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## Lest We Fail: The Importance of Enforcement in International Criminal Law

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# LEST WE FAIL: THE IMPORTANCE OF ENFORCEMENT IN INTERNATIONAL CRIMINAL LAW

MARY MARGARET PENROSE\*

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## INTRODUCTION

The pervasiveness of violent crime must surely rank as one of the premier failures of the twentieth century, as it rapidly approaches its inglorious end.<sup>1</sup>

In a world that is becoming increasingly international, we must admit that we are a world defined by war and seemingly unending conflict. For residents of the United States this may require more effort or understanding, as war has not touched this country's shores in many years.<sup>2</sup> Nevertheless, the United States has participated in many wars, coups, dictatorships and military operations since the last time its citizens heard the phrase, "Never again!"<sup>3</sup>

World War II, the war succeeding the war "to end all wars," does not provide the solace and deterrence it promised to deliver.<sup>4</sup> In a very literal sense, "Never again," has not lived up to its promise. Instead, the phrase has become common parlance in the growing inter-

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1. David O. Friedrichs, *Peacemaking Criminology and the Punitive Conundrum: A New Foundation for Social Control in the Twenty-First Century?*, in PUNISHMENT: SOCIAL CONTROL AND COERCION 27 (Christine T. Sistare ed., 1996).

2. Since the American Civil War between the Union Forces of the North and the Confederate Army representing the South, only one other war touched United States' soil. During World War II, Japanese forces bombed Pearl Harbor in Hawaii. The contiguous states, however, remain immune from the scars of war that many modern countries still recall and, unfortunately, continue to endure.

3. Although the United States has not hosted a war, in the traditional sense, in many years, the United States has certainly participated in several significant military operations. See Lt. Col. Steven J. Lepper, *War Crimes and the Protection of Peacekeeping Forces*, 28 AKRON L. REV. 411 (1995) (stating that "[s]ince the Cold War ended we have had Desert Storm, Bosnia (still continues today), Somalia (remnants of which are still around today) and Haiti . . . This really is not peace.") (internal parentheticals in original). Further examples include sending United States forces into Grenada, Panama, and most recently, Iraq. In addition, United States forces joined their NATO counterparts in lodging a containment attack against Serbian President, Slobodan Milosevic in the ongoing Balkan war.

4. See, e.g. John Shattuck, *From Nuremberg to Dayton and Beyond: The Struggle for Peace with Justice in Bosnia*, 3 HOFSTRA L. & POL'Y SYMP. 27, 28 (1999) (observing that "Bosnia . . . confronted the world with a war that Europe had thought it would [not] see again: a genocidal, ethnic-religious conflict, generating massive atrocities against civilians, creating millions of refugees and displaced persons within a formerly unified nation.").

national community.<sup>5</sup> Shortly after the Dirty War in Argentina, a truth commission issued findings entitled "*Nunca Mas*." Likewise, Brazil concluded its dictatorship with a new Constitution and a report documenting atrocities dubbed "*Nunca Mais*." Finally, Uruguay labeled its groundbreaking report following its military dictatorship as, "*Nunca Mas*."<sup>8</sup> With resounding consistency, people around the world continue to hear the assurance, "Never again!"

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5. See MICHAEL P. SCHARF, *BALKAN JUSTICE* xiii (1997) (recalling that "[a]fter the Nazis exterminated six million Jews during the Holocaust, the world community said 'Never again.'"); see also Diane F. Orentlicher, *International Criminal Law and the Cambodian Killing Fields*, 3 *ILSA J. INT'L & COMP. L.* 705, 706 (1997) [hereinafter Orentlicher, *International Criminal Law*] (stating that "[i]f a state provides sanctuary to Nazis, it has breached the vow of universal conscience, 'Never Again.'"); Kofi Annan, *Advocating for an International Criminal Court*, 21 *FORDHAM INT'L L.J.* 363, 364-65 (1997) (advocating for the establishment of an international criminal court to give true meaning to the phrase, "Never again").

6. *Nunca mas* is the Spanish translation of the phrase "Never again." *Nunca Mas* was the report prepared by the Argentine National Commission on the Disappeared. See Neil J. Kritz, *Editor's Introduction*, in 2 *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES* 323 (Neil J. Kritz ed., 1995) (pointing out that the National Commission was appointed by Argentinean President Raul Alfonsin). The National Commission's report "was widely read in Argentina and abroad and provided powerful documentation of the systematic violation of human rights by the military regime." *Id.* at 324.

7. *Nunca mais* is the Portuguese translation of "Never again." Much like the Argentinean project, the Brazilian research project, *Brasil: Nunca Mais*, resulted from a presidential directive. See Joan Dassin, *Torture in Brazil: A Report by the Archdiocese of Sao Paulo*, in 2 *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES* 448, 451 (Neil J. Kritz ed., 1995) (stating that the objective of the research project "Brazil: Never Again," was to give a true meaning to the phrase "Never again" thus attempting to ensure that the violence, infamy, injustice, and persecution that occurred in Brazil in the past would not be repeated).

8. Unlike the Argentinean report prepared by the government commission and the Brazilian report prepared largely with church assistance, the Uruguayan report had neither government nor church support. Rather, the project ultimately was taken up by the Peace and Justice Service ("SERPAJ"). See Seveco Paz y Justicia, *Uruguay Nunca Mas: Human Rights Violations 1972-1985*, in 2 *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES* 420 (Neil J. Kritz ed., 1995). (reasoning by SERPAJ for undertaking the project, which was the threat against silencing the collective memory). "[T]he need for documenting [is] in order to inform, to make sure that what had happened would not be forgotten or, considering the awfulness of the experience, its lessons lost." *Id.* at 428.

This simple phrase emanates a belief in peace and a desire for distance from the harsh realities of war. "Never again," was a primary catalyst behind the formation of the United Nations ("UN") in 1945.<sup>9</sup> Yet, what role has the UN successfully played in curtailing the onset of and the casualties caused by war? Despite accurate and reliable information regarding the situation in Rwanda, the UN and its Member States stood idly by and thus enabled the mass execution of between 500,000 and 1,000,000 Rwandans in only 100 days.<sup>10</sup> One witness testifying before the International Criminal Tribunal for Rwanda ("ICTR" or "Arusha") projected that if the UN had sent a mere 50,000 troops to Rwanda, the mass-genocide could have been averted successfully.<sup>11</sup> Likewise, the UN has been equally ineffective in the ongoing conflict in Angola.<sup>12</sup> Despite warnings to the UN from

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9. The term "United Nations" was coined by President Franklin Delano Roosevelt of the United States when twenty-six nations pledged their support against the Axis powers in a document entitled "Declaration by United Nations." See United Nations, *Basic Facts About the United Nations* (visited Aug. 23, 1999) <<http://www.un.org>>; see also GEOFFREY BEST, *WAR AND LAW SINCE 1945*, at 67 (1994) (stating that "[t]he establishment of the United Nations Organization in 1945 was the central act of recognition by the war-surviving generation that something striking had to be done to avoid the recurrence of such disasters.").

10. See Bernard Muna, *Conference on War Crimes Tribunals: The Rwanda Tribunal and its Relationship to National Trials in Rwanda*, 13 AM. U. INT'L L. REV. 1469, 1480 (1998) (commenting on the expediency of the mass-executions in Rwanda).

[T]he genocide in Rwanda was five times faster than the one in Germany, even though the German genocide had gas chambers. If you take the lower figure of 500,000 people killed you are looking at 5,000 people a day. If you take the higher figure of one million people killed, you are looking at 10,000 people killed a day without guillotines or gas chambers. Instead, most of the killings were done with match heads and spears. This meant that a large proportion of the population were implicated for this to succeed.

*Id.*

11. See The Honorable Navanethem Pillay, *Conference on War Crimes Tribunals: The Rwanda Tribunal and its Relationship to National Trials in Rwanda*, 13 AM. U. INT'L L. REV. 1469, 1479 (1998) (stating that Major-General Romeo Dallaire offered this projection while testifying before the ICTR in its first trial).

12. See generally HUMAN RIGHTS WATCH, *ANGOLA: ARMS TRADE AND VIOLATIONS OF THE LAWS OF WAR SINCE THE 1992 ELECTIONS* (1994) [hereinafter *ANGOLA*] (depicting the conflict raging in Angola in a report by "Human Rights Watch Africa" and "Human Rights Watch Arms Project"). The report cites both the Savimbi-led UNITA forces and the government-maintained MPLA forces with violations of Common Article 3 of the four Geneva Conventions. See *id.* at 134-52.

the warring factions that peacekeepers were unwelcome, the UN invested millions of dollars to send peacekeeping forces into Angola that were withdrawn well before the end of the conflict.<sup>13</sup>

And finally, we must recognize the limited influence the UN has wielded over the territories of the Former Yugoslavia.<sup>14</sup> Even the six-year presence of an *ad hoc* International Tribunal in the Netherlands and its added threat of punishment has not adequately deterred the warring factions from committing rape, torture, forced expulsion, forced displacement, genocide, murder and other war crimes.<sup>15</sup> While the UN considered sending peacekeeping forces back into the Former Yugoslavia, NATO forces lodged a separate air-attack against

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The report states that "UNITA has been guilty of horrendous violations of the laws of war, including direct attacks on civilians, indiscriminate shelling, summary executions, mutilation of corpses, starvation of civilians, hostage-taking, forced portering, recruitment of child soldiers, denial of the freedom of movement, and blockage of relief aid." *Id.* at 88. Likewise, government forces were charged with "widespread violations of the rules of war since the October 1992 elections, including direct attacks on civilians, indiscriminate attacks, summary executions, torture, forced displacement, and recruitment." *Id.* at 61.

13. See *id.* (reporting that, during the transitional period alone, the UN maintained 576 officials within Angola at a cost of \$132 million).

14. See The Honorable Gilbert Guillaume, *The Future of International Judicial Institutions*, 44 INT'L & COMP. L.Q. 848, 857 (1995) (discussing the very early workings of the Tribunal).

Many people, both in the United Nations and in academic circles, noted first that the decision to establish the Tribunal was made by the Security Council in February 1993 at a time when there was a "total lack of progress towards peace in the region." As the Tribunal itself put in its first report, the Security Council then had a "need to demonstrate to the international community that the UN was not sitting back idly. . . ." But the maintenance of peace in the region is above all the responsibility of the Security Council, whose action has not been particularly successful in this respect over the past three years. Negotiations are still going on in that connection and include such persons as Mr. Karadzic and Mr. Mladic, who were named by the Prosecutor of the Tribunal as "war criminal suspects." At a certain stage, it could prove impossible to maintain this dual approach and one might be faced with a difficult choice.

*Id.*

15. See *War With Milosevic*, ECONOMIST, Apr. 3, 1999, at 17-18 (indicating that as many as one million refugees in Kosovo may have been displaced during the Serbian-led ethnic cleansing efforts of March and April, 1999). At one point, the refugees were pouring over the borders of neighboring Albania, Macedonia, and Montenegro at a rate of approximately 4,000 per hour. See *id.*

Serbian President, Slobodan Milosevic after growing impatient with the seeming impunity enjoyed by combatants of the Balkan conflict.<sup>16</sup>

The title of this work embodies a concern that if the International Criminal Tribunals at Nuremberg, Tokyo and the recent additions at The Hague<sup>17</sup> and Arusha are used as a gauge for deterring future violence, the international community must admit failure.<sup>18</sup> This statement, however, is somewhat shortsighted in that it analyzes only one mechanism for achieving peace. The Nuremberg and Tokyo precedent provided the fertile ground for adopting two modern *ad hoc* International Tribunals and, potentially, an international criminal court capable of providing international redress for crimes. These advancements in a unified world community were not possible shortly after the Second World War. Rather, the advancements that stem from Nuremberg and Tokyo are a *direct result* of their failures.

Ours is a world unquestionably divided by conflict.<sup>19</sup> War and chaos linger in the Congo.<sup>20</sup> Starvation and disease are prevalent in

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16. See *id.* (pointing out that NATO began the air strikes against the Former Yugoslavia). It is important to recognize that the NATO air strikes were not pre-approved or sanctioned by the UN See United Nations, *Security Council Rejecting Demand for Cessation of Force Against Yugoslavia* (visited Aug. 23, 1999) <<http://www.un.org/news/press>> (underscoring the factious nature of the NATO campaign in a Press Release issued on Mar. 26, 1999). Russia, one of five permanent members of the UN Security Council, sponsored a resolution demanding that NATO cease its unilateral use of force against the Federal Republic of Yugoslavia. See *id.* (noting further that China, another permanent member of the Security Council, joined Russia in supporting the Resolution). The measure failed by a count of 12 votes to 3. See *id.*

17. See *infra* text accompanying notes 26-27 (setting forth that "The Hague" is used interchangeably with the "ICTY," which is the Tribunal prosecuting war criminals from the Former Yugoslavia).

18. During the time this Article was written, war and killings continued in both Rwanda and the Former Yugoslavia. The issuance of six final judgments against ICTY defendants did not curtail the ethnic cleansing or forced displacements that occurred throughout Kosovo and other Balkan regions. See *War With Milosevic*, *supra* note 15.

19. See Michael P. Scharf, *The Prosecution versus Dusko Tadic: An Appraisal of the First International War Crimes Trial since Nuremberg*, 60 ALB. L. REV. 861, 861-62 (1997) (detailing the numerous atrocities that plagued the world since the claim, "Never again," including Cambodia, Argentina, East Timor, Uganda, Iraq, and El Salvador).

20. See ARYEH NEIER, *WAR CRIMES: BRUTALITY, GENOCIDE, TERROR AND THE STRUGGLE FOR JUSTICE* 145 (1998) (discussing the unrest that prevails in

war-torn Iraq.<sup>21</sup> Conflict remains in Rwanda.<sup>22</sup> Violence continues in Sierra Leone, Indonesia,<sup>23</sup> Afghanistan, Angola, East Timor, Cambodia,<sup>24</sup> and numerous other countries.<sup>25</sup> We must assess the impact of modern efforts to combat war lest we fail again.<sup>26</sup> With the tools the international community now possesses, there is an opportunity for redemption. Enforcement of international humanitarian law and hu-

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Congo).

21. See *id.* (referring to the poor conditions that remain in Iraq that are the result of war).

22. See Todd Howland & William Calathes, *The U.N.'s International Criminal Tribunal, Is It Justice or Jingoism for Rwanda: A Call for Transformation*, 39 VA. J. INT'L L. 135, 151 n.60 (1998) (citing the United States Department of State 1997 Country Report for Rwanda).

23. See generally Seth Mydans, *Ancient Hatreds, New Battles*, N.Y. TIMES, Mar. 14, 1999, at 50 (Magazine) (describing the war between Christians and Muslims that has resulted in tens of thousands of people, mostly Muslim immigrants, fleeing).

24. See HUMAN RIGHTS WATCH, *CAMBODIA AT WAR* (1995) [hereinafter *CAMBODIA*] (describing the war crimes that continue to be committed in the ongoing conflict in Cambodia). Much like the prior report prepared by Human Rights Watch regarding Angola, this report similarly documents abuses committed by both Royal Governmental forces and the Khmer Rouge. See *id.* at 22 (remembering the Khmer Rouge for "their bloody reign from 1975 to 1979, when approximately a million Cambodians—almost one eighth of the population—lost their lives outright to murder, starvation, slave labor and disease."). Ironically, Human Rights Watch begins its report by proclaiming that "[a]lthough the United Nations peacekeeping mission in Cambodia has been hailed as one of the most successful ever, Cambodia was back at war even before the last of the peacekeepers had left." *Id.* at 10.

25. NEIER, *supra* note 20, at 415 (noting that more than one hundred conflicts worldwide existed, and continue to exist, since the end of World War II and illustrating this point by stating that, at the time the book was written, such conflicts existed in Afghanistan, India, Burma, Indonesia, Turkey, Iraq, Sri Lanka, Columbia, Peru, Congo, Uganda, Liberia, Somalia, Tajikistan, and Sudan).

26. See JOSEPH E. PERSICO, *NUREMBERG: INFAMY ON TRIAL* 442 (1994) (advocating a need to establish an international instrumentality to punish the perpetrators of over one hundred wars who have collectively killed millions of people).

Between 1945 and 1992, the world experienced twenty-four wars between nations, costing 6,623,000 civilian and military lives. Ninety-three civil wars, wars of independence, and insurgencies have cost 15,513,000 additional lives. Until 1993, no international instrument had been convened to try any aggressor or any perpetrator of war crimes in any of these 117 conflicts.

*Id.*



man rights obligations, however, remains the cornerstone of any formula for success.

Accordingly, this Article addresses the importance of enforcement issues as they relate to international criminal law. Part I of this Article considers the history and development of the International Tribunals. Specifically, Part I first addresses the history and legacy of Leipzig and the renowned Nuremberg Tribunal and their respective contributions to the development of the two current *ad hoc* Tribunals in The Hague and Arusha. Part II analyzes the difficulty of enforcing international criminal law, particularly as it relates to arrests and trials conducted at the International Criminal Tribunal for the Former Yugoslavia ("ICTY" or "The Hague") and the ICTR. Parts III through V of this Article address the numerous issues related to punishment in international criminal law and contemplates whether such punishment, in fact, operates to further the protection of human rights. Finally, the Article concludes with recommendations that address the future role that international criminal tribunals should assume if such bodies are to be utilized successfully in combating human rights violations and atrocities of war.

At a time when the world community is coming increasingly closer together,<sup>27</sup> there is a duty to future generations to leave a legacy of peace. The tools are readily available. Malleable blueprints exist from our unfortunate predecessors, yet the responsibility lies with this generation to improve upon these prior judicial offerings. We must begin forging a collective solution to combat international violence before it is too late. The starting place may be as simple as enforcing the laws that we, as an international community, have already agreed exist. This Article considers whether the use of international criminal tribunals is the best mechanism to achieve the result we are seeking. This analysis is necessary, lest we fail.

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27. See FRANCIS G. JACOBS & ROBIN C.A. WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (2d ed. 1996); see also THOMAS BUERGENTHAL & DINAH SHELTON, *PROTECTING HUMAN RIGHTS IN THE AMERICAS* (4th ed. 1995) (providing an example of the increasing cohesiveness between sovereign nations by the development, and successful maintenance, of regional judicial systems such as those that currently exist in Europe, Africa, and the Americas, each having the common goal of securing and preserving human rights in areas that were previously dominated by violence).

## I. THE HISTORY AND DEVELOPMENT OF INTERNATIONAL TRIBUNALS

The point is often made, . . . that the war crimes prosecutions in the former Yugoslavia and in Rwanda cannot possibly be as effective as the Nuremberg trials because there cannot be any victors' justice. I think the contrast between the Nuremberg trials and the Bosnia, Yugoslavia and Rwanda trials is even greater than that. I would go so far as to say whereas the Nuremberg trials were a symbol of the allies' triumph, the Tribunals for the former Yugoslavia and Rwanda in many ways symbolize failure.<sup>28</sup>

As the world community stood mute and watched the horrors unfolding in Rwanda and the Former Yugoslavia, it is plain to see that the world as an international community failed by not intervening when intervention was clearly possible. We failed to step in when the chance existed to legitimize the cry, "Never again!" Now, as the world gazes upon the rubble and destruction that permeates what remains in both Rwanda and the Former Yugoslavia,<sup>29</sup> we must re-evaluate our ability to deter international violence. It is time that the world community honestly addresses the difficulties encountered in securing peace among varied cultures. In doing so, world leaders must reassess the impact that criminal prosecutions and international tribunals have in securing and furthering human rights.

### A. THE LEGACY OF NUREMBERG

When we evaluate the impact of World War II war crimes trials on reducing future atrocities, we must admit failure.<sup>30</sup>

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28. Tom Gjelten, *Conference on War Crimes Tribunals: Tribunal Justice, the Challenges, the Record, and the Prospects*, 13 AM. U. INT'L L. REV. 1541, 1556 (1998).

29. After maintaining the Yugoslav Tribunal for nearly six years, NATO forces apparently took "the law" into their own hands by contravening the wishes of other members of the UN Security Council. This action, regardless of any military advances that may have destabilized the Serbian forces, unquestionably resulted in an exodus of Albanian refugees. See John Kifner, *Kosovars Flee to Beat Serb Deadline of Death*, N.Y. TIMES, Mar. 31, 1999, at A1 (reporting on the mass-exodus of refugees fleeing Kosovo).

30. JOHN L. GINN, SUGAMO PRISON, TOKYO 241, at 56 (1992).

One cannot legitimately begin to discuss the two modern war crimes tribunals without first pausing to consider the legacy of the International Military Tribunal ("Nuremberg") at Nuremberg.<sup>31</sup> This analysis is necessary because Nuremberg truly "marked the re-affirmation of the importance of the individual in the world of nation-states."<sup>32</sup> Nuremberg initiated a process whereby individuals, as opposed to nation-states, were subject to criminal prosecution for the atrocities of war and violations of the laws of war.<sup>33</sup> This revolution in international law, however, was not accomplished without great criticism.<sup>34</sup>

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31. See, e.g., PERSICO, *supra* note 26, at ix (writing about Nuremberg after nearly half a century because of the stark similarity between Serbian concentration camps and the atrocities seen in Auschwitz and Buchenwald); SCHARF, *supra* note 5, at 3-17 (paralleling German concentration camps to the atrocities experienced in the Former Yugoslavia); Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, 30 N.Y.U. J. INT'L & POL. 167, 167 (1998) (referencing Nuremberg in the first sentence of the article). While the Persico book acknowledges the importance of the Tokyo Tribunal, both in terms of history and precedent, the scope of this article does not permit a detailed discussion of the Tokyo Tribunal. See generally GINN, *supra* note 30; RICHARD L. LAEL, *THE YAMASHITA PRECEDENT* 59-77 (1982); LAWRENCE TAYLOR, *A TRIAL OF GENERALS* 103-11 (1981); M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 31-38 (1997) (describing in detail, the Tokyo Tribunal and prosecutions of Japanese war criminals under General Douglas A. MacArthur).

32. Henry T. King, Jr., *Address: The Meaning of Nuremberg*, 30 CASE W. RES. J. INT'L L. 143, 148 (1998).

33. See *id.* at 147 (asserting that Nuremberg's most important contribution was the prosecution of individuals, instead of merely nations, for violations of world peace and human rights); see also NAOMI ROHT-ARRIAZA, *IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE* 24 (1995) (contending that Nuremberg was revolutionary in its prosecutions of people instead of nation-states for human rights atrocities).

34. See, e.g., Senator Howard Taft, in WILLIAM SAFIRE, *LEND ME YOUR EARS: GREAT SPEECHES IN HISTORY* 597, 601 (1992) (illustrating one of the strongest and most memorable criticisms in opposition of the World War II war crimes Tribunals because they represented an *ex post facto* application of law).

I believe that most Americans view with discomfort the war trials which have just been concluded in Germany and are proceeding in Japan. They violate that fundamental principle of American law that a man cannot be tried under an *ex post facto* statute. The trial of the vanquished by the victors cannot be impartial, no matter how it is hedged about with the forms of justice. I ques-

Nuremberg was a reactionary body. It was created in reaction to the unspeakable atrocities committed in Europe during World War II against gypsies, Catholics, homosexuals, mentally and physically impaired persons, and Jews. Nuremberg was necessary to demonstrate that if a Third World War occurred, justice in the form of prosecutions and criminal sentences would be swiftly and sternly administered. In this regard, Nuremberg was additionally a reaction to the failures experienced at Leipzig.<sup>35</sup>

Immediately following the First World War ("World War I"), the victorious Allies gathered together to determine the fate of those most responsible for the war.<sup>36</sup> The main target was to be the German Kaiser, Wilhelm II.<sup>37</sup> After convening a "Commission on the Responsibility of the Authors of the War and On Enforcement Penalties,"<sup>38</sup> the Allies submitted a list of 896 suspected war criminals to Germany.<sup>39</sup> Germany adamantly refused the list and informed the

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tion whether the hanging of those who, however despicable, were the leaders of the German people will ever discourage the making of aggressive war, for no one makes aggressive war unless he expects to win. About this whole judgment there is the spirit of vengeance, and vengeance is seldom justice. The hangings of the eleven men convicted will be a blot on the American record which we shall long regret.

*Id.*

35. See KELLY DAWN ASKIN, WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS 96 (1997) (characterizing the establishment of a Tribunal at Nuremberg as reactionary).

36. See Bassiouni, *supra* note 31, at 14-15 (indicating that three Articles appearing in the Treaty of Versailles address the need for an *ad hoc* criminal tribunal). Article 228 of the Treaty of Versailles specifically "recognizes the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war." *Id.* at 15 n.8. The two major Articles addressing criminal proceedings, Articles 227 and 228, never were implemented. See *id.* at 18.

37. See TELEFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 12 (1992) (comparing Kaiser Wilhelm II to Hitler by observing that "Kaiser Wilhelm II and his general staff contrived to conduct German war operations in such a way as to raise a worldwide storm of hate and fear, almost comparable to that achieved by Adolph Hitler a quarter of a century later.").

38. See DONALD A. WELLS, WAR CRIMES AND LAWS OF WAR 69 (1984) (explaining that the Commission on Responsibility of the Authors of War and On Enforcement Penalties' function was the investigation of war crimes and the recommendation of appropriate action for those crimes).

39. The actual number of persons named in this initial document is the subject

Allies that such prosecutions, if attempted, would result in the renewed outbreak of war.<sup>40</sup> Rather than force the prosecution issue, the Allies reevaluated the suspects and sent Germany a second, much shorter list identifying forty-five alleged war criminals.<sup>41</sup> Again, Germany resisted the idea of what it considered to be broad prosecutions and eventually agreed to prosecute twelve of the individuals named before the Supreme Court of Germany at Leipzig.<sup>42</sup> These prosecutions resulted in a mere six convictions with initial sentences ranging from six-months to four-years imprisonment.<sup>43</sup> This dismal

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of some controversy. See TAYLOR, *supra* note 37, at 17 (stating that "on February 3, 1920, the Allies presented to the Germans a list of 854 individuals, including many famous military and political figures, for turnover"). Compare WELLS, *supra* note 38, at 70 (recounting that "[o]n February 3, 1920 a list of 896 alleged war criminals was submitted to Baron von Lersner, the German Legate."), with NEIER, *supra* note 20, at 254 (proffering that 895 suspected war criminals were listed for prosecution), and Bassiouni, *supra* note 31, at 16 n.12 (acknowledging that a fourth view reports a list containing 901 names but contends 895 names is the appropriate number). The author relied upon the 896 figure because it appears most frequently in the scholarly literature. See, e.g., Major Marsha V. Mills, *War Crimes in the 21st Century*, 3 HOFSTRA L. & POL'Y SYMP. 47, 59 (1999) (stating that the refusal of Germany to hand over the 896 requested defendants was based on the rationale that if Germany acquiesced, the delicate peace that was reached would break); Timothy L.H. McCormack, *Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law*, 60 ALB. L. REV. 681, 705 n.129 (1997) (providing the following break-down of the defendants demanded by the Allied Forces: United Kingdom (97), Belgium (334), France (334), Italy (29), Poland (57), and Romania (41)); Walter Gary Sharp, Sr., *International Obligations to Search for and Arrest War Criminals: Government Failure in the Former Yugoslavia?*, 7 DUKE J. COMP. & INT'L L. 411, 417 (1997).

40. See WELLS, *supra* note 38, at 70 (discussing Germany's refusal to bring forth the 896 war criminals who the Allies requested for prosecution).

41. Unlike the figures contained in the initial submission by the Allies, there was no disagreement on the amended submission. See TAYLOR, *supra* note 37, at 17; WELLS, *supra* note 38, at 70; Bassiouni, *supra* note 31, at 20; McCormack, *supra* note 39, at 706; Sharp, *supra* note 39, at 417-18 (indicating that 45 alleged war criminals were on the final list sent to Germany by the Allies).

42. See WELLS, *supra* note 38, at 70 (proffering that Germany ultimately agreed to the prosecution of twelve war criminals).

43. See TAYLOR, *supra* note 37, at 17; WELLS, *supra* note 38, at 70 (reporting that three of the men convicted received sentences of six months, ten months, and two years, respectively). These light sentences served as a strong impetus for the creation of the International Military Tribunal ("Nuremberg") at Nuremberg many years later. See McCormack, *supra* note 39, at 706 (asserting that the Allies considered each of the defendants' sentences to be lenient); Mills, *supra* note 39, at 59 (commenting on the lenient sentences handed down to the six defendants); Sharp,

record of prosecutions and the lack of any semblance of justice resulted in the withdrawal of Allied Observers at Leipzig.<sup>44</sup> A few minor prosecutions of World War I war criminals continued in Belgium, France, Bulgaria, and Turkey.<sup>45</sup>

Overall, however, Leipzig was a failure.<sup>46</sup> Leipzig convincingly demonstrated that the international community could not trust the domestic courts of defeated nations to render impartial justice.<sup>47</sup> This phenomenon has repeated itself in numerous settings since the failure of Leipzig.<sup>48</sup> In fact, Hitler himself relied upon the Allies' inertia following World War I in proclaiming, "[w]ho after all is today speaking about the destruction of the Armenians?"<sup>49</sup> Yet, Hitler's belief that the acts of the Third Reich would remain above reproach underestimated the residual effect of Leipzig. The victorious Allies were determined to avoid their past mistakes. This determination materialized in tangible form at Nuremberg.

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*supra* note 39, at 418 (stating that the six defendants who were convicted each received light sentences).

44. See WELLS, *supra* note 38, at 70 (discussing the destructive result of the miniscule number of convictions and the lenient sentences given at Leipzig).

45. See *id.*; see also TAYLOR, *supra* note 37, at 18 (observing, ironically, that only Yugoslavia, among the Balkan states, called for the punishment of war criminals).

46. See Bassiouni, *supra* note 31, at 20 (asserting that true justice was sacrificed in Leipzig for international and domestic politics of the Allied countries because the Treaty's commitment to try and punish perpetrators of war crimes was never carried out).

47. See BENJAMIN B. FERENCZ, 2 *ENFORCING INTERNATIONAL LAW—A WAY TO WORLD PEACE* 439 (1983).

48. See TAYLOR, *supra* note 37, at 18 (maintaining that, since the Treaty of Lausanne in 1923, the political price for cessation of hostilities is the award of amnesty for defeated forces); see also Aryeh Neier, *What Should be Done About the Guilty?*, 1 *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES* 172, 177-78 (Neil J. Kritz ed., 1995) (describing the amnesties adopted in Guatemala, El Salvador, Honduras, Nicaragua, and Chile in the 1980s); José Zalaquett, *Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints*, in 1 *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES* 3 (Neil J. Kritz ed., 1995) (distinguishing between the Argentinean case that resulted in some prosecutions and the Uruguayan case involving amnesties).

49. See Bassiouni, *supra* note 31, at 21 (quoting Adolph Hitler in his speech to the Chief Commanders and Commanding Generals on the Obersalzberg on Aug. 22, 1939).

Nuremberg is often hailed as “victors’ justice” and challenged for its application of *ex post facto* laws.<sup>50</sup> In retrospect, these objections are not wholly without merit.<sup>51</sup> The precepts established by the Nuremberg and Tokyo Tribunals advanced radical theories regarding the conduct of war. Never again would soldiers be immune from prosecution after committing grave and unspeakable tragedies against humankind—even in the name of war. Following Nuremberg, soldiers may finally be held accountable for actions which—though prohibited for years in numerous international and domestic treaties—had gone unpunished by law for centuries. The challenged innovation at Nuremberg and Tokyo was not the novelty of the law or the crimes listed in the indictments. Rather, the shocking advancement was that the existing laws were finally being enforced in an international setting.<sup>52</sup> The passionate cry of “Never again” was transmogrified into a merciful plea of “Never before!”

In many regards, Nuremberg is a dark shadow ominously clouding

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50. See 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 332 (1994) (“A primary criticism of Nuremberg was that it amounted to victors’ justice since the tribunal was composed exclusively of prosecutors and judges from the victorious countries and the defendants were limited to Germans, even though the allied personnel also committed serious violations of humanitarian law during the war”). By contrast, the International Tribunal was not created by either the victors or the parties involved in the conflict, but rather, it was created by the UN, which represented the international community. See *id.* (contrasting the establishment of the Nuremberg Tribunal with later international tribunals); see also Bassiouni, *supra* note 31, at 29 (averring that, in Nuremberg, all of the defendants were German whereas none of the Allied Military was prosecuted for war crimes against Germans thus resulting in a one-sided prosecution).

51. See SCHARF, *supra* note 5, at 11 (criticizing the Allies for not appointing either a German, or neutral, judge to the Tribunal since many of the victor states’ own citizens were equally guilty of war crimes perpetrated against Germans).

52. See *id.* at 13 (maintaining that Nuremberg should not be judged by contemporary standards, rather viewed in light of its historical context thus appreciating the extraordinary fact that the major German war criminals were even given a trial instead of being summarily executed as proposed by Churchill and Stalin); see also Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2555 (1991) [hereinafter Orentlicher, *Settling Accounts*] (claiming that the Nuremberg prosecutions, by prosecuting German nationals, vastly broadened the scope of international law because prior to that time, international law never addressed a state’s treatment of its own citizens, much less imposed criminal sanctions for such conduct).

the history of international criminal law. Nuremberg still stands as a testament to the fact that the laws of war are meted out by the victors of war. Hence, modern scholars of international law attempt to ignore and minimize the concerns regarding "victors' justice"<sup>53</sup> and the application of *ex post facto* laws.<sup>54</sup> Instead, many commentators focus on the important moral imperative of bringing the architects and perpetrators of international atrocities to justice. While Nuremberg may be vulnerable to challenge on procedural grounds, there is no denying the legacy that this Tribunal left in the development of international criminal law.<sup>55</sup> For all its shortcomings, Nuremberg was a necessary, albeit imperfect, judicial process.<sup>56</sup> Nuremberg laid the foundation for the next major milestone in international criminal law, the ICTY.<sup>57</sup>

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53. See BENJAMIN FERENCZ, 1 AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE 88 (1980) (declaring that neither the validity of judgments nor the fairness of the trial was diminished by the fact that the judges hailed from the victor States).

54. See PERSICO, *supra* note 26, at 438 (stating that the "[International Military Tribunal's] legitimacy can be attacked on *purist* legal grounds.") (emphasis added). *But see id.* at 440 (excusing Nuremberg's application of the law since justice was satisfied).

55. See Orentlicher, *International Criminal Law*, *supra* note 5, at 705 (observing that Nuremberg marked the commencement of the general acknowledgement that certain crimes are of universal concern and become the world's responsibility).

56. See ASKIN, *supra* note 35, at 98-99 (assigning Nuremberg fault for the inadequate procedural safeguards it provided the vanquished defendants). In Nuremberg, there was no right of appeal, the evidentiary rules were unrestrained, and the attorneys provided to the defendants were typically American servicemen who had insufficient training and experience. The ICTY and ICTR Statutes arguably remedied these flaws by implementing procedural protections that more closely follow those announced in many international covenants and conventions, such as in the International Covenant on Civil and Political Rights, which relates to due process and judicial procedure.

57. The full and proper designation of the ICTY is the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.



## B. THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

The International Criminal Tribunals for the former Yugoslavia and Rwanda . . . provide the hope of not only advances in international law similar to Nuremberg and Tokyo, but advancements in the enforcement of international law, where Nuremberg unfortunately failed to follow through. It was not Nuremberg's failure. It was the failure of the international community to follow up after Nuremberg.<sup>58</sup>

On February 22, 1993, the Security Council of the UN decided that the establishment of an international tribunal was necessary "for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the Former Yugoslavia since 1991."<sup>59</sup> The Resolution, commonly referred to as Resolution 808, provided the UN Secretary-General no more than sixty days to present the Security Council with "a report on all aspects of this matter, including specific proposals."<sup>60</sup>

Thereafter, on May 25, 1993, the Security Council adopted a second Resolution, Resolution 827, which provided specific proposals for the establishment of the Tribunal.<sup>61</sup> Acting under its Chapter VII powers contained in the UN Charter, the Security Council officially called upon all States to "cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal."<sup>62</sup> This mandate further required all States to "take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute."<sup>63</sup>

The importance of cooperation is critical when considering the role that arrests, investigations, and detention assume in facilitating

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58. Tina Rosenberg, *Conference Convocation*, 13 AM. U. INT'L L. REV. 1383, 1407 (1998).

59. S.C. Res. 808, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/808 (1993)

60. *Id.*

61. See S.C. Res. 827, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/827 (1993) [hereinafter ICTY Statute] (attaching the Statute governing the ICTY as an Addendum to this Resolution).

62. *Id.*

63. *Id.*

criminal justice. With the issuance of these two Resolutions, the world community witnessed the origination of the first war crimes Tribunal since the Allies established similar judicial bodies immediately following World War II. This new Tribunal, however, differed from its predecessors in several important respects. First, because the ICTY was established prior to the cessation of hostilities in the Former Yugoslavia and under the guise of Chapter VII of the UN Charter—Articles 39 and 41—the Tribunal was considered a vehicle to help “maintain and re-establish international peace and security.”<sup>64</sup> This origin, coming as it did from the full international community, should immunize the ICTY from challenges of “victors’ justice” that the Nuremberg and Tokyo Tribunals continue to endure.<sup>65</sup> An origination in the Security Council of the UN further suggests that the establishment of the Tribunal is reflective of the will of the international community. As such, there is an expectation—conspicuously not yet realized—that the individual states comprising the UN will

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64. KARINE LESCURE & FLORENCE TRINTIGNAC, INTERNATIONAL JUSTICE FOR FORMER YUGOSLAVIA 6 (1996).

In affirming that the situation generated by the virtually systematic breaches of international humanitarian law in Former Yugoslavia constituted a threat to international peace and security under the terms of Article 39 of Chapter VII, the Security Council provided itself with the means to apply Article 41 of the same chapter. This Article enables it, in such a situation, to take adequate measures not involving the use of armed force. The measures actually quoted are of an economic nature (complete or partial rupture of economic ties and rail, sea and air links, etc.), but this is not exclusively the case because Article 41 also envisages the breaking of diplomatic relations. Although the creation of a criminal jurisdiction may seem very far removed from such measures, the formulation of the second sentence in Article 41 “*these may include*” clearly shows the exemplary and non-restrictive nature of the list.

*Id.*

65. *Id.* at 3-4 (asserting that the Tribunal for the Former Yugoslavia, due to its birth from the Security Council, maintains both international and political credentials, thus justice from that Tribunal will not be subject to the criticism of “victors’ justice,” which tainted the Nuremberg proceedings); *see also* M. CHERIF BASSIOUNI & PETER MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 201 (1996) (differentiating the Tribunal for Former Yugoslavia from the Nuremberg proceedings since the former was established by the Security Council of the UN instead of the victors of the war); *supra* notes 50-51 and accompanying text (discussing victors’ justice, which was the primary complaint of the Nuremberg proceedings).

enforce the orders and judgments of the ICTY.<sup>66</sup>

The second main distinction between the ICTY and the World War II Tribunals is the limitations on allowable penalties set forth in the ICTY statute, which explicitly preclude imposing the death penalty.<sup>67</sup> Furthermore, the Tribunal emphasized, in its first Sentencing Judgment, that the possible range of punishment is limited strictly to imprisonment and that even fines, hard labor, and corporal punishment are prohibited by the ICTY Statute.<sup>68</sup> This limitation of imprisonment necessarily mandates the establishment of a system for detention to house convicted individuals. Currently, there is no international or regional facility established for the incarceration of persons convicted by an international tribunal or UN body.

The third distinction between the ICTY and the World War II Tribunals is the availability of precedent. Because the judgments of Nuremberg, Tokyo, and the proceedings under Control Council Law No. 10<sup>69</sup> are continually upheld and supported by the international

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66. See Frederik Harhoff, *Consonance or Rivalry? Calibrating the Efforts to Prosecute War Crimes in National and International Tribunals*, 7 DUKE J. COMP. & INT'L L. 571, 575 (1997) (suggesting that because the two *ad hoc* Tribunals were enacted pursuant to the Security Council's Chapter VII powers, orders and judgments issued by the Tribunals should be considered legally binding on the individual states under international law); see also The Honorable Gabrielle Kirk McDonald, *The Eleventh Annual Waldemar A. Solf Lecture: The Changing Nature of the Laws of War*, 156 MIL. L. REV. 30, 35 (1998) (advocating a need for states to be subject to a binding authority for violations of international law).

67. See RICHARD H. MINEAR, VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL 31 (1971) (observing that the death penalty was a regularly exercised option both at Nuremberg and Tokyo). Of the 25 men convicted by the Tokyo Tribunal, seven received the death penalty. See *id.* Likewise, 11 defendants at Nuremberg were sentenced to death by hanging. See TAYLOR, *supra* note 37, at 598-99. Ironically, the main complaint by defendants regarding the death penalty seemed to be the manner of death imposed. See *id.* at 601-02 (reporting that the Nuremberg soldiers who were sentenced to death by hanging petitioned for the more honorable death; death by firing squad).

68. Prosecutor v. Erdemovic, Sentencing Judgment, IT-96-22-T, \_\_I.L.R.\_\_ (Int'l Crim. Trib. for Yugo. 1996) <<http://www.un.org/icty>> vacated on alternate grounds, (limiting punishment to imprisonment).

69. See SCHARF, *supra* note 5, at 10 (discussing the issuance of Control Council Law No. 10 subsequent to the creation of the International Military Tribunal at Nuremberg). This law permitted the prosecution of the "lesser" Nazi defendants, such as low-level political and military leaders, businessmen, doctors, and jurists. See *id.* (noting that these individuals were tried by military tribunals in the Allied-

community, the leaders and soldiers involved in the Balkan massacres cannot complain that the application of the laws of war constitute *ex post facto* laws.<sup>70</sup> The Nuremberg precedent, however questionable during the late 1940s, is now the accepted benchmark for international criminal law. Perhaps the strongest legacy resulting from Nuremberg is the punishment of war crimes and the prosecution of violators, as opposed to the apparent immunity the violators previously enjoyed.<sup>71</sup>

The fourth distinction between the two modern *ad hoc* Tribunals and the World War II Tribunals is that neither the ICTY nor the ICTR<sup>72</sup> are situated within the countries where the fighting, hostilities, and war crimes occurred.<sup>73</sup> Thus, the two modern Tribunals must overcome challenges of transportation and limited access to victims, witnesses, suspects, and investigators, each of whom rely on the convenience of venue. Likewise, the UN Tribunals must overcome the obstacle of "importing justice" to countries still suffering the aftermath of war.<sup>74</sup> The "international" Tribunals in The Hague and

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occupied zones of Germany).

70. See Theodore Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 562 (1995) (contending that Nuremberg is considered binding precedent in spite of its application of *ex post facto* laws).

71. But see McCormack, *supra* note 39, at 730 (claiming that, although the international community clamors for an effective international criminal law, no state is willing to accept the broad jurisdiction that an international criminal court could exercise over any State); but see also Stephan Landsman, *Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions*, 59 LAW & CONTEMP. PROBS. 81, 82 (1996) (recalling that 19 separate truth commissions were established—as opposed to war crimes tribunals—to deal with internal atrocities and crimes against humanity in the past 21 years).

72. The full and proper designation for the ICTR is 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 1 January and 31 December 1994.

73. See Bassiouni, *supra* note 31, at 49 (indicating that the Tribunal's foreign location was a major point of contention for Rwandans). The placement of the Tribunal in Arusha hinders many Rwandans from following the events and trials. See *id.*

74. See Payam Akhavan, *Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda*, 7 DUKE J. COMP. & INT'L L. 325, 342 (1997) (observing that the ICTR must begin to

Arusha are removed from the site of conflict both physically and symbolically.<sup>75</sup> The Judges and Prosecutors acting on behalf of the UN are thus making decisions about each country from a comfortable distance unlike their Nuremberg predecessors who lived, worked, and dispensed justice amidst the destruction.<sup>76</sup>

The most notable distinction between the ICTY and the other Tribunals mentioned, including the ICTR, is the fact that war continued to plague the Balkan region subsequent to the formation of the ICTY. As recently as April 1999, hundreds of thousands of ethnic Albanian refugees fled Kosovo under the threat of Serbian violence.<sup>77</sup> These forced displacements resulted in a full-scale international crisis due to the unavailability of food, clothing, shelter, and basic medical supplies for many of the refugees.

The ICTY has been far from successful, after a six-year existence, in restoring peace to the Balkan region. Many of the refugees whose homes were burned, destroyed, or otherwise overtaken easily could have proffered more appropriate uses for the millions of dollars the UN has invested thus far in the ICTY. Those fleeing and being forced from their homeland *should be* skeptical when the international community promises that justice will be done.

Perhaps, at this point, the ICTY aptly demonstrates that criminal

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reach into Rwanda by, first, utilizing the most accessible language in the region, Kinyarwanda, and second, by employing the most accessible median in the region, radio). The ICTR must be much more aggressive in disseminating information about its work if it is to have any discernable impact on the reconciliation process. *See, e.g., id.* (urging for the disbursement of information regarding the Tribunal proceedings within Rwanda, which can be analogized to the need of the Former Yugoslavia for such disbursement). A significant hurdle relating to the ICTY is that the Tribunal's working languages, French and English, do not include any of the native Serb-Croat languages of the Yugoslav region. *See generally id.* (discussing the need to disburse information in the language native to Rwandans).

75. *See* AIREY NEAVE, ON TRIAL AT NUREMBERG 43 (1978) (mentioning that the symbolic location of Nuremberg should not go unnoticed). It was at Nuremberg, in 1938, that Hitler officially proclaimed the anti-Jewish laws that precipitated the Holocaust. *See id.*

76. *See id.* at 43-47 (recognizing that the judges and prosecutors involved in the proceedings at Nuremberg did their jobs amidst the aftermath of the war).

77. *See* ECONOMIST, *supra* note 15, at 17-18 (adding that, because of the violence, many Albanian politicians either were killed or in hiding, thus making the achievement of a political solution more difficult).

trials should not precede the end of conflict—at least not without first securing the proper enforcement mechanisms necessary to effectuate justice. The first priority of the international community in any war situation should be to cease the violence and to bring a definitive end to war. Only then should we begin considering what to do with those responsible for war atrocities.

### C. THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

Whenever we talk about the failures or shortcomings of some of these international efforts, I think it is important that we come to speak<sup>78</sup> about the failures of the Member States that constitute the United Nations.

Much like its sister institution, the ICTR was established by a UN Security Council resolution pursuant to its Chapter VII powers.<sup>79</sup> Thus, despite the fact that the war in Rwanda was purportedly over, the purpose of the Tribunal was, and presumably still is, to restore peace and order to the country via criminal prosecutions. The process of establishing the Rwandan Tribunal mirrored that previously attempted at Leipzig, Nuremberg, Tokyo, and the Former Yugoslavia. In each of these instances, including Rwanda, the UN established a Commission of Inquiry to initially determine the feasibility and advisability of creating a criminal tribunal.<sup>80</sup> Only in one instance, the

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78. The Honorable Thogene Rudasingwa, Rwandan Ambassador to the United States, *The Rwanda Tribunal and its Relationship to National Trials in Rwanda*, 13 AM. U. INT'L L. REV. 1469, 1485 (1998).

79. See *infra* note 83 (noting that Security Resolution 955 established the ICTR in September 1994); see also Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INT'L L. 349, 353 (1997) (acknowledging that the UN adopted Resolution 955 approximately 16 months after the establishment of the ICTY).

80. See Bassiouni, *supra* note 31, at 11-12 (cataloguing the five *ad hoc* international investigation commissions as follows: (1) the 1919 Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties—1919 Commission preceding Leipzig; (2) the 1943 United Nations War Crimes Commission—the predecessor to Nuremberg; (3) the 1946 Far Eastern Commission—the predecessor to the Tokyo Tribunal; (4) the 1992 Commission of Experts Established Pursuant to Security Council Resolution 780 to Investigate War Crimes and other Violations of International Humanitarian Law in the Former Yugoslavia—the predecessor to the ICTY; and (5) the 1994 Independent Commission of Experts Established Pursuant to Security Council Resolution 935 to Investigate Grave Violations of International Humanitarian Law in the Territory of Rwanda—the predecessor to the ICTR).

1919 Commission, did the process permit a domestic court to serve as the arbiter of justice. But, as previously observed, it is the very failure observed at Leipzig that precludes domestic enforcement for violations that have increasingly been characterized as international crimes. Thus, there continues a trend of not appointing a domestic court to enforce what increasingly is characterized as violations of international crimes.<sup>81</sup> Hence, much like Nuremberg and the ICTY, the ICTR is a reactionary body.<sup>82</sup>

Despite its recognition of need for international assistance, the Rwandan government objected to the ultimate inception of the ICTR. Initially, Rwanda requested that the Security Council establish an international tribunal to assist it with the awesome task of rendering justice after the genocide. Rwanda certainly recognized the need for help but that help did not come in the form that the Rwandan government hoped for or expected. Thus, despite the need and desire for international assistance, Rwanda ultimately cast the only negative vote at the Security Council against Resolution 955, which established the ICTR.<sup>83</sup>

Rwanda's reaction toward Resolution 955 signifies an important breakdown in the international system.<sup>84</sup> While the Rwandan people

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81. See *supra* notes 35-49 and accompanying text (discussing the Allies unsuccessful attempts to prosecute war criminals following World War I).

82. See Payam Akhavan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 AM. J. INT'L L. 501, 501 (1996) (observing that atrocities are the most effective method for setting standards in the international human rights arena). Furthermore, "[i]n a sense, the decision to establish these Tribunals is yet another expression of the reactive nature of the international human rights system." *Id.*

83. See S.C. Res. 955, U.N. SCOR, 49th Session, U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute] (attaching as an Addendum to this Resolution, the statute governing the ICTR). Ironically, or perhaps fortuitously, Rwanda was one of the rotating at-large members of the Security Council at the time this issue was decided. Its voice and presence, however, did not deter the creation of an institution it did not welcome.

84. See Orentlicher, *International Criminal Law*, *supra* note 5, at 705-06 (discussing the conflict within the international community on the most appropriate method of distributing justice following a period of genocide or internal atrocities). Professor Orentlicher suggests that there is a very real paradox in operation at the international level. See *id.* at 705 (recognizing that the Nuremberg principles now are accepted as customary international law and illustrate the important principle that certain crimes are universally condemned as reprehensible on the one hand,

clearly desired international assistance, the perceived usurpation of state sovereignty in dealing with the extraordinary circumstances experienced in the country posed a threat to Rwanda's control over genocidal justice. One of the most vigorous challenges raised by Rwanda was the fact that the UN Tribunal was expected to share a single Prosecutor and a single Appeals Chamber with the ICTY.<sup>85</sup> This objection stemmed, in part, from the belief that the proposed Statute already provided for so few ICTR personnel that the Tribunal could not possibly fulfill its mandate.<sup>86</sup> Adding to Rwanda's frustra-

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but pointing out that, on the other hand, responses to such crimes should meaningfully reflect the unique culture of the country in which the crimes occurred to effectively achieve its central aim of accountability). Although Professor Orentlicher specifically discusses the appropriate method for dealing with the Khmer Rouge in Cambodia, the reasoning is quite consonant with the situation in Rwanda where the national legal system is defunct. *See id.* at 709 (observing that while conflicting legal cultures should not deter the international community from pursuing prosecutions in Cambodia, the acknowledgement and understanding of such limitations should cause the international community to proceed with caution). Likewise, the international community must understand Rwanda's reluctance toward a UN-dominated Tribunal in its contextual reality. *See generally* 1 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Neil J. Krutz ed., 1995) (discussing the growing dilemma of international accountability).

85. *See* LAWYERS' COMMITTEE FOR HUMAN RIGHTS, PROSECUTING GENOCIDE IN RWANDA (1997) [hereinafter LAWYERS' COMMITTEE] (noting the difficulties in establishing a structure that efficiently deals with the problems in Kigali and Arusha). The Lawyers Committee for Human Rights observed that "[b]uilding a team of investigators, prosecutors, administrators and support personal in Kigali and Arusha, which have limited infrastructure and where communications and travel are difficult are expensive [endeavors]." *Id.*; *see also* Bassiouni, *supra* note 31, at 47 (observing that, although the ICTR and the ICTY statutes differ, the Tribunals are similar in that they share a common prosecutor and a common Appellate Chamber). Moreover, "[t]his is a curious formula for two separate *ad hoc* Tribunals established separately by the Security Council through two unrelated resolutions." *Id.*; *see also* Ambassador Manzi Bakuramutsa, *Identifying and Prosecuting War Criminals: Two Case Studies—the Former Yugoslavia and Rwanda*, 12 N.Y.L. SCH. J. HUM. RTS. 631, 646-47 (1995) (reporting that the Rwandan government wanted an increased number of trial chambers, as well as its own Appeals Chamber and Prosecutor).

86. *See* Morris, *supra* note 79, at 355 (adding that several scholars questioned the decision to provide the two *ad hoc* bodies with a single prosecutor); *see also* Bassiouni, *supra* note 31, at 48 (contending that the single prosecutor is an insurmountable structural problem). Professor Bassiouni observes that "[t]he choice of a single Prosecutor was particularly ill-advised because no person, no matter how talented, can oversee two sets of prosecutions separated by 10,000 miles." *Id.* A major impetus for utilizing only a single Prosecutor resulted from the many diffi-



tion, the UN gave the ICTR primacy jurisdiction over domestic proceedings within Rwanda but located the proceedings outside of Rwandan territory.<sup>87</sup> Primacy allows the ICTR, at any point during a domestic proceeding, to request that the defendant and the entire criminal proceeding be transferred to Arusha.<sup>88</sup> Thus, upon request by the ICTR, Rwanda must surrender its domestic authority over a chosen defendant and defer its proceedings to the ICTR. This pale hybrid of concurrent jurisdiction "may obstruct national catharsis by frustrating popular expectations in the victim's country that justice will be done under domestic law to those most responsible"<sup>89</sup> for the genocide.

The second major objection raised by Rwanda was the statute's prohibition of the death penalty.<sup>90</sup> Although Rwanda has not utilized the death penalty since 1982, the new Rwandan government indicated its desire to resurrect the punishment for genocidal prosecutions. This anomaly means that defendants prosecuted abroad will likely receive a less grave sentence than those prosecuted domestically.<sup>91</sup> Rwanda opposed this proscription against the death penalty fearing that the ICTR would exercise its primacy jurisdiction against the leaders and masterminds of the genocide, thereby leaving the

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culties associated with the prolonged selection process for the ICTY Prosecutor. *See id.*; *see also* Morris, *supra* note 79, at 356 (postulating that such delays in arriving at a consensus for a second international Prosecutor surely would be pronounced and would delay further the ICTR's work).

87. *See* Bakuramutsa, *supra* note 85, at 649 (stating that the main objectives of the Tribunal were to teach the Rwandans to fight against impunity as well as to promote national reconciliation, thus concluding that the seat of the international Tribunal should be set in Rwanda).

88. *See* ICTR Statute, *supra* note 83, art. 8 (giving the ICTR primacy over domestic courts in Rwanda).

89. Harhoff, *supra* note 66, at 573.

90. *See* Morris, *supra* note 79, at 356-57 (quoting the former Rwandan Ambassador to the UN, Manzi Bakuramutsa, as stating that such disparate treatment for the leaders of the genocide "is not conducive to national reconciliation in Rwanda."); *see also* William A. Schabas, *Justice, Democracy, and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems*, 7 CRIM. L.F. 523, 553 (1996) (emphasizing that the exclusion of the death penalty is a particularly contentious point for Rwanda).

91. *See generally* Morris, *supra* note 79, at 356 (addressing the inequity that may result from the Tribunal's exclusion of the death penalty and the Rwandan court's inclusion of capital punishment).

“lesser” defendants susceptible to a harsher penalty than those most responsible for the Rwandan massacre.<sup>92</sup>

Finally, Rwanda took exception to the restricted temporal jurisdiction given to the ICTR.<sup>93</sup> Unlike the ICTY Statute, which seemingly provides an open-ended time frame for jurisdiction,<sup>94</sup> the Arusha Tribunal’s mandate is limited to war crimes and atrocities committed between January 1, 1994 and December 31, 1994. This one-year period is inadequate to embrace the intricate events involved in planning, inciting, and eventually implementing a genocidal campaign<sup>95</sup> that surpassed Hitler’s campaign in terms of speed and efficiency.<sup>96</sup> Accordingly, Rwanda objected to the one-year man-

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92. See Morris, *supra* note 79, at 356 (acknowledging the discrepancy that may arise when those who merely played a role in the genocide are tried and sentenced to death in Rwandan courts while the masterminds of the genocide are tried before the Tribunal, thus escaping capital punishment); see also Bakuramutsa, *supra* note 85, at 648-49 (discussing the foreseeability of the fact that the leaders of the genocide will be tried before the Tribunal and escape capital punishment while those who carried out the plan will be subjected to execution); Schabas, *supra* note 90, at 553 (commenting that the Rwandans criticize the exclusion of the death penalty claiming that severe injustice will result when the masterminds of the genocide escape the death penalty).

93. See Bakuramutsa, *supra* note 85, at 645-46 (stating that the Rwandan government desired a jurisdictional mandate beginning on Oct. 1, 1990 and extending through July 17, 1994).

94. See ICTY Statute, *supra* note 61, art. 1 (setting forth the jurisdiction of the Tribunal). The ICTY Statute provides that “[t]he International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the Former Yugoslavia since 1991 in accordance with the provisions of the present Statute.” *Id.* Thus, while the ICTY Statute provides a starting point of 1991 for jurisdictional purposes, there is no express deadline for termination of the Tribunal’s jurisdiction. See *id.* (lacking a date for cession of jurisdiction). Arguably, the events occurring through 1999 are no longer vulnerable to prosecution under the ICTY Statute.

95. See Morris, *supra* note 79, at 350-51 (describing the history of the Rwandan conflict, particularly highlighting the planning stages that may have begun as early as 1991).

96. See Akhavan, *supra* note 74, at 328-29 (discussing the strong planning and organization that was present in Rwanda). It is estimated that Rwanda lost nearly one million citizens in a mere three months. See *id.* at 328 (noting further that the pre-genocide population of Rwanda was approximately seven and one half million). The Rwandan representative to the UN Security Council suggested that the genocide is comparable to a loss of over 37 million Americans in less than three months. See *id.* at 328-39. “In its own gruesome way, such efficiency is an impres-

date as compromising the true character of the Rwandan genocide and placing an artificial limitation on the crimes committed.<sup>97</sup> While Rwanda will likely prosecute persons domestically for activities preceding the ICTR jurisdictional period, the UN elected not to impose criminal liability on persons whose actions predating January 1, 1994, ultimately culminated in genocidal acts.<sup>98</sup>

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sive feat of organization, especially in a developing country. Accordingly, the Rwandan genocide cannot simply be dismissed as an unforeseeable and spontaneous outburst of primordial bloodlust." *Id.*; see also LAWYERS' COMMITTEE, *supra* note 85 (arguing that the genocide in Rwanda may be the swiftest genocide in history); PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* (1998) (setting forth a riveting account of the genocide). Mr. Gourevitch writes:

Decimation means the killing of every tenth person in a population, and in the spring and early summer of 1994 a program of massacres decimated the Republic of Rwanda. Although the killing was low tech—performed largely by machete—it was carried out at a dazzling speed: of an original population of about seven and a half million, at least eight hundred thousand people were killed in just a hundred days. Rwandans often speak of a million deaths, and they may be right. The dead of Rwanda accumulated at nearly three times the rate of Jewish dead during the Holocaust. It was the most efficient mass killing since the atomic bombings of Hiroshima and Nagasaki.

*Id.*

97. See Morris, *supra* note 79, at 354 (discussing the importance of understanding not only the temporal jurisdiction, but also, the subject-matter jurisdiction in evaluating Rwanda's objection to the one-year mandate). Furthermore,

[w]hile the ICTR was to have jurisdiction over actual killings, rapes, and other acts constituting genocide, war crimes, and crimes against humanity only if those acts were committed in 1994, it is likely that under the terms of the ICTR Statute, the planning, preparation, or aiding and abetting of those 1994 acts also can form the basis for criminal liability through complicity, even if that preparation occurred prior to 1994. Final determination of whether that form of accomplice liability will be recognized by the ICTR as coming within its temporal jurisdiction must await a judicial ruling. If the aiding and abetting prior to 1994 of crimes that were completed in 1994 is determined to come within the temporal jurisdiction of the ICTR, then not quite as much was lost by the limitation on the ICTR's temporal jurisdiction as one might first have imagined. Nevertheless, even if that liberal interpretation of accomplice liability is adopted by the ICTR, there are certain crimes that the Statute's temporal limitations will indeed exclude.

*Id.*

98. See *id.* at 353-54 (noting that the Former Rwandan Ambassador to the UN argued that the one-year jurisdictional limitation would prevent the ICTR from

The inherent shortcomings in the ICTR Statute, ironically, are proving less debilitating than those difficulties experienced by The Hague Tribunal.<sup>99</sup> Rwanda and its African neighbors have been helpful in accommodating the mission of the ICTR to restore peace in the previously war-torn country.<sup>100</sup> Still, the ICTR should not be seen as a panacea for the chaos that remains prevalent in Rwanda. The war was, perhaps, only a symptom of a much larger problem. Now, as Rwanda attempts to deal domestically with its more than 90,000 inmates awaiting trial on charges of genocide and related war crimes,<sup>101</sup>

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fully capturing those atrocities that culminated in the genocide, observing that "[t]hose activities . . . began with planning and sporadic massacres . . . dating back to 1990.").

99. The most clear distinction between the ICTR and ICTY is that the genocide in Rwanda finally ended, creating a sufficient break to enable the detention of numerous individuals. The high-ranking officials who feared domestic prosecution fled to neighboring countries. Nevertheless, the ICTR managed to secure some of the leaders and architects of the genocide. In stark contrast, the ICTY has been unable to secure a fair proportion of high-ranking officials who remain indicted but at large. The inability of the international community to assist in arresting or detaining these suspects easily is attributed to the fact that the fighting in the Former Yugoslavia has ended only recently. Unlike the World War II institutions, the ICTY is attempting to bring justice to a region just beginning to recover from war and violence. The deterrent effect of this institution clearly has not been realized.

100. See ICTR/INFO-9-2-162 (visited Aug. 23, 1999) <<http://www.un.org/Docs/sc.htm>> (indicating that Eliezer Niyitegeka, former Minister of Information during the Interim Government, was arrested by Kenyan law enforcement officials); see also ICTR/INFO-9-2-167 (visited Aug. 23, 1999) <<http://www.un.org/Docs/sc.htm>> (noting the arrest in Nairobi of Dr. Casimir Bizimungu, former Minister of Foreign Affairs and Minister of Health in Rwanda); ICTR/INFO-9-2-176 (visited Aug. 23, 1999) <<http://www.un.org/Docs/sc.htm>> (describing the arrest of three ICTR defendants in Cameroon—Jerome Bicomumpaka, former Minister of Foreign Affairs, Prosper Mugiraneza, former Minister Responsible for Civil Service, and, Justin Mugenzi, former Minister of Commerce).

101. See Morris, *supra* note 79, at 357 (discussing the difficulties in attempting to obtain an accurate estimate of the number of individuals currently held domestically by Rwandan authorities). Professor Morris observed that Rwanda must now face "the enormous problem of how to handle the other 90,000-plus criminal cases arising from the Rwandan genocide." *Id.* Professor Morris further noted the unfeasibility of full trials for the multitude of defendants, who constitute more than one percent of the national population, since such a feat would be infeasible even for nations possessing great wealth. See *id.* at 361 (recognizing, at the same time, the opposite extreme of releasing the prisoners under a grant of amnesty, which is an unacceptable solution to the survivors and constitutes a security risk for the country); see also Akhavan, *supra* note 74, at 339 (stating that because of limited resources, it is futile to think that the Tribunal is able to replace the role of the

the international community must send a signal that it will not disappoint the Rwandans a second time. While we failed to intervene during the catastrophe and assist when assistance could have stalled, or even prevented the genocide, we are at a point where international justice can finally contribute to healing in Rwanda.<sup>102</sup> To be effective, however, the international community must demonstrate a commitment—in actions and not words alone<sup>103</sup>—to the rule of law that lies dormant today in Rwanda.<sup>104</sup>

#### D. ESTABLISHING AN INTERNATIONAL CRIMINAL COURT

Until we are certain that international crimes will be prosecuted and punished, justice will not be done . . . [T]his affects us not only because of our values, but also because of the amount of attention and resources that the international community must devote to these man-made tragedies.<sup>105</sup>

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Rwandan domestic courts in proceeding with fair trials for the approximately 85,000 people presently detained).

102. See Akhavan, *supra* note 74, at 332 (asserting that the genocide of 1994 was not a surprise for the international community). Moreover,

[i]t was the culmination of many years of cynical indifference and willful blindness to the plight of the Rwandan people. . . . It is apparent that *ex post facto* punishment of genocide is no substitute for effective preventative action. The establishment of the Rwanda Tribunal cannot undo the damage that resulted from the failure to intervene. Nor can it now bring instantaneous relief through justice and reconciliation to a society traumatized beyond imagination. If the Tribunal has brought instantaneous relief, it has been for the benefit of the spectators whose conscience has been eased, and whose credentials as 'civilized nations' have been reaffirmed. In the wake of such a monstrous cataclysm, the achievements of the Tribunal in the short-term can be described as modest, at best.

*Id.* at 332.

103. See Bakuramutsa, *supra* note 85, at 650 (reporting that, because the international community did not respond to the genocide, Rwanda believed that the community's sole interest in establishing the Tribunal was to ease its own conscience); see also Richard Goldstone, *Assessing the Work of the United Nations War Crimes Tribunals*, 33 STAN. J. INT'L L. 1, 5 (1997) (commenting that many view the ICTY as a vehicle for the international community to hide behind, realizing its feeble effort in aiding the people of the Former Yugoslavia).

104. See Goldstone, *supra* note 103, at 5 (contending that "[n]ational reconciliation can be achieved only if accountable justice is established and if the survivors of the genocide are assured that what has happened will never happen again.").

105. Claudio Grossman, *Conference Convocation*, 13 AM. U. INT'L L. REV. 1383, 1386 (1998).

In determining the desirability of an international court, it is not enough to complain that "justice" demands such a creation. Rather, the international community must consider the existing precedents previously discussed and analyze whether a permanent institution will rectify, or merely perpetuate, the inefficient distribution of international criminal justice.<sup>106</sup>

It is important to note that international law is not really law at all—at least not in the traditional legislative or penal sense.<sup>107</sup> Rather, international law is a symbiotic fusion of law, politics, and the competing interests of sovereignty.<sup>108</sup> From an academic perspective, international law is that which has been accepted by states as binding behavior, either due to custom or treaty, and that which is believed or considered to be binding on states as evidenced by state practice.<sup>109</sup>

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106. See McCormack, *supra* note 39, at 731 (noting that previous attempts to prosecute international crimes often fall victim to national interests and the "statist" system of international politics).

107. While this may appear to be a slightly radical statement for an international lawyer to make, the impetus behind this statement is the belief that there truly cannot be law where there is no requirement that the purported legal standards apply to each nation. For example, international legal obligations are based solely on treaty obligations, which permit certain states to "opt out" of proscribed conduct, thus states are not bound to apply standards with which they disagree. Furthermore, there are no coercive enforcement mechanisms upholding violations of law. See BLACK'S LAW DICTIONARY 795 (5th ed. 1979) (defining law as "[t]hat which must be obeyed and followed by citizens subject to sanctions or legal consequences."); see also *id.* (defining law as "... a body of rules of action or conduct prescribed by controlling authority, and having binding legal force."). But see *id.* at 733 (defining international law as "[t]he law which regulates the intercourse of nations; the law of nations."). The definition further states that international law is "[t]he customary law which determines the rights and regulates the intercourse of independent nations in peace and war." *Id.*

108. See Louis Henkin, *Conceptualizing Violence: Present and Future Developments in International Law*, 60 ALB. L. REV. 571, 577 (1997) (describing the limitations of international law). Mr. Henkin contends that international law deals with issues in politics, not issues of law. See *id.* (postulating that, although the possibility of establishing an International Criminal Court came about by political force, the same political force has the power to limit significantly the powers and authority of this body).

109. See ROHT-ARRIAZA, *supra* note 33, at 39-40 (describing the concept as one commonly referred to as *opinio juris*). However, general principles of law recognized by civilized nations likewise provide a legal source in international law. *Id.* at 46-49; see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES § 102 (1997) (describing sources of international law including

While international tribunals purport to be acting pursuant to "law," their respective activities are constrained and limited by the logistical nuances of an international community.<sup>110</sup> To have law, there must exist mechanisms capable of enforcing that law.<sup>111</sup> Otherwise, the "law" is no more than a code of civility that exists at the whim of each independent nation-state.<sup>112</sup> It is the "victor's justice" paradigm.<sup>113</sup> Law without enforcement relies on the altruistic nature of

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custom and general principles of law); Steven R. Ratner, *New Democracies, Old Atrocities: An Inquiry in International Law*, 87 GEO. L.J. 707, 726-27 (1999) (stating that the history of how states deal with addressing abuses of the past is at the core of international criminal law, which is borne from customary law or international standards). See generally FARHAD MALEKIAN, *THE MONOPOLIZATION OF INTERNATIONAL CRIMINAL LAW* 37 (1995) (observing that international criminal law is borne from customary or international standards); Anthony Clark Arend, *Do Legal Rules Matter? International Law and International Politics*, 38 VA. J. INT'L L. 107, 141-42 (1998) (discussing generally that international legal rules are socially constructed).

110. See generally Lucas W. Andrews, *Sailing Around the Flat Earth: The International Tribunal for the Former Yugoslavia*, 11 EMORY INT'L L. REV. 471, 471-511 (1997) (commenting on the continued and flagrant impunity enjoyed by the two main Serbian defendants, Ratko Mladic and Radovan Karadzic, and how their impunity clearly illustrates the role that political will plays in enforcing international criminal law). Mr. Andrews asserts that, to operate effectively, the Tribunal requires cooperation of states. See *id.* at 511. Likewise, despite repeated requests, the ICTR and UN failed to encourage a United States District Court in Texas to release the Rwandan defendant, Elizaphan Ntakirutimana, although statutorily obligated to do so. See *infra* note 149, at 410-12. The UN has not taken formal action against the United States as a result of its refusal to release this prisoner.

111. Robert O. Weiner, *Trying to Make Ends Meet: Reconciling the Law and Practice of Human Rights Amnesties*, 26 ST. MARY'S L.J. 857, 857 (1995) (maintaining that international law suffers from a credibility problem, which stems from the chasm between written law and practice and is made worse by the international attention it receives).

112. See WESLEY CRAGG, *THE PRACTICE OF PUNISHMENT: TOWARDS A THEORY OF RESTORATIVE JUSTICE* 102 (1992) (reminding that no legal system can exist when people choose the laws that they wish to obey). Furthermore, unless the people subject to the legal system generally abide by its laws, a legal system, likewise, cannot exist. See *id.* (observing basic elements required for a successful legal system).

113. Some of the strongest evidence in support of this statement is the double standard applied immediately following World War II. Although the customary international law embodied in the Geneva Conventions at the time unequivocally proscribed the massive and random destruction of civilian populations, the United States intentionally decimated two Japanese cities, Hiroshima and Nagasaki, with-

nation-states to peaceably co-exist in a world where economic scarcity and power struggles predominate.<sup>114</sup> Law without enforcement is destined to fail.<sup>115</sup>

During a meeting in Rome in the summer months of 1998, the international community comprised of various state representatives, scholars, dignitaries, and nongovernmental organizations ("NGOs"), reached agreement that a permanent international criminal court was necessary.<sup>116</sup> The representatives of the meeting memorialized this agreement in a document commonly referred to as "The Rome Statute."<sup>117</sup> Yet, even with the benefit of hindsight and the limited guidance of two existing *ad hoc* Tribunals, the international community

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out reproach. Although the conduct and actions of the United States during World War II were arguably criminal, those actions were not condemned in an international setting because the "law" that existed was applied only against the vanquished. This event illustrates the limitations of international law. Rarely in our history is international law applied against a powerful nation. The United States, more than any other single nation, has managed to evade its obligations under international law with continued success and impunity. Such immunity undermines the legal system in which the world community operates.

114. See Steven R. Ratner, *The Schizophrenias of International Criminal Law*, 33 TEX. INT'L L.J. 237, 256 (1998) (cautioning that the current system merely perpetuates the monopolization of criminal enforcement by powerful states against other states and their citizens). Mr. Ratner further argues that decisions involving international criminal justice to achieve some form of accountability primarily lies with an elite group of nation-states. See *id.* (contending that those decision-making states will rarely implicate themselves for human rights violations).

115. See generally Orentlicher, *Settling Accounts*, *supra* note 52, at 2542 (discussing the importance of enforcement). Professor Orentlicher emphasizes that, without enforcement, there is no deterrence effect from the law since there is no mechanism for creating authority of the law itself. See *id.*; see also Joel Feinberg, *The Expressive Functions of Punishment*, in A READER ON PUNISHMENT 77 (R. A. Duff & David Garland eds., 1994) (averring that breaching a statute without punishment results in the loss of character of the law); Ratner, *supra* note 114, at 256 (observing that it is futile to create laws that are not enforced since the result does not really create a law in which people will abide).

116. See Leila Sadat Wexler, *A First Look at the 1998 Rome Statute for a Permanent International Criminal Court: Jurisdiction, Definition of Crimes, Structure and Referrals to the Court*, in 3 INTERNATIONAL CRIMINAL LAW 655 (Cherif Bassiouni ed., 1998) (reporting on the development of the Rome Statute).

117. See U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Statute on the International Criminal Court, 17 July 1998, U.N. Doc. A/CONF/189/9, reprinted in 37 I.L.M. 999 (1998) [hereinafter Rome Statute] (establishing the International Criminal Court).



again ignored the fact that law cannot exist without enforcement. Much like its predecessor judicial bodies, the International Criminal Court ("ICC") envisions a world where nation-states will assist one another in the implementation and enforcement of international law.<sup>118</sup>

Under the current sovereignty-based system, this forecasted structure is premature and possibly misguided.<sup>119</sup> The ICTY and ICTR both suffer from significant limitations based on the failure to spontaneously achieve or coerce international cooperation from individual states. This failure is most evident in the impotency of the enforcement provisions at the respective Tribunals. Article 29 of the ICTY Statute requires that nation-states fully cooperate in the enforcement of arrests and sentences.<sup>120</sup> Article 28 of the ICTR Statute contains a nearly identical requirement.<sup>121</sup> This cooperation, despite its statutory mandate, has not been forthcoming. As will be addressed more fully below, neither Tribunal has been able to compel nation-

118. Leila Sadat Wexler, *The Proposed Permanent International Criminal Court: An Appraisal*, 29 CORNELL INT'L L.J. 665, 703-05 (1996) [hereinafter Sadat Wexler, *The Proposed Permanent ICC*] (setting forth the intended reliance of the International Criminal Court on nation-states for enforcement).

119. See Antonio Cassese, *On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 EUR. J. INT'L L. 2, 11 (1998) (reasoning that the hesitance of states to enforce international criminal law as set forth by international tribunals is not surprising since such enforcement encroaches on state sovereignty in the hallowed area of criminal law).

120. See ICTY Statute, *supra* note 61, art. 29 (requiring cooperation from states in the investigation and prosecution of international humanitarian law violations). Article 29 provides that:

1. States *shall cooperate* with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States *shall comply without undue delay* with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
  - (a) the identification and location of persons;
  - (b) the taking of testimony and the production of evidence;
  - (c) the service of documents;
  - (d) the arrest or detention of persons;
  - (e) the surrender or the transfer of the accused to the International Tribunal.

*Id.* (emphasis added).

121. See ICTR Statute, *supra* note 83, art. 28 (requiring virtually the same level of cooperation from nation-states as Article 29 of the ICTY Statute).

states to assist with, or cooperate in, enforcing international arrest warrants issued by the Tribunal. While the ICTR has been more successful in receiving cooperation relating to arrests,<sup>122</sup> the ICTY proceedings have been stagnated severely by an inability to secure the arrest and detention of high-profile defendants.<sup>123</sup>

Likewise, the Tribunals have been unable to obtain any significant cooperation from nation-states to assist in the enforcement of sentences.<sup>124</sup> Because the UN does not maintain any permanent prison facilities and the Tribunals merely constitute *ad hoc* bodies, the Tribunals must rely on outside states and institutions to enforce their judgments. In this regard, both the ICTY and ICTR Statutes provide that

[i]mprisonment shall be served in a State designated by the International Tribunal from a list of States, which have indicated to the Security Council their willingness to accept convicted persons. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal.<sup>125</sup>

Neither Tribunal has been successful in securing agreements to enforce the announced sentences. To date, only four states, Italy, Finland, Norway and, Sweden, have agreed to accept prisoners from the

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122. See *supra* note 100 and accompanying text (noting, with particularity, the assistance provided by Kenya and Cameroon).

123. See *id.* (reporting that, only recently, since July 1997, were several high-profile defendants arrested and transferred).

124. See Sadat Wexler, *The Proposed Permanent ICC*, *supra* note 118, at 707.

125. ICTY Statute, *supra* note 61, art. 27. The ICTR Statute provides one important distinction. Unlike the ICTY Statute, which seemingly precludes imprisonment within the Former Yugoslavia, the ICTR Statute provides in pertinent part that “[i]mprisonment shall be served in Rwanda or any of the States on a list of States which have indicated to the Security Council their willingness to accept convicted persons, as designated by the International Tribunal for Rwanda.” ICTR Statute, *supra* note 83, art. 26 (emphasis added). However, as Rwandan prisons are currently incapable of handling the overflow of domestic suspects, it is unlikely that the ICTR will return any convicted individuals to Rwanda for imprisonment. Even if space in the domestic prisons was available, there is no indication that Rwanda meets the minimal UN standards for prisoners. This additional shortcoming likely will dissuade the Tribunal further from sending ICTR convicts back to Rwanda. As a UN body, the place of imprisonment must be suitable under UN minimum standards.

ICTY.<sup>126</sup> And, only two nation-states, Mali and Benin, have indicated their willingness to accept prisoners from the Arusha Tribunal.<sup>127</sup> Yet, both Statutes unequivocally require that states comply "without undue delay" in the "arrest or detention of persons."<sup>128</sup>

If we are to realize the aspiration that international law and an ICC can effectively assist our world community in the achievement of peace and the recognition of human rights, we must honestly assess the feasibility such ICC offers. In making this assessment, it is imperative that we analyze the role that international criminal tribunals play in the furtherance of human rights. If the goal is strictly pedagogical, there is some support that international tribunals effectively establish an accurate record for posterity.<sup>129</sup> If, however, the goal is to

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126. See *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, U.N. GAOR, 52d Sess., Agenda Item 49, at VIII (1997) [hereinafter *Fourth Annual Report*] (indicating that Italy was the first state to provide agreement regarding use of its prison facilities on Feb. 6, 1997). Thereafter, on May 7, 1997, Finland signed an agreement offering use of its domestic prison facilities. See *id.* Norway became the third cooperating state when it signed an agreement to assist in the enforcement of sentences on April 24, 1998. Sweden became the fourth European nation to accept ICTY prisoners on February 18, 1999. See *ICTY Press Release: Sweden to Become Fourth State to sign an Agreement on the Enforcement of Sentences* (Feb. 18, 1999) <<http://www.un.org/icty/pressreal/p382-e.htm>>.

127. See *supra* note 100 and accompanying text (confirming that only the Mali government signed an agreement regarding the enforcement of ICTR sentences on Feb. 12, 1999, despite the numerous statements from states purportedly "willing" to accept ICTR prisoners); see also ICTR website located at <<http://www.ictor.org>>. This information can be gleaned from the ICTR fact sheet, which is updated regularly.

128. See *supra* note 120 (providing the full text to Article 29); see also ICTR Statute, *supra* note 83, art. 28 (requiring, like the ICTY Statute, that "States shall comply without undue delay with any request for assistance . . . including, but not limited to: . . . (d) The arrest or detention of persons.") (emphasis added).

129. See Goldstone, *supra* note 103, at 6 (citing indictment and arrest rates of Yugoslavian and Rwandan Tribunals, and recognizing "systematic mass rape" as a war crime); see also Howland & Calathes, *supra* note 22, at 150 (declaring that the Rwandan Tribunal contributed to overall justice by developing the world's understanding of human rights by means of the media); Landsman, *supra* note 71, at 83 (pointing out the virtues of prosecution as a means of educating people about the nature and extent of wrongdoing, and establishing a record of what truly happened); McDonald, *supra* note 66, at 44 (asserting that the Tribunal has the important duties of establishing a historical record of the occurrences in the Former

administer criminal law and bring the perpetrators of human rights atrocities to justice, we must consider the limited success that international criminal tribunals have achieved in reaching these goals.<sup>130</sup>

While the creation of an ICC is being welcomed by most of the international community, there remain skeptics.<sup>131</sup> If the forthcoming ICC fails to remedy those components of Nuremberg, Tokyo, the ICTY, and the ICTR that have plagued the pursuit of justice, the ICC will merely perpetuate these failings. It is imperative that scholars and jurists learn from the mistakes of the past and build upon existing precedent to create an effective juridical body. Successful prosecution of criminal law requires enforcement. At present, the Rome Statute does not address the issue of enforcement in any measurable fashion. The distinctions between the ICTY, ICTR, and Rome Statute relating to enforcement are minimal.<sup>132</sup> This oversight discounts a

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Yugoslavia, and ascertaining what caused the perpetration of such heinous crimes against humanity in order for the Tribunal to promote peace and security).

130. See Bassiouni, *supra* note 31, at 12-13 (advocating the need for establishing a permanent, independent, international criminal justice system to establish a record so that mistakes of the past will not recur in the future). In order to establish such a system, Professor Bassiouni asserts that politics must be put aside. See *id.* (requiring further, cooperation of the individual states to establish an independent, international criminal law regime); see also Orentlicher, *International Criminal Law*, *supra* note 5, at 711 (concluding that the international community must come together and demand justice for human rights violations to properly give meaning to the vow "Never Again").

131. See Brian T. Hildreth, *Hunting the Hunters: The United Nations Unleashes Its Latest Weapon in the Fight Against Fugitive War Crimes Suspects—Rule 61*, 6 TUL. J. INT'L & COMP. L. 499, 505 (1998) (averring that, even if a permanent international criminal court existed, state cooperation remains critical to ensure that defendants are brought before the court); see also McCormack, *supra* note 39, at 730 (stating that the ICC is not accepted fully as having "broad jurisdiction" over defendants); Sadat Wexler, *supra* note 118, at 679-80 (hypothesizing that the establishment of the ICC is opposed because of a belief that a large number of crimes would be left outside of the court's jurisdiction).

132. See Rome Statute, *supra* note 117, arts. 86-102 (setting forth cooperation requirements). Article 86 sets forth the "general obligation to cooperate" as follows: "State Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court." *Id.* art. 86. Article 93 requires similar individual measures of cooperation to those seen in Articles 29 and 28 of the ICTY and ICTR Statutes, respectively. Article 93 mandates that:

1. States Parties shall, in accordance with the provisions of this Part and under

truth that has been tested repeatedly and consistently demonstrated, namely, that left to their own desires and devices, nation-states will continue to pursue their own self-interests at the cost of enforcing international law.<sup>133</sup> As a world community, we are surely capable of more. In an attempt to offer more, I will next consider the two existing *ad hoc* tribunals in search of future guidance. The apparent lack

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procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:

- (a) The identification and whereabouts of persons or the location of items;
- (b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;
- (c) The questioning of any person being investigated or prosecuted;
- (d) The service of documents, including judicial documents;
- (e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;
- (f) The temporary transfer of persons as provided in paragraph 7;
- (g) The examination of places or sites, including the exhumation and examination of grave sites;
- (h) The execution of searches and seizures;
- (i) The provision of records and documents, including official records and documents;
- (j) The protection of victims and witnesses and the preservation of evidence;
- (k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and
- (l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.

*Id.* art. 93; *see also supra* notes 120-21 and accompanying text (discussing the provisions of Article 28 of the ICTR Statute, and Article 29 of the ICTY Statute). Most problematic, however, is the continued reliance on "willing" states to enforce the sentences of imprisonment issued by the Court. In Article 103, the Rome Statute again relies on individual states to enforce the Court's judgments. *See Rome Statute, supra* note 117, art. 103, para. 1 (declaring that "[a] sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons."). *But see id.* art. 103, para. 4 (providing, as though envisioning the dilemma currently before the two *ad hoc* Tribunals, that "[i]f no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State, in accordance with the conditions set out in the headquarters agreement referred to in article 3, paragraph 2 . . . [t]he costs arising out of the enforcement of a sentence of imprisonment shall be borne the Court.").

133. Louis René Beres, *Iraqi Crimes During and After the Gulf War: The Imperative Response of International Law*, 15 LOY. L.A. INT'L & COMP. L.J. 675, 683 (1993) (calling for prosecution of Iraqi war criminals based on the Nuremberg precedent). Such prosecutions, however, were never accomplished. *Id.*

of enforcement and arrest powers, the difficulty and disparity in sentencing issues, and the problems created by reliance on state cooperation for detention are, and continue to be, the main impediments to both institutions. The treatment—and eventual remedy—of these crucial issues likely will determine the final assessment of The Hague and Arusha Tribunals.<sup>134</sup>

## II. THE PROBLEM OF ENFORCEMENT: EXPOSING THE GREATEST WEAKNESS

Sometimes the state goes on record through its statutes, in a way that might well please a conscientious citizen in whose name it speaks, but then owing to official evasion and unreliable enforcement gives rise to doubts that the law really means what it says.<sup>135</sup>

Much can be said about the ICTY and ICTR, as much has been expected. Neither institution has provided the remedy envisaged by the Security Council or the participating states. Hence, it is not disingenuous to assert that both Tribunals have fallen far short, at least at this time, of their respective expectations. There is still ongoing war and conflict in both regions.<sup>136</sup> There is the continued commission of war crimes and crimes against humanity in both regions, as well as in many other nations.<sup>137</sup> Peace and security have not been restored to either community. And, due to budget constraints and various other logistical problems, very few convictions have been forthcoming from either body. In a very real sense, justice has not been delivered to either the Former Yugoslavia or Rwanda. We again are on the

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134. The realization that the present system has not worked well in bringing international criminals to justice should temper the increasing momentum of an international criminal institution. Without losing any of the existing enthusiasm, it is necessary to candidly assess the limitations of an international criminal system to rectify the shortcomings to ensure that the ultimate endeavor is a success.

135. Feinberg, *supra* note 115, at 79.

136. See Alan Cowell, *Its a Wonder this Alliance is Unified*, N.Y. TIMES, Apr. 25, 1999, at 5 (describing NATO's activities in the Balkan region as the first "true combat mission" NATO undertook in its 50-year existence); see also Howland & Calathes, *supra* note 22, at 151 n.60 (describing the ongoing conflict in Rwanda).

137. See, e.g. ANGOLA, *supra* note 12, at 88; CAMBODIA, *supra* note 24, at 137 (detailing the continuing war crimes violations committed in each respective region).

brink of failure.

#### A. LACK OF ARRESTS AND OUTSTANDING INDICTMENTS

It is mostly the question of enforceability that weakens the body of international criminal law.<sup>138</sup>

When the International Military Tribunal began its proceedings at Nuremberg, the hostilities had ceased and the capture of defendants was accomplished with very little incident.<sup>139</sup> The modern Tribunals, however, must contend with the fact that their access to the accused occurs at the will of each respective state providing refuge to the defendants.<sup>140</sup> Many of the perpetrators of these war crimes have fled to neighboring countries where they believed they would find a safe haven.<sup>141</sup> There is no vanquished population from which to pear down defendants.<sup>142</sup> This shortcoming has made the arrest of many ICTY

138. MALEKIAN, *supra* note 109, at 56.

139. See The Fifth Annual Ernst C. Steifel Symposium, 1945-1995: *Critical Perspectives on the Nuremberg Trials and State Accountability*, 12 N.Y.L. SCH. J. HUM. RTS. 631, 637 (1995) (reporting that the accused in the Nuremberg trial were in the custody of the Tribunal).

140. See 970507IT Transcript (visited Aug. 21, 1999) <<http://www.un.org/icty/transel/970507IT.txt>> (pointing out that the first defendant that the International Tribunal arrested and subsequently turned over to The Hague authorities by Germany was Dusko Tadic). Likewise, Zambian officials arrested Jean-Paul Akayesu, outside of Rwanda and turned him over to the ICTR. See Prosecutor v. Akayesu, ICTR-96-4-T (1998) (visited Aug. 21, 1999) <<http://www.un.org/icttr/english/judgments/akayesu.html>> (reporting the capture and arrest of a Rwandan war criminal). Similarly, Kenyan officials arrested Jean Kambanda outside of Rwanda and turned him over to the ICTR. See Prosecutor v. Kambanda, ICTR-97-23-S (1998) (visited Aug. 21, 1999) <<http://www.un.org/icttr/english/judgments/kambanda.html>> (reporting the arrest of an indicted Rwandan war criminal).

141. See ICTY, *ICTY Latest List of Detainees* (Dec. 22, 1999) <<http://www.un.org/icty/glance/list3.htm>> [hereinafter *ICTY Fact Sheet*] (indicating that, of the 33 individuals currently detained by the ICTY, only 3 were arrested by states outside the Balkan region). Likewise, of the 38 individuals in ICTR custody, 14 individuals were arrested in Kenya, 9 in Cameroon, 3 in Zambia, 2 in Belgium, 2 in Togo, 2 in Cote d'Ivoire, 2 in Benin, 1 in Switzerland, 1 in Burkina Faso, 1 in Mali, 1 in Namibia, and 1 in South Africa. See *supra* note 100 and accompanying text (providing a breakdown of the defendants currently in ICTR custody).

142. See Kenneth J. Harris & Robert Kushen, *Surrender of Fugitives to the War Crimes Tribunals for Yugoslavia and Rwanda: Squaring International Legal Obligations with the U.S. Constitution*, 7 CRIM. L.F. 561, 562 (1996) (noting that, un-

and ICTR defendants problematic. To date, public indictments issued by the ICTY, name sixty-six separate defendants.<sup>143</sup> Of those named, only thirty-three defendants are in custody at the ICTY holding facility, awaiting trial.<sup>144</sup> Similarly, the ICTR has issued twenty-eight public indictments, implicating forty-eight separate defendants.<sup>145</sup> Thirty-eight of these individuals are in ICTR custody. This dilemma is a direct result of the lack of coercive enforcement provisions within the ICTY and ICTR Statutes.

Further, neither Tribunal has a police force or prison unit to assist in the physical component of its work.<sup>146</sup> Instead, the ICTY and ICTR are forced to rely on the participation and cooperation of states and/or NATO forces<sup>147</sup> to assist them in the performance of their du-

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like in World War II where the Allies caused the defendants to surrender, the current Tribunals must rely entirely on state cooperation to arrest and surrender defendants).

143. See *ICTY Fact Sheet*, *supra* note 141 (acknowledging that there are an unknown number of private indictments that remain "under seal" at the Tribunal).

144. See *id.*, *supra* note 141 (stating that, in August 1998, Drazen Erdemovic was transferred to Norway to serve his sentence following exhaustion of appeal).

145. See INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, PRESS & PUBLIC AFFAIRS UNIT, *Fact Sheet No. 1: The Tribunal at a Glance* (July 1999) <<http://www.ictor.org/ENGLISH/factsheets/factshee.htm>> (indicating the number of indictments the ICTR handed down).

146. See Anne L. Quintal, *Rule 61: The "Voice of the Victims Screams" Out for Justice*, 36 COLUM. J. TRANSNAT'L L. 723, 734 (1998) (addressing the fact that neither Tribunal has its own prison facilities).

147. See Diane F. Orentlicher, *Swapping Amnesty for Peace and the Duty to Prosecute Human Rights Crimes*, 3 ILSA J. INT'L & COMP. L. 713, 715 (1997) [hereinafter Orentlicher, *Swapping Amnesty*] (discussing the commitment of Yugoslavian, Bosnian, and Croatian governments to cooperate with the Tribunal in the Dayton Peace Agreements). Scholars harshly criticized the work of NATO police forces given their apparent impotence in this area. See *id.* (condemning the work of NATO's IFOR forces). Professor Orentlicher insists that:

[f]or its part IFOR has made a shameful mockery of its professed policy to arrest suspects indicted by the Hague Tribunal if they are "encountered." One United States commander asserted that his troops would arrest suspects like Radovan Karadzic only if they literally stumble into an IFOR checkpoint. In fact, the record suggests that IFOR would not even arrest indicted suspects under these circumstances. . . . [T]he costs of this de facto impunity include an intangible, but potentially serious, erosion of the Hague Tribunal's authority. Just as the craven acquiescence in "ethnic cleansing" by the United Nations Protection Force (UNPROFOR) in Bosnia deeply compromised the



ties.<sup>148</sup> This limitation has proven much more serious than apparently anticipated during the drafting of the respective Tribunal Statutes. For example, the United States still refuses to turn over Elizaphan Ntakirutimana, a named ICTR defendant, despite repeated requests from the Tribunal and the UN.<sup>149</sup> No mechanism currently exists to compel compliance from the United States under the Statute's requirements.<sup>150</sup> Again, the limitations of international law are demon-

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credibility of the United Nations, a continuing failure to secure the arrest of suspects indicted by the Hague Tribunal will surely diminish its hard earned credibility and its ability to advance healing in Bosnia.

*Id.* at 716-17. Professor Orentlicher provides two further examples of the inertia of IFOR. First, she explains that the most senior Croat official, Dario Kordic, lived in a government-owned apartment in Croatia without capture. *Id.* at 715. Although Mr. Kordic eventually surrendered himself to The Hague Tribunal, he lived successfully without arrest for nearly two years. *See* Prosecutor v. Kordic, Indictment (visited Aug. 22, 1999) <<http://www.un.org/icty/indictment/english/10-11-95.htm>> (listing Mr. Kordic's indictment date). Second, Professor Orentlicher cites Ivica Rajic, an indicted ICTY alleged defendant who lived for almost a year in a hotel owned by the Croatian Defense Ministry. *See* Orentlicher, *Swapping Amnesty*, *supra* note 147. Although The Hague Tribunal indicted Mr. Rajic on August 23, 1995, he has successfully avoided capture for over four years and remains at large; *see also* Quintal, *supra* note 146, at 759 (suggesting that the Tribunals should amend their Rules to give SFOR "more power to arrest the war criminals" or require that automatic sanctions are instituted against non-compliant states).

148. *See* Jelena Pejic, *The Tribunal and the ICC: Do Precedents Matter?*, 60 ALB. L. REV. 841, 846-53 (1997) (discussing the need for tribunals to rely on states' assistance in carrying out their duties).

149. Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 411-12 (1998) (discussing complications involved in the surrender of Elizaphan Ntakirutimana).

150. Once again the international community is confronted with the concept that large and powerful nations may evade their responsibilities under international law. *See supra* notes 108-115 (discussing that the problems with enforcement of international criminal law stem from the fact that states are unwilling to give up their own sovereignty in the area of criminal law). Rule 59 of the ICTR Rules of Procedure and Evidence allows the Tribunal to demand adherence by a state, and if refused, the Tribunal may petition the Security Council to make the demand. *See* INT'L CRIM. TRIB. RWANDA, R. 59 (visited Aug. 26, 1999) <<http://www.un.org/ict/rules.html>> (allowing the Security Council to step in for assistance in enforcement at the Tribunal's request). However, because the United States is one of five permanent members of the Security Council, action taken against the United States is unlikely in this matter. The ICTR is left to wait for the United States to comply with its request and hope that compliance comes quickly. *See* LAWYERS' COMMITTEE, *supra* note 85, at IV; *see also* THEODORE MERON, WAR CRIMES

strated when political will undermines enforcement.<sup>151</sup>

The continued inertia and ambivalence demonstrated toward enforcement by the international community is inexplicable. Although the political will existed to establish a criminal tribunal for the purposes of trying individuals accused of war crimes and crimes against humanity, the political will apparently does not exist to arrest and detain such individuals to enable the Tribunals to function as designed.<sup>152</sup> It is disconcerting to imagine that an international criminal court sits idle because the international community, both individually and collectively, refuses to risk the consequences of enforcement.<sup>153</sup> Few, if any, legal systems exist where arrests are not considered a vital part of criminal enforcement.<sup>154</sup> Certainly, each UN Member State recognized the risks of enforcing criminal law when the ICTY and ICTR Statutes were adopted. Likewise, each state presumably understood that arresting suspects is an inherently risky endeavor.<sup>155</sup>

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LAWS COME OF AGE 278-80 (1998) (discussing the possible need for the Security Council to pressure states that fail to cooperate with a tribunal).

151. See Annan, *supra* note 5, at 365 (averring that the Tribunals require the arrest of all indicted persons before they can complete their task); see also Cassese, *supra* note 119, at 17 (recognizing the limitation of politics in international law, and arguing that if a state retains any important aspect of its sovereignty, thus preventing the establishment of an effective enforcement mechanism for international law, the international criminal tribunals will have a lackluster impact).

152. See MALEKIAN, *supra* note 109, at 56 (acknowledging that the enforcement issue is a controversial one in international criminal law applications and principles).

153. See Brown, *supra* note 149, at 413-14 (asserting that the Tribunal's greatest hindrance is its inability to execute arrest warrants); see also Sharp, *supra* note 39, at 450-53 (analyzing the hesitation by nations, including the United States and Bosnia, to arrest and surrender war criminals due to the political risk involved).

154. See Goldstone, *supra* note 103, at 8 ("Imagine, by analogy, the effect in [the United States] of a statement by a police chief or an attorney general to the effect that it is not worth spilling the blood of a policeman to go and arrest a mass rapist or serial murderer."); see also Neil J. Kritz, *Accountability for International Crimes and Serious Violations of Fundamental Human Rights: Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 59 LAW & CONTEMP. PROBS. 127, 130 (1996) (emphasizing the necessity of arresting war criminals to alleviate mental anguish of victims and prevent future human rights violations).

155. See Goldstone, *supra* note 103, at 8 (observing that, despite the obvious risk involved in enforcing criminal law, the United States and NATO countries remain reluctant to place their IFOR and SFOR forces at risk); see also Sharp, *su-*

To intervene against those who rape, kill, and pillage requires a stoic character and steadfast resolve. One cannot expect those offenders who violate the rights of others and act against the norms of civilized society to be sensitive to the rule of law or to cooperate with policing authorities.<sup>156</sup> The individuals targeted by the two *ad hoc* bodies rival many of the world's most renowned criminals. Our passivity regarding enforcement ensures their continued freedom.<sup>157</sup>

Perhaps most illustrative of the inadequacy of the current system, however, is that fact that the majority of indictees in ICTY custody surrendered prior to arrest.<sup>158</sup> The IFOR and SFOR forces entrusted to facilitate arrests have not yet yielded to international shame or pressure. These forces remain indignantly convinced that perilous arrests do not constitute any component of their mission.<sup>159</sup> "[IFOR] maintains that, with respect to the arrest of the indicted persons—which is IFOR's potentially most important contribution to the Tribunal's

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*pra* note 39, at 456 (describing the unwillingness of western countries to expose their soldiers to the risks associated with apprehending international criminals).

156. See *NATO Troops Kill Bosnian War Crimes Suspect*, CNN Interactive (Jan. 9, 1999), available in <<http://www.cnn.com/WORLD/europe/9901/09/bosnia.ap/index.html>> (illuminating this point well is the death of one ICTY suspect, Dragan Gagovic, who opted to try and fend off his would be captors rather than voluntarily submit to arrest).

157. See Cassese, *supra* note 119, at 10 (explaining that impunity of military or political leaders is a risk confronted when enforcement mechanisms fail). In this circuitous manner, the failure to enforce international law, as exemplified by failing to arrest indicted defendants, secures the very impunity the tribunals were created to avoid. See *id.* (reiterating that lack of enforcement results in the impunity, which works against the concept of creating tribunals).

158. See ICTY <<http://www.un.org/icty/>> (indicating that 13 individuals voluntarily surrendered to the ICTY). In contrast, international forces arrested only 11 defendants. See *id.* (pointing out that, of the 11 arrested, SFOR was responsible for ten while UNTAES was responsible for 1). The ICTR, however, struggles with similar enforcement difficulties. Recently, Ignace Bagilishema, the former Bourgmestre of Mabanza commune, surrendered to the ICTR after successfully taking refuge for a period of time in South Africa. See ICTR/INFO-9-2-165 (last modified Feb. 21, 1999) <<http://www.un.org/Docs/sc.htm>> (acknowledging that, prior to Mr. Bagilishema's surrender, arrest warrants were issued by the ICTR to Zambia, Australia, South Africa and Singapore—all to no avail).

159. See generally Paola Gaeta, *Is NATO Authorized or Obligated to Arrest Persons Indicted by the International Criminal Tribunal for the Former Yugoslavia?*, 9 EUR. J. INT'L L. 174, 175 (1998) (providing a thorough analysis of whether the IFOR and SFOR forces have the legal authority to arrest Tribunal indictees).

work—that it ‘will detain and transfer to [the Tribunal] persons indicted for war crimes . . . when it comes into contact with such persons in carrying out [its] duties.’”<sup>160</sup> Implicit in this statement is an admission or acknowledgement that IFOR will not aggressively seek out indicted war criminals. If we are unable to rely on an international force capable of providing police services to assist with arrests, who will fulfill the mandate to bring international criminals before the tribunals? As the construction of an ICC looms dimly on the horizon, this question of enforcement must be both addressed and remedied.

The ICC must first remedy their lack of enforcement powers,<sup>161</sup> particularly over nations that comprise the permanent members of the Security Council.<sup>162</sup> A judicial body cannot be effective if it is subservient to the vacillating interests of nation-states. Such subservience delimits the true and illusory adjudication powers of the court.<sup>163</sup> As I have continually stated, the lack of coercive power to bring an accused before the court emasculates the legal character of

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160. Drazen Petrovic, *The Post-Dayton Role of the International Criminal Tribunal for the Former Yugoslavia*, in POST-WAR PROTECTION OF HUMAN RIGHTS IN BOSNIA AND HERZEGOVINA 209 (Michael O’Flaherty & Gregory Gisvold eds., 1998) (citing NATO Press Release (96)26 (Feb. 14, 1996), available in <<http://www.nato.int/docu/pr/1996/>>).

161. See Pejic, *supra* note 148, at 854 (observing that “[g]iven that states have so far failed to meaningfully assist the Tribunal, despite its mandatory character and potential Security Council backing, there is an even greater possibility that they will be slack in cooperating with the ICC.”); see also MERON, *supra* note 150, at 285 (warning that international criminal tribunals require police power to distribute justice effectively and asserting that the lack of such power endangers the very effort of creating an international criminal law regime); Brown, *supra* note 149, at 409-10 (postulating that the failure to bring indicted criminals to justice will undermine the tribunal’s credibility); Sadat Wexler, *supra* note 118, at 714-15 (suggesting that the tribunal will be ineffective in deterring international crime without support from the states).

162. See MALEKIAN, *supra* note 109, at 51 (projecting that, so long as particular members of the Security Council retain their permanent seats thus controlling enforceability of international criminal law, the elements constituting an international crime will likewise remain in controversy).

163. See *id.* at 70 (arguing that the lack of prosecutions for war crimes committed during the Vietnam War aptly demonstrates the monopolistic nature of international criminal law). Though the post-Nuremberg proceedings evince that war crimes and crimes against humanity are not subject to any statute of limitations, there is a conspicuous absence of war crimes trials against American servicemen.

an international criminal body. Merely branding an individual as an "international fugitive" is adding little to the success of either Tribunal.<sup>164</sup> As the current situation indicates, international criminal law cannot depend on the acquiescence of powerful nations. Otherwise, international tribunals return to the setting of "victors' justice," which begs the question whether international criminal law is capable of equitable distribution. Without salient enforcement, international criminal law provides only the enticing mirage of justice.

## B. CONVICTIONS AND ONGOING TRIALS

[T]he principal problem with the enforcement of international humanitarian law through the prosecution and punishment of individuals is that the implementation of this method ultimately hinges on, and depends upon, the goodwill of states.<sup>165</sup>

One cannot deny the fact that progress at the Tribunals, as measured by convictions, has been limited severely. The case of Drazen Erdemovic at The Hague is the only final judgment<sup>166</sup> issued by either the ICTY or the ICTR in their more than eleven combined years of

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164. *But see* Hildreth, *supra* note 131, at 515 (noting the heightened ability of the Court to apply pressure in the capture of fugitive suspects through the assignment of "international fugitive" status); *but see also* MERON, *supra* note 150, at 283 (admonishing that "those indicted by the tribunal are now branded with a mark of Cain that serves as some measure of retribution, preventing them from traveling abroad and instilling in them the fear of arrest by an adversary or foreign government."); Peter Rosenblum, *Save the Tribunals; Salvage the Movement, A Response to Makau Mutua*, 11 TEMP. INT'L & COMP. L.J. 189, 194 (1997) (averring that since international fugitives effectively become social outcasts, there is an increased chance that they eventually may be prosecuted).

165. Cassese, *supra* note 119, at 4.

166. The Hague and Arusha Tribunals both have a limited number of convictions pending on appeal. Currently, six defendants are appealing convictions before the ICTY, while the prosecutor is appealing the sole acquittal rendered. *See* ICTY (last visited Dec. 20, 1999) <<http://www.un.org/icty/>>. A seventh defendant was recently convicted. It is uncertain at this point whether this most recent conviction and sentence against Goran Jelusic will be unchallenged on appeal. His sentence of forty years, however, is the harshest sentence to date and signifies the first break with domestic sentencing practices. *See Press Release* 454-e (Dec. 14, 1999) available at <<http://www.un.org/icty/>>. Similarly, all five defendants convicted by the ICTR are exercising their appellate rights. *See* ICTR (last visited Dec. 20, 1999) <<http://www.ictor.org/ENGLISH/factsheets/factsee.htm>>.

operation.<sup>167</sup> On March 5, 1998, the ICTY sentenced Mr. Erdemovic to five years in prison after pleading guilty to murdering between seventy and one hundred unarmed Muslims in a mass execution.<sup>168</sup> Unlike the Nuremberg proceedings that began with those most responsible for the design and implementation of Hitler's "Final Solution," the two *ad hoc* Tribunals instituted their prosecutions based on their restricted ability to arrest and detain various suspects.<sup>169</sup> In contrast to the Nuremberg, Tokyo, and the Control Council Law No. 10 proceedings where there was a clear delineation between the upper echelon defendants who were responsible for the planning, organiza-

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167. Interestingly, the case of Mr. Erdemovic has gained very little attention. Instead, most scholars and observers have focused on the trial of Dusko Tadic. *See, e.g.,* SCHARF, *supra* note 5, at 93-226 (providing a thorough review of Dusko Tadic's trial). Mr. Scharf observed that "historians are likely to rank the trial of Dusko Tadic among the most important trials of the century . . . [T]he importance of the Tadic case lies not in the status of the defendant or even the nature of his alleged crimes, but in the fact that the proceedings constituted an historic turning point for the world community." *Id.* at 214. This inattention regarding Erdemovic may be based on the fact that Erdemovic pled guilty and, thus, did not test the trial capacities of the ICTY. *See id.* at 133. The omission may also be due to the fact that Erdemovic truly is one of the smaller players in a grand scheme of ethnic cleansing. *But see id.* at 222 (observing that Tadic stood trial for the murder of 13 people and the torture of 19 more). Based on sheer numbers, Erdemovic killed six to eight times as many individuals as Tadic. *See id.* at 133 (noting Erdemovic was charged with the murders of up to 100 civilians). The failure to cite Erdemovic and his "minimal" prosecution—particularly in light of the negligible five-year sentence that was issued—certainly does not add credibility and prestige to the pursuits at The Hague.

168. *See UN War Crimes Court Hands Down First Sentence*, AGENCE FRANCE PRESS, Nov. 29, 1996, available in 1996 WL 12190835 (reporting that Erdemovic was the first international suspect to plead guilty before a trial and be sentenced by the Tribunal); *see also Balkans War Criminal Jailed*, INDEP. (LONDON), Nov. 30, 1996, available in 1996 WL 13510171 (reporting that Erdemovic is the first individual to be sentenced by an international war crimes Tribunal since the Nuremberg and Tokyo trials). The original sentence handed down by the Trial Chamber was 10 years imprisonment. Following a successful appeal and remand to a second, different Trial Chamber, Mr. Erdemovic was sentenced to serve only five years in prison. *See "Honest" Bosnian Killer Has Sentence Cut from 10 to Five Years*, AGENCE FRANCE PRESS, Mar. 5, 1998, available in 1998 WL 2235479 (reporting that Erdemovic's sentence was reduced based, in part, on his cooperation and forthrightness with the court).

169. *See* SCHARF, *supra* note 5, at 222-23 (stating that numerous critics distinguished the ICTY's first few trials from Nuremberg, where the key architects of the Holocaust were tried).

tion, and incitement of the mass-killings and the "lesser" criminals, there is no apparent, or structured, hierarchy of defendants at either Tribunal. Rather, the Tribunals must rely on the fortuity of case developments based upon sporadic arrests,<sup>170</sup> infrequent surrenders,<sup>171</sup> and subservient political factors.<sup>172</sup>

In many regards, the inaugural case of Drazen Erdemovic signifies the impotence of the *ad hoc* Tribunals. There is no denying that Mr. Erdemovic is one of the "lesser" criminals involved in the ethnic cleansing of the Former Yugoslavia. While the gravity of his acts in killing numerous unarmed Muslims cannot be overemphasized, neither can the world ignore that his conviction adds very little to the

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170. See Jose E. Alvarez, *Rush to Closure: Lessons of the Tadic Judgment*, 96 MICH. L. REV. 2031, 2079-80 (1998) (commenting on the difficulties of preventing future human rights violations due to the large number of suspected criminals and the hesitations within the international community).

171. Recently, the ICTR realized the fortuitous nature of surrenders when Omar Serushago surrendered to the Tribunal *prior* to any indictment being issued for his arrest. See *infra* text accompanying note 181.

172. See SCHARF, *supra* note 5, at 223 (referring to the Prosecutor's wish of beginning the ICTY proceedings with a higher-profile defendant, which was denied due to political considerations). When asked whether the Tadic case was a good one with which to begin, Richard Goldstone replied,

If one had a choice, clearly not. Instead one would have wanted to start with a higher profile defendant. It is highly unsatisfactory that someone at the level of Dusko Tadic should face trial and that those who incited and facilitated his conduct should escape justice and remain unaccountable. But it's really an academic question because we had no choice; Tadic was the only accused available to bring before the Tribunal at a time when the judges, the media, and the international community were clamoring for us to begin prosecutions.

See *id.* (citing Interview with Justice Richard Goldstone, Brussels, Belgium (July 20, 1996)). This statement is indicative of the political and logistical constraints confronting both Tribunals. *Id.* The international community "clamored" for the creation of *ad hoc* Tribunals at a time when the target countries, the Former Yugoslavia and Rwanda, were not ready to receive them. The impotence of the UN and the world community in forcing compliance with the Tribunals is also portrayed through such prosecutorial barriers. Recently, the new Chief Prosecutor, Louise Arbour, was denied access to Kosovo after another ethnic massacre. Ms. Arbour was accordingly unable to obtain fresh evidence from the village and crime site and was required to wait for permission to enter the crime scene. Such limitations present huge obstacles in the administration of a criminal Tribunal. Unlike Nuremberg where the Allied Forces maintained control over Germany, no one seems to have control over the situations still plaguing the Former Yugoslavia and Rwanda.

restoration of peace in the Balkan region. After Mr. Erdemovic admitted to massacring between seventy and one hundred individuals, he was sentenced to a mere five years in a Norwegian prison.<sup>173</sup> This paltry sentence underscores the difficulty in bringing war criminals to justice.<sup>174</sup>

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173. Only four states thus far agreed to accept ICTY prisoners upon final conviction and signed agreements to this effect. These states are Italy, Finland, Norway, and Sweden. *See ICTY Press Release: Sweden to Become Fourth State to Sign an Agreement on the Enforcement of Sentences* (Feb. 18, 1999) <<http://www.un.org/icty/pressreal/p382-e.htm>>. Six others states indicated their "willingness" to enforce ICTY sentences. These states include Bosnia and Herzegovina, Croatia, Denmark, Germany, the Islamic Republic of Iran, Pakistan and Sweden. *See Report on the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, U.N. ICTY, 52d Sess., Agenda Item 49, para. 152, U.N. Doc. S/1997/729 (1997) [hereinafter *ICTY Report*]. In addition to those offering support, ten other states indicated that they are unable to accept ICTY prisoners. The unavailable states are the Bahamas, Belarus, Belize, Burkina-Faso, Ecuador, France, Liechtenstein, Malaysia, Poland and Slovenia. *See id.* para. 155.

174. The ICTY Trial Chambers consistently made contradictory statements regarding sentencing. The Trial Chamber, responsible for sentencing Erdemovic following appeal, noted that the "degree of suffering to which the victims of the massacre were subjected before and during the killings," particularly "[t]he atmosphere of terror and violence" that pervaded these events. *Prosecutor v. Erdemovic, Sentencing Judgement*, IT-96-22, para. 20, \_\_I.L.R.\_\_ (Int'l Crim. Trib. for Yugo. 1998) <<http://www.un.org/icty>>. The Trial Chamber continued that

[f]or the victims who arrived after the first set of killings, there was the certain knowledge of death, as they will have seen the bodies of those already murdered and heard the gunshots fired by the accused and his fellow executioners. The degree of suffering of these people cannot be overlooked.

*Id.* Yet, in pronouncing the lenient sentence of five years of imprisonment, the Trial Chamber focused on Mr. Erdemovic's hesitance to partake in the killings and his reaction to having carried out such heinous tasks. *See id.* ("It is clear that he took no perverse pleasure from what he did."). Likewise, the rhetoric contained in the Furundzija Judgement suggests a strange dichotomy between outrage and reticence. The Furundzija Trial Chamber stated, in relation to the allegations of torture, that "[t]orture is one of the most serious offenses know to international criminal law and any sentence imposed must take this into account." *Prosecutor v. Furundzija*, IT-95-17/1, para. 281, \_\_I.L.R.\_\_ (Int'l Crim. Trib. for Yugo. 1998) <<http://www.un.org/icty>>. The Trial Chamber further noted that Mr. Furundzija played a prominent role in the commission of many particularly gruesome rapes. *See id.* paras. 282-283 (finding that the rapes in this case were vicious and included torture of the victims). "Apart from the factors mentioned above, the Trial Chamber bears in mind the severe physical pain and great emotional trauma that [the



Six of these sentences and the sole acquittal achieved at The Hague are currently on appeal. Thus, in nearly six full years of operation,<sup>175</sup> the ICTY has completed only six trials involving nine separate defendants, including Mr. Erdemovic's guilty plea. This pace is counterproductive to accountability goals, which often focus on the swiftness and certainty of punishment.<sup>176</sup>

The situation in Arusha is equally challenged by indolence. During its first two years of existence, the ICTR was publicly admonished by the UN for its administrative failings and inability to conduct business.<sup>177</sup> Once the ICTR rectified its situation, there was renewed

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victim] has had to suffer as a consequence of these depraved acts committed against her." *Id.* para. 287. Despite the potency of this language, the Trial Chamber sentenced Mr. Furundzija to ten years of imprisonment for the acts of torture and eight years of imprisonment for the outrages upon personal dignity, including rape. *Id.* at pt. IX. Further contrary to the strong language condemning the attack and the reflection upon the mandate of the ICTY to contribute to reconciliation, deterrence, and the combat of impunity, the Tribunal opted that the sentences be served concurrently. *Id.* Although there is no requirement that sentences be served either consecutively or concurrently, the ICTY ruled, in each of the sentences pronounced to date, that the sentences be served concurrently. This determination undoubtedly is due to the domestic sentencing practices of the Former Yugoslavia, which require concurrent sentences. *Id.* para. 293.

175. See SCHARF, *supra* note 5, at 63-66 (indicating that six months expired before the Judges were empanelled in November, 1993). Thereafter, the Judges were faced with the onerous task of creating rules of procedure and evidence controlling Tribunal proceedings, an endeavor that spanned an additional two months. *Id.* at 66-73. To exacerbate matters, the selection of an acceptable Prosecutor took even longer. For various political reasons, Richard Goldstone was not selected to begin the Tribunal's prosecutorial work until July 7, 1994. *Id.* at 75-79. Without judges or a Prosecutor to issue indictments, the Tribunal was unable to perform any criminal justice functions prior to late 1994. *Id.*

176. See Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, in 1 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 65 (Neil J. Kritz ed., 1995) (comparing the success of the Greek transition period from military to democratic regimes and subsequent trials with the Argentinean experience). Professor Huntington noted that the important distinction between Greece and Argentina was that Karamanlis, of Greece, moved quickly with prosecutions when he had a high amount of public support while Alfonsín, of Argentina, moved more slowly, thereby permitting "public outrage and support for prosecution [to give] way to indifference. . . ." *Id.* at 74-75.

177. See LAWYERS' COMMITTEE, *supra* note 85, at pt. VI (describing the serious management and administrative problems hindering early success at the ICTR). This report confirms that the UN Office of Internal Oversight Services issued a

hope regarding possible contributions to peace and healing in Rwanda.<sup>178</sup> To date, however, the ICTR has handed down only five sentences, all of which remain pending on appeal. The first sentence was issued in *Prosecutor v. Akayesu*<sup>179</sup> on September 2, 1998, more than four full years after the creation of the Tribunal. One month later, on October 2, 1998, the ICTR handed down its second sentence following a guilty plea from Jean Kambanda, the former Prime Minister of the Interim Government of Rwanda.<sup>180</sup> Three additional defendants, Omar Serushago, Clement Kayishema, and Obed Ruzindana, have been condemned by the ICTR for their respective roles in the Rwandan genocide.<sup>181</sup>

Contrary to the more lenient sentences imposed at the ICTY, three of the first five convictions rendered at the ICTR have resulted in life sentences for the respective defendants.<sup>182</sup> The two remaining sentences, however, are more consistent with those administered at The Hague and demonstrate the commitment of the ICTR to consider the ends of justice and individual situations in declaring sentences.

Despite these sparse and intermittent convictions, neither institution really has established itself as a body capable of rendering justice while simultaneously securing peace and reconciliation in war-

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scathing report detailing gross mismanagement at the ICTR on Feb. 12, 1997. *Id.* As a result of the UN Report, the UN Secretary-General asked for and received the resignation of both the ICTR registrar and deputy prosecutor. *Id.*

178. *See id.*

179. Sentencing Judgment, ICTR-96-4-T, \_\_\_I.L.R.\_\_\_\_ (Int'l Crim. Trib. for Rwanda 1998) <<http://www.ictr.org>>.

180. Sentencing Judgment, ICTR-97-23-S, \_\_\_I.L.R.\_\_\_\_ (Int'l Crim. Trib. for Rwanda 1998) <<http://www.ictr.org>>.

181. Sentencing Judgment, ICTR 98-39-S, para. 1, \_\_\_I.L.R.\_\_\_\_ (Int'l Crim. Trib. for Rwanda 1999) <<http://www.ictr.org>>. An interesting side-note to the prosecution/conviction of Mr. Serushago is that he surrendered to the Tribunal. Thus, the ICTR did not have to wait for his arrest to begin proceedings. In fact, Mr. Serushago was not even indicted prior to his voluntary surrender. *See Prosecutor v. Serushago*, para. 34. His actions most likely exemplify the concerns that Rwandan officials had—defendants will prefer the option of a prison sentence as opposed to death penalty exposure. *See supra* text accompanying notes 90-92. For information regarding the two remaining defendants *see generally* <<http://www.ictr.org>> (last visited Dec. 20, 1999)

182. *See infra* text accompanying notes 206-210. Jean-Paul Akayesu, Jean Kambunda, and Clement Kayishema have each received life sentences. *See* <<http://www.ictr.org>> (last visited Dec. 20, 1999).

torn countries. The laborious nature of the proceedings and the thorough attempt to create fair rules of procedure and evidence have crippled the Tribunals. The Nuremberg proceedings took one year to complete from start to finish.<sup>183</sup> Similarly, the Tokyo trials lasted only two and one half years and resulted in determinations of guilt for each of the indicted individuals.<sup>184</sup> Thus, the justice delivered at Nuremberg and Tokyo was swift, sure and expedient. The World War II Tribunals marked a conclusion to the war, but did not unnecessarily belabor the process so as to cause the interest in their endeavors to wane.

In recognition of the logistical problems faced by both the ICTY and ICTR, the Security Council recently amended the Tribunal Statutes to incorporate a third Trial Chamber at both The Hague and Arusha. Despite the obvious deficiencies encountered at both venues, the Security Council reiterated its conviction that "the prosecution of persons responsible for serious violations of international humanitarian law will contribute to the process of national reconciliation and to the restoration and maintenance of peace in Rwanda"<sup>185</sup> and Yugoslavia.<sup>186</sup> This steadfast commitment is necessary if these bodies are to lay a solid foundation for the ICC and contribute any discernable precedent to international criminal law.

It seems unfair at this point to evaluate the Tribunals based solely

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183. See SCHARF, *supra* note 5, at 10 (noting that the Nuremberg trial of 22 German officials lasted 284 days).

184. See ASKIN, *supra* note 35, at 167-70 (observing that all of the Tokyo Trial defendants were adjudged of at least one charge). This figure regarding conviction ratio deals only with the "A" category defendants, which are defendants charged with crimes against peace. See *id.* at nn.558, 559.

185. See S.C. Res. 1165, U.N. SCOR, 53d Sess., U.N. Doc S/RES/1165 (1998) (indicating that Resolution 1165 was adopted by the Security Council at its 3877th meeting on April 30, 1998).

186. See S.C. Res. 1166, U.N. SCOR, 53d Sess., U.N. Doc S/RES/1166 (1998) (indicating that Resolution 1166 was adopted by the Security Council at its 3878th meeting on May 13, 1998). The language contained in Resolution 1166 mirrors that set forth in Resolution 1165 regarding Rwanda. The Security Council stated as follows: "Remaining convinced that the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia contributes to the restoration and maintenance of peace in the former Yugoslavia, . . . Decides to establish a Third Chamber of the International Tribunal." *Id.*

on their tangible work product. Unlike their predecessor at Nuremberg, both the ICTY and ICTR must struggle to achieve justice in distant locations where access to witnesses, evidence, and defendants is limited. The lack of convictions and ongoing trial progress may not be as relevant as the decisions that *have been* rendered. Accordingly, Part IV of this Article is devoted to analyzing the judgments and sentences issued by the respective Tribunals.

### III. SENTENCING AND DETENTION: THE NEED FOR UNIFORMITY

It is much easier to show that punishment has a symbolic significance than to state exactly what it is that punishment expresses.<sup>187</sup>

Following the Nuremberg judgments, eleven men were condemned to death by hanging.<sup>188</sup> In this ironic manner—through the imposition of the death penalty—the international community confirmed that killing was wrong. Surprisingly, the defendants' main objection to their sentences was not that they resulted in death.<sup>189</sup> Rather, the Nuremberg defendants opposed imposition of a penalty, death by hanging, which was reserved for common criminals.<sup>190</sup> In

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187. Feinberg, *supra* note 115, at 76.

188. See TAYLOR, *supra* note 37, at 598-99. A twelfth defendant, Martin Bormann, was tried *in absentia*, found guilty and likewise sentenced to death. See MICHAEL R. MARRUS, THE NUREMBERG WAR CRIMES TRIAL 1945-1946: A DOCUMENT HISTORY 261 (1997). But, as Mr. Bormann was never captured by the Tribunal, he avoided the fate suffered by his compatriots. *Id.* In all, 19 men were convicted at Nuremberg. See ROBERT E. CONOT, JUSTICE AT NUREMBERG 497-507 (1983) (noting that three defendants were acquitted of all charges and eventually released). The Tokyo defendants fared no better. Of the 25 men convicted by the Tokyo Tribunal, seven received the death penalty. See MINEAR, *supra* note 67, at 31 (suggesting that the Tokyo indictment was more Draconian than the Nuremberg judgment).

189. From a strictly logical perspective, the imposition of a penalty of death to illustrate that death (through killing) is wrong is indefensible and absurd. The morality of killing is no more justifiable in punishment than in the proscribed commission of a crime. Nonetheless, this argument did not arise at Nuremberg.

190. See TAYLOR, *supra* note 37, at 601-02 (observing on appeal that the defendants attempted to commute the sentences to life imprisonment or the method of execution). Ironically, the main complaint by defendants focused on the use of

fact, one of the defendants so opposed the method of execution that he opted for suicide rather than submit to the gallows.<sup>191</sup>

Much has changed in the world since the days of Nuremberg. Of particular significance from a human rights perspective is the growing concern regarding impunity.<sup>192</sup> In paradoxical fashion, the human rights community increasingly is supporting the need for punishment.<sup>193</sup> While once this field was dominated by a concern for the rights and the treatment of prisoners,<sup>194</sup> human rights lawyers rapidly

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hanging as the instrumentality of death. *See id.* (pointing out that the Nuremberg defendants challenged their death-by-hanging sentence on the rationale that a soldier was entitled to the more honorable death by firing squad). This delineation between an "honorable death" by firing squad and the less favored method of hanging did not go unnoticed by the Nuremberg judges. *See PERSICO, supra* note 26, at 385 (observing that Judge Henri Donnedieu de Vabres considered utilizing the firing squad for each of the military defendants adjudged guilty, and noting that Russian Judge Nikitchenko objected to use of firing squads precisely because "[t]he bullet was the fate of honorable adversaries, not of butchers.").

191. *See CONOT, supra* note 188, at 504 (describing the successful suicide attempt by famed defendant, Hermann Goering, who managed to keep hidden within his cell a single cyanide capsule in case he was convicted). In fact, Mr. Goering purportedly left a suicide note voicing his objection to the method of death. *See PERSICO, supra* note 26, at 418 (reflecting on Goering's conviction that he should die an honorable death). Goering's letter reads as follows:

To the Allied Control Council:

I would have had no objection to being shot. However, I will not facilitate execution of Germany's *Reichsmarschall* by hanging! For the sake of Germany, I cannot permit this. Moreover, I feel no moral obligation to submit to my enemies' punishment. For this reason, I have chosen to die like the great Hannibal.

*Id.*

192. *See Neier, supra* note 48, at 172 (observing a progression by democratic governments in transition for demanding accountability for past repression).

193. *See id.* (describing efforts by nations undergoing transitions to democracy on dealing with past repression and abuses and demanding accountability); *see also* Human Rights Watch, *Policy Statement on Accountability for Past Abuses*, in 1 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 217 (Neil J. Kritz ed., 1995) (advocating for "criminal prosecutions and punishment for those who have the highest degree of responsibility for the most severe abuses of human rights" while recognizing that "accountability may be achieved by public disclosure and condemnation in cases of lesser responsibility and/or less severe abuses.").

194. The most notable change in position may well be that expressed by Amnesty International, which took a position *against* amnesties. *See* Amnesty Interna-

are becoming the instigators in the international community's desire to punish.<sup>195</sup> The ambivalent lack of action demonstrated throughout the 1960s, 1970s and 1980s culminated in a culture of punishment. Amnesties are considered inadequate as victims and humanitarians contend that impunity must not prevail.<sup>196</sup> Punishment, via criminal prosecutions, is perceived as the most favored method of combating impunity.<sup>197</sup> Thus enters the ICC.

As human rights lawyers, however, we must not lose sight of our moral compass in our zeal to further protect human rights.<sup>198</sup> For even those least deserving of our sympathy or justice will ultimately hold *us* accountable for the methodology we employ against *them*. We cannot ourselves avoid the very moral mandates *we* profess. If the achievement and advancement of human rights remains the goal, human rights lawyers somehow must maintain a just disposition toward those who come before the heralded criminal process. The ICC must deliver justice, not only for the victims, but also for the victimizers. Only through the consistent application of human rights norms will the international community ensure that humanitarian principles succeed and, eventually, triumph.

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tional, *Policy Statement on Impunity*, in 1 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 219 (Neil J. Kritz ed., 1995) ("[T]hose responsible for human rights violations must be brought to justice whether they are officials of a past or current government and regardless of whether they are members of the security forces or unofficial paramilitary groups. Alleged perpetrators should be brought to trial and such trials should conclude with a clear verdict of guilt or innocence.").

195. See William A. Schabas, *Sentencing By International Tribunals: A Human Rights Approach*, 7 DUKE J. COMP. & INT'L L. 461, 501 (1997) (warning that a human rights approach to punishment must avoid the growing tendency toward retributive justice).

196. See Elie Wiesel, in NUREMBERG FORTY YEARS LATER: THE STRUGGLE AGAINST INJUSTICE IN OUR TIME 11, 15, 20 (Irwin Colter ed., 1995) ("Neutrality is wrong. When human beings are in danger, when human dignity is at stake, neutrality is a sin, not a virtue. For neutrality never helps the victim, it only helps the victimizer, it never assists the tormented, it only encourages the tormentor.").

197. See *id.* at 20 (reflecting on the feeling that justice was served by allowing witnesses to testify about their memories of Nuremberg).

198. Benjamin Franklin once cautioned that "necessity makes a bad bargain."

## A. SENTENCING TIED TO DOMESTIC SENTENCING PRACTICES

The creation of an international criminal court is a unique opportunity to advance justice, prevent future acts of cruelty, and promote peace. The establishment of fair and consistent international criminal sentencing guidelines will be a significant contribution to these worthy goals.<sup>199</sup>

One of the main distinctions (and moral improvements) between the ICTY, the ICTR and the World War II Tribunals is that the modern *ad hoc* Tribunals prohibit the imposition of the death penalty.<sup>200</sup> This proscription fully comports with the growing consensus that the death penalty itself constitutes a violation of human rights.<sup>201</sup> Thus, the Statutes adopted by the Security Council limit the penalties imposed by the Tribunals to imprisonment.<sup>202</sup> Both systems envisioned that their respective Tribunal "shall have recourse to the general practice regarding prison sentences in the courts of Rwanda"<sup>203</sup> or the

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199. Daniel B. Pickard, *Proposed Sentencing Guidelines for the International Criminal Court*, 20 LOY. L.A. INT'L & COMP. L.J. 123, 164 (1997) (offering one of the few published viewpoints on sentencing and international criminal law).

200. The death penalty was a regularly exercised option both at Nuremberg and Tokyo. See MINEAR, *supra* note 67, at 31-32 & n.24 (observing that seven of the original Tokyo defendants received the death penalty). Likewise, 11 defendants at Nuremberg were hung by the Allied forces as punishment for the egregious crimes they committed. See TAYLOR, *supra* note 37, at 598-99.

201. WALLACE A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* 20-21, 285-89 (1993) (recognizing the progression in international norms on limiting the use of the death penalty, such as setting higher standards on procedural requirements whereby, the death penalty may be imposed by law).

202. See ICTR Statute, *supra* note 83, art. 23 (restricting sentences by the ICTR to life imprisonment); Prosecutor v. Kambanda, Sentencing Judgment, ICTR-97-23-S, para. 10, \_\_\_I.L.R.\_\_(Int'l Crim. Trib. for Rwanda 1998) <<http://www.ictr.org>> (interpreting this limitation regarding imprisonment to likewise restrict other forms of punishment, such as penal servitude or fines); see also ICTY Statute, *supra* note 61, art. 24 (limiting sentences imposed by the ICTY to life imprisonment).

203. See ICTR Statute, *supra* note 83, art. 23 (providing, in pertinent part, that "[t]he penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chamber *shall* have recourse to the general practices regarding prison sentences in the courts of Rwanda."), quoted in Prosecutor v. Kambanda, Sentencing Judgment, ICTR 97-23-S, para. 9, \_\_\_I.L.R.\_\_(Int'l Crim. Trib. for Rwanda 1998) (emphasis added) <<http://www.ictr.org>>. Although no specific term of imprisonment is noted in ei-

Former Yugoslavia.<sup>204</sup>

These provisions, which tie sentencing practices to domestic sentencing patterns, are terribly disconcerting. How can an international criminal body attach its penalty scheme to variant domestic jurisdictions? To do so undermines the true "international" character of war crimes and crimes against humanity. Furthermore, this concession underscores the sacrifice necessary to ensure political support and the political will of international participants. The Rome Statute, fortunately, distances the ICC from sentencing procedures based primarily on domestic schemes.<sup>205</sup> The danger resulting from a do-

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ther Tribunal Statute, each of the Tribunals proscribed the outer parameter of life imprisonment in each of their respective Rules of Procedure and Evidence. See INT'L CRIM. TRIB. FOR RWANDA R. 101 <<http://www.un.org/icttr/rules.html>> (specifying that "[a] person convicted by the Tribunal may be sentenced to imprisonment for a term up to and including the remainder of his life."). Furthermore, in determining the sentence under Rule 101, the Tribunal shall take into account the customary practice of Rwanda regarding prison sentences. See *id.* (requiring the ICTR to account for Rwanda's general practices when handing down prison sentences); see also Kambanda, ICTR 97-23-S, para. 41 (interpreting the intent of Rule 101 as to act as a guide for Tribunal judges to utilize in determining the appropriate sentences).

204. See ICTY Statute, *supra* note 61, art. 24 (providing, in nearly identical fashion to the ICTR's Article 23, Article 24 of the ICTY statute, in pertinent part, requires that "[t]he penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers *shall* have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia."), *quoted in* Prosecutor v. Erdemovic, Sentencing Judgment, IT-96-22, para. 12, \_\_\_I.L.R.\_\_(Int'l Crim. Trib. for Yugo. 1998) (emphasis added) <<http://www.un.org/icty>>. Much like the ICTR, the ICTY further delineates the parameters of imprisonment in Rule 101 of its Rules of Procedure and Evidence by permitting imprisonment up to and including life. See *Rules of Procedure and Evidence*, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. Doc. IT/32 Rev. 6 (6 Oct. 1995) [hereinafter ICTY Rules] (accounting for the customary sentencing practice of the Former Yugoslavia as delineated in Rule 101(A)).

205. See Rome Statute, *supra* note 117, art. 77 (providing, in pertinent part, that a convicted individual will be subject to "[i]mprisonment for a specified number of years, which may not exceed a maximum of 30 years; or . . . [a] term of life imprisonment justified by the extreme gravity of the crime and the individual circumstance of the convicted person."). In this regard, there is less likelihood that we will witness discrepancy in sentencing between similarly situated individuals who commit similar crimes in distinct locations. Fortunately, the venue of the crime becomes less relevant for sentencing purposes under the ICC provisions.



mestic-model sentencing formula is illustrated by the limited judgments issued at the two modern Tribunals.

Although both Tribunals profess their ability to override this link, the transparency of the fixation to domestic practices is aptly demonstrated in the decisions rendered. The ICTY, in its most thorough sentencing decision to date, considered the inconsistency confronted by Rule 101(A) of the ICTY Rules of Procedure and Evidence, which permit sentences allowing life imprisonment, with the sentencing practices in the Former Social Federal Republic of Yugoslavia ("SFRY"), which prohibit any penalty in excess of twenty years for a capital offense and fifteen years for a non-capital offense.<sup>206</sup> The Trial Chamber found that the regional limitations regarding punishment did not preclude the ICTY from imposing a life sentence if warranted.<sup>207</sup> Interestingly, however, the ICTY has not yet found sufficient cause to deviate from the SFRY sentencing scheme. The ICTY has subjected each defendant to precisely the same penalty scheme that otherwise would have been encountered in the domestic setting. Not a single defendant who was ineligible for a minimum term under SFRY principles was given a sentence exceeding twenty years.<sup>208</sup> Furthermore, no defendant who was subject to a minimum term under SFRY principles was sentenced below that minimum.<sup>209</sup>

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206. See *Prosecutor v. Delalic*, Sentencing Judgment, IT-96-21-T, para. 1193, \_\_\_ I.L.R. \_\_\_ (Int'l Crim. Trib. for Yugo. 1998) <<http://www.un.org/icty>> (understanding the general practice regarding sentences in the courts of the Former Yugoslavia as a guide for the Trial Chamber in determining sentences in cases before the ICTY).

207. See *id.* paras. 1193-1196 (concluding that in each ICTY case the Tribunal consulted, the practices of the domestic courts in determining the appropriate sentences).

208. See *infra* note 210 and accompanying text (illustrating the sentences that convicted criminals received from the ICTY). But see <<http://www.un.org/icty>> for information regarding the recent conviction and sentence of Goran Jelusic. Mr. Jelusic, though acquitted on charges of genocide, received the harshest sentence to date—forty years. Because this conviction is not yet final, it remains to be seen whether the ICTY will actually veer from the domestic sentencing practices and uphold this sentence.

209. Two defendants, Dusko Tadic and Hazim Delalic, both received the SFRY maximum penalty of 20 years. See *Prosecutor v. Tadic*, 112 I.L.R. 286, 314-15 (Int'l Crim. Trib. For Yugo. 1998) (Sentencing Judgment) (holding that each of the sentences will be served concurrently); see also *Delalic*, IT-96-21-T, para. 1286 (agreeing with the *Tadic* court that the sentences would be served concurrently in-

Regardless of strong language, which indicates that the ICTY has the authority to announce any sentence, there is not yet any observable departure from the SFRY domestic model.<sup>210</sup>

Accordingly, there is an appreciable disparity between the sentences pronounced by the ICTY and those handed down at the ICTR. The longest sentences the ICTY issued occurred in the judgments against Dusko Tadic and Hazim Delalic, each of whom was sentenced to twenty years.<sup>211</sup> By comparison, the ICTR imposed life

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stead of consecutively). Tadic's sentence has recently been increased on appeal, however, to twenty-five years. It is uncertain at this point whether Tadic will challenge the increase—or be permitted to do so—on appeal. Esad Landzo received a sentence of 15 years. *See* Delalic, IT-96-21-T at para. 1285 (noting Landzo's sentence). Anto Furundzija received a sentence of ten years. *See* Prosecutor v. Furundzija, Sentencing Judgment, IT-95-17/1-T-10, sec. IX (Int'l. Crim. Trib. For Yugo. 1998) <<http://www.un.org/icty>> (noting Furundzija's sentence). *See* Delalic, IT-96-21-T, para. 1285 (noting Mucic's sentence). Finally, Drazen Erdemovic received an initial sentence of ten years, which was reduced following appeal to five years. *See* Prosecutor v. Erdemovic, Sentencing Judgment, IT96-22, paras. 6, 23, \_\_\_\_ I.L.R. \_\_\_\_ (Int'l Crim. Trib. For Yugo. 1998) <<http://www.un.org/icty>> (noting Erdemovic's sentence). The most recent judgment against Zlatko Aleksovski, issued by the Tribunal on May 7, 1999, marked the lightest sentence thus far. Mr. Aleksovski was ordered to serve two and one half years in prison for violations of the laws and customs of war. *See* ICTY Press Release, *Aleksovi Case: The Judgment of the Trial Chamber* (last modified May 7, 1999) <<http://www.un.org/icty>> (crediting Aleksovski for time served and thereby ordering his immediate release).

210. *But see supra* note 208 (considering the possibility that the forty-year sentence pronounced against Goran Jelusic may provide the first case departing from this practice). In addition to the deference afforded time-based penalties, the ICTY likewise has afforded great weight to the SFRY principles regarding concurrent versus consecutive sentencing. *See* Furundzija IT-95-17/1-T, paras. 292-96 (holding that, in cases of multiple convictions for offenses committed by several acts stemming from the same event, the sentence is limited to punishment only for the most serious offense). The Court, while proclaiming judicial independence, has yet to veer far from the SFRY policies regarding concurrent sentences. *See, e.g., id.* (demonstrating the ICTY's use of allowing convicted defendants to serve their sentences concurrently). Each of the defendants convicted of more than one offense before the ICTY received concurrent sentences—all remaining at or below the maximum penalty permissible under the SFRY domestic model. *See supra* note 209 and accompanying text (discussing the preference of the ICTY to allow those convicted by the Tribunal to serve concurrent sentences). This recalcitrance to enact stiff penalties becomes troublesome when compared with the sentencing practices utilized in Arusha. *See infra* notes 212-216 and accompanying text (analyzing the stiff penalty structure utilized by the ICTR).

211. *See supra* note 209 (reporting the sentences that Dusko Tadic and Hazim Delalic received). *But see* <<http://www.un.org>> (last visited Dec. 20, 1999) (indi-

sentences on three of the initial five defendants who were convicted.<sup>212</sup> These results similarly are based on the connection between ICTR defendants and domestic sentencing practices. Relying on Rwanda Organic Law No. 8/96,<sup>213</sup> which was adopted two years after the genocide, the ICTR categorized each of its three convicted defendants as either Category 1 or Category 2 defendants.<sup>214</sup>

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cating that the first appeal heard regarding Dusko Tadic resulted in an increase of his sentence from twenty to twenty-five years)

212. See <<http://icttr.org>> (last visited Dec. 20, 1999) (setting forth the sentences received by the ICTR defendants as follows: Jean-Paul Akayesu (life); Jean Kambanda (life); Clement Kayishema (life); Obed Ruzindana (twenty-five years); and Omar Serushago (fifteen years)).

213. See Rwandan Organic Law No. 8/96 (1996), *cited in* Prosecutor v. Kambanda, ICTR-97-23-I, para. 18, \_\_I.L.R.\_\_ (Int'l Crim. Trib. for Rwanda 1998) <<http://www.icttr.org>>. Adopted by Rwanda in 1996, the Rwandan Organic Law on the Organization of Prosecutions for Offenses constituting the Crime of Genocide or Crimes against Humanity contains four (4) distinct categories of offenders. The four (4) categories can be summarized as follows:

#### Category 1

- a) Persons whose criminal acts or those whose acts place them among planners, organizers, supervisors and leaders of the crime of genocide or a crime against humanity;
- b) Persons who acted in positions of authority at the national, prefectural, communal, sector or cell, or in a political party, the army, religious organizations, or militia and who perpetrated or fostered such crimes;
- c) Notorious murderers who by virtue of the zeal or excessive malice with which they committed atrocities, distinguished themselves in their areas of residence or where they passed; and,
- d) Persons who committed acts of sexual violence.

#### Category 2

Persons whose criminal acts or whose acts of criminal participation place them among perpetrators, conspirators or accomplices of intentional homicide or of serious assault against the person causing death.

#### Category 3

Persons whose criminal acts or whose acts of criminal participation make them guilty of other serious assaults against the person.

#### Category 4

Persons who committed offenses against property.

*See id.* (setting forth the categorical breakdown of offenders under Rwandan law).

214. See Kambanda, ICTR-97-23-I, para. 19 (finding Kambanda as a Category 1 defendant); *see also* Akayesu, ICTR-96-4-T at paras. 46-49 (characterizing Akay-

The main distinction, in Rwanda, between Category 1 and Category 2 defendants is that persons falling under Category 1, if convicted, receive a mandatory death sentence.<sup>215</sup> These defendants cannot even benefit in sentencing by pleading guilty.<sup>216</sup> Accordingly, Jean Kambanda, the Prime Minister of the Interim Government during the genocidal campaign, received a life sentence after pleading guilty to a six-count indictment, which included claims of genocide and crimes against humanity.<sup>217</sup> The ICTR showed no amount of leniency or mercy in the life sentence rendered against Kambanda, who, domestically, would have been considered a Category 1 defendant and sentenced to death. Rather, the decision closes with the discomforting admission that the ICTR noted "the general practice of sentencing by the Courts of Rwanda"<sup>218</sup> to reach its determination. This final notation was unnecessary, as the entire decision seemingly foreshadows this obvious reliance on domestic sentencing practices. One must question, however, the fate of Mr. Kambanda if he committed his acts within the territory of the Former Yugoslavia. This manifest disparity encumbers justice on the international level.

In each of the cases conducted before the ICTY and ICTR thus far, the convictions are based on crimes of systematic murder and extensive torture of numerous individuals. In each instance, the crimes

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esu's actions in accordance with acts defined in categories 1 and 2); Prosecutor v. Serushago, ICTR 98-39-DP, \_\_I.L.R.\_\_ (Int'l Crim. Trib. for Rwanda 1999) <<http://www.icttr.org>>. This institution of criminal categories *after* the genocide is disconcerting since the use of such punishments may violate the principles *nullum crimen sine lege* or *nulla poena sine lege*. Nonetheless, the ICTR has utilized the Rwanda Organic Law categories in each of the three aforementioned decisions.

215. See Kambanda, ICTR-97-23-I, para. 19 (stating that persons in Category 1 are subject to a mandatory death penalty, whereas, those convicted under Category 2 will receive the substitute penalty of life imprisonment). *But see* Schabas, *supra* note 90, at 538 (indicating that even Category 1 defendants may benefit from pleading guilty so long as their names were not included in the Official Gazette's list of first category suspects).

216. See Kambanda, ICTR 97-23-S, para. 37 (suggesting that persons classified under category 1 of the Rwanda Organic Law will not receive a reduced sentence for a guilty plea).

217. See *id.* sec. IV (pleading guilty to genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide, murder, and extermination).

218. *Id.*

were committed due to racial hatred or ethnic cleansing.<sup>219</sup> In each of these cases, the allegations were based on the most egregious transgressions known to humankind—war crimes and crimes against humanity. As one scholar explained, crimes against humanity are considered universally offensive and subject to international prosecution, particularly because they are considered universal crimes—crimes against all humankind.<sup>220</sup> Why, then, is there such distinct variation between the sentences rendered against international criminals? Why is there not some measure of uniformity or universality in sentencing? The international community must solve this dilemma regarding sentencing issues, and elucidate some standard principles before the

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219. It is plausible that the distinctions in sentencing are based on the crimes committed. While most of the defendants appearing before the ICTY are charged with and convicted of crimes against humanity, each of the five ICTR defendants have been charged with and convicted of genocide. See *supra* note 208 and accompanying text (classifying each defendant as either a category 1 or 2 defendant but ultimately convicting each defendant of genocide). While, strictly speaking, there is no hierarchy of human rights, there may be a sustainable argument for treating genocide more harshly than crimes against humanity. While crimes against humanity are unquestionably deplorable, the special intent required of genocide may provide some justification for the noted disparity. It is more likely, however, that the differentiation is tied to domestic models and is a direct result of the respective Tribunals' reliance on the sentencing practices of domestic courts. See, e.g., Kambanda, ICTR 97-23-S, paras. 14-16 (stating initially that "[t]he [Trial] Chamber holds that crimes against humanity, already punished by the Nuremberg and Tokyo Tribunals, and genocide, a concept defined later, are crimes which particularly shock the collective conscience," but later asserting that "the Chamber is of the opinion that genocide constitutes the crime of crimes, which must be taken into account when deciding the sentence."). To date, only one ICTY defendant (Goran Jelusic) has even stood trial on charges of genocide and he was acquitted of these charges. Instead, he was convicted on fifteen counts of crimes against humanity and sixteen counts of violations of the laws and customs of war. See <<http://un.org/icty>> (last visited Dec. 20, 1999).

220. See Orentlicher, *Settling Accounts*, *supra* note 52, at 2555-2557 (asserting that crimes against humanity should be punished by an international court because such crimes transcend municipal law and violators of offenses are an affront to all mankind); see also Benjamin Ferencz, *The United Nations and Human Rights Forty Years Later*, in NUREMBERG FORTY YEARS LATER: THE STRUGGLE AGAINST INJUSTICE IN OUR TIME 99, 102 (Irwin Cotler ed., 1995) ("When crimes reach such a magnitude that they offend all of humankind, they are crimes not merely against the state but against humanity. And every nation has a right to intervene and insist that those who are responsible, those who have committed these crimes and their accomplices, be held accountable in a court of law.").

ICC is given the onerous task of delivering justice to all humankind.<sup>221</sup>

## B. DISTINCTIONS IN SENTENCING

Now, if you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him. And men are not improved by their injuries.<sup>222</sup>

It is problematic to compare the sentencing schemes at the two Tribunals. Both Tribunals stem from an identical mandate to achieve national reconciliation and the restoration of peace through criminal prosecutions. Both Tribunals presumably are bound by Article 10(3) of the International Covenant on Civil and Political Rights, which mandates that "[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation."<sup>223</sup> Yet, the proffered purposes for sentencing at

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221. It seems both inconsistent and illogical to proclaim that a particular act constitutes a crime against *all humankind* but render a sentence for each violation depending on the venue where the crime was committed or, worse yet, the nationality of the victim or offender. Such fallacious reasoning results in legitimate claims of unfairness. The purpose of unifying or internationalizing a criminal justice system is to provide consistent approaches to dealing with the horrific nature of war crimes and crimes against humanity, not only in the assurance of punishment, but also in the sentences announced. Genocide should not result in a life sentence for an offense committed in Rwanda and a 20-year term of imprisonment for the same offense committed in Yugoslavia. See *supra* notes 215-218 and accompanying text. If the international community is to pay homage to the Universal Declaration of Human Rights' proclamation that "[a]ll human beings are born free and equal in dignity and rights" and the further assurance that "[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law," then a more uniform system of sentencing is necessary. *Universal Declaration of Human Rights*, G.A. Res. 217A(III), U.N. GAOR, 3d Sess. at 71, U.N. Doc. A/810 (1948). The fact that certain countries may place a higher or lower sentencing value on life should not determine the gravity of the offense. Rather, as we move toward a more global approach to criminal justice, we are in need of a more consistent approach to criminal sentencing.

222. GEORGE BERNARD SHAW, *THE CRIME OF IMPRISONMENT* 26 (1946).

223. *International Covenant on Civil and Political Rights*, G.A. Res. 2200A(XXI), U.N. GAOR, 21st Sess., Supp. No. 6, at 49, U.N. Doc. A/6316/Annex (1966). Article 10(3) suggests that the issuance of a life sentence with no possibility of parole, pardon, or commutation constitutes improper punishment. See Schabas, *supra* note 195, at 509 (characterizing life imprisonment

the ICTY and ICTR seem inconsistent and, at times, even irreconcilable.<sup>224</sup> If the world community attempts to prosecute war criminals based on principles of universality and international customary law, the resulting sentences should not be intertwined with domestic jurisprudence and should not find support in distinguishable theories of punishment. As previously set forth, any attachment to domestic practices delimits accountability based on the specific, and often fortuitous, venue where the crime was committed. This approach confirms the assertion that international law is not really law at all. This type of international law remains dependent on and tied to the nuances of each domestic jurisdiction. Such inequalities are unworkable if the international community is to establish a functioning body of international criminal jurisprudence.

In many regards, the ICTY seems to fail humanity as it proclaims minimal sentences for killers and torturers reminiscent of World War II. To the extent that the Tribunal serves as a deterrent, the nature of the penalties issued does not communicate the appropriate disgust or intolerance necessary to dissuade another Drazen Erdemovic from massacring another seventy to one hundred Muslims in a different Balkan city. The level of hate still festering in the Former Yugoslavia may encourage men and women to sacrifice five years<sup>225</sup> of their re-

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without the possibility of mitigation of the sentence as cruel, inhuman, and degrading punishment). The more restricted approach adopted by the Rome Statute, whereby sentences generally are limited to 30 years, is reflective of the growing consensus in Europe, which is that life sentences constitute improper punishment. *See id.* at 480 (contending that Yugoslavian lawmakers perceived a sentence of life imprisonment to be cruel punishment).

224. *See id.* at 476-81 (recognizing that a sentencing system tied solely to domestic penal laws and lacking in any numeric or other traditional guidelines naturally will lead to divergent sentencing approaches); *see also* Pickard, *supra* note 199, at 132 (observing that the rules and statutes of the Tribunals lack any numerical sentencing guidelines or provisions, despite efforts to define the crime within the Tribunals' jurisdiction).

225. This statement assumes that Mr. Erdemovic actually will be required to serve his full sentence. *See* ICTY Statute, *supra* note 61, art. 28 (providing for early release of all convicted individuals). In fact, the language of Article 28 of the ICTY Statute provides that "[i]f, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal accordingly." *Id.* Rule 123 of the ICTY Rules of Procedure and Evidence seemingly goes further in specifically requesting that the host State notify the Tribunal of eligibility for pardon or commutation. *See* ICTY Rules, *supra* note 204 (setting

spective lives to "settle a score." The message that the international community, via the ICTY, is communicating to war criminals cannot be overlooked. The lesson should be that *no one* is permitted to engage in ethnic cleansing, rape, genocide, torture, murder, or any other crime against humanity.<sup>226</sup> A sentence of five years does not adequately deliver this mandate.<sup>227</sup>

Yet, the other end of the spectrum causes equal concern. Recognizing that international arrests and prosecutions are uniquely onerous, the Tribunals should remain cognizant of the benefits received from defendants who plead guilty.<sup>228</sup> The leniency denoted in Erde-

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forth Rule 123, which requires a State housing an ICTY criminal to notify the Tribunal of his pardon or early release). Because Mr. Erdemovic is incarcerated in Norway, he is subject to an early release after either two-thirds of his sentence is served or, after one-half of the sentence expires if he is a first time offender. *See* Mary Margaret Penrose, *Spandau Revisited: The Question of Detention and the ICTY*, at n.51 (1999) (unpublished manuscript, on file with Notre Dame's Center for Civil and Human Rights).

226. This assurance regarding equal application of law is located in Article 7 of both the ICTY and ICTR Statutes. *See* ICTY Statute, *supra* note 61, at art. 7; *see also* ICTR Statute, *supra* note 83, art. 7 (ensuring that *anyone* responsible for human rights violations is subject to criminal liability, irrespective of official position in government). The relevant part of Article 7 ensures that "[t]he official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment." ICTY Statute, *supra* note 61, art. 7; *see also* ICTR Statute, *supra* note 83, art. 7.

227. *See* Sharp, *supra* note 39, at 413 (asserting that light sentencing is indicative of international apathy just as much as the international community's unwillingness to search aggressively for and arrest indicted violators of human rights).

228. *See* Prosecutor v. Erdemovic, Sentencing Judgement, IT-96-22, para. 21, I.L.R. (Int'l Crim. Trib. for Yugo. 1998) <<http://www.un.org/icty>> (reducing Erdemovic's sentence on appeal, partly due to his cooperation with the Tribunal as evinced by his surrender and subsequent guilty plea). The language regarding plea-bargaining is quite insightful and bears repeating in full:

It is in the interests of international criminal justice and the purposes of the International Tribunal to give appropriate weight to the cooperative attitude of the accused. He truthfully confessed to his involvement in the massacre at a time when no authority was seeking to prosecute him in connection therewith, knowing that he would most probably face prosecution as a result. Understanding of the situation of those who surrender to the jurisdiction of the International Tribunal and who confess their guilt is important for encouraging other suspects or unknown perpetrators to come forward. The International Tribunal, in addition to its mandate to investigate, prosecute and punish seri-



movic's sentence certainly illustrates this point.<sup>229</sup> The ICTY clearly was responsive to the fact that an individual's plea of guilty saves judicial resources and insulates victims from reliving horrifying experiences. The ICTR, however, did not demonstrate an adequate awareness, or acceptance, of the realities of plea-bargaining in the Jean Kambanda case. The ICTR noted that the defendant had "extended substantial co-operation and invaluable information to the Prosecutor" and that "his guilty plea has also occasioned judicial economy, saved victims the trauma and emotions of trial and enhanced the administration of justice."<sup>230</sup>

Despite this recognition, Jean Kambanda received the harshest sentence available under the ICTR Statute—life imprisonment. In fact, this sentence is identical to Mr. Kambanda's compatriots, Jean-Paul Akayesu and Clement Kayishema, who demanded and received a full trial. In advising clients, lawyers practicing before the ICTR have less motivation to encourage defendants to plead guilty if there is the possibility that the sentence will be the same as that received following a trial.<sup>231</sup> This result is counterproductive to the furtherance

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ous violations of international humanitarian law, has a duty, through its judicial functions, to contribute to the settlement of the wider issues of accountability, reconciliation and establishing the truth behind the evils perpetrated in the Former Yugoslavia. Discovering the truth is a cornerstone of the rule of law and a fundamental step on the way to reconciliation: for it is the truth that cleanses the ethnic and religious hatreds and begins the healing process. The International Tribunal must demonstrate that those who have the honesty to confess are treated fairly as part of a process underpinned by principles of justice, fair trial and *protection of the fundamental rights of the individual*. On the other hand, the International Tribunal is a vehicle through which the international community expresses its outrage at the atrocities committed in the former Yugoslavia. Upholding values of international human rights means that whilst protecting the rights of the accused, the International Tribunal must not lose sight of the tragedy of the victims and the sufferings of their families.

*Id.* (emphasis added).

229. *See id.* (reporting the leniency of Erdemovic's sentence, in spite of the fact that he executed between 70 and 100 Muslims).

230. *Prosecutor v. Kambanda*, Sentencing Judgment, ICTR-97-23-S, paras. 47, 54, \_\_I.L.R.\_\_ (Int'l Crim. Trib. for Rwanda 1998) <<http://www.ictor.org>>.

231. *See supra* note 213-15 and accompanying text (indicating that the crucial variable may be whether the accused constitutes a Category 1 or Category 2 defendant under Rwandan law).

of human rights.<sup>232</sup> If every defendant demanded a trial, the work of the ICTR could lag on for years. At present, the paucity of prosecutions and idleness of judgments undermines the original ICTR mandate to restore peace to Rwanda. The recent sentence announced at the ICTR against Omar Serushago, however, gives cause for hope. For the first time in Arusha, an individual convicted by the Tribunal received a sentence short of life.<sup>233</sup>

Still distressing, in terms of sentencing, is the recognition that these two Tribunals, provided with essentially identical mandates and faced with similarly gruesome crimes,<sup>234</sup> display markedly different approaches toward sentencing. The ICTY and ICTR maintain a shared prosecutor and a shared Appeals Chamber, yet the sentences rendered by the separate bodies are worlds apart. While the ICTY

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232. See Schabas, *supra* note 195, at 496-97 (noting the practice of plea-bargaining in common law countries, where prosecutors frequently drop or reduce some of the counts in exchange for a deal).

233. See Prosecutor v. Serushago, Sentencing Judgment, ICTR 98-39-S, para. 25, \_\_I.L.R.\_\_ (Int'l Crim. Trib. for Rwanda 1999) <<http://www.ictr.org>> (demonstrating one of the most encouraging opinions to come out of either Tribunal, because it truly merged the ICTY and ICTR Tribunals). Much like the ICTY's treatment relating to Drazen Erdemovic, the Serushago judgment reflected a recognition that plea-bargaining assists both the Tribunal, in terms of surrender and judicial economy, and the individual countries still grappling with the issue of healing and reconstruction. See Serushago, ICTR 98-39-S, para. 25. Accordingly, the sentence levied against Mr. Serushago denotes the first variation of *either Tribunal* from a strict adherence to domestic sentencing practices. If Mr. Serushago were convicted of genocide in Rwanda, he most certainly would have been subject to the death penalty. See *supra* notes 211-218 and accompanying text (comparing the different penalties for the same crime when the penalty depends on where the crime was committed and which judicial body tries the case). His surrender and subsequent prosecution by the ICTR unquestionably resulted in a more lenient sentence of 15 years. See Serushago, ICTR 98-39-S, para. 25. And, since this conviction, the ICTR has issued a second "shortened" sentence of twenty-five years against Obed Ruzindana. See *generally* <<http://www.ictr.org>> (last visited Dec. 20, 1999).

234. While the acts of killing and torture similarly are grounded in racial hatred, the true nature of the crimes is distinct. All three of the ICTR convictions included counts of genocide, whereas the ICTY convictions fell short of genocide. Instead, the majority of the convictions emanating from The Hague are grounded in crimes against humanity and war crimes. Although there is no technical hierarchy of international crimes, the desire to destroy an entire population, for example the Tutsis, rightfully provides a deeper cause for concern. Accordingly, while there is no stated or express hierarchy, it appears that an informal belief that genocide is the most grave crime is being reflected in both The Hague and Arusha.

bases its sentencing practices on such considerations as its duties to “contribut[e] to reconciliation,” deterrence, and rehabilitation in the Former Yugoslavia,<sup>235</sup> the ICTR focuses instead on its “unfettered discretion” to render justice by individualizing the sentence in each case.<sup>236</sup> Only recently, and only once, have the separate Tribunals demonstrated a shared desire to consider the personal circumstances of the defendant by taking into consideration such issues as the defendant’s voluntary surrender versus arrest, a plea of guilty versus trial, family and social background, and public expression of remorse.<sup>237</sup> While the ICTR potentially considered these variables in each of its three decisions, the absence of language indicating these considerations in the decisions preceding *Prosecutor v. Serushago* belies such conclusion.

The failure to reach a consensus on the issue of sentencing will preclude the ICC from simply adopting the Tribunals’ collective methodology. Rather than provide a single blueprint, the ICTY and ICTR currently provide competing models. The inability to agree on sentencing procedures merely impedes future tribunals and the ICC from resting on the precedents being established. This failure most likely will result in a situation analogous to the drawn out inception of the two *ad hoc* Tribunals whereby, the first several years of the

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235. See *Prosecutor v. Furundzija*, Sentencing Judgment, IT-95-17/1, paras. 287-91, \_\_I.L.R.\_\_ (Int’l Crim. Trib. For Yugo. 1998) <<http://www.un.org/icty>> (stating each of these as set forth by the ICTY in the “Sentencing Policy of the Chamber”). The Trial Chamber actually made numerous statements—without definitively arriving at a single list of “sentencing policies”—in explaining its system. See *Furundzija*, IT-95-17/1, para. 287-91 (noting initially that “[i]t is the mandate and the duty of the International Tribunal, in contributing to reconciliation, to deter such crimes and to combat impunity.”). Immediately thereafter, the Tribunal stated that it “accepts that two important functions of the punishment are retribution and deterrence.” *Id.* (indicating later, however, that “none of the above should be taken to detract from the Trial Chamber’s support for rehabilitative programmes in which the accused may participate while serving his sentence.”).

236. See *Prosecutor v. Kambanda*, Sentencing Judgment, ICTR-97-23-S, para. 25, \_\_I.L.R.\_\_ (Int’l Crim. Trib. for Rwanda 1998) <<http://www.ictor.org>> (indicating that although the Trial Chamber will look at Rwanda’s general prison sentencing practices, it will favor its own discretion to take into account the personal circumstances of each individual defendant).

237. See, e.g., *Serushago*, ICTR 98-39-S (providing an illustration of the ICTR’s accounting for the individual circumstances of the case in determining the appropriate sentence).

ICC's existence will be invested in evidentiary and procedural conundrums. In addition, this failure calls into question the nature of customary international law with respect to criminal sentencing. If no such custom or practice exists, how can the world adopt a truly "international" court? The time to change, or perhaps even merge, the existing systems still exists, but that time is quickly running out.

#### IV. THE UNRESOLVED ISSUE OF DETENTION

[T]he paradox of punishment is that a penal institution somewhat similar to that in use in our society seems from a moral point of view to be both required and unjustified.<sup>238</sup>

Neither Tribunal maintains a permanent prison facility. Rather, both the ICTY and ICTR rely on the assistance of the international community to effectuate and fulfill their respective mandates. Article 27 of the ICTY Statute provides that:

Imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal.<sup>239</sup>

Article 27 is complemented by Rule 103 of the Tribunal's Rules of Procedure and Evidence, which states that "[i]mprisonment shall be served in a State designated by the Tribunal from a list of States which have indicated their willingness to accept convicted persons."<sup>240</sup>

These provisions invariably will lead to distinctions in treatment between international prisoners depending on the host country accepting the prisoner. The ICTY Trial Chamber articulated concerns of its own regarding detention and imprisonment issues in the first sentencing case to come before the Tribunal, *Prosecutor v. Erdemo-*

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238. Alan H. Goldman, *The Paradox of Punishment*, in PUNISHMENT 30, 30 (Simmons et al. eds., 1995).

239. ICTY Statute, *supra* note 61, art. 27 (emphasis added).

240. ICTY Rules, *supra* note 204.

*vic.* The Tribunal noted that:

because persons found guilty will be obliged to serve their sentences in institutions which are often far from their places of origin, the Trial Chamber takes note of the inevitable isolation into which [such prisoners] will have been placed. Moreover, cultural and linguistic differences will distinguish them from the other detainees.<sup>241</sup>

These factors—transportation, lack of language ability, and remoteness from family members—cause concern from a human rights perspective. Transportation, in and of itself, can be seen as punitive.<sup>242</sup>

To date, however, the debate regarding enforcement of sentences has focused less on the practical details relating to conditions of confinement and more on the immediate problem relating to simply securing agreements from States to accept prisoners. Both the ICTY and ICTR lobbied for State assistance with enforcing sentences to no avail.<sup>243</sup> The Honorable Gabrielle Kirk McDonald, ICTY President, recently called for support from the international community while delivering a speech at American University in Washington, D.C.<sup>244</sup>

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241. Prosecutor v. Erdemovic, Sentencing Judgment, IT-96-22-T, \_\_I.L.R.\_\_ (Int'l Crim. Trib. for Yugo. 1996) <<http://www.un.org/icty>>, *vacated on other grounds*.

242. See Schabas, *supra* note 195, at 494 (providing the archetypal example of the Australian Prison Colony). Professor Schabas recommends that, to properly determine the appropriate sentence, a tribunal should consider the place and condition of incarceration as mitigating factors. See *id.* at 494-95 (acknowledging that Tribunal prisoners placed in facilities in countries different from their own are isolated in that their families are not nearby for visits, they likely do not speak the language, and their cultures likely are different, thereby making socialization with other prisoners or prison personnel difficult).

243. See *Fourth Annual Report*, *supra* note 126; *Third Annual Report of the ICTR* (last modified Sept. 23, 1998) <<http://www.un.org>> [hereinafter *Third Annual Report of the ICTR*]. The Secretary-General sent a letter to all member states regarding enforcement and inviting each state to acknowledge whether they were capable of assisting the ICTR in the enforcement of sentences. Only six states responded to this communication. See *Third Annual Report of the ICTR*, para. 156. Norway and Sweden indicated their willingness to assist with enforcement, whereas Ecuador, Estonia, Japan, and Liechtenstein each responded that they were unable to provide help. See *id.* Previously, Belgium, Denmark, and Switzerland each indicated their willingness to receive ICTR prisoners. See *id.* para. 154. Not a single state responding favorably, however, has signed a formal agreement enabling the transport of ICTR prisoners to these states. See *id.*

244. Judge McDonald joined many other notable international scholars and ju-

Judge McDonald explained that “the nature of the modern State and its place in the international community means that it is they [the individual states] who are expected, in fact required, to provide the structural and systematic support necessary to sustain the Tribunal.”<sup>245</sup> This expectation includes the agreement from host states to provide prison space for international criminals.<sup>246</sup>

Much like the dilemma encountered with arrests, the international community is not offering assistance with detention. Beyond the obvious concerns regarding prison space, an additional concern arises when one ponders the future of the Tribunals. Both bodies are presumptively temporary structures. Yet, provisions do not exist that oversee the enforcement of sentences being pronounced once the Tribunals are disbanded.

Issues relating to pardon, commutation, and parole are to be directed to the Tribunal President, who in consultation with the judges, is to render a decision.<sup>247</sup> This provision presupposes that these bodies—or some relic of these bodies—will be in existence at the time such pardon, commutation, and/or parole decisions become necessary. Depending on the host-state and domestic parole regulations, the length of incarceration will vary.<sup>248</sup> Prisoners receiving life sentences surely will outlive the existence of these Tribunals.<sup>249</sup> Never-

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rists at a conference entitled *War Crimes Tribunals: The Record and the Prospects*, which took place at American University's Washington College of Law from March 31-April 1, 1998.

245. The Honorable Gabrielle Kirk McDonald, *Conference on War Crimes Tribunals: The International Criminal Tribunal for the Former Yugoslavia*, 13 AM. U. INT'L L. REV. 1422, 1426 (1998).

246. *See id.* (advocating the need for states to provide space in their prisons for international convicts).

247. *See* ICTY Statute, *supra* note 61, art. 28; *see also* ICTR Statute, *supra* note 83, art. 29 (discussing the judicial process regarding parole and commutation of sentences within each Tribunal).

248. *See* Mary Margaret Penrose, *Spandau Revisited: The Question of Detention and the ICTY* (1999) (unpublished manuscript, on file with Notre Dame's Center for Civil and Human Rights) (discussing the parole provisions in Norway, Italy, and Finland).

249. *See, e.g.,* TAYLOR, *supra* note 37, at 615-18 (describing a similar situation that the International Military Tribunal faced when it abandoned the Tribunal in Germany). Rudolf Hess was the last defendant remaining in 1987 when he committed suicide at the Spandau prison facility. *See id.* (noting that Spandau was the

theless, no formal consideration has been given to this issue.

In many respects, sentencing is one of the most overlooked components of the Tribunals' work. While the international community is clamoring for arrests, indictments, and convictions, little mention is made of the sentencing and detention dilemma facing the ICTY and ICTR. No structured response has been provided regarding the inevitable issues of pardon, parole, and commutation. It is as though convictions in name will suffice, with little energy being invested in the actual mechanics of criminal sentencing.

Still, the international community speaks eagerly of an ICC and the unprecedented influence such body will have on world order. As we race forward to build yet another international criminal institution, perhaps it is prudent to consider precisely where and how we will house these international criminals. To date, there are but six choices. Could it be that the vision of effective criminal prosecutions was so distant that the actual need for prison facilities was something of an afterthought for the Tribunal architects? To have a functioning international criminal court, there must be a prison facility<sup>250</sup> or cluster of facilities<sup>251</sup> to place individuals once convicted. That simple solution, however, remains elusive. It is one more area in which the international community is failing.

## V. FUTURE OUTLOOK

I believe that even amid today's mortar bursts and whining bullets, there is still hope for a brighter tomorrow. I believe that wounded justice, lying

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sole place of detention for the Nuremberg defendants). Similarly, the Tokyo defendants all served their respective sentences contemporaneously at the Sugamo Prison facility in Tokyo. See MINEAR, *supra* note 67, at 174 (reporting that, because the sentences rendered outlasted the presence of the Far East Tribunal, the Japanese government eventually was given limited authority over the Tokyo prisoners).

250. See Nancy E. Guffey-Landers, *Establishing an International Criminal Court: Will It Do Justice?*, 20 MD. J. INT'L L. & TRADE 199, 233 (1996) (advocating a need for a prison facility specifically for international criminals).

251. An international or regional group of prison facilities might be an adequate solution. Since each of the major geographic and political areas, with the exception of Asia, maintain regional judicial systems, perhaps adopting regional prison systems provides the best possible starting place.

prostrate on the blood-flowing streets of our nations, can be lifted from this dust of shame to reign supreme among the children of men.<sup>252</sup>

It is easy at this juncture to admit or forecast failure. The two Tribunals truly have added little to the peace and world order of our international community. Indictees remain free and flaunt, with great indignation, the inability of international law to reach them. There is no police or military force, to date, which has ensured that the mandate of either Tribunal is fulfilled. As the few individual defendants who have received a trial or pleaded guilty begin to receive their sentences, a mere six states have indicated their willingness to cooperate in enforcing these sentences. Intellectual honesty demands that, at some point, there is a candid assessment of the approximately 400 million-dollar<sup>253</sup> investment required to adjudicate these sparse convictions. For the thousands of refugees who fled Kosovo, and the equally offensive number of Rwandans who remain perishing in overcrowded domestic prisons, the self-righteous veneer must be lifted to expose this futile investment.<sup>254</sup> It is important to ask how much this money could have contributed to the well being and potential security for those displaced by the two conflicts. International criminal law, as exemplified by the two *ad hoc* Tribunals, has proven itself lamentably deliberate and incapable of single-handedly restor-

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252. Martin Luther King, Jr., *1964 Nobel Prize Acceptance Speech*, in *I HAVE A DREAM* 110 (James M. Washington ed., 1992).

253. See *Third Annual Report of the ICTR*, *supra* note 243 (showing a gross budget for the Tribunal in 1997 of \$41,517,450). This same document indicates that the ICTR budget increased in 1998 to \$56,736,300. See *id.* (indicating the \$15,000,000 increase over only one year); cf. *ICTY Bulletin No. 18* (visited Aug. 23, 1999) <<http://www.un.org/icty>> (reporting the ICTY budget for 1997 as \$48,587,000). But see MERON, *supra* note 150, at 283 (contending that although the Tribunal has not yet accomplished its goals specific to Yugoslavia, it has reinforced international law, which is a feat that should be noted in a cost-benefit analysis).

254. There is no question that the "moral high-ground" continues to be occupied by those supporting the Tribunals. Yet, from a sheer economic perspective, one must challenge the approach taken to discern whether the best choice was made. While hindsight provides a great advantage over those acting in the moment, periodic reviews are necessary to ensure that advancement is made in the most effective manner, which is by utilizing knowledge obtained over the years. If history truly does repeat itself, there is an obligation to avoid those mistakes that we are capable of avoiding.



ing peace or justice to either region. The international community is again failing.

Unlike its predecessor institutions, the ICC possesses an important advantage—there is no sense of urgency. The ICC has been a vision of the international community since the time immediately following World War II.<sup>255</sup> Only with the resurgence of genocide and the reappearance of *ad hoc* criminal bodies has the vision transformed into a workable model capable of realization. Yet, much like its predecessors, the impetus of the ICC is the continued existence of war crimes and crimes against humanity, such as ethnic cleansing and genocide.

The importance of non-immediacy should not be discounted. The ICC has a luxury that both modern Tribunals were denied—the luxury of time. Accordingly, the builders of this long-awaited institution should utilize this luxury to the fullest extent and take the requisite time before its inception to ponder the future implications of internationalizing criminal law. As previously indicated, the issues of arrests, sentencing, and detention should receive particular consideration. The ICC must realize, and remain fully cognizant, of the failures and shortcomings experienced at Nuremberg, Tokyo, and more recently, in The Hague and Arusha. The ICC, as presently structured, has the continuing disadvantage of being a court in an international system with no police force, no prison system, and no true mechanism for coercing recalcitrant states to comply with its orders.<sup>256</sup> As the two modern *ad hoc* bodies have demonstrated, these omissions and inadequacies pose much more serious problems than initially envisioned. The failure to remedy the lack of enforcement powers, sentencing disparities, and detention issues likely will lead to a replication of the impotency experienced at the ICTY and ICTR.<sup>257</sup>

An international criminal court is a good start toward achieving

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255. See SCHARF, *supra* note 5, at 14 (commenting that the development of an international criminal court has been an objective since the Nuremberg trials).

256. Under the current system, it is doubtful whether the ICC could require any state to submit to its jurisdiction. The United States indicated its reluctance to sign on to a world court such as the ICC, thereby sacrificing some of its sacrosanct sovereignty.

257. See Pejic, *supra* note 148, at 860 (urging for enforcement in international criminal law).

international accountability for the gravest and most vile crimes, but one must not be shortsighted or overly eager to build a structure without substance. What good has come to the Former Yugoslavia by indicting many low-level individuals while permitting President Slobodan Milosevic, Radovan Karadzic, and Ratko Mladic to remain free? Their continued presence within Yugoslavia likely contributed to the purging of Kosovar Albanians during the spring of 1999. Their continued freedom insults those awaiting justice. Likewise, the ICTR has made little progress by convicting five individuals and having only two venues to send these individuals for service of their sentences. The international community must stand up and begin contributing to what was anticipated as a truly international endeavor. For now, state cooperation remains conspicuously absent.

Yet, the international community should not accept this negative assessment as conclusive evidence that it is bound to fail again in the future. Rather, the world should be motivated to make change—a change that is well-reasoned, well-considered, and that evinces an ability to learn from past mistakes. That change is possible. While the international community may not yet possess a solution for war and conflict, it certainly has the ability to enforce the laws of war. Politics must be placed far behind the more immediate need for world order. Law must come first and enforcement of law is a prerequisite to respect for the law. International law without enforcement will fail. It has failed.<sup>258</sup> It continues to fail.<sup>259</sup>

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258. See FERENCZ, *supra* note 47, at xix (maintaining that, although there has been progress in international law, there has been a great deal of failure, which leaves the world in a dangerous place and averring that significant further progress must be made to achieve effective enforcement of international criminal law).

259. See CONOT, *supra* note 188, at 520 (setting forth poignant comments regarding the state of international criminal law at the conclusion of Nuremberg and inspiring the United States and the world to start making progress in the area). Mr. Conot writes:

“What, basically, did Nuremberg accomplish?” Francis Biddle asked in a report to President Truman upon his return to the United States. The conclusions of Nuremberg may be ephemeral or they may be significant. That depends on whether we now take the next step. I suggest that the time has now come to set about drafting a code of international criminal law. At first, it seemed as if the United Nations might act on Biddle’s proposal. On December 11, 1946, the General Assembly affirmed without dissent the judgment of the tribunal, and decided to embody the principles in “a general codification

Whatever solution is selected, the criticisms proffered in this Article constitute a sincere attempt to better the system that exists. The world is on the brink not only of failure, but also of success. The Rome Statute and nascent ICC provide a long awaited opportunity. The rule of law finally may have a place among the sovereign nature of independent states.<sup>260</sup> There is possibly, after more than fifty years of preparation, a common understanding regarding world order. As Henry David Thoreau once said:

If one advances confidently in the direction of his dreams, and endeavors to live the life which he has imagined, he will meet with a success unexpected in common hours. . . . If you have built castles in the air, your work need not be lost; that is where they should be. Now put foundations under them.<sup>261</sup>

The ICTY and ICTR provide a formula capable of much improvement. Now put foundations under them.

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of offenses against the peace and security of mankind, or of an international criminal code." Once more, predictably, it was far easier to agree in principle than to implement the principles with a machinery of enforcement.

*Id.*

260. The recent arrest and continued detention of former Chilean President Augusto Pinochet exemplifies the debate between international law and state sovereignty. Numerous Chileans protested the arrest of General Pinochet in England despite sustainable claims that he violated numerous principles of international law.

261. *See generally* Cassese, *supra* note 119, at 4 (making a similar analogy although cast in more negative terms). In describing the questionable foundation of the Tribunals, Judge Cassese referenced a German lawyer's comments from 1932 as follows:

[I]nternational law is an edifice built on a *volcano*—state sovereignty. By this, [Niemeyer] meant that whenever state sovereignty explodes onto the international scene, it may demolish the very bricks and mortar from which the Law of Nations is built. It is for this reason that international law aims to build devices to withstand the seismic activity of states: to prevent or diminish their pernicious effect. This metaphor is particularly apt in relation to an international tribunal. The tribunal must always contend with the violent eruptions of state sovereignty: the effect of states' lack of cooperation is like lava burning away the foundations of the institution.

*Id.*