and thus are not subject to the Geneva or Hague Conventions.⁸⁰ The Tribunal possesses the authority to judge these potential challenges of jurisdiction.⁸¹ How the judges may rule remains to be determined, but the potential for problems exists.

c. Limited Temporal Jurisdiction

Article 7 of the Rwandan Statute limits temporal jurisdiction to crimes committed between January 1, 1994 and December 31, 1994.⁸² This is problematic because limiting the jurisdiction could protect those who planned the genocide.⁸³ The Rwandan national courts may successfully prosecute those who carried out the genocide. However, the Tribunal's time limit does not reach those who gave the orders which would cause the Tribunal to lose credibility.

3. Administrative Problems

a. Gathering Evidence

The Commission of Experts for Rwanda and the Special Rapporteur for Rwanda have found significant violations of human rights.⁸⁴ Still, the thorough process of gathering evidence for trial will be long and arduous.⁸⁵ According to Article 14 of the Rwandan Tribunal Statute, the rules governing evidence and procedure are the same as those for the Yugoslavian Tribunal.⁸⁶

79. Meron, *supra* note 32, at 82.

80. *Id.*

81. *Id.*

82. S.C. Res. 955, *supra* note 20, at 6.

83. Bonner, *supra* note 23.

84. *Escor*, *supra* note 13, at 11-13.

85. Hampson, *supra* note 8, at 29. The crimes fact-finding will be especially complicated because of the co-mingling of war-crimes fact-finding and humanitarian fact-finding. There has been a great deal of political control over some of the formal investigations. *Id.* There is a strong likelihood that some of the information is likely to remain within foreign ministries. *Id.* It is even possible that the limited resources of the Tribunal may prevent a full investigation. *Id.* at 30. Although the non-governmental organizations such as Helsinki Watch and Amnesty International are depended upon by the international community, problems may exist with admitting their information into any kind of formal evidence. *Id.* at 28. The same principle can be extended to the Rwandan crisis.

86. *International Tribunal Rules of Procedure and Evidence*, 2d Sess., U.N. Doc. IT/32 (1994).

Lacking any enforcement mechanisms, the collection of evidence in Yugoslavia has been blocked several times by Serbian forces.⁸⁷ If the Serbs continue to be uncooperative, it may be impossible to obtain sufficient evidence to indict or prosecute certain suspects.⁸⁸ This may foreshadow a similar problem in Rwanda. Unless the Tribunal is able to convince the Hutu forces to cooperate, the prosecutors may not be able to gather enough evidence for prosecution.⁸⁹

b. Extradition

Most of the criminals in Rwanda have fled the country. The Tribunal currently lacks an enforcement mechanism to extradite persons to the Hague Tribunal.⁹⁰ Rule 56 of Evidence and Procedure for the Tribunal⁹¹ requires all states to comply with an extradition order, but lacks a corresponding mechanism to enforce the rule.⁹² Furthermore, the tribunal does not allow for trials in absentia.⁹³ Accordingly, sanctions have been suggested as the method through which states should be forced to comply.⁹⁴ However, as of yet, no sanctions have been imposed to bring about compliance.⁹⁵

Unfortunately, extradition problems for the Yugoslavian Tribunal have already developed. Currently, the only two cases upon which the

87. Laber & Nizich, *supra* note 9, at 12.

88. *Id.*

89. Andrew Purvis, *Collusion with Killers*, TIME, Nov. 7, 1994, at 52. The massacres in Rwanda have been more of a random nature. Although evidence of a planned genocide exists, the attacks have not been planned in an attempt to gather more territory. Often the attacks are retaliatory murders, committed in the night. *Id.* When morning light comes, entire families are found slain in the middle of the camps. *Id.* There has not been a highly systematic level of record-keeping; therefore, collecting evidence will already be complicated.

90. Laber & Nizich, *supra* note 9, at 12.

91. *International Tribunal Rules of Procedure and Evidence*, *supra* note 86, at 30. Rule 56 states that "[t]he state to which a warrant of arrest is transmitted shall act promptly and with all due diligence to ensure proper and effective execution thereof in accordance with Article 29 of the statute."

92. Laber & Nizich, *supra* note 9, at 12.

93. *Tribunal Charges Camp Commander*, NEW ORLEANS TIMES-PICAYUNE, Nov. 8, 1994, at A10.

94. Laber & Nizich, *supra* note 9, at 12.

95. *But see* U.N. SCOR, 48th Sess., 3217th mtg., at 13, U.N. Doc. S/PV.3217 (1994). The United States Ambassador to the United Nations, Madeleine Albright, argued that sanctions may in fact be unnecessary. Because those extradited will be outlaws in their home nations, that itself is a significant punishment. *Id.* For the rest of their lives, their mobility will be hampered because travel would increase the risk of discovery. *Id.* Albright predicts that this will be sufficient deterrent to ignoring extradition orders. *Id.*

United Nations Tribunal has taken action have both been hampered by extradition problems with Germany and the Serbian held portion of Bosnia.⁹⁶ In an attempt to prevent the same problem from occurring, Rwanda itself has asked Belgium to extradite about ten Rwandans suspected of orchestrating the genocide earlier this year.⁹⁷ Provided Belgium does not forestall extradition of the Rwandan criminals for lack of an extradition agreement with the Tribunal, these ten may be brought before the Tribunal shortly.

c. *Superior Orders*

The Tribunal has not recognized the defense of superior orders.⁹⁸ This omission is present in the Yugoslavian Tribunal, and has been criticized for excluding good faith situations where the actor did not know the deed was wrong.⁹⁹ Whether the Court will allow such a defense should depend on the facts and circumstances of each case, rather than precluding its use completely.¹⁰⁰ In both Rwanda and Yugoslavia, several defendants may be able to prove that they did know their actions were wrong. Therefore, the superior orders argument may provide these defendants with a viable defense resulting in a lighter sentence.

4. The Last Problem: Peace Over Punishment

Lastly, the success of this Tribunal is important not only for its goals of deterrence and punishment, but also for its effect on the future of international criminal law.¹⁰¹ An unsuccessful tribunal may have a long-

96. Toups, *supra* note 1. Dusan Tadic, a Bosnian Serb held by Germany since February, may not be turned over to the Tribunal. Extradition treaties exist between countries, but not between the countries and international organizations. *Id. Tribunal Charges Camp Commander, supra* note 93. Dragan Nikolic has been formally indicted by the Tribunal, but will not be handed over by the Bosnian Serbs with whom he is currently hiding. The Tribunal has no power to order his extradition. *Id.*

97. *Exiled Dictator on Genocide Charges*, GLASGOW HERALD, Nov. 14, 1994, at 7.

98. S.C. Res. 955, *supra* note 20, at 6. Statute Article 6(4) - Individual Criminal Responsibility states: "The fact that an accused person acted pursuant to an order of a Government [sic] or a superior shall not relieve his or her criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires."

99. *A.B.A. Report, supra* note 30, at 38.

100. *Id.* at 40.

101. Meron, *supra* note 32, at 78. Scholars in the sphere of international criminal law such as Theodor Meron hope that the Tribunal's creation "gives a new lease on life to that part of international criminal law which applies to violations of humanitarian law."

term deleterious effect on the development of international criminal law.¹⁰² If the use of tribunals is threatened but never successfully implemented, the credibility of future attempts at an international criminal court could be jeopardized.¹⁰³ The United Nations officially established that the first and foremost goals of the Tribunal are “deterrence, justice, and peace.”¹⁰⁴ However, several times during the peace negotiations the parties have suggested foregoing the Tribunals for Rwanda, and especially Yugoslavia,¹⁰⁵ in the interest of a peace settlement.¹⁰⁶ Gary Bass noted that the reason the Tribunal is lacking in strength is that it has not been sufficiently extricated from the peace process: “when a Balkan peace settlement is on the table, the war crimes tribunal tends to be shunted

102. Joel Cavicchia, *The Prospects for an International Criminal Court in the 1990s*, 10 DICK. J. INT’L L. 223, 243 (1992).

103. *Id.*

104. See *A “Terrible War” Rages On*, U.N. CHRON., Mar. 1994, at 65.

105. *European Perspective*, *supra* note 6, at 25. The situation is particularly precarious in the former Yugoslavia where the military leaders participating in the peace negotiations are also some of the Tribunal’s future indictees. Representative Steny Hoyer, acting Co-Chairman of the Commission on Security and Cooperation in Europe, has voiced concerns over the appointment of Milosevic to the peace negotiations. *Id.* After having been formally termed a war criminal by the United States government, Milosevic now is in a position to decide whether the Tribunal will be established. *Id.* Congressman Hoyer is not confident that Milosevic will act impartially. *Id.*

See also Anthony D’Amato, *Peace vs. Accountability In Bosnia*, 88 AM. J. INT’L L. 500, 501 (1994). Professor D’Amato alleges that currently these military leaders are being offered amnesty in exchange for peace in the former Yugoslavia. *Id.* In essence, the threat of a Tribunal is being used as a “bargaining chip” over the peace negotiators to come to a quicker resolution. *Id.* at 504. In return, the leaders are promised that the Tribunal will never happen. *Id.*

Although Professor D’Amato cites no authority for his allegations, it is not totally incredible. It is highly unlikely that those Yugoslavian leaders are going to reach a peace settlement soon, since in doing so they would be availing themselves to prosecutions. It is plausible that the United Nations officials would offer the criminals a deal in the interest of bringing peace to the area more quickly. Of course, the obvious secrecy of this bargaining makes proving it a virtual impossibility, but it remains an interesting factor to consider in the weighing of the Tribunal’s future.

106. Linda Maguire, *An Interview with Telford Taylor*, 18 FLETCHER F. WORLD AFF. 1, 2 (1994). Telford Taylor, a prosecutor at Nuremberg, tells his views of the international tribunal:

TT: The Serbs have gone a long way toward getting what they want and they are not going to want to pull back and make things better for the Bosnians, so the war could drag on and make things that much worse. But at the moment, both sides seem to be endeavoring to find some solutions to these problems.

LM: So in the interest of a lasting political settlement, the idea of the former Yugoslavian Tribunal might be scuttled altogether, just so the parties can move on?

TT: I should think that it would be very difficult to come to a conclusion with the Serbs without some agreement between the parties allowing for a general amnesty, or some other solution that the Serbs would be willing to swallow.

aside; Britain and other European Community countries worry that threats of prosecution might derail a settlement."¹⁰⁷

The same is true of Rwanda. Experts such as Frank Cringler, a former United States Ambassador to Rwanda, have even warned against using the tribunal at all.¹⁰⁸ Cringler claims that reuniting this society is more important than singling out one group. He asserts it may be necessary to welcome war criminals back, or at least defer prosecution, to promote the end of hostilities.¹⁰⁹ When dealing with ethnic conflicts, there is a strong likelihood that one group could create further animosity, thereby preventing reconciliation.¹¹⁰ As in Yugoslavia, there is a strong contingent in Rwanda that wishes to sacrifice justice in order to re-establish peace.

Bringing an end to the hostilities in these countries is laudable. However, hopes of deterring future atrocities in Rwanda can only occur if justice is served quickly. Even now with the Tribunal looming in the near future, there is no evidence of restraint by the Rwandan criminals.¹¹¹ If the Tribunal chooses to replace punishment with a settlement of hostilities, the set-back to international criminal law could be enormous.

The preceding criticisms of the Tribunal are by no means an exhaustive list. Only a few of the most obviously troublesome have been mentioned in order to illustrate the immense problems which face the current Tribunal structure.

5. The Outlook for the Tribunal

To a certain degree it is true that a successful tribunal would increase the legitimacy of international criminal law.¹¹² Increased stability of international law would probably accompany this revitalization.¹¹³ In fact, the mere formation of the Tribunal is indicative of the international

107. Gary J. Bass, *Courting Disaster: The U.N. Goes Soft on Bosnia. Again.*, NEW REPUBLIC, Sept. 6, 1993, at 12.

108. Masland, *supra* note 3, at 37.

109. *Id.* at 37.

110. *Id.*

111. Purvis, *supra* note 89, at 52. Hutu militias, who fled following the Tutsi coup this summer, are now terrorizing the refugee camps established throughout neighboring Zaire. They are robbing the supplies and food which arrive daily, after being donated by the international community. *Id.* The supplies are then sold to raise money to buy weapons and munitions in an elaborate effort to retake Rwanda from the Patriotic Front. *Id.* These acts themselves are also criminal: the potential starvation of millions of refugees will not be taken lightly by the Tribunal.

112. Kleinberger, *supra* note 10, at 106.

113. *Id.*

community's desire to end the blatant violations of humanitarian law in these situations.¹¹⁴ However, the sincerity of the community's intentions is not in question; the ability to do something about it is. The immensity of the problems facing the Tribunal make success unlikely. This is unfortunate not only for the international community, but more importantly, for the Yugoslavian and Rwandan victims. Thus an alternative forum may provide the proper method for adjudication.

III. ALTERNATIVE FORUMS

A. *The State's Duty To Prosecute Prior Human Rights Violations*

International criminal law does require states to punish certain human rights abuses.¹¹⁵ Some international treaties explicitly provide for this duty.¹¹⁶ Most treaties, such as the International Convention on Civil and Political Rights, do not expressly mention a duty to punish when these

114. See Meron, *supra* note 32, at 78. Theodor Meron has stated that the creation of the Yugoslavian Tribunal has already made seven institutional and normative improvements to international law. First, by defining the Yugoslavian crisis as a threat to international peace, the United Nations has created a strong precedent that the violation of humanitarian laws is a threat to peace. *Id.* at 79. Second, the Tribunal's statute also legitimizes various areas of humanitarian law as customary law. *Id.* Next, the tribunal successfully treated the Yugoslavian crisis as an international arms conflict, thus securing the application of the entirety of international humanitarian law. *Id.* at 80. Fourth, although not firmly established, the Tribunal's actions will further the movement for international criminality of offenses under common Article 3 of the Geneva Convention. *Id.* at 82. Also, the due process guarantees in the Tribunal's statute are extended in relation to those of the Nuremberg and Tokyo Charters. *Id.* at 83. Sixth, rape is recognized as a crime against humanity. *Id.* at 84. Finally, by discarding the requirement for a nexus of the crime to the war, the definition of "crimes against humanity" has been broadened. Thus, the prosecution of crimes related to the conflict, but not in the course of armed conflict, will be far easier. *Id.* at 87.

115. Ortenlicher, *supra* note 53, at 2551.

116. The Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277 [hereinafter Genocide Convention]. This convention explicitly expresses the state's duty to prosecute violations of their respective treaties. Ironically, the Genocide Convention itself offers little aid to the Rwandan genocide. The Convention ensures punishment of the crime in national courts. *Id.* art. VI, 78 U.N.T.S. at 280-82, but the lack of a universal jurisdiction is particularly problematic because the Rwandans are unlikely to obtain relief from the previous regime through the Convention's mechanism. See generally Lori L. Brunn, Note and Comment, *Beyond the 1948 Convention-Emerging Principles of Genocide in Customary International Law*, 17 MD. J. INT'L L. & TRADE 193 (1993) (Lack of universal jurisdiction is the greatest problem with this convention.). *Contra* Ortenlicher, *supra* note 53, at 2565. As a matter of customary international law, there is universal jurisdiction over genocide, although it is not specifically mentioned within the Genocide Convention itself.

rights are violated,¹¹⁷ but have been interpreted to mean that a state must investigate and punish violations of these rights.¹¹⁸

In the Rwanda case, the international community was concerned over the newly-established government's ability to fulfill its international obligations, and granted Rwanda's request for an international tribunal.¹¹⁹ Before losing its sole jurisdiction, Rwanda did have the duty to prosecute these violations. It is useful to examine the methods that other burgeoning democracies are using to deal with the human rights violations of previous regimes. Perhaps the Rwandan tragedy would have been better mitigated under such a domestic option.

1. The Chilean Model

Recently Chile and several other newly democratized nations have decided to sacrifice justice for reconciliation.¹²⁰ Since 1990, Chile has offered blanket amnesty to the prior repressive regime while still instituting an investigation into the crimes of that regime.¹²¹ The reasons for this approach are basically political. Initially, seeking criminal convictions may have caused unrest, and possibly another coup.¹²² Furthermore, many of those who stood to benefit from the amnesty had already been murdered or had disappeared.¹²³ Therefore Chile chose to ignore its internationally imposed obligation to prosecute the subjects of its investigation¹²⁴ and freed itself to concentrate on reuniting the nation.

Chile's decision to breach its international duty to prosecute should not be advocated for Rwanda. However, the more basic and practical aspects of the Chilean model of reconstruction, with a limited degree of

117. Ortenlicher, *supra* note 53, at 2551. See generally Naomi Roht-Arriaza, Comment, *State Responsibility To Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CALIF. L. REV. 449, 479, 482-83 (1990) (stating that the scope of remedy required by Human Rights violations is specifically outlined for each International Convention).

118. *Id.* at 2552.

119. S.C. Res. 955, *supra* note 20, at 2.

120. Charles Krauthammer, *Truth, Not Trials; A Way for the Newly Liberated To Deal with the Crimes of the Past*, WASH. POST, Sept. 9, 1994, at A27.

121. Robert J. Quinn, Note, *Will the Rule of Law End? Challenging Grants of Amnesty for the Human Rights Violations of a Prior Regime: Chile's New Model*, 62 FORDHAM L. REV. 905, 907 (1994).

122. Krauthammer, *supra* note 120.

123. Quinn, *supra* note 121, at 918.

124. *Id.*

amnesty, may be fruitful for Rwanda.¹²⁵ If Rwanda follows Chile's emphasis on investigations¹²⁶ and reparations,¹²⁷ perhaps it might have had the opportunity to reconcile while maintaining stability.¹²⁸ If Chile had not granted a blanket amnesty, but merely punished the most severe human rights violations, they would have been complying with their international obligation to prosecute.¹²⁹

Admittedly, the situation in Rwanda differs from Chile. In Chile, a single repressive regime perpetrated the human rights violations, while in Rwanda, an entire ethnic group violated human rights during a civil war for generations. Considering the magnitude of the Rwandan genocide, it is unlikely that amnesty would even be considered by the Rwandan government. However, this approach is proving successful for other emerging African democracies like South Africa¹³⁰ and should be considered by the Rwandan authorities.

IV. THE NEED FOR AN INTERNATIONAL CRIMINAL COURT

Punishment of the massacres, "mindless violence and carnage,"¹³¹ and genocide of Rwanda would have been most sensible in a permanently established International Criminal Court.¹³² However, despite the drawbacks of a tribunal, the United Nations has decided to prosecute criminals through an ad hoc method.¹³³ This decision is indicative of not only the international community's desire for a permanent court, but also its reluctance to commit the necessary resources.¹³⁴

125. *Id.* at 960. The international community should recognize that a modification of the Chilean model would be acceptable for other transitional governments. The Chilean model provides stability, while satisfying those injured with lengthy investigations.

126. *Id.* at 954. President Aylwin created the National Commission on Truth and Reconciliation in order to fulfill the state's responsibility to acknowledge previous violations.

127. *Id.* at 955. Chilean Law No. 19,123 created the National Corporation for Reparation and Reconciliation which provides medical, educational, and monetary assistance to victims and their families.

128. Quinn, *supra* note 121, at 960.

129. *Id.*

130. Krauthammer, *supra* note 120.

131. *Massacres, 'Mindless Violence and Carnage' Rage in Rwanda*, U.N. CHRON., Sept. 1994, at 15.

132. U.N. GAOR, 48th Sess., Supp. No. 10, at 271, U.N. Doc. A/48/10 (1993). According to article 22 of The Draft Statute for an International Criminal Tribunal, the court would have jurisdiction over the crimes defined in various treaties such as The Convention on the Prevention and Punishment of the Crime of Genocide, the Geneva Conventions, and the proposed Draft Code of Crimes Against the Peace and Security of Mankind.

133. SCOR Res. 955, *supra* note 20, at 1.

134. Maguire, *supra* note 106, at 4.

A. What Law Would Be Applied?

Undoubtedly, the need for an international criminal code and court exists.¹³⁵ A draft code of punishable crimes has been a thorn in the side of the International Law Commission of the United Nations since Nuremberg.¹³⁶ The inability to reach a consensus on the definition of aggression stalled the adoption of any code for virtually forty years.¹³⁷ Fortunately, the end of the Cold War not only thawed East-West cooperation, but also revived the criminal code debate. In 1987, President Gorbachev's Perestroika policy included recognition of the jurisdiction of international courts and was a major impetus for the drafting of a new criminal code.¹³⁸ It was this new political climate, coupled with Iraq's invasion of Kuwait in 1990, which propelled the need for a criminal code and court to the forefront of international criminal law.¹³⁹

135. Nagan, *supra* note 33, at 24. The sudden surge to create a permanent court has also been attributed to administrative and bureaucratic causes. The International Law Commission has been forced to seek extra resources from the United Nations budget in order to fulfill the investigatory duties with which it was charged in the former Yugoslavia. *Id.* Thus, there has been a strong pressure from within the United Nations bureaucracy to create a separate tribunal with its own prosecutorial and investigatory capabilities, in the hopes of relieving the burden on the International Law Commission. *Id.*

136. Lieutenant Commander Rolph, *Perfecting an International Code of Crimes*, ARMY LAW, June 1992, 42, 47.

137. Benjamin B. Ferencz, *An International Criminal Code and Court: Where They Stand and Where They're Going*, 30 COLUM. J. TRANSNAT'L L. 375, 378 (1992).

138. *Id.* at 379.

139. Louis R. Beres, *After the Gulf War: Iraq, Genocide and International Law*, 69 U. DET. MERCY L. REV. 13, 14 (1991). The U.N. Security Council repeatedly condemned the Iraqi invasion of Kuwait. However, without a code or court to punish Iraqi aggressions, crimes were "carried out with essential impunity." *Id.* at 13. These crimes should have been addressed by international law, but politics have interfered with any real punishment. *Id.* at 14. See Kleinberger, *supra* note 10, at 72. Kleinberger effectively uses Iraq's behavior during the Persian Gulf War as evidence of the need for an international criminal court. Nevertheless, even if an adjudicative response had materialized, the lack of available adjudicative mechanisms would render such a response useless. *Id.* First, the doctrines upon which international criminal law exists are vague and generalized. *Id.* at 86. Neither the Nuremberg Charter, nor the U.N. charter, nor the Geneva Conventions have successfully defined the war crimes or provided a legal basis for punishment. *Id.* at 87. Although Iraq would have few viable defenses in the light of the tremendous atrocities which violated portions of all of these statutes, the lack of one cohesive code would make adjudication very difficult. *Id.* at 106. Under each statute, only a few of the atrocities would be crimes.

Second, the lack of a suitable forum for hearing this case is indicative of the need for a Court. *Id.* at 103. The International Court of Justice has jurisdiction over disputes between states to enforce international conventions, customs, and recognized principles of law. *Id.* at 104. However, municipal courts in Kuwait or the United States could have provided a viable forum. *Id.* at 103. Even an ad hoc tribunal could have tried crimes of particular individuals. *Id.*

The most recent and inclusive attempt at developing an international code of crimes was made by the International Law Commission in 1991.¹⁴⁰ The "Draft Code of Crimes Against the Peace and Security of Mankind"¹⁴¹ was particularly noteworthy for categorizing colonialism, apartheid, serious injury to the environment, terrorism, and drug trafficking as crimes.¹⁴² This draft successfully highlighted the problems which needed to be addressed before any code could be adopted.¹⁴³ However, its imperfections were too large to withstand scrutiny,¹⁴⁴ and it has not been brought to a vote.

First, the Draft Code failed to specify punishments for the crimes it listed.¹⁴⁵ Also, many of the provisions were vague.¹⁴⁶ The terminology was ambiguously defined by attempting to create a consensus from wording which was extracted from previous international conventions.¹⁴⁷ Such terminology did not achieve the specificity and legal precision required by a penal code for the fair distribution of justice.¹⁴⁸ Often there

But without a single court enforcing a single code, adjudication would only be as binding as Iraq would allow it to be.

Kleinberger theorizes that it is the fundamental hierarchical differences between international and criminal law which prevents the development of an international criminal court when the need for their merger is so apparent. *Id.* at 104. Criminal law relies on a vertical power structure where the enforcer of law is superior to the violator of law. *Id.* at 105. However, international law is based on a horizontal power structure whereby all nations are equal and accession to the law is virtually voluntary. *Id.* at 104. International criminal law will be virtually stagnant until the two systems can be reconciled.

140. *Report of the International Law Commission on the Work of its Forty-Third Session*, U.N. GAOR, 46th Sess., Supp. No. 10, at 238-344, U.N. Doc. A/46/10 (1991).

141. The original draft code was presented to the General Assembly in 1954 as The Draft Code of Offenses Against the Peace and Security of Mankind. 9 U.S. GAOR Supp. (No. 9) at 11, U.N. Doc. A.2693 (1954). It has yet to be adopted.

142. Ferencz, *supra* note 137, at 381. *See generally* William N. Gianaris, *The New World Order and the Need for an International Criminal Court*, 16 *FORDHAM INT'L L.J.* 88 (1992) (explaining that the increasing scope and diversity of international crime created the need for an international criminal court as no other time in history).

143. Rolph, *supra* note 136, at 47.

144. Ferencz, *supra* note 137, at 381.

145. U.N. GAOR, 46th Sess., at 205-06, U.N. Doc. A/46/10 (1991). The drafters were unable to reach a conclusion as to which kind of penal system to institute: one group sought to establish separate penalties depending on the crime; the other group desired a single penalty, with a minimum and maximum sentence depending on the circumstances of each case. The death penalty and life imprisonment were also hotly debated by the Commission. *Id.* at 206. Many members argued from the position that the death penalty was immoral and unnecessary, while nations who used the death penalty, lobbied for its establishment. *Id.* at 208-09.

146. Ferencz, *supra* note 137, at 381.

147. *Id.*

148. *Id.* *See, e.g.* M. Cherif Bassiouni, *Crimes Against Humanity: The Need for a Specialized Convention*, 31 *COLUM. J. TRANSNAT'L L.* 457, 486-87 (1994). Professor Bassiouni

was no adequate description of the legal elements which constitute a particular crime.¹⁴⁹ The delegates of the various nations were quick to point out the failures of the Draft.¹⁵⁰ Unable to produce a penal code to satisfy all nations, the Draft Code remains in limbo.¹⁵¹

The current stalemate of the Draft Code has directly affected the development of the International Criminal Court.¹⁵² The United Nations' Committee on International Criminal Jurisdiction has deferred action on the International Criminal Court until an agreement is reached as to the code of crimes.¹⁵³ Thus, the need for a criminal code is self-evident: until a code is adopted, the Court will never be established.

B. *The Future of the Court*

If the International Criminal Court is to be created, now is the time. First, there is a positive aura of cooperation as evidenced by the ad hoc tribunals, and the Security Council's resolute intent to end conflicts in various areas of the world.¹⁵⁴ Second, nations' increasing fears of drug trafficking and terrorism in the modern world have increased interest in an international court.¹⁵⁵ Third, nations are becoming weary of expending lives and money on other nations' conflicts. Using military force against other nations in order to enforce international law is becoming burdensome.¹⁵⁶

outlines several particular problems with the portion of the draft which deals with crimes against humanity. First, there are fewer crimes listed as crimes against humanity than in the Nuremberg Charter. *Id.* Furthermore, many crimes which are carried over from Article 6(c) of the Nuremberg Charter do not correspond to the definitions of the crimes in the Draft. *Id.* at 457. In his legal expertise, Professor Bassiouni fails to see the nexus between some of the newly-listed crimes to the original crimes against humanity. *Id.* at 486-87.

149. *Id.*

150. U.N. GAOR 6th Comm., 46th Sess., 29th-37th mtgs., U.N. Doc. A/C.6/46/SR.29-37 (1991).

151. The Draft Code of Crimes Against the Peace and Security of Mankind was debated again in 1993. After the member nations had a chance to review the Draft Code, its main failures were analyzed and various portions of the original were changed. *See Report of the International Law Commission on the Work of Its Forty-Fifth Session*, U.N. GAOR, 48th Sess., Supp. No. 10, at 21-25, U.N. Doc. A/48/10 (1993).

152. Ferencz, *supra* note 137, at 385.

153. *Id.*

154. Jose A. Baez, *An International Crimes Court: Further Tales of the King of Corinth*, 23 GA. J. INT'L & COMP. L. 289, 291 (1993).

155. Cavicchia, *supra* note 102, at 231.

156. Michael D. Greenberg, *Creating an International Criminal Court*, 10 B.U. INT'L L.J. 119, 141 (1992).

Despite the lack of a recognized code of crimes, or a court, many scholars have kept the goal of an International Criminal Court alive.¹⁵⁷ Some of these scholars have proposed permanent methods of adjudication which, had they been created, would have provided very viable alternatives for trying the instigators of the Rwandan genocide.¹⁵⁸

1. The Current Draft

Today, in 1994, the International Law Commission (ILC) of the United Nations remains hopeful that the current draft presented to the United Nations General Assembly will be adopted.¹⁵⁹ The most recent proposal has been created in accordance with several principles. First, the Court would be established by statute to which the states would sign in the form of a treaty.¹⁶⁰ The Court would exercise jurisdiction over private persons, not states.¹⁶¹ Also, the Court's jurisdiction would not be limited to the Code of Crimes Against the Peace and Security of Mankind, but would extend over specified international treaties.¹⁶² Additionally, the

157. M. Cherif Bassiouni has been a recognized authority on international criminal law, and a proponent of an International Criminal Court for decades. At the request of the United Nations, M. Cherif Bassiouni prepared the draft statute of an international criminal jurisdiction to implement the Apartheid Convention in 1980. See M. Cherif Bassiouni & Christopher L. Blakesley, *The Need for an International Criminal Court in the New International World Order*, 25 VAND. J. TRANSNAT'L. L. 151, 158 (1992). The plan was submitted but lay dormant until 1990, when a revision of Bassiouni's draft was sent to the United Nations Congress on Crime Prevention and the Treatment of Offenders.

158. Because the Rwandan crimes are being tried as violations of human rights, the laws of war are beyond the scope of this article. However it is interesting to note the possibility of a war crimes tribunal in an American military forum. In particular, it has been suggested that an American court-martial or military commission would provide a stable forum for adjudication of international violations of the laws of war. See Robinson O. Everett & Scott L. Silliman, *Forums for Punishing Offenses Against the Law of Nations*, 29 WAKE FOREST L. REV. 509, 510 (1994). Proponents of this approach argue that there is sufficient precedent in the Nuremberg and Tokyo Tribunals to support this method. *Id.* at 511. According to article I, section 8, clause 10 of the United States Constitution, Congress has the power to punish offenses against the law of nations. *Id.* at 512. This clause does not specify nationalities. By stretching this constitutional clause to include offenders of other nations, Congress may be able to punish foreign nationals who violate the recognized law of nations both against the United States and third parties. *Id.* at 514. Whether the United States would want to take on this obligation and increase its perception as the "watchdog of the world" is another question. Nevertheless, this is a seemingly viable option to consider.

159. Robert Rosenstock, *The Forty-Fifth Session of the International Law Commission*, 88 AM. J. INT'L L. 134 (1994). The previous draft has been revised and is being prepared for examination by the General Assembly.

160. James Crawford, *The ILC's Draft Statute for an International Criminal Tribunal*, 88 AM. J. INT'L L. 140, 142 (1994).

161. *Id.*

162. *Id.*

Court would basically have consensual, rather than compulsory, jurisdiction.¹⁶³ Finally, the Court would stand only when required.¹⁶⁴

2. Refutable Objections to the International Criminal Court

The objections to the International Criminal Court are easily refuted. Undoubtedly the main reason that the International Criminal Court does not exist is because nations fear losing their sovereignty.¹⁶⁵ States are concerned that either their citizens will not be awarded fair adjudication, or alternatively, that they will not receive just compensation in a foreign court.¹⁶⁶ However, nations must fulfill their international obligation of obedience to international law that transcends national duties.¹⁶⁷ Initial concerns of sovereignty must be suppressed in order to create the International Criminal Court which will enforce human rights and other international duties.¹⁶⁸

A second major objection to the International Criminal Court is that nations foresee conflicts between their domestic courts and the international court.¹⁶⁹ Admittedly, concurrent jurisdiction may cause bitter conflicts.¹⁷⁰ No system is perfect, but the expected positive results of the International Criminal Court, such as improved extradition and prosecution, will greatly outweigh those instances of inconvenience when those conflicts occur.¹⁷¹

Some critics cite the dangers in disrupting the existing system as the reason to postpone creating the Court.¹⁷² They claim that needed resources may be diverted from the more mundane concerns such as efforts to combat crime.¹⁷³ However, if the Court is standing only when problems arise, there would be virtually no cost between sessions.¹⁷⁴ The

163. *Id.*

164. *Id.*

165. Blakesley, *supra* note 7, at 78.

166. *Id.*

167. See Nanette Dumas, *Enforcement of a Human Rights Standard: An International Human Rights Court and Other Proposals*, 13 HASTINGS INT'L & COMP. L. REV. 585, 593 (1990).

168. *Id.*

169. Blakesley, *supra* note 7, at 79.

170. Bassiouni & Blakesley, *supra* note 157, at 166.

171. *Id.* at 168.

172. Scharf, *supra* note 55, at 162.

173. *Id.*

174. See Crawford, *supra* note 160, at 142.

method of mutual assistance would be no more costly than the mutual assistance currently employed by the United Nations.¹⁷⁵

3. Conclusion

The obstacles posed by critics of the International Criminal Court, if not easily overcome, are certainly manageable. Had the International Criminal Court been established, Rwanda's adjudication may have had a higher likelihood for success. A permanent court would have had the stability which the ad hoc tribunal lacks.¹⁷⁶ Secondly, the administrative problems which plague the ad hoc tribunal would have been minimized by the Court's growth and success.¹⁷⁷ Finally, a permanent tribunal would not be involved in the political questions surrounding the peace process. Therefore, justice would not be sacrificed in the interest of reaching a settlement.

V. CONCLUSION

The recent tragedy in Rwanda is only one example of many human rights violations throughout the world. Unfortunately, there is no permanent forum for adjudication of these crimes. Therefore, the international community has responded arbitrarily to some of these situations with ad hoc tribunals. Yet it seems inherently unfair for some of these violations to be singled out for punishment while others are not.

Furthermore, the current Tribunal imposed upon Rwanda has several short-comings. These short-comings will have an effect not only upon the outcome of the Rwandan adjudication, but upon the future of international criminal law. For this reason it is becoming increasingly imperative for the United Nations General Assembly to create an International Criminal Court. A permanently established international tribunal with a clarified code of crimes is needed to handle the human rights violations throughout the world. The exaggerated fears and apathy of many nations have prevented the adoption of this permanent tribunal. Consequently, they have prohibited Rwanda, and other nations with similar human rights problems, from having the fair adjudication which they deserve. In 1995, the Nuremberg Trials will celebrate their 50th anniversary. This is the appropriate time to re-evaluate the ideals of Nuremberg and expand upon them with a permanent Tribunal.

175. See Bassiouni & Blakesley, *supra* note 157, at 178.

176. M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 *IND. INT'L & COMP. L. REV.* 1, 34 (1991).

177. *Id.*