

## How Effective are International Criminal Tribunals? An Analysis of the ICTY and the ICTR

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**ABSTRACT** *The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were established by the United Nations in 1993 and 1994 to apprehend and try individuals suspected of committing war crimes including genocide. The crimes that are prosecuted by these courts are the same, and the structure of the tribunals is also similar (indeed, they both share the same appellate court). However, the mandate of the ICTR is much more narrow and is limited both in terms of the period of time under investigation (one calendar year) as well as being limited to crimes that were committed only in Rwanda. Given the mandate and structure of these tribunals, many question their effectiveness. This article examines these tribunals and measures effectiveness by examining not only the number of indictments that have been handed down but the actual number of individuals apprehended. One of the criticisms of both tribunals is that the lack of success in apprehending suspects diminishes the deterrent effect of the tribunals. Based on a case study of the ICTY and the ICTR, we find that the lack of effective apprehension has reduced the deterrent effect of the tribunals and provided one of the primary justifications for the creation of an international criminal court.*

The 1990s have witnessed the greatest advance of international humanitarian law<sup>1</sup> since the end of the Second World War. The creation of the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) represents significant advancements in the interpretation and implementation of international law. The success of these tribunals (as well as their failures) ultimately became the basis for the debate over the need for a permanent international criminal institution which resulted in the International Criminal Court (ICC). While much of the literature has regarded these tribunals as ineffective institutions for the promotion of international justice, there is no accepted standard for measuring the effectiveness or success of these tribunals. Some argue that these tribunals should be judged by their ability to provide for international peace and security<sup>2</sup> or to deter future atrocities<sup>3</sup> or even to reintegrate societies.<sup>4</sup>

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It is understandable that there are vastly different standards used to judge the relative success of these tribunals. The ICTY and the ICTR were established to deal with some of the worse atrocities seen since the Second World War. The government-sponsored ethnic cleansing policies in the former Yugoslavia lasted for several years while the number that died in the Rwandan genocide is almost unimaginable. Given the complexity of the crimes, the magnitude of the genocides and the nature of the conflicts it is not surprising that there are varying standards used to judge these tribunals. Nor is it surprising that many authors find that the tribunals have not fulfilled their mandates.

Rather than relying on a subjective standard, this article takes a different approach to examining the success or effectiveness of these tribunals. We examine the ICTY and ICTR authorising resolutions in order to understand the goals of the international community in establishing the tribunals. By examining the black letter of the law, we are able to be more specific in our judgment of the success of these tribunals. Even though our approach is different than other authors, we also find that the ICTY and the ICTR have a mixed record of fulfilling their mandates. This has less to do with the institutions and more to do with the broad nature of their mandates. This article is organised into four sections. First, we outline the nature of the conflict in the former Yugoslavia and Rwanda. Then we examine the international response to these conflicts and examine the debate on the creation of these tribunals. Third, we analyse the structure of the tribunals and their initial problems in organising the rules of procedure. Finally, we turn our attention to measuring the effectiveness of the tribunals by examining the record of the tribunals against the resolutions that authorised their creation.

### **The Conflict in the Former Yugoslavia**

The conflict in the former Yugoslavia between Serbia, Croatia and Bosnia was an international war between former republics of Yugoslavia.<sup>5</sup> However, it also exhibited characteristics of a civil war in Bosnia, as Bosnian Croats, Bosnian Serbs and Bosnian Muslims fought each other.<sup>6</sup> Before the beginning of the break-up of Yugoslavia in 1991, the country displayed a significant ethnic diversity. The ethnic situation was complicated by the fact that most nationalities were not confined within the borders of a specific republic, province or even district.<sup>7</sup> Croatia had a substantial Serbian minority of about 12 per cent. Macedonia contained Turks, Vlachs and a fast-growing Albanian population. While Muslim Slavs, Serbs and Croats made up the population of Bosnia, no single group formed a majority of the population. Only Serbia proper,<sup>8</sup> Slovenia and Montenegro were largely homogeneous.

Between 1945 and 1980, Marshal Tito was able to suppress religious and ethnic rivalries among the various ethnic groups within Yugoslavia; however, no real effort was made by the political or religious leaders to settle the differences between the groups. The power of the republics began to increase at the expense of the federal government after the adoption of the 1974 constitution, which encouraged the expansion of Croatian, Slovenian, Muslim and Albanian autonomy. Soon after Tito's death in May 1980, long-standing differences were finally expressed within the communist parties of the country's republics and provinces.

The deepest and oldest ethnic rivalry in Yugoslavia was the one between the Serbs and the Croats who, despite their shared language, possessed different political cultures and religious beliefs. When the Kingdom of Serbs, Croats and Slovenes was created after

the first World War,<sup>9</sup> Serbs dominated the government.<sup>10</sup> This gave rise to an anti-Serb movement, particularly in Croatia, which would have preferred independence. In April 1941, Yugoslavia was occupied by the Axis powers. The Croatian radical-right, the Ustase, were installed by Hitler and Mussolini, forming the so-called 'Independent State of Croatia'. The power of the Ustase also extended into Bosnia. Extermination camps were established in both Croatia and Bosnia where Serbs, Jews and Gypsies were killed. On the other side, Chetniks (Serbian forces) attacked Croats and Bosnians. It is estimated that more than 1.7 million people died in Yugoslavia during the Second World War.<sup>11</sup> These events set the historical and the political backdrop for the war that broke out 50 years later in Croatia and Bosnia that accompanied the break-up of Yugoslavia in 1991-92.

Croatia and Slovenia were the first to declare their independence in 1991,<sup>12</sup> followed by Macedonia and Bosnia in 1992.<sup>13</sup> The secession of Slovenia and Macedonia was relatively peacefully. However in the newly independent Croatia, Serbs became classified by the government as a minority. The new government of Franjo Tudjman dismissed many Serb communist bureaucrats from government positions and replaced them with Croats.<sup>14</sup> Tudjman also encouraged nationalist sentiments which were associated with the rule of the Ustase, provoking apprehension among Serbs in Croatia. In order to protect the Serb minority, the Yugoslav army started a war immediately after Croatia's declaration of independence in June 1991. By December, the Yugoslav army and Serb separatists within Croatia had taken nearly a third of Croatia's territory.<sup>15</sup> A ceasefire was agreed to between Serbia and Croatia in January 1992 under the auspices of the UN. It is estimated that 20,000 people died and 400,000 became refugees during the Croatian war.

By April 1992 another conflict had begun in Bosnia. As in Croatia, the Serbian population in Bosnia went from being part of the dominant plurality in Yugoslavia to being a minority in the new state. In Bosnia, however, Serbs remained a significant minority (approximately 30 per cent of the population). The Serbs who lived there were determined to remain within a united Yugoslavia and to build a greater Serbia. They received strong backing from extremist groups in Belgrade. The war in Bosnia quickly superseded the conflict in Croatia in terms of the amount of killing and forms of ethnic violence, including ethnic cleansing and mass expulsions of civilians. By 1993, the Bosnian Muslim government was besieged in the capital Sarajevo, surrounded by Bosnian Serb forces who controlled around 70 per cent of the country. In Central Bosnia, the mainly Muslim army was fighting a separate war against Bosnian Croats who wanted to form part of a greater Croatia. The UN had deployed the UN Protection Force (UNPROFOR) to monitor the ceasefire and to establish 'safe zones' including Sarajevo and Srebrenica.<sup>16</sup> However in July 1995 Srebrenica became the site of one of the worst massacres in the conflict, where an estimated 7,500 Muslim men and boys were killed by Bosnian Serbs.<sup>17</sup> It is estimated that 200,000 died and 2 million became refugees in the war in Bosnia between 1992 and 1995.<sup>18</sup> The efforts of the UN and the presence of UN peacekeepers to contain the violence proved ineffective.

Eventually, conflict also erupted between the central government of the Federal Republic of Yugoslavia<sup>19</sup> and the province of Kosovo.<sup>20</sup> This was also an internal, civil war in the Federal Republic of Yugoslavia. In 1989, Slobodan Milosevic was able to make changes to the Yugoslav constitution that ended the autonomous status of the provinces of Vojvodina and Kosovo.<sup>21</sup> Milosevic ended Kosovo's autonomy; established direct

Serbian rule over the province; expelled ethnic Albanians from the Kosovo parliament, the state bureaucracy and state-owned industries; and closed the state-run school system and most of the medical system. In response, Albanians pressed for Kosovo's independence, and in 1992 they elected a nominal parliament and boycotted Serbian elections. Finally by 1998, the Kosovo Liberation Army or KLA (supported by the majority ethnic Albanians) began to actively target Serbians and Serbian institutions. The international community, while supporting greater autonomy, opposed the Kosovar Albanians' demand for independence. The Serbian government then escalated the conflict by sending armed forces into the region. It is estimated that an excess of 11,000 ethnic Albanians died during this period and about 1.5 million were driven from their home in the conflict. In February 1999, the two parties to the conflict were forced to the negotiating table in Rambouillet, France to find a peace agreement. Later with air strikes by NATO in March 1999, the Serbian army was forced to leave Kosovo, allowing for ethnic Albanians to return to the region.

### **The Conflict in Rwanda**

Unlike the human rights abuses in the former Yugoslavia, the genocide in Rwanda was essentially a domestic conflict between the two major tribes. Violence between the majority Hutu and minority Tutsi tribes had occurred sporadically even before the period of de-colonisation in 1962. For much of the colonial period, the German and later the Belgian government relied upon the Tutsi minority for local administration. While the Hutus constituted approximately 85 per cent of the population, they held less than 4 per cent of the chieftain positions.<sup>22</sup> In the 1920s, the Belgians introduced identity cards to differentiate between the tribes.<sup>23</sup> Prunier argues that these cards were essential to establishing the two different tribes because they had 'none of the characteristics of tribes, which are micro-nations. They shared the same Bantu language, lived side by side with each other without any "Hutuland" or "Tutsiland" and often intermarried.'<sup>24</sup> In addition to sharing the same language, the tribes also shared a dominant Roman Catholic faith. Therefore unlike the war in the former Yugoslavia, the basis of the 1994 genocide was political and not ethnic in nature.

While the Belgians promoted the minority Tutsis, when eventually in 1959 the Tutsis began to advocate independence, the Belgian government quickly withdrew their support for them. Haile-Mariam goes so far as to argue that the break between the Belgian authorities and the Tutsi elite constituted a 'starting point for the germination of the genocide in Rwanda'.<sup>25</sup> Following the demands of the Tutsis, the Belgian government organised elections in 1960 in which the Hutus received the vast majority of mayoral posts. Within two years, the Hutus had completely supplanted the Tutsis as the local elites. During this transition, there were numerous reports of widespread massacres of Tutsis that led to a mass exodus of the Tutsi minority to neighbouring countries.<sup>26</sup>

Systematic killings of Tutsis continued after the country became independent in 1962 and were well-documented in 1963, 1966 and 1973.<sup>27</sup> By the time of the 1973 coup led by a Hutu military officer, Juvénal Habyarimana, there were estimated to be some 700,000 Tutsi refugees living in Burundi, Uganda, Tanzania and Zaire.<sup>28</sup> Although there was still sporadic violence under the Habyarimana regime, Kuperman argues that 'large-scale violence against domestic Tutsi largely disappeared for 15 years'.<sup>29</sup> However during this time, the Rwandan government prevented the return of Tutsi refugees

which by now had organised into a paramilitary force known as the Rwandan Patriotic Front (RPF) which launched military operations into Rwanda from bases in Uganda. From 1990 through 1993, there were various RPF incursions into Rwanda, which eventually led to the signing of the Arusha Peace Accords between the Rwandan government and the RPF in August 1993. The Accords mandated power-sharing between Hutu elites and the RPF in a transitional government monitored by a UN peacekeeping mission known as UNAMIR.

The uneasy peace between the Hutus and the Tutsis ended on 6 April 1994 when President Habyarimana's plane was shot down by a missile. To this day, it is not known whether the missile was fired by RPF insurgents or by conservative elements of the Hutu elite that were displeased with the Arusha Accords. What is well-documented is that starting that same day, the Hutu elite, including the Presidential Guard, began to round up and kill Tutsi opposition leaders.<sup>30</sup> Contingents of UNAMIR forces were quickly withdrawn, so that the international community had an insignificant presence and was unable to prevent the genocide.<sup>31</sup> The perpetrators of the genocide quickly moved to eliminate not only the Tutsi elite that was part of the transitional government but also villagers including women and children. While Tutsis are lighter-skinned than Hutus, there is no obvious basis for differentiating the two tribes, and therefore the Rwandan-issued identity cards established under the Belgian colonial government were used during the initial roadblocks to capture Tutsi politicians and activists.<sup>32</sup>

What is so remarkable about the Rwandan genocide is the speed by which it occurred. Within two weeks of the start of the genocide, some 250,000 Tutsis were massacred. Those not killed at Tutsi gathering sites fled to neighbouring countries, especially Uganda. As Tutsi refugees in Uganda reported the atrocities, the RPF launched a northern offensive; however, the RPF's offensive 'simply could not match the pace at which the militiamen and soldiers were massacring civilians'.<sup>33</sup> The scale of the genocide is beyond comprehension. By the time the RPF had captured Kigali in July 1994 some 500,000–1,000,000 Tutsi had been systematically killed while between 10,000 and 100,000 Hutus were killed as the RPF re-took the country.<sup>34</sup> In addition to those who were killed, over 2 million Hutus fled the country to Zaire, and many Tutsis and Hutus were internally displaced within Rwanda.<sup>35</sup>

### **The International Response: Creating the ICTY**

The UN and the EU observed with growing concern the developments in the former Yugoslavia. In September 1991 two ceasefire agreements were negotiated between Croatia and Serbia, but they were quickly broken. Security Council Resolution 713, adopted in September 1991, acknowledged the efforts of the EU and Conference on Security and Cooperation in Europe (CSCE) for trying to encourage a dialogue and secure peace between the parties to the conflict. Over 20 countries had provided information to the UN about the violations of international humanitarian law that were taking place in the former Yugoslavia.<sup>36</sup> In response to the failure of the ceasefires, the Security Council imposed an arms embargo on all parties to the conflict. This embargo particularly harmed the Croats and the Bosnian Muslims, because the Yugoslavian army was mainly composed of Serbs.

On 6 October 1992, the UN Security Council adopted Resolution 780 establishing a Commission of Experts to investigate and collect evidence on 'grave breaches of the

Geneva Conventions and other violations of international humanitarian law' in the conflict in the former Yugoslavia.<sup>37</sup> By this time, war was raging in Bosnia, and the UN was particularly concerned about the ethnic cleansing taking place. The Commission issued its first Interim Report on 22 February 1993 stating that the establishment of an *ad hoc* international criminal tribunal was necessary. The governments of Croatia and Bosnia expressed support for the creation of the tribunal through the CSCE, while the Federal Republic of Yugoslavia opposed its establishment.<sup>38</sup>

The ICTY was established by the Security Council through Resolution 827 on 25 May 1993. The Resolution states that the ICTY was created 'for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date determined by the Security Council upon the restoration of peace.' The temporal mandate of the Tribunal was left open since the conflict was still taking place. In addition, the location of the Tribunal was specified to be The Hague. There was unanimous support within the Security Council for the creation of the Tribunal.<sup>39</sup> Some argue that states in the Security Council found the creation of the Tribunal appealing because it provided an economically and politically inexpensive means of responding to demands for international action.

Using its authority under Chapter VII of the UN Charter, the Security Council passed the resolution creating the ICTY for the purpose of prosecuting four types of offences: grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity.<sup>40</sup> To indict on charges of grave breaches, violations of the laws or customs of war or crimes against humanity, the prosecutor was expected to show the existence of a state of war, while a charge of genocide did not need to meet this requirement. The offence of violations of the laws or customs of war has been viewed quite broadly and is often invoked when the other three offences do not appear to be justified. Article 7(1) of the Resolution provides that a person who 'planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation or execution of a crime' shall be individually responsible for the crime. However, the resolution does not specify the level of participation in the crime. In addition, the penalties that the Tribunal is allowed to give to those found guilty do not include the death penalty.

### **The International Response: Creating the ICTR**

Similar to the ICTY, the Security Council requested that the Secretary General empanel a Commission of Experts to investigate and report on the evidence of Hutu violations of international humanitarian law. In October 1994, the Commission reported to the Security Council that there was undeniable and overwhelming evidence that the actions taken against the Tutsi constituted genocide and that a tribunal should be established. Unlike the government of the Federal Republic of Yugoslavia, the Rwandan government strongly urged the Council to establish a tribunal and offered its full cooperation.<sup>41</sup>

Resolution 955 authorised the creation of the ICTR and was adopted in November 1994. The ICTR was created under authority of Chapter VII of the UN Charter, which specifies that the Security Council has the right to take actions which maintain peace and security.<sup>42</sup> The Tribunal's competencies extend to violations of international humanitarian law, including specifically genocide, crimes against humanity and violations of Article III to the Geneva Conventions and Additional Protocol II.<sup>43</sup> While the basic logic, competencies

and organisation of the ICTR were very similar to the ITCY, there were some significant differences. First, Resolution 955 provided the ICTR temporal jurisdiction only over crimes that were committed during one year, between 1 January and 31 December 1994. Any violations of international humanitarian law that were committed prior to January 1994 were beyond the jurisdiction of the ICTR. Second, the trial chambers for the ICTR were not specified in the resolution. UN member states were later asked to submit a request to host the ICTR. Ultimately Arusha, Tanzania was chosen because of its proximity to Rwanda. These differences between the tribunals reflect the different nature of the genocides. While the ICTR was established in essentially a post-conflict environment, the ITCY was created while war was still raging. This is an important distinction that we will return to when we examine the effectiveness of international humanitarian law.

While Rwanda had initially made a request to the Security Council to create the Tribunal, the country ultimately voted against Resolution 955. There were a number of objections that Rwanda raised concerning the jurisdiction, competency and location of the ICTR. First, the Rwandan government objected to the temporal jurisdiction, arguing that the Tribunal's jurisdiction should have covered crimes committed from 1990 and that the jurisdiction should be limited to July 1994 rather than December 1994.<sup>44</sup> The government wanted earlier crimes committed before the Arusha Accords to be under the jurisdiction of the ICTR, and the government did not want to extend temporal jurisdiction to December so that retribution crimes that occurred against Hutus would not be covered.

Second, the government objected to the penalties prescribed in Resolution 955. While the Rwandan penal code provides for the death penalty, Resolution 955 limits penalties to imprisonment. The more limited penalty combined with stratified concurrent jurisdiction and *non bis in idem* meant that those indicted by the ICTR would not face the possibility of the death penalty.<sup>45</sup> This was an important issue because most individuals believed that the ICTR would be responsible for prosecuting those in the former regime and the principal planners of the genocide. This meant that those who were most culpable would not face the possibility of the death penalty.

Third, the Rwandan government wanted to limit the scope of crimes solely to the act of genocide.<sup>46</sup> By limiting the scope to genocide, acts perpetrated by Tutsis after July would not be subject to ICTR jurisdiction. While Resolution 955 places genocide first on the list of crimes, it also includes crimes against humanity and violations of the Geneva Conventions.

Fourth, the Rwandan government objected to the location of the ICTR in Arusha,<sup>47</sup> arguing that the 'deterrent effect of the trial and punishment will be lost if the trials were to be held hundreds of miles away from the scene of the crime'.<sup>48</sup> This is an issue that we will return to in the last section. While the government voted against the resolution, Rwandan President Bizimungu later promised to fully cooperate with the Tribunal.

### **The Structure and Initial Growing Pains of the ICTY and the ICTR**

The 3 May 1993 report by the Secretary General, based on the Commission of Experts' first Interim Report outlined the structure of the ICTY. The report would later serve as the basis for Resolution 827 establishing the Tribunal. The experts were sceptical of the potential use of national courts to deal with the conflicts. With the breakdown of

Yugoslavia, there was not much faith in the capacity of the judicial system in any of the three country parties to the conflict to provide justice for breaches of international humanitarian law.<sup>49</sup>

Initially, the ICTY was composed of 11 judges (three judges for each of two trial chambers and five appellate judges). The appellate chamber of the ICTY would be shared with the ICTR. The judges of the ICTY were elected in September 1993, and the court held its inaugural session in The Hague in mid-November of that year. Initially, the Secretary General proposed the establishment of three courtrooms with a staff of around 400 assisting the Tribunal's work. The General Assembly, however, reduced the budget allocation, allowing for a single courtroom and a staff of about 100. In May 1998, the Security Council expanded the number of ICTY judges from 11 to 14. In 2000, the number of judges was further expanded to 16, with the addition of nine *ad litem* judges to assist with the increased workload of the Tribunal. By that time, three trial chambers were operational.<sup>50</sup>

For most of its first two years, the ICTY had no defendants in custody even though it had already issued 34 public indictments.<sup>51</sup> The ICTY was very ineffective in securing the apprehension of indictees. However by late 1995, some of the indictees were finally extradited to The Hague. Starting in mid-1996, the ICTY shifted away from simply issuing indictments towards trial of the accused. The first trial began in May 1996, and the *Tadic* case established the rules and procedures that would serve as the basis for future cases. In the *Tadic* case, one of the first issues ruled on was the legality of the Tribunal, and whether the Security Council had exceeded its authority under Chapter VII of the UN Charter when it created this institution. The Appeals Court ruled that the ICTY did have the legal authority under Chapter VII to try defendants.

Later, the jurisdiction of the Tribunal was expanded in 1999 as warfare broke out between ethnic Albanians and the Serbian army in the province of Kosovo. On 29 September it was announced that the ICTY's jurisdiction under its original statute would be extended to Kosovo. Interestingly, many of those accused in this conflict had already been accused of crime in the Bosnian conflict. The ICTY announced in June 2000 that it would also begin investigating alleged KLA atrocities against Serbs.

The ICTR was also composed of 11 judges (three judges for each of the two trial chambers and five appellate judges). Significantly, the appellate chamber is still shared with the ICTY and therefore is located at The Hague rather than Arusha. While many have criticised the appellate chamber structure, Morris argues that 'the importance of developing a coherent body of international criminal law may weigh against having separate appellate courts potentially rendering conflicting statements of international law.'<sup>52</sup> She is, however, critical of the fact that the two tribunals share the same prosecutor, which stymies the development of different prosecutorial approaches. The ICTR became operational in July 1995 and issued its first indictment of eight Rwandan officials suspected of genocide in November 1995.

Within a year of the first ICTR indictments, the Rwandan Organic Law authorising the prosecution of the crime of genocide was passed by the legislature. Unlike the temporal jurisdiction of the ICTR, the Organic Law covers the period of 1 October 1990–1 December 1994.<sup>53</sup> The passage of this law came at a time when approximately 90,000 defendants were being held in Rwandan jails.<sup>54</sup> Unlike Resolution 955, the Organic Law contains four categories of suspects, and those prosecuted under Category 1 can receive the death penalty. Because of the large number of defendants, the law provides for the other three



categories a fixed sentence reduction as part of a guilty plea agreement. However by 1999, almost 35 per cent of those that had been convicted had received the death sentence and less than 10 per cent had been acquitted.<sup>55</sup>

Perhaps because of the imposition of the death sentence in so many cases, there has often been a conflict between the ICTR and the Rwandan national courts over the custody of defendants. Because of stratified concurrent jurisdiction, the national courts must hand over any defendant in custody to the ICTR. In addition if both the ICTR and the Rwandan government seek the extradition of a suspect from another country, the extradition order of the ICTR takes precedence. This of course assumes that countries will extradite suspects, an issue that we address below.

### **Measuring the Effectiveness of International Criminal Tribunals**

What should be the basis of measuring and defining the effectiveness or success of these or any international criminal tribunals? This is a difficult question to answer because of the different interpretations of the rationale for establishing these tribunals. While various authors have agreed on the importance of these tribunals, there has been much less agreement on what their mission is and how to measure their effectiveness. This is partly due to the fact that the Security Council saw these tribunals as having a multi-faceted mandate. The UN resolutions contain specific language that describes the international community's reasoning for establishing these tribunals. For example, Resolution 955 establishes three reasons for the creation of the international criminal tribunals. The Resolution notes that the ICTR (1) will contribute to the 'maintenance of peace', (2) will ensure 'that such violations are halted and effectively redressed' and (3) will lead to a 'process of national reconciliation'. While the first two mandates are similar for the ICTY, Shinoda notes that the ICTR was the first international tribunal established for the purpose of national reconciliation.<sup>56</sup>

Much has been written about the deterrent effect of these tribunals. For example, Yacoubian argues that deterrence is one of the three possible justifications given for the creation of international penal theory.<sup>57</sup> Although decisions of the ICTY and the ICTR courts have referred to the deterrent effect of the tribunals, they are not a forum that can provide a general deterrent.<sup>58</sup> Certainly one may infer that the creation of a tribunal expresses international condemnation of acts such as genocide that would hopefully have a deterrent effect on future crimes.

The immediate goals of the tribunals were to maintain peace and provide justice to victims. If these are goals of international justice, then they should be the basis upon which we judge the relative success and failure of these tribunals. The difficulty of judging the success of these tribunals involves the counterfactual example of what would be the current peace-building and justice efforts in the former Yugoslavia and Rwanda without the creation of the tribunals. In other words while the tribunals have not completely fulfilled their mandates, the ICTY and the ICTR have provided more security and justice than the national courts could or have provided.

### *The Maintenance of Peace*

Typically within the context of domestic society, judicial institutions are not viewed as organs of peace and security. Law enforcement agencies are charged with the mandate

of providing law and order. However in an international context, judicial institutions such as the International Court of Justice and the newly created International Criminal Court have been used to promote peace and security. When evaluating the tribunals, Roberts finds that neither tribunal has been successful at maintaining peace.<sup>59</sup> He notes that the ITCY did not contribute to peace-building efforts, and in the case of the ICTR, he argues that the 'continuing bitter conflicts in the African Great Lakes region, including Hutu-Tutsi killings within Rwanda, do not suggest that the Tribunal has yet had a significant effect.'<sup>60</sup> Shinoda also questions whether peace-building 'might collide with purely judicial needs... Does justice really contribute to peace? Should we reject unjust peace even in post-conflict regions?'<sup>61</sup>

The goal of peace is an understandable mandate of the ITCY. This Tribunal was created during the conflict as an element of the international community's peace-building initiatives. In 1993, when the Security Council approved the creation of the Tribunal, the conflict within Bosnia was still raging. If we are to define peace as the absence of war, we can initially conclude that the ICTY's goal to maintain peace was not achieved. Even though the Tribunal began operations in mid-November 1993, the conflict within Bosnia continued until the end of 1995, when the Dayton Peace Accord was signed by the parties to the conflict. The existence of the Tribunal and the possibility of being indicted did not seem to encourage an ending of hostilities and the examination of peaceful methods to solve the differences between the Bosnian Serbs, Croats and Muslims.<sup>62</sup> As stated earlier, the mandate of the ICTY was expanded in 1999 to include the Kosovo conflict. Even though this was an internal Serbian conflict, it appears that the Serbs were not concerned about the possibility of a change in the mandate of the ICTY to include this conflict even when the Bosnian conflict included elements of an internal war.

Although the ICTR was established in a 'post-conflict' environment, the international community was concerned that revenge killings on the part of the Tutsis would undermine peace in the region. Since the establishment of the ICTR, estimates are that ten of thousands have perished in clashes between Hutu insurgents and Tutsi revenge killings. While Bosnia and Kosovo have received international peacekeepers,<sup>63</sup> there has not been a peacekeeping presence in Rwanda. Even with peacekeepers, these judicial institutions will only be effective at promoting peace and security with the cooperation of law enforcement agencies. Indeed, the efforts of the tribunals have been stymied by not having their own law-enforcement personnel. It would appear that the ability of either tribunal to maintain and promote peace-building measures is limited by the assistance from the international community.

However what would be the peace-building and security level without the ICTR? Akhavan argues that while conflict continues in Rwanda, the extent of revenge killings would be far greater in the absence of the ICTR. 'Notwithstanding the various conflicts between the ICTR and the Rwandese government ... this policy of accountability, aimed at discrediting the Hutu extremists, has also restrained the extent of anti-Hutu vengeance killings ... the shadow of the ICTR proceedings ... have exercised a moderating influence in the postconflict peace-building process.'<sup>64</sup>

#### *Providing Justice (General Considerations)*

In the following sections we briefly outline some of the issues involved in tribunal justice. Perhaps no other aspect of the tribunals has received so much criticism as their ability to

provide justice to victims as well as to ensure the rights of defendants. While the use of national courts in Rwanda differs from the former Yugoslavia, the rules of evidence, due process and appellate jurisdiction are almost identical. In addition, the experience of apprehending and extraditing defendants in both the ICTY and the ICTR has been unfortunately very similar.

*Providing Justice (Apprehension and Extradition)*

Security Council Resolution 827 clearly states that 'all states shall cooperate fully with the International Tribunal . . . including the obligation of states to comply with the requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute.'<sup>65</sup> However until recently, the ICTY encountered continual resistance apprehending and extraditing indictees, both from the parties to the conflict and by other states.<sup>66</sup> In the Dayton Accords of 1995, Bosnia, Croatia and the Federal Republic of Yugoslavia specifically agreed to assist the Tribunal in accomplishing its mandate.<sup>67</sup> Afterwards, Bosnia and Serbia each transferred an indictee captured by the national police force in 1996. Croatia transferred an indictee for the first time in August 1997. However in each case, domestic efforts between 1993 and 2002 resulted in only six individuals being transferred to the Tribunal from Serbia, two from Bosnia and three from Croatia.

The ICTY was prolific in issuing indictments in its first few years. Between 1994 and 1996, it issued 44 public indictments. Between 1997 and 1999, the number decreased to 17, with a similar number between 2000 and 2002. However, there were only eight arrests by the end of 1996. The numbers began to increase, with 31 arrests between 1997 and 1999 and 34 between 1999 and 2002. About 44 per cent of those in custody of the Tribunal voluntarily surrendered while approximately 34 per cent were captured by the Stabilisation Force (SFOR).<sup>68</sup> ICTY indictees have been arrested by Austria, Bosnia, Croatia, Serbia and Germany, as well as SFOR.<sup>69</sup> One of the major concerns of the prosecutor has been the lack of cooperation from the *Republika Srpska* within the Bosnian Federation.<sup>70</sup>

One problem in gauging the success of the ICTY in apprehending indicted individuals is the practice by the prosecution of requesting sealed indictments.<sup>71</sup> When submitting an indictment to a judge for confirmation, the prosecutor can request under ICTY Rule 53 that the indictment not be publicly disclosed on the grounds that doing so would make it more likely that the accused would evade apprehension. Therefore, sealed indictments have been used as a tool of the prosecution to increase the speed by which defendants are apprehended. While the number of persons publicly indicted is known, the number of persons indicted under seal is not.<sup>72</sup> Of those who have been publicly indicted, there are still 23 at large, including Radovan Karadzic and Ratko Mladic, the political and military leaders of the Bosnian Serbs. However, Akhavan argues that the difficulty in capturing indicted individuals should not be considered a failure, since 'interim justice' can take place through the restriction of travel and deprivation of freedom of movement, as well as their removal from public office and stigmatisation of indicted individuals.<sup>73</sup>

Unlike the ICTR which has a mandate to investigate high-ranking officials, during the first years of the ICTY resources were disproportionately allocated to investigating low-ranking perpetrators of the direct commission of crimes such as murder, which were familiar to prosecutors and investigators in the context of domestic law enforcement. The ICTY did not benefit from having a national court system which would prosecute

lower-level officials and military personnel. While there are benefits to prosecuting low-level perpetrators that have a direct link with victims, most analysts have stressed that the ICTY's value is ultimately based on its ability to successfully prosecute those at the highest level. Given the difficulty involved in arresting indicted war criminals, the ICTY established Rule 61 (under Article 15 of Resolution 827) which provides for a 'super-indictment' in certain circumstances. The purpose of this rule was to broaden world awareness of perpetrators' actions. It allowed the prosecutor to present the indictment and all supporting evidence to the Tribunal in an open court session. This could include examination of witnesses whose testimony would become part of the record. Under the provisions of Rule 61, the prosecution could present highlights of the case in the absence of the accused, essentially for the media.<sup>74</sup>

Since 1997, the ICTY prosecutor has specifically focused on the indictment of high-level offenders. However, the ICTY failed to indict Croatian President Franjo Tudman, his Defence Minister Gojko Susak and former Bosnian Croat leader Mate Boban prior to their respective deaths. On the other hand, on 26 August 1999, Austrian police arrested General Momir Talic, a key commander during the Bosnian war. In April 2000, French commandos belonging to the SFOR in Bosnia arrested Momcilo Krajisnik, President of the Bosnian Serb Assembly from 1990 to 1995. After Bosnian Serb President Radovan Karadic, Krajisnik was the most influential wartime ultranationalist still active on the Bosnian political stage. In January 2001, Biljana Plavsic, former deputy to Karadic and former Bosnian Serb President was arrested. The arrest of Slobodan Milosevic by Yugoslav police on 1 April 2001 and the subsequent extradition to The Hague on 28 June 2001 represents a landmark for the Tribunal. Milosevic is the first head of state to face trial in an international court.<sup>75</sup> Now the Tribunal can boast a 78 per cent rate of apprehension of publicly indicted individuals, with 45 trials either taking place or completed.

In the case of Rwanda, the initial effectiveness of the Tribunal was also greatly undermined by the lack of cooperation from other countries. Article 28 of Resolution 955 specifically requires all UN member-states to provide full cooperation including the extradition of individuals to the ICTR. Several African countries, mostly notably Kenya and the former Zaire (now the Democratic Republic of Congo), refused requests to extradite suspects.<sup>76</sup> Both countries accepted a large number of Hutu refugees, including several of the leading planners of the genocide. Part of this reluctance to extradite was due to the balance of power struggle that has engulfed Central Africa since the mid-1990s. As Magnarella notes 'they [Kenya and Zaire] supported Rwanda's former rulers because they regarded the successor RPF-led government as a client of Uganda's President Yoweri Museveni, their rival for leadership in East and Central Africa.'<sup>77</sup>

Some of these early problems have been worked out, and the ICTR has lately been much more successful at apprehending and extraditing defendants. So far, 21 countries have extradited indictees to the ICTR. Significantly in 2002, the Democratic Republic of Congo, a haven for Hutu refugees, extradited its first two defendants. Approximately 75 per cent of those indicted by the Tribunal have been arrested, and approximately half of those arrested have either been tried or are currently in the trial process (see Tables 1 and 2). The ICTR has six categories for defendants. Thirteen detainees are 'political leaders' including 11 ministers of the 1994 interim government as well as the former president of the National Assembly. There are 13 'military leaders,' three 'media leaders,' 14 'senior government administrators' and three 'religious leaders'. Significantly, the former Prime Minister Jean Kambanda has been convicted for genocide. This verdict, along with

Table 1. Indictments and Arrests

	Yugoslavia	Rwanda
Individuals indicted	106*	80
Individuals arrested	83	60
Individuals at large	23	20
Percentage arrested	78%	75%

Sources: United Nations. International Tribunal for Rwanda, *Seventh Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994*, (A/57/163-S/2002/733 and the International Criminal Tribunal for the Former Yugoslavia, 2002). Webpage. <http://www.un.org/icty/glance/index.htm> (24 March 2003).

\*Publicly indicted.

the recent conviction of former Bosnian Serb President Plavsic for crimes against humanity, are two of the most important convictions in international humanitarian law.

#### *Providing Justice (Speedy Trial)*

Resolution 827 guarantees the accused the right to a trial without delay. A speedy trial is a prerequisite for justice for the accused.<sup>78</sup> Unlike the tribunals established to deal with Germany and Japan after the Second World War, where activities by the accused were carefully documented, in the case of the former Yugoslavia the prosecutor has had to rely on witness accounts, which is time-consuming and expensive. The collection of evidence becomes more difficult with the passage of time, when the recollections of the victims become more nebulous, and access to sites of the conflict either is not allowed, or takes place at a time when it becomes difficult to get reliable evidence. In addition, there has been concern expressed by witnesses over their protection after testifying, particularly since the focus of the tribunals is now the prosecution of high-ranking political and military leaders. One of the practices of the ICTY that has also been criticised is the use of unnamed witnesses.<sup>79</sup> During the discussion of the creation of the Tribunal, trials *in absentia* were also debated, with France in favour of them in some circumstance while the Italians were not. The Italian position ultimately prevailed.<sup>80</sup> However as

Table 2. Trials, Convictions and Acquittals

	In Trial Chambers	
	Yugoslavia	Rwanda
Trials in progress	23	22
Number of trials completed	22	9
Convictions	17	8
Acquittals	5	1

Sources: See source note for Table 1.

previously discussed, under Rule 61 the prosecutor was allowed to present the case to the Tribunal without the accused being present.

The trials that have been completed by the ICTY have taken on average three and half years from arrest through appeal. In an effort to provide a speedier trial, the Tribunal began in 2002 to conduct six simultaneous trials instead of four, which had been the practice before.<sup>81</sup> Even with the increase in the number of judges in 2000 and the use of multiple trials, it is expected that regular trials will last until at least 2008. Of those publicly indicted, 23 still remain at large, 30 are currently at the pre-trial stage and 23 are yet to receive final sentencing.

The ICTR's Resolution 955 also includes language that requires that an individual be tried without delay. So far, of those trials that have been completed, it has taken an average of four and half years from arrest through appeal. One of the concerns of the ICTR is that as more individuals have been apprehended, the waiting time for detainees has increased. There are currently many detainees that could be scheduled for trial, but there is a lack of space on the trial docket. A report by ICTR President Navanethem Pillay acknowledged that the current process is unduly long. 'Despite efforts of the judges and of all support sections, trials continue to be long drawn out and often defy the best-laid plans.'<sup>82</sup> However, the report notes that the trial and appellate proceedings are lengthy because 'judicial proceedings at the international level are far more complicated than proceedings at the national level'.<sup>83</sup> The report goes on to cite the problem of translating documents, interpretation of the trial proceedings into three languages, as well as the non-appearance of witnesses from Rwanda as the principal reasons why the process is so slow. The lack of a speedy trial is not only problematic for the defendant but also for the victim as it compounds the problem of national reconciliation.

#### *The Process of National Reconciliation*

The goal of national reconciliation was not expressly mentioned in the mandate of the ICTY. However, national reconciliation is a precondition to a permanent peace.<sup>84</sup> The ability of individuals involved in the conflict to return to a normal life, living side by side with those they once fought is as important as maintaining the peace. After the conflict in the former Yugoslavia, nearly 2 million people returned to their countries and homes. But some 1.3 million people are still displaced, including 230,000 ethnic Serbs, Roma and other minorities who fled Kosovo. The Federal Republic of Yugoslavia continues to host 390,000 refugees, the largest single refugee community in Europe. Refugees are concerned about returning to their homes in Croatia, Bosnia and Kosovo because of fear of retaliation from other ethnic and religious groups. Since Bosnia was divided into a Muslim-Croatian Federation and the *Republika Srpska* under the Dayton Accords, a large number of people fear going back to areas now controlled by opposing ethnic factions. About 250,000 Croatian Serbs remain in exile mostly in the Federal Republic of Yugoslavia and in Bosnia.<sup>85</sup>

The goal of national reconciliation which is specifically mentioned in Resolution 955 is unique to the ICTR. It is a broad goal, and Shinoda argues that the Security Council 'did not unequivocally address a logical link between international peace and national reconciliation through such a compulsory tribunal'.<sup>86</sup> In the Security Council debate over Resolution 955, Howland and Calathes quote the Czech Republic representative who argued that the ICTR 'is hardly designed as a vehicle for reconciliation ... Reconciliation is a

much more complicated process'.<sup>87</sup> Fundamentally, *national* reconciliation is an internal, domestic process. The ICTR represents an *international* attempt to forge national reconciliation, because the national courts and government are either institutionally weak or not disposed to healing the society.<sup>88</sup> There have been well-publicised conflicts between the national courts and the ICTR. These conflicts have undermined the credibility of the ICTR in the eyes of many Rwandans. Because of its location in Arusha, the ICTR has been accused of being too remote from the people (both Tutsis and Hutus) to facilitate national reconciliation. Moreover, some have criticised the Tribunal because the majority of those that are convicted have not served sentences in Rwanda. At this point, 75 per cent of those convicted are serving their sentences in Mali. Three other countries including Benin, Swaziland and most recently France have also agreed to accept ICTR convicts.

Fundamentally, national reconciliation can only occur in an environment in which both sides feel that justice is being achieved. In order to promote national reconciliation there cannot be 'victim's justice'. This is part of the problem with the stratified concurrent jurisdiction of the ICTR and the national courts. Morris argues that as long as individuals perceive that international as well as domestic judicial institutions are systematically biased towards one group, reconciliation will never occur. 'If the leaders are away receiving "international justice" which is perceived as lenient, and the followers are at home getting "bargains" in the national justice system, then no one is punished fully and severely, relative to national standards, for the horrors that were committed.'<sup>89</sup>

As in the case of the former Yugoslavia, one important aspect of national reconciliation involves the return of Hutu and Tutsi refugees. Hundreds of thousands of Tutsis fled the country in the 1960s and remained refugees until after 1994. Following the RPF's capture of Kigali in July 1994, more than 2 million Hutus fled the country. Immediately after the RPF's return, Tutsi refugees began to return to Rwanda, followed later in 1995 and 1996 by a large number of Hutus. Estimates are that approximately 2.5 million Hutu and Tutsi refugees have re-entered the country since 1994. On this basis, national reconciliation has been occurring and has been much more successful than in the former Yugoslavia where refugees have been much slower to return. However, it is doubtful that the Tribunal can be credited for the return of refugees. The return of refugees has been based on policies of the post-genocide governments as well as support from the international community. Once it became clear that there was going to be a significant return of refugees, the Rwandan government began a program called 'villagisation' in order to re-organise the system of villages to cope with the returning refugees. The program has been criticised by many human rights organisations and aid agencies as creating new internally displaced former refugees. However, the program has not based re-location on tribal distinction, which at least has fostered greater goodwill among all Rwandans. While the Tribunal establishes the international community's interest in conflict resolution, the Tribunal is too far removed to be an effective agent of reconciliation.

### **Conclusions**

This article has explored the rationale and mandates of the ICTY and the ICTR and analysed how effective these tribunals have been in fulfilling their mandates. Given the nature of the crimes and their broad mandates, it is not surprising that these tribunals have not been more effective in providing peace and security, justice to victims and defendants, as well as fostering national reconciliation. While the establishment of the tribunals is

better than no activity on the part of the international community, systems of justice can only be effective when all parties recognise the legitimacy of the judicial process (something that has been especially lacking in the case of the ICTY). Moreover any system of justice, whether international or national in scope, cannot fulfil its mandate with very complex administrative problems brought about either because of limited financial resources or the inability to work with law enforcement personnel.

Some of the problems of the tribunals are due to the nature of international humanitarian law and their broad mandate. Whether these tribunals could ever become instruments of peace and security is highly debatable. Moreover, it is difficult to imagine circumstances in which *national* reconciliation could be created by an *international* institution. This is not to say that organisations like the Council of Europe or the CSCE (now known as the Organisation for Security and Co-operation in Europe) have not been instrumental in resolving national disputes and fostering post-conflict peace-building measures. However, the ICTY and the ICTR had very broad mandates following some of the worse atrocities seen since the Second World War. Any institution, no matter how well designed, would have difficulty in providing peace and security as well as reconciliation in these cases.

However some of the problems with the tribunals have as much to do with design as purpose. Given the nature of the crimes and the number of possible indictees, the international community was extremely short-sighted in creating tribunals with such a small number of judges and chambers. We see just how limited the resources of the tribunals are now that they are more effective in apprehending and extraditing defendants. Many detainees are unduly awaiting trial because the docket has become so full. While any system of justice has administrative problems, some of the problems facing the ICTY and the ICTR could be easily remedied with a greater financial contribution from the international community. For example while the ICTY average annual budget for the last five years has been in excess of \$114 m, the initial budget for 1993 was only \$276,000. Indeed, it was not until after 1998 that the budget was increased to over \$50 m. This is not to argue that simply providing more funds would alleviate all the problems surrounding these tribunals; however, funds early in the process providing for more investigators, judges and chambers would have improved the current state of affairs.

Another reason why these tribunals have not been more successful is because unlike Nuremburg and Tokyo, the ICTY and especially the ICTR have dealt with civil war conflict. The nature of the crimes committed in the former Yugoslavia and Rwanda is especially problematic for international humanitarian law. Roberts argues that 'the atrocities of the 1980s and 1990s have been in conflicts with at least some element of civil war. Such wars are often more bitter than international wars . . . [the] rules applicable to internal conflicts . . . are more limited than those for international armed conflicts.'<sup>90</sup> Undoubtedly, the provision of a police force attached to the tribunals as well as more funding would have contributed to a greater level of success. However, many of the issues discussed above do not lead to clear policy recommendations. It is unclear whether these tribunals should have been established in the territory of the former Yugoslavia and Rwanda or whether the bifurcation of the process (as in the case of Rwanda) or the use of sealed indictments (as in the case of the ICTY) are effective in fulfilling their mandates. All of these considerations are important as the international community institutionalises the International Criminal Court and replaces *ad hoc* international justice with a permanent judicial body.



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### Notes

1. International humanitarian law governs the conduct of the state and the individual during conflict. So-called 'laws of war' such as the Geneva Conventions fall under this category. Roberts argues that while the laws of war provide a set of internationally approved military standards, the laws should not be viewed as a 'system of international criminal justice.' See Adam Roberts, 'Implementation of the Laws of War in Late 20<sup>th</sup>-Century Conflicts Part II', *Security Dialogue*, Vol.29 (1998), pp.277.
2. Hideaki Shinoda, 'Peace-Building by the Rule of Law: An Examination of Intervention in the Form of International Tribunals', *International Journal of Peace Studies*, Vol.7 (2002), pp.41–58.
3. Madeline H. Morris, 'The Trials of Concurrent Jurisdiction: The Case of Rwanda', *Duke Journal of Comparative & International Law*, Vol.7 (1997), pp.349–74.
4. Mark A. Drumbl, 'Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda', *New York University Law Review*, Vol.75 (2000), pp.1221–326.
5. Yugoslavia was composed of six republics including Bosnia-Herzegovina (which we refer to simply as Bosnia), Croatia, Macedonia, Montenegro, Serbia and Slovenia.
6. The Bosnian Croats received support from Croatia while the Bosnian Serbs received assistance from the Federal Republic of Yugoslavia.
7. While approximately 98% of all Yugoslavia's Slovenes lived in Slovenia and about 96% of Macedonians lived in Macedonia, only 60% of the Serbs lived in Serbia proper, and only 70% of the Montenegrins lived in Montenegro.
8. Serbia contained two autonomous provinces (Kosovo and Vojvodina) that had significant ethnic minorities. Serbia proper (in other words Serbia without the inclusion of the two autonomous provinces) was almost completely homogeneous.
9. It was re-named Yugoslavia in 1929.
10. Serbs also dominated the military, which gave them an advantage over the other ethnic groups once Yugoslavia began to collapse in 1991.
11. Aryeh Neier, *War Crimes: Brutality, Genocide, Terror and the Struggle for Justice* (New York: Random House, 1998).
12. In May 1991 Croatian voters supported a referendum calling for their republic to become independent, which was passed by the parliament in June. A similar referendum passed in December in Slovenia after the parliament had already declared independence in June.
13. In January 1992, Macedonia declared independence. Bosnian Serb leaders also declared independence in January, and at the beginning of March, the non-Serb population voted for independence.
14. Franjo Tudjman was the leader of the Croat Democratic Union, which was formed in 1989. A former partisan general, he was imprisoned in the 1970s for upholding Croatian rights.
15. The territory included most of western Slavonia and Krajina until the Croats took back most of the territory in 1995.
16. The 'safe zones' were established in 1992 and included Tuzla, Gorazde, Zepa, Sarajevo, Bihac and Srebrenica.
17. Srebrenica was supposedly protected by Dutch peacekeepers, but they proved ineffective in preventing the massacre in July 1995.
18. The Dayton Accords signed in November 1995 established a Federation in Bosnia-Herzegovina, with a Bosnian Serb republic (*Republika Srpska*) and a Bosnian/Croat federation.
19. The Federal Republic of Yugoslavia was created in 1992 between the republics of Serbia and Montenegro.
20. The Kosovo region was considered the homeland of Serbs, who were defeated by the Ottoman Turks in the Battle of Kosovo of 1389. After the Serbian defeat, Albanians settled into the region becoming the overwhelming majority with Serbs constituting only about 10% of the population.
21. Slobodan Milosevic was the leader of the Communist Party and became President of Serbia in 1989. He was elected President of the Federal Republic of Yugoslavia in 1997.
22. Paul J. Magnarella, *Justice in Africa: Rwanda's Genocide, Its Courts, and the UN Criminal Tribunal* (Aldershot: Ashgate, 2000).

23. Yves Beigbeder, *Judging War Criminals: The Politics of International Justice* (New York: St. Martin's Press, 1999).
24. Gérard Prunier, *The Rwanda Crisis: History of a Genocide* (New York: Columbia University Press, 1995), p.5.
25. Yacob Haile-Mariam, 'The Quest for Justice and Reconciliations: The International Criminal Tribunal for Rwanda and the Ethiopian High Court', *Hastings International and Comparative Law Review*, Vol.22 (1999), p.680.
26. Morris (note 3).
27. Daphna Shraga and Ralph Zacklin, 'The International Criminal Tribunal for Rwanda', *European Journal of International Law*, Vol.7 (1996), pp.501-18.
28. Prunier (note 24).
29. Alan J. Kuperman, 'Rwanda in Retrospect', *Foreign Affairs*, Vol.79 (2000), p.95. According to Haile-Mariam, the Habyarimana government imposed a severe quota system which limited Tutsis to 9% of school enrolment and civil service positions and prohibited them from entering the military (see note 25).
30. This period began the so-called 'interahamwe' (a Rwandan term meaning those who kill together).
31. Magnarella (note 22). One of the major issues that emerged from the genocide was the culpability of the international community. Numerous scholars have argued that the international community could have taken steps to either prevent or least reduce the number of causalities. Kuperman argues that any form of international intervention would have still resulted in the deaths of hundreds of thousands of Tutsis (see note 29). This important debate on the possible prevention of the Rwandan genocide is beyond the scope of this article.
32. Guy Vassal-Adams, *Rwanda: An Agenda for International Action* (Oxford: Oxfam, 1994).
33. *Ibid*, p.37.
34. The exact number of deaths is difficult to determine. Prunier argues that as many as 800,000 Tutsi were killed (see note 24). Kuperman argues that that the total Tutsi population of Rwanda was estimated at 650,000, and based on aid agency reports approximately 500,000 Tutsi were killed (see note 29). Others claim that the 1991 census data severely under-reported the Tutsi population. While the exact number will never be known, the fact is that between 500,000 and 800,000 persons were systematically killed within a span of three months.
35. Morris (note 3).
36. James C. O'Brien, 'The International Tribunal for Violations of International Humanitarian Law in the former Yugoslavia', *American Journal of International Law*, Vol.87 (1993), pp.639-59.
37. M. Cherif Bassiouni, 'The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of Humanitarian Law in the Former Yugoslavia,' in Roger S. Clark and Madeleine Sann (eds), *The Prosecution of International Crimes* (New Brunswick, NJ: Transaction, 1996), p.61.
38. O'Brien (note 36).
39. Peter Burns, 'An International Tribunal: The Difficult Union of Principle and Politics', in Roger S. Clark and Madeleine Sann (eds), *The Prosecution of International Crimes* (New Brunswick, NJ: Transaction, 1996).
40. George S. Yacoubian, 'Sanctioning Alternatives in International Criminal Law: Recommendations for the International Criminal Tribunals for Rwanda and Yugoslavia', *World Affairs*, Vol.161 (1998), pp.48-55.
41. Shragna and Zacklin (note 27).
42. Like the ICTY, the authority of the Security Council under Chapter VII to create a tribunal was the subject of one of the first cases at the ICTR. The ICTR trial chamber in the *Kanyabashi* case addressed this issue and affirmed the legality of the creation of the ICTR.
43. Article III of the Geneva Conventions specifically deals with 'armed conflict not of an international character'. While Rudolph argues that the creation of the ICTR is an unprecedented expansion of international law, Article III specifically deals with domestic conflicts among contracting parties. See Christopher Rudolph, 'Constructing an Atrocities Regime: The Politics of War Crimes Tribunals', *International Organization*, Vol.55 (2001), pp.655-93.
44. Magnarella (note 22).
45. Article 8, Section 2 of Resolution 955 provides that the ICTR 'shall have the primacy over the national courts of all States'. Therefore, the ICTR has stratified concurrent jurisdiction with Rwandan national courts. In addition, the concept of *non bis in idem* is similar to the American legal notion of double jeopardy. Therefore, the Rwandan courts could not prosecute those that were found innocent by the ICTR.
46. Shraga and Zacklin (note 27).

47. Resolution 977 adopted by the Security Council in February 1995 authorised the creation of the ITCR in Arusha, Tanzania.
48. Haile-Mariam (note 25), p.698.
49. O'Brien (note 36). However in 2002, Chief Prosecutor Carla Del Ponte and President Claude Jorda of the ICTY travelled to Bosnia to explore the possibility of holding trials for mid-level indictees in the country, creating the possibility for domestic courts' involvement in the future.
50. The United States and the Netherlands funded the construction of the two additional chambers.
51. Sean D. Murphy, 'Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia', *American Journal of International Law*, Vol.93 (1999), pp.57-97.
52. Morris (note 3), p.355.
53. Jeremy Sarkin, 'The Necessity and Challenges of Establishing a Truth and Reconciliation Commission in Rwanda', *Human Rights Quarterly*, Vol.21 (1999), pp.767-823.
54. Morris (note 3).
55. Sarkin (note 53).
56. Shinoda (note 2).
57. Yacoubian (note 42). A number of authors have argued that the tribunals were established to deter future genocides. While the reports to the Secretary General that eventually formed the basis of Resolutions 827 and 955 set out the need to deter future crimes, this rationale is not specifically mentioned in the authorising resolutions.
58. General deterrence is defined as a concern with preventing the same crime in the future. So-called specific deterrence is concerned with preventing a specific individual from committing the same crime (recidivism).
59. Roberts (note 1).
60. *Ibid.*, p.274.
61. Shinoda (note 2), p.45.
62. A notable example is the massacre in Srebrenica in July 1995, almost two years after the creation of the ICTY.
63. Roberts argues, however, that the presence of peacekeepers is no guarantee of peace-building efforts. He notes that UN peacekeepers were passive observers to the atrocities at Srebrenica in July 1995. See Adam Roberts, 'Implementation of the Laws of War in Late 20th-Century Conflicts Part I', *Security Dialogue*, Vol.29 (1998), pp.137-50.
64. Payam Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?', *American Journal of International Law*, Vol.95 (2001), p.23.
65. This includes a requirement to assist in the arrest of indicted individuals and their transfer to the Tribunal.
66. Theodor Meron, 'Answering for War Crimes: Lessons from the Balkans', *Foreign Affairs*, Vol.76 (1997), pp.2-8.
67. Slobodan Milosevic, the President of Serbia at the time, also represented the *Republika Srpska* at the meeting.
68. SFOR took over for UNPROFOR at the end of the conflict. Payam Akhavan, 'Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal', *Human Rights Quarterly*, Vol.20 (1998), pp.737-816.
69. Statistics are compiled from information available at the ICTY website.
70. Beigbeder (note 23).
71. Murphy (note 54).
72. Prosecutor Del Ponte is moving away from sealed indictments now that there is more cooperation from the parties to the conflict.
73. Payam Akhavan, 'The Yugoslav Tribunal at a Crossroads: The Dayton Peace Agreement and Beyond', *Human Rights Quarterly*, Vol.18 (1996), pp.259-85.
74. This practice has been reduced as more individuals are being arrested or have surrendered voluntarily.
75. Rudolph (note 43).
76. The refusal to extradite suspects is not specific to African countries. France and even the US have refused to extradite individuals to the ITCR. Moreover, there has been at least one case in which a country extradited a suspect to Rwanda rather than the ICTR. See Morris (note 3).
77. Magnarella (note 22), p.51.
78. Daryl A. Mundis, 'Current Developments: Improving the Operation and Functioning of the International Criminal Tribunals', *American Journal of International Law*, Vol.94 (2000), pp.759-73.
79. Monroe Leigh, 'The Yugoslav Tribunal: Use of Unnamed Witness Against Accused', *American Journal of International Law*, Vol.90 (1996), pp.235-38.

80. Burns (note 41).
81. United Nations, International Tribunal for the Former Yugoslavia, *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, (A/57/379-S/2002/985 2002).
82. United Nations, International Tribunal for Rwanda, *Seventh Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994* (A/57/163-S/2002/733, 2002), p.4.
83. Ibid.
84. Shinoda (note 2).
85. United Nations High Commission for Refugees, 'The Balkans', <http://www.unhcr.ch/cgi-bin/txis/vtx/Balkans> (20 March 2003).
86. Shinoda (note 2), p.49.
87. Todd Howland and William Calathes, 'The U.N.'s International Criminal Tribunal: Is It Justice or Jingoism for Rwanda? A Call for Transformation', *Virginia Journal of International Law*, Vol.39 (1998), p.144.
88. Several authors including Sarkin (note 53) and Shinoda (note 2) argue that the only means by which to foster national reconciliation is through the use of a truth and reconciliation commission. Sarkin argues that these commissions which have been used in Chile, El Salvador, Argentina and most notably South Africa have been a successful vehicle for promoting reconciliation.
89. Morris (note 3), p.365.
90. Roberts (note 63).