

## **ABSTRACT**

The International Criminal Tribunals for the Former Yugoslavia and Rwanda establish the beginning of a new pattern in the genuine international implementation of international criminal law and the move back to the international model inaugurated at Nuremberg. But even these tribunals were first and foremost, the by-products of international realpolitik. They were born out of a political desire to redeem the international community's conscience rather than the primary commitment of the international community to guarantee international justice. In the early stages, there was a persistent lack of political will by Member States to act, or to act with enough assertiveness with regard to the conflicts, notwithstanding the exposition of deliberate and systematic patterns of massive violations of human rights. The Yugoslav and Rwanda Tribunals were not established because of the United Nations, or the powerful States that control it. They were not established because of an intrinsic value on punishing war criminals or upholding the rule of law. Rather, the mobilisation of shame by non-governmental organisations and especially the grisly pictures beamed to the world by the television camera created a public relations nightmare and made liars of the centres of Western civilisation.

**INTERNATIONAL JUSTICE UNDER THE SHADOW OF REALPOLITIK:  
REVISITING THE ESTABLISHMENT OF THE AD HOC INTERNATIONAL  
CRIMINAL TRIBUNALS**

Jackson Nyamuya Maogoto\*

*[Two ad hoc international criminal tribunals have been established in the post-Cold War era. The ad hoc approach of enforcing international criminal law is reactive and narrowly focused on solving the international emergency of the moment. It is notable that the reaction to the situations in Rwanda and Yugoslavia and the process of establishing the ad hoc tribunals was abused by political interference in an international arena where realpolitik not law is the main governing force. In the post-Cold War era, it is expected that the international community will make a genuine attempt to redeem its conscience for its legal and moral abdication of its international obligation to enforce international criminal law in the Cold War era. However, just as in the post-World War II international military tribunals, realpolitik permeated the international community's reaction and the process of establishing the ad hoc tribunals for the former Yugoslavia and Rwanda, diluting the international community's commitment to the enforcement of international criminal law through judicial sanction.]*

## **2.1 Introduction**

A series of conflicts in the Cold War era set the arena for violations of international humanitarian law.<sup>1</sup> All too often the violations were gross, but in an era where the 'East' and 'West' were slaves of ideology, political interests presented a divided front to the issue of enforcement of international humanitarian law. The resultant bipolar politics, rendered the United Nations powerless to deal with many of the humanitarian crises accompanied by gross human rights violations because of vetoes - 279 of them - cast in the Security Council<sup>2</sup>-then handicapped by national interests and political and ideological motivations. The horrors in Cambodia under Pol Pot, Uganda under Idi Amin, Guatemala under the military, and Iraq under Saddam Hussein, among many others, did little to push States to national or

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\* LL.B(Hons),Moi University, LL.M candidate at the University of Melbourne majoring in international criminal and humanitarian law. The author acknowledges the helpful and enlightening comments of an anonymous referee that contributed to the strengthening of the Article's argument.

<sup>1</sup> Benny Morris, 'Arab-Israeli War' at 28-27, Sydney Schanberg, 'Cambodia' at 58-65, J.C. Randall, 'Iran-Iraq War' at 208-215 in Roy Gutman and David Reiff (eds), *Crimes of War: What the Public Should Know*. See also, W. M. Reisman & J. Silk, 'Which Law Applies to the Afghan Conflict (1988) 82 *American Journal of International Law* 459

<sup>2</sup> *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peacekeeping: Report of the Secretary-General*, GA 47<sup>th</sup> Sess., Agenda Item 10, para 14, UN Doc. A/47/277-S/24111 (1992), reprinted in ILM 953, 958(1992).

international prosecution of heinous crimes against civilian populations.<sup>3</sup> Until the establishment in 1994 of the Yugoslav and Rwanda Tribunals, the promise of Nuremberg stood as a cruel hoax, with the exception of the questionable efforts by the post-Mengistu regime of Ethiopia to prosecute former Dergue officials for genocide and crimes against humanity.<sup>4</sup>

One might pick Cambodia as a paradigm for international humanitarian law's weakness in dealing with such crimes. International law after all depends for its legitimacy on the willingness of the world's Nation-States to obey and enforce. In Cambodia's case most Nation-States expressed shock and horror at the wave of mass killings by the Khmer Rouge and did nothing. Washington and its allies, were slaves to Cold War ideology; they decided it was better to keep the Khmer Rouge in the UN Seat than to have it go to a government in the orbit of Vietnam and its mentor, the Soviet Union. Realpolitik, not law was the governing force.

During the Cold War era, notwithstanding the strengthening of international humanitarian law (and in essence international criminal law) by the 1949 *Geneva Conventions*,<sup>5</sup> and their Additional Protocols, accountability to international criminal law was not the rule rather it

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<sup>3</sup> See Amnesty International, *Torture in the Eighties*, (Uganda) 130, (Guatemala) 158-161 (1984); Middle East Watch & Physicians for Human Rights, *The Anfal Campaign in Iraqi Kurdistan* (1993); James D. Ross, *Cambodia: The Justice System and Violations of Human Rights* (Lawyers Committee for Human Rights, 1992) 14-17.

<sup>4</sup> Amnesty International, *Amnesty International Report: 1994* (1994) 131. For an account of the problems of the Ethiopian prosecutions, see International Human Rights Law Group, *Ethiopia in Transition: A Report on the Judiciary and the Legal Profession*, (1994) 28-31; Amnesty International, *Ethiopia: Accountability Past and Present: Human Rights in Transition*, (April 1995) 46-53. See also 'Ethiopia: 'Red Terror' Detainees Finally Charged', Amnesty International News Service, January 23, 1997.

<sup>5</sup> *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Aug. 12, 1949, 75 UNTS 31 (*Geneva Convention I*); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, Aug. 12, 1949, 75 UNTS 85 (*Geneva Convention II*); *Geneva Convention Relative to the Treatment of Civilians in War*, Aug. 12, 1949, 75 UNTS 135 (*Geneva Convention III*); *Geneva Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, 75 UNTS 287 (*Geneva Convention IV*). These Conventions were opened for signature on 12 August 1949 and came into force on 21 October 1950.

was the exception in conflict, and realistically an international rule-of-law could not take hold without the political will and international cooperation of the world community. However, since the end of the Cold War there have been fewer vetoes, and the security arm of the United Nations, once disabled by circumstances beyond its control, has emerged as a central instrument for the prevention and resolution of conflicts and for the preservation of peace.

The moral abdication of States during the Cold War era set the stage for the series of internecine conflicts in Rwanda, Somalia, Liberia, Bosnia, and elsewhere that ushered in the immediate aftermath of the Cold War. States and individuals had come to regard international humanitarian law as more of a moral code of conduct than binding international obligations on States and individuals. The lack of a systematic enforcement regime in the five decades since the Second World War contributed to the lack of respect for the legitimacy of international criminal law, and even to a degree of cynicism about it. The *ad hoc* international criminal tribunals in the 1990s represented an international effort to put in place such a regime.

With the Cold War era over, and the crumble of the ideological barrier between the 'East' and 'West', the Security Council was able to achieve 'Great Power Unanimity'<sup>6</sup> (for the first time in five decades) on operations authorised under Chapter VII of the Charter (to maintain or restore international peace and security) enabling the UN to carve out a much broader role by acting as a watchdog over international disputes, a peacemaker and peacekeeper. Though slow to react, the Security Council issued a series of resolutions with regard to the conflicts in

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<sup>6</sup> *UN Charter*, Article 27(3). The *Charter of the United Nations* (the 'Charter') was established as a consequence of the United Nations Conference on International Organisation held at San Francisco and was brought into force on 24 October 1945. As of May 2000, membership in the UN had reached a total of 189 states. For a reproduction of the Charter, see Ian Brownlie, *Basic Documents in International Law* (4<sup>th</sup> ed, 1995) 1-35

the 1990s, and deployed peacekeepers.<sup>7</sup> On 25 May 1993, the Security Council took a landmark decision to establish the *ad hoc* tribunal for the former Yugoslavia (ICTFY), the first tangible measure taken by the international community since the Nuremberg and Tokyo Tribunals, to enforce international criminal law. In November 1994, the Security Council created another *ad hoc* court, the International Criminal Tribunal for Rwanda (ICTR).

The International Criminal Tribunals for the Former Yugoslavia and Rwanda establish the beginning of a new pattern in the genuine international implementation of international criminal law and the move back to the international model inaugurated at Nuremberg. In the Cold War Era, national prosecutions boldly supplanted this model. No prosecutions occurred at the international level during the Cold War. With this failure at the international level, the key juridical moments of international criminal law were confined to the domestic circuit.<sup>8</sup>

But even these *ad hoc* tribunals were first and foremost, the by-products of international realpolitik. They were born out of a political desire to redeem the international community's conscience rather than the primary commitment of the international community to guarantee international justice. The Yugoslav and Rwanda Tribunals were not established because of the United Nations, or the powerful States that control it. They were not established because of an intrinsic value on punishing war criminals or upholding the rule of law. Rather, the mobilisation of shame by non-governmental organisations and especially the grisly pictures beamed to the world by the television camera created a public relations nightmare and made liars of the centres of Western civilisation. The point is made by two writers of the Yugoslav Tribunal who were '[c]lose observers of the Security Council reactions to published and

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<sup>7</sup> Former Yugoslavia (1992), Somalia (1992), Cambodia (1992), Croatia (1995, 1996, 1998) and East Timor (1999). For information on the relevant Security Council resolutions and profiles of the peacekeeping missions, see the UN Website at the following URL: <[http://: www.un.org/documents/sc/res](http://www.un.org/documents/sc/res)>.

televised reports of mass rapes, murder, and torture as part of the systematic Serbian program of 'ethnic cleansing' reminiscent of the Nazi genocide. Once the political will of the major powers was mobilised by public shame and public outrage, Security Council resolutions provided the legal basis for speedy action.'<sup>9</sup>

This Article aims to highlight the political aspects precedent to, and accompanying the establishment of the *ad hoc* international criminal tribunals. Section one will review the background and development of the two conflicts that led to the creation of the two tribunals. Section two will focus on the international realpolitik that preceded the establishment of the tribunals with regard to the gross and systematic violations of international law and an insight into the politics of the actual process of establishing the tribunals. Section three will highlight the general weaknesses of the *ad hoc* mechanism as a system of implementing international criminal law. The issue of the establishment of the International Criminal Court while of paramount importance will not be dealt with in this Article whose focus is on the realpolitik that surrounded the establishment of the *ad hoc* international criminal tribunals.

## **1.2 Situational Background and Development of The Two *Ad Hoc* International Criminal Tribunals**

### *1.2.1 International Criminal Tribunal For The Former Yugoslavia*

Yugoslavia, created in 1918 from the Kingdoms of Serbia, Montenegro and portions of the defunct Austro-Hungarian empire, was known as the 'State of Serbs, Croats and Slovenes' until it was renamed 'Yugoslavia' in 1929, and in 1974, the 'Socialist Federal Republic of

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<sup>8</sup> See generally, Gerry Simpson, Didactic and Dissident Stories in War Crimes Trials, (1997) 60 *Alberta Law Review* 801 (discussing the trials of Eichmann, Demjanjuk, Barbie, Polyukhovich, Preibke, Touvier and others).

<sup>9</sup> Virginia Morris & Michael P. Scharf (eds) *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* (1995) xxi. See also David P. Forsythe, 'Politics and the International Tribunal for the Former Yugoslavia' (1994) 5 *Criminal Law Forum* 401.

Yugoslavia'. Prior to the Second World War, Yugoslavia was ruled by King Alexander I as a unitarist monarchy. Ethnic divisions were not strongly exhibited in the country.<sup>10</sup>

In 1941, the Axis Powers invaded Yugoslavia, whose army was forced to surrender. From 1941 to 1945, the Axis Powers created a succession of puppet governments to administer various parts of the territory of Yugoslavia. As Dimitrijevic observes, the policy of the Axis Powers had far-reaching consequences:

*Those parts of the territory historically claimed by Croats and not annexed by other powers, ie. Italy, were constituted into 'The Independent State of Croatia'. This territory was governed by a former terrorist movement, whose members came from Italy and Hungary, and who attempted to emulate Hitler's racist policies. In addition to Jews and Gypsies, who were few, their main targets were Serbs, who in that 'independent State' suffered a veritable genocide, with several hundred thousand victims, according to most conservative estimates.<sup>11</sup>*

Opposition to the Fascist State of Croatia was taken up first and foremost by Josip Broz Tito, himself a Croat, as leader of the Communist resistance as well as by General Mihailovic, leader of the Cetniks. The Cetniks were composed primarily of anti-Communist Serbs who were loyal to the monarchist Government of King Peter II, exiled at that time in London.

In 1946, following the victory of Tito's forces and the ascent to power of the Communist Party in Yugoslavia, the monarchy was abolished, and the Federal People's Republic of Yugoslavia was reconstituted as a federation. The component five states of Croatia, Macedonia, Montenegro, Serbia and Slovenia, each contained a majority of the ethnic group as reflected in the name of each state. A sixth province, Bosnia-Herzegovina, whose borders reflected administrative lines drawn by the former Ottoman and Austro-Hungarian empires, was home mainly to Croats, Serbs and Muslims (who had converted to Islam during Ottoman

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<sup>10</sup>See Vojin Dimitrijevic, 'Nationalities and Minorities in the Yugoslav Federation' in Yoram Dinstein and Mala Tabory(eds) *The Protection of Minorities and Human Rights* (1992) 419-434.

<sup>11</sup>Ibid. at 420-421.

rule). In the 1970's, certain other divisions were created, such as the region of Kosovo and the Province of Vojvodina, autonomous units within the Yugoslav federation.<sup>12</sup>

Tito had suppressed resurgent nationalist ambitions of ethnic groups consistently during his rule from 1946 until his death in 1980. Not long after Tito's death, however, individual States within Yugoslavia began to agitate for greater autonomy from the central Government. With the death of Marshal Tito<sup>13</sup> the seething cauldron of historical ethnic hatreds among the Croats, Serbs, Bosnian Muslims, and Slovenes threatened to turn the Balkans into a theatre of war.<sup>14</sup> The atrocities in the Balkans had been predictable for some time. Fighting in Yugoslavia broke out in 1991 when the Serbian Yugoslav Peoples' Army (JNA) attacked Slovenia and Croatia after they declared independence.

In a Slovenian referendum on the question of secession from Yugoslavia, held in December 1990, an overwhelming majority of voters opted for independence. A declaration of independence was announced on 8 May 1991, followed by the necessary amendments to the operative constitutional law on 25 June. The secession of Slovenia from the Federal Republic of Yugoslavia opened the door to several other secessionist claims. The resulting disorder and instability in the other Yugoslav republics unleashed many long dormant territorial disputes among the ethnic and religious groups of Yugoslavia and revived the determination on the part of certain groups to settle old scores. The rise in tension expressed itself in armed hostilities, eventually degenerating into full-fledged armed conflict. Arguably, the disintegration of Yugoslavia was exacerbated by premature recognition on the part of certain

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<sup>12</sup>Ibid. at 422.

<sup>13</sup> Roger Thurow, 'Tito's Legacy: Political Drifting, An Economy in Chaos Prevail in Yugoslavia; Question is Whether Nation Will Turn More to Soviets Out of Economic Need; Sharpening Ethnic Rivalries', *Wall Street Journal*, May, 1986, available in 1986 WL-WSJ 258991.

<sup>14</sup> Dimitrejevic, above note 10 at 422.

influential members of the international community of Slovenia as an independent State.<sup>15</sup> Croats living in the Republic of Croatia declared their independence from the rump Federation of Yugoslavia on 16 March 1991. By 1992, Franjo Tudjman was elected President of Croatia.

In Bosnia-Herzegovina, 63% voted for the emergence of an independent Republic, headed by President Alija Izetbegovic. Bosnia- Herzegovina declared itself independent in April 1992. Within a few days of the declaration of independence of Bosnia-Herzegovina, Serb nationalist militia, including some soldiers from the Yugoslav National Army, invaded parts of Bosnia-Herzegovina. Under Serbian Democratic Party leader Radovan Karadzic<sup>16</sup> the Serb Republic was proclaimed with its administrative centre in Pale. Well-armed Serbian militia were able to occupy, at some points, 70% of Bosnian territory. The Serbian leaders carried out a policy of 'ethnic cleansing'<sup>17</sup> to try to rid the occupied territories of Bosnian Muslims through a systematic policy of widespread massacres and other serious violations of human rights and humanitarian law, including mass deportations of civilian Muslims. Slobodan Milosevic, president of Serbia and Montenegro, the truncated Yugoslavia, fuelled Serb nationalist sentiments with calls for a Greater Serbia, and support for the secession of Serbians in Croatia and Bosnia.<sup>18</sup>

Amidst the disintegration of Yugoslavia, and the ensuing war, the United Nations sent peacekeeping forces, known as the United Nations Protection Force (UNPROFOR), in Croatia and Bosnia to create conditions for a peace settlement, protect civilians in the so-

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<sup>15</sup> On 15 January 1992, the twelve members of the European Community (EC) recognised Slovenia.

<sup>16</sup> In July 1996, Karadzic was indicted by the International Criminal Tribunal for the Former Yugoslavia

<sup>17</sup> The term 'ethnic cleansing' has been used to designate the practice of 'rendering an area ethnically homogeneous by using force or intimidation to remove persons or given groups from the area.' *Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780* (1992), UN SCOR, Annex 55, UN Doc. 5/25274 (10 Feb. 1993).

<sup>18</sup> Thurow, above note 13 at 13.

called UN Protected Areas, and to assist UN humanitarian agencies.<sup>19</sup> In the meantime, the Balkans had turned into killing fields. As early as August 1991, JNA and other Serb forces had killed hundreds of civilians in Vukovar, a city in eastern Croatia.<sup>20</sup> According to a human rights report:

*United Nations Personnel were aware of massive violations of human rights and humanitarian law in the former Yugoslavia soon after fighting broke out between the Yugoslav Peoples' Army (JNA) and Croatian forces in 1991 . . . When Vukovar fell to the Serbs on November 19, 1991, the UN Secretary-General's personal envoy to the former Yugoslavia, Cyrus Vance, intervened to help facilitate the evacuations of hundreds of patients from the city hospital. He later learned that just hours before the evacuation, JNA and irregular Serb forces had removed over 200 patients and staff from the hospital and executed them outside the city.*<sup>21</sup>

UN soldiers and civilian personnel who witnessed and reported these accounts of violations to their superiors were told to be passive because they had no authority to intervene or stop the abuses.<sup>22</sup> Whatever the reasons, initial reports of killings were never made public or condemned by the UN or any of the major Western powers.<sup>23</sup> To make matters worse, the UNPROFOR presence in Croatia and Bosnia had proven ineffective in protecting civilians or creating conditions for a peace settlement. Perhaps nowhere was this failure more evident than in the Bosnian Serb siege of Sarajevo and their capture of large chunks of Bosnia, events that led to UNPROFOR's evacuation of Sarajevo on May 16, 1992.<sup>24</sup> After a Bosnian Serb attack on a Sarajevo market in May 1992 killed twenty civilians, the UN Security Council voted to impose sanctions on Serbia, which controlled Bosnian Serbs.<sup>25</sup>

It was not until July 1992 that the world would learn of the scale of atrocities in the former Yugoslavia, thanks to the work of print and television journalists, and especially Roy Gutman

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<sup>19</sup> Physicians for Human Rights, *Medicine Under Siege in the Former Yugoslavia: 1991-1995* (1996) 17-18.

<sup>20</sup> *Ibid.* at 23.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.* at 23-24.

<sup>24</sup> *Ibid.* at 18.

of New York Newsday.<sup>26</sup> Television cameras showed pictures of ‘hundreds of emaciated men behind barbed wire, their eyes hollow from hunger and despair.’<sup>27</sup> Killings of civilians, as many as hundreds of thousands, and the brutal rape of women became commonplace in the war. Only after the public knew what was happening in the former Yugoslavia did the UN and powerful States start talking about a war crimes tribunal.

In response to the deteriorating human rights situation in the former Yugoslavia, the UN Commission on Human Rights was called into its first ever special session, during which it adopted resolution 1992/S-1/1 on 14 August 1992, requesting the Chairman of the Commission to appoint a special rapporteur ‘to investigate first hand the human rights situation in the territory of the former Yugoslavia, in particular within Bosnia and Herzegovina’.<sup>28</sup>

The first report<sup>29</sup> of Special Rapporteur Mazowiecki to the Commission on Human Rights concerned, *inter alia*, the policy of ethnic cleansing and other serious human rights violations committed in the territory of the former Yugoslavia. The report stated that ‘[t]he need to prosecute those responsible for mass and flagrant human rights violations and for breaches of international humanitarian law and to deter future violators requires the systematic collection of documentation on such crimes and of personal data concerning those responsible.’<sup>30</sup> The Special Rapporteur then recommended that ‘[a] commission should be created to assess and

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<sup>25</sup> Paul Lewis, ‘UN Votes 13-0 for Embargo on Trade with Yugoslavia; Air Travel and Oil Curbed’, *New York Times*, May 31, 1992, at 1.

<sup>26</sup> Roy Gutman, ‘Prisoners of Serbia's War: Tales of Hunger, Torture at Camp in North Bosnia’, *New York Newsday*, Jul. 19, 1992, at 7. Gutman exposed the horrible treatment of Croat and Muslim detainees in Serb camps in Banja Luka and Trnopolje in Bosnia as well as the Manjaca and Omarska camps.

<sup>27</sup> Physicians for Human Rights, above note 19, at 24.

<sup>28</sup> See *Report on the Situation of Human Rights in the Territory of the former Yugoslavia* submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 14 of Commission resolution 1992/S-1/1 of 14 Aug. 1992, E/CN.4/1992/S-1/9, 28 Aug. 1992.

<sup>29</sup> *Ibid.* Chapter 1.

<sup>30</sup> *Ibid.* at para. 69.

further investigate specific cases in which prosecution may be warranted. This information should include data already collected by various entities within the United Nations system, by other inter-governmental organisations and by non-governmental organisations.’<sup>31</sup>

Subsequently, a number of reports called for criminal investigation of war crimes and serious violations of humanitarian law as well as the timely collection of information and evidence to support such investigations.<sup>32</sup> Various Governments, international organisations and non-governmental organisations also urged international prosecutions to be carried out. Security Council resolution 771, adopted on 13 August 1992, required Member States to submit reports on violations of humanitarian law perpetrated in the territory of the former Yugoslavia. On 6 October 1992, the Security Council adopted resolution 780<sup>33</sup> which:

*Request[ed] the Secretary-General to establish, as a matter of urgency, an impartial Commission of Experts to examine and analyse the information submitted pursuant to resolution 771 (1992) and the present resolution, together with such further information as the Commission of Experts may obtain through its own investigation or efforts, of other persons or bodies pursuant to resolution 771 (1992), with a view to providing the Secretary-General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia.*

In October 1992, the Secretary-General constituted a five-member independent and impartial Commission of Experts to determine whether there were grave breaches of the four *Geneva*

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<sup>31</sup> Ibid. at para. 70.

<sup>32</sup> See eg. E/CN.4/1992/S-1/10 of 27 Oct. 1992 at para 18 as well as Annex 11 (Statement by Dr. Clyde Snow). See also *Report of the Special Rapporteur* (transmitted by the Secretary-General to the Security Council and General Assembly) A/47/666; S/24809 of 17 Nov. 1992, para. 140, where Mr. Mazowiecki stated: ‘There is growing evidence that war crimes have been Committed. Further investigation is needed to determine the extent of such acts and the identity of those responsible, with a view to their prosecution by an international tribunal, if appropriate’. See further the later reports of the Special Rapporteur for more details on the human rights situation in the former Yugoslavia: E/CN.4/1993/50 of 10 Feb. 1993; E/CN.4/1994/3 of 5 May 1993; E/CN.4/1994/4 of 19 May 1993; E/CN.4/1994/6 of 26 Aug. 1993; E/CN.4/1994/8 of 6 Sept. 1993; E/CN.4/1994/47 of 17 Nov. 1993; E/CNA/ 1994/1 10 of 21 Feb. 1994; E/CN.4/1995/4 of 10 June 1994; E/CN.4/1995/10 of 4 Aug. 1994; A/49/641 -S/1 994/1252 of 4 Nov. 1994; E/CN.4/1995/54 of 13 Dec. 1995; E/CN.4/1995/57 of 9 Jan. 1995; E/CN.4/1996/3 of 21 Apr. 1995; and E/CN.4/1996/6 of 5 July 1995. On 27 July 1995, Mr. Mazowiecki informed the Commission of his decision to resign his mandate. The responsibilities of the Special Rapporteur on the former Yugoslavia were taken up by Ms. Elisabeth Rehn of Finland as of Sept. 1995.

<sup>33</sup> See SC Res 780 (1992) adopted by the Security Council at its 3119<sup>th</sup> meeting, 6 Oct. 1992. Reprinted in 31 *International Legal Materials* (1992) 1476.

*Conventions* of 12 August 1949.<sup>34</sup> The Commission collected information from various sources, carried out a number of investigations, and submitted three reports to the Secretary-General on serious violations of international humanitarian law in the territory of former Yugoslavia, referring to widespread patterns of wilful killing, ethnic cleansing, mass killings, torture, rape, pillage and destruction of civilian property, destruction of cultural and religious property and arbitrary arrests.<sup>35</sup>

On 22 February 1993, the Security Council unanimously adopted resolution 808, which underlined the Council's intention to create an international tribunal to prosecute individuals responsible for serious violations of international humanitarian law committed in the territory of former Yugoslavia since 1991' and requested the Secretary-General to report on all aspects of the matter and to make specific proposals on the resolution's implementation.<sup>36</sup> On 3 May 1993, the Secretary-General duly submitted his report to the Security Council as requested.<sup>37</sup> The report explains the legal basis for the tribunal's establishment, its competence and organisation, investigation and pre-trial proceedings, trial and post-trial proceedings (including those relating to the rights of the accused, witness protection, judgement and penalties, appeal, review and the enforcement of sentences), and makes provision for cooperation and judicial assistance of States with the Tribunal. The Statute of the International Criminal Tribunal for the Former Yugoslavia, as proposed by the Committee of Experts to the Secretary-General, formed the appendix to the Secretary-General's report.

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<sup>34</sup> See *Report of the Secretary-General on the Establishment of the Commission of Experts Pursuant to Paragraph 2 of Security Council Resolution 780* (1992), UN Doc. S/24657 (1992).

<sup>35</sup> See UN Doc. S/25274 of 9 Feb. 1993.

<sup>36</sup> See SC Res 808 of 22 Feb. 1993.

<sup>37</sup> See *Report of the Secretary-General Pursuant to paragraph 2 of Security Council Resolution 808* (1993), UN Doc. S/25704 of 3 May 1993.

On 25 May 1993, the Security Council adopted resolution 827 and unanimously approved the report of the Secretary-General,<sup>38</sup> deciding:

*...to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace and to this end to adopt the statute of the International Tribunal annexed to the report of the Secretary-General.*

### 1.2.2 International Criminal Tribunal For Rwanda

Prior to the genocide, the population of Rwanda consisted of an estimated 85% Hutu, 14% Tutsi, and 1 % Twa and other.<sup>39</sup> As far back as the 15th century, the Rwanda-Burundi area was ruled by monarchic clans. Prior to the colonial era, political tensions in Rwanda were not particularly accentuated along ethnic lines. However, as the nineteenth century drew to an end, Germany began to assert indirect colonial rule over Rwanda and Burundi with only a very small presence through the tactic of 'divide and rule'. The reinforcement and manipulation of the ruling elites in Rwanda formed an important element of Germany's colonial policy from 1897 to 1916.<sup>40</sup> During the First World War, Germany lost control over the area to Belgium, which then ruled Rwanda from 1916 to 1962. Belgium administered Rwanda under the League of Nations mandates system, pursuant to Article 22 of the League Covenant, and then, following dissolution of the League of Nations on 18 April 1946, as a United Nations Trust Territory.

As Germany had done, Belgium reinforced the centuries-old Tutsi monarchy in Rwanda through a system of patron-client control, favouring the minority Tutsi people as the ruling

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<sup>38</sup> S/25704 of 3 May 1993 & Add. 1 of 17 May 1993.

<sup>39</sup> The indigenous Twa minority was the first people to populate the area of Rwanda as far back as 2,000 BC. Around 3,000 years later, a migration of Hutu to the area began. People of Tutsi extraction began to migrate to the area around 1500 AD. Traditionally, the Hutu have been agrarian and sedentary whereas the Tutsi have been cattle-owners and nomadic.

<sup>40</sup> See generally Alain Destexhe, *Rwanda and Genocide* (1995).

class, partly on the grounds that the Tutsi people originated from the Nile River region, were somehow 'more European' in character than the Hutu people, and therefore, were supposedly superior as well.<sup>41</sup> Thus, by 1933-34, when the colonial administration carried out a census and introduced a mandatory identity card for every Rwandese citizen indicating his or her ethnic origin, the distinction between Hutu and Tutsi had become a cornerstone of Belgian colonial rule.

After the Second World War ended, Rwandan Hutus pushed for democratic reforms, a goal supported by the Belgian Government. Belgian patronage of the Tutsis continued, but relations became strained. Tutsis not only opposed Belgium's proposed democratic reforms, which threatened to undermine Tutsi positions of privilege and power, but also intensified a drive for national independence from Belgium.

Eventually, Belgium was able to institute a number of democratic reforms in Rwanda, over the objections of Tutsi leaders, and pushed through the holding of local and national elections in Rwanda. It was clear that the Hutus stood to gain from democratic elections whereas the Tutsi-dominated Government was likely to be voted out. In November 1959, the heightened resentment between the two groups took the form of open hostilities. Several hundred Tutsis were massacred, which in turn sparked a mass exodus of thousands of Tutsis from Rwanda, mostly to Uganda and Zaire.

On 26 October 1961, Gregoire Kayibanda, leader of Parmehutu (Party for the Emancipation of the Hutu people), was formally elected President of the newly formed Parliament of the

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<sup>41</sup>See eg. Pierre Ryckmans, *Dorniner Pour Servir* (1931) at 26: 'The Batutsi were meant to reign. Their fine presence is in itself enough to give them a great prestige vis-a-vis the inferior races which surround ... It is not surprising that those good Bahutu, less intelligent, more simple, more spontaneous, more trusting, have let

Republic of Rwanda, and maintained political control until 1973. In 1961, the Rwandan monarchy, which had existed for centuries, was abolished by overwhelming popular demand through national referendum and replaced by a republican form of Government. On 1 July 1962, Rwanda achieved independence. In the early 1960's, violence was never absent from the scene. Particularly large-scale massacres were perpetrated in 1963 and 1966, mainly against Tutsis.

In July 1973, Juvenal Habyarimana, a Hutu from the north of Rwanda, seized control of the Government, and in 1975, formed the National Revolutionary Movement for Development. Although Habyarimana promised to create a fair balance between the Hutu and Tutsi groups, he banned all opposition political parties except his own, and in 1978, changed the Constitution to make Rwanda officially a one-party State.

Motivated to regain their former position of prestige in the country, and concerned to aid their brothers and sisters in Rwanda from the recurrent violence perpetrated against them, Tutsi paramilitary forces coalesced into the Rwandese Patriotic Front (RPF). The RPF launched small-scale incursions from neighbouring countries into Rwandese territory in order to force Habyarimana towards power-sharing. On 1 October 1990, the insurgent RPF crossed the Ugandan border and carried out several military operations in the north of Rwanda. Out of revenge, Hutu groups killed some 300 Tutsis in the following weeks.<sup>42</sup> By 1992, over 350,000 persons had fled the violence in the northern regions of Rwanda, becoming displaced in the interior of Rwanda.

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themselves be enslaved without ever daring to revolt' as quoted in Gerard Prunier, *The Rwanda Crisis 1959-1994: History of a Genocide* (1995) at 9.

<sup>42</sup> See generally Francois Misser, *Vers un Nouveau Rwanda?* (1995) for a series of interviews conducted with the Vice-President and Minister of Defence of the Government of Rwanda, Major-General Paul Kagame.

By 1993, it must have been clear to the Habyarimana Government that the Rwandese Patriotic Front had become an insurgency movement capable of destabilising Rwanda and that it would be prudent to explore the possibilities of a cease-fire. On the other side, RPF commanders were obliged to negotiate with the Government in order to translate small-scale military victories into longer lasting political success. Negotiations between the Government of Rwanda and the Rwandese Patriotic Front commenced at Arusha, Tanzania, on 10 August 1992. The main issues to be addressed at the Arusha peace negotiations were: the need for multi-party elections and power-sharing in Rwanda; the fostering of peace and respect for the rule of law; and, an end to the RPF insurgency. These negotiations did not bear fruit immediately.

However, further meetings were convened in August 1993 and these ended with a political settlement. On 4 August 1993, the Arusha Accords were signed between the Rwandese Patriotic Front and the Government of Rwanda.<sup>43</sup> The Accords, sponsored by the Governments of Tanzania, Belgium and Germany, as well as by the United Nations, were designed to promote respect for basic human rights and the rule of law, broaden power-sharing in Rwanda, and end the RPF insurgency.

In a report of 11 August 1993, the Special Rapporteur of the Commission on Human Rights on extra-judicial, summary or arbitrary executions<sup>44</sup> drew attention to continuing serious

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<sup>43</sup> The Agreement provided for a broad role for the United Nations, through what the agreement termed the Neutral International Force (NIF), in the supervision of implementation of the Accords during a transitional period which was to last 22 months. Previously, in a letter to the Secretary-General on 14 June 1993 (S/25951), the government and the RPF had jointly requested the establishment of such a force and asked the Secretary-General to send a reconnaissance team to Rwanda to plan the force. The parties agreed that the existing OAU Neutral Monitoring Group (NMOG II) might be integrated into the NIF.

<sup>44</sup> See the report of Mr. Bacre Waly Ndiaye on his mission to Rwanda from 8-17 April 1993, E/CN.4/1994/7/Add. 1 of 11 August 1993.

human rights violations in Rwanda and raised the question as to whether these violations might qualify as 'genocide'.<sup>45</sup>

On 24 September 1993, the UN Secretary-General laid before the Security Council a plan to empower an international military force to ensure compliance with the Arusha Accords. He recommended that the existing peacekeeping force, dubbed UNOMUR,<sup>46</sup> be folded into a 'United Nations Assistance Mission in Rwanda' (UNAMIR). On 5 October 1993, the Security Council adopted resolution 872 which created UNAMIR for an initial period of six months.

While the Arusha Accords were considered by many as the first sign of effective power-sharing, they also bolstered the accusations made by extremist Hutu elements that the Habyarimana regime was merely a puppet of foreign Tutsi interests who threatened to regain direct control over the Government. In the final months of 1993, these extremist Hutu elements began to plan the elimination of the Tutsi people by training groups of 300 persons (the *Interahamwe*), in methods of systematic slaughter.

In early April 1994, President Habyarimana flew to Dar-es-Salaam to attend a meeting with President Ali Hassan Mwinyi of Tanzania, Kenyan Vice-President George Saitoti, Burundian President Cyprien Ntayamira, and President Yoweri Museveni of Uganda, concerning the maintenance of peace and security in the region.

On 6 April, following the meeting, the President of Rwanda returned by jet to Kigali accompanied by the President of Burundi who intended to continue on to Bujumbura. As the presidential aircraft circled Kigali airport to land, it was shot down. All those aboard,

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<sup>45</sup> Ibid. at paras. 78-80.

including Juvenal Habyarimana and Cyprien Ntyamira, several ministers and their entourages, died in the crash.

The downing of the aircraft triggered massacres throughout the country. Within thirty to forty minutes of the aircraft crash, roadblocks were set up in Kigali by Hutu militia, at which identity cards were checked, Tutsis singled out, and murdered on the spot. The immense slaughter plunged Rwanda into total chaos. United Nations inactivity and acquiescence to genocide is damning. There were credible reports that the United Nations peace-keeping force in Rwanda (UNAMIR), which had been present to facilitate the peace negotiations between the Hutu government and the RPF, apparently knew that a genocide might take place but the UN took no preventive action.<sup>47</sup>

On 7 April, Prime Minister Agathe Uwilingiyimana, as well as 10 Belgian peacekeeping soldiers assigned to protect her, were murdered by soldiers of the Rwandese Government. Shocked by these events, and by the rapid and serious deterioration of security in Rwanda, the Government of Belgium decided on 12 April to remove its UNAMIR contingent from Rwanda.<sup>48</sup> The April 1994 withdrawal by Belgium of its 400 UNAMIR contingent and the failure of the remaining UNAMIR forces to intervene allowed Hutu leaders to unleash genocidal massacres against Tutsis and moderate Hutus.<sup>49</sup> Later attempts by the UN to

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<sup>46</sup> UNOMUR stands for United Nations Observer Mission Uganda-Rwanda established by SC Res 846, 22 June 1993.

<sup>47</sup> Human Rights Watch, *World Report 1995* (1994) 41. See generally Joint Evaluation of Emergency Assistance to Rwanda, *The International Response to Conflict and Genocide: Lessons From the Rwanda Experience*, Vols. I-V (March 1996). This is corroborated by *Report of the Independent Inquiry Into Rwanda Report*, below note 91.

<sup>48</sup> UNAMIR had been vested only with a UN Charter Chapter VI mandate to monitor and assist in the implementation of the Arusha Accords. It had neither the capability nor the mandate to enforce peace that could have been made available to it pursuant to Chapter VII of the Charter. On 21 April, the Security Council adopted resolution 912, which reduced the size Of UNAMIR from 2,500 to 270.

<sup>49</sup> World Report, above note 47, at 46. Human Rights watch has painted the picture of a highly culpable UN and international community: 'following the plane crash [carrying President Habyarimana], the beginning of the massacres, and the resumption of civil war, the UN and the US initially reacted with retreat, confusion, and lethargy. This apparent indifference, combined with the lack of any reaction by the international community to the massacres in Burundi in October and November 1993, made the Rwandan Hutu extremists think that they could kill with impunity.'

intervene were too little and too late. As later put by Human Rights Watch, '[s]hamefully absent at the moment of the killings, the international community is now moving slowly [by establishing the Rwanda Tribunal] to bring those guilty to justice.'<sup>50</sup>

The massacres continued, perpetrated mainly by extremist Hutu militia associated with Habyarimana's political party, the Coalition for the Defence of the Republic, members of the Presidential Guard and regular army forces of the then Government of Rwanda. The slaughter required extensive administrative and logistical planning, evidenced by the chillingly calculated and thorough way in which it was carried out, and by the fact that most of the victims – between 500,000 and 1 million mainly Tutsi persons as well as politically moderate Hutu leaders and their families<sup>51</sup> - were killed over the relatively short period from 6 April through the first three weeks of May 1994.

Shortly after the Hutu extremists launched the genocide, the RPF undertook a military offensive, moving from Uganda into northern Rwanda. By mid-July 1994, under the leadership of Paul Kagame, the RPF was able to halt the genocide, force the retreat of the former Government of Rwanda and associated militia from Kigali, and assert effective control over the rest of Rwandese territory. Kagame was elevated to Vice-President and Minister of Defence in the new Government of Rwanda.

Most of the individuals responsible for carrying out violations of human rights and humanitarian law fled the country amongst the over 2 million that sought refuge in the neighbouring countries of Burundi, Zaire and Tanzania, for fear of possible Tutsi reprisals and

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<sup>50</sup> World Report, above note 47, at 45. See also Christopher C. Joyner, *Enforcing Human Rights Standards in the Former Yugoslavia*, (1994) 22 *Denver Journal of International Law & Policy* 235.

revenge attacks. Numerous criminal suspects fled to francophone west African countries, as well as to Kenya, and as far away as Belgium, Canada, France, Switzerland and the United States.

Once the International Criminal Tribunal for the Former Yugoslavia had been created, it would have appeared *patently discriminatory* for the Security Council not to have considered creation of an international criminal tribunal also for Rwanda. Despite the fact that many of the Security Council's Members did not consider Rwanda to be as closely tied to their national interests as the former Yugoslavia, the Security Council nevertheless had to respond in a like manner.

In response to the massive violations of human rights and humanitarian law in Rwanda, the Security Council adopted resolution 935 on 1 July 1994, which recalled that 'all persons who commit or authorise the commission of serious violations of international humanitarian law are individually responsible for those violations and should be brought to justice' and requested the Secretary-General:

*... to establish, as a matter of urgency, an impartial Commission of Experts to examine and analyse information submitted pursuant to the present resolution, together with such further information as the Commission of Experts might obtain, through its own investigations or the efforts of other persons or bodies, including the information made available by the Special Rapporteur on Rwanda, with a view to providing the Secretary-General with its conclusions on the evidence of grave violations of international humanitarian law committed in the territory of Rwanda, including the evidence of possible acts of genocide.*

Resolution 935 requested the Secretary-General to report to the Security Council within four months of the Commission's establishment. The Commission of Experts concluded that both sides to the armed conflict in Rwanda during the period 6 April 1994 to 15 July 1994 were

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<sup>51</sup> See *Report on the Situation of Human Rights in Rwanda* submitted by R. Degni-Segui, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 20 of Commission resolution E/CNA/S-3/1 of 25 May 1994, doc. E/CN.4/1995/7 of 28 June 1994, para. 24.

responsible ‘... for serious breaches of international humanitarian law, in particular of obligations set forth in article 3 common to the four *Geneva Conventions* of 12 August 1949 and in Protocol II additional to the *Geneva Conventions* and relating to the protection of victims of non-international armed conflicts, of 8 June 1977.’<sup>52</sup>

While the Commission took note of violations committed both by elements associated with the former Government of Rwanda as well as by members of the Rwandese Patriotic Front, it concluded that:

*... there exists overwhelming evidence to prove that acts of genocide against the Tutsi group were perpetrated by Hutu elements in a concerted, planned, systematic and methodical way. Abundant evidence shows that these mass exterminations perpetrated by Hutu elements against the Tutsi group as such, during the period mentioned above, constitute genocide within the meaning of article 11 of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted on 9 December 1948. To this point, the Commission has not uncovered any evidence to indicate that Tutsi elements perpetrated acts committed with intent to destroy the Hutu ethnic group as such during the said period, within the meaning of the Genocide Convention of 1948.*

The Commission therefore recommended international prosecution of the persons responsible for these crimes under international law and that ‘... the Security Council amend the Statute of the International Criminal Tribunal for the former Yugoslavia to ensure that its jurisdiction covers crimes under international law committed during the armed conflict in Rwanda that began on 6 April 1994.’

On 8 November 1994, the Security Council adopted resolution 955 creating the International Criminal Tribunal for Rwanda, with its Statute as the resolution's annex. Resolution 955 reiterated the Council's ‘grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda’, determines ‘that this situation continues to constitute a threat to

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<sup>52</sup> See *Preliminary Report* 4 October 1994, part VIII (A); UN Doc. S/1994/1125.

international peace and security’ and resolves ‘to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them’. Resolution 955 underlines the Security Council's conviction that prosecution of individuals responsible for serious violations of international humanitarian law are intended to contribute to the process of national reconciliation and the restoration and maintenance of peace.

The establishment of the ‘other’ tribunal, the Rwanda Tribunal, was possible because the Yugoslav Tribunal had set a precedent for such action by the international community. The UN and the powerful States that control it could not reject a tribunal for Rwanda when they had set one up for the former Yugoslavia; formally, white European lives were put on the same footing with black African lives. The overlapping conflicts, which had been so brutal and barbaric, had taken place in front of the television camera, making it impossible to set up a process for prosecuting one group of perpetrators and not the other. Nevertheless, the Rwanda Tribunal was an afterthought, a fact underscored by its grafting to the Yugoslav Tribunal.<sup>53</sup>

At this point, the article will now highlight the various political ambiguities and reluctances on the part of the international community with regard to the reaction to the situations in Rwanda and Yugoslavia, and the political considerations that influenced the process through which the tribunals were established.

### **1.3 The Shadow of International Realpolitik in The Process of Establishing The *Ad Hoc* International Criminal Tribunals**

#### **1.3.1 *The Sovereignty Factor***

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<sup>53</sup> Makau Mutua, ‘Never Again: Questioning the Yugoslav and Rwanda Tribunals’ (1997) *Temple International and Comparative International Law Journal* 167, 178.

The original, non-binding CSCE Final Act of 1975 affirmed, in Principle I, the right of every State to juridical equality, territorial integrity, freedom and political independence with the protection of the territorial integrity of States, defined in greater detail in Principle IV.<sup>54</sup> Further the reference to territorial integrity confirms an obligation directed at States, but not at peoples, alluding to an obligation of non-intervention further reinforced in Principle VI of the Final Act. It was perceived by the Serbian-dominated central authority as *carte blanche* for the forcible implementation of its goals to reunify the federation and consolidate its leadership within it. In light of this fact, British Foreign Secretary Douglas Hurd, for example, was reportedly 'obliged significantly to qualify an early statement supporting the 'integrity of Yugoslavia' by adding that this should not include the use of force.'<sup>55</sup>

Problems arose over what kind of international response was permissible with or without consent of the parties or of Yugoslavia. Milosevic strongly insisted on non-interference as Europe discussed military intervention in the Summer of 1991, and had considerable support among, for example, many Third World countries.<sup>56</sup> A rather confusing debate concerning the meaning of article 2(7) of the *UN Charter*-the principle of non-intervention-seriously delayed and weakened the initial response to the Crisis. Coupled with this interpretational conundrum at the international level was the fact that the CSCE (the security arm of the EC) was just being transformed from a mechanism dedicated to maintaining crisis stability in Cold War Europe to a standing organisation capable of offering procedures akin to collective security

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<sup>54</sup> The participating States will respect the territorial integrity of each of the participating States.

Accordingly, they will refrain from any action inconsistent with the purposes and principles of the Charter of the United Nations against the territorial integrity, political independence or the unity of any participating State, and in particular from any such action constituting a threat or use of force. The principle of territorial integrity, borrowed in terminology from Article 2(4) of the UN Charter, confirmed obligations of states and possibly expanded upon them by adding 'the unity of participating States' as an object of protection. However, it is an obligation, albeit in the case of the CSCE a non-binding obligation, established among states. It protects them from threats to their territorial integrity from outside, but not from challenges from within. CSCE is the acronym for the Council for Cooperation and Security in Europe.

<sup>55</sup> Quoted in Wise & Helm, 'New-look CSCE's First Test', *Independent*, June 28, 1991, at 13.

within Europe meaning that the regional effort was hamstrung by lack of concrete ideas on how best to react.

The Europeans kept the UN out of Yugoslavia in the early stages.<sup>57</sup> The EC's year-long solo efforts proved inadequate to negotiate a political settlement of the conflict in Yugoslavia. While the commitment of the EC to handle the crisis was meritorious, it was not realistic. The nature of the dispute simply did not lend itself to simple negotiation of a political solution.<sup>58</sup> The US, still involved in the Gulf, insisted on the logic of the *UN Charter* and hence felt that the UN had no role to play unless regional attempts failed. The Soviet Union, concerned about the precedent of UN intervention could set for future conflicts in Yugoslavia, insisted on non-interference. Even the UN Secretary-General was sceptical since, he argued, this was an internal Yugoslav matter.<sup>59</sup> For instance, Slovene requests for deployment of UN observers were turned down because Slovenia was not an independent UN member. However with the recognition of Croatia and Slovenia on 15 January 1992 by the European Community (EC), the conflict became *de jure* international opening up the atrocities and gross violations of humanitarian law to even closer media scrutiny which precipitated increased world condemnation.<sup>60</sup>

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<sup>56</sup> Age Eknes, 'The United Nations' Predicament in the Former Yugoslavia' in Thomas G. Weiss (ed), *The United Nations and Civil Wars* (1995)114.

<sup>57</sup> Ibid. 113. See Marc Weller, 'The International Response To The Dissolution Of The Socialist Federal Republic of Yugoslavia' (1992) 86 *American Journal of International Law* 5699 (for the very early attempts of Europe to address the conflict)

<sup>58</sup> Deep-seeded animosity and distrust, coupled with the absence of a central authority in Yugoslavia, foretold that the parties were not likely to simply talk through their differences. Without a peacekeeping force to bring order and stability to the region, the charged situation did not permit a negotiated settlement of political differences. While some regional organisations are outfitted to compliment negotiation efforts with the dispatch of peacekeeping forces, the EC is not equipped to resort to peacekeeping. Instead, the EC sent 'monitors' to the region that proved incapable of little more than observing the escalating violence. See Amy Lou King, 'Bosnia-Herzegovina—Vance-Owen Agenda For A Peaceful Settlement: Did The UN Do Too Little, Too Late, To Support This Endeavour?' (1993) 23 *Georgia Journal of International and Comparative Law* 347, 368-369.

<sup>59</sup> Eknes, above note 56 at 113.

In the case of Rwanda, most countries in the West decided that the civil anarchy war that was underway was an internal matter involving a fight for political power and dominance and thus was not subject to any greater action by the international community.<sup>61</sup> As powerfully put by Human Rights Watch '[c]ertain White House officials counselled that military intervention would be useless because they believed that the war resulted from deeply rooted "tribal hatreds" which, "because they had always existed," would continue forever.' A few weeks after the massacres had begun, when it had long been evident that genocide was taking place, a senior member of the Clinton administration ordered officials not to speak of 'genocide' because the term could increase the moral pressure on the President and force him to act.<sup>62</sup> It was already apparent to the international community that the actions in Rwanda were not linked to any struggle for power, but rather it was a systematic genocide by Hutu extremists, perpetrated against the Tutsi minority and politically moderate Hutus throughout the country. Pursuant to the stance that the genocidal conflagration in Rwanda was an internal matter, on 21 April 1994, about two weeks after the bloodbath in Rwanda had begun, the Security Council adopted resolution 912, which reduced the size of UNAMIR from 2,500 to 270 in spite of pleas from some African countries (nine days before) to have the military capability of the peacekeeping force bolstered.<sup>63</sup>

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<sup>60</sup> In October 1992, under pressure from the international civil society and at the behest of the United States, the Security Council adopted resolution 780 establishing the Commission of Experts to Investigate the War Crimes and Other Violations of International Humanitarian Law in the Former Yugoslavia, above note 34.

<sup>61</sup> UNAMIR was an operation which was created in the shadow of Somalia. In particular the deaths of the Pakistani and US peacekeepers in Somalia in 1993 had a deep effect on the attitude towards the conduct of peacekeeping operations. For instance, the UN commission of inquiry set up to study these tragic deaths in Somalia, whose report came out just as preparations were being made to strengthen UNAMIR in the wake of the genocide, concluded that '*the UN should refrain from undertaking further peace enforcement actions within the internal conflicts of States*' (emphasis added) (S/1994/653) For the Government of the United States the events in Mogadishu were a watershed in its policy towards UN peacekeeping. By May 1994, when the genocide in Rwanda began, President Clinton had enacted PDD25, a directive which placed strict conditions on US support for United Nations peacekeeping.

<sup>62</sup> World Report above note 47 at 46.

<sup>63</sup> On 13 April, Nigeria had presented a draft resolution in the Security Council on behalf of the Non-Aligned Caucus advocating a strengthening of UNAMIR.

Even if one could grant part of the argument that the tensions between Hutus and Tutsis were in a sense historical, one could still not justify inaction on that basis. If that were a valid premise for viewing conflicts with racial, ethnic, or religious dimensions, it would be senseless to expend resources on peace efforts between Arabs and Jews in the Middle East or Protestants and Catholics in Northern Ireland. That is why such views and policies must be exposed for what they truly are: racist excuses for inaction.<sup>64</sup>

### 1.3.2 *National Foreign Policy Interests*

There were never any easy options for the former Yugoslavia. The war posed a stronger challenge to norms and principles among concerned governments than a classical strategic threat would have done. The use of armed force, even collectively, to influence the course of the conflict was therefore likely to generate contradictory pressures and unsatisfactory results. From the initial stages, it was evident that the major actors or governments had varying inclinations or interests, and this created tensions in the regional organisations as well as in the UN.<sup>65</sup> The result was disaster. The initial policy of keeping Yugoslavia together was replaced by attempts to find compromise solutions, which in effect meant redrawing frontiers. Such an approach proved difficult on one main reason, the unwillingness of the parties to compromise on territory.<sup>66</sup> Adding to this problem was the premature recognition by some European States of the independence of some of the breakaway States and the ambivalent

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<sup>64</sup> See World Report, above note 47, at 46.

<sup>65</sup> Certainly, the last thing that Lord Owen and Vance needed was a commission (Commission of Experts, above note 34) that would demonstrate the criminality of Serbian leaders, including Milosevic, and the victimisation of the Bosnians. If that had happened, world public opinion would have clamoured for accountability for the atrocities. Milosevic and other Serbian leaders would not, under these circumstances, agree to a negotiated settlement. Owen thought that equal moral blameworthiness was needed to achieve a climate that would convince the Bosnians to accept whatever the Serbians dictated, and to avoid focusing on the prospect of the prosecution of Serbian leaders. To show otherwise, namely that one side committed heinous crimes against the other, was an impediment to that realpolitik approach. After all the same 'criminals' were the same leaders that Lord Owen and Vance were supposed to cajole and coax into a political settlement. (Lord David Owen-for the EC together with Cyrus Vance-for the UN were co-chairs of the Permanent Conference on the former Yugoslavia convened in London on 26-28 August 1992, which adopted the principles for negotiating peace in the former Yugoslavia). See also text in note 83 below.

<sup>66</sup> Eknes, above note 56 at 115.

Security Council Resolutions that sided with or punished the Serbs, thus undermining efforts that depended on all the parties' cooperation.<sup>67</sup>

Even after the major powers recognised Bosnia-Herzegovina as a sovereign State, admitted it as a full member of the UN, and established diplomatic relations, meanwhile suspending from UN membership of the rump Yugoslavia and imposing sanctions on it for supporting the war<sup>68</sup> they still refused to identify the war as an *international armed aggression* and instead characterised it as a *civil war* and an ancient ethnic feud hence permitting them to avoid their collective security obligations under the *UN Charter*.<sup>69</sup>

Even after the ICTY was established, few prosecutions occurred initially, because NATO forces were reluctant to apprehend indicted criminals for fear of retaliation. Most shocking was the initial refusal of NATO and the United States to arrest war crimes suspects following the American-brokered Dayton Accords and the deployment of 60,000 troops in Bosnia.<sup>70</sup> Perhaps the reason lies in the American reliance on Milosevic, the Serbian President many viewed as the architect of the genocidal war, to broker the agreement.<sup>71</sup> In any event, the Accords largely ratified the gains of the Serbs, leaving the Bosnian Muslims with only fifty-one percent of Bosnia-Herzegovina, a Muslim-Croat federation; the rest became Republika

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<sup>67</sup> Security Council Resolutions 713 (25 September 1991), 757 (30 May 1992), 781 (9 October 1992), 787 (16 November 1992). These resolutions covered economic and military sanctions and their implementation. See, *The United Nations and the Situation in the Former Yugoslavia: Resolutions of the Security Council and Statements by its President*, 25 September 1991-28 April 1995. (United Nations Department of Public Information, 1995).

<sup>68</sup> On 6 April 1992, the twelve members of the European Community (EC) recognised Bosnia-Herzegovina (BiH) in its boundaries when it was one of the six republics of Socialist Federal Republic of Yugoslavia (SFRY) followed by its recognition by the US a day later, on 7 April 1992. On 25 May 1992, the Security Council adopted resolution 755, approving the membership of BiH to the UN. About four months later, on 19 September 1992, the Security Council adopted resolution 777, deciding that the Federal Republic of Yugoslavia (FRY) could not automatically continue the membership of the SFRY.

<sup>69</sup> *UN Charter*, above note 6, Article 52.

<sup>70</sup> E. Sciolino, 'Accord Reached to End the War in Bosnia; Clinton Pledges U.S. Troops to Keep Peace', *New York Times*, Nov. 22, 1995, at A1. The Dayton Accords were initialled on November 21, 1995, by the presidents of Bosnia-Herzegovina, Croatia, and Serbia in Dayton Ohio, ending the four-year war in the former Yugoslavia.

<sup>71</sup> 'Dissembling in Serbia', *Asian Wall Street Journal*, Feb. 10, 1997, at 12, available in WESTLAW, Intlnews.

Srpska, a separate and autonomous Serb republic, and a haven for Karadzic and Mladic,<sup>72</sup> two of the most senior Serbs indicted by the ICTY. The Dayton Accords charged neither the NATO forces nor the signatory states with finding and arresting indicted war criminals.<sup>73</sup> Initially the Yugoslav Tribunal remained a symbolic gesture without the wherewithal to discharge its mission. The United States feared that going after suspects would upset the Dayton Accords.<sup>74</sup> In any event, both the United States and NATO forces initially carried out a policy of appeasement towards indicted war criminals.<sup>75</sup> NATO forces were keen in discharging the initial official policy of ‘monitor, don’t touch’ in relation to the war criminals but subsequently under international pressure and condemnation resorted to limited case by case arrests.<sup>76</sup> This was arguably to deflect international criticism and condemnation of NATO’s passivity and aloofness in assisting the ICTFY in spite of its formidable military resources.

Major criminals like Karadzic and Mladic remain at large. Worse yet, Milosevic was given *de facto* immunity in exchange for his signature on the Dayton Accord in 1994. The result was not peace, and certainly not reconciliation, but a truce—a truce that was short-lived in light of the massacre by General Mladic of 7000 Bosnian men in Srebrenica in 1995, and the commencement of ‘ethnic cleansing’ in Kosovo in 1998. The result was a tenuous indictment by the ICTY against Milosevic for ordering war crimes and crimes against humanity.

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<sup>72</sup>Physicians for Human Rights, above note 26, at 32.

<sup>73</sup>Id. at 32. Medicine Under Siege, above note 19, at 32.

<sup>74</sup>Dissembling in Serbia, above note 70.

<sup>75</sup>‘War-Crimes Hypocrisy’, *Washington Post*, Feb. 2, 1997, at C6 (attacking American policy of appeasement of war crimes suspects, reconfirmed when Secretary of State Albright met with Louise Arbour, the new Yugoslav Tribunal Prosecutor). *Washington Post* editorial concludes war crime suspects ‘have not been arrested because U.S. troops have chosen not to arrest them—because ultimately, President Clinton has failed to order their arrests.’ See also ‘Discussions, But No Plans Yet on Catching War Criminals: Pentagon’, *Agence France Presse*, Feb. 11, 1997, available in LEXIS, News Library, CURNWS File.

<sup>76</sup>Michael Scharf, ‘The Tools For Enforcing International Criminal Justice In The New Millennium: Lessons From The Yugoslavia Tribunal’ (2000) 49 *DePaul Law Review* 925, 956-964.

Milosevic may be on notice because he may still be needed to prevent harm to NATO forces and to make yet another definitive political settlement regarding Kosovo.

With regard to Rwanda, initially, the international political spotlight was never on the events. Compounding this further is the fact that Rwanda, represented by the Habyarimana government, was a member of the Security Council from January 1994. In effect, one of the parties to the Arusha Peace Agreement had full access to the discussions of the Council and had the opportunity to try to influence decision-making in the Council on its own behalf. Further, the presence of Rwanda on the Security Council also had a profound effect on the kind of information presented to the Council on the Rwandese situation by limiting the scope and depth of the information.

In the meantime, the West focused on Yugoslavia, and the most violent event in Europe experienced since the Second World War. Rwanda situated as it in Africa is far removed from the West and one may hazard a rule of the thumb that military measures are normally considered only if vital political and/or economic interests are at stake. The tiny former Belgian Colony had none of this lure and without the initiative of the powerful Western countries nothing definitive would be done to address the situation. Rwanda is neither a major strategic spot nor an economically vital asset like Kuwait to major Western powers. In addition, none of the Western powers had any supposed historical and cultural links to the Rwandese other than historical imperialistic links that don't count for much. On the other hand, in the case of Yugoslavia, the West seemed to defer due to supposed historical and cultural links of the Serbs to the Russians. As Rwanda degenerated into a genocidal

conflagration there was little that Africa would do other than watch the macabre butcher of tens of thousands of Tutsis and Hutu moderates every day over a period of about six weeks.<sup>77</sup>

### 1.3.3 *International Obligations*

As mentioned above, the major powers refused to identify the war in the former Yugoslavia as an international aggression in order to avoid their collective security obligations under the *UN Charter*.<sup>78</sup> In response to the atrocities reported by the media, relief organisations and even their own diplomats, and to quell the public outcry over the haunting images of starved, *concentration camp* inmates behind barbed wire (reminiscent of Nazi Germany), the Security Council passed resolutions its members then failed to implement and in conjunction with the European Community, set up a diplomatic process which neither would back up by force.<sup>79</sup> To evade their obligations under the 1948 *Genocide Convention*,<sup>80</sup> requiring parties to *prevent* and punish the crime of genocide, Western leaders took frequent recourse to the term used by Serbian officials, *ethnic cleansing*,<sup>81</sup> and then stated that all parties had committed the practice.<sup>82</sup> They did not use the term *genocide* until the work of the ‘war crimes commission’, the Commission of Experts was in full swing, collecting evidence and submitting damning reports pointing to a pattern of massive deliberate and systematic human rights violations.

The UN also exhibited reluctance over addressing the human rights reality of the Balkan conflagration. As the situation spiralled out of control, the UN increasingly defended the

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<sup>77</sup> As noted by Prunier, above note 41 at 261, ‘[i]f we consider that probably around 800,000 people were slaughtered during the short period...the daily killing rate was at least five times that of the Nazi death camps.’

<sup>78</sup> See *UN Charter*, above note 6.

<sup>79</sup> Eknes, above note 56 at 115-120.

<sup>80</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, UNTS 78, 277, entered into force on 12 January 1951 (*Genocide Convention*).

<sup>81</sup> See, *Interim Report of the Commission of Experts*, above note 11.

<sup>82</sup> This was in order to create a climate of equal moral blameworthiness that would convince the Bosnians to accept whatever the Serbians dictated.

Vance-Owen agenda<sup>83</sup> of diplomacy and conciliation as the best hope for resolving the conflict. The UN thus allowed the peace process to serve as the scapegoat, hoping to shield attention away from the UN's own inept handling of the threat to international peace. Thus, over a year after conflict erupted in the former Yugoslavia, the International Conference on the Former Yugoslavia (London Conference), successor to the Conference on Yugoslavia, ushered in what was hoped to be a fresh chapter in the peace process--the building of a new diplomatic machinery.<sup>84</sup> Secretary-General Boutros-Ghali anticipated that the London Conference would 'create a new momentum,'<sup>85</sup> organised to remain in continuous session until a final settlement was reached.<sup>86</sup> The London Conference combined an unprecedented coalition of the United Nations and the European Community 'to deal with a situation fraught with danger for international peace and security.'<sup>87</sup>

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<sup>83</sup> Cyrus R. Vance, former U.S. Secretary of State, was appointed as the Secretary-General's personal envoy to Yugoslavia. (The appointment of Vance was the result of a September 25, 1991 Security Council resolution inviting then Secretary-General Javier Perez de Cuellar to offer his assistance in peace-making efforts and to report back as soon as possible. Cyrus Vance to Visit Yugoslavia as UN Chief's Envoy, Reuters Oct. 9, 1991. Vance served as Secretary of State for just over three years under U.S. President Jimmy Carter, resigning in 1980 after opposing a decision to launch an armed rescue mission to free Americans being held hostage in Iran) Stepping in amidst the EC-sponsored peace process and the tenth failed cease-fire in three months, Vance commenced a 'fact-finding' mission in Yugoslavia to sound out the parties on prospects for future negotiations. Although the Security Council did not act with respect to the Yugoslav conflict over the next two months, Vance maintained an active role at the request of the Secretary-General. Embarking on two subsequent missions to Yugoslavia in October and November 1991, Vance held discussions with the parties concerning the feasibility of deploying a UN peace-keeping operation in Yugoslavia, and arranged yet another cease-fire agreement. In Resolution 721, the Council endorsed Vance's efforts, although it would not consider a peacekeeping operation until the warring parties complied with previous agreements. See Amy Lou King, Bosnia-Herzegovina--Vance-Owen Agenda For A Peaceful Settlement: Did The U.N. Do Too Little, Too Late, To Support This Endeavour? (1993) 23 *Georgia Journal of International and Comparative Law* 347

<sup>84</sup> Judy Dempsey, Carrington Resigns as EC Peace Envoy to Yugoslavia, *Financial Times*, Aug. 26, 1992, at 1. While the resignation of EC Conference Chairman Lord Carrington indicated the failure of a year-long mission, the London Conference was intended to act as a turning point in the peace process, to tackle the obstacles to a settlement of the disputes between the Croats, Bosnian-Muslims, and Serbs.

<sup>85</sup> Steve Crawshaw & Tony Barber, 'Inside Story: Peace? What Peace?', *Independent*, August 30, 1992, at 17.

<sup>86</sup> International Conference on the Former Yugoslavia, Aug. 27, 1992, UN Doc. LC/C4 Final, reprinted in International Conference on the Former Yugoslavia: Documents Adopted at the London Conference, 31 ILM 1488, 1534 (1992). The International Conference on the Former Yugoslavia envisaged two stages: (1) the London Conference, convening August 26 to 28, 1992; and (2) the Geneva Process, convening September 3, 1992, to meet in continuous session in Geneva until a settlement was reached.

<sup>87</sup> The London Conference combined the efforts of the UN, the EC, the Conference on Security and Cooperation in Europe (CSCE), the Organisation of the Islamic Conference (OIC), and other international organisations. Widespread support of the Vance-Owen Geneva peace plan for Bosnia-Herzegovina rose from the ashes of the failed efforts of the European Community and the United Nations to effectively handle the Yugoslav crisis.

If the former Yugoslavia suffered from international inaction, the world seemed asleep, uncaring, as ominous clouds gathered over Rwanda, igniting a murderous inferno as they touched the ground. Rwanda was further punished for the failures of the international community in the Somali debacle, and the resultant big power 'fatigue' from that crisis.<sup>88</sup> Partly due to that experience, and American marginalisation of Africa, the United States refrained from intervening or pushing for effective international action to stop the genocide in Rwanda.<sup>89</sup> American racist stereotypes of 'African conflicts' became the pretext for passivity as a top American official forbade the use of the term genocide to describe the Rwandan holocaust.<sup>90</sup>

The planning of the genocide in Rwanda involved the complicity of the international community.<sup>91</sup> The planning of this genocide which is important legally because it established the clear intent of its architects to commit the crime, thus an obligation on the world to prevent it, had become known to the UN well before it took place.<sup>92</sup> The Rwandan government effort in 1993 to carry out a census in which all Rwandans had to state their tribe had been followed by a slaughter of Tutsis in the Northern part of the Country. This would

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<sup>88</sup>For the failures of United States and UN efforts in Somalia see Hussein H. Adam, 'Somalia: A Terrible Beauty Being Born' in William I. Zartman, (ed) *Collapsed States: the Disintegration and Restoration of Legitimate Authority* (1995) 69-89; Michael Begg, UN Withdrawal From Somalia, *Irish Times*, March 15, 1995, at 15.

<sup>89</sup>Joyce Price, 'Why Rwanda Was Ignored', *Washington Times*, July 31, 1994, at A4.

<sup>90</sup>World Report, above note 47, at 46 .

<sup>91</sup> As noted in the conclusion of the *Report of The Independent Inquiry Into The Actions of The United Nations During The 1994 Genocide In Rwanda* 15 December 1999, '[t]he Independent Inquiry finds that the response of the United Nations before and during the 1994 genocide in Rwanda failed in a number of fundamental respects. The responsibility for the failings of the United Nations to prevent and stop the genocide in Rwanda lies with a number of different actors, in particular the Secretary-General, the Secretariat, the Security Council, UNAMIR and the broader membership of the United Nations. This international responsibility is one which warrants a clear apology by the Organisation and by Member States concerned to the Rwandese people. (In a letter dated 18 March 1999 (S/1994/339), the Secretary-General informed the Security Council of his intention to appoint an independent inquiry into the actions of the United Nations during the 1994 genocide in Rwanda. In their reply (S/1999/340), the members of the Council expressed their support for the initiative in this unique circumstance. In May 1999, the Secretary-General appointed Mr Ingvar Carlsson (former Prime Minister of Sweden), Professor Han Sung-Joo (former Foreign Minister of the Republic of Korea) and Lieutenant-General Rufus M. Kupolati (rtd.) (Nigeria) to conduct the inquiry.) The full report can be accessed at the UN Website at the following URL: <[http:// www.un.org/News/ossg/rwanda-report](http://www.un.org/News/ossg/rwanda-report)>.

<sup>92</sup>Ibid.

prove to be a macabre dress rehearsal for the genocide of 1994 in which extremist Hutus brutally decimated the Tutsi population of the country, and also targeted moderate Hutus.

In the run-up to the signing of the Arusha peace accord, it was clear that President Habyarimana was re-structuring the Hutu-dominated national administration to put extremists in positions of authority—extremists whose main goal was to conspire to launch a final genocidal strike against the hated Tutsi minority spearheaded by the *Interahamwe*. Other genocides took place in secret.<sup>93</sup> Rwanda was different. There was a UN peacekeeping force on the ground in Rwanda (UNAMIR). Its members stood by and watched as the killings took place. The rest of the world watched on television as Rwanda exploded. By the time the UN Security Council had finally concluded what was plain from the start—that a genocide had indeed been taking place—it was too late to do anything for the people of Rwanda.<sup>94</sup> To have admitted otherwise would have bound the parties to the 1948 *Genocide Convention*<sup>95</sup> to intervene and bring the mass murder to a halt. The Security Council, on May 17,<sup>96</sup> did eventually find that a genocide was taking place. By that time half a million Tutsis and Hutu moderates were dead. Secretary-General Boutros Boutros-Ghali's acknowledgement was too little too late.<sup>97</sup>

The UN Secretary-General was still ahead of US Secretary of State, Warren Christopher. From the beginning of the slaughter, the US government had prohibited its officials from

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<sup>93</sup> Genocide of the Armenians by Turkey during the First World War and the Nazi extermination of Europe's Jews and Gypsies.

<sup>94</sup> On 30 April 1994 Security Council issued a Presidential Statement (S/PRST/1994/21). The Council did not at that stage respond to the substance of the Secretary General's letter, and instead promised to do so at a later stage. The Council pointed out that the killings of civilians had 'especially' taken place in areas under the control of members or supporters of the interim Government of Rwanda (whose representative was still participating in the deliberations of the Council). The Council circumvented the use of the term genocide by instead including an almost direct quote from the *Genocide Convention* in the text. It was until 17 May 1994 with the adoption of resolution 918 that the Security Council acknowledged the genocide in Rwanda.

<sup>95</sup> *Genocide Convention*, above note 80.

<sup>96</sup> SC Res 918, 17 May 1994.

using the term *genocide*.<sup>98</sup> Finally, on June 10, 1994 Christopher relented reluctantly and in bad grace. ‘If there is any magic in calling it genocide,’ he conceded, ‘I have no hesitancy in saying that.’ There was magic, all right, in the sense that using the term would have bound the US and other governments to act. By the time Christopher made his grudging concession to reality, it was too late, which may have been the idea all along. The United States entered the region only after the RPF had emerged victorious, and then only with the express mandate of airlifting supplies to refugee camps in Zaire where at least one million Hutus had fled.<sup>99</sup>

#### 1.3.4 *Control of the Ad hoc Tribunal Process*

This section specifically focuses on the establishment of the two *ad hoc* tribunals and highlights their control through administrative, financial and bureaucratic process, that are the by-product of political considerations.

##### 1.3.4.1 Bureaucratic Control of the two Commissions of Experts

On October 6, 1992, the Security Council adopted Resolution 780, establishing a Commission of Experts to investigate and gather evidence of ‘grave breaches of the *Geneva Conventions* and other violations of international humanitarian law’ in the conflict in the former Yugoslavia.<sup>100</sup> The history of the Commission and its work is fraught with the influences of politics.

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<sup>97</sup> Boutros Boutros-Ghali's letter to the Security Council of 29 April (S/1994/518).

<sup>98</sup> Mark Huband, ‘Rwanda-The Genocide’ in Roy Gutman and David Reiff (eds), *Crimes of War: What the Public Should Know* (1999) 314.

<sup>99</sup> Craig Nelson, ‘Rwanda: U.S. Keen to Prove its Concern over Refugees Plight, *Independent* (London), August 1, 1994, at 9.

<sup>100</sup> SC Res 780, UN SCOR, 47th Sess., UN Doc. S/RES/780 (1992).

The political climate and the intensity of the conflict at that time created a situation in which the pursuit of a political settlement was deemed a priority.<sup>101</sup> The pursuit of justice was a response to international humanitarian concerns and to the terrible atrocities of the war that the media brought so vividly to the attention of world public opinion. But, because the major powers did not want to intervene militarily, the UN and EC mediators had neither a stick nor a carrot to induce cessation of hostilities and pressure the aggressive Serbs into a political settlement. On the hand, the establishment of an international investigative body with the broadest possible mandate since Nuremberg was not conducive to the pursuit of political settlements when the very leaders involved in the negotiations could also become the targets of the investigation. Political settlement negotiations could not be conducted while the prospects of criminal investigation and eventual prosecution existed. In the face of this dilemma, the choice made was to favour politics over justice.

As a result, the Commission never received any funding from the UN to conduct its field investigations. The limited resources provided by the UN only covered the bare minimum of administration costs for a short period of time. Moreover, the UN frequently placed bureaucratic and financial hurdles in the Commission's way. Consequently, the Commission resorted to external funding sources and accepted the aid of volunteers and personnel contributed by certain governments.<sup>102</sup> As the Commission's work and database work grew and became substantial enough to evidence patterns of criminality that could not have occurred without design and senior political and military leadership involvement, the

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<sup>101</sup> Not all of the Security Council's Permanent Members supported the initiative for a Tribunal, which was seen as potentially disruptive of negotiations for a political settlement of the conflict spearheaded by Lord Owen and Cyrus Vance (see text in footnotes 65, 83 and 87 above). Some Security Council members, as well as other Member States, felt that such a judicial organ should be established by the General Assembly or by a multilateral treaty. Other members urged that this was an opportunity to establish a permanent international criminal court, but the political advantages of controlling *ad hoc* institutions by the Security Council prevailed.

<sup>102</sup> M. Cherif Bassiouni, 'From Versailles to Rwanda in Seventy Five Years: The Need to Establish an International Criminal Court' (1997) 10 *Harvard Human Rights Journal* 11,40.

Commission's work became threatening to the political process.<sup>103</sup> Consequently, it became politically necessary to terminate the work of the Commission while attempting to avoid the negative consequences of such a direct action.

The Commission of Experts was arbitrarily terminated on 30 April 1993 by a decision of the United Nations Legal Affairs (OLA) contrary to the Security Council's mandate in resolution 827, which requested that the Commission of experts continue its work pending the appointment of a Prosecutor for the Tribunal. The Prosecutor did not take office until 15 August 1994, almost eight months after the OLA told the Commission of Experts to terminate activities. By employing bureaucratic measures, an obstruction of justice was carried out quietly. An administrative decision was taken--probably at the behest, but certainly with the support of, some of the Permanent Members--leaving no legal trace of the deed.<sup>104</sup> The chairman of the Commission of Experts, Cherif Bassiouni, expressed deep dissatisfaction with what he termed the premature termination of the Commission in April 1994. He criticised this decision from a moral perspective because '[i]t would be the worst disservice to humanity to push it all under the rug'; from a practical perspective because the Commission's work could not be completed and because no prosecutor had yet been appointed; and from an institutional perspective because the announcement to close down the Commission came only from the UN Office of Legal Affairs, not the Security Council itself.<sup>105</sup>

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<sup>103</sup> While press reports charging responsibility for 'ethnic cleansing,' 'systematic rape,' and other systematic violations of international humanitarian law could be ignored, evidence substantiating these allegations was a real threat.

<sup>104</sup> The reasons for this action were not explained and the Security Council did not take a position on the termination of the Commission of experts. Nevertheless, the Secretary-General, in a 1995 report to the Commission of Human Rights, incorrectly stated that the Commission of Experts 'concluded its work by 30 April 1994 in accordance with the decision under the terms of the SC resolution 827 (1993).' See *Situation on Human Rights in Bosnia and Herzegovina: Report of the Secretary-General*, UN ESCOR, 51<sup>st</sup> Sess., 15, UN Doc. E/CN.4/ 1995/62 (9 February 1995).

<sup>105</sup> Philippe Naughton, 'Yugoslav War Crimes Investigator Assails U.N.', Reuters, Mar. 18, 1994, available in LEXIS, World Library, Allnews File. The decision to close down the Commission in April 1994 was highly controversial. To quote a former UN High Commissioner for Refugees: [The] abrupt closing of the investigation before the tribunal is properly up and running is already having consequences on the ground. It has raised doubts about the tribunal's legal authority for completing the exhumation of a mass grave of Croatian victims . . . in

In July 1994, the Security Council passed Resolution 935 establishing a Commission of Experts to investigate grave violations of international humanitarian law committed during the Rwandan Civil War, including possible acts of genocide, and report its findings to the Secretary-General.<sup>106</sup> The Rwandan Commission lasted only four months which was not long enough for the Commission to effectively fulfil its investigatory mandate.

The Security Council made sure that the Rwanda Commission would not embark on the same path taken by the Commission of Experts for Yugoslavia. The Rwanda Commission was given a limited mandate, three months to carry it out, and no means to investigate any specific allegations. The three-man Commission spent a total of one week in the field, and conducted no investigations. Its report was patterned on the Final Report of the Commission of Experts for the Former Yugoslavia, but necessarily lacked the thoroughness of the latter. The Rwanda Commission Report was based on reports made by other bodies, and other media and published reports.

#### 1.3.4.2 Administrative and Financial Control of the *ad hoc* Tribunals

With regard to funding, the Security Council requested that the General Assembly do so through the regular budget of that body. Since the Security Council established the Tribunals pursuant to its Chapter VII powers, this was an odd and unnecessary choice, and it impeded the initial work of the Tribunals. If the Security Council had funded the Tribunals through its

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Vukovar. Future investigations, and therefore prosecutions, are also likely to be undercut. . . . 'For critics of the West's cowardly stance during this savage war . . . the tribunal mattered: it offered some prospect of accountability. Although it was never likely that the paper trail would exist to implicate top officials, the successful prosecution of field commanders and local extremists, who encouraged mass rape and murder, might have begun a healing process after the war. Now, though, the neutering of the international tribunal is under way. Only a facade will remain, it seems--one that can be counted on not to produce embarrassing prosecutions. . . .'

Sadruddin Aga Khan, 'War Crimes without Punishment', *New York Times*, Feb. 8, 1994, at A23, available in LEXIS, World Library, Allnws File.

<sup>106</sup> SC Res 935, UN SCOR, 49th Sess., UN Doc. S/RES/935 (1994).

peacekeeping budget, the Tribunal would not have needed to go through the various stages of the General Assembly's budget procedures.<sup>107</sup> This is evidenced by the fact that by March 1995 the UN still had not resolved how the Yugoslav tribunal would be financed, leaving a voluntary trust fund of US \$6 million the only sure source of support.<sup>108</sup> At that time the General Assembly's budget was severely reduced, and as a result the Tribunals were inadequately funded at their inception.<sup>109</sup> The General Assembly initially declined to meet the Secretary-General's recommendations for funding the Tribunal,<sup>110</sup> although individual governments made pledges of financial and other forms of support.<sup>111</sup> At the same time, there were complaints about the failure of Western nations to adhere to promises to second staff to the prosecution team.<sup>112</sup> Concerns were raised in many quarters about whether the Tribunal is

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<sup>107</sup> Statute of Yugoslav Tribunal, above note 38, at art. 32. The Statute of the Yugoslav Tribunal obligates the UN to fund the tribunal. See also Craig Topper, 'And Justice for All? An Ad Hoc Tribunal for the Former Yugoslavia' (1995) 8 *New York International Law Review* 48.

<sup>108</sup> Lawyers Committee for Human Rights, *The International Criminal Tribunal for the Former Yugoslavia* 33 (April 1995). The UN Secretary General, had requested US \$38,652,900 to cover the operations of the tribunal for 1994-95 biennium, and so complained that the inability of the UN to appropriate funds for the tribunal had forced him to allocate money without the proper appropriations processes.

<sup>109</sup> Bassiouni above note 62 at 44. There is substantial debate over how the Tribunals should be funded. Funding levels of the tribunals by a financially hamstrung UN General Assembly purse clearly affect its ability to carry out their mandated responsibilities. This is one way in which the Tribunals and more particularly, the work of the Prosecutor can be affected notwithstanding the two statutes enshrinement of the Prosecutor's independence.

<sup>110</sup> The Secretary-General ultimately requested approximately \$33 million for the biennium 1994-1995. *Report of the Secretary-General as Requested by the General Assembly in Resolution 47/235: Revised Estimates-- Financing of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, U.N. GAOR Fifth Comm., 48th Sess., Agenda Item 159, U.N. Doc. A/C.5/48/44/Add.1 (1994). About \$11 million was allocated to the Tribunal for calendar year 1994. 'General Assembly Authorises \$90 Million for UNPROFOR', MINURSO, International War Crimes Tribunal, U.N. Press Release, U.N. Doc. GA/8661 (Apr. 14, 1994), available in U.N. Gopher/Current Information/Press Releases; (since the Security Council set up the Tribunal, 'U.N. funding [had been] in doubt. Then on April 15 [1994] the General Assembly voted the body \$11.5 million to get it through 1994, rather than the \$32 million it was seeking to take it through to end-1995.')

<sup>111</sup> Among them were the United States, Thomas W. Lippman, 'U.S. Accuses the Serbs of More Atrocities', *International Herald Tribune*, Dec. 30, 1994, available in LEXIS, World Library, Allnws File (reporting contribution of \$13 million in cash and services to the Tribunal); Carol J. Williams, 'No Amnesty for Perpetrators of Balkans Atrocities, U.S. Says', *New York Times*, Jan. 7, 1994, at A6, available in LEXIS, World Library, Allnws File; Pakistan, 'Pakistan Gives \$1 Million to Bosnian War Crimes Tribunal', UPI, Feb. 1, 1994, available in LEXIS, World Library, Allnws File. For more information, see *Annual 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*, 183-188, U.N. SCOR, 49th Year, Agenda Item 152, U.N. Doc. S/1994/1007 (1994).

<sup>112</sup> Stephen Eagleburger, 'Balkan War-Crimes Prosecution Bogs Down' *New York Times*, July 7, 1994, at A5 available in LEXIS, World Library, Allnws File (speaking about promises of staff from Britain and Canada, then Acting Deputy Prosecutor Graham Blewitt said, 'They're not materialising, and I have some doubts that they will materialise.'). But see Maryann Stenberg, 'United Nations: Australians Help in Bosnia War Crime Prosecution',

only ‘a convenient way to quiet human rights activists and other supporters of the Bosnians. . . . a bargaining chip to win Serbian and Croatian agreement to a peace settlement.’<sup>113</sup> An unnamed senior Clinton administration official was quoted as saying that while ‘[a]cts of genocide and war crimes have been committed, orchestrated by leaders from on high,’ support for the Tribunal ‘drops off fast outside the United States.’<sup>114</sup>

The year long delay in the appointment of a Prosecutor is further evidence of the politicisation of the Tribunals’ establishment process.<sup>115</sup> As it turned out, the Security Council's selection of a prosecutor proved to be a highly contentious process.<sup>116</sup> The successful candidate, Ramon Escovar-Salom, resigned to join the newly formed government of Venezuela without taking up his official duties with the Tribunal.<sup>117</sup> Finding a replacement was just as divisive politically,<sup>118</sup> with Russia blocking all NATO candidates.<sup>119</sup> In July 1994, a judge of the

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*The Age* (Melbourne), June 21, 1994, available in LEXIS, World Library, Allnws File (discussing Australian personnel working for the International Tribunal).

<sup>113</sup> To similar effect is Eagleburger, *Ibid* (‘The hopes of bringing such war criminals to international justice . . . have been dimmed by wrangles among United Nations member nations and lack of enthusiasm among key European allies, who fear that prosecution might interfere with the continuing search for a diplomatic settlement.’); George Rodrigue, ‘Doubts Surround Opening of Balkan War Crimes Court’ *Dallas Morning News* (querying lack of personnel, funding, and other resources needed by the Commission of Experts as either an ‘act of superb diplomatic hypocrisy’ or an ‘act of superb diplomatic inattention’).

<sup>114</sup> Eagleburger, above note 112.

<sup>115</sup> The Secretary-General presented his first nomination for the Prosecutor to the Security Council in August 1993. However the Security Council’s final selection of Richard Goldstone of South Africa as Prosecutor did not occur until mid-July 1994. In August 1993 the UK requested the Security Council to appoint the Prosecutor by consensus, thereby effectively ensuring that a candidate would not be approved if one of the major powers opposed the nomination. See M Cherif Bassiouni and Peter Manikas, *The Law of the International Criminal Tribunal for The Former Yugoslavia* (1996) 210-12.

<sup>116</sup> Eg., ‘Balkans War Crimes Tribunal Blocked by Strains within Security Council’, *Agence France Presse*, Aug. 20, 1993, available in LEXIS, World Library, Allnws File; Paul Lewis, ‘Disputes Hamper U.N. Drive for a War Crimes Tribunal’, *New York Times*, Sept. 9, 1993, at A10, available in LEXIS, World Library, Allnws File; Stanley Meisler, U.N. Is Deadlocked on War-Crimes Prosecutor, *Montreal Gazette*, Sept. 12, 1993, at B1, available in LEXIS, World Library, Allnws File; ‘Venezuelan on War Crimes Panel: Tribunal Will Probe Atrocities in Former Yugoslavia’, *Chicago Tribune*, October 22, 1993, at 10, available in LEXIS, World Library, Allnws File.

<sup>117</sup> On the prosecutor's appointment, see S.C. Res. 877, U.N. SCOR, 48th Sess., 3296th mtg. at 1, U.N. Doc. S/RES/877 (1993), available in U.N. Gopher/Documents/Security Council Resolutions. On his resignation, see ‘Bosnia- Venezuela: Boutros-Ghali Accepts Prosecutor's Resignation’, *Inter Press Serv.*, Feb. 8, 1994, available in LEXIS, World Library, Allnws File; ‘Secretary-General Appoints Graham Blewitt as Acting Deputy Prosecutor, War Crimes Tribunal, for Humanitarian Law Violations in Former Yugoslavia’, U.N. Press Release, U.N. Doc. SG/SM/5221 (Feb. 8, 1994), available in U.N. Gopher/Current Information/Press Releases.

<sup>118</sup> Anthony Lewis, ‘At Home Abroad: The Civilised World’, *New York Times*, July 1, 1994, at A25, available in LEXIS, World Library, Allnws File.

appellate division of the South African Supreme Court, Richard J. Goldstone, was named to this post<sup>120</sup> some five months after Escovar- Salom's resignation.

Even though the statutes for the ICTR and the ICTFY differ, the tribunals share a common Prosecutor and a common Appellate Chamber. This is a curious formula for two separate *ad hoc* tribunals established separately by the Security Council through two unrelated resolutions. According to the Secretary- General, however, the 'institutional links . . . ensure a unity of legal approach, as well as economy and efficiency of resources.' But as Bassiouni notes:

*The decision to link the two bodies was not, however, based on any valid legal argument. The United States, which pushed for this formula, wanted to avoid delays in selecting the Prosecutor as was the case with the ICTFY. The rationale for sharing the ICTFY Appellate Chamber was based entirely on a cost-saving consideration. The choice of a single Prosecutor was particularly ill- advised because no person, no matter how talented, can oversee two major sets of prosecutions separated by 10,000 miles. The idea that one can shuttle between The Hague, Netherlands and Arusha, Tanzania as part of a normal work schedule is nothing short of absurd. Sharing a single Appellate Chamber also poses two problems, though of a more benign legal nature.<sup>121</sup> First, the substantive law applicable to the two Tribunals is different. That means that in an eventual interpretation of "crimes against humanity" under both Statutes, the Appellate Chamber must necessarily be inconsistent. Second, while the ICTFY judges rotate in the Appellate Chamber, the ICTR judges do not.*

The Rwanda Tribunal was in effect a side-show to the Yugoslav Tribunal; the Prosecutor for both tribunals was resident at The Hague as were the members of the Appeals Chamber. The international press and the United Nations were pre-occupied with the Yugoslav Tribunal and only seemed to give the most perfunctory attention to the Rwanda Tribunal. Under the

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<sup>119</sup> Paul Lewis, 'South African Is to Prosecute Balkan War Crimes', *New York Times*, July 9, 1994, at A2, available in LEXIS, World Library, Allnws File. For the atmosphere immediately preceding Goldstone's appointment, see Eagleburger, 94, at A5.; Lewis, *Ibid*.

<sup>120</sup> S.C. Res. 936, U.N. SCOR, 49th Year, 3401st mtg. at 1, U.N. Doc. S/RES/936 (1994), available in U.N. Gopher/Documents/Security Council Resolutions; Lewis, above note 106. Goldstone served as chairman of a commission constituted in 1991 to investigate political violence and human rights abuses in preparation for the April 1994 elections in South Africa. Graham Blewitt, acting deputy prosecutor, will stay on as deputy, and because both Blewitt and Goldstone come from common law jurisdictions, Goldstone will appoint an additional deputy from a civil law jurisdiction.

<sup>121</sup> Bassiouni, above note 102 at 48.

circumstances, it is not difficult to conclude that big power cynicism deflated the seriousness of the notion of international rule of law, an essential norm of civilisation for a diverse world.

The Rwanda Tribunal's first hearing was held in January 1997 amidst charges of corruption and mismanagement at the tribunal. An investigation of the Rwanda Tribunal conducted by the United Nations was highly critical of the entire effort, from the tribunal itself to the United Nations offices in New York.<sup>122</sup> The investigation was requested by concerned member States, UN staff, and the UN Office of Internal Oversight Services.<sup>123</sup> The report found that the tribunal's Registry had no accounting system; that the tribunal had incomplete and unreliable financial records; unqualified staff; disregard of UN regulations; shortage of cells and courtrooms; lack of lawyers and investigators; lack of logistical, transport, and office equipment; and *neglect of the tribunal by UN headquarters* in New York.<sup>124</sup> In addition, the Office of the Prosecutor in Kigali was riddled with operational difficulties and feuded openly with the Registry in Arusha.<sup>125</sup> These problems together with lack of funding, the geographical separation of the Registry from the Prosecutor's Office, and poor infrastructure seriously hindered the initial effort for the effective establishment of the tribunal and its work.<sup>126</sup>

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<sup>122</sup> See Financing of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between January 1 and December 31 1994, United Nations, *Report of the Secretary General on the Activities of the Office of Internal Oversight Services*, 51st Sess., Agenda items 139, 141, at 1, U.N. Doc A/51/789 (1997). See also 'UN Court Hears Chilling Rwanda Genocide Testimony', Reuters North American Wire, Jan. 10, 1997 available in LEXIS, News Library, CURNWS File; 'Rwanda Tribunal Reopens in Tanzania, Then Closes', Inter Press Service, Jan. 9, 1997

<sup>123</sup> *Ibid.*, *Report of the Secretary General*, Annex (Summ.).

<sup>124</sup> See generally *Id.*, PP 3-69. See also Craig Turner, 'Rwanda War Crimes Tribunal Mismanaged,' Report Says, *Los Angeles Times*, Feb. 13, 1997, at 8; John Goshko, 'UN Probe Find Mismanagement, Waste in Rwanda War Crimes Tribunal', *Washington Post*, Feb. 13, 1997, at A20.

<sup>125</sup> *Report of Rwanda Tribunal*, above note 122, Summ.

<sup>126</sup> *Ibid.* See also 'UN Rwanda Tribunal Head Defends His Record', Reuters North American Wire, Jan. 11, 1997, available in LEXIS, News Library, CURNWS File (Registrar Adede arguing that he had made some progress with few resources). See also Mark Rice-Oxley, 'Setbacks Best Rwanda Genocide Tribunal: Administrative Woes, Official Meddling Threaten to Thwart the UN's Legal Initiatives', *National Law Journal*, Dec. 30, 1996, at A12.

The investigative report, which concluded that the Rwanda Tribunal was dysfunctional in virtually all areas, recommended, *inter alia*, that the UN provide the tribunal with more administrative and financial support, and that more guidance and cooperation with the Yugoslav Tribunal be forged to improve its performance.<sup>127</sup> Kofi Annan, the UN Secretary General met with senior officials from the Rwanda Tribunal in February 1997 and immediately fired Registrar Adede and Deputy Prosecutor Rakotomanana, the two senior officials identified in the investigative report as largely responsible for the Tribunal's woes.<sup>128</sup> It would seem that initially the UN and its officials did not take the Rwanda Tribunal seriously by engaging competent staff and funding it adequately.

Though the ICTR and the ICTFY are largely semi-autonomous in all aspects of operations, the UN headquarters still has residual administrative and financial control. The exercise of administrative and financial control over the Tribunal by UN headquarters' personnel may subordinate important decisions concerning personnel, travel, and witness protection to New York. These arrangements would hamper, delay, and frustrate the work of the Tribunal, particularly the investigatory and prosecutorial efforts. So far though, the work of the tribunals has been free from bureaucratic interference from the United Nations Headquarters.

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<sup>127</sup> *Report of Rwanda Tribunal*, above note 122, PP 75-100.

<sup>128</sup> Annan then appointed Agwu Ukiwe Okali, a Nigerian UN bureaucrat based in Nairobi, Kenya, to replace Adede. See Two Dismissed From Tribunal on Rwanda, N.Y. Times, Feb. 27, 1997, at A6; Craig Turner, '2 Resign From UN Tribunal on Rwanda', *Los Angeles Times*, Feb. 27, 1997, at A6; John Goshko, 'Annan Fires 2 Top Aides at the Genocide Tribunal', *International Herald Tribune*, Feb. 28, 1997, at 2; Thalif Deen, 'Two Officials Fired From UN Rwandan Tribunal', *Jane's Defense Weekly*, Mar. 5, 1997, at 6, available in LEXIS, News Library, CURNWS File; 'Kofi Annan Weighs Rwanda Tribunal Changes', UPI, Feb. 22, 1997, available in LEXIS, News Library, CURNWS File; 'UN Chief Promises to Act on Rwanda Tribunal Report', Agence France Presse, Feb. 13, 1997, available in LEXIS, News Library, CURNWS File; 'UN Chief Summons Top Court Officials After Mismanagement Charges', Agence France Presse, Feb. 12, 1997, available in LEXIS, News Library, CURNWS File.

### 1.3.5 *Judicial Independence*

This issue arises in the context of the process of creating the *ad hoc* tribunals and their relation to the Security Council. It is obvious that the process of creation places the *ad hoc* tribunals in the position of subsidiary organs of the Security Council-which is a political body. The more significant question is whether the tribunals are under the Security Council. While it can be argued that the *UN Charter* does not establish a hierarchy among its organs, thus that all are *inter pares*. Whether this relationship extends to subsidiary judicial organs, such as the *ad hoc* tribunals, is not established. If the subsidiary organ has the same *ratione materia* as the organ which created it, then the subsidiary organ will be treated as having the same *locus standi* as the principal organ. But when the Security Council creates a judicial subsidiary organ, that body no longer discharges the same *rationae materia* of the Security Council as it performs judicial functions. This then in effect places its status below that of the principal organ.

The international criminal tribunals for the Former Yugoslavia and Rwanda could have been created through multilateral conventions prepared and put forward by the General Assembly for adoption by States. In principle, this approach would have maximised the legitimacy of the Tribunals through the broadening of political participation in their creation and would have ensured that they were more firmly based on the sovereign will of States. However, the seeking of consensus through the General Assembly or specially convened diplomatic conference would not likely have met with success on account of the highly sensitive nature of the issue. Probably few States could have been persuaded to lend their approval to an international criminal tribunal without their lengthy and detailed consideration. Furthermore, it was clear that action had to be taken relatively quickly in the cases of the former Yugoslavia and Rwanda and that substantially more time would have elapsed before a sufficient number

of ratifications would be deposited as to enable such a convention to enter into force. Moreover, such a convention put forward for adoption by the General Assembly or conference would probably have reflected the lowest common denominator among States and could have resulted in a heavily compromised tribunal statute.

Even worse, by the time the two *ad hoc* Tribunals could become operational, if ever, political will to make them work would have dissipated. The chances for transforming political will and good intentions into effective implementation would have long disappeared. Creation as a subsidiary organ of the Security Council ensured that all States were legally bound to implement the Security Council's decisions in respect of the tribunals.<sup>129</sup> States went along with the establishment of the Tribunals because it was painless and temporary; tribunals set up only with the limited mandate of prosecuting offenders in the Yugoslav and Rwanda conflicts. The tribunal also let powerful States 'off the hook;' they could no longer be accused of inaction.

As subsidiary organs of the Security Council, a political body, the Tribunals may be criticised for not being wholly independent from the Council or the political influences of the more powerful States. On the other hand, most municipal courts or other judicial organs are also created through political decisions and institutions. Such organs are not *ipso facto* unable to render judgement in a fair and unbiased manner. Indeed, even judicial organs created by other judicial organs ultimately trace their origins to the political process. This is not to posit the absolutely objective character of judicial decision-making, but rather, the possibility of relatively independent adjudication by organs created through the political process.

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<sup>129</sup>See *UN Charter*, above note 6, Articles 48 and 49 in this regard.

The Secretary-General's Report<sup>130</sup> on the creation of the International Criminal Tribunal for the Former Yugoslavia emphasises that the tribunal 'would, of course, have to perform its functions independently of political considerations; it would not be subject to the authority or control of the Security Council with regard to the performance of its judicial functions'. Ultimately, such provisions are unlikely to determine the level of the Tribunal's independence and impartiality. It will be up to each Tribunal to establish its own image of independence and impartiality through the quality of the judgements it renders.

### 1.3.6 *Acquiring Custody Over the Offender*

Article 29 of the Statute of the International Criminal Tribunal for the Former Yugoslavia, corresponding to Article 28 of the Statute of the International Criminal Tribunal for Rwanda, obliges States 'to cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law' as well as to comply without delay with any request for assistance or an order coming from the Trial Chamber, as regards, *inter alia*, 'the arrest or detention of persons' and 'the surrender or the transfer of the accused' to the International Tribunal.

The work of the International Criminal Tribunals for the Former Yugoslavia and Rwanda cannot be made effective without the cooperation of the Governments in whose territory the crimes were committed, since there is no occupying power (only new territorial settlements or arrangements) and no international force presently deployed that is capable or willing to arrest suspected criminals. In the case of Rwanda, the acute interest of the Government in prosecuting the perpetrators of crimes under international law, may coincide with the interests of the international community. In the case of the former Yugoslavia, a government in whose

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<sup>130</sup>Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), including the Statute of the Tribunal, UN. Doc. S/25704 of 3 May 1993 & Add. 1 of 17 May 1993.

territory war crimes or crimes against humanity were committed may view the Tribunal's work as inimical to its own political interests and may subvert or sabotage the Tribunal's attempts to acquire custody over alleged offenders. In such a case of non-cooperation or obstruction, the Tribunal may be relegated to the prosecution of individuals largely on a random basis, according to its fortunes in gaining custody over the alleged offender.

International political pressure has so far not proven very effective as a means by which to ensure surrender of alleged offenders to the Tribunal. For example, on 9 November 1996, the Government of Serbia responded to international pressure and relieved Mr. Ratko Mladic - a high-profile commander indicted for war crimes before the International Criminal Tribunal for the Former Yugoslavia - from his official responsibilities. However, Mr. Mladic has yet to be apprehended or turned over by the Serb authorities to the Tribunal.

In effect, the absence both of full cooperation from the territorial Government and of political resolve on the part of the international community to forcibly apprehend alleged offenders through an international police force, leaves the Tribunals with few other options. In most cases, political pressure is likely to be a far too blunt and unreliable tool to provide a substitute for regularised mandatory arrest and detention procedures. Each Tribunal therefore is consigned to hoping that individual suspects make the mistake of venturing beyond the protection of their national State into the territory of other States whose governments may be more willing to apprehend and surrender them.

In order to force the surrender of an alleged offender from a recalcitrant State, the Security Council may decide to impose sanctions against the Government. However, the imposition of economic, military or other restrictions for such a purpose, constitutes an inappropriately

powerful, imprecise and perhaps ineffective tool. The rationale is that sanctions imposed upon a government may pressure it to comply with its legal obligations. Yet, in many instances, governments may be willing to endure such sanctions without responding. Moreover, the use of sanctions against a government is easily confused in the public mind as a form of collective punishment against the entire population. This kind of misperception may not only hinder efforts to secure cooperation, but may also play inadvertently into the hands of the Government by politicising the issue. Furthermore, the unfortunate and erroneous impression left with the population that sanctions are meant to punish it, certainly undermines the whole thrust of international criminal law which is to enforce responsibility for crimes under international law on an individual rather than collective basis. The *Lockerbie Case*,<sup>131</sup> illustrates how the imposition of sanctions to force surrender of criminal suspects in some cases may even threaten to undermine the rule of law at the international level, rather than to strengthen it.

#### **1.4 General Weaknesses of The *Ad Hoc* Mechanism in The Implementation of International Criminal Law**

This section of the article enumerates general the weaknesses inherent in the *ad hoc* system of implementing international criminal law that limit the practical import for the more coherent implementation of international criminal law. Historically, the accretion of international legal norms on individual criminal responsibility lacked pre-conceived plan, logical interrelation or ordered design. The agglomeration of the rules therefore remains haphazard, chaotic and complex, and forms neither a coherent nor integrated system. The *ad hoc* system does not provide a panacea by which a lack of coherence in norms of international criminal law, or the effectiveness of its implementation, can be fixed, for the following reasons.

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<sup>131</sup>*Questions of interpretation and Application of the 1941 Montreal Convention Arising from the Aerial Incident at Lockerbie*, Libya v UK, 1992 ICJ Reports 3 of 14 April 1992; Libya v US 114-217. See L.S. Sunga, *An Emerging System of International Criminal Law: Developments in Codification and Implementation* (1997) at

First, the tribunals do not cover the entire normative field of international criminal law, nor were they intended to do so. As such, they neither ‘fill in the gaps’, nor create generalised norms on individual criminal responsibility in a way that would substantially reduce the perplexing and irregular character of the *lex lata*. Codification and progressive development on the other hand, aim to bring clarity, comprehensiveness and coherence to the field of international criminal law.

Second, *ad hoc* tribunals are designed to address the specific factual situation of the country coming within its particular competence. The formulations of the statutes for the *ad hoc* tribunals are tailored to fit the situations to which they apply; their formulations are tailored to fit the facts. Thus the substantive definitions therein are not necessarily drafted with a view toward future application. The judgments of these tribunals, however broadly construed, cannot but reflect the particularities of the subject matter being adjudicated upon and the specific circumstances involved. As such, these judgments will not substitute for a comprehensive codification and progressive development of the broad principles of international criminal law.

Third, it is certain that, similar to adjudication in domestic criminal courts, cases will continue to come before *ad hoc* international criminal courts in a rather unsystematic manner. Given that resources are finite, many practical considerations in the labour and time-intensive prosecution process, such as availability of evidence, the Prosecutor’s success in acquiring custody, as well as decisions whether to plea-bargain in order to gain inculpatory information on other suspects and the profile of a particular individual (which may be a result of the media’s focus), govern the selection of suspects for indictment.

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271-275 for a discussion of the case and the accompanying actions by the Security Council through a series of resolutions relating to the incident.

Fourth, is the preponderance of politics in the system. During the establishment of the international military tribunals, the entire process was propelled by the unity of the ‘Big Four’ (U.S., Britain, France and Russia). In the establishment of the *ad hoc* tribunals for former Yugoslavia and Rwanda, the process was driven by the Security Council’s ‘Big Five’ unity, despite the differing of opinions that necessitated the Statute of the ICTFY (the first *ad hoc* tribunal) to be rushed through in order to avoid a veto power by one of the permanent members that would have ended the initiative.<sup>132</sup> Like the ‘Big Four’ unity at the end of the Second World War, the ‘Big Five’ unity at the end of the Cold War, amounts to an oligarchic supranational alliance, that is without doubt political in nature and thus its decisions are rooted in political considerations.<sup>133</sup> Apart from the seeming monopolisation of the implementation of international criminal law by a political body,<sup>134</sup> the *ad hoc* system cannot provide a substitute for the more comprehensive and deductive approach to the codification of international criminal law, as well as the development of general principles of international criminal law from the specific jurisprudence of the tribunals.

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<sup>132</sup> Bassiouni & Manikas, above note 115 at 201.

<sup>133</sup> The origins of the Tribunal for the former Yugoslavia were an instrument of political pressure on the Bosnian Serbs to accept a negotiated solution without requiring any serious outside military action to stop the war, rather than an instrument of justice. Indeed, the Security Council before long discovered that the Tribunal could severely complicate the Dayton peace negotiations when two Bosnian Serb leaders, Radovan Karadzic and Ratko Mladic, were indicted by the Tribunal as war criminals. To blunt the Tribunal’s ‘teeth’, its Statute was reinterpreted to mean that the Tribunal does not have powers of compulsion, some Security Council members tried to cut its funds, and withhold evidence from it. See *The Economist*, 11 March 1995, 21-23; *The New York Times*, 3 November 1995, 45; 8 November 1995, A1,A4. Further, the Dayton Peace Accord is worded in such a way that it does not require IFOR to enforce the Tribunal’s orders. Cf. *General Framework agreement for the Peace in Bosnia and Herzegovina*, Article IX and Annex 1, Article VI (2), (3), (4), (11) which do not mention the International tribunal in a detailed specification of instances when IFOR is allowed to use force.

While the ICTR was established with no underlying political situation to influence, it still was a creature of politics first and justice second. The Security Council was still smarting from sustained criticism by members of the UN (especially the Third World) and the wider global civil society over its sloppiness in handling the Rwandese situation through its failure to prevent a genocide it knew was in the offing. The Third World was particularly displeased and failure to establish a similar tribunal for Rwanda would have resulted in a very disgruntled Third World. As the Third World comprises well over a third of the UN membership, it would be political suicide to isolate this large block of votes as the ‘Big Five’ also have other agendas to pursue in the General Assembly, and it was important to maintain goodwill by establishing the ICTR.

<sup>134</sup> Interestingly, even the Statutes for the *ad hoc* tribunals for former Yugoslavia and Rwanda exhibit a number of differences, some of which were hinged on political considerations by the ‘Big Five’ in the Security Council. See M. Cherif Bassiouni, *Crimes Against Humanity in International Law* (2<sup>nd</sup> ed, 1998) 196-197; Payam

The *ad hoc* system remains, in effect, a stopgap measure in the absence of the permanent International Criminal Court. The need for a solid institution capable of serving the high standards of international criminal justice would be better served by establishment of the permanent International Criminal Court as a matter of urgency.

## 2.8 CONCLUSION

The failure by the United Nations to prevent, and subsequently, to stop the genocide in Rwanda was a failure by the United Nations system as a whole. The fundamental failure was the lack of resources and political commitment devoted to developments in Rwanda and to the United Nations presence there. There was a persistent lack of political will by Member States to act, or to act with enough assertiveness.<sup>135</sup>

With regard to the Yugoslav conflict, even after the Security Council took action, the idea of an international tribunal for the former Yugoslavia was seen as a political pressure tool to coerce the Serbs to accept a politico-diplomatic solution to the crisis. The West was keen to clear up this 'mess' in its backyard and adopted the 'carrot and stick' model. The idea of an international tribunal was seen as the stick and the acceptance of by Serbs of a political settlement the carrot. But the momentum generated by the Commission of Experts simply ruled out any attempt to short-circuit the coming into reality of an international tribunal.

With regard to Rwanda, once the West had established a tribunal for the former Yugoslavia, it would have appeared patently discriminatory not to establish one for Rwanda. Already, there was strong disgruntlement by the developing world over the double standards that appeared evident from the focus of the West on Yugoslavia, with disregard to Rwanda where the UN

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Akravan, 'The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment' (1996) 90 *American Journal of International Law* 501.

(and the West) had been aware well in advance that a national scheme of genocide was under elaborate planning.

By 1995, bureaucratic hurdles, lack of resources, non-disclosure of evidence, and other more subtle means were used to avoid impede and/or avoid the likelihood of international prosecutions. Thus, the Commission of Experts on the former Yugoslavia was not funded for investigations, and when it accumulated evidence perceived as dangerous to the political peace process, it was arbitrarily terminated. The 1994 Rwanda Commission was not given a long enough mandate or adequate resources to do any investigation. These past experiences with *ad hoc* international tribunals confirm the need for a permanent system of international criminal justice.<sup>136</sup>

Because they only try certain offenders in certain conflicts, these tribunals and their laws and penalties raise fundamental questions about compliance with the principles of legality and about general considerations of fairness. Furthermore, *ad hoc* tribunals generally do not provide equal treatment to individuals in similar circumstances who commit similar violations. Thus, such tribunals create the appearance of uneven or unfair justice, even when the accused are properly deserving of prosecution. A permanent system of international criminal justice based on the pre-existing *Rome Statute*<sup>137</sup> would allow any person from any nation to be held accountable for violations.

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<sup>135</sup>*Report of Independent Inquiry into Rwanda*, above note 91.

<sup>136</sup>Bassiouni, above note 102 at 59.

<sup>137</sup> *Rome Statute for an International Criminal Court* adopted on 17<sup>th</sup> July 1998 during the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, by an unrecorded vote of 120 in favour and 7 against, with 21 abstentions -- will enter into force after 60 countries have ratified it. As of July 17<sup>th</sup> 2000, the *Rome Statute* has 98 Signatories and 14 Ratifications.

It should be said though that despite their initial ignominious beginnings, the tribunals have cast aside political shackles and are committed to giving a good judicial account of themselves. One thing is clear. The new legal regime is an enormous advance for the world community. It constitutes an objective and fair system of criminal justice to be applied in all instances falling within its jurisdiction. These courts are clearly prototypes for other such tribunals and they carry with them the moral and political force of the world community.

Arguably the creation of the International Tribunals moved the world community closer to the establishment of the permanent international criminal court. In the past, the major barrier to this goal was the conflict between State sovereignty and the jurisdiction of such a tribunal. States are generally reluctant to expose their citizens (especially politicians and senior military commanders) to potential criminal prosecutions for conduct undertaken in the name of the State.<sup>138</sup> If the International Tribunals are largely successful in carrying out their mandate, their record will dispel many of the more principled concerns of States. One hopes that the numerous teething problems experienced by the tribunals will contribute to an informed process in establishing an effective permanent international criminal court. It is suggested that the Tribunal's accomplishments and the international revulsion toward gross human rights violations in the dark pockets of the world will persuade enough States to put aside their traditional jurisdictional jealousy over crimes and subscribe to the *Rome Statute*<sup>139</sup> bringing into existence the permanent international criminal court in the not too distant future.

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<sup>138</sup>Many national armed forces maintain a war crimes investigation section, but they are usually concerned with crimes perpetrated against their own citizens or troops. Eg., Alfred de Zayas, *The Wehrmacht War Crimes Bureau, 1939-1945* (1989). It is also common knowledge that the U.S. Judge Advocate General's Office conducted a series of investigations subsequent to Operation Desert Storm that focused on possible war crimes committed by Iraqi personnel. See 'Analysis: Dual Containment--Clinton's New Policy on the Middle East Region', Moneyclips, May 29, 1993, available in LEXIS, World Library, Allnws File.

<sup>139</sup>See note 137 above.