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## PANEL III: IDENTIFYING AND PROSECUTING WAR CRIMES: Two CASE STUDIES – THE FORMER YUGOSLAVIA AND RWANDA

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## PANEL III.

### IDENTIFYING AND PROSECUTING WAR CRIMES

MS. LITTELL: Good afternoon, welcome back. I'm glad so many of you could continue to join us this afternoon.

Professor Ruti Teitel<sup>1</sup> will be moderating the panel entitled "Identifying and Prosecuting War Crimes" which will include a discussion of the former Yugoslavia and Rwanda. Professor Teitel has been instrumental in this symposium. She's the faculty co-chair for the *Journal of Human Rights* and she is the "brains" behind this entire symposium. I will now turn things over to her.

#### *Professor Ruti Teitel*

PROFESSOR RUTI TEITEL: That's Susan's modesty because really it is the students Journal of Human Rights that are instrumental and it is a collaboration.

Well, here we are at the end of what I think has been a very inspiring day, at least I can say so for myself, and this last panel promises to be, I think, a culmination in the sense that we are going to pursue the contemporary efforts, the ones that are vital and on the front pages of the *New York Times* today.

We have for the first panel a group that will explore some of the issues and problems in the identification and prosecution of genocide, war crimes, and crimes against humanity that we have heard about today and the jurisprudence that was defined at Nuremberg. The group of people that we have has promised to explore these issues from a variety of different perspectives. I hope this will be a provocative and even a controversial exchange. To facilitate that, the panelists will speak about ten minutes and then we

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<sup>1</sup> Professor of Law, New York Law School. B.S., Georgetown University, 1977; J.D., Cornell Law School, 1980.

hope to have time for questions.

Let me begin with Mr. Graham Blewitt the deputy prosecutor for the international tribunals that have been convened for the former Yugoslavia and Rwanda.<sup>2</sup>

Mr. Blewitt and I have met, however, in his former incarnation when he was working in Australia for the Special Investigations Unit that was in charge of the attempts to prosecute Nazi war criminals who had resided in Australia.<sup>3</sup> So his life story epitomizes the comparative and historical analysis that we have talked about today, which is the efforts to apply the post-war precedents to war crimes and crimes against humanity today.<sup>4</sup>

Following Mr. Blewitt, Ambassador Bakuramutsa, who is the permanent representative of Rwanda to the United States, will speak and will explore with us the comparative advantages of the international tribunal. After the Ambassador, Lt. Col. Steven Lepper will speak. We are grateful to have a representative from the Joint Chiefs of Staff and, in particular, he will address some of the legal issues he has been involved in. He is, in fact, one of the members of the team that drafted proposed rules of procedure and evidence for the tribunals that have been convened. Then we will hear from Mr. O'Brien, who is advisor to Madeleine Albright at the United Nations for the American perspective. Following that, we will have two noted policy analysts from the human rights community, Stephanie Grant from The Lawyers' Community on Human Rights and Juan Mandez from Human Rights Watch, who was formally a lawyer in Argentina and has been active in his representation of human rights dissidents and prisoners and was himself a victim of the Argentine government. So I think we have here a variety of perspectives and I'm looking forward to the exchange. Perhaps we can begin with Deputy Prosecutor Blewitt.

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<sup>2</sup> See, e.g. Leonard Doyle, *Deputy for the Dead Closes In*, THE INDEPENDENT, Mar. 15, 1994, at 9 (profiling Graham Blewitt as deputy prosecutor for the tribunals); Barbara Franklin, *A Tribunal Waiting for Work*, 81 A.B.A. J. 30, 30 (1995).

<sup>3</sup> Graham Blewitt, *Prosecuting World War II Persecutors: Efforts at an Era's End*, 12 B.C. THIRD WORLD L.J. 199, 209-10 (1992).

<sup>4</sup> See generally *Australia: War Crimes and the Need to Ensure a Fair Trial*, Feb. 3, 1990, available in LEXIS, News Library, TXTNWS File (noting that the Special Investigations Unit has "relied on material from trials conducted in Germany").

*Graham Blewitt*

MR. GRAHAM BLEWITT: Thank you very much. Let me say at the outset as a war crime prosecutor just how honored I feel being at this seminar today in the presence of so many of the Nuremberg prosecutors. For me that is a great honor and I feel very privileged to have been able to participate.

I'm also very encouraged to hear the words that have been flowing from the panelists today, lending support to the idea of an international criminal tribunal. I hope that I can add some notes of optimism to the discussion. At the very outset, noting what the topic of this panel is, namely, "Identifying and Prosecuting War Crimes" with two case studies, Yugoslavia and Rwanda, I would like to add a third example and that is Australia because I think it has some relevance to what we are doing in Yugoslavia.

Very briefly, Australia got involved in the investigation and prosecution of war crimes in the mid-1980's.<sup>5</sup> After the war, Australia received many hundreds of thousands of refugees, despite persons from Europe, and amongst those were numerous war criminals.<sup>6</sup>

The government, since the 1950's, had been sweeping the issues under the carpet and finally, in the mid 1980's, it was decided that the time had come to do something about it.<sup>7</sup> The government set up the Special Investigations Unit to investigate and prosecute war criminals, and it amended the war crimes legislation to enable prosecutions to take place in the ordinary criminal courts in Australia, as if the crimes had been committed in Australia at that time.<sup>8</sup>

The Special Investigations Unit investigated allegations which had been brought to its attention and during its life from 1987 through to January 1994 it investigated 840 cases.<sup>9</sup> In prosecuting

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<sup>5</sup> See, e.g., *Hidden Legacy of the Fugitives from War*, THE INDEPENDENT, July 6, 1992, at 5 (noting that Australia was one of the countries which passed war crimes legislation in the 1980's).

<sup>6</sup> See, e.g., Richard Goldstone, *Exposing Human Rights Abuses: A Help or Hindrance to Reconciliation?*, 22 HASTINGS CONST. L.Q. 607, 610 (1995).

<sup>7</sup> See e.g., *Id.*

<sup>8</sup> See Blewitt, *supra* note 3, at 211.

<sup>9</sup> *Id.*

the cases that were brought, a number of things had to be proved.

First of all, it was necessary under the legislation to prove that the Second World War actually occurred and that the parts under investigation, namely the Soviet Union was, in fact, under occupation. It was also necessary to prove that there was such a thing as the "final solution", in other words, a genocide that had occurred in relation to the European Jews.

In the cases that we prosecuted, we achieved the proof of that by calling a number of historians, including Professor Raul Hilburg.<sup>10</sup> Through the historians we were able to establish that, indeed, there was a war; that there was an occupation, and that the Germans certainly had the policy to exterminate the Jews of Europe.

We were able in proving the latter point to produce original captured documents. These documents were spread throughout the various archives in the world, including those here in the United States.<sup>11</sup> One of the earliest panelists today, Robert Wolfe, was actually called as a witness in Australia and he produced some of the original documents held by his archive. That's how we established the war and the policies that were being implemented.

To prove the involvement of the accused in the trials, we relied upon direct evidence, and that was the evidence of eye witnesses and through normal police detective methods, we were able to trace, even after fifty years, survivors of the atrocities which occurred in many cases.<sup>12</sup>

In addition, we had forensic evidence in the form of expert evidence relating to the exhumation of mass graves.<sup>13</sup> That evidence provided proof that the mass executions were, in fact, performed by the Germans and it confirmed what the eye witnesses had said, as to the number, the sex and the ages of the victims.<sup>14</sup>

As to who we were to prosecute, that decision was based on

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<sup>10</sup> See *id.* at 213 (noting that Professor Raul Hilberg was in Australia to give historical testimony).

<sup>11</sup> Christian Tomuschat, *International Criminal Prosecution: The Precedent of Nuremberg Confirmed*, 5 CRIM. L.F. 237, 243 (1994) (identifying various archives in Germany and Japan as having contained the incriminating documents used as proof at the Nuremberg trials).

<sup>12</sup> See Blewitt, *supra* note 3, at 212.

<sup>13</sup> *Id.* at 214.

<sup>14</sup> *Id.*

the allegations that we received.<sup>15</sup> We were able to identify most of the accused that were prosecuted on the basis of photographs that were taken at the time of their migration to Australia. These were photographs taken in the late 1940's, and we were able to obtain those photographs and show them to the witnesses so that we weren't showing photographs of men in their seventies. We were able to show relatively contemporary photographs. That's how we went about proving the cases in Australia. We are adopting a similar approach in relation to Yugoslavia.

Before I talk too much about Yugoslavia, I would like to add to the debate that has already taken place tonight, that is, whether there should be trials by an international tribunal or national courts.<sup>16</sup> What I would like to say about that is that the tribunal's jurisdiction is concurrent to that of national courts.<sup>17</sup> It is possible for national courts to run and try cases with the tribunal's jurisdiction having promineny over the national courts.<sup>18</sup>

The task facing the Yugoslav tribunal is somewhat different and a little bit more complicated than that faced by the Australian investigations and I dare say that did face the Nuremberg prosecutors.<sup>19</sup> That is because the conflict in the former Yugoslavia is still ongoing.<sup>20</sup>

The warring parties have not left a paper trail in the same

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<sup>15</sup> *Id.* at 211.

<sup>16</sup> For a discussion of this issue, see generally Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554 (1995).

<sup>17</sup> *Statute of the International Tribunal for the Former Yugoslavia, annexed to Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. S.C. Doc. S/25704, para. 49 (1993), reprinted in 32 I.L.M. 1163, 1173 (1993), adopted by S.C. Res. 827, U.N. SCOR, 48th Year, 3217th mtg. at 1, U.N. Doc. S/RES/827 (1993), reprinted in 32 I.L.M. 1203 (1993) [hereinafter *Yugoslavia Statute*] (detailing jurisdiction of national courts and international tribunals).

<sup>18</sup> *Id.* (stating that "[t]he International Tribunal and national courts shall have concurrent jurisdiction"); see Meron, *supra* note 16, at 576 (describing the jurisdictional relationship between national courts and the international tribunals).

<sup>19</sup> See Richard Casey, *U.N. Powerless on War Crimes*, Times Newspapers Ltd., Feb. 28, 1993, available in LEXIS, News Library, PAPERS File (quoting the chief British Nuremberg prosecutor as saying that the task facing the Yugoslav tribunal "will be much more difficult than Nuremberg").

<sup>20</sup> See Goldstone, *supra* note 6, at 618.

way that the Nazi Germans did,<sup>21</sup> although there are some documents which have been siezed, it remains to be seen just how relevant they will prove to be.

However, we will have to prove the historical context within which this conflict occurred and we intend to do that by calling historians. Obviously, World War II Nazi historians are not relevant to this particular case, but we have been able to find a number of relevant historians. I suspect that primarily the evidence we will call to establish the commission of crimes will be direct evidence and that will come from witnesses.<sup>22</sup> There are various forms of witnesses, including the United Nations Protection Force and other U.N. and non-governmental organizations which have been stationed in the area and have observed the commission of crimes.<sup>23</sup> We take the view that such individuals are potential witnesses before the tribunal and we expect to call them.

There have also been hundreds of thousands of refugees that have fled the former Yugoslavia<sup>24</sup> and in Germany alone there are 400,000 refugees.<sup>25</sup> All of these people are potential witnesses, and the tribunal is attempting to locate and identify those who can give relevant evidence. We expect that when prosecutions commence, we will be able to call eye witnesses before the tribunal.

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<sup>21</sup> See *id.* at 617 (commenting that “[a] paper trail, such as that which assisted the prosecutors at Nuremberg, has not been discovered in respect of the former Yugoslavia”); Alex Ross, *Watching for a Judgment of Real Evil*, N.Y. TIMES, Nov. 12, 1995, at H37, H40 (commenting that the prosecutors at Nuremberg relied extensively on written records and that “it is doubtful that a similar paper trial [sic] exists in Bosnia”).

<sup>22</sup> Tomuschat, *supra* note 11, at 243 (commenting that at the International Tribunal for the Former Yugoslavia, the “main source of evidence will . . . be testimony by witnesses”).

<sup>23</sup> See generally Boutros Boutros-Ghali, *Friedman Award Address*, 33 COLUM. J. TRANSNAT’L L. 251, 255 (1995).

<sup>24</sup> Anthony Lewis, *Abroad at Home; Pressure on Serbia*, N.Y. TIMES, Dec. 18, 1992, at A39 (noting that more than 500,000 refugees have fled the former Yugoslavia); see Frank Wright, *Adrift in a Sea of Unknown; Bosnians Leave Lives Behind to Seek Refuge on Croatia Island*, STAR TRIBUNE, Aug. 13, 1995, at 1A (noting that over one million refugees have fled the former Yugoslavia).

<sup>25</sup> Roger Cohen, *Lost in War; A Special Report; One Bosnian Family, Torn Apart and Scattered*, N.Y. TIMES, Dec. 31, 1994, at A1, A5 (noting that there are 400,000 refugees in Germany).

One of the main differences between the Nuremberg prosecutions and those being undertaken by our tribunal is the fact that the accused in the case of Nuremberg were in custody, while in the case of the tribunal, they are not.<sup>26</sup> And, in effect, the tribunal has been set up to prosecute those who are most responsible for the commission of the crimes<sup>27</sup> and, of course, many of them are still in political and military power today.<sup>28</sup> That just leads me to explain how, in my view, the tribunal can be successful, notwithstanding the fact that Yugoslavia in particular has indicated that it will not surrender individuals to our jurisdiction.<sup>29</sup>

The rules of the tribunal provide as follows: That on the completion of an investigation, once the prosecutor is satisfied that there is sufficient evidence to establish a prima facie case,<sup>30</sup> an indictment is prepared and submitted to a trial judge.<sup>31</sup> If the trial judge is satisfied that the evidence does, in fact, establish a prima facie case, the judge confirms the indictment and issues an arrest warrant.<sup>32</sup> That warrant is then forwarded to the country where the

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<sup>26</sup> See *UN Votes To Set Up War-Crimes Tribunal*, ST. LOUIS POST-DISPATCH, Feb. 23, 1993, at 1A (noting that in Yugoslavia, suspects were not indicted, "let alone apprehended").

<sup>27</sup> Goldstone, *supra* note 6, at 617 (explaining that due to the small number of trial chambers, only those who were "the most guilty" should be indicted).

<sup>28</sup> SECTION OF INTERNATIONAL LAW AND PRACTICE, AMERICAN BAR ASSOCIATION, REPORT ON THE INTERNATIONAL TRIBUNAL TO ADJUDICATE WAR CRIMES COMMITTED IN THE FORMER YUGOSLAVIA 2 (1993) [hereinafter REPORT ON INTERNATIONAL TRIBUNAL]; see Kenneth S. Gallant, *Securing the Presence of Defendants Before the International Tribunal for the Former Yugoslavia: Breaking with Extradition*, 5 CRIM L.F. 557, 557 (1995) (observing that many individuals who have committed war crimes remain in command).

<sup>29</sup> *Bosnia Serb Leader Rejects Handover of Suspects*, Reuters, Feb. 13, 1995, available in LEXIS, World Library, ALLNWS File; cf. Howard S. Levie, *The Statute of the International Tribunal for the Former Yugoslavia: A Comparison with the Past and a Look at the Future*, 21 SYRACUSE J. INT'L L. & COM. 1, 23 (1995) (observing that former Yugoslavian territories cannot be expected to surrender personnel to the tribunal for prosecution).

<sup>30</sup> See Goldstone, *supra* note 6, at 617 (commenting that the evidence must at least establish a prima facie case); Levie, *supra* note 29, at 20, 21 (describing the process by which the prosecutor investigates alleged crimes, collects evidence and brings indictments before a judge for review and approval).

<sup>31</sup> Levie, *supra* note 29, at 21.

<sup>32</sup> See generally *id.* at 22.



person who is the subject of the warrant is residing, together with the request that that individual be surrendered to the tribunal.<sup>33</sup> Because the tribunal has been set up under Chapter seven of the U.N. Charter,<sup>34</sup> there's an obligation on all member states to comply with such a direction,<sup>35</sup> so that in the case of a noncompliance, further things can happen.<sup>36</sup>

If somebody is not surrendered pursuant to the first warrant, the process is as follows: The prosecutor will represent the indictment and will call the evidence upon which that indictment is based. That evidence will be led in public, which means that it is there for the world to see. Having led that evidence, the trial chamber can reconfirm the indictment and can issue an international arrest warrant. At the same time, it can inform the Security Council of the noncooperation of the country which failed to surrender the individual in the first place, and the Security Council can then impose sanctions upon that noncooperating country.<sup>37</sup>

Now I take the view that if the tribunal is in existence long enough, and if it indicts the persons who are most responsible for crimes, if they are political leaders, the mere fact of publication of the evidence will brand internationally those individuals as fugitives. The fact that there is an international arrest warrant in existence will have the effect of confining that individual to the country where he is.<sup>38</sup> Now, I don't think it is being overly optimistic to think that after some periods of years if these individuals remain as political leaders, they will, in effect, become unable to govern because they

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<sup>33</sup> *Id.*

<sup>34</sup> See REPORT ON INTERNATIONAL TRIBUNAL, *supra* note 28, at v.3; Boutros-Ghali, *supra* note 23, at 254.

<sup>35</sup> See Levie, *supra* note 29, at 22 (stating that the duty of states to turn over persons indicted is "mandatory").

<sup>36</sup> See Boutros-Ghali, *supra* note 23, at 254.

<sup>37</sup> See Stephen Engelberg, *War Crimes Panel Orders Suspect Released*, N.Y. TIMES, Dec. 11, 1995, at A10 (explaining that failure to cooperate with the tribunal could result in sanctions).

<sup>38</sup> See Marie Ryan, *Prosecutor of a New Nuremberg, Tribunals at the Hague are About To Tackle the Horrors of Bosnia and Rwanda*, THE INDEPENDENT, June 7, 1995, at 27 (noting that international arrest warrants will reduce the number of countries offering criminals safe haven); see also Peter Benesh, *UN Tribunal Set Up War-Crimes Trial of Serbs*, WASH. TIMES, Mar. 19, 1995, at A1 (noting that the country where the criminal is living becomes a kind of jail).

will not be able to maintain the confidence of the electorate;<sup>39</sup> nor will they be able to participate in international discussions.

If that's the case, it is not hard to imagine that their popularity in their own country will wane and they may be opposed.<sup>40</sup> I would think that a political opponent coming to power would only be too willing to surrender a political adversary to the tribunal. So if the tribunal is in existence long enough, I think we will see those individuals surrendered to the tribunal and they will be subject to its jurisdiction. I would hope that if we're successful in that way, it will be a "shot in the arm" for the creation and establishment of a permanent international criminal court. I firmly believe that is what is needed to set up a deterrent to stop future atrocities and future genocide.<sup>41</sup>

To the extent that the tribunal needs your support, I ask for it. I think it is going to be a long haul. We can't guarantee or assume that we will receive support into the future. If it stands that the tribunal is doing what it is set up to do, then I would ask for the support of everybody here to speak up when the time comes that people might be able to close the tribunal down. Thank you very much.

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<sup>39</sup> Joyce Hackel, *A Genocide Later, Rwanda Again on Edge*, CHRISTIAN SCI. MONITOR, Nov. 28, 1995, at 1 (noting that "confidence in the government is eroding" as injustices continue).

<sup>40</sup> *Id.*

<sup>41</sup> See Ved P. Nanda, *UN Cracks Down on War Criminals*, DENVER POST, Nov. 13, 1994, at F4; see also Michael Clough, *The UN Must Abandon its New Military Role*, L.A. TIMES, Mar. 29, 1994, at M1 (observing that a permanent international criminal court "would provide a significant deterrent against the kind of atrocities occurring in Rwanda").

PROFESSOR TEITEL: Ambassador Bakuramutsa.

*Ambassador Manzi Bakuramutsa*

AMBASSADOR BAKURAMUTSA: First I want to explain that I'm not a lawyer and I'm discussing here a very big issue which is for the lawyers. I also would like to explain that instead of being positive, I'm going to be negative because the title of my speech is "Why the Government of Rwanda Called for an International Tribunal and Yet Opposed the United Nations Security Council Resolution" which established the tribunal.<sup>42</sup> I hope you understand this position.

First, I would like to say that it is nearly one year ago to the day, that on April 6, 1994, and continuing for a period of about two months, the world witnessed the mass murder, thanks to CNN, of hundreds of thousands of members of the Abatutsi, minority ethnic group in Rwanda, as well as Hutus, who were members of opposition political parties.<sup>43</sup>

This means that according to the October 1994 Harper's index, half of the Abatutsi population in Rwanda has been killed since May.<sup>44</sup> That is compared to the killing of one-third of the German Jewish population between 1933 and 1945.<sup>45</sup> The present estimate of the number of Abatutsi killed in a two-month period was approximately one million from among a population of seven and a

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<sup>42</sup> See generally Melissa Gordon, *Justice on Trial: Efficacy of the International Criminal Tribunal for Rwanda*, 1 INT'L LAW STUDENT ASS'N J. INT'L & COMP. L. 217, 221-22 (1995); *Rwanda Genocide Inquiry Begins at Last*, DAILY TELEGRAPH, Oct. 10, 1994, at 10.

<sup>43</sup> Gordon, *supra* note 42, at 219 (noting that "[i]n the first three months of 1994, one million Tutsis were slaughtered"); Raymond Bonner, *U.N. Commission Recommends Rwanda 'Genocide' Tribunal*, N.Y. TIMES, Sept. 29, 1994, at A1, A13; David Lamb, *The Road to Ruin for Rwanda; Today's Horrors Are Rooted in a Past of Ethnic Hatred and Perils of an Army-Like Many of Africa-Trained Not to Defend the Borders but to Preserve the Ruling Hierarchy*, L.A. TIMES, Jun. 11, 1994, at A1 ("several hundreds of thousands killed and two million homeless").

<sup>44</sup> Harper's Index, BUFFALO NEWS, Oct. 30, 1994, at 18.

<sup>45</sup> *Id.*

half million.<sup>46</sup>

Mothers and children were eviscerated.<sup>47</sup> Rivers were filled with blood and bodies and schools and churches were turned into slaughter houses.<sup>48</sup> The killings succeeded in disintegrating Rwandese society and only stopped when the Army of the Rwandese political front defeated the then-Rwandese Government Army.<sup>49</sup> Since 1959, successive governments of Rwanda have consistently committed human rights violations on a massive scale,<sup>50</sup> to the extent that in 1964 the Pope and Nobel Laureates Sir Bertrand Russell and Jean Paul Sartre characterized the killing in Rwanda as the most heinous genocide of this century after the one committed by the Nazis against the Jews.<sup>51</sup>

Even as recently as the period of 1990 to 1993, massacres of Abatutsi have taken place in Rwanda.<sup>52</sup> The perpetrators of the series of acts of genocide have never been brought to justice. The culture of impunity lead to the tragedy of April and July 1994. Undoubtedly, genocide had occurred in Rwanda.

Article II of the Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948 states;

Genocide means any of the following acts committed with intent to destroy in whole or in part a national, ethnical, racial or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions on life calculated to bring about its physical destruction in whole or in part

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<sup>46</sup> See Gordon, *supra* note 42, at 219.

<sup>47</sup> See Lamb *supra* note 43, at A1.

<sup>48</sup> Manoah Esipisu, *Only Dogs Remain in Rwandan Massacre Village*, Reuters, Sept. 30, 1994, available in LEXIS, News Library, REUWLD File.

<sup>49</sup> See Lamb, *supra* note 43, at A1.

<sup>50</sup> See Naomi Roht-Arriaza, *Can a Majority Bring Itself to Justice for Crimes Against a Minority*, THE RECORDER, Jan. 4, 1996, available in LEXIS, News Library, PAPERS File (commenting that Rwanda has seen a "cycle of killing with impunity" since 1959).

<sup>51</sup> See Lamb, *supra* note 43, at A1 (noting "several hundred thousand killed and two million homeless").

<sup>52</sup> Bonner, *supra* note 43, at A1, A13; Andrew Jay Cohen, *On the Trial of Genocide*, N.Y. TIMES, Sept. 7, 1994, at A23.

[among others].<sup>53</sup>

As concluded by the special rapporteur for human rights, the conditions, as stated in the definition, were obvious in the case of Rwanda in view of the massacres that were perpetrated and the propaganda which incited the killings.<sup>54</sup>

The government of Rwanda, which was established in July 1994, strongly believes that bringing the perpetrators of genocide to justice is an indispensable part of the process of establishing the rule of law, achieving national reconciliation and building a stable democratic society.<sup>55</sup> To that end, it requested the Security Council of the United Nations to establish an international tribunal to judge those who committed the crimes.<sup>56</sup>

Addressing the U.N. General Assembly on October 6, 1994, the President of Rwanda called for the creation of an international tribunal as a matter of urgency.<sup>57</sup> It was seen as a necessary tool for justice, in view of the fact that most of the criminals had sought refuge in other countries.<sup>58</sup> In that statement, the President said, "Rwanda requests the Security Council to adopt a resolution to facilitate the arrest and trial of the murderers who were hiding in the refugee camps outside the country. The resolution will grant authority to hold persons who are suspected in the genocide. Six

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<sup>53</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951; for the United States Feb. 23, 1989) [hereinafter Genocide Convention]; see Matthew Lippman, *The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later*, 8 TEMP. INT'L & COMP. L.J. 1, 22 (1994) (citing definition of Genocide Convention).

<sup>54</sup> See, e.g., *UN Panel Charges Genocide in Rwanda*, CHI. TRIB., Oct. 4, 1994, at 6.

<sup>55</sup> See *Rwanda; President Says Killers Must Be Punished or Effects of Genocide Will Spread Abroad*, BBC Summary World Broadcasts, Oct. 13, 1995, available in LEXIS, Nexis Library, TXTNWS File.

<sup>56</sup> S.C. Res. 955, U.N. SCOR, 49th Year, 3453 mtg. at 1, U.N. Doc. S/RES/955 (1994) (taking note of Rwanda's request to establish an international tribunal).

<sup>57</sup> *Underlying Problems in Caribbean Continue To Be 'Unnoticed and Unattended,' Prime Minister of Antigua and Barbados Tells General Assembly*, Fed. News Serv., Oct. 7, 1994, available in LEXIS, World Library, ALLWLD File [hereinafter *Underlying Problems Continue*] (indicating that Rwandan President Pasteur Bizimungu expressed to the General Assembly the "urgency" of prosecuting through an international tribunal those responsible for genocide).

<sup>58</sup> *Id.*

months after the crimes were committed, there must be action.”<sup>59</sup>

That appeal was also in a letter to the Security Council in July 1994. The special rapporteur appointed on recommendation of the commission of human rights, Rene Degni-Sequi, recommended the establishment of the tribunal in his report of October 13, 1994, on the situation of human rights in Rwanda.<sup>60</sup>

As a member of the Security Council for the two years 1994 and 1995, the present government of Rwanda participated in the protracted consultation to draft the resolution to establish the international tribunal. However, as a result of the strong political interests of other governments, the end result was unsatisfactory to Rwanda and the Rwandan representative chief, therefore, voted against the resolution.<sup>61</sup>

On November 8, 1994, the United Nations Security Council adopted Resolution 955 and entitled it “Establishment of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandese Citizens Responsible for such Violations Committed in the Territory of Neighboring States.”<sup>62</sup> The vote of the fifteen members of the Council was as follows: thirteen in favor, one against, which was Rwanda, and one abstention, which was China.<sup>63</sup>

The reason why Rwanda proposed the establishment of the tribunal is because the international tribunal was seen as the means to eradicate the creature of impunity, which has characterized Rwandese society since 1959.<sup>64</sup> The Rwandese, who had been taught that it was acceptable to kill as long as the victim was from a different ethnic group or from an opposition party, cannot arrive at national reconciliation unless they learn new values. National

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<sup>59</sup> *Id.*

<sup>60</sup> See, e.g., Christina M. Cerna, *A Small Step Forward for Human Rights: The Creation of the Post of United Nations High Commissioner of Human Rights*, 10 AM. U.J. INT'L L. & POL'Y 1265, 1270 (1995).

<sup>61</sup> See, e.g., Raymond Bonner, *Shattered Nation: A Special Report; Rwanda Now Faces Painful Ordeal of Rebirth*, N.Y. TIMES, Dec. 29 1994, at A1.

<sup>62</sup> S.C. Res. 955, U.N. SCOR, 49th Year, 3453 mtg. at 1, U.N. Doc. S/RES/955 (1994).

<sup>63</sup> *Id.*

<sup>64</sup> See Roht-Arriaza, *supra* note 50.

reconciliation can be achieved only if accountable justice is established and if the survivors of genocide are assured that what has happened will never happen again.<sup>65</sup>

Secondly, by asking for the establishment of the international tribunal, the Rwandese government wanted to involve the international community, which was so harmed by the genocide and by the grave and massive violation of international humanitarian law. It wanted to enhance the exemplary nature of justice that would be seen to be completely neutral and fair.<sup>66</sup>

Thirdly, the Rwandese government appealed for an international presence in order to avoid any suspicion of its wanting to organize pity, vengeful justice.<sup>67</sup> Fourthly, the Rwandese government requested and finally supported the establishment of the tribunal to make it easier to get at those criminals who have found refuge in foreign countries.<sup>68</sup> Fifthly, the genocide committed in Rwanda is a crime against humanity and it should be suppressed by the international community as a whole.<sup>69</sup>

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<sup>65</sup> See S.C. Res. 955, U.N. SCOR, 49th Year, 3453 mtg. at 1, U.N. Doc. S/RES/955 (1994) (recognizing that "prosecution of persons responsible for serious violations of international humanitarian law would . . . contribute to the process of national reconciliation"); see also *id.*

<sup>66</sup> Jason A. Dzubow, *The International Response to the Civil War in Rwanda*, 8 GEO. IMMIG. L.J. 513, 519 (1994) (observing that the international character of the tribunal will produce neutral judges rather than judgments made by the victims of the accused).

<sup>67</sup> See *Cease-Fire Agreement in Tajikistan*, Fed. News Serv., Nov. 9, 1994, available in LEXIS, World Library, ALLWLD File [hereinafter *Cease-Fire Agreement*] (acting as the representative of Rwanda, Manzi Bakuramutsa said his government had appealed for the establishment of an international tribunal in order to avoid any suspicion of a "speedy, vengeful justice").

<sup>68</sup> See *Underlying Problems Continue*, *supra* note 57; *Rwanda Genocide Tribunal Opens with Global Appeal*, June 28, 1995, available in LEXIS, News Library, TXTNWS File (stating that countries where planners of genocide sought refuge were obliged under international law to cooperate with tribunal).

<sup>69</sup> See Lippman, *supra* note 53, at 70; Peter da Costa, *Rwanda: U.S. and U.N. Pressed to Dub Killings Genocide*, Inter. Press Serv., May 3, 1994, available in LEXIS, News Library, WIRES Files (stating that the international community would be legally required to take action for the suppression of acts of genocide); see also *Ad Hoc Committee on Establishment of International Criminal Court Weighs Questions of Inherent Jurisdiction over Certain Matters*, Aug. 18, 1995, available in LEXIS, News Library, FEDNEW File (stating that genocide is among the crimes of international concern to be suppressed by international court).

Now, I will explain why the Rwandese government has rejected the Security Council resolution. First, the government of Rwanda regarded the dates set for the *ratione temporis* competence of the international tribunal for Rwanda from January to the 31st of December 1994 as inadequate.<sup>70</sup> The genocide which the world witnessed in April 1994 had been the result of a long period of planning during which pilot projects for extermination had been successfully tested before this date.<sup>71</sup>

The international community, through its diplomatic representatives and international organizations, as well as human rights organizations, were well aware of the massacres that had taken place in 1991, 1992, and 1993;<sup>72</sup> it cannot claim that it became cognizant of the situation only in the wake of the tragedy of April 1994. It had already been recognized by the special rapporteur of the United Nations in May 1993 and in a March 1993 report of the international commission that genocide had, in fact, occurred in Rwanda.<sup>73</sup> Consequently, the Rwandese government had to propose that account be taken of the period from October 1, 1990, the

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<sup>70</sup> See Richard D. Lyons, *U.N. Approves Tribunal on Rwandan Atrocities*, N.Y. TIMES, Nov. 9, 1994 (noting that "the Rwandan delegate voted against the measure [creating an international tribunal on Rwanda], complaining that it lacked a death penalty and only covered crimes committed in 1994").

<sup>71</sup> See *Cease-Fire Agreement*, *supra* note 67; Anthony Goodman, *Council Establishes Genocide Tribunal*, Reuters World Serv., Nov. 8, 1994, available in LEXIS, News Library, REUWLD File; see also *Rwanda; China Explains Security Council Abstention on Rwanda Tribunal*, BBC Summary of World Broadcasts, Nov. 16, 1994, available in LEXIS, World Library, ALLWLD File (Rwanda ambassador found inadequate the prosecution of only those suspected of committing genocide during 1994).

<sup>72</sup> See generally *Rebels Allege Massacre of Civilians in Rwanda*, Agence France-Presse, Aug. 13, 1991, available in LEXIS, World Library, ALLWLD File (indicating that more than 1000 Tutsi's were killed early in 1991); *Rwanda Says Rebels Massacred 38 Civilians*, Reuters, Jan. 21, 1992, available in LEXIS, World Library, ALLWLD File (reporting the deaths of Rwandan citizens at the hands of the Rwanda Patriotic Front); *Rwanda's Army Accuses Rebels of Massacres*, Reuters Ltd., February 18, 1993, available in LEXIS, World Library, ALLWLD File (reporting accusations that more than 500 peasants were massacred).

<sup>73</sup> See Delia Fahmy, *Rwanda: Report Blames Government for Mass Slayings*, Inter. Press Serv., Mar. 8, 1993, available in LEXIS, World Library, ALLWLD File (discussing the March report from the International Commission for the Investigation of Human Rights Violations which criticized the Rwandan government for its role in genocide).



beginning of the war between the then-government of Rwanda and the Rwandese patriotic front, to July 17, 1994, the defeat of the government.<sup>74</sup> That proposal was rejected by the members of the Security Council without a valid reason.

An international tribunal which refused to consider the causes of the genocide in Rwanda and its planning and that refused to consider the pilot project that preceded the major genocide of April 1994 cannot be of any use to Rwanda because it will not contribute to eradicating the culture of impunity or creating a climate conducive to national reconciliation.<sup>75</sup> In this respect, there is a contradiction between Article Six and Article Seven of the statute.<sup>76</sup>

Secondly, the government of Rwanda found that the composition and the structure of the international tribunal for Rwanda were inappropriate and ineffective.<sup>77</sup> The tribunal is composed of two-tier chambers with three judges in each.<sup>78</sup> There the appeals chamber is shared by the tribunal for the former Yugoslavia and tribunal for Rwanda, and it will have only five judges.<sup>79</sup> The two

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<sup>74</sup> See Anthony Goodman, *U.N. Establishes Rwanda Genocide Tribunal*, Reuters World Serv., Nov. 8, 1994, available in LEXIS, News Library, TXTNWS File (stating that the Kigali government alleges that the Hutu-led government began planning genocidal massacres much earlier than July 1994).

<sup>75</sup> *Cease-Fire Agreement*, *supra* note 67 (observing that Rwanda was troubled that certain countries which had taken an active part in the civil war would be able to propose judges for the Tribunal and to make decisions regarding the imprisonment of detainees).

<sup>76</sup> Article 6 of the Statute of the International Tribunal for Rwanda establishes a prosecutorial plan designed to impose individual criminal responsibility. *Statute of the International Tribunal for Rwanda*, annexed to S.C. Res. 955, U.N. SCOR, 49th Year, 3453 mtg. at 1, U.N. Doc. S/RES/955 (1994). Article 7 limits the jurisdiction of the tribunal to crimes committed during the period Jan. 1, 1994, to Dec. 31, 1994. *Id.*

<sup>77</sup> See generally *Cease-Fire Agreement*, *supra* note 67 (discussing Rwanda's objections to the Statute of the International Tribunal for Rwanda).

<sup>78</sup> See James C. O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT'L L. 639, 645 (1993) (describing the structure of the Tribunal as established by Articles 11 through 15 of the Statute of the International Tribunal for the former Yugoslavia).

<sup>79</sup> See Peter H.F. Bekker, *Election of Judges of the International Tribunal for Violations of Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT'L L. 668, 668 (1993) (detailing the names of the eleven judges selected on September 17, 1993); see also Julia Preston, *Tribunal Set on Rwandan War Crimes; Kigali Votes No on UN Resolution*, WASH. POST., Nov. 9, 1994, at A44.

tribunals will also share the same prosecutor.<sup>80</sup> It is understood that Rwanda will be supported by a deputy prosecutor.<sup>81</sup>

Given the magnitude of the task awaiting the staff of the tribunal and the need for speedy and exemplary action by the tribunal, the government of Rwanda asked that the number of trial chamber judges be increased and that the international tribunal for Rwanda be given its own appeal chamber and prosecutor.<sup>82</sup> No well founded reply was given. The Rwandese government considered that the establishment of so ineffective an international tribunal would only appease the conscience of the international government community rather than respond to the expectations of the Rwandese people and of the victims of genocide in particular.<sup>83</sup>

Thirdly, it was surprising, in light of the meager human and financial resources available,<sup>84</sup> that the draft statute for the international tribunal intended to dispense its energy prosecuting crimes that came under the jurisdiction of internal tribunals in addition to the crime of genocide.<sup>85</sup> Furthermore, nothing in the draft resolution instructed and indicated the order of priority for crimes considered by the tribunal. Under those conditions, nothing could prevent the tribunal from devoting its resources on a priority basis to prosecuting the crimes of plunder, corporal punishment, or the intention to commit such crimes while relegating to a second river

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<sup>80</sup> *Statute of the International Tribunal for Rwanda*, art. 15, annexed to S.C. Res. 955, U.N. SCOR, 49th Year, 3453 mtg. at 1, U.N. Doc. S/RES/955 (1994) (providing that the prosecutor of the International Tribunal for the Former Yugoslavia shall serve as prosecutor before the International Tribunal for Rwanda); see Boutros-Gahli, *supra* note 23, at 1614; Richard Norton Taylor, *Rwanda Suspects Face Arrest*, THE GUARDIAN, Jan. 3, 1996, at 14 (observing that Judge Richard Goldstone is chief prosecutor for both the Rwanda Tribunal and the War Crimes Tribunal for the Former Yugoslavia).

<sup>81</sup> *Statute of the International Tribunal for Rwanda*, art. 15, annexed to S.C. Res. 955, U.N. SCOR, 49th Year, 3453 mtg. at 1, U.N. Doc. S/RES/955 (1994) (providing for a Deputy Prosecutor to assist in actions before the International Tribunal for Rwanda).

<sup>82</sup> See *Cease-Fire Agreement*, *supra* note 67 (noting that the Rwandan government objected to the number of judges as "inadequate" and requested its own prosecutor).

<sup>83</sup> Goodman, *supra* note 74.

<sup>84</sup> Roht-Arriaza, *supra* note 50 (commenting that the international criminal tribunal on Rwanda "has been hampered by a lack of money and investigatory staff").

<sup>85</sup> *Cease-Fire Agreement*, *supra* note 67.

genocide that brought about its establishment.<sup>86</sup>

Fourthly, certain countries took a very active part in the civil war in Rwanda. My government hoped that everyone would understand its concern at seeing those countries propose candidates for judges and participate in the election.<sup>87</sup>

The fifth reason is that the government of Rwanda objected to trial being held outside Rwanda since those who ordered the massacres and are now living abroad would get off more lightly than ordinary Rwandans who faced the death penalty in local courts.<sup>88</sup> The fate of Rwandan detainees in foreign countries should be the decision of the Rwandan people, or at least the international tribunal.

The sixth reason is that the international tribunal, as designed in the resolution, established a disparity in sentences and ruled out capital punishment, which is, nevertheless, provided for in the Rwandese penal code.<sup>89</sup> Since it was foreseeable that the tribunal will be dealing with the suspects who devised, planned, and organized the genocide, they may escape capital punishment, whereas those who simply carried out a plan would be subject to the harshness of that sentence. That situation is not conducive to national reconciliation in Rwanda. The seventh reason is that my government called for the establishment of an international tribunal to prosecute those guilty of genocide because the international community is deeply concerned in

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<sup>86</sup> See *Ad Hoc Committee on Establishment of International Criminal Court Weighs Question of Inherent Jurisdiction over Certain Matters*, Fed. News Serv., Aug. 18, 1995, available in LEXIS, News Library, FEDNEW File (noting that the international court's jurisdiction covers not only crimes of genocide, but also war crimes, crimes against humanity and aggression).

<sup>87</sup> See *Cease-Fire Agreement*, *supra* note 67 (noting Rwanda's concern that some countries which had played a role in the civil war would be permitted to propose tribunal judges).

<sup>88</sup> See *Rwanda Will Cooperate with Court, Kagame Says*, Reuters, Nov. 9, 1994, available in LEXIS, World Library, ALLWLD File.

<sup>89</sup> See Raymond Bonner, *Rwandan Leader, Calling U.S. Envoy 'A Disaster,' Hopes for a Replacement*, INT'L HERALD TRIB., Nov. 9, 1994, available in LEXIS, News Library, PAPERS File (arguing that unequal justice will result from tribunal's lack of power to impose death penalty); Raymond Bonner, *Rwandans Divided on War-Crimes Plan*, N.Y. TIMES, Nov. 2, 1994, at A10 (noting that defendants tried before the tribunal will get lighter sentences than those tried before Rwandan courts).

this respect.<sup>90</sup>

Also and above all, we requested the establishment of this tribunal to teach the Rwandese people a lesson, to fight against the impunity to which it had become accustomed since 1959.<sup>91</sup> The other main objective was to promote national reconciliation. It, therefore, seemed clear that the seat of the international tribunal should be set in Rwanda. It will have to deal with the Rwandese against the Rwandese. Only in this way can the desired effect be achieved.

Furthermore, establishing the seat of the tribunal on Rwandese soil would promote the harmonization of international and national jurisprudence. The authors of the draft hesitated to indicate where the future seat of the tribunal would be. The change proposed by the Rwandese government could very well be accommodated by international law and did not run counter to the idea of international jurisdiction.

Although Rwanda wants and believes in having an international tribunal for the country, and although the government is convinced that such a tribunal could be organized, taking into account the concern of the Rwandese people without bearing its international nature and its independence, my government decided to vote against the draft resolution.<sup>92</sup>

Now, it would be unfair if I didn't share with you the position of other countries who are members of the Security Council. The government of Rwanda requested the establishment of an international tribunal to try the perpetrators of genocide, and the establishment was supported by the majority of the members of the Security Council.<sup>93</sup>

I would like to share with you the points of view of some countries which have taken a position in these matters. In abstaining in the vote of resolution, the permanent representative of China stated that "it is an incautious act to vote in a hurry on a draft resolution and statute that the Rwandan government still finds difficult to accept, and it is also hard to tell what impact this may have on any relevant

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<sup>90</sup> *France: A 'Duty' to Halt Rwanda's Killings*, U.S. NEWS & WORLD REP., June 27, 1994, at 12.

<sup>91</sup> See Roht-Arriaza, *supra* note 50 (commenting that Rwanda has seen a "cycle of killing with impunity" since 1959).

<sup>92</sup> See generally Lyons, *supra* note 70.

<sup>93</sup> See *supra* text accompanying notes 61-63.

effort in the future.”<sup>94</sup> The Chinese representative supported the Rwandese desire for full resolution on the draft. That position was endorsed by the permanent representative of Brazil as well.

As we stated, in the case of the tribunal for the former Yugoslavia, Brazil is not convinced that the competence to establish and/or exercise an international criminal jurisdiction is among the constitutional powers of the Security Council,<sup>95</sup> or that the option of resorting to a resolution of the Security Council is the most appropriate method for such a purpose. These are the two main states which took a very strong position.

The government of Rwanda remains convinced that the permanent interest of the international community in setting up the tribunal was to appease its conscience<sup>96</sup> in view of the fact that it had not responded to save the Rwandese from genocide.<sup>97</sup> It was a delayed response of the international community which stood by and allowed one million people to die. The establishment of the international tribunal provided them with a sense of self-satisfaction and achievement in response to the genocide.

In spite of its principal decision to vote against the resolution to establish the international tribunal for Rwanda, the government of Rwanda stated publicly that it has cooperated with the United Nations on the matter.<sup>98</sup> It will continue to do so if the United Nations or the tribunal do not work against the interest of the people and the government of Rwanda. The primary concern of the government is and remains that the international tribunal be set up as an integral part of the process of establishing the rule of law in achieving national reconciliation in a country which has been torn apart by a state policy

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<sup>94</sup> See Goodman, *supra* note 74 (quoting the Chinese Representative).

<sup>95</sup> See Ralph Zacklin, *War Crimes: Bosnia and Beyond*, 34 VA. J. INT'L L. 277, 279 (1994) (commenting that some have argued that establishing the war crimes tribunal for the former Yugoslavia exceeds the Security Council's power under Chapter VII).

<sup>96</sup> Goodman, *supra* note 74.

<sup>97</sup> Louise Lief, *The Prevent Defense, An Agreement with Cuba Cools Tensions, but Other Crises Are Heating up*, U.S. NEWS & WORLD REP., Sept. 19, 1994, at 51.

<sup>98</sup> Lyons, *supra* note 70, at A12 (noting that the Rwandan government has stated it will cooperate with the tribunal and quoting Representative Bakuramutsa as saying “Rwanda fully supports the tribunal, although we might not yet be satisfied with the resolution”).

of extreme human rights violation.<sup>99</sup>

I would like to end my speech by telling you where we are now. The Rwandan government was hoping that the international tribunal would try all the people responsible for the deaths of over one million people. Now it is busy establishing a national tribunal in which the government has just passed a law to authorize international judges and lawyers to come into Rwanda and to strengthen the national tribunal in a way that will respond to the need of the country. I thank you very much.

PROFESSOR TEITEL: Thank you very much, Ambassador, for the statement and the important update. Now Lt. Col. Lepper.

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<sup>99</sup> See S.C. Res. 955, U.N. SCOR, 49th Year, 3453 mtg. at 1, U.N. Doc. S/RES/955 (1994) (observing that national reconciliation can be achieved by the prosecution of those responsible for humanitarian law violations). See generally Eric Randsell, *The Wounds of War, A Reconstruction of Rwanda's Genocide Suggests the Killing Could Return*, U.S. NEWS & WORLD REP., Nov. 28, 1994, at 67 (describing the genocide and mass killings that have taken place in Rwanda).

*Lt. Col. Steven Lepper*

LT. COL. LEPPER: I thank the law school and the *Journal of Human Rights* in particular for inviting me and all of us to attend this very important symposium. I would also like to provide a standard caveat. Since I am a U. S. Government lawyer, I don't want anything I say to be construed as a U. S. Government position. Everything that I say here are my own thoughts and that's likely to become very obvious to you in just a moment.

My thesis, basically, is that although international tribunals are very important and, indeed, in Bosnia and Rwanda extremely appropriate, they are not the solutions to all of our problems. Certainly, in some cases they can, in fact, get in the way of what we are ultimately trying to achieve; to establish responsible state practice in the world.

Ultimately, the prevention of violations of international humanitarian law is a function of vigorous state adherence to international law. This adherence, I contend, comes in two basic forms. First, states must resolve to use force,<sup>100</sup> if such force is necessary and appropriate, and in a manner consistent with provisions and principles of international humanitarian law. In other words, they must strictly follow the rules set forth in the laws of war. Second, if those rules are violated, they must be willing and able to prosecute persons who violate them.

One of these principles, at least as they apply to the prevention of *jus in bello* violations is the idea that only a highly disciplined military force is capable of using force without violating international humanitarian law. Now many of you may be one step ahead of me and thinking that the Nazis were highly disciplined military forces and they committed numerous law-of-war violations.<sup>101</sup>

Let me add to what I said, though, that this discipline must be oriented properly. In other words, it is the disciplined military force representing a government and people dedicated to the rule of law

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<sup>100</sup> See, e.g., Bruce W. Nelan, *Crimes Without Punishment*, TIME, Jan. 11, 1993, at 21.

<sup>101</sup> See generally TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 200-07, 584 (1992)(note book review in the issue).

that is capable of following the laws of war. The one example I'm most familiar with, being a member of it, is the U.S. Armed Forces. The United States, like many states today, is dedicated to the endorsement of and the adherence to international humanitarian law. We in the military take that responsibility very seriously. We train and retrain our people periodically so that they understand what their rights and obligations are.

Our Uniform Code of Military Justice, or U.C.M.J., provides for the prosecution of military members who violate that law.<sup>102</sup> The U.C.M.J. also gives commanders the ultimate responsibility to prosecute war crimes committed by their troops.<sup>103</sup> It is a necessary attribute of their authority and essential to their ability to control the actions of their units. Anything that undermines that ability to prosecute, or authority to discipline their troops ultimately weakens the discipline of the force and, therefore, increases the likelihood of law- of- war violations.

Now, one possible threat to the authority of commanders and the discipline of the military commanders is an over-reliance on international prosecutions. Certainly, as Bosnia and Rwanda illustrate, international tribunals are appropriate in some circumstances. However, employing them in all conflicts may have the unintended effect of undermining state responsibility for adherence to and prosecution of violations of international humanitarian law.<sup>104</sup> I contend that this threat exists at two levels.

First, at the state level, international tribunals may provide reluctant national leaders an easy way to avoid their responsibility to prosecute or extradite persons who commit international humanitarian law violations.<sup>105</sup> An example is the terrorist bombing of Pan Am Flight 103.<sup>106</sup> While international prosecution of terrorists would be

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<sup>102</sup> 10 U.S.C. §§ 801-835 (1990) (Uniform Code of Military Justice).

<sup>103</sup> *See id.* at §§ 816-821.

<sup>104</sup> *See* Stuart H. Deming, *War Crimes and International Criminal Law*, 28 AKRON L. REV. 421, 423 (1995) (observing that overemphasis on international criminal court could "provide an easy way out" for countries which are not developing effective prosecutorial systems themselves).

<sup>105</sup> *Id.*

<sup>106</sup> *See generally* Craig R. Whitney, *Jetliner Carrying 258 to U.S. Crashes in Scottish Town*, N.Y. TIMES, Dec. 22, 1988, at A1 (noting that Flight 103 from Frankfurt to New York crashed over Lockerbie, Scotland, killing all 258 aboard).



far better than a sham prosecution in Libya, neither is a solution to the essential problems of Libya's refusal to reject terrorism.<sup>107</sup>

The U.N. sanctions renewed last week are appropriate efforts to get Libya to become a responsible member of the international community. But to allow Libya to submit terrorists to an international tribunal, without also requiring it to accept responsibility for its support of international terrorism, will result in short-term justice for these particular terrorists. However, it will also turn down the heat on Libya<sup>108</sup> and, therefore, come at the expense of allowing it to abdicate its long-term responsibility to conform its behavior to international norms.<sup>109</sup>

At a second level, a knee-jerk establishment of international tribunals may undermine the authority of military commanders. To the extent that international tribunals prevent commanders from exercising disciplinary authority over their own troops, they remove what is perhaps the key to state adherence to international laws of war. Again, the short term benefits of imposing international justice will come at the long-term expense of command authority, disciplined forces and, therefore, state adherence to international humanitarian law.

Now, all of this begs a fundamental question: Under what circumstances should international prosecutions be pursued? The fundamental answer, I suggest, is when national prosecutions, in either the offender's state of nationality or in any other state with legitimate jurisdiction over and ability to prosecute the offense, would not satisfy the ends of justice.<sup>110</sup> Three specific examples can be derived from the Nuremberg, Bosnia, and Rwanda tribunals.

First, when the state itself is responsible for the crimes, it

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<sup>107</sup> Richard Z. Chesnoff, *He Just Keeps on Ticking, Economic Sanctions Have Not Quenched Muammar Qadhafi's Fire*, U.S. NEWS & WORLD REP., Feb. 21, 1994, at 55 (observing that the U.N. imposed stiff sanctions upon Libya which refused to extradite two Libyan nationals charged with bombing Pan Am Flight 103 in 1988).

<sup>108</sup> See generally Paul Lewis, *Libya Unyielding Despite UN Demand*, N.Y. TIMES, Jan. 22, 1992, at A8.

<sup>109</sup> See generally Deming, *supra* note 104, at 423.

<sup>110</sup> Meron, *supra* note 16, at 576.

may not be appropriate to allow it to prosecute the offenders.<sup>111</sup> The best example here is Nazi Germany. Had Germany emerged from the war intact, as, for example, Iraq emerged from Desert Storm,<sup>112</sup> it would hardly have been appropriate for its leaders to sit in judgment of themselves.<sup>113</sup> Now, the reason I hedged a bit by saying it *may* not be appropriate for a state responsible for crimes to prosecute its own offenders is because a change in regime may lead to circumstances favoring domestic prosecution of former leaders.<sup>114</sup> A perfect contemporary example of that is Ethiopia. The genocide in Ethiopia is only now being revealed,<sup>115</sup> and it's to Ethiopia's credit and also to Rwanda's credit that both countries are willing to invite the world to watch their two countries prosecute persons who are accused of committing war crimes.<sup>116</sup>

The second situation in which international prosecution will be preferred to domestic prosecution is where the state with jurisdiction is either unwilling or unable to prosecute or extradite the offender,<sup>117</sup> or when an attempted domestic prosecution is obviously a sham.<sup>118</sup> As I mentioned a moment ago in the Libya situation, in these cases it would be far better to compel the state to live up to its international obligations by getting it to conduct its own prosecutions.

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<sup>111</sup> See Diane F. Orentlicher, *Settling Accounts: The 'Duty' to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2565 (1991) (noting that states that have committed war crimes are usually incapable of prosecuting offenders because of the political repercussions that may ensue within the country).

<sup>112</sup> See, e.g., Monroe Karmin, *National Press Club Luncheon*, Fed. News Serv., Oct. 11, 1995, available in LEXIS, News Library, FEDNEW File.

<sup>113</sup> See Orentlicher, *supra* note 111, at 2565.

<sup>114</sup> See Payam Akhavan, *Enforcement of the Genocide Convention*, 8 HARV. HUM. RTS. J. 229, 232 (1995) (observing that an exception to the rule that states involved in genocide should not try themselves exists where "a new political elite seizes power through a coup d'etat").

<sup>115</sup> See *Ethiopian Ex-Rulers Go on Trial*, N.Y. TIMES, Dec. 14, 1994, at A8 (describing the first day of the trials of former Ethiopian leaders on crimes of genocide and crimes against humanity).

<sup>116</sup> Edward O'Loughlin, *Africa Dominated by War and Peace*, THE IRISH TIMES, Dec. 29, 1994, at 4.

<sup>117</sup> See Akhavan, *supra* note 114, at 232 (noting that "[i]n general, most states' prosecutorial and judicial apparatus are unwilling, or unable, to confront powerful elites who may be responsible for genocidal acts").

<sup>118</sup> See Orentlicher, *supra* note 111, at 2564 n.106.

Finally, international prosecutions are useful methods of breaking circles of violence. As in both Bosnia and Rwanda, where ethnic genocide has been engaged in for quite some time,<sup>119</sup> the effort toward establishing an international tribunal which will both be fair and be perceived as fair will be a way to prevent either side from considering the prosecutions to be victor's justice. Now, during the next two weeks here in New York at the U.N., the General Assembly is considering creation of an International Criminal Court.

The current draft statute finalized by the International Law Commission last summer does not adequately distinguish between those cases for which international war crimes prosecutions are appropriate or not appropriate. Although its preamble appropriately states that the International Criminal Court is intended to be complimentary to national criminal justice systems,<sup>120</sup> several of its operative provisions belie that assertion. It is the objective of an overwhelming majority of the states participating in these negotiations to ensure that international prosecutions called for and established under the International Criminal Court do not undermine the efficacy of the extensive national criminal justice and extradition systems that we have put into place over the last fifty years.

During the current Ad Hoc Committee negotiations, we have the opportunity to reign in the impulses plunging us headlong into a system of international criminal justice that might provide short term benefits at the expense of long term problems. Our challenge is to establish a balance between the need for international prosecutions in some cases and state prosecutions in others. I hope you wish us luck in that endeavor. Thank you.

PROFESSOR TEITEL: Thank you, Lt. Lepper and now Mr. O'Brien. I'm sure there will be responses to some of these statements in the comments to come.

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<sup>119</sup> See O'Loughlin, *supra* note 116, at 4.

<sup>120</sup> See James Crawford, *The ILC Adopts a Statute for an International Criminal Court*, 89 AM. J. INT'L L. 404, 409 (1995) (pointing out that the preamble to the draft of the statute emphasizes the limited jurisdiction of the court).

*Jim O'Brien*

MR. JIM O'BRIEN: I also have to note that my comments are my own, not necessarily those of the U.S. Government. When you work on these issues every day, it is very easy to forget how far we have come in the last few years. I find my work to be an exercise in remembering.

What I want to do today is to talk about the political will to support these tribunals, some of the significant issues facing the tribunals and what I think the legacies of these tribunals might be. Along the way I would like to drop a few facts just so people understand much of the efforts the international community has put into these tribunals to this point.

The first, political will: How do you generate the will to create and then to sustain efforts like these? The political will arose I think from a simple, almost cynical, explanation. In Yugoslavia in 1992 we saw a Holocaust again, for the first time in my lifetime, and I think people realized we had to respond in some way.<sup>121</sup> One response, not a complete response but one response, was to create an international tribunal that would hold the people responsible for the atrocities individually accountable.<sup>122</sup> This is the response we saw after World War II. The Security Council could not turn away when faced with a similar violence on a grander scale, as the Ambassador noted, in Rwanda a year and a half later. In November 1994, the Security Council established a tribunal for Rwanda.<sup>123</sup>

Now, there is some political will to establish these tribunals. The Yugoslav tribunal this week will finally receive its full budget of close to \$40 million over two years.<sup>124</sup> In addition to the U.N.

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<sup>121</sup> See Richard Norton Taylor, *The Ghosts of Nuremberg*, THE GUARDIAN (remarking that the conduct in the former Yugoslavia resembled a holocaust and that guilt, in part, inspired the creation of a tribunal to try war crimes).

<sup>122</sup> Julian Bedford, *Judges To Set Rules for Rwanda Genocide Tribunal*, Reuters, June 25, 1995, available in LEXIS, News Library, TXTNWS File.

<sup>123</sup> S.C. Res. 955, U.N. SCOR, 49th Year, 3453 mtg. at 1, U.N. Doc. S/RES/955 (1994) (establishing the international tribunal for Rwanda); see *Rwanda-Genocide Trial Site, Prosecutor Named*, Facts On File, Mar. 30, 1995, available in WESTLAW, ALLNEWSPLUS database, FFWND File, 1995 WL 7732184.

<sup>124</sup> See Thomas S. Warwick, *War Crimes; Don't Let Them Get Away with It*, WASH. POST, Dec. 20, 1994 (characterizing the size of the U.N. budget as nearly \$32 million).

budget, of which the United States will pay at least a quarter,<sup>125</sup> there will be voluntary contributions. I think fifteen to twenty states have contributed about \$8 million; Pakistan and Malaysia, \$3 million between them.<sup>126</sup> The United States has contributed \$3 million,<sup>127</sup> in addition to the money we will owe as a result of the U.N. budget.<sup>128</sup>

States are also contributing personnel. I think about ten to fifteen states have contributed personnel to the Yugoslavia tribunal at their own expense. The United States is paying for people to work full-time on tribunal business, including a number of very experienced prosecutors and investigators.<sup>129</sup>

In Rwanda, countries are beginning to make voluntary contributions of funds. Switzerland, I think, made the first.<sup>130</sup> The United Kingdom, Ireland, and the United States are also contributors. We committed \$1.4 billion thus far to the establishment of the Rwandan tribunal. But those just get you the institutions and they don't necessarily get you the results you want with those institutions, and I'll talk some more about the problems the institutions will face. But I think at one point it is all our responsibility to continue working to make sure that the institutions maintain what momentum they've got or to get more momentum if we need to have it. The Yugoslavian tribunal took far too long to get running. If it weren't for the efforts of Mr. Blewitt, it would have taken longer.

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<sup>125</sup> See Stephen Seplow, *U.N. Feels Helpless To Fulfill its Peacekeeping Mission; Lacks Power to Enforce Security Council's Mandates*, THE PHOENIX GAZETTE, Aug. 19, 1994, at A26 (noting that the United States pays about 25% of the U.N.'s regular budget).

<sup>126</sup> Cf. Stephanie Grant, *Hague Court Tackles Both Yugoslavia and Rwandan Crimes*, Inter. Press Serv., April 7, 1995, available in LEXIS, World Library, ALLWLD File (characterizing Malaysia, Pakistan, and Italy as "substantial" cash donors).

<sup>127</sup> See UNITED STATES DEP'T OF STATE, *ADVANCING AMERICAN INTERESTS THROUGH THE UNITED NATIONS*, DEP'T OF STATE DISPATCH, Vol. 6, No. 8, Feb. 20, 1995.

<sup>128</sup> See generally Seplow, *supra* note 125, at A26 (discussing United States contributions to U.N.'s budget).

<sup>129</sup> See Lt. Col. Steven Lepper, *War Crimes and the Protection of Peacekeeping Forces*, 28 AKRON L. REV. 411, 413 (1995) (discussing the United States personnel commitment to the tribunal).

<sup>130</sup> See Stephanie Nebhay, *Donors Pledge up to \$600 Million in Aid to Rwanda*, Reuters, Jan. 19, 1995, available in LEXIS, World Library, ALLWLD File (indicating that Switzerland has contributed aid to Rwanda).

He came on board nearly a year after the tribunal was established and did a great deal of work to get it in shape.<sup>131</sup> The chief prosecutor finally started work almost a year-and-a-half after the tribunal was established, and it now has indictments and is preparing for trials.<sup>132</sup> We would have liked to have seen all of that sooner. But we hope that it is at least the beginning of an answer to many of the atrocities suffered in the region in 1992 and 1993.

This week, the deputy Prosecutor is in Kigali, Rwanda. The head of investigations has been there often and is preparing a plan. A few United States-sponsored investigative teams have visited Kigali, collected a number of important documents and also conducted a number of interviews, so the tribunal is ready to start. It is again too slow. We would have liked to have seen it operating more quickly. Now, the Ambassador has outlined a number of difficulties that the government of Rwanda had with the statute of the tribunal,<sup>133</sup> and rather than engage in a point by point discussion of those, I think what I note is the overall approach the U.S. Government is taking to making the tribunal effective.

The statute is a compromise,<sup>134</sup> as any political document is. But the idea is that the domestic jurisdiction of Rwandan courts will work and will cooperate actively with the international jurisdiction provided by the tribunal. This has a few advantages. The first is it ensures that no one slips between the cracks; that neither side is overwhelmed by its burden and thus unable to live up to its obligations.

The second is, and I think this is particularly important for the future of Rwanda, it commits the international community to making the Rwandan justice system function effectively. Now, that's a commitment I don't think we have lived up to. The United States has

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<sup>131</sup> See generally Doyle, *supra* note 2, at 9 (profiling Graham Blewitt as deputy prosecutor for the tribunals).

<sup>132</sup> See *ADDSTribunal Fears Over Non-Extradition*, Agence France-Presse, Feb. 13, 1995, available in WESTLAW, ALLNEWSPLUS database, AGFRP File, 1995 WL 7758751.

<sup>133</sup> See *Expert Commission Reiterates Genocide Findings*, Associated Press, Dec. 2, 1994, available in WESTLAW, ASSOCPR database, 1994 WL 10110588.

<sup>134</sup> See generally Peter Burns, *An International Criminal Tribunal: The Difficult Union of Principle and Politics*, 5 CRIM. L.F. 341 (1994); David P. Forsythe, *Politics and the International Tribunal for the Former Yugoslavia*, 5 CRIM L.F. 401 (1994).

made commitments to improve the administration of justice in Rwanda<sup>135</sup> and, although we have been slow getting money on the ground, I think that's starting to happen now.

The European Union has committed about 150 people to be there providing advice, in helping the Rwandan domestic judicial system begin to work through the massive backlog of cases that is present.<sup>136</sup> But I think a premise for that sort of cooperation is that there has to be substantial overlap in their jurisdiction. There has to be overlap in their ability to try all of the important people and all of the important cases. You couldn't draw a black line from the beginning and have them function effectively. What you need is to have two bodies working towards the same end and then allow qualified experts, independent of governmental pressure, to make the decisions about which cases fit best in which body.

For all the differences that the Ambassador outlined, I would like to emphasize that there's excellent cooperation from the Rwandan government,<sup>137</sup> and it makes clear throughout the debates that although it might find some things in the statute difficult to accept,<sup>138</sup> it will cooperate with the tribunal. I think it has done everything that is within its power to do, and we expect to have fruitful cooperation from Rwanda in the future.<sup>139</sup>

Now, I would like to turn briefly to a couple of substantive issues and perhaps to the legacies of the tribunals. I just want to mention two substantive issues facing the tribunal. The first one is the scope of its jurisdiction.<sup>140</sup> At Nuremberg, there were essentially

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<sup>135</sup> Madeleine K. Albright, *International Law Approaches the Twenty-First Century: A U.S. Perspective on Enforcement*, 18 FORDHAM INT'L L.J. 1595, 1603-04 (1995) (observing that the United States has led efforts to establish, assist, and finance the international tribunal for Rwanda).

<sup>136</sup> Dzubow, *supra* note 66, at 519.

<sup>137</sup> See Lyons, *supra* note 70, at A12.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> See generally Levie, *supra* note 29, at 6, 7 (describing offenses over which the tribunals have jurisdiction and noting that neither has jurisdiction over "crimes against peace").

three crimes:<sup>141</sup> (1) The crime against peace,<sup>142</sup> the crime of committing aggressive war, (2) crimes against humanity,<sup>143</sup> government-sponsored systematic campaign against certain protected groups, which is a precursor to genocide, and (3) war crimes,<sup>144</sup> violations of the laws of war, essentially crimes against noncombatants, prisoners of war, and civilians. Only the last two are featured in the jurisdiction of the international tribunals in Yugoslavia<sup>145</sup> and Rwanda.<sup>146</sup> I want to focus on crimes against humanity.

I think the point we need to remember now, and I started by

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<sup>141</sup> See generally Brenton L. Saunders, *The World's Forgotten Lesson: The Punishment of War Criminals in the Former Yugoslavia*, 8 TEMP. INT'L & COMP. L.J. 357, 363-66 (1994) (discussing the types of crimes with which the Nuremberg Tribunal was concerned).

<sup>142</sup> At Nuremberg, "crimes against peace" were defined as "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan of conspiracy for the accomplishment of the foregoing." Charter of the International Military Tribunal, Aug. 8, 1945, art. 6(c), 59 Stat. 1546, 82 U.N.T.S. 284.

<sup>143</sup> The Nuremberg Tribunal defined "crimes against humanity" as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or prosecutions on political, racial or religious grounds in execution of or in connection with any crimes within the jurisdiction of the Tribunal . . . ." *Id.* at art. 6(c).

<sup>144</sup> The Nuremberg Charter defined "war crimes" as:

[V]iolations of the laws or customs of war. Such violations shall include, but not limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

*Id.* at art. 6(b).

<sup>145</sup> *Yugoslavia Statute*, *supra* note 17, at art. 3, 5, reprinted in 32 I.L.M. at 1172, 1173-74 (defining the tribunal's jurisdiction with respect to violations of the customary laws of war and crimes against humanity); see Ruth Wedgwood, *War Crimes in the Former Yugoslavia: Comments on the International War Crimes Tribunal*, 34 VA. J. INT'L L. 267, 271, 272 (1994) (indicating that violations of the customary laws of war and crimes against humanity are among the actionable crimes under the Statute for the Tribunal for the former Yugoslavia).

<sup>146</sup> *Statute of the International Tribunal for Rwanda*, annexed to S.C. Res. 955, U.N. SCOR, 49th Year, 3453 mtg. at 1, U.N. Doc. S/RES/955 (1994) (listing and defining the crimes over which the tribunal has jurisdiction).



noting the importance of memory, is that the Nuremberg tribunal was unable to try the Holocaust as such, and the reason for that was a technical legal problem in its jurisdiction.<sup>147</sup> The only way you could prosecute the German government for its crimes against German citizens, or the Czech government for crimes against its citizens and all throughout the occupied areas, the statute required that the crimes against humanity be committed in execution of or in connection to an armed conflict.<sup>148</sup> The international tribunal essentially ruled out all of the atrocities committed before World War II and then lumped the remaining atrocities, those committed during World War II, into the whole range of other atrocities committed during the result of the Nazi regime during the War. I think we owe the victims in Bosnia and in Rwanda a full account of the campaigns against them, of not just the atrocities, but of the orchestration of those atrocities, by putting that essentially on trial,<sup>149</sup> and this presents us with questions of legal interpretation, a quintessential lawyers' problem.

The Yugoslavia statute provides jurisdiction over crimes against humanity committed in armed conflict.<sup>150</sup> The question is, what does that mean? The United States has argued that this means simply crimes committed during an armed conflict, and because the armed conflict continues and has occurred virtually the entire time, this interpretation removes any requirement for substantive connection between crimes against humanity and the armed conflicts. This greatly reduces the burden on prosecutors and will allow the prosecutors to directly place on trial the plans and campaigns orchestrated by those who wanted to see ethnic cleansing carried out through the death of innocent civilians.

The second substantive issue I wanted to discuss concerns

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<sup>147</sup> See Wedgwood, *supra* note 145, at 271 (explaining that at Nuremberg, the prosecution could only prosecute crimes against humanity which were committed "in execution of or in connection with crimes against peace and conventional war crimes") (internal quotation marks deleted).

<sup>148</sup> *Id.* at 271-72.

<sup>149</sup> See *id.* at 271 (observing that the tribunals for the former Yugoslavia and Rwanda "would be well advised" to discard the jurisdictional limits which affected the Nuremberg prosecutions).

<sup>150</sup> *Yugoslavia Statute*, *supra* note 17, at art. 5, *reprinted* in 32 I.L.M. at 1173-74 (stating the tribunal's jurisdiction over "crimes [against humanity] when committed in armed conflict").

defendants. How do you get them? As Mr. Blewitt indicated, we don't have all of the defendants.<sup>151</sup> There cannot be *in absentia* trials because those smack of show trials.<sup>152</sup> Often I think states want to see an *in absentia* trial because you can put on evidence that wouldn't survive a proper adversarial proceeding.<sup>153</sup> We want to see a thorough record established in this case.

What do we do if we cannot get defendants in custody? One thing Mr. Blewitt has already outlined—we can have what has been called a super-indictment proceeding where the prosecutor appears before the tribunal and presents all of the evidence he wishes to present at trial.<sup>154</sup> That establishes a record.<sup>155</sup> That's an important point, I think, for the victims of the atrocities to know that somebody has not forgotten them, but I think we want more. We want to put people in the dock and try them.

How do you do that? There are ways. The first way is to press states to cooperate. States have an obligation binding under international law to turn over defendants.<sup>156</sup> Secretary of State Christopher, Ambassador Albright and recently President Clinton, have all said that the United States will hold states to their obligations under the U.N. Charter.<sup>157</sup> Ambassador Albright and Secretary

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<sup>151</sup> See Akhavan, *supra* note 114, at 243 (indicating that many leading suspects remain at large).

<sup>152</sup> See Aryeh Neier, *Judgment in Sarejevo?: For the Serbs' Victims, A War Crimes Tribunal is the Last Hope*, WASH. POST, April 18, 1993, at C3 (commenting that holding a trial in the absence of a defendant would "lack the appearance of fairness"); see also Wedgwood, *supra* note 145, at 267-68 (commenting that U.N. Secretary General Boutros Boutros-Ghali recommended, and the Security Council agreed, not to permit *in absentia* trials).

<sup>153</sup> *Id.* at 268.

<sup>154</sup> *Id.*; see also Gallant, *supra* note 28, at 581-83 (discussing the procedure which permits the prosecutor to present all of the evidence against an accused to a judge before gaining custody of the defendant).

<sup>155</sup> See Gallant, *supra* note 28, at 581-83.

<sup>156</sup> Levie, *supra* note 29, at 22-23 (discussing the obligation of states to cooperate with the tribunal).

<sup>157</sup> Cf. Lepper, *supra* note 129, at 412-14 (1995) (discussing the United States commitment to and involvement in the International Tribunal for the Former Yugoslavia). Member states have an obligation under the U.N. Charter to cooperate with the Security Council of the United Nations. See Wedgwood, *supra* note 145, at 269.

Christopher have both said that the U.S. will consider sanctions against states that refuse to cooperate,<sup>158</sup> and that we will consider cooperation with the tribunal in any decision to lift the crippling economic sanctions now pointed against some states of the former Yugoslavia.

A second way to capture defendants is when they travel. Traditionally, Yugoslavs have been a very mobile work force in Europe and it is a great tradition of these people to go and live with family members or work abroad. The more that the tribunal is able to focus on these folks and find them where they are living, the more of them will be arrested. I think you will see more of that in the future. The way that you track fugitives is first you have to get an indictment. The international legal machinery is triggered by a formal requirement, and we've only begun to utilize that formal requirement in the last few months, and I think we will see more arrests.<sup>159</sup>

The third way is I think you just cannot forget, and I think there are two elements to this. The first element is you have to remember the Nazi hunters. The arrest of one person indicted by the tribunal came about because a refugee saw someone she thought was a perpetrator and badgered authorities until he was brought into custody. I think that similar efforts by other refugees and a devotion of resources by the prosecution to cultivating that kind of intensity of effort will lead to more arrests. We might not get the leaders that way but we will get a fair number of people.

The second element is that we can't let these states off the hook. As Mr. Blewitt said, there will be political changes, and new regimes may no longer be interested in protecting the people protected by the current regime.<sup>160</sup> I think we have already seen a sea of change in Serbian political rhetoric over the last year. As far as my amateur historical research has revealed, for the first time,

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<sup>158</sup> See Jeri Laber & Ivana Nizich, *The War Crimes Tribunal for the Former Yugoslavia: Problems and Prospects*, 18 FLETCHER F. WORLD AFF. 7, 13 (1994) (quoting Ambassador Albright as saying that sanctions will be imposed against those who refuse to comply with the tribunal).

<sup>159</sup> Akhavan, *supra* note 114, at 243-44.

<sup>160</sup> *Cf. id.*, at 244-45 (suggesting that blacklisting political figures may serve to advance the democratization process by stigmatizing suspected criminals).

Serbs are criticizing other Serbs for atrocities committed against other ethnic groups.<sup>161</sup> That could only have come about as a result of international pressure upon them. It may at this point be political opportunism, an attempt to appease the West. But it creates, I think, a wedge in the different groups in the former Yugoslavia in a way in which eventually the leaders of those states may see it to their advantage to cooperate with the tribunal rather than to try to hide fugitives from justice.<sup>162</sup>

Now I just want to mention briefly what I see as the legacy of the tribunals. The first, I think, is a political legacy, and that is the tribunals provide a new tool for peace keeping.<sup>163</sup> I don't think we need go as far as Steve Lepper's fears,<sup>164</sup> that is, to establish a tribunal with mandatory jurisdiction over any conflict, but I think we have to remember here the role of Nuremberg.<sup>165</sup>

Professor Herbert Wechsler said a few years ago that he thinks one of the reasons there was relatively little conflict after the war ended in the cold winter of 1945 was that people knew that process was being undertaken against the people who were

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<sup>161</sup> See, e.g., *Serbs Report Atrocities by Own Militia*, SACRAMENTO BEE, Nov. 12, 1993, at A21 (observing that "for the first time since war broke out in the former Yugoslavia . . . [local newspapers] published eyewitness accounts of atrocities Serb paramilitary groups committed in Croatia and Bosnia").

<sup>162</sup> Cf. Neier, *supra* note 152, at C3 (commenting on the resentment among Serbs toward those responsible for war crimes and suggesting that the international tribunal may provide a solution).

<sup>163</sup> See generally S.C. Res. 827, U.N. SCOR, 48th Year, 3217th mtg. at 1, U.N. Doc. S/RES/827 (1993) (establishing the International Tribunal for the Former Yugoslavia as a response to threats to peace and security); S.C. Res. 955, U.N. SCOR, 49th Year, 3453 mtg. at 1, U.N. Doc. S/RES/955 (1994) (establishing the International Tribunal for Rwanda as a response to threats to peace and security); Alan C. Laifer, *Never Again? The "Concentration Camps" In Bosnia-Herzegovina: A Legal Analysis of Human Rights Abuses*, 2 NEW EUR. L. REV. 159, 179 (1994) (stating that the Security Council recognized that war crimes "still constitute[] an international threat to peace and security").

<sup>164</sup> See *supra* text accompanying notes 100-20.

<sup>165</sup> See Laifer, *supra* note 163, at 179 ("Madeleine Albright, the United States Ambassador to the United Nations, stated with regard to this resolution that "[t]he Nuremberg principles have been reaffirmed . . . [but unlike the trials at Nuremberg] this will be no victors' tribunal.").

responsible for the conflict.<sup>166</sup> I think that we will see that the tribunals will advance peace in the long term in both the former Yugoslavia and in Rwanda.<sup>167</sup>

First, and most practically, the tribunals can remove people who would otherwise cause violence.<sup>168</sup> There are individuals notorious as suspected war criminals who had become the targets of reprisals, or who had engendered hatred amongst their followers. To the extent they could be removed from the situation, from the camps in Tanzania and other countries, or from the governmental structures of the former Yugoslavia, we would have done peace, I think, a good service. Secondly, the tribunals can promote an ideal of what these societies should stand for, an account of individual accountability of the rule of law.<sup>169</sup>

Now, for all the difficulties the Ambassador outlined, I think the tribunal will make a contribution in both of these societies. I think, when we are doing this, we have to remember the role of memory as well, in both the former Yugoslavia and in Rwanda. Both of these places are haunted by violent pasts.<sup>170</sup> In a way, ghosts are causing violence. I know more about the former Yugoslavia and I know a number of people there attribute the violence to the group activities of other groups in the past. One thing the tribunal can do is identify individuals and hold them responsible, so that people can trace where the group enmity arose from and how it played out in

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<sup>166</sup> See Norman Silber & Geoffrey Miller, *Toward "Neutral Principles" in the Law: Selections from the Oral History of Herbert Wechsler*, 93 COLUM. L. REV. 854, 911 (1993) (commenting that condemnation of reprehensible conduct through prosecutions may have had a positive effect on the minds of victims).

<sup>167</sup> See Laifer, *supra* note 163, at 179-80 (commenting that it is believed that prosecution of war crimes and crimes against humanity will prevent future crimes and will ultimately lead to "a furtherance of cooperation among peoples and the promotion of international peace and security").

<sup>168</sup> *Id.* See generally *Bring the Killers to Justice*, FT. WORTH STAR-TELEGRAM, April 2, 1995, at 2 (commenting on the goal of the tribunals which is to eliminate war crimes through prosecution of the guilty).

<sup>169</sup> See Levie, *supra* note 29, at 4 (recognizing that "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced").

<sup>170</sup> See David M. Kresock, *"Ethnic Cleansing" in the Balkans: The Legal Foundation of Foreign Intervention*, 27 CORNELL INT'L L.J. 203, 216-19 (1994) (discussing Yugoslavia's violent past).

this case.<sup>171</sup>

The second legacy the tribunals may leave us is a legal legacy concerning the relationship of a government to its own people. I've already talked about crimes against humanity. That's the leg of both the tribunals' jurisdiction that extends to a government's relationship with its own people.<sup>172</sup> Until a couple of years ago, that could be applied only in a time of an armed conflict, perhaps even just an international armed conflict.<sup>173</sup> We are now seeing a weakening of that connection, and it may be that, after these two tribunals, we will have an opportunity to press ahead and prosecute government officials for what they do to their own citizens in a time of peace.<sup>174</sup>

Now when will that be? I don't know, and I don't know that Steve Lepper and I, or other government officials, will be the ones to make that decision. I think that decision will have to emanate from a lot of concerned activities by citizens, by non-governmental organizations, and by others. Again, it is something that all of us have to do. It is not enough simply to come to a conference and talk about this. We have to remain active in calling to the attention of government the need to act in this area.

When I look back and try to remember what I think is most important for guiding us here, I think we have to try to make sure that the perpetrators are remembered, as a measure of humanity's own depravity, and to make sure that we don't forget that. We have to make sure that the victims are remembered as a measure of our own resilience against evil and so they are not forgotten. As for

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<sup>171</sup> See generally *id.* (discussing violence in Yugoslavia's past and how intense ethnic hatred divides the country); Alex N. Dragnich, *Bosnia-Herzegovia: A Case Study of Anarchy in the Third World*, 3 CARDOZO J. INT'L & COMP. L. 163, 163-65 (1995) (discussing underlying causes of Yugoslavia's current bloodshed and the history of violence and ethnic hatred in the country).

<sup>172</sup> See Levie, *supra* note 29, at 11 (noting that some have argued that "only international entities . . . are the subjects of international law and that, therefore, individuals cannot be punished for violations of that law except as their national laws may so provide and their national courts may so decide"). See generally Saunders, *supra* note 130, at 360 (discussing the tribunal's ability to punish those who commit crimes against peace, war crimes, and crimes against humanity).

<sup>173</sup> See Levie, *supra* note 29, at 11; Saunders, *supra* note 141, at 360.

<sup>174</sup> See generally Saunders, *supra* note 141, at 371 (discussing the fact that the Security Council now has the "power to determine the existence of any threat to peace, breach of the peace, or act of aggression").

myself, as a government official, I want to make sure that I can remember the role of government officials during World War II, those who turned their backs on evidence of the Holocaust, and try to see that I was not responsible in the same way, at least within my own limited area.<sup>175</sup> So all of those arms of memory, I think, are part of how we can proceed in this case and try to bring a little bit of justice in two areas that have had too little.

PROFESSOR TEITEL: Thank you for those inspiring remarks. And now Stephanie Grant who was director of program and policy of human rights and was formally consultant to the United States special rapporteur in Yugoslavia until 1984 in Geneva.

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<sup>175</sup> See TAYLOR, *supra* note 101, at 23 (quoting a German officer saying how horrified he was that high ranking German officers simply turned their backs on atrocities).

*Stephanie Grant*

MS. STEPHANIE GRANT: I would like to say something along the general theme of expectation and reality because I think one of the difficulties we have in thinking about the Yugoslav tribunal is in remembering that it is a relatively small and rather finite institution, dealing with an enormously complex set of human and historical and legal realities.<sup>176</sup>

I am going to begin on a very specific note and that's just to remind us that on the 13th of February, which is just six weeks ago, the tribunal issued the first ever indictment on a charge of genocide. The person indicted is named Zeljko Meakic.<sup>177</sup> He was one of the Bosnian Serbs charged with killing, beating, raping, and mistreating prisoners at the Omarska death camp near an area named Prijedor in Bosnia. He was chief commander of the camp.<sup>178</sup>

The indictment states the offense in these terms, and I think this takes us straight back in history: "Zeljko Meakic intending to destroy, in whole or in part, the Bosnian Muslim and Bosnian Croate people as national, ethnic or religious groups was implicit in the killing of Bosnian Muslim and Bosnian Croates at the Omarska camp, thereby committing genocide."<sup>179</sup>

Meakic is the twenty-second person to be indicted,<sup>180</sup> and the first person ever to be indicted, as I've said, on charges of

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<sup>176</sup> See M. Cherif Bassiouni, *Former Yugoslavia: Investigating Violations of International Humanitarian Law and Establishing an International Criminal Tribunal*, 18 *FORDHAM INT'L L.J.* 1191, 1204-07 (1995) (discussing the difficulties that the International Criminal Tribunal for the Former Yugoslavia will have due to legal, practical and political hurdles in prosecuting war crime defendants); see also Wedgewood, *supra* note 145, at 269-71 (discussing the practical difficulties in trying to prosecute war crime defendants due to evidentiary problems).

<sup>177</sup> See generally William Drozdiak, *War Crimes Tribunal Arraigns First Suspect; Bosnian Pleads Not Guilty to Charges that He Killed Muslims at Detention Camp*, *WASH. POST*, Apr. 27, 1995, at A31 (discussing the indictment of Dusan Tadic and indicating that Zeljko Meakic was the senior commander at the Omarska death camp and one of the first twenty-two Serbs indicted for crimes against humanity).

<sup>178</sup> *Id.*

<sup>179</sup> See generally *id.*

<sup>180</sup> See *id.* But see Marjorie Miller, *UN War Crimes Tribunal Charges 21 Bosnian Serbs*, *L.A. TIMES*, Feb. 14, 1995, at A1 (including this suspect among the names of the twenty-one persons indicted).



genocide.<sup>181</sup> This is evidence that the Yugoslav tribunal is properly in business. There are huge expectations for this tribunal. I think if I was Graham Blewitt,<sup>182</sup> I would feel completely crippled by the enormous difficulties of what this tribunal must do.

I would like to look at three or four of the very practical problems which are inherent in conducting international criminal investigations at this point in time. I'd like to preface that by reminding us that Yugoslavia has had the misfortune of being in a sense a laboratory of the international community.<sup>183</sup> Many of the things which the international community has done and achieved in the case of Yugoslavia meant that the approach to the creation of the Rwandan tribunal could go rather more quickly than it did.<sup>184</sup>

Yugoslavia has been a laboratory in the sense that it has presented the international community with the challenge of how to learn, or perhaps to relearn, the ways in which a system of international justice and international law enforcement can be constructed and made real.<sup>185</sup> That has been a relatively slow and difficult process. I want to look initially at three specific areas: the question of the difficulty of evidence, the difficulty of investigation and the difficulty, to which others have referred, of trying defendants

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<sup>181</sup> Roger Cohen, *Tribunal Charges Genocide by Serb*, N.Y. TIMES, Feb. 14, 1995, at A1 ("In the first genocide indictment ever handed down by an international tribunal, the court charged Zeljko Meakic, the overall commander of the Serbian-run Omarska camp in northwestern Bosnia, with 'genocide and crimes against humanity.'").

<sup>182</sup> Graham Blewitt is the deputy prosecutor for the International Criminal Tribunal for the former Yugoslavia. Formerly a war crimes prosecutor in his native Australia, Blewitt now leads the team of ninety charged with prosecuting war crimes out of the Balkan conflict. See Franklin, *supra* note 2, at 30-31.

<sup>183</sup> Zacklin, *supra* note 95, at 279 (observing that The Tribunal for the Former Yugoslavia will serve as a model for future international prosecutions).

<sup>184</sup> *Id.*; see also Steven Coll, *In the Shadow of the Holocaust*, WASH. POST, Sept. 25, 1994, at WO12 (discussing the role of the Hague Tribunal as a foundation for the establishment of a permanent U.N. international court of human rights which will have an immediate impact in Rwanda and all future international conflicts).

<sup>185</sup> See Zacklin, *supra* note 95, at 280 (noting that "[t]he Tribunal will be, at the very least, an exercise in establishing mechanisms to judge war crimes, and at most an effective model that may be utilized in the establishment of a permanent tribunal with a broader criminal jurisdiction").

who are outside the control of the tribunal.<sup>186</sup>

The expectations which have been all around the Yugoslav tribunal, first of all, focused on the question of evidence of war crimes. People assumed that because there had been very extensive media and non-governmental organization reporting, that could seamlessly translate into the hard evidence that was necessary for the criminal prosecution. The inadequacy of the evidence took the international community by surprise. The conflict in Bosnia was never a secret one.<sup>187</sup> Atrocities were reported daily.<sup>188</sup> In the first months of the Bosnian conflict the United Nations Protection Force credited 3000 journalists. They all filed their reports. There was reporting by the U.N.<sup>189</sup> and the first U.N.- placed field monitors. But then suddenly the world had to realize that reporting human rights was a different matter from proving criminal responsibility. When the commission of experts, which went out of business last year, handed over its mandate to the tribunal, it handed over 65,000 pages of documentation containing around 50,000 delegations.

It was the task of the prosecutor's office of Graham Blewitt, and of those who later joined him, to see whether that information could be transformed into evidence. I was reading Telford Taylor's book,<sup>190</sup> and I came across a comment which he made in, I think May

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<sup>186</sup> See Bassiouni, *supra* note 176, at 1204-07 (discussing the evidentiary difficulties of prosecuting war criminals and the other legal, practical, and political hurdles which the war tribunal will face in Yugoslavia); Wedgewood, *supra* note 145, at 269 (noting evidentiary problems which arise from prosecuting war crimes); Franklin, *supra* note 2, at 30-31 (discussing the evidentiary difficulties of prosecuting suspected war criminals *in absentia* encountered by Graham Blewitt, Deputy Prosecutor of the War Crimes Tribunal).

<sup>187</sup> See Gideon A. Moor, *The Republic of Bosnia-Herzegovina and Article 51: Inherent Rights and Unmet Responsibilities*, 18 FORDHAM INT'L L.J. 870, 897-98 (1995) ("Taking note of the continued reports of human rights atrocities within Bosnia . . . the Security Council expressed alarm at continuing reports of human rights violations.").

<sup>188</sup> See, e.g., *U.N. Reports Massacre of Bosnian Muslims in Expulsions*, WASH. POST, Oct. 19, 1995, at A35 (reporting about "100 Muslims were killed earlier this month after resisting Serbs trying to expel them from their homes"); see also Lepper, *supra* note 129, at 412 (commenting that "the world was inundated with stories from the press about the brutality in Bosnia").

<sup>189</sup> See, e.g., *Croates, Muslims Sign Cease-Fire*, SAN DIEGO UNION TRIBUNE, May 10, 1993, at A1 (U.N. observers reporting that "most residents had fled to the hills for safety . . . there have been signs of heavy shelling the past few days").

<sup>190</sup> TAYLOR, *supra* note 101.

of 1945, which seemed very apposite. He said, “[o]ur task was... to prosecute leading Nazis on . . . criminal charges, . . . . The first question a prosecuting attorney asks . . . is ‘[w]here is the evidence?’ The blunt fact was that [in May 1945], despite what everyone knew about the Nazi leaders, virtually no judicially admissible evidence was at hand.”<sup>191</sup> This, I think, was the mountain that the relatively small initial team of prosecutors in the Hague have been having to climb. They’ve been having to go through enormous quantities of soft evidence and try to turn it into evidence which they can put before the court.

The second problem is that of international investigation. Normally, when police investigate an offense, they do so in a language they understand, a culture they know, and in a political or criminal context with which they are familiar. The tribunals’ investigators’ witnesses are scattered in the refugee diaspora.<sup>192</sup> I understand that Omarska<sup>193</sup> indictments required travel to no less than twelve countries, including Malaysia. They have to establish that there was a murder because they don’t have the corpse. They have to conduct their investigations through interpreters in another country and at a distance.<sup>194</sup> The problem of distance also, of course, means that in all but one of these indicted cases it’s quite unlikely that the defendant will appear in the court,<sup>195</sup> and the expectations that the court would now be in full swing as of March of this year seem relatively unlikely to be realized.

Set against this, I think one has to look at what the tribunal has achieved. It has drafted and adopted rules of procedure which,

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<sup>191</sup> *Id.* at 49.

<sup>192</sup> See William W. Horne, *The Real Trial of the Century*, THE AMERICAN LAWYER, Sept. 1995, at 4, 58 (noting that it can be very difficult for a prosecution team consisting of people from twenty-nine different cultures to obtain indictments).

<sup>193</sup> Omarska was a concentration camp located in the Prijedor district of Bosnia. Cohen, *supra* note 181, at A1.

<sup>194</sup> See Horne, *supra* note 192, at 60 (observing that if a witness agrees to speak against an alleged perpetrator, “an interpreter and two investigators must travel from the tribunal to wherever in Europe the witness is located”).

<sup>195</sup> See Christiane Amanpour, *The Next 50 Years, Part 3 - Crimes of War* (CNN News Transcript 606-3, Oct. 22, 1995) available in LEXIS, World Library, ALLNWS File (indicating that only one of forty-three people indicted is currently in custody).

I think, will be model rules of procedure for other tribunals.<sup>196</sup> This I think is a very important point for the national courts because in the case of Yugoslavia, and probably in all cases, as Professor Louis Henkin reminded us this afternoon, the place where the most prosecutions will take place will be and should be in national courts. The tribunal, as Graham Blewitt told us, has concurrent jurisdiction.<sup>197</sup>

This means that where a court in one of the successor states of the former Yugoslavia tries somebody, either on criminal charges or on war crime charges, the tribunal may decide whether it should seek to have the case transferred to it to try or to have a completed case retried in the Hague.<sup>198</sup> It can exercise this jurisdiction in a number of circumstances which are set out in its statute and rules.<sup>199</sup> One of them is where the national proceedings were not impartial, were not fairly conducted, or were designed to shield the accused from international responsibility.<sup>200</sup> The tribunal can also exercise its jurisdiction where ordinary criminal charges are brought despite evidence of war crimes.<sup>201</sup>

Now, this is an enormously important part, and the question is how the tribunal is going to be able to exercise its jurisdiction and the degree to which this power can enable the tribunal to act as a

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<sup>196</sup> See *Statute of the International Tribunal for Rwanda, annexed to, S.C. Res. 955, U.N. SCOR, 49th Year, 3453 mtg. at 1, U.N. Doc. S/RES/955 (1994)* (stating that "the Tribunal shall adopt the rules of procedure and evidence already adopted by the International Tribunal for the Former Yugoslavia"); see also Levie, *supra* note 29, at 3 (noting that the International Tribunal for Rwanda will follow the procedural rules of the International Tribunal for the Former Yugoslavia).

<sup>197</sup> Levie, *supra* note 29, at 14.

<sup>198</sup> *Id.* at 15 (describing the jurisdiction of the Tribunal for the Former Yugoslavia).

<sup>199</sup> See generally *Yugoslavia Statute, supra* note 17, at art. 10, reprinted in 32 I.L.M. 1177 (specifying the instances in which a defendant may be retried by the tribunal after a national court prosecution).

<sup>200</sup> *Id.*; see Levie, *supra* note 29, at 15 (noting that Article 10(2) of the Statute of the International Tribunal for the Former Yugoslavia specifies when retrial of a defendant is permitted).

<sup>201</sup> *Yugoslavia Statute, supra* note 17, at art. 10(2)(a), reprinted in 32 I.L.M. 1177 (stating that a defendant may be tried by the tribunal following a national court trial when "the act for which he or she was tried was characterized as an ordinary crime"); see Levie, *supra* note 29, at 15 (commenting generally on retrials under the Statute of the International Tribunal for the Former Yugoslavia).

supervisory body, not a court of appeal, but a court of reference and influence, which will set standards throughout the national criminal institutions of Bosnia, Croatia, Serbia, Montenegro, and possibly Macedonia. Speaking practically and in the long-term, this is going to be of more effective importance than the relatively small number of cases which the tribunal is going to be able to try in the Hague.

This is not to minimize the importance of these proceedings, which are going to establish the law. They are going to set standards and they are going to have very important deterrent effects.<sup>202</sup> But of the hundreds of thousands of war crimes, crimes against humanity, and acts of genocide which have been committed in the course of the Yugoslavian conflict, these must be dealt with.<sup>203</sup> They must be tried within national courts.

Originally, the tribunal was little known in the former Yugoslavia.<sup>204</sup> One of the reasons for that is that it didn't have the money to translate its statute and rules, among other things, into Serbo-Croate.<sup>205</sup> This is all changing. I was talking to a journalist a week ago who is working in the small area of Bosnia, speaking with local people, and he described the increasing reluctance that those who he was interviewing felt to talk with him about what had happened, and he ascribed that reluctance to the fact that suddenly the tribunal was becoming known.

Now, this may seem something very small, but if someone believes in the deterrent quality of the effect of prosecution, it is actually something of considerable importance. What now must happen is that the tribunal's proceedings in the Hague must be

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<sup>202</sup> See Stephanie Grant, *Yugoslavia: Balkan Image and Hague Reality*, Inter. Press Serv., May 27, 1995, available in LEXIS, Nexis Library, ALLNWS File (suggesting that the tribunal's work should be widely reported to deter future incidents of war crime).

<sup>203</sup> See O'Brien, *supra* note 78, at 639 (observing that "the victims of atrocities in the former Yugoslavia deserve justice, as do all those elsewhere who will be protected by strengthened international humanitarian law").

<sup>204</sup> See Grant, *supra* note 202 (commenting that "the tribunal is largely unknown to those within its jurisdiction").

<sup>205</sup> The working languages of the International Tribunal for the Former Yugoslavia are English and French. *Yugoslavia Statute*, *supra* note 17, at art. 33, reprinted in 32 I.L.M. at 1200.

reported throughout the former Yugoslavia.<sup>206</sup> There is a project run by an institute in London called the Institute of War and Peace Reporting whereby a Serbo-Croate speaking journalist will be in the courtroom and will be reporting on a daily basis what is happening so that this can be published and publicized throughout the media in the area.

The next important thing is that lawyers, judges, and non-governmental organizations in the region need to know about the tribunal. They need to know its statutes; they need to know the laws being applied; and they then need to be able to press for prosecution under Yugoslavian rule, because the law of the Social Federation of Yugoslavia, former Yugoslavia, which has now been incorporated into the law of all the successive states, contains the Geneva Convention, the genocide convention and all the laws which are necessary to conduct prosecutions at the national level.<sup>207</sup>

I think that when I started by saying that I wanted to talk about expectation and reality, I think it is very important to have high hopes for these tribunals, but I also think it is important to recognize the practical reality in which they work. Not to be cast down by that, but to recognize the practical and real and immediate tasks which have to be undertaken in order to establish individual responsibility and to replace collective responsibility by individual prosecution within national courts and within the region.

PROFESSOR TEITEL: And now Juan has promised to pull all this together in ten minutes.

*Juan Mendez*

MR. JUAN MENDEZ: Thank you very much. By mutual accord with Stephanie, I will concentrate on Rwanda rather than on the former Yugoslavia and I will do so on the basis of the research that my colleagues at our African division, formally known as Africa Watch, have conducted. So I'm not going to attempt to bring

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<sup>206</sup> See Grant, *supra* note 202.

<sup>207</sup> See Genocide Convention, *supra* note 53. Article 2 imposes a legal obligation upon contracting states to prevent and punish genocide. *Id.*

everything together.

A man of Tutsi origin is in jail right now in Rwanda and he's elderly and has difficulty living through the prison experience. He recently wrote a note to a judicial authority in Rwanda. The basis for his arrest is complaints that he was actually spared from the genocide of last year because a man of Hutu origin protected him and that man of Hutu origin was up to his neck in the killing of fellow Tutsies. And by one of those sometimes unexplainable things that happens in a catastrophe of this sort, he apparently saved the life of this man.

That seems to be the only basis for his arrest, and when he wrote to this judicial authority, he was not asking to be released. He was borrowing some money and, because of his old age, he could not find his way to having a place to sit down in a prison in Kigali. In fact, in that prison and in some others, there's a density of about four prisoners for every square meter,<sup>208</sup> and so it is very difficult to sit down and most of these prisoners are sleeping in shifts.

I don't pretend to say by any means that this case is representative of the 30,000 people who are in custody in Rwanda.<sup>209</sup> By all accounts, many of them may be deservedly in prison, but, unfortunately, our research shows that this is not a completely isolated case. We have seen several other cases in which injustices may be committed in the name of the duty and obligation of the state of Rwanda to punish the crime of genocide.<sup>210</sup>

One of the cases that we learned about, and this is an instance of interference by military authorities with the proper roles of the judiciary, is a judge last year who actually ordered the release of about twenty-two accused persons because he did not find, under the laws of Rwanda, that the conditions existed for them to remain in

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<sup>208</sup> See *Central Africa Faces New Refugee Crisis*, UPI, Mar. 31, 1995, available in LEXIS, World Library, ALLNWS File [hereinafter *Central Africa*] (quoting the Red Cross which observed that "[p]risons have become so overcrowded that . . . detainees must share a square meter of floor space with four to six inmates").

<sup>209</sup> *Id.* The Red Cross indicates that there are some 30,000 prisoners in 135 detention centers throughout Rwanda. *Id.*

<sup>210</sup> See, e.g., Julian Bedford, *Inmates Threaten Breakout from Jam-Packed Jails*, Reuters Ltd., Apr. 4, 1995, available in LEXIS, News Library, CURNWS File (reporting that more than 30,000 prisoners are crowded into jails that were built to house only 5000).

preventive detention.<sup>211</sup> These people were released but were immediately rearrested by the military authorities in the region and the judge himself subsequently disappeared.<sup>212</sup>

I am telling this horror story not to disparage the effort, but on the contrary, to point out that the effort of the Rwandan government to prosecute and punish is in serious jeopardy unless these abuses can be stopped. And it is difficult to see them stop any time soon when there are now more than 30,000 people in custody;<sup>213</sup> about 15,000 of them, about half, were arrested in the first six months of this present government's existence,<sup>214</sup> and more than half of them were arrested only in the last three months.<sup>215</sup> At this rate, the new arrests are about 1500 a week.<sup>216</sup> Under those conditions, it becomes understandable that many injustices will be committed.

In fact, extrinsically, the Ministry of Justice itself considers that about twenty percent of those people who are in custody have no reason to be in custody today in Rwanda.<sup>217</sup> Our monitoring staff,

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<sup>211</sup> See *Rwanda-Berundi: Countries Urged to Act as New Killings Loom*, Inter. Press Serv., Apr. 6, 1995, available in LEXIS, World Library, ALLNWS File. The facts indicate that 80 prisoners were authorized to be set free as ordered by the judge. Subsequently, they were arrested by the military. *Id.* Justice Gratein Ruhorahoza was determined to be missing shortly thereafter. *Id.*

<sup>212</sup> *Id.* Justice Ruhorahoza was taken away by government soldiers after posting the names of 80 prisoners he scheduled for release. *Id.*

<sup>213</sup> See Elif Kaban, *Rwanda Pledges To Do More To Heal Ethnic Rifts*, Reuters News Serv., Nov. 2, 1995, available in LEXIS, World Library, ALLNWS File [hereinafter *Rwanda Pledges*] (jails packed with 57,000 Hutus); Elif Kaban, *Rwanda: Red Cross Says 2330 Die in Rwandan Jails*, Reuters News Serv., Oct. 29, 1995, available in LEXIS, News Library, WIRES File [hereinafter *Red Cross*] (estimating prison population at 40,000); see also *supra* note 210.

<sup>214</sup> See *The Crises in Rwanda and Berundi Are Not Over Yet*, CHRISTIAN SCI. MONITOR, Dec. 19, 1994, available in LEXIS, News Library, PAPERS File (estimating 15,000 arrests).

<sup>215</sup> See generally HUMAN RIGHTS WATCH WORLD REPORT 1996, at 41 (discussing arrest and imprisonment statistics for Rwanda).

<sup>216</sup> See *Central Africa*, *supra* note 208 (reporting that overcrowding in Rwandan jails is caused by an addition of approximately 1500 prisoners a week); *Rwanda Pledges*, *supra* note 213 (estimating 1000 weekly arrests on suspicion of involvement in genocide).

<sup>217</sup> See Scott Peterson, *Rwanda Prisons Are Swamped by 'War Criminals'*, THE DAILY TELEGRAPH, Oct. 5, 1994, available in LEXIS, World Library, ALLNWS File (noting that "[t]he Ministry of Justice admits that some people are held wrongly" but



which is currently in Rwanda, has heard of the emergence of accusers on demand that, for the appropriate fee, can act as an accuser before any police or military authority and can have somebody who they don't like, or for whatever other reason, arrested.

There have been deaths in custody.<sup>218</sup> You must have read about the March tragedy when people suffocated to death.<sup>219</sup> There the Rwandan authorities appropriately exercised their duty to investigate and punish these serious crimes. Those who were responsible for not opening the cell door so that these people would not die have been arrested<sup>220</sup> and they hopefully will be prosecuted. That willingness to prosecute their own will do a lot of good in legitimatizing Rwanda's effort and in ensuring support by the international community for this effort.<sup>221</sup>

But, on the other hand, there is an estimate of about 1000 deaths in custody in these nine months,<sup>222</sup> and this is the only case that we know of where there has been some appropriate response. As I said, the prison conditions are appalling.<sup>223</sup> The International

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does not offer actual percentages of those wrongly detained).

<sup>218</sup> Elif Kaban, *Human Rights Fears Surround Rwanda Refugee Influx*, Reuters, Nov. 30, 1995, available in LEXIS, World Library, ALLNWS File (noting that 2300 inmates have died in jails overcrowded with 60,000 genocide suspects); *Rwanda: About 1,000 Inmates Die in Less Than A Year in Overcrowded Gitarama Prison*, BBC Monitoring Serv., July 7, 1995, available in LEXIS, World Library, ALLNWS File (noting that about 1000 inmates had died over the past nine or 10 months at Gitarama prison); see *Rwanda: More Detention Centres for Rwanda*, Reuters News Serv., Oct. 4, 1995, available in LEXIS, News Library, TXTNWS File ("The Red Cross says some 1,000 inmates died so far this year of dysentery and malaria in Gitarama.").

<sup>219</sup> See Bedford, *supra* note 210 (observing that "22 people suffocated to death in a police station cell on the outskirts of Kigali as they waited to be transferred to the capital's already jam-packed central prison").

<sup>220</sup> See *Twenty-Two Prisoners Suffocate to Death in Rwandan Jail*, Agence France-Press, Mar. 19, 1995, available in LEXIS, News Library, WIRES File (reporting that an official and the guards who locked the detainees in the room have been arrested).

<sup>221</sup> See *Not Since Nuremberg*, WASH. POST, Aug. 21, 1994, at C8 (questioning whether "leading suspects will escape prosecution by virtue of their bargaining power as political leaders").

<sup>222</sup> See *supra* footnote 218.

<sup>223</sup> See *Kenya: Hundreds Dead in Rwanda's Appalling Prisons*, Reuters, Sept. 26, 1995, available in LEXIS, News Library, TXTNWS File (characterizing Rwanda's prisons as "appalling"); *Red Cross, supra* note 213 (observing that 2300 inmates have died from disease).

Committee of the Red Cross that monitors prison conditions has warned publicly of the possibility of an outbreak of serious illness because of these conditions that, under any circumstance, amount to cruel, inhumane, and degrading treatment. There are also problems with due process.<sup>224</sup> Of all the people who are in custody in the region of Kigali, there are about 7000 people in custody,<sup>225</sup> only about 1500 have even appeared before a magistrate once.<sup>226</sup> Some months ago a liberation committee was formed.<sup>227</sup> The liberation committee was supposed to review each case. We applauded the measure, and we supported it. Unfortunately, pretty soon the liberation committee included members of the secret services and even members of the liberation committee itself complained that the presence of secret police members in the liberation committee was inappropriate. Even so, the liberation committee saw about 100 cases, and of those, ordered the release of fifty-eight and in some of those cases the people holding them didn't even comply with the liberation committee's request.<sup>228</sup>

There is no question that the government of Rwanda is trying to live up to its duty. Actually the government of Rwanda has done more than the rest of the international community has done to prevent and punish the crime of genocide.<sup>229</sup> My concerns, as I have just

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<sup>224</sup> See HUMAN RIGHTS WATCH WORLD REPORT 1996, at 40 (observing that nearly 57,000 people are being detained in Rwandan prisons under conditions which violate the due process guarantees of Rwandan law).

<sup>225</sup> See *Rwanda: About 1000 Inmates Die in Less Than a Year in Overcrowded Gitarama Prison*, BBC Monitoring Serv., July 7, 1995, available in LEXIS, World Library, ALLNWS File (noting that Gitarama is "the worst prison where 7000 inmates are crammed into space built for 400").

<sup>226</sup> Cf. *Kenya: U.N. Agency Empties Warehouses for Rwanda Inmates*, Reuters News Serv., Aug. 3, 1995, available in LEXIS, World Library, TXTNWS File ("Rwanda's judiciary has been paralyzed since the end of three months of civil war and genocide last year and is unable to process detainees because of a lack of magistrates and funds.").

<sup>227</sup> See HUMAN RIGHTS WATCH WORLD REPORT 1996, at 41-42 (discussing the creation of a "selection commission" to review the cases of prison detainees).

<sup>228</sup> Cf. *id.* (explaining that the few persons who were released "were only provisionally at liberty and had not been cleared of the charges against them" and others were attacked or killed).

<sup>229</sup> See S.C. Res. 955, U.N. SCOR, 49th Year, 3453 mtg. at 1, U.N. Doc. S/RES/955 (1994) (recognizing Rwanda's interest and repeated requests for an international tribunal).

expressed them, go to the necessary legitimacy of the effort and not to the effort itself.

There should be no equivalence between the abuses that present state agents in Rwanda commit with the genocide that was committed last year and my criticism is by no means intended to provide that equivalence. I very strongly reject that. But again, current abuses have to be dealt with, and the government has to show its willingness to try their own, just as it is willing to try the enemy or the enemy of its people. In that regard, the first task, the most urgent task, is to rebuild the judiciary.<sup>230</sup> It has been said before today, but I would say within rebuilding the judiciary, the first and most urgent task is to rebuild a certain function within the judiciary by which magistrates can examine the charges against every detainee, to do so expeditiously, but at least with some form of due process, so that these unfair cases may be dealt with soon. Those who have to remain in prison because, their prima facie evidence of their involvement in crime should then remain in prison but under appropriate prison conditions.<sup>231</sup>

I'm not going to dwell on domestic trials in the former Yugoslavia, but I do want to refer you to a couple of reports that we have done about those trials in different states of the former Yugoslavia. By our account, very few, if any, of those trials live up to any serious scrutiny under international human rights norms. But, as I said before, it is not only the government of Rwanda and certainly not only the government of the former Yugoslavia that has the responsibility to prosecute and punish these crimes.<sup>232</sup>

So what has been the record of other domestic jurisdictions

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<sup>230</sup> A rebuilding of the judiciary has already begun. See *Rwanda: Rwanda Sets up Supreme Court in Big Step to Justice*, Reuters News Serv., Oct. 12, 1995, available in LEXIS, News Library, TXTNWS File (noting that "[t]he Rwandan government has appointed a new Supreme Court in the first major step towards rebuilding its justice system destroyed by last year's genocide").

<sup>231</sup> See generally AMNESTY INTERNATIONAL, REPORTS OF KILLINGS AND ABDUCTIONS BY THE RWANDESE PATRIOTIC ARMY, APR.-AUG. 1994, at 12 (1994) (making recommendation to the Rwandan government to improve treatment of prisoners and preventative detention procedures).

<sup>232</sup> Cf. Dusan Cotic, *A Critical Study of the International Tribunal for the Former Yugoslavia: Introductory Remark*, 5 CRIM. L.F. 223, 231 (1994) (suggesting that "the world community" has an obligation to prevent war crimes).

that have some responsibility, either to try to extradite, or in the case of the ad hoc tribunals that have been created, at least to transfer those prisoners to the appropriate jurisdiction? In France, where presently there are apparently many former Rwandese culprits of the genocide, the government has shown no willingness whatsoever to investigate them.<sup>233</sup>

In Belgium and in Switzerland the evidence is a little more encouraging.<sup>234</sup> At least there are some serious efforts to gather evidence against people who may be there. Canada has decided to forgo trial and is instead using its immigration law to deport someone involved in the genocide.<sup>235</sup> As far as other African nations, in Kenya and Tanzania there has been very little effort.<sup>236</sup> In South Africa, the government recently gave asylum to someone involved in arms traffic that provided arms to the former government of Rwanda;<sup>237</sup> arms that helped commit the genocide. In addition, Zaire in fact is cooperating to rearm the militia and perhaps contribute to create another outburst of the genocide.<sup>238</sup>

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<sup>233</sup> See Robert Block, *Bickering Delays Start of Rwanda Genocide Tribunal; France Is Believed To Be Behind Efforts to Hinder Prosecution of Suspected War Criminals*, THE INDEPENDENT, Nov. 2, 1994, at 12 (noting that “[h]uman rights groups and international organizations believed that France is behind efforts to hinder the prosecution of Rwanda’s former leaders”).

<sup>234</sup> See *Governments Need to Arrest More Genocide Criminals*, Agence France-Presse, Sept. 14, 1995, available in LEXIS, News Library, WIRES File (noting that “Belgium, France, Switzerland and Canada have taken action against a handful of suspects”).

<sup>235</sup> See *Rwanda: Radio Says Canada and Cameroon Ready To Extradite Alleged Criminals*, BBC Monitoring Serv., June 26, 1995, available in LEXIS, World Library, TXTNWS File (noting that Canadian authorities arrested and extradited Leon Mugesera, believed to have been instrumental in the Rwandan genocide).

<sup>236</sup> See Chris Mcgreal, *Rwanda Tribunal Chief Struggles To Win Funds; Investigators Hampered in Effort To Compile Evidence of Genocide*, THE GUARDIAN, Oct. 24, 1995, at 11 (discussing the need to deal with uncooperative governments such as Kenya “which is openly hostile and sheltering some of the former Hutu leaders eventually expected to be charged with genocide”).

<sup>237</sup> See generally *U.N. To Probe Arms Flow to Former Rwanda Troops*, Reuters N. Am. Wire, Sept. 7, 1995, available in LEXIS, World Library, ALLWLD File (discussing the flow of weapons to former Rwanda troops).

<sup>238</sup> See *id.* (noting that “the architects of Rwanda’s genocide were rearming themselves in preparation for an attempt to return to power, aided by France, Zaire and South America”).

The other part of the international community's response has been the creation of a special war crime tribunal, an ad hoc war crime tribunal for Rwanda.<sup>239</sup> It should never be seen as an alternative to domestic prosecutions.<sup>240</sup> I think some of the misunderstandings between the Rwandan government and the international community at the time of the debate at the United Nations had to do with what was perceived as an attempt to bar Rwanda from living up to its obligation under international law. In some instances, the war crime tribunal was seen as an alternative to the domestic prosecutions. The Rwandan government had a right to protest that. I think those things have been cleared up, but the misunderstanding was real.

But we have heard before that there's been very little cooperation. We were encouraged with the nomination of Honore Rakotomanana, the prosecutor from Madagascar,<sup>241</sup> because just as in the case of Justice Goldstone,<sup>242</sup> their nominations for the prosecutorial job are a sign that these things are taken seriously. However, as of today, the prosecutor for Rwanda has only about a staff of five, and that is certainly not enough for the task.<sup>243</sup> Time is not on our side. It is not on the side of the war crimes tribunal and it is not on the side of the Rwandan government because the more that these delays occur, the more that there will be injustices committed and the more the legitimacy of both efforts, the

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<sup>239</sup> S.C. Res. 955, U.N. SCOR, 49th Year, 3453 mtg. at 1, U.N. Doc. S/RES/955 (1994) (establishing the International Tribunal for Rwanda); see Akhavan, *supra* note 114, at 237 (observing that the Security Council established "ad hoc international penal tribunals for the former Yugoslavia and Rwanda as enforcement measures").

<sup>240</sup> See Akhavan, *supra* note 114, at 245-46 (stating that even if prosecutions are successful, "international tribunals are not a substitute for the necessary action to prevent genocide").

<sup>241</sup> See *U.N. Appoints Prosecutor for Rwandan Tribunal*, N.Y. TIMES, Jan. 15, 1995, at A6.

<sup>242</sup> Richard Goldstone is the chief prosecutor for both the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda. Tomuschat, *supra* note 11, at 240; William Drozdiak, *Top Serbs Charged with War Crimes*, WASH. POST, July 26, 1995, at A1.

<sup>243</sup> As of January 23, 1996, this has changed slightly. See *International Tribunal: Short on Means and Long on Rwandan Impatience*, Agence France-Press, Jan. 23, 1996, available in LEXIS, News Library, WIRES File (commenting that the prosecutor for Rwanda has a team of forty).

international and the domestic one, will suffer.

Comparatively, it should be a lot easier to do the job in Rwanda than in the former Yugoslavia.<sup>244</sup> But the human rights monitors, for example, that the United Nations deployed are not, as far as we can tell, providing for a particularly important service in gathering the evidence that would be necessary.<sup>245</sup>

I would like to finish with a comment on U.S. policy that has been very, very helpful in regards to both war crime tribunals for the former Yugoslavia and Rwanda. Ambassador Albright has shown exceptional leadership in insisting on the seriousness of this effort and has been the greatest ally that we have in ensuring that these tribunals will not be sacrificed for the expediency of a misunderstood wave of dealing with peace issues.<sup>246</sup>

But, on the other hand, it is kind of puzzling that the United States does not support the international criminal court.<sup>247</sup> Although it is not couched in those terms, we have looked carefully at the arguments made by the United States in the debate in the United Nations about the international criminal court, and without getting into details right now, I don't think they can be justified or explained as only an effort to improve on a draft.<sup>248</sup> The U.S. position in this regard can only be understood as an effort to punt, to delay, or

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<sup>244</sup> *Contra* Tomuschat, *supra* note 11, at 242, 243 (commenting that the task faced by the International Tribunal for Rwanda is more difficult than that faced by the Tribunal for the Former Yugoslavia).

<sup>245</sup> *See World Tribunal on Rwanda Killings Urged*, N.Y. NEWSDAY, Sept. 19, 1994, at A17 (noting that "[t]he UN has promised to set up a war tribunal and pledged about 150 human rights monitors to Rwanda. However, only a handful as yet have been sent.").

<sup>246</sup> *See* Lepper, *supra* note 129, at 413 (commenting that Ambassador Albright was a leader in pressing the Security Council to address the commission of war crimes). *See generally* Zacklin, *supra* note 95, at 281 (observing that the political will and support of member states are necessary to the success of the tribunal for the former Yugoslavia).

<sup>247</sup> The United States has voted against a draft resolution to create a permanent international criminal court citing disagreements with the breadth of such a court's jurisdiction as provided in the draft. *See, e.g.*, John F. Harris, *Clinton Pushes for U.N. War Crimes Tribunal*, WASH. POST, Oct. 16, 1995, at A4 (stating that "[t]he United States has opposed a draft for a permanent tribunal, pending at the United Nations because the administration wants such a body to have a narrow mandate so that it must have approval from [the] U.N. Security Council to pursue the cases.").

<sup>248</sup> *See generally id.*

worse, to kill the effort altogether.<sup>249</sup>

There is also some effort that we, those of us in the non-governmental community can make. We have also been slow to react. We can also help gather information. We have established a small presence in Rwanda of a permanent nature and we are working with local domestic human rights organizations in trying to assist in gathering evidence, while at the same time insisting on a very rigorous observance of due process rights.<sup>250</sup> There have been many exhumations and, unfortunately, the exhumations have not been done with a view of preserving evidence so that it can be used in trial.<sup>251</sup> But there is expertise in the non-governmental organization community, and we hope it will be used eventually to do so.

I want to finish simply with what is at least intended to be a warning note. The delays and inordinate lack of serious support for the ideal of accountability for what has happened in Rwanda is conspiring against all of us. It is conspiring against the legitimacy of the effort of the Rwandan government, but it will be laid on our own lap, not only on the government of Rwanda. It will be seen as a lack of interest displayed by the international community at the time when the genocide was happening.<sup>252</sup> The increasing violence that one can expect to happen in Burundi or perhaps even in Rwanda itself will be

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<sup>249</sup> See Daniel P. Jones & Katherine Farrish, *Clinton Backs Permanent World Court; Stance Reverses Longtime U.S. Policy*, HARTFORD COURANT, Oct. 17, 1995, at A1 (quoting a retired international prosecutor at Nuremberg as saying that "the United States has been and is dragging its heels" on the issue of establishing a permanent court). *But see* Harris, *supra* note 247, at A4 (reporting President Clinton as expressing commitment to a permanent international criminal court).

<sup>250</sup> See generally HUMAN RIGHTS WATCH WORLD REPORT 1996, at 44 (discussing the presence of Human Rights Watch/Africa and other human rights organizations in Rwanda); *Update on Developments in Rwanda and Burundi*, DEP'T OF STATE DISPATCH, April 17, 1995, Vol. 6, no. 16 (1995) (describing the United States involvement with Rwanda).

<sup>251</sup> Cf. Donatella Lorch, *Rwanda Calls for Others To Join Massacre Inquiry*, N.Y. TIMES, Apr. 28, 1995, at 12 (stating that bodies have been exhumed for the purpose of controlling Rwanda's negative image and not for the purpose of preserving evidence to be used at trial).

<sup>252</sup> See Akhavan, *supra* note 114, at 246 (arguing that "[t]he Rwandan Tribunal cannot adequately compensate for inaction on the part of the international community").

another very serious blow to this step into accountability.<sup>253</sup>

I don't want to sound terribly gloomy. I think we can, we meaning all of us, the whole world, can still salvage this effort. But time is running short and there are steps in the wrong direction that we need to correct very quickly. Thank you.

PROFESSOR TEITEL: I want to thank all the panelists. You have been a very patient audience and we are about to enjoy some wine and a more informal exchange. I promised the Ambassador a minute to respond to some of the more controversial points made, but it has to be brief.

AMBASSADOR BAKURAMUTSA: I thank our friend from Human Rights Watch very much. What he said is the truth. Our government does not deny that people are in prison and dying in prison. However, as he has said himself, there has been for a while a very big misunderstanding between my country and the U.N. regarding the international tribunal.

In the meantime, while Rwanda was negotiating with the U.N., many people were arrested and put in prison because we estimated about 30,000 people were responsible for the deaths of the approximately one million people who lost their lives.<sup>254</sup> So as a means of preventative detention, to avoid any violence in the street, my government started to arrest people.<sup>255</sup> It is true that some of the people are innocent, but how do we know who they are? Our judicial system has been destroyed and is only now being rebuilt.

What else can the government do? It can either arrest the people or let them go in the street and probably be killed by some member of a family wanting to avenge their relatives who have been killed. Given this choice, my government has chosen to arrest

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<sup>253</sup> See Susan Litherland, *Burundi: NGOS Mobilise to Prevent Repetition of Rwanda Genocide*, Inter. Press Serv., Feb. 4, 1995, available in LEXIS, World Library, ALLWLD File ("The fear that Burundi could become central to Africa's next killing ground has promoted non-governmental organizations from around the world to form a plan of action to stop the escalation of violence between Tutsis and Hutus.").

<sup>254</sup> See, e.g., Helen Signy, *Rwanda: Rwandans Die in Crowded Jails*, SYDNEY MORNING HERALD, April 15, 1995, at 13.

<sup>255</sup> Bedford, *supra* note 210 (indicating the arrest and imprisonment of approximately 30,000 persons in Rwanda).



people.

Now, the country has been destroyed. This is the reason why we need support from the international community, not with the prison, but to put together a judicial system and then the problems can be solved. The innocent people will be set free and the guilty ones can be forgiven or punished. But really what you have said is true. My government has no choice though. We cannot let the suspects remain at large because that could create another killing system by the people of Rwanda themselves. So we put these people in prison.

The prison conditions are poor just as many citizens' own homes are poor. Since the countryside is poor you can imagine that the prison will be poor. Poverty is another problem in the country. We really need international support. If we don't have it, we will have to do it ourselves with the means we have. I thank you very much.

#### *Audience Questions*

PROFESSOR TEITEL: I will take one question.

AUDIENCE MEMBER: My question is directed to Mr. O'Brien, the only panelist who mentioned genocide by name. Does the United States government formally recognize what continues to take place in Bosnia as constituting genocide as defined in Article 2 of the Genocide Convention?<sup>256</sup> If not, what specific, discernible disparity has the United States government, or Madeleine Albright herself,

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<sup>256</sup> The Convention on the Prevention and Punishment of the Crime of Genocide defines "genocide" as:

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Genocide Convention, *supra* note 53.

found between the reality of what was taking place and that which constitutes genocide which, in effect, takes us off the hook from preventing genocide as prescribed by Article 1 of the Genocide Convention?<sup>257</sup> If the United States does recognize the activity as genocide, has our response to date been consistent with our Article 1 pledge to prevent genocide?

MR. O'BRIEN: Two parts. One, yes, it's genocide, and yes, we have said that publicly.

AUDIENCE MEMBER: The United States Government said it publicly?

MR. O'BRIEN: Yes, consistently since early 1993, which was the time we first pulled things together. Warren Christopher said there were acts of genocide there.<sup>258</sup> A controversy emerged about his use of the phrase "acts of," a controversy I never understood, on either side.<sup>259</sup> Then in June of 1993 he said yes, it was genocide.<sup>260</sup> In June of 1994, he said it publicly in hearings.<sup>261</sup> I think it was the House Foreign Affairs Committee, now renamed the House International Relations Committee.

Now, as far as what the genocide convention means, I think the consistent position of the U.S. Government, the U.S. Senate, not just this administration, but every administration to consider ratifying the Genocide Convention, is that Article 1 does not establish any obligation outside the territory of the party to the convention. So our obligation is to prevent genocide within the United States. Beyond

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<sup>257</sup> Article I of the Convention on the Prevention and Punishment of the crime of Genocide states that "[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish." *Id.*

<sup>258</sup> Thomas W. Lippman, *U.S. Troop Withdrawal Ends Frustrating Mission To Save Rwandan Lives*, WASH. POST, Oct. 3, 1994, at A11.

<sup>259</sup> *Border Reform Plan Introduced*, THE FRESNO BEE, Feb. 4, 1994, at A6 ("A veteran foreign service officer has charged that Secretary of State Warren Christopher repeatedly rejected characterizations of the Serb War on Bosnia as 'genocide,' as part of an effort to avoid taking stronger action.").

<sup>260</sup> Lippman, *supra* note 258.

<sup>261</sup> *Id.*

that, every United States administration from the negotiators on through over the last fifty years says we have no territorial obligation. So I think the second part of your question is based upon a falsehood.

AUDIENCE MEMBER: So, in other words, you're saying because genocide is taking place across the border in some other territory, we are not legally obligated to prevent it?

MR. O'BRIEN: That's what the Convention means. I'm saying that's what the convention means. It establishes no such legal obligation.

PROFESSOR TEITEL: I'd like to thank everyone who came and our panelists throughout the day. One point that has been signaled throughout all of these comments is the importance of political will for sustaining these efforts in the pursuit of law in the service of justice and accountability, and these conferences and debates and the litigation and the writing and the efforts of students and lawyers are critical in that endeavor, and so I want to thank you for your attendance and cooperation.

(Whereupon, the Fifth Annual Ernst C. Stiefel Symposium: 1945-1995: Critical Perspectives on the Nuremberg Trials and State Accountability concluded at 6:45 p.m.)