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A Predictive Framework for the Effectiveness of International Criminal Tribunals

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A Predictive Framework for the Effectiveness of International Criminal Tribunals

ABSTRACT

This Note examines international criminal tribunals and analyzes the factors that can govern the level of their effectiveness. The historical background in this area is essential, for one of the main points of the Note is that international criminal tribunals cannot be detached from the political circumstances that create them and enforce their verdicts if those verdicts are to be enforceable at all.

The Note begins with an analysis of the International Military Tribunal at Nuremberg, and compares it to its contemporary counterpart, the International Military Tribunal at Tokyo. The Note then makes a similar analysis of the recent International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda.

From the histories of these international criminal tribunals, the Note develops a predictive framework for the effectiveness of the newly-legislated permanent International Criminal Court (ICC). The predictive framework is built on several factors including: the degree of defeat among the losing parties, the level of cooperation among the victorious allies, popular approval of judicial procedures unacceptable under most other circumstances, and the weight of the evidence.

The last part of the Note applies this predictive framework to the new Rome Statute for the ICC. Though the ICC is a cornerstone of the dream of a truly effective and politically detached international criminal justice system, the experience of international criminal tribunals during the twentieth century demonstrates that such courts are dependent on the unified political will and military power of the alliance that supports their creation and enforces their verdicts.

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I. INTRODUCTION

The creation of a permanent International Criminal Court (ICC)¹ by the 1998 Rome Conference brings hope that the precedents of Nuremberg may be used to end impunity for gross violations of human rights.² Judge Gabrielle Kirk McDonald of the International Criminal Tribunal for the Former Yugoslavia (ICTY) called the new permanent court “a wrecking ball” against the “rock of State sovereignty” that usually shelters war criminals from prosecution.³ The enforcement of international criminal law, however, depends upon the unified political will and military power of the alliance that

1. This Note will usually refer to the International Criminal Court as the “ICC.”

2. See David J. Scheffer, *Developments in International Criminal Law: The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 21 (1999); Phyllis Hwang, *Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court*, 22 FORDHAM INT'L L.J. 457, 457 (1998).

3. Gabrielle Kirk McDonald, *The Eleventh Annual Waldemar A. Solf Lecture: The Changing Nature of the Laws of War*, 156 MIL. L. REV. 30, 51 (1998).

supports the international tribunal.⁴ Without the power of coercion, there is little or no enforcement.⁵

While the International Military Tribunals at Nuremberg and Tokyo⁶ at the end of the Second World War established precedents for the enforcement of international criminal law and human rights, their success, in both trial results and public perception, was only possible because of a combination of factors. These factors include: the degree of defeat among the losing parties, the level of cooperation among the victorious allies, popular approval of judicial procedures unacceptable under most other circumstances, and the weight of the evidence.⁷ At Nuremberg, the United States, Britain, France, and Russia mustered the fleeting reserves of allied cooperation to try the leaders of Nazi Germany for war crimes. They succeeded in convicting most of those prosecuted, exposing the moral bankruptcy of Nazism, and establishing an international precedent that aggressive war is a punishable crime. The level of success at Nuremberg, however, has not been repeated since, not even at Tokyo at the end of the same war.

This Note analyzes how international criminal tribunals succeed and fail by examining first the Nuremberg and Tokyo tribunals, and then the current ICTY and International Criminal Tribunal for Rwanda (ICTR). From the histories of these international criminal tribunals, this Note develops a predictive framework for the effectiveness of the newly legislated ICC.

Part II of this Note is a brief history of modern international criminal tribunals: Nuremberg, Tokyo, the ICTY, and the ICTR. Part III analyzes the success and failures of international criminal tribunals in light of historical and political factors and then develops the factors into a predictive framework for the enforcement of international criminal law. Part IV applies this predictive framework to the new Rome Statute for a permanent ICC in order to analyze when it might be most effective.⁸

4. Jonathan I. Charney, *Editorial Comment: Progress in International Law?*, 93 AM. J. INT'L L. 452, 455 (1999).

5. Charles Madigan & Colin McMahon, *A Slow, Painful Quest for Justice: Autopsy of a War Crime Tribunal*, CHI. TRIB., Sept. 7, 1999, at 1. The defense counsel for Dusko Tadic before the ICTY, Michail Wladimiroff, said that in a situation like Bosnia "[y]ou are not going to prosecute your own people." *Id.*

6. Generally called in this Note the "Nuremberg Tribunal" and the "Tokyo Tribunal" respectively.

7. TAYLOR, *infra* note 20, at 86.

8. Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. No. A/CONF.183/9, 37 I.L.M. 999 (1998) [hereinafter Rome Statute].

II. BRIEF HISTORY OF MODERN INTERNATIONAL CRIMINAL TRIBUNALS

A. *Nuremberg and Tokyo Trials*

The Nuremberg and Tokyo trials after the Second World War established the modern precedents for international criminal liability for genocide, war crimes, crimes against humanity, and aggressive war.⁹ By the judgment of the International Military Tribunal, eleven Nazis were sentenced to death and seven to prison at Spandau.¹⁰ Three were acquitted.¹¹ In Tokyo, a military tribunal under a similar charter delivered retribution upon several of the most prominent Japanese.¹² Two former Japanese premiers, Baron Koki Hirota and General Hideki Tojo, were hanged, as were five other Japanese generals.¹³

The differences in the actions of the victorious Allied Powers in Germany and Japan, however, illustrate some basic problems in establishing and enforcing international criminal law. An international criminal tribunal is only as effective as the collective political will and military power of the alliance that creates and supports it because the nature of criminal law is coercive.¹⁴ The tribunals at Nuremberg and Tokyo can be distinguished by several factors, including the relative powers and interests of the participating nations and the structure of authority.¹⁵ The Big Four powers negotiated the creation of the Nuremberg tribunal at

9. See Charter of the International Military Tribunal, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, art. 6, 59 Stat. 1544, 82 U.N.T.S. 279, 286-88; ROBERT JACKSON, *THE NUREMBERG CASE* (1947) [hereinafter *Nuremberg Charter*]. The crime of aggressive war is called "crimes against the peace" in the Nuremberg and Tokyo charters. See generally *id.*

10. TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 602 (1992).

11. *Id.* at 613. Those acquitted at Nuremberg then faced trials before German courts. Hans Frische and Franz von Papen were convicted of other crimes and served sentences; Hjalmar Horace Greeley Schacht was acquitted by the German Denazification Court and lived to be ninety-two. *Id.*

12. See ARNOLD BRACKMAN, *THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS* 381 (1987). Seven were sentenced to death, fifteen to life in prison, and two for lesser terms. No one was acquitted. *Id.*

13. *Id.*

14. See David J. Scheffer, *Developments in International Criminal Law: The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 21 (1999). Scheffer describes how the final text of the Rome Statute includes the crime of aggression, even though the conference had reached an impasse in trying to define it. *Id.* As a result, the United States did not immediately or enthusiastically sign the treaty. *Id.*

15. BRACKMAN, *supra* note 12, at 59-60.

London.¹⁶ The Tokyo tribunal, in contrast, was created by the declaration of General Douglas MacArthur acting as Supreme Commander of the Allied Powers.¹⁷ The judges sitting on the Tribunal represented the eleven nations of the Far Eastern Commission, but MacArthur retained authority to review prosecutions and sentences.¹⁸

The literature on the Nuremberg trials is vast and will not receive significant addition here, but it must be said that the conditions which resulted in the establishment of the first modern international criminal tribunal and its prosecution of twenty-one former military and political leaders of one of the world's strongest powers are not likely to occur again.¹⁹ These conditions include: the unconditional surrender of Germany, the poor prospects of escape, the relatively balanced alliance of the three great world powers, widespread international support and attention, and the Nazis' habit of keeping meticulous records of their genocidal activities.²⁰

During the heat of the fighting, the Allies committed themselves to obtaining the "unconditional surrender" of both Germany and Japan, and in the case of Germany, the Allies achieved their goal.²¹

16. TAYLOR, *supra* note 10, at 75.

17. BRACKMAN, *supra* note 12, at 60.

18. *See id.* Those nations were Australia, New Zealand, Canada, the Netherlands, France, Britain, the United States, the Soviet Union, China, and two colonial territories on the brink of independence: India and the Philippines. *Id.* The Allied Council for Japan that advised the Supreme Commander consisted, however, of just four nations: Britain, China, the Soviet Union, and the United States. Most of the occupation troops in Japan were Americans. *Id.*

19. "In most of the recent wave of democratizations, the *ancien regime* has negotiated itself out of power, usually insisting on amnesty as a precondition for its quiet exit. In a few cases, like Greece and Romania, the authoritarian regime suddenly collapsed, making trials or executions possible. But it is unusual to be able to impose one's political will as the Allies did after World War II." Gary Jonathan Bass, *International Law: War Crimes and the Limits of Legalism*, 97 MICH. L. REV. 2103, 2115 (1999) (reviewing MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998) and MARK OSIEL, *MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW* (1997)).

20. TELFORD TAYLOR, *FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10*, at 86 (1949).

21. RAYMOND G. O'CONNOR, *DIPLOMACY FOR VICTORY: FDR AND UNCONDITIONAL SURRENDER* (1971); RONALD H. SPECTOR, *EAGLE AGAINST THE SUN. THE AMERICAN WAR WITH JAPAN* 222-23 (1985). The policy of unconditional surrender was criticized during and after the war as an unwise interference with the possibility of removing the war-like rulers of either nation by diplomacy. SPECTOR, *supra* at 222-23; *see also* THOMAS PARRISH, *ROOSEVELT AND MARSHALL: PARTNERS IN POLITICS AND WAR* 336-42 (1989). The origins of the policy, though complicated, are tied closely to the failure of Western diplomacy to enforce the Versailles Treaty and contain German and Japanese aggression. FRANK FREIDEL, *FRANKLIN D. ROOSEVELT: A RENDEZVOUS WITH DESTINY* 463-64 (1990). After the debacle at Munich and the fall of France and the Philippines, Western credibility was so low that the slogan of "unconditional surrender" became both a rallying cry and a renunciation of appeasement. *See*

Unconditional surrender meant that the Germans would place themselves at the complete mercy of the victors; there would be no negotiated terms.²² Unconditional surrender is not the most common way to end a war because few nations are so beaten and powerless as to have no leverage at all to demand escape or immunity for the surviving leaders, or some other concession.²³ When the Germans surrendered unconditionally on May 7, 1945, however, the German war machine was mostly destroyed and in disarray, Hitler was dead, and the Red Army had taken Berlin by assault.²⁴ United States and British forces controlled Western Europe from the Atlantic to the Elbe River and sealed off any escape.²⁵ Having witnessed and endured countless Nazi lies and atrocities, the Allies were of one mind not to negotiate.²⁶

Therefore, the Germans surrendered unconditionally to a delicately balanced international alliance. The "Big Four"²⁷ in the alliance disagreed fundamentally on postwar policy, but had depended on each other throughout the war. The United Kingdom

ELLIOTT ROOSEVELT & JAMES BROUGH, *A RENDEZVOUS WITH DESTINY: THE ROOSEVELTS IN THE WHITE HOUSE* 332-33 (1975).

22. DAVID EISENHOWER, *EISENHOWER: AT WAR, 1943-1945*, at 797 (1986); John L. Snell, *What to Do with Germany?*, in *THE MEANING OF YALTA: BIG THREE DIPLOMACY AND THE NEW BALANCE OF POWER* 40-41 (John L. Snell, ed., 1956).

23. In November 1918 the conditions of the Armistice included exile for the German Kaiser and a promise by the Allies not to occupy the whole of Germany. Secretary Lansing to the Imperial German Government, October 23, 1918, State Department Archives, in *THE DIPLOMACY OF WORLD POWER: THE UNITED STATES, 1889-1920* 154-55 (Arthur S. Link & William M. Leary, Jr., eds., 1970).

24. Hitler committed suicide in Berlin on April 30, 1945; by then the Russians had stormed the Tiergarten and were only a block away from Hitler's bunker. JOHN TOLAND, *THE LAST 100 DAYS* 529 (1965).

25. EISENHOWER, *supra* note 22, at 794-805.

26. General Eisenhower did not even face the Germans at his headquarters at Rheims until they had been coldly received and instructed by his chief of staff, General Bedell Smith. Eisenhower's words to the Germans were few and curt. EISENHOWER, *supra* note 22, at 797-801.

27. The "Big Four" of the London Charter and Nuremberg trials were the United States, the United Kingdom, the Soviet Union, and France. Nuremberg Charter, *supra* note 9, art. 1. The United States, the United Kingdom, and the Soviet Union functioned as the "Big Three." *Id.* art. 1. Their leaders for most of the war were Franklin D. Roosevelt, Winston Churchill, and Joseph Stalin. DAVID MCCULLOUGH, *TRUMAN* 345 (1992). Roosevelt died on April 12, 1945, and Harry Truman became President. During the Potsdam Conference that summer, Churchill was replaced as British Prime Minister by Clement Atlee. *Id.* at 446. For a colorful description of the Big Three at Potsdam, see *id.* at 409-12, 416-23. France, under de Gaulle's leadership after its humiliating defeat in 1940 was assigned an occupation zone in Germany, and thus became part of the "Big Four" of the German occupation and Nuremberg. Nuremberg Charter, *supra* note 9, art. 1. During most of the years of wartime cooperation, France had little weight in Allied affairs; General de Gaulle was not even told the date of D-Day. Eisenhower, *supra* note 22, at 231. Sometimes, usually in reference to Far Eastern affairs, the "Big Four" included China's Chiang Kai-shek rather than France. SPECTOR, *supra* note 21, at 330.

under Winston Churchill wished to remain an imperial and colonial power.²⁸ Russia under Joseph Stalin wished to partition Germany, establish hegemony in Eastern Europe, and sponsor communist revolutions worldwide.²⁹ The United States under Franklin D. Roosevelt wished to rebuild world order based on the democratic principles of the Atlantic Charter and Woodrow Wilson's model of collective security.³⁰ The United States needed Britain and her colonies as bases for projecting power.³¹ Britain and Russia depended on U.S. lend-lease aid.³² France was defeated and humiliated in 1940 and had little strength in 1945, but the United States and the United

28. The British, to paraphrase Churchill, had not fought two world wars in order to dismember their empire, but the American ideals since President Wilson presided over the Paris Peace Conference in 1919 were national "self-determination," republican forms of government, and democracy. SPECTOR, *supra* note 21, at 352. For this reason, British, and American policies in the Far East often clashed, both before and after the Second World War. *See id.* In 1945 the British, as well as the Dutch and the French, wished to renew their imperial presence in Asia; the Americans wished the end of colonialism and the births of independent republics. *See* RANDALL B. WOODS & HOWARD JONES, *DAWNING OF THE COLD WAR: THE UNITED STATES' QUEST FOR ORDER* 3-5 (1991).

29. *See* Protocol of Proceedings of the Crimea Conference, Feb. 11, 1945, arts. III-IV, 3 Bevans 1013, available at 1945 WL 6738, at 5-8; Agreement Regarding Japan, Feb. 11, 1945, 59 Stat. 1823, 3 Bevans 1022, available at 1945 WL 6737; *see also* C.L. SULZBERGER, *SUCH A PEACE: THE ROOTS AND ASHES OF YALTA* 124-26, 158-61 (1982). The Allied Powers had agreed upon the joint occupation of Germany at the Yalta Conference in 1945. Protocol of Proceedings of the Crimea Conference, arts. III-IV, *supra*. The Russians would occupy most of the lands east of the Elbe River. MCCULLOUGH, *supra* note 27, at 450. Of the German lands west of the Elbe, the British would have the northern sector, the French the central sector, and the Americans the southern sector. Though a permanent partition was not intended, Germany remained divided for forty-five years. EISENHOWER, *supra* note 22, at 652-53. Stalin had no intent to allow the reunification of Germany or a pro-Western government in Poland. SULZBERGER, *supra* at 86-87.

30. The Atlantic Charter was signed by Roosevelt and Churchill aboard the *H.M.S. Prince of Wales* in 1941. *See* THEODORE A. WILSON, *THE FIRST SUMMIT: ROOSEVELT AND CHURCHILL AT PLACENTIA BAY 1941* 64 (1991). In it, the American and British governments declared their commitment to the "freedom from fear and want." *THE ATLANTIC CHARTER xvii-xviii* (Douglas Brinkley & David R. Facey-Crowther, eds., 1994). "Collective security" was part of President Wilson's "Fourteen Points" for world peace using an open and public League of Nations instead of secret diplomacy and balance of power politics. WOODROW WILSON'S CASE FOR THE LEAGUE OF NATIONS 57-59 (Hamilton Foley ed., 1923).

31. *See* WILSON, *supra* note 30, at 64.

32. The Lend-Lease Act provided "all aid short of war" for those fighting Nazi Germany, and later, Japan. Through lend-lease aid, the wealth and production of the United States supported Britain and Russia with supplies of credit, food, fuel, and munitions before and after Pearl Harbor and America's declaration of war. LEON MARTEL, *LEND-LEASE, LOANS, AND THE COMING OF THE COLD WAR: A STUDY OF THE IMPLEMENTATION OF FOREIGN POLICY* 4-6 (1979).

Kingdom considered the restoration of French power necessary as a postwar counter-weight to Russia and Germany.³³

It was the German plan to try to break the Allied Powers by exploiting the natural division between the democracies and the communists.³⁴ After Hitler's suicide, German leaders preferred to surrender to the United States and the United Kingdom,³⁵ rather than face the wrath of the Russians.³⁶ The United States and the United Kingdom, for their part, refused to breach their alliance with the Russians, and the German surrender was accepted at Rheims by all the Allied governments, including the Russians.³⁷ The various armies cooperated in rounding up the leading Nazis, and while a few Nazis committed suicide, escape was impossible for most because almost every country in the world was at war with Germany and a German passport was virtually worthless.³⁸

At the insistence of the United States and by the London Agreement of August 8, 1945, the leading Nazis were to be tried by an international military tribunal.³⁹ The British feared that such a tribunal would provide the Germans with both an opportunity to embarrass their captors and a forum for Nazi propaganda.⁴⁰ The Russians would have preferred to dispatch their captives using

33. See generally WILLIAM L. SHIRER, *THE COLLAPSE OF THE THIRD REPUBLIC: AN INQUIRY INTO THE FALL OF FRANCE IN 1940* (1969); see also THEODORE H. WHITE, *FIRE IN THE ASHES: EUROPE IN MID-CENTURY 240* (1953).

34. See WILLIAM L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH: A HISTORY OF NAZI GERMANY 1091-92* (1960).

35. See JAMES LUCAS, *LAST DAYS OF THE THIRD REICH: THE COLLAPSE OF NAZI GERMANY, MAY 1945*, 574-75 (1986). For this reason, the Germans, represented by Field Marshall Alfred Jodl, traveled to the Reims, France to surrender at the military headquarters of the Western allies. *Id.* General Eisenhower, the Supreme Allied Commander, avoided an insult to his Russian allies, if not also a breach of the alliance, by having the Russian military attache assigned to his headquarters sign the documents of surrender on behalf of his government. *Id.*; see also SHIRER, *supra* note 34, at 1138-39.

36. The Russians, having endured the worst of Nazi brutality for four years, committed innumerable atrocities as they advanced across Germany in 1945. They were the sort of atrocities that would now fall under the ICC Statute. MCCULLOUGH, *supra* note 27, at 407-08.

37. LUCAS, *supra* note 35, at 574.

38. Joseph Goebbels was perhaps the most famous Nazi to evade capture by suicide. SHIRER, *supra* note 34, at 1136. He and his wife committed suicide after poisoning their children. *Id.* Heinrich Himmler, head of the Gestapo, also committed suicide. *Id.* at 1141. Hermann Goering committed suicide in his cell the night before his scheduled execution. BRACKMAN, *supra* note 12, at 226-27. Adolf Eichmann and Joseph Mengele were the two most famous Nazis to escape to South America, though Eichmann was later captured by Israeli secret agents, tried in Israel, and executed. See generally MOSHE PEARLMAN, *THE CAPTURE AND TRIAL OF ADOLF EICHMANN* (1963). Mengele too was eventually captured and tried. See generally GERALD POSNER & JOHN WARE, *MENGELE: THE COMPLETE STORY* (1986).

39. TAYLOR, *supra* note 10, at 59.

40. Bass, *supra* note 19, at 2103-04.

Stalinist methods.⁴¹ Though both the British and the Russians feared that some Nazis might not receive their just desserts because of the U.S. obsession with due process of law, the Nazis incriminated themselves through the fastidious German habit of keeping careful records.⁴² One point, however, that the United States could not win through the London negotiations was that the Nuremberg Tribunal's jurisdiction was limited to crimes of the losing Axis Powers; there would be no broader jurisdiction to crimes committed by Allied Powers.⁴³

The vast conquests of the German army, the years of Nazi occupation, and the worldwide publicity of heinous crimes stimulated intense international interest in the Nuremberg trials. The prosecution, most notably Justice Robert Jackson, seized the moment to impose international criminal liability for aggressive war, war crimes, crimes against humanity, and genocide.⁴⁴ By focusing world outrage, assuaging grief, and stimulating German soul-searching by the publicity of dreadful crimes,⁴⁵ the Nuremberg trials facilitated a

41. TAYLOR, *supra* note 10, at 211. After the death of V.I. Lenin in 1924 Joseph Stalin eliminated his enemies using mass arrests, deportations, secret trials, and show trials. See generally ROY ALEKSANDROVICH MEDVEDEV, *LET HISTORY JUDGE: THE ORIGINS AND CONSEQUENCES OF STALINISM* (George Shriver ed. and trans., Columbia University Press, 1989); ALEKSANDR SOLZHENITSYN, *THE GULAG ARCHIPELAGO, 1918-1956: AN EXPERIMENT IN LITERARY INVESTIGATION* (Thomas P. Whitney & Harry Willetts trans., Harper & Row, 1974-78). As the Red Army advanced across Europe in 1945 thousands of German prisoners and civilians were shot or deported to concentration camps. LUCAS, *supra* note 35, at 80-94.

42. TAYLOR, *supra* note 20, at 86. Taylor noted:

Few of the defendants committed atrocities with their own hands, and in fact they were rarely . . . at . . . the scenes of their worst crimes. They made plans and transmitted orders, and the most compelling witnesses against them were the documents which they drafted, signed, initialed, or distributed. The bulk of these documents were available in each case by the time the indictment was filed . . .

Id.

43. See generally Nuremberg Charter, *supra* note 9; see also *supra* note 36 and accompanying text.

44. See generally Nuremberg Charter, *supra* note 9.

45. To the Japanese people, in contrast, the most apparent war crimes were the Allied bombings of civilians, specifically the nuclear attacks at Hiroshima and Nagasaki." MARK OSIEL, *MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW* 181 (1997). While millions of Germans had witnessed Nazi brutality and thousands were herded by their Allied conquerors through the death camps, the Japanese people were generally remote from the scenes of their armies' war crimes. *Id.* Nanking, Manila, and Singapore, for instance, are overseas and far away. *Id.* "Because of the centrality of Hiroshima to Japanese memory of the period, it has become 'virtually impossible . . . to recall that Japan had been waging a war of aggression prior to Hiroshima and Nagasaki.' In contrast, the impact on the national memory of the Yamashita and Tokyo War Crimes Trials—widely broadcast to the population—has been virtually nil, until very recently." *Id.* (quoting NORMA FIELD, *IN THE REALM OF A DYING EMPEROR* 45 (1991)).

catharsis to the Second World War that is by no means complete, but is certainly better than the festering scars of the Peace of Paris in 1919.⁴⁶

The trials of the Nazis at Nuremberg relied less on the testimony of surviving witnesses than on mountains of documents maintained by a regime that saw itself as having an historic mission to exploit and exterminate its perceived enemies.⁴⁷ Under this sense of destiny, the Nazis took great pains to record the planning and execution of thousands.⁴⁸

The circumstances unique to the collapse of Nazi Germany in 1945 resulted in tremendous success for the prosecutors of the International Military Tribunal at Nuremberg and broad international support for the verdicts.⁴⁹ Not once since then have three relatively equal powers beaten a major world power through force of arms, accepted the unconditional surrender of a leaderless and demoralized enemy, established a joint occupation, and prosecuted the enemy for war crimes by relying largely on that enemy's own documents.⁵⁰ Not even in Tokyo.⁵¹

The Tokyo Tribunal demonstrates how political realities influence, if not dictate, the effectiveness of the enforcement of international criminal law.⁵² Though Japan's industrial capacity and navy had been shattered in 1945, millions of armed Japanese remained resolved to die for their Emperor in suicidal attacks against the pressing Allied forces. Therefore, "the principal issue in brokering the Japanese surrender was the status of the Emperor, a subject that was debated both internally in the United States and on the world stage."⁵³ While it was known that the Emperor had no operational political power, some in the State Department argued that his divine status inspired fanatical militarism and necessitated his removal, if not his execution.⁵⁴ The Emperor alone had the power

46. Bass, *supra* note 19, at 2112.

47. ADOLF HITLER, *MEIN KAMPF* 123-24, 638-40 (Ralph Manheim, trans., Harcourt-Brace 1943) (1923); SHIRER, *supra* note 34, at 937-39.

48. SHIRER, *supra* note 34, at 963-74.

49. Bass, *supra* note 19, at 2103.

50. MICHAEL P. SCHARF, *BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG* 15 (1997).

51. See JOHN W. DOWER, *EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II* 443-84 (1999).

52. Robert E. Ward, *Presurrender Planning: Treatment of the Emperor and Constitutional Change*, in *DEMOCRATIZING JAPAN: THE ALLIED OCCUPATION* 1, 3 (Robert E. Ward & Sakamoto Yoshikazu eds., 1987).

53. Noah Berlin, Comment, *Constitutional Conflict with the Japanese Imperial Role: Accession, Yasukuni Shrine, and Obligatory Reformation*, 1 U. PA. J. CONST. L. 383, 390-91 (1998).

54. WILLIAM P. WOODARD, *THE ALLIED OCCUPATION OF JAPAN, 1945-1952 AND JAPANESE RELIGIONS* 9-13 (1972).

to amend the Japanese Constitution, however, and so the State Department recognized that his continued status might be useful in the postwar reformation of the Japanese nation.⁵⁵

The Japanese, even after two atomic attacks, agreed to surrender only "with the understanding that the said Declaration does not compromise any demand which prejudices the prerogatives of His Majesty as a sovereign ruler."⁵⁶ Before accepting these terms, the United States requested that upon surrender the "authority of the Emperor and the Japanese government to rule the state shall be subject to the Supreme Commander of the Allied Powers."⁵⁷ After months of suicidal Japanese fighting for every island and hill, the Allies, led by the United States, acquiesced to their enemy's insistence that Emperor Hirohito remain titular head-of-state.⁵⁸ Thus, despite the pledge made with considerable fanfare that the Allies would accept nothing but unconditional surrender, the Allies granted this one concession to the Japanese.⁵⁹

The Emperor himself cooperated with the Allied powers willingly, and within a month, General MacArthur defended the Emperor and his status against international cries to try him as a war criminal.⁶⁰ He stated that such a trial would have "tragic consequences," including the implementation of a "military government" and "at least one million reinforcements" to combat probable resistance and guerrilla warfare.⁶¹ The Supreme Commander persuaded both President Truman and the Congress not to press the issue.⁶² By then the international sentiment of "Bring the boys home!" and the daily costs and risks of occupation prevailed over any legal theory that the Emperor should be tried.⁶³ If the Emperor's status was insurance that the Japanese would not resume their suicidal fighting, then millions of families were willing to make

55. Ward, *supra* note 52, at 3-4 (citing "Status of the Japanese Emperor," National Archives, Notter Files, Box 63, J-315, May 25, 1943).

56. PAUL MANNING, *HIROHITO: THE WAR YEARS* 157 (1986).

57. *Id.* at 158.

58. HERBERT FEIS, *JAPAN SUBDUED: THE ATOMIC BOMB AND THE END OF THE WAR IN THE PACIFIC* 118-120 (1961).

59. *Id.* at 125-26. President Truman never regretted his decision to spare the Japanese monarchy because it ended the war and saved thousands of lives. MCCULLOUGH, *supra* note 27, at 459-60. Nonetheless, it was of tremendous symbolic importance to the Japanese and compromised the American commitment (adverse to our British allies) to establish republican forms of government in the postwar world. *See id.* Truman wrote that if the Japanese wished to keep their Emperor, "we'd tell 'em how to keep him."

60. THOMAS CRUMP, *THE DEATH OF AN EMPEROR: JAPAN AT A CROSSROADS* 154 (1989).

61. *Id.* at 177.

62. MANNING, *supra* note 56, at 219-21.

63. FEIS, *supra* note 58, at 126.

such a bargain.⁶⁴ Thus, the U.S. public policy of ending the fighting and bringing the servicemen out of harm's way saved the Emperor and the monarchy.⁶⁵

But the largely unilateral U.S. decision to spare the Emperor was not without its critics. The Australians and Russians wished to indict the Emperor, and the Australians even reminded the Americans of Justice Jackson's words at Nuremberg that "any head of state who launches aggressive war is personally guilty as a war criminal."⁶⁶ But militarily and politically speaking, they were in little position to argue, for the "Americans, as the principal occupying power, had vetoed all Allied opposition."⁶⁷

The structure of the Allied command in the Far East was instrumental for the U.S. dominance of postwar policy in Japan. In contrast to the situation in Europe,⁶⁸ the United States commanded every Far Eastern theater of war, even when outnumbered, as in

64. MCCULLOUGH, *supra* note 27, at 451-52.

65. BRACKMAN, *supra* note 12, at 77-78. The Australians brought the issue up again in January 1946, but the Supreme Commander responded: "His indictment will unquestionably cause a tremendous convulsion among the Japanese people, the repercussions of which cannot be overestimated." *Id.* MacArthur told the chief Allied prosecutor, Joseph Keenan, that the Emperor could be neither a defendant nor a witness at the trials. *Id.*; see also OSIEL, *supra* note 45, at 186-87 ("To exclude the Emperor from criminal liability was also implicitly to exclude the Japanese people at large from moral responsibility More concretely, the Allied decision to protect Hirohito 'impeded the awakening of the Japanese people's own historical consciousness.'").

66. BRACKMAN, *supra* note 12, at 77.

67. *Id.* at 78. Though the Chinese and many other Asian peoples suffered ghastly casualties, there was little doubt in 1945 that the American resources of technology, firepower, and logistics had brought Japan to its knees. See SPECTOR, *supra* note 21, at 560. After the British defeat at Singapore in 1942 the contest for supremacy in Asia was between the Americans and the Japanese. *Id.* at 132.

68. The command structure in Europe was diffused by history, politics, and geography. See EISENHOWER, *supra* note 22, at 66-68. Britain had stood alone heroically against Germany from June 1940 to June 1941, and Britain had served as the base for the Allied invasion of France. SHIRER, *supra* note 34, at 774-82, 1036-39. By 1945 it was the weight of American and Russian arms that crushed Germany, but British stature remained high. MCCULLOUGH, *supra* note 27, at 411-12. Churchill, by his stubborn resistance and will, equaled Roosevelt and dwarfed Truman in prestige. *Id.* at 412. On the Western Front, British and American officers shared in an integrated Allied command of which Eisenhower was the Supreme Commander, but by no means a potentate. EISENHOWER, *supra* note 22, at 66-68. On the Eastern Front, the Russians maintained a command independent of any American or British influence. SULZBERGER, *supra* note 29, at 71-72. At Yalta, the Big Three had negotiated occupation zones, and at London, joined by France, they negotiated the jurisdiction of the Nuremberg tribunal. Nuremberg Charter, *supra* note 9, art. 1. Thus, the military situation in Europe, both on the ground and in the command structure, prevented the Americans from dictating postwar policy, including the workings of the Nuremberg tribunal. TAYLOR, *supra* note 10, at 59-60.

China and India, by the soldiers of allied nations.⁶⁹ Without U.S. arms, Japan would not have been defeated shortly after Germany, if at all. The Japanese army was never broken in the same sense the German army was broken. In August 1945 millions of Japanese soldiers continued to occupy the most populated regions of China, French Indochina, and the Dutch East Indies and to brace for an invasion of the home islands.⁷⁰ Without discounting the valor and sufferings of all the Allied Powers in the Far East, it can be asserted that the subjugation and subsequent occupation of Japan was accomplished largely through U.S. firepower and resources.⁷¹ As Allied forces prepared to invade Japan, the U.S. Pacific Fleet outnumbered the rest of the world's warships combined, and the U.S. Air Force ended the savage war with the world's only nuclear attacks. When Japan surrendered, there were no occupation zones in the home islands as there were in Germany. The Allied troops arrived under the Supreme Command of General MacArthur, and most of those troops were from the United States.⁷²

The Allied command structure favored U.S. dominance, and the presence of MacArthur assured it.⁷³ Unlike General Dwight D. Eisenhower, MacArthur was by nature an autocrat rather than a diplomat, and by the terms of the Japanese surrender, he became *shogun*⁷⁴ to the Emperor and functioned as a Roman proconsul in his relations to his own government.⁷⁵ Although the Supreme Commander exercised little operational control over the Tokyo Tribunal other than declaring the Emperor unimpeachable, his

69. See generally BARBARA W. TUCHMAN, *STILWELL AND THE AMERICAN EXPERIENCE IN CHINA, 1911-45* (1970). The three principal theater commanders during the war in the Pacific were American officers: Admiral Chester Nimitz, General Douglas MacArthur, and General Joseph Stilwell. SPECTOR, *supra* note 21, at 144-46. All three commanded soldiers and sailors of all Allied powers, and in Stilwell's case, most of the soldiers in the China-Burma-India Theater were not Americans. *Id.* at 142-43. But see WHITE, *supra* note 33, at 149.

70. The Chinese had suffered more deaths than any other Far Eastern ally, thus giving Chiang Kai-shek a pyrrhic victory; Mao Zedong's communists would soon win their civil war. WHITE, *supra* note 33, at 132-33. The Russians entered the war in the Far East only one week before Japan's surrender. MCCULLOUGH, *supra* note 27, at 457. The Russians captured Manchuria and northern Korea rather quickly, and these late actions resulted in communist control of both regions. THEODORE H. WHITE & ANNALEE JACOBY, *THUNDER OUT OF CHINA* 132-35, 279-83 (1946).

71. DONALD M. NELSON, *ARSENAL OF DEMOCRACY: THE STORY OF AMERICAN WAR PRODUCTION* ix (1946); SPECTOR, *supra* note 21, at xiv.

72. WILLIAM MANCHESTER, *AMERICAN CAESAR: DOUGLAS MACARTHUR, 1880-1964* 497 (1978).

73. *Id.*

74. The *Shogun* was the power behind the throne in feudal Japan, a sort of prime minister or vizier. DOWER, *supra* note 51, at 19, 203.

75. MANCHESTER, *supra* note 72, at 466. A Roman proconsul was governor of a province and military commander of legions outside of Rome proper. MATTHEW BURSON, *ENCYCLOPEDIA OF THE ROMAN EMPIRE* 348 (1994).

dominance over postwar Japan and his ultimate power to review sentences⁷⁶ left the lasting impression that the Tribunal administered the "victors' justice."⁷⁷

The rules of evidence and procedure support that impression. The Tokyo Charter provided: "The tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence that it deems to have probative value."⁷⁸ While this provision was almost identical to one at Nuremberg, the Tokyo Tribunal relied upon its liberality more than did the Nuremberg Tribunal, partly because the Japanese destroyed thousands of

76. The United States Supreme Court refused to review the war crimes trials. See *Hirota v. MacArthur*, 338 U.S. 197, 198 (1948) (per curiam):

We are satisfied that the tribunal sentencing these petitioners is not a tribunal of the United States. The United States and other allied powers conquered and now occupy and control Japan. General Douglas MacArthur has been selected and is acting as the Supreme Commander for the Allied Powers Under the foregoing circumstances the courts of the United States have no power or authority to review, to affirm, set aside or annul the judgements and sentences imposed.

77. RICHARD H. MINEAR, *VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL* 179-80 (1971); see also *In re Yamashita*, 327 U.S. 1, 34-35 (1946) (Murphy, J., dissenting). General Tomoyuki Yamashita was held criminally liable by a U.S. Military Commission in the Philippines (not the International Tribunal at Tokyo) for failing to prevent dozens of war crimes committed by 260,000 Japanese troops scattered across the hundreds of islands of the Philippine archipelago. BRACKMAN, *supra* note 14, at 242-48. Many of the crimes were committed by Navy personnel only nominally under his command and in the final stages of defeat, and no proof was offered that Yamashita ordered or knew of any of the atrocities. MANCHESTER, *supra* note 72, at 487. His swift trial offered little time to prepare an affirmative defense, or even plan the cross-examination of witnesses, and the rules of evidence set by military decree were so broad as to make guilt the foregone conclusion. *Id.* at 484-85. Justice Murphy summarized the procedures with biting sarcasm:

We the victorious American forces, have done everything possible to destroy and disorganize your lines of communication, your effective control of your personnel, your ability to wage war. In those respects we have succeeded. We have defeated and crushed your forces. And now we charge and condemn you for having been inefficient in maintaining control of your troops during the period when we were so effectively besieging and eliminating your forces and blocking effective control. Many terrible atrocities were committed by your disorganized troops. Because these atrocities were so widespread we will not bother to charge or prove that you committed, ordered or condoned any of them. We will assume that they must have resulted from your inefficiency and negligence as a commander. In short, we charge you with the crime of inefficiency in controlling your troops. We will judge the discharge of your duties by the disorganization which we ourselves created in large part. Our standards of judgment are whatever we wish to make them.

Yamashita, 327 U.S. at 34-35.

78. Charter of the International Military Tribunal for the Far East (Tokyo Charter), U.S. Dept. of State Publication 2765 at 5-16.

documents to keep them out of the hands of the Allies.⁷⁹ In fact, the Tribunal did not reject evidence submitted by the prosecution.⁸⁰ The only evidence rejected at Tokyo was evidence in support of the defendants against charges of aggressive war, specifically regarding the foreign policies and war aims of the Allied Powers.⁸¹ The Tribunal allowed no such discussion.⁸² The rules of procedure were just as questionable. One death sentence was imposed following a six-to-five vote; the other six death sentences were by votes of seven to four.⁸³ By a vote of six to five, the Tribunal chose the gallows over a firing squad as the method of execution.⁸⁴ Such verdicts and sentences would have been unconstitutional in many, if not most, of the nations participating on the Tribunal.⁸⁵

The results of the Tokyo Tribunal were harsh but inconsistent. Hirota, a civilian who as Premier during the late 1930s had advocated Japanese expansion but was not directly tied to any war crimes, was one of those executed.⁸⁶ According to the dissenting Dutch justice, Hirota was not guilty of any crime.⁸⁷ Koichi Kido, keeper of the privy seal and the Emperor's closest advisor, was sentenced to life imprisonment;⁸⁸ he was not directly connected to any war crimes, but rather, his crime was his failure to investigate on behalf of the Emperor the reports of crimes committed.⁸⁹

By these standards, the Emperor should have also been in the dock, and His Majesty's absence as a defendant or witness became all the more conspicuous as every document and officer claimed to act in his name.⁹⁰ In his concurring opinion, Sir William Webb of Australia observed that the Emperor's authority was apparent when the Emperor, not the atomic bombs, stopped the war.⁹¹ The Emperor's

79. BRACKMAN, *supra* note 12, at 39-41. The Japanese took advantage of the two-week period between the cease-fire and the coming of Allied troops to the home islands to destroy incriminating state and military papers. *Id.*

80. MINEAR, *supra* note 77, at 120.

81. *Id.* at 120-21.

82. *Id.* at 121.

83. *Id.* at 90-91.

84. *Id.*

85. *Id.* at 90-92.

86. *Id.* at 71-72.

87. BRACKMAN, *supra* note 12, at 389. Justice Roling later wrote that aggressive war was a valid crime, but that such an offense should not by itself carry a death sentence. See James A.R. Nafziger, 90 AM. J. INT'L L. 342, 342 (1996) (reviewing B.V.A. ROLING AND ANTONIO CASSESE, *THE TOKYO TRIAL AND BEYOND* (1993)).

88. BRACKMAN, *supra* note 12, at 408.

89. *Id.* at 274.

90. See *id.* at 390. The French justice, Henri Bernard, considered the whole procedure flawed because the "principal author," the Emperor, was not among those accused. *Id.*

91. *Id.* at 387.

immunity, while a political expediency, did not remove his moral responsibility to try to prevent the war, even at the risk of his life.⁹²

For the foregoing reasons, the Tokyo Tribunal does not enjoy the prestige and respect of the Nuremberg Tribunal. The Tokyo Tribunal, in retrospect, does not seem as just, and therefore is seldom cited as a landmark in international criminal law, except in tandem with Nuremberg. The Tokyo Tribunal, unlike the Nuremberg Tribunal, carries little independent moral force. Several circumstantial factors differentiate the two, and these factors are both political and legal: (1) the German surrender was truly unconditional, while the Japanese surrender was conditioned on the Emperor's continued sovereignty and criminal immunity; (2) Germany was almost completely conquered by the Allied armies, while Japan's armies retained the strength and will to fight; (3) Germany was already divided by the occupying armies when the Nazis capitulated, while Japan's occupation was accomplished under a unified command dominated by the United States; (4) the Big Four negotiated the Nuremberg Charter by treaty, giving it international standing, while the Tokyo Charter was decreed by the Supreme Commander of the occupation forces; (5) while a majority vote was required in both tribunals, rulings in the Nuremberg Tribunal were often handed down with the consent of three out of four judges, whereas in the Tokyo Tribunal a simple majority of the eleven judges could rule on procedure, verdicts, and sentences; (6) at Nuremberg, the prosecution had convincing evidence against most of the defendants without pushing liberal rules of evidence, and as a result, three were acquitted, while at Tokyo, the prosecution obtained at least one very questionable conviction and death sentence and did so by arguably stretching the same rules of evidence.⁹³ Not one was acquitted.

92. *Id.* at 387-88.

93. Defense Appeal to General MacArthur, Nov. 21, 1948, reprinted in MINEAR, *supra* note 77, at 207. The defense stated:

The verdict looks too much like an act of vengeance to impress the world with our love for justice and fair play. The conviction of all the defendants alike, even those whom the prosecution admits should not have been charged and of those whose conviction they are "ashamed" compares unfavorably with the result of the Nuremberg trial.

Id.

B. *International Criminal Tribunals for Yugoslavia and Rwanda*

After the Nuremberg and Tokyo tribunals, no international criminal court sat for more than forty years.⁹⁴ Though a near consensus exists among international lawyers that such a court would facilitate justice, law, and order in lands torn by war and anarchy, the unsolved questions of how such a court would work and what its jurisdiction would be remained.⁹⁵ Despite a growing body of international human rights law building on the precedents set at Nuremberg and Tokyo⁹⁶ and stark images of crimes against humanity in places such as Cambodia and Iraq, the United Nations (UN) did not establish another international criminal court until atrocities in the Balkans continued unabated for several years. The United States and several European powers postured and issued threatening press statements, but the problem only became worse. Eventually, after Croatia had declared its independence from Yugoslavia and Bosnia-Herzegovina had become a bloody killing zone, the United Nations Security Council created the ICTY in May 1993.⁹⁷ Less than a year later, Rwanda erupted in genocidal violence after President Juvenal Habyarimana was assassinated, resulting in the deaths of approximately 800,000 people and the dispersal of two million refugees to neighboring countries.⁹⁸ The United Nations Security Council created the ICTR at the end of 1994.⁹⁹

94. Vincent M. Creta, Comment, *The Search for Justice in the Former Yugoslavia and Beyond: Analyzing the Rights of the Accused Under the Statute and the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia*, 20 HOUS. J. INT'L L. 381, 382 (1998).

95. Stuart H. Deming, *War Crimes and International Criminal Law*, 28 AKRON L. REV. 421, 421 (1995).

96. See generally Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. 100-20, 1465 U.N.T.S. 85; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 (1977); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609, 16 I.L.M. 1442 (1977).

97. Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AM. J. INT'L L. 57, 57 (1999).

98. Paul J. Magnarella, *Some Milestones and Achievements at the International Criminal Tribunal for Rwanda: The 1998 Kambanda and Akayesu Cases*, 11 FLA. J. INT'L L. 517, 518 (1997).

99. *Id.* at 520-21.

The ICTY¹⁰⁰ and ICTR,¹⁰¹ like the Nuremberg and Tokyo tribunals, are ad hoc courts of limited jurisdiction. They were established in response to a widespread international conviction that war crimes and acts of genocide should not go unpunished.¹⁰² The crimes under the jurisdiction of the ICTY include grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide, and crimes against humanity.¹⁰³ The jurisdiction of the ICTR is the same except that it omits war crimes.¹⁰⁴

1. International Criminal Tribunal for the Former Yugoslavia (ICTY)

War crimes in the Balkans have a long history. On St. Vitus Day, June 28, 1389, the Ottoman Turks defeated the Serbs at the Battle of Kosovo.¹⁰⁵ Muslims ruled most of the Orthodox Serbs for the next five centuries, forcing the Serbs to accept a second-class status.¹⁰⁶ The Serbs frequently revolted. Other Slavs, especially in the cities, converted to Islam and gained better status; later generations of Serbs would resent the local Muslims for the decisions of their ancestors.¹⁰⁷ To the west, Catholic Croats and Slovenes became part of the Hapsburg Empire and maintained relatively close ties to Austria, Hungary, and Italy and tense relations with Muslim Bosnians and Orthodox Serbs to the east and south.¹⁰⁸ After the Balkan wars in 1912 and 1913 Serbs obtained independence from the Ottoman Empire.¹⁰⁹ During these wars Serb nationalists committed gross acts of violence intended to change the "ethnic character" of entire regions and unite all Serbs throughout the Balkans.¹¹⁰ In an

100. 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, UN Doc. S/25704, annex (1993), *reprinted in* 32 I.L.M. 1192 (1993), available at <http://www.un.org/icty/basic/statut/statute.htm> [hereinafter ICTY Statute].

101. 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, between 1 January 1994 and 31 December 1994, UN Doc. S/Res/955, annex (1994), *reprinted in* 33 I.L.M. 1598 (1993), available at <http://www.un.org/icty/basic/statut/statute.htm>.

102. See McDonald, *supra* note 3, at 32-33. But see Lucas W. Andrews, Comment, *Sailing Around the Flat Earth: The International Tribunal for the Former Yugoslavia as a Failure of Jurisprudential Theory*, 11 EMORY INT'L L. REV. 471, 472-75 (1997) (arguing that the ICTY was the cynical creation of a Security Council that was unwilling to prevent the violence but willing to set up a court for the sake of the appearance of doing something).

103. ICTY Statute, *supra* note 100, arts. 2-5.

104. ICTR Statute, *supra* note 100, arts. 2-4.

105. SCHARF, *supra* note 50, at 21-22. As Faulkner said, "The past is never dead. It's not even the past." WILLIAM FAULKNER, REQUIEM FOR A NUN 92 (1951).

106. SCHARF, *supra* note 50, at 22.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

attempt to force the hated Austrians out of Bosnia-Herzegovina, a Bosnian Serb nationalist and anarchist named Gavrilo Princip fired the fateful bullets that killed the Archduke Franz Ferdinand, heir to the Hapsburg throne.¹¹¹ The date of the assassination was June 28, 1914, 525 years after the Battle of Kosovo.¹¹² In refusing the Austrian demands that the conspirators be turned over to justice, Serbia relied on its traditional Orthodox ally, the Russian Czar.¹¹³ A chain reaction of international alliances set off the First World War.

The Serbs fought on the winning side, and the Peace of Paris in 1919 gave birth to Yugoslavia, "the land of the south Slavs."¹¹⁴ King Alexander of Serbia united an uneasy dominion of Serbs, Croats, Slovenes, Macedonians, and other ethnicities, but this kingdom could not survive the onslaught of the Second World War.¹¹⁵ Between the wars, Italian Fascists supported the *Ustasha* movement for Croatian independence; an *Ustasha* assassin murdered King Alexander in 1934.¹¹⁶ After the Germans and Italians invaded and partitioned Yugoslavia in 1941, the *Ustasha* gained supremacy in Croatia and Bosnia-Herzegovina and applied Nazi methods to exterminating the Serbs.¹¹⁷ It was the Croats that coined the term "ethnic cleansing;" in acts of calculated terror, they killed more than a half-million Serbs and drove off a million others.¹¹⁸

Ironically, a Croatian communist by the name of Josip Broz Tito reunited Yugoslavia by driving out the Fascists and Nazis and murdering more than 100,000 Croats when the *Ustasha* surrendered at the end of a civil war in 1946.¹¹⁹ Though the federal union of the six republics within Yugoslavia remained weak, Tito maintained control through his ruthless secret police and redrew state boundaries to disperse the Serbs among several regional governments.¹²⁰ The Soviets helped Tito unite the factions within the Yugoslav union by their threats to invade.¹²¹ To face the threats, Tito maintained a large national army trained in mountain warfare.¹²²

Tito died in 1980 and internecine war broke out in 1991.¹²³ While the origins of ethnic strife in the region are ancient, a

111. See SCHARF, *supra* note 50, at 22.

112. *Id.*

113. *Id.*

114. *Id.* at 22.

115. *Id.* at 23-24.

116. *Id.* at 23.

117. MISHA GLENNY, *THE FALL OF YUGOSLAVIA: THE THIRD BALKAN WAR* 81 (rev. ed. 1994).

118. SCHARF, *supra* note 50, at 23.

119. *Id.* at 24.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

government project of the 1980s undertaken “from the top down incited rabid Serb nationalism.”¹²⁴ Slobovan Milosevic exploited Serbian nationalism to become head of the Serbian Communist Party in 1986, and garnered popular support by using federal troops to suppress Albanians in Kosovo, where Serbs were vastly outnumbered.¹²⁵ Using television as a powerful propaganda tool, Milosevic reminded the Serbs of centuries of oppression from the Ottoman Turks to the Croatian *Ustasha*.¹²⁶ In 1991 Milosevic prevented Stipe Mesic, a Croat, from assuming the federal presidency as provided under the constitutional rotation.¹²⁷ Croatia and Slovenia declared independence, and Milosevic sent units of the Yugoslav National Army into those regions.¹²⁸

While Slovenia withstood the attacks of Serb forces and forced their withdrawal, the Serbs seized control of one third of Croatia’s territory in the fall of 1991.¹²⁹ In the Croatian town of Vukovar, the Serbs murdered two-hundred hospital patients and buried them in a mass grave.¹³⁰ After thousands of casualties, the United Nations brokered a cease-fire and the withdrawal of the Yugoslav army.¹³¹ Four years later, rearmed with German aid, Croatia recaptured its lost territories.¹³²

124. WARREN ZIMMERMANN, ORIGINS OF A CATASTROPHE: YUGOSLAVIA AND ITS DESTROYERS—AMERICA’S LAST AMBASSADOR TELLS WHAT HAPPENED AND WHY 138 (1996).

125. See SCHARF, *supra* note 50, at 25.

126. ZIMMERMANN, *supra* note 124, at 120.

127. SCHARF, *supra* note 50, at 26. According to the Yugoslav constitution, the presidency was to rotate annually among the six republics. *Id.*

128. See *id.*

129. *Id.*

130. *Id.*; see also *The City of Vukovar*, at <http://www.vukovar.hr/en/index.htm> (last visited Jan. 7, 2001) (copy on file with the Vanderbilt Journal of Transnational Law).

131. SCHARF, *supra* note 50, at 27.

132. *Id.* The ICTY has requested that the Croatian government turn over to the authorities in the Hague transcripts of talks between the late President Tudjman and his closest advisors regarding the war of reconquest. S. Despot & A. Plisic, *War-Time Government Preparing Joint Statement for ICTY*, CROATIAN INFORMATION CENTRE, January 5, 2001, at <http://www.hic.hr/english/news/politics.htm#icty> (copy on file with the Vanderbilt Journal of Transnational Law). The ICTY is investigating charges of “ethnic cleansing of Serbs by Croats when the Croatian army forced the Yugoslav army out of Croatia.” *Id.*; see also *Croatian Government Unhappy With ICTY*, CROATIAN INFORMATION CENTRE-ZAGREB, Jan. 22, 1999, at http://www.dalmatia.net/croatia/politics/unhappy_with_icty.htm (copy on file with the Vanderbilt Journal of Transnational Law). Many Croats feel that the ICTY reaches only Croats, never Serbs:

[A] major difference Croatia has with the ICTY is the very serious rumour about the possibility of processing a number of Croatian Army generals and high ranking officials responsible for the command and implementation of Operation Storm. Minister Granic reiterated that Storm was in all of its elements a legitimate and professional military and police operation that

Rather than stay attached to the belligerently nationalistic Serbs dominating Yugoslavia, Bosnia-Herzegovina voted for secession on March 1, 1992.¹³³ The ethnic composition of Bosnia at the time was forty-three percent Slavic Muslim, thirty-one percent Serb, and seventeen percent Croat.¹³⁴ Though the Serbs boycotted the election, approximately sixty-three percent of the total electorate voted for independence.¹³⁵ The European Community and the United States recognized Bosnian independence.¹³⁶

The Serbs attacked almost immediately using demobilized troops from the Yugoslav National Army and Bosnian Serb militias and seized control of seventy percent of Bosnia's territory.¹³⁷ Against the weak opposition of UN economic sanctions and peace-keeping troops, Serb forces rained artillery shells and sniper fire at the Bosnian towns they did not control.¹³⁸ In the areas under Serb control, "ethnic cleansing" of non-Serbs was the policy: murder, beatings, rapes, concentration camps,¹³⁹ confiscation of property, and the burning of villages.¹⁴⁰ By the end of 1994 the Serbs had killed, incarcerated, or dispersed ninety percent of the 1.7 million non-Serbs who had once lived in Bosnia.¹⁴¹

The Security Council of the United Nations, to understate the point, took no effective action to prevent the "ethnic cleansing." Had

created the elements needed for the war and crisis to also end in Bosnia & Herzegovina It is interesting that when it was founded, The Hague tribunal was defined as being an independent judicial body that was above all politics, i.e., that it would not be subservient to any political policies. Having that in mind, it is interesting to note that not a single person has been accused of committing crimes against B & H Croats.

Id.

On a similar note, a prominent Croatian writer told an American journalist: "They [Croatian soldiers] were unique volunteers in Croatian history They believed they were fighting a noble war for Croatia, but the only thing they've got was threats from The Hague, and from people who could not differentiate between justice and war crimes." Georgie Anne Geyer, *International Organizations Focus 'Attention' On Croatia*, Oct. 26, 1999, <http://www.uexpress.com/ups/opinion/column/gg/text/1999/10/gg9910262719.html>.

133. SCHARF, *supra* note 50, at 27-28.

134. VIRGINIA MORRIS & MICHAEL P. SCHARF, 1 AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 19 (1995).

135. SCHARF, *supra* note 50, at 27.

136. *Id.*

137. *Id.* at 28. Though the Serb nationalist forces in Bosnia were not officially under the command of the Milosevic government in Belgrade, Milosevic had deliberately transferred all Serb army officers native to Bosnia to their home province in anticipation of such use. See LAURA SILBER & ALLAN LITTLE, YUGOSLAVIA: DEATH OF A NATION 218 (1995).

138. See SCHARF, *supra* note 50, at 28-29.

139. See SILBER & LITTLE, *supra* note 137, at 250.

140. SCHARF, *supra* note 50, at 28-29.

141. *Id.*

UN soldiers entered Bosnia at the time of the election for Bosnian independence, the Serbs would have been unable to exploit the military weaknesses of Bosnians without triggering an armed response from the Security Council.¹⁴² The UN economic sanctions had little effect, and the arms embargo prevented the Bosnian Muslims from defending themselves, while the Serbs continued to receive arms from Belgrade.¹⁴³ The “no-fly” zone was violated with impunity, and the UN “safe areas” became synonymous with “massacre.”¹⁴⁴ The United Nations never backed threats with force until the NATO air strikes of 1995; between the outbreak of the Bosnian war in 1992 and the bombing campaign of 1995 more than 100,000 died.¹⁴⁵

Having failed to prevent the carnage, the Security Council created the first international criminal tribunal since the Second World War.¹⁴⁶ The ICTY is an ad hoc court established under Chapter VII of the UN Charter by which the Security Council is authorized to enforce the peace.¹⁴⁷ The ICTY statute imposes a duty on all members of the United Nations to cooperate with its investigations and arrests.¹⁴⁸ The ICTY spent most of its first three years dealing with administrative matters: offices and staff for the headquarters at the Hague, field offices in the Balkans, international cooperation in arrest and detention, funding, electing judges, and adopting rules of procedure and evidence.¹⁴⁹

The tribunal’s first trial, *Prosecutor v. Dusko Tadic*,¹⁵⁰ resulted in a conviction, but it illustrates some problems inherent in the ICTY.¹⁵¹ The most obvious problem for the ICTY is that those most

142. *Id.* at 30.

143. M. CHERIF BASSIOUNI & PETER MANIKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 31 (1996).

144. SCHARF, *supra* note 50, at 36.

145. ZIMMERMANN, *supra* note 124, at xi-xii.

146. *See* BASSIOUNI & MANIKAS, *supra* note 143, at 199-201.

147. Jelena Pejic, *Conceptualizing Violence: Present and Future Developments in International Law: Panel II: Adjudicating Violence: Problems Confronting International Law and Policy on War Crimes and Crimes Against Humanity: The Tribunal and the ICC: Do Precedents Matter?*, 60 ALB. L. REV. 841, 842-43 (1997).

148. *Id.* at 843-44.

149. Sean D. Murphy, *Developments in International Criminal Law: Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AM. J. INT’L L. 57, 57 (1999).

150. *Prosecutor v. Dusko Tadic*, Case No. IT-94-1, available at <http://un.org/icty/judgement.htm>. *See* SCHARF, *supra* note 50, at 97. Tadic did not stay in Bosnia, but went to Munich, home to thousands of Serb, Croatian, and Bosnian immigrants, where he was soon identified as a war criminal and arrested under German human rights law on February 12, 1994. *Id.* The ICTY prosecutor, Richard Goldstone, obtained custody of Tadic from the German government, and his trial resulted in the first international criminal conviction since the Second World War. *Id.*

151. *See* Jonathan A. Bush, *Nuremberg: The Modern Law of War and Its Limitations*, 93 COLUM. L. REV. 2022, 2083-84 (1992) (citing the review essay of

responsible for the policy of ethnic cleansing are safe from prosecution in Belgrade or in Bosnian Serb territory.¹⁵² As important as the Tadic trial is as a precedent,¹⁵³ Tadic himself was by no means a major player in Balkan politics,¹⁵⁴ even if he was a despicable character.¹⁵⁵ Radovan Karadzic and Ratko Mladic, for instance, are two of the most notorious suspects for Bosnian war crimes, but neither Bosnian Serb authorities nor the Federal Republic of Yugoslavia will cooperate in arresting them.¹⁵⁶

TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* (1992)).

In short, Nuremberg aimed at fairness, and by and large it succeeded, but few war crimes trials since then have been as conscientiously constructed. Doubtless Taylor would be greatly pleased, as would this reader, if the principles of Nuremberg could be applied to halt, deter, and punish the sort of gross violations occurring every day in Bosnia, both by 'trigger-pullers' and by those higher-ups who have unleashed and supplied the criminals. But if history is any guide, the chances are that future trials may well be unfair. Of course the human rights community and the United Nations may try to construct scrupulously fair trial structures. Praise is due them if they succeed, but, if they do, they may find rather more acquittals than the public and victims' groups are anticipating. 'There is some reason to think that the convictions [at the Subsequent Proceedings] . . . were the result of a fluke—that is, 'the German proclivity for systematic records and the unexpectedly swift final victory, which placed files of documents in Allied hands.' In other settings, forensic evidence will be difficult to find, witnesses and victims may be dead, and the burden of criminal proof will require the necessary but frustrating acquittal of many offenders. More likely than convictions of the guilty after fair trial is a repeat of the ominous pattern of summary trials, conducted in a climate of extreme political passion, in areas only recently liberated from the defendants' grasp. And, if the past is again any guide, after the initial enthusiasm for justice has worn off, we are likely to see widespread, premature pardons of convicted offenders.

Id.

152. See Pejic, *supra* note 147, at 850.

153. See SCHARF, *supra* note 50, at 223.

154. See *id.* at 93-97. Dusko Tadic was a Serb pub owner from Korarac, a predominantly Muslim town. *Id.* at 93-94. As ethnic tensions grew, he joined the Serb Democratic Party and banned Muslims from his pub. *Id.* at 94. When the Serbs besieged the town in May 1992 Tadic is said to have assisted them in selecting targets, and when the town surrendered on May 26 Tadic allegedly singled out the leaders of the town to the bloodthirsty Serbs, who executed them. *Id.* at 95. Of 15,000 Muslim residents, 2,000 were killed by artillery fire, and 5,000 by summary execution. *Id.* Kozarac is now a ghost town, and its name is stricken from Serbian maps. *Id.* The Serb homes alone remain standing, including Tadic's. *Id.*

155. *Id.* at 213-14 and 222-24. Tadic stood trial for the murders of thirteen people and the torture of nineteen others, but was acquitted on all the murder counts from lack of evidence. See *id.* The prosecution lacked evidence to pursue the charge of genocide. *Id.* He was sentenced to prison. *Id.*

156. See Pejic, *supra* note 147, at 850; *Bosnian Envoy Calls for Karadzic Arrest*, November 20, 2000, at <http://www.cnn.com/2000/WORLD/europe/11/20/bosnia.envoy/> (copy on file with the Vanderbilt Journal of Transnational Law).

Milosevic has also been indicted, but as head of the government of Yugoslavia, he was not likely to be captured without a *coup d'etat*.¹⁵⁷ Indeed, it is arguable that the indictment made him less likely to step down from power. As of this writing, despite the recent election of the opposition leader Vojislav Kostunica as President of Yugoslavia and the defeat of pro-Milosevic factions in Serbian state elections, it remains uncertain whether the new government will allow the international prosecution of Milosevic and his supporters. Most recently, the new Yugoslav Foreign Minister, Goran Svilanovic, insisted that any trial of Milosevic or his advisors, whether for international human rights violations or domestic crimes, must take place on Yugoslav soil.¹⁵⁸

Since the Tadic trial, the ICTY has obtained guilty pleas or convictions for several other defendants, including the Croat general Tihomir Blaskic, and captured and indicted the Bosnian Serb generals Stanislav Galic,¹⁵⁹ Momir Talic, and Radislav Krstic.¹⁶⁰ Perhaps the ICTY will eventually try Milosevic and his leading advisors as well. Nonetheless, the ICTY's task is not nearly so clear and obtainable as the Nuremberg Tribunal's, despite the numerous comparisons.¹⁶¹

157. *But see "Realistic" Prospect of Trying Milosevic for War Crimes*, AFX (AP), July 12, 1999, at http://www.lexis.com/research/retrieve/frames?m=id792a71cdfd9b4704d81cb338c4cc08+_fmtstr=FULL+docum=1+_startdoc=1+_startchk=1+wchp=dGLSIV_ISIb2+_md5=a3fed492866e69254783f68a6e4a214. "Asked about chances of actually putting Milosevic on trial, [prosecutor Louis] Arbour said: 'I think it is very realistic. The question is when and how—that I cannot tell you, but I believe that we have set in motion a process that is completely irreversible.'" *Id.*

158. Elisaveta Konstantinova, *Yugoslavia to Form Own War Crimes Body—Minster*, Jan. 27, 2001, http://dailynews.yahoo.com/h/nm/20010125/wl/yugoslavia_warcrimes_bulgaria_dc_1.html.

159. *Bosnians Plead Not Guilty on Killing, Rape Charges*, AGENCE-FRANCE PRESSE, December 29, 1999, http://www.lexis.com/research/retrieve/frames?_mfet2d6e6e099682e668088cd3722cc10+_fmtstr=FULL+docnum+3+_startdoc=1+_startchk=1+wchp=dGLSIV-IsIb2+_mds=87259dfde0333991a2d6364be7c1c297.

160. *Genocide Trial of Bosnian Serb General Opens, Europe's Worst Atrocity Since World War II, Prosecutor Says*, March 13, 2000, at <http://www.cnn.com/2000/WORLD/europe/03/13/yugo.warcrimes/>. (copy on file with the Vanderbilt Journal of Transnational Law).

161. *See* Charles Madigan & Colin McMahon, *A Slow, Painful Quest for Justice*, CHI. TRIB., Sept. 7, 1999, at 1. Michail Wladimiroff, defense counsel for several tribunal cases, who supports the mission of the tribunal, said:

Nothing will happen in Kosovo. There is an effort to bring in foreign lawyers, prosecutors and judges to run cases on a local basis . . . but I really have my doubts about whether it will be successful They won't be able to do it, because there is no clear victory In normal times, if there is a killing, you can go deep down to the bottom and go after the little ones, but after a war you simply cannot do that In war we have licensed killers It changes everything.

Id.

2. International Criminal Tribunal for Rwanda (ICTR)

Rwanda presents perhaps the clearest case of genocide since the Holocaust.¹⁶² On April 6, 1994, the population of Rwanda was approximately eight million, of which about eighty-five percent were Hutus and fourteen percent were Tutsis.¹⁶³ From April to July 1994 somewhere between 500,000 and 800,000 were killed, most of them Tutsis.¹⁶⁴

The origins of the conflict, like those in the former Yugoslavia, go back several centuries. In precolonial times, the aristocratic Tutsi minority ruled, and later, German colonialists ruled the region through Tutsi royalty.¹⁶⁵ The Belgians took over after the First World War and established an "apartheid" system based on Tutsi superiority and patrilineal descent, despite the widespread practice of intermarriage among Hutus and Tutsis.¹⁶⁶ As a result, tribal membership became more "rigid."¹⁶⁷ After independence in 1962 the Hutu majority dominated Rwandan politics and forced thousands of Tutsis into exile, often in Uganda.¹⁶⁸ General Habyarimana came to power in 1973 and prohibited Tutsis from holding positions of leadership; all citizens were forced to carry ethnic identity cards.¹⁶⁹ After an attack on Rwanda by Tutsi exiles called the Rwandan Patriotic Front (RPF), Hutu nationalists intensified their attacks against Tutsis, killing as many as 2,000 from 1990 to 1993.¹⁷⁰ Despite French military assistance to the Hutus,¹⁷¹ Habyarimana was eventually forced to agree to share power with the Tutsis. He and his cabinet, however, resisted this prospect by exploiting ethnic hatred and planning mass murder.¹⁷² The Rwandan government trained "Hutu militia" in methods of extermination, compiled lists of Tutsis, and distributed firearms and machetes.¹⁷³

The death of President Habyarimana sparked a rampage of killing seldom matched this century.¹⁷⁴ Immediately following the

162. Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 365 (1999).

163. Magnarella, *supra* note 98, at 519.

164. Alvarez, *supra* note 162, at n.10.

165. See 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA* 48-49 (1995).

166. *Id.* at 48-49 n.223. Rwanda is approximately sixty-five percent Catholic, nine percent Protestant, one percent Muslim, and twenty-five percent indigenous religions, but differences in religion apparently did not influence the genocide. *Id.*

167. *Id.* at 48-49.

168. See Magnarella, *supra* note 98, at 519-20.

169. *Id.*

170. *Id.*

171. See MORRIS & SCHARF, *supra* note 165, at 52-53.

172. See *id.* at 53-55.

173. *Id.* at 52-53.

174. See *id.* at 53-59.

plane crash, Hutu extremists in the army and militia implemented the plans to exterminate the Tutsis, and the moderate Hutus who would oppose such action.¹⁷⁵ They began by assassinating all moderate members of the cabinet, including the prime minister.¹⁷⁶ They erected barricades and conducted a “systematic slaughter” by checking ethnic identification cards.¹⁷⁷ Whether on the street, in the hospital, at school, or in a church, Tutsis were murdered mercilessly.¹⁷⁸

The planners of the genocide allegedly included the widow of General Habyarimana as well as the leader of Habyarimana’s party,¹⁷⁹ the president of the interim government,¹⁸⁰ the prime minister of the interim government,¹⁸¹ and the ministers of justice and defense.¹⁸² The operators of radio stations and newspapers, often friends or members of the Habyarimana family, were also implicated as planners and leaders of the genocide.¹⁸³ The implementers included thousands of Hutus at all levels of society, in and out of the military and government.¹⁸⁴ Considering the number of army officers and civic officials that actively participated, it is impossible to conclude that the genocide was not planned at the highest levels of the governing party.¹⁸⁵

Not unlike the situation in the Balkans, the United Nations Security Council’s actions did nothing to stop the carnage.¹⁸⁶ Despite the Secretary-General’s recommendations to increase the peace-keeping force, the Security Council voted to reduce the force from 1,515 to 270.¹⁸⁷ A few months later, however, the Security Council authorized the French to send troops to establish a “humanitarian protected zone” in southeast Rwanda, but the French troops did not prevent the Hutus from continuing the slaughter; the Hutus even

175. *See id.* at 53-54.

176. MORRIS & SHARF, *supra* note 165, at 54.

177. *Id.* at 54.

178. *See id.* at 54-55.

179. Agathe Habyarimana is General Habyarimana’s widow, and Matthieu Ndirumpatse was the leader of Habyarimana’s political party. *See id.* at 55.

180. Theodore Sindikubwabo was the president of the interim government. *See id.*

181. Jean Kambanda. *See id.*

182. Agnes Ntamabyariro and Augustin Bizimana, respectively. *See id.* at 55-56.

183. *See id.* at 56.

184. *See* MORRIS & SHARF, *supra* note 165, at 55-58.

185. *See id.* at 57-58.

186. Karen MacGregor, *Survivors Sue UN for ‘Complicity’ in Rwanda Genocide*, *Independent News*, January 11, 2000, at <http://www.independent.co.uk/news/world/Al.../Rwanda110100.shtml> (copy on file with the Vanderbilt Journal of Transnational Law).

187. MORRIS & SCHARF, *supra* note 165, at 59-60.

broadcast genocidal hatred over the radio from within the zone.¹⁸⁸ Once again, the nations which possibly possessed the military capability to intervene refused to act.¹⁸⁹

After about one hundred days of unspeakable bloodshed, the Hutu extremist government was overthrown by the army of Tutsi exiles, the RPF.¹⁹⁰ They formed a new government on July 18, 1994, and called it the Rwanda Unity Government. Hutus and Tutsis participated.¹⁹¹ Though the Tutsi exiles had been first to call for an international criminal tribunal when the genocide began,¹⁹² once in power the new coalition government opposed such a tribunal until it realized that the worst culprits of the genocide had fled Rwanda and would be free from Rwandan prosecution.¹⁹³ Moreover, the Rwandan justice system was nearly destroyed, thus undermining domestic prosecutions of the thousands of murderers still in Rwanda.¹⁹⁴

In a process not unlike the one that created the ICTY, the Security Council created the ad hoc ICTR.¹⁹⁵ Several points of tension between the ICTR and the Rwandan government nonetheless remain. First, the ICTR is controlled by foreigners but pursues justice for crimes committed in Rwanda and adjacent countries.¹⁹⁶ The Rwandans naturally feel a loss of control of their own destiny and irritation that convicted killers will not get the death penalty, but

188. *Id.* at 60-61.

189. It is quite debatable if any power could have acted quickly enough to save most of the lives lost. See Mark Weisburd, *International Law and the Problem of Evil*, 34 VAND. J. TRANSNAT'L L. 225, 239-40 nn.74-84 (2001). According to Weisburd's analysis, it would have been unlikely that Western intelligence could have confirmed the fact of the ongoing genocide before April 20, though the genocide began on April 7. *Id.* It is doubtful that a significant military force could have been operational in Rwanda before mid-May because military jet transports require facilities beyond the capacities of Rwanda's airports. *Id.* Thus, Weisburd argues that the success of a military intervention was far from certain and would have been too tardy to prevent most of the bloodshed. *Id.*

190. The fact that the RPF fought its way to power is remarkable in that it shows the military prowess of the Hutu extremists to have been too little to stop a determined foreign intervention by American or British soldiers. *Id.* The history of the century is full of examples of seemingly short and simple interventions that became military and political defeats for the superior powers—Somalia, Lebanon, Afghanistan, Vietnam, the Bay of Pigs, and the Suez Canal. *Id.* Air-drops are especially risky and often result in significant casualties from accidents as well as from enemy fire. *Id.* Military leaders are understandably reluctant to risk their best fighting units on humanitarian missions in which the only logistical support must be by air. *Id.*

191. See Magnarella, *supra* note 98, at 520.

192. See MORRIS & SCHARF, *supra* note 165, at 60-62.

193. See *id.* at 66-67.

194. See *id.*

195. See generally Payam Akhavan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 AM. J. INT'L L. 501 (1996); Paul J. Magnarella, *Expanding the Frontiers of Humanitarian Law: The International Criminal Tribunal for Rwanda*, 9 FLA. J. INT'L L. 421 (1994).

196. See MORRIS & SCHARF, *supra* note 165, at 68.

rather, will serve their time in "some posh facility" in Europe.¹⁹⁷ Secondly, the ICTR, like the ICTY, took years to begin its first trial, and despite setting some impressive precedents, only a handful of the defendants have been prosecuted.¹⁹⁸

Two cases in particular deserve mention as milestones in international law. In *Prosecutor v. Akayesu*,¹⁹⁹ an international criminal tribunal tried and convicted an individual for genocide and crimes of sexual violence. The tribunal defined rape, listed as a crime against humanity under the ICTR statute, and applied its definition in a human rights context.²⁰⁰ In *Prosecutor v. Kambanda*,²⁰¹ the ex-premier of Rwanda, Jean Kambanda, became "the first person in history to accept responsibility for genocide before an international court."²⁰² Thus, the ICTR, too slow for the demands of justice and too small for the task of punishing a massive government-mandated genocide, has nonetheless set important precedents in international criminal law.

III. THE ESTABLISHMENT OF THE INTERNATIONAL CRIMINAL COURT

The ICTY and ICTR, despite their flaws, provided the impetus for the creation of a permanent international criminal court.²⁰³ The inefficiency of an ad hoc tribunal to bring to justice even the worst offenders was demonstrated by the tremendous cost of the Tadic trial²⁰⁴ and the length of time necessary to negotiate and implement the ICTR Statute.²⁰⁵ A permanent international criminal court was contemplated at the end of the First World War and again after Nuremberg, but was shelved due to Cold War politics until the fall of the Berlin Wall in 1989.²⁰⁶ The end of bipolar geopolitics and the

197. *Id.* Capital punishment is practiced under Rwandan law but prohibited under Article 23 of the ICTR Statute. Rome Statute, *supra* note 8, art. 23.

198. *Id.*

199. *Akayesu*, Case No. ICTR 96-4-T (Sept. 2, 1998), available at <http://www.ictr.org/english/judgments/akayesu.html>.

200. *Id.*; see also Diane Marie Amann, *International Decision: Prosecutor v. Akayesu, Case ICTR-96-4-T. International Criminal Tribunal for Rwanda*, Sept. 2, 1998, 93 AM. J. INT'L L. 195, 195-96 (1999). The classification of rape as a human rights violation has received considerable attention. See generally Kelly D. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 AM. J. INT'L L. 97 (1999).

201. *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S (Sept. 4, 1998), available at <http://www.ictr.org/english/judgments/kambanda.html>.

202. Magnarella, *supra* note 98, at 518.

203. See Sheffer, *supra* note 14, at 13.

204. See SCHARF, *supra* note 50, at 80-84. The cost of the Tadic trial alone was approximately \$20 million. *Id.* at 224.

205. See MORRIS & SCHARF, *supra* note 165, at 67-72.

206. See Mahnouch H. Arsanjani, *Developments in International Criminal Law: The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22, 22 (1999).

experience of international cooperation during the Persian Gulf War in 1991 opened fresh opportunities in human rights law. Neither the crisis in Yugoslavia nor the genocide in Rwanda could be blamed on the Soviet Union, and the trials before the ICTY and ICTR brought hope that a little deterrence by the powerful and free may spare the blood of the weak.²⁰⁷

During the summer of 1998 delegates from most of the world's nations gathered in Rome to negotiate a statute to create a permanent international criminal court.²⁰⁸ The conference concluded with the adoption of what is now called the Rome Statute of the ICC.²⁰⁹ By an unrecorded vote, 120 nations were in favor, 7 opposed, and 21 abstained.²¹⁰ The United States stated publicly that it opposed the statute as written,²¹¹ while France, Britain, and Russia indicated their support.²¹²

While there is a general consensus among international lawyers that a permanent international criminal court would be useful, "the real issue is how it will work"²¹³ an issue that consumed most of the attention of the Rome Conference.²¹⁴ The most debated provisions of the statute included: (1) the crimes under jurisdiction of the court, (2) the definitions of those crimes, (3) and the independence of the office of prosecutor.²¹⁵ Less debated provisions, but still vital to the prestige and success of the court include the general obligation of

207. See SCHARF, *supra* note 50, at 220.

208. Arsanjani, *supra* note 206, at 22.

209. See *id.*

210. *Id.*

211. On December 31, 2000, the United States signed the Rome Statute. President Clinton maintained that the United States remains opposed to the treaty as written, but that the United States signed the treaty in order to be allowed to participate in further negotiations over its procedures and rules of evidence. If the United States had not signed by the end of the year 2000, it would have been barred from these negotiations. As of this writing, only twenty-seven of the sixty nations required to bring the ICC into being have ratified the Rome Statute. Signing costs little; ratification is what matters. It is doubtful that the U.S. Senate will ratify the Rome Statute in the foreseeable future because of widespread opposition. See Lawrence L. Knutson, *Clinton Supports War Crimes Court*, WASH. POST, December 31, 2000, http://www.washingtonpost.com/wp/srv/aponline/20001231/aponline212301_000.htm.

212. Arsanjani, *supra* note 206, at 22; Charney, *supra* note 4, at 454. Of the seven unrecorded votes against the statute, only the United States made its vote public, and its reservations are textual rather than conceptual. Charney, *supra* note 4, at 454. The other likely opposed countries were China, Israel, Libya, and Iraq. *Id.*

213. Deming, *supra* note 95, at 421.

214. See Philippe Kirsch & John T. Holmes, *Developments in International Criminal Law: The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 AM. J. INT'L L. 2, 3-4 (1999).

215. Arsanjani, *supra* note 206, at 25-27.

nations to cooperate with the investigations and indictments of the court and the rules of procedure and evidence.²¹⁶

The jurisdiction of the ICC is "over persons for the most serious crimes of international concern . . . and complementary to national criminal jurisdictions."²¹⁷ In other words, the ICC's jurisdiction is concurrent unless a nation cannot or will not cooperate.²¹⁸ These serious crimes include the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.²¹⁹ Several delegations strongly advocated the inclusion of drug-trafficking and terrorism in the list of crimes, but to no avail.²²⁰ The crime of aggression was included, despite the lack of agreement on its definition.²²¹

The Rome Statute can and does contain substantive law,²²² including definitions of genocide, crimes against humanity, and war crimes²²³ because the ICC is the creation of international treaty, not an ad hoc arm of the Security Council. In this way, international criminal law, which first developed *ex post facto* (at least to some extent) at Nuremberg,²²⁴ is becoming positive law.²²⁵ Genocide is the shortest of the three articles, and because of its *mens rea* requirement, it remains most difficult to prove.²²⁶ The definition of crimes against humanity reflects the recent interpretation by the ICTY eliminating the nexus between armed conflict and crimes against humanity.²²⁷ Crimes against humanity include murder,

216. See Charney, *supra* note 4, at 463. "Without custody of the accused or the necessary evidence, convictions will be impossible. To become an effective institution, the ICC will need strong and widespread international support so that it can build a record of success and credibility and thus establish its legitimacy." *Id.*

217. Rome Statute, *supra* note 8, art. 1.

218. Arsanjani, *supra* note 206, at 24-25; Rome Statute, *supra* note 8, art. 17.

219. Rome Statute, *supra* note 8, art. 5.

220. See Kirsch & Holmes, *supra* note 214, at 6.

221. See *id.*

222. But see *id.* at 7, n.19 (claiming that the purpose of the statute was "not to create new substantive law, but only to include crimes already prohibited under international law.>").

223. Rome Statute, *supra* note 8, arts. 6-8. The Security Council cannot create substantive law; it can merely establish a tribunal such as the ICTY and ICTR to enforce existing laws. See generally UN Charter, arts. 23-51.

224. See TAYLOR, *supra* note 10, at 635-36.

225. See Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT'L L. 302, 308-09 (1999).

226. See Press Release, Goran Jelasic Sentenced to 40 Years Imprisonment for Crimes Against Humanity and War Crimes, December 14, 1999, <http://www.un.org/icty/pressreal/p454-e.htm>. Jelasic pled guilty to 34 crimes, but the final count, genocide, went to trial, and Jelasic was acquitted because the prosecution failed to prove an intent to destroy an ethnic group, in whole or in part. *Id.*

227. See Hwang, *supra* note 2, at 501; William J. Fenrick, *Should Crimes Against Humanity Replace War Crimes?*, 37 COLUM. J. TRANSNAT'L L. 767 (1999).

extermination, enslavement, deportation, unlawful imprisonment, torture, rape and sexual violence, persecution, enforced disappearance of persons, apartheid, and other inhumane acts.²²⁸ Regarding war crimes, the Rome Statute largely reiterates the definitions of the Geneva Conventions.²²⁹

Given the amount of text dedicated to genocide, crimes against humanity, and war crimes, the lack of an article defining "aggression" is conspicuous. Characterizing aggressive war as a crime is what Justice Jackson considered to be the most important precedent of the Nuremberg trials.²³⁰ A definition of aggressive war, however, was not agreed upon at Rome; indeed, even the best definition of aggressive war might be subjectively exploited by propagandists from any power seeking ICC prosecutions against its enemies.²³¹ As a result of this omission, the United States and other nations fear that the ICC might impair controversial foreign policy judgments with the threat of criminal indictments, thereby compromising national interests.²³²

With the crime of aggressive war left undefined, the independence of the ICC prosecutor becomes an even more crucial issue. The nations at the Rome Conference fell roughly into three groups, with obvious exceptions and overlaps. The largest group favored a strong court independent of the Security Council.²³³ The second group consisted of the permanent members of the Security Council, and this group sought a strong role for the Security Council over the jurisdiction of the ICC as well as the exclusion of nuclear weapons from the list of weapons prohibited by the statute.²³⁴ The third group was hostile to the Security Council, insistent that nuclear weapons be prohibited in the statute, and also generally in favor in a court of restricted powers.²³⁵

228. See Rome Statute, *supra* note 8, art. 7.

229. See *id.* art. 8, para. 2(a).

230. See Statement by Robert Jackson, Nov. 21, 1945, 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 155 (1949). Jackson stated near the conclusion of his remarks: "The refuge of the defendants can be only their hope that international law will lag so far behind the moral sense of mankind that conduct which is crime in the moral sense must be regarded as innocent in law." *Id.*

231. See Cara Levy Rodriguez, Note, *Slaying the Monster: Why the United States Should Not Support the Rome Treaty*, 14 AM. U. INT'L L. REV. 805, 828-32 (1999).

232. See Charney, *supra* note 4, at 463; Rodriguez, *supra* note 231, at 831-32.

233. See Kirsch and Holmes, *supra* note 214, at 4. The United Kingdom joined this group after the election of the Labour government. *Id.*

234. See *id.* The permanent members are the United States, the United Kingdom, France, Russia, and China. *Id.*

235. See *id.* This group included India, Mexico, and Egypt. *Id.* The conference debated a list of weapons to be banned that included chemical and biological weapons, but reached no agreement and codified no such provision. See *id.* at 7-8.

Once the Conference began, it became apparent that a large number of countries favored a prosecutor independent of the Security Council and free to pursue investigations and indictments at discretion.²³⁶ Therefore, the statute creates broad preconditions to the exercise of the ICC's jurisdiction by requiring that "one or more" of the states involved has accepted jurisdiction and is the territory on which the conduct occurred, or the state of which the accused is a national.²³⁷ In short, a nation that has not ratified the treaty may still find its nationals under investigation and international indictment.²³⁸ Moreover, the statute sets three relatively easy triggers for the exercise of jurisdiction: (1) referral to the prosecutor by a state party, (2) referral to the prosecutor by the Security Council, and (3) the prosecutor's discretion.²³⁹ Having created as broad a jurisdiction over the four enumerated crimes and an independent office of prosecutor, the statute allows a state to opt out from granting jurisdiction over war crimes for the limited period of seven years commencing from the date of ratification.²⁴⁰ No other reservations are allowed.²⁴¹

Pivotal to any court, but less controversial at the Rome Conference than subject-matter and personal jurisdiction, are the rules of procedure and evidence. The statute, having its own text as governing law, avoids the *ex post facto* and *nulla crimen sine lege* questions of the Nuremberg and Tokyo tribunals.²⁴² Like the ICTY and ICTR, the ICC may protect its victims by conducting proceedings in camera or by electronic means.²⁴³ Likewise, the Trial Chamber has three judges and the Appeals Chamber five, with decision by majority vote.²⁴⁴ Consistent with international tribunals since Nuremberg, the ICC follows European civil law rules on the admissibility of evidence, "taking into account, *inter alia*, the probative value of the evidence and any prejudice" that such evidence

236. *See id.* at 8.

237. Rome Statute, *supra* note 8, art. 12.

238. *See* Rodriguez, *supra* note 231, at 834-35.

239. Rome Statute, *supra* note 8, arts. 13, 15. Article 15 authorizes the prosecutor to "initiate investigations proprio motu," that is, on the prosecutor's initiative. *Id.* art. 15, para. 1. Under Article 42 the prosecutor is elected by secret ballot by "an absolute majority of the members of the Assembly of States Parties," as are the deputy prosecutors. *Id.* art. 42, para. 4. A prosecutor or deputy prosecutor can be removed under Article 46 only by the same method. *Id.* art. 46, para. 2(b).

240. Kirsch & Holmes, *supra* note 214, at 10-11; Rome Statute, *supra* note 8, art. 124.

241. Rome Statute, *supra* note 8, art. 12.

242. *Id.* arts. 22-24.

243. *Id.* art. 68, para. 2. Use of undisclosed witnesses undermined the credibility of the ICTY during the Tadic trial. *See* SCHARF, *supra* note 50, at 212-13.

244. Rome Statute, *supra* note 8, art. 39.

may cause to a fair trial.²⁴⁵ Besides these divergences from Anglo-American common law, the statute allows the prosecutor as well as the defendant to appeal a verdict.²⁴⁶ Other rules of procedure and evidence are voted upon or amended by a two-third majority of the Assembly of States.²⁴⁷

IV. PREDICTING THE ICC'S EFFECTIVENESS AND IMPROVING THE ROME STATUTE

A. *Factors that Predict an International Criminal Tribunal's Effectiveness*

Volumes have been written about the meanings of the precedents of Nuremberg, but for the purposes of this note, the principles of Nuremberg to be enforced by the ICC include individual criminal accountability under international law for war crimes, crimes against humanity, aggressive war, and genocide, even if the individual acted upon the orders of his superiors, or merely failed to act in his official capacity to stop the crime.²⁴⁸ Unfortunately, the historical circumstances of Nuremberg are not likely to be repeated in a case involving the ICC. Nuremberg was unique, and the factors that allowed for the success of the Nuremberg Tribunal as a court of law, an international precedent, and a means of healing differ with every international trial. Nonetheless, these factors can form a predictive model for the effectiveness of an international criminal court. The factors that determine the effectiveness of an international criminal court include: (1) the degree of physical control exercised by the enforcing powers; (2) the degree of cooperation among the enforcing allies, neighboring countries, and interested parties; and (3) the perceived integrity of the tribunal's procedures.²⁴⁹ These factors will control the effectiveness of any action taken by the ICC prosecutor.

1. Degree of Physical Control Over the Jurisdiction and the Defendants

The first factor, the degree of physical control, is often related to the severity of a state's defeat in war and is well-illustrated by the

245. *Id.* art. 69, para. 4.

246. *Id.* art. 81.

247. *Id.* art. 51, para. 2. The Assembly of States consists of the nations that have ratified the statute. *See id.* art. 2.

248. *See* Timothy Wu & Yong-Sung (Jonathan) Kang, *Criminal Liability For the Actions of Subordinates—The Doctrine of Command Responsibility and Its Analogues in United States Law*, 38 HARV. INT'L L. J. 272, 274-76 (1997).

249. *See supra* note 7 and accompanying text.

four international tribunals since the Second World War.²⁵⁰ Beginning with Nuremberg, the defeat of the Nazis in 1945 was total; the German army was shattered on the battlefield. The joint occupation of the Allied powers was not resisted after the surrender, and Allied control of the sea prevented escape for all but a few of the leading Nazis.²⁵¹ Moreover, German morale was so low that Allied forces soon became more concerned with feeding the civilians than with a possible resumption of armed hostilities.²⁵² If the Germans continued to hate their captors, their hatred was largely impotent, and the Nuremberg Tribunal obtained personal jurisdiction over most of the leading Nazis, at least over those who did not commit suicide.²⁵³

In the Far East, however, the Allied Powers did not break the Japanese will to fight without the consent and national radio broadcast of the Emperor. Despite millions of casualties from battles, disease, malnutrition, fire-bombing, and two atomic bombs, the Japanese preferred to fight until they fell. The war cult of the Emperor could only be broken by the Emperor, and MacArthur and Truman, rather than risk prolonged hostilities and chaos that could be exploited by the Russians, accepted the Japanese surrender on the condition that the Emperor remain head of state.²⁵⁴ The Japanese capitulated on August 15, 1945, but Allied troops did not arrive for two full weeks.²⁵⁵ Despite repeated requests by other Allied powers that the Emperor be tried as a war criminal, MacArthur and Truman agreed that the expediency of preserving the reign of the Emperor outweighed the risks of the resumption of hostilities with a suicidal enemy on his native islands.²⁵⁶ The cult of the Emperor, undermined and amended but not broken, prevented the Allied Powers from obtaining the same degree of physical control over Japan that they had over Germany.

Forty-five years later, the United Nations Security Council created the ICTY without exercising physical control,²⁵⁷ or at least obtaining regional cooperation, over most of its territorial jurisdiction and defendants. The criticism of the ICTY since its inception has been its inability to arrest and try those most responsible for the war

250. *See id.*

251. *See supra* note 38 and accompanying text.

252. *See MCCULLOUGH, supra* note 27, at 406.

253. *See supra* note 38 and accompanying text.

254. SPECTOR, *supra* note 21, at 546-47.

255. BRACKMAN, *supra* note 12, at 39-40.

256. *See id.* at 78.

257. *See* Mark S. Martins, "War Crimes" During Operations Other Than War: Military Doctrine and Law Fifty Years After Nuremberg, 149 MIL. L. REV. 145, 160 (1995).

and atrocities in the Balkans.²⁵⁸ The ICTY's first trial involved a Bosnian Serb foolish enough to immigrate to Germany and get arrested by local police.²⁵⁹ Although the ICTY has convicted several higher officers since the Tadic trial, the lack of physical control by soldiers under the authority of NATO or the United Nations hinders its mission severely. Most conspicuously, indicted officers of both the federal government of Yugoslavia and the Bosnian Serb government continue to flaunt the ICTY's weakness by making public appearances, sometimes within sight of United Nations or NATO troops.²⁶⁰

In Rwanda, the Tutsi-led Rwandan Unity Government replaced the genocidal regime of Hutu extremists after a brief war whose casualties pale in number to those of the genocide.²⁶¹ The nation remains physically exhausted and morally devastated from the carnage, and many of the leading Hutu extremists have fled the country.²⁶² There is no foreign occupation, only a relatively small number of United Nations peace-keeping troops.²⁶³ Therefore, the ICTR depends largely on the cooperation of the Rwandan Unity Government, Rwanda's neighbors, and other countries to enforce service of its criminal indictments.

2. Degree of Cooperation Among the Enforcing Powers

The most crucial factor in most cases that will come before the ICC will be the degree of cooperation among the enforcing powers because unconditional surrender followed by prolonged and intensive foreign occupation is rare. Unfortunately for the ICC, international cooperation will vary according to the case and the nations involved. Geography, history, domestic politics, traditional alliances, and conflicts of interests mean that the ICC will sometimes be powerless to investigate or to serve its indictments.

Nuremberg, for instance, was the last major cooperative international effort involving both the United States and Russia until the crest of *détente* during the 1970s.²⁶⁴ The joint prosecution to punish the Nazis ended less than three years before the Berlin Airlift began in the wake of growing Cold War tensions.²⁶⁵ During this brief opportunity, Justice Jackson seized the moment to establish

258. See SCHARF, *supra* note 50, at 222-24.

259. See Brenda J. Hollis, *The Thomas P. Keenan Memorial Lecture: The International Criminal Tribunal for Yugoslavia*, 39 A.F. L. REV. 37, 38 (1996).

260. SCHARF, *supra* note 50, at 224-25.

261. MORRIS & SCHARF, *supra* note 165, at 58, 71 n.356.

262. *Id.* at 58, 703.

263. See generally *id.* at 637-660.

264. See generally MICHAEL B. FROMAN, *THE DEVELOPMENT OF THE IDEA OF DÉTENTE* (1991).

265. MCCULLOUGH, *supra* note 27, at 630-31.

precedents in international law that have seldom been matched.²⁶⁶ The precedent for an international tribunal to prosecute aggressive war and other crimes at Nuremberg was only possible because the Russians, the British, and the French were just as committed to punishing the Nazis as the United States.

Moreover, these same German Nazis were not useful to any of the Big Four. While the Big Four disagreed on how to characterize the crimes of the Nazis and on the methods of bringing justice to the Nazis, they agreed that the Nazi leaders were criminals who should be punished and that German military power must be neutralized.²⁶⁷ If sparing one or several of the Nazis, say Herrmann Goering, would have given political advantage to any one of the Big Four powers, it is probable that the Nuremberg trials would not have had such conclusive results.²⁶⁸ Germany is a powerful and strategically located nation. In 1945 the Big Four agreed on the joint occupation of Germany and the systematic destruction of Nazi power.²⁶⁹ By 1949 the cooperation of the Nuremberg Tribunal would have been impossible.²⁷⁰

It should not be forgotten that there would have been no Nuremberg trials if the United States had persisted in its demand for an independent prosecutor with powers to investigate and indict Allied as well as Axis leaders and combatants. Under the London Agreement, the Americans, British, French, and Russians cooperated to prosecute only one type of defendant: their Axis enemies.²⁷¹ In contrast, the ICC by statute is not limited to specific years, particular places, and designated nationalities.²⁷² Nations that have fought bitter wars in streets and deserts and over mountains and oceans

266. TAYLOR, *supra* note 10, at 634.

267. *See id.* at 634-35.

268. *See* Vahakn N. Dadrian, *The Armenian Genocide and the Legal and Political Issues in the Failure to Prevent or to Punish the Crime*, 29 UWLA. L. REV. 43, 77. In comparing the failure to prosecute the Armenian genocide of the First World War with the success of the prosecution at Nuremberg, Dadrian says: "In Nuremberg, the decisive factor in the quest for such justice was the functional effectiveness of a modicum of a unison among the victors vis-à-vis a vanquished enemy. It was that unison which overwhelmed all other subsidiary issues including the issue of national sovereignty." *Id.*

269. TAYLOR, *supra* note 10, at 639.

270. As noted above, in 1948 the Soviet Union set a blockade around Berlin, necessitating the Berlin Airlift by the United States. MCCULLOUGH, *supra* note 27, at 630-31.

271. LUCAS, *supra* note 35, at 227-230. As the German armies collapsed, military discipline within the Allied armies broke down, and soldiers of the victorious powers committed atrocities, including rape, theft, and even murder. *See id.* If the Rome Statute had been in force, the ICC prosecutor would have had discretion to investigate six years of Allied military operations and possible aggressive intent in Allied diplomacy. *See generally* Rome Statute, *supra* note 8.

272. Rome Statute, *supra* note 8, arts. 104, 111.

will, however, be quite reluctant to open their military and diplomatic records to international scrutiny.

In the Far East, the Allied Powers cooperated in the arrests of leading Japanese officers, but the American political decision to spare the Emperor from prosecution incited lasting dissent among the eleven powers that participated in the Tokyo Tribunal.²⁷³ With eleven powers participating rather than just four, the voice of the Tokyo Tribunal was bound to be more discordant than that of Nuremberg.²⁷⁴ The discord did not necessarily affect the outcomes of the trials, but rather, the dissent among the Allies seriously undermined the credibility of the Tokyo Tribunal.²⁷⁵ It seemed less a court of law rather than carrier of the victors' vengeance and political expediency. In the Far East, the United States needed to settle scores quickly if unevenly in order to stabilize Japan, avoid a suicidal guerrilla war on the home islands, and prevent further communist expansion into Asia.²⁷⁶ United States policy prevailed over the sometimes contrary and dissenting voices of the Allies.²⁷⁷ There was also a historical irony that undermined the credibility of the Tokyo Tribunal; several of the Allied powers on the Tokyo Tribunal had acquired their Asian interests through aggressive war, if not by also committing crimes against humanity and war crimes, and would attempt to continue their colonial policies after the war.²⁷⁸

For the ICTY, international cooperation has not been a given, even to the extent found at the Tokyo Tribunal. So long as there is stalemate in the Balkans, whether peaceful or bloody, national loyalties and diplomatic expediency will hinder, if not prevent, the completion of the ICTY's mission.²⁷⁹ The planners of the bloodshed in Belgrade and the most murderous of the Bosnian Serbs and Serb Kosovars would likely be protected by either their governments or the mountainous terrain and sympathetic locals. Meanwhile, the

273. BRACKMAN, *supra* note 12, at 78, 387-90.

274. *See supra* notes 66, 88-92 and accompanying text.

275. MINEAR, *supra* note 77, at 90-91.

276. SPECTOR, *supra* note 21, at 556.

277. BRACKMAN, *supra* note 12, at 78.

278. The United States granted independence to the Philippines in 1947, but held on to many Pacific islands as new possessions. *See generally* LARRY COLLINGS & DOMINIQUE LAPIERRE, *FREEDOM AT MIDNIGHT* (1995). Great Britain granted independence to India in 1947. The Netherlands and the French lost guerrilla wars in an effort to keep possession of Indonesia and Vietnam respectively. PAUL JOHNSON, *MODERN TIMES: THE WORLD FROM THE TWENTIES TO THE EIGHTIES* 477-80 (1983); STANLEY KARNOW, *VIETNAM: A HISTORY* (1991) 209-14. Russia had fought with Japan over northern Manchuria, Korea, and Sakhalin Island for decades. *See generally* JOHN ALBERT WHITE, *THE DIPLOMACY OF THE RUSSO-JAPANESE WAR* (1964); TSUYOSHI HASEGAWA, *THE NORTHERN TERRITORIES DISPUTE AND RUSSO-JAPANESE RELATIONS, 1697-1985* (1998).

279. *See supra* notes 258-60 and accompanying text.

Security Council powers generally cannot agree on a Balkan policy because of traditional alliances in the region.²⁸⁰ Russia is the ancient ally of Orthodox Serbia in conflicts with both Catholic and Muslim countries,²⁸¹ therefore an invasion of Serbia by NATO forces would have lasting and potentially dangerous repercussions. Russia's support for Serbia, combined with Germany's traditional support for Croatia and America's reluctance to risk military casualties mean that the stalemate will likely last for years, with or without Milosevic. Milosevic and his henchmen had no incentive to resign or retire, much less surrender to NATO or UN authorities because of the ICTY indictments for war crimes. Now that Milosevic is out of power, the ICTY still relies on the new regime in Belgrade to extradite those indicted, or hope that Milosevic and others will either give themselves up or go where NATO soldiers or UN peace-keepers can and will serve warrants. That the ICTY has had any success at all is a tribute to those who have worked tirelessly and creatively to make it a working trial court and to the gradual escalation of NATO involvement on the ground and in the air.

The ICTR has not had as extensive a problem serving its warrants as the ICTY. First, Rwanda suffered not war, but government-sponsored genocide and is not partitioned by political factions.²⁸² Secondly, Rwanda is not the flashpoint for competing world powers, as is Yugoslavia.²⁸³

3. The Perceived Integrity of the Tribunal and Its Procedures

The perception of the justice administered by an international criminal tribunal is just as important to the court's credibility as the verdict in any single case. "Justice must not only be done but also be seen to be done."²⁸⁴ In this way, an international tribunal is less a court of law than an instrument of public outrage tempered by whatever sense of fairness remains. Justice Jackson captured this challenge of history in his opening statement:

We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspirations to do justice.²⁸⁵

280. See generally MARK ALMOND, *EUROPE'S BACKYARD WAR: THE WAR IN THE BALKANS* (1994).

281. See *id.* at 308-16.

282. MORRIS & SCHARF, *supra* note 165, at 704.

283. For a geographical description of Rwanda, see GERARD PRUNIER, *THE RWANDAN CRISIS: HISTORY OF GENOCIDE 1-4* (1995).

284. Bass, *supra* note 19, at 2112.

285. Statement by Robert Jackson, *supra* note 230, at 101.

Nuremberg, more specifically Justice Jackson's opening statement, remain the pinnacle moment in international criminal law because of the lasting perception that justice was done.²⁸⁶ The Nuremberg lawyers and judges made mistakes, and the convictions on some counts are questionable.²⁸⁷ Nonetheless, the weight of the documentary evidence combined with Justice Jackson's eloquence and integrity created credibility not carried by any international tribunal since.²⁸⁸ For any international criminal court, the challenge is to appear to be noble people fighting the crimes of the wicked, but it is just as easy to appear to be bitter and vengeful people dwarfed by the heinous acts of the wicked.

In any jurisdiction litigating issues of first impression, there is the need to balance the demands of public policy with existing law, and sometimes even to defer to natural law.²⁸⁹ Indeed, in a theoretical sense, the three-way conflict of legal realism, legal positivism, and natural law is present in any case of first impression.²⁹⁰ An international criminal tribunal often must go where the law has never been. At Nuremberg, the Big Four powers

286. See TAYLOR, *supra* note 10, at 167.

287. *Id.* at 631-32.

288. See Henry T. King & Theodore C. Theofrastous, *From Nuremberg to Rome: A Step Backward for U.S. Foreign Policy*, 31 CASE W. RES. J. INT'L L. 47, 49-50 (1999).

289. "Natural law" here is used in the sense that law does not exist in a moral vacuum, and that law is not simply what the strong say it is. See PLATO, THE REPUBLIC, I. 338 (Benjamin Jowett trans. 1991) (Thrasymachus argues to Socrates: "I proclaim that justice is nothing else than the interest of the stronger." Socrates' rebuttal constitutes the rest of the work.) In this sense, genocide is wrong not only because public policy at the moment disfavors it and statute prohibits it, but also because it is presumable that reasonable people should reach this conclusion naturally. Charney, *supra* note 4, at 453 (referring to "the law's natural-justice goals"); BRACKMAN, *supra* note 12, at 224; see also Russell Kirk, *Natural Law and the Constitution of the United States*, 69 NOTRE DAME L. REV. 1035, 1036 (1994) ("Objectively speaking, natural law, as a term of politics and jurisprudence, may be defined as a loosely-knit body of rules of action prescribed by an authority superior to the state. These rules (according to several different schools of natural law and natural rights speculation) are derived from divine commandment, from right reason with which man is endowed by his Creator, from the nature of mankind empirically regarded, from the abstract Reason of the Enlightenment, or from the long experience of humankind in community").

290. "Legal realism" here refers to the critique that judges "actually decide cases" not by adherence to doctrine but "according to their own political or moral tastes, then choose an appropriate legal rule as a rationalization." RONALD DWORKIN, TAKING RIGHTS SERIOUSLY xi, 3 (1977). "Legal positivism," according to Dworkin, "rejects the idea that legal rights can pre-exist any form of legislation." *Id.* Legal realists and legal positivists often deny the existence of natural law. See also Andrews, *supra* note 90 at 481 (explaining that international law is a product of natural law, but that current attempts to create international courts with coercive powers is an acceptance of Justinian, or legal positivist, principles into an area of law that has always rejected legal positivist principles).

appear to have pushed beyond the limits of positive law and regular procedures without offending decency and justice.

At Tokyo, in contrast, the tribunal failed to match the credibility of Nuremberg, and this failure illustrates one of the pitfalls of an international tribunal. At Tokyo, the prosecution pushed the rules of evidence to the limit in order to convict Hirota and Kido of the crime of aggressive war, and by the time the trial was complete, it was obvious that the same evidence and testimony could also convict the absent Emperor.²⁹¹ Hirota was executed and Kido was sentenced to life in prison, but the Emperor remained above the law.

Perhaps a chief prosecutor of greater stature and eloquence could have overcome the general feeling that the Tokyo tribunal was a tool for political expediency. Joseph Keenan was a seasoned politician and capable litigator, but he was no Robert Jackson.²⁹² Once the Supreme Commander declared the Emperor off-limits of the Tribunal, Keenan's hands were tied on the most critical war crimes issue. He did his best, but could not avoid the impression of being the instrument of revenge.²⁹³

The ICTY's credibility falters mostly by the defendants it fails to arrest, but perhaps its second worst credibility problem is its lack of speed. At Nuremberg, the prosecution presented most of its case by submitting documents.²⁹⁴ The defense witnesses consumed most of the trial time, but the documents were damning and conclusive.²⁹⁵ The ICTY, in contrast, must prosecute most cases using dozens of witnesses and relatively few documents.²⁹⁶ The defense counters with multiple witnesses.²⁹⁷ The trials are often lengthy, and the defendants must then wait months for a judgment.²⁹⁸ In contrast, at both Nuremberg and Tokyo, the defendants were tried together and the sentences were issued on the same day.²⁹⁹ The effect was far more dramatic.

Thirdly, even some of the ICTY's most enthusiastic advocates admit that its dependence on conflicting testimony undermines the credibility of its verdicts.³⁰⁰ The civil law rules of evidence are broad, the rationale being that judges trained in the law, unlike common law

291. MINEAR, *supra* note 77, at 115.

292. See BRACKMAN, *supra* note 12, at 54-55.

293. By the time the Tokyo trials began, public attention had long been glued on Nuremberg and also on the many trials of Japanese war criminals held in the Philippines and other countries, most famously, the trial of General Yamashita. See *id.* at 223-24.

294. TAYLOR, *supra* note 10, at 172-76.

295. See *supra* note 42 and accompanying text.

296. See SCHARF, *supra* note 50, at 117.

297. See *id.* at 176.

298. See *id.* at 176-77.

299. TAYLOR, *supra* note 10, at 598-99; BRACKMAN, *supra* note 12, at 372-86.

300. See SCHARF, *supra* note 50, at 212.

juries, can weigh evidence on the whole, even hearsay evidence, and weigh it justly.³⁰¹ The impression in common law countries, however, is that the rights of the accused are violated by the evidentiary rules.³⁰² Many of the convictions and sentences would not have been obtained under common law procedures.³⁰³

Fourthly, because the ICTY cannot usually serve its indictments, the prosecutor's discretion comes under frequent criticism—Richard Goldstone's choice to prosecute Tadic, an underling, as the ICTY's first trial, and Louise Arbour's decision to announce the indictment of Milosevic during the NATO bombing campaign of 1999.³⁰⁴

The ICTR may seem more successful than the ICTY because it has already convicted some of the major players in the Rwandan genocide, namely Kambanda and Akayesu.³⁰⁵ Moreover, the conviction of Akayesu on a genocide charge was unprecedented in an international court. Nonetheless, any credibility of the ICTR superior to the ICTY is mainly due to the ICTR's ability to gain jurisdiction over those it indicts.³⁰⁶

Rwanda is, however, remote and strategically unimportant and so will never receive the sort of attention given the Nazis at Nuremberg. The nations of the Security Council did not fire a shot in anger while the Hutus massacred the Tutsis, and arguably, the Security Council only created the ICTR, and for that matter, the ICTY, to save face after its inaction and apparent impotence. The remote location of Rwanda and its Tribunal contribute to the credibility problems. Arusha, Tanzania, site of the ICTR, is more than 400 miles (640 kilometers) from Kigali, the capital of Rwanda, and even farther away from the world's media centers. The distance

301. MINEAR, *supra* note 77, at 119.

302. See generally Rod Dixon, *Prosecuting International Crimes, An Inside View: Developing International Rules of Evidence for the Yugoslav and Rwanda Tribunals*, 7 *TRANSNAT'L L. & CONTEMP. PROBS.* 81 (1997).

303. See, e.g., Sienho Yee, *The Erdemovic Sentencing Judgment: A Questionable Milestone for the International Criminal Tribunal for the Former Yugoslavia*, 26 *GA. J. INT'L & COMP. L.* 263 (1997); see also RICHARD GOLDSTONE, *FOR HUMANITY: REFLECTIONS OF A WAR CRIMES INVESTIGATOR* 89 (2000).

304. SCHARF, *supra* note 50, at 100.

305. The ICTR also has its procedural problems that undermine its credibility. For instance, those captured and indicted tend to prefer French and Canadian attorneys, so much so that the ICTR announced in October 1998 that it would refrain from appointing French and Canadian attorneys in the interest of geographic balance. Christine Poulon & Mair McCafferty, *News From the International War Crimes Tribunals*, 6 *HUM. RTS. BR.* 23 (1999). The announcement provoked a hunger strike from some of the prisoners. *Id.* at 3, 23.

306. See *Rewards Offered for Leads About Rwandan Fugitive*, *WASH. POST*, Jan. 5, 2001, http://www.washingtonpost.com/wp-srv/aponline/20010105/aponline151250_000.htm. Of the fifty-three publicly indicted Rwandans, forty-four are in the custody of the ICTR. *Id.* The United States has offered an award of \$5,000,000 for information leading to the transfer or conviction of any of nine fugitives indicted by the ICTR but still at large. *Id.*

is so great that most of the world and even some of the survivors of the genocide may not know that trials are pending. In contrast, the Nuremberg trials commanded the world's attention and took place in a city famous for its Nazi activities. Moreover, the Allies "went to considerable lengths to explain to the German public exactly what the Nazi leadership stood accused of."³⁰⁷ The ICTR should not be blamed for the fact that many people around the world, and perhaps even in Rwanda, are not aware of its existence. The point here is that international publicity is a major factor in the credibility of an international court, not only as a legitimate instrument of the rule of law, but also as a deterrent to similar crimes.

Moreover, the ICTR can only try a fraction of the criminals. More than 140,000 are in custody for crimes against the Tutsis, a number a poor country can hardly sustain in its court systems or jails.³⁰⁸ In many ways, the tragedy of Rwanda dwarfs any legal remedy: "A perfect genocide—in which the rule of law has not been violated, because murder was the law—shatters the logic of criminal justice by redefining deviance."³⁰⁹

B. Predicting the ICC's Effectiveness

Historically, these three predictive factors, the degree of control by the enforcing powers, the degree of cooperation among the interested powers, and the integrity and credibility of the court, determine the general success of an international criminal tribunal. These factors are likely to determine the success of the ICC in a given conflict and as a deterrent. Perhaps the ICC has the potential to develop the sort of precedent and legitimacy that might deter violations of human rights, and its status as a permanent court will eliminate the long lag times needed to establish ad hoc tribunals. Nonetheless, its effectiveness will be case-specific and based on the above factors.

1. Three Recent Conflicts: Three Hypotheticals of the ICC's Effectiveness

Using recent human rights violations as hypotheticals, the ICC can expect mix results. For instance, if the ICC had been in place in 1990 it probably would have served the situation in Rwanda better

307. Poulon & McCafferty, *supra* note 305, at 23; *see also* RICHARD L. MERRITT, *DEMOCRACY IMPOSED: U.S. OCCUPATION POLICY AND THE GERMAN PUBLIC, 1945-49* 151 (1995). The Americans distributed literature, filmed documentaries, broadcast on radio, and even marched German citizens through the death camps. *Id.*

308. Alvarez, *supra* note 162, at 475-76. Alvarez uses critical race theory to question the ICTR's jurisdictional primacy and prefers the ICC's completeness jurisdictional principle. *Id.*

309. Nicholas Confessore, *Rwanda, Kosovo, and the Limits of Justice*, AM. PROSPECT, July-Aug. 1999, at 90.

than the ICTR because the first trials would have taken place two to three years earlier.³¹⁰ A permanent ICC would have improved upon the lagging speed of the ICTY trials as well.³¹¹ Nonetheless, crimes such as those committed by Saddam Hussein in Iraq, Kuwait, and Israel are probably beyond a judicial remedy. Crimes committed by a Security Council power such as China are most likely untouchable by the ICC or any other court.³¹²

The greatest challenge for the ICTR was that the swiftness of the violence and the sheer numbers of killers and killed created legions of criminal defendants. After genocidal bloodshed, the rebuilding of a country requires a rapid international response, and if the ICC had been in place, it could have spared the Rwandans months of waiting for the negotiations of the jurisdiction of the ICTR and the first trials. The ICC and the Rwandan Unity Government could have negotiated and divided the vast caseload according to urgency and magnitude. While the genocide was still news, the ICC could have been issuing warrants and serving indictments. The Rwandan Unity Government could have immediately shipped out the leading suspects to the ICC sitting at the Hague. Especially for the most notorious planners and implementers of the genocide, the ICC would have been a suitable forum and may have commanded the world's attention.

Cooperation with international authorities is less of a problem in Rwanda than in Yugoslavia, but some points of controversy remain. Rwandan law in many cases under trial would issue a death sentence, but neither the ICC nor the ICTR can do so under its statute. Here the credibility of the ICC is key, because the Rwandans would be more likely to trust the ICC's justice, even if it were not as harsh, if it were swift. Nonetheless, the ICC will not be seen as a credible court in many cultures if it will not take "an eye for an eye."

Perhaps the ICC would be most effective in a situation such as Rwanda's. Rwanda is a weak nation remote from the world's great powers and has little strategic importance. Rwanda suffered a sudden outbreak of violence from within that shattered its own government and courts. The genocidal regime collapsed suddenly, and the new coalition is too weak to punish all the criminals and rebuild the country. Here the ICC, if properly led on the bench and in the office of prosecutor, may fulfill its promise and mandate because there would be little challenge to its physical control of the suspects, adequate international cooperation, and the stature necessary to gain the attention and respect of the world.

In the case of Yugoslavia, however, it is questionable if the ICC would have improved on the work of the ICTY in any way other than

310. MORRIS & SCHARF, *supra* note 165, at 707-08.

311. See Sheffer, *supra* note 14, at 13.

312. See Pejic, *supra* note 147, at 860.

the length of the trials held. It can be argued that if the ICC had existed in 1991 it may have deterred Milosevic and the Yugoslav federal government in Belgrade from launching an aggressive war to prevent Croatian, Slovenian, and Bosnian secession. Nevertheless, it is just as likely that the Serb nationalists would not have taken any international authority seriously unless it were backed by assertive ground forces of a major power. The unwillingness of the United States to shed the blood of ground troops in the Balkans combined with the fear that an U.S.-led invasion of Serbia would provoke Russian intervention has thus far given the Serb nationalists relative impunity. Thus, in the former Yugoslavia, the lack of physical control over the territory of the conflict's main instigator severely hinders the success and credibility of any international criminal tribunal, whether the ICTY or the ICC.

Looking at a third hypothetical, Iraq and the Persian Gulf War, the ICC's effectiveness would be limited at best. The United Nations had the military power to drive all the way to Baghdad and seize physical control of Iraq.³¹³ With physical control it would have been possible to destroy Iraq's nuclear and chemical weapons capabilities, prevent further violations of human rights, and arrest many of the leading Iraqis as war criminals, possibly even President Hussein.

For a variety of political reasons, however, the United Nations forces, led by the United States, limited their ground operations to Kuwait and southern Iraq. The United States, wary of casualties, balked at a deeper penetration of Iraq and subsequent occupation in which U.S. soldiers would be exposed to terrorist attacks. Meanwhile, Iraq's Arab neighbors, mostly Sunni Muslims, feared the replacement of Hussein's party in Iraq by radical Shiite Muslims allied with Iran more than they feared Hussein's continuance in power.³¹⁴ As threatening and hostile as Hussein is, he was and is useful to the powers that defeated him, even the United States and Saudi Arabia. Therefore, the United States and the United Nations alliance would rather stand by while Iraq bombs and gases the Kurds and executes its dissenters than intervene in the name of human rights. It is a terrible dilemma, a "Hobson's choice," but it illustrates as well as any recent conflict that the enforcement of international human rights will always be limited by the number of military casualties a nation is willing to take in order to serve a warrant or prevent a crime.

313. See Peter Tsouras et al., *The Ground War*, in *MILITARY LESSONS OF THE GULF WAR* 107 (Bruce W. Watson ed., 1991).

314. John Pimlott, *The International Ramifications*, in *THE GULF WAR ASSESSED* 195 (John Pimlott & Stephen Badsey eds., 1992)

2. Predicting the ICC's Effectiveness as a Deterrent

The ICC's most enthusiastic proponents acknowledge that political realities will often clash with the enforcement of human rights law, but they argue that the ICC's existence as a permanent institution will have meaningful deterring effects.³¹⁵ First, a nation's leaders will now know that a court is in place to try them for human rights violations. While an ad hoc tribunal has no mission beyond its mandate, the ICC is a permanent institution and has power to investigate, indict, and try violators of human rights without several rounds of diplomacy.³¹⁶ Secondly, the ICC's advocates argue that violators of human rights will now know that impunity behind national boundaries cannot be assumed. While Nuremberg, Tokyo, the ICTY, and the ICTR were rare exceptions to the principle of national sovereignty, the jurisdiction of the ICC is very broad and permanent. Thirdly, all nations, even major powers, will now more assertively monitor their own military operations, police, and penal institutions because of the possibility of the international embarrassment of an ICC investigation and trial.

These are strong arguments, but they do not address the most basic problem of the ICC: the ICC can only deter by its credibility as an enforcer of human rights law, but its credibility is dependent upon physical coercion and international cooperation as exercised by powers that view the ICC's interests as their own. Two controversies in the Rome Statute illustrate this basic problem: the lack of agreement on a definition of the crime of aggressive war, and the independence of the office of prosecutor.

The leaders of only two nations have ever been convicted, at least in modern times, of the crime of aggressive war: Germany and Japan.³¹⁷ Of all the defendants at Nuremberg and Tokyo, only five were convicted of the crime of aggressive war alone, and not one of those five was executed.³¹⁸ While the American prosecutors at Nuremberg worked diligently and conscientiously to develop criminal liability for launching an aggressive war, they were unable to win over the French, the British, the Russians, or the United States Supreme Court.³¹⁹ It is problematic if not impossible to divorce

315. Charney, *supra* note 4, at 461-62.

316. *Id.* at 460.

317. See discussions *supra* Part II.A.

318. TAYLOR, *supra* note 10, at 587-95; BRACKMAN, *supra* note 12, at 379.

319. ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 340 (1994). Justice Black believed that the Nuremberg and Tokyo defendants were being tried for *ex post facto* crimes: "If you want to punish people like that, take them out and shoot them." *Id.* Later he wrote, "One of the most evil effects of the affair was, I think, that it diluted the general meaning of 'judicial proceeding.'" *Id.*

aggression from war because in war the best defense is often a good offense.³²⁰

The Nuremberg and Tokyo charters very deliberately allowed prosecution only against members of the Axis powers. Without such a restriction, the Allied Powers would have had plenty of aggressive wars to prosecute among themselves—the Russian invasions of Poland, Finland, and the Baltic states in 1939-40, the American subjugation of the Philippines long before the Japanese attack,³²¹ and centuries of French, Dutch, and British imperialism.³²²

This recitation of wrongs is not an attempt to place the Allies on the same moral plane as the Nazis or to cast blame; it is to illustrate that the worst results of the public policies of the world's most powerful nations are generally beyond public litigation. "Litigation is not an ideal form of social action."³²³ Nuremberg, despite its success as precedent, was brought into being by fifty million deaths and the unconditional surrender of Germany to the most powerful alliance ever forged by a fight against evil. Stalin, Churchill, and Truman did not lead their nations to victory over the Nazis in order to surrender themselves, their advisors, and their soldiers to an international tribunal for war crimes.

Aggressive war, despite the pleadings of Justice Jackson, may be a crime beyond a judicial remedy. The Rome Conference could not define it³²⁴ without implicating the foreign policies of the world's great powers and many of the lesser ones. Moreover, to define the crime of aggressive war is to impugn the legitimate borders of the very powers called to enforce human rights law around the world. What great power has not expanded its borders through aggressive war? For this reason, the ICC statute may not ever define aggressive war, and if it does, the ICC prosecutor will be forced to make a

320. See James P. Lucier, *Just What Is a War Criminal?*, INSIGHT ON NEWS, Aug. 2, 1999, at 13. John Bolton, former U.S. Assistant Secretary of State, stated:

It is a big mistake for us to grant any validity to international law even when it may seem in our short-term interest to do so—because, over the long term, the goal of those who think that international law really means anything are those who want to constrict the United States. We ought to be concerned about this so-called right to humanitarian intervention—a right of intervention that is just a gleam in one beholder's eye but looks like flat-out aggression to somebody else.

Id.

321. See generally JAMES H. BLOUNT, JR., *THE AMERICAN OCCUPATION OF THE PHILIPPINES, 1898-1912* (1913).

322. The Allies also committed what under the Rome Statute would be war crimes—the fire-bombing of civilian populations in Hamburg, Dresden, Tokyo, and other cities, not to mention the nuclear attacks on Hiroshima and Nagasaki. See Rome Statute, *supra* note 8, art. 8.

323. Confessore, *supra* note 309, at 90.

324. Arsanjani, *supra* note 206, at 29.

political judgment on whether to pursue this issue after every conflict.

The lack of checks on the ICC prosecutor's jurisdiction and discretion as well as the uncertainties regarding the definitions of crimes, not only aggressive war, but also crimes against humanity³²⁵ and war crimes, create opportunities for prosecutorial abuse.³²⁶ State prosecutors, as political as they may be, are accountable to the head of state or delegated authority that appoints or elects them, as well as to established laws and precedents.³²⁷ Their prosecutions have geographic and structural boundaries. For instance, if the prosecution of a foreign suspect might provoke a war, few constitutions would allow the state prosecutor to press those charges without express permission of the head of state or delegated authority. The ICC prosecutor, however, has independent discretion accountable mainly to the pretrial chamber.³²⁸ The ICC prosecutor is elected or removed by the majority vote of the states party to the Rome Statute; the power of the pretrial chamber and the threat of removal are the main structural checks upon the prosecutor's discretion.³²⁹

The office of ICC prosecutor is analogous in some ways to the United States office of independent counsel, but the ICC prosecutor's mandated powers are broader.³³⁰ While the office of independent counsel only has powers to disrupt and undermine the executive branch of the United States, the office of ICC prosecutor can indict several heads of state at once.³³¹ The American office of independent counsel is ad hoc and granted a specific mandate by a special division of judges.³³² The ICC prosecutor is permanent and broadly mandated

325. Darryl Robinson, *Defining "Crimes Against Humanity" at the Rome Conference*, 93 AM. J. INT'L L. 43, 43-48 (1999). See generally Hwang, *supra* note 2.

326. Rodriguez, *supra* note 231, at 816-18. But see Arsanjani, *supra* note 206, at 27 (raising the argument made at the Rome Conference that the independence of the prosecutor outweighs the potential for abuse and that the pretrial chamber would have broad competence to prevent abuses).

327. See, e.g., CAL. CONST. art. 5, § 13; GA. CONST. art. 5, § 3; VA. CONST. art. V, § 15.

328. See John E. Noyes, *Association of American Law Schools Panel on the International Criminal Court*, 36 AM. CRIM. L. REV. 223, 247-48 (1999).

329. Rome Statute, *supra* note 8, art. 56; Arsanjani, *supra* note 206, at 27; M. Cherif Bassiouni & Christopher L. Blakesley, *The Need for an International Criminal Court in the New International World Order*, 25 VAND. J. TRANSNAT'L L. 151, 162 (1992). ("Prevention of the 'abuse of power or process can be guaranteed effectively in the substance of the governing rules and the structure and mechanism of the court as controlled in the organic statute of the court.'").

330. Compare Ethics in Government Act, 28 U.S.C. § 601 (1978) with Rome Statute, *supra* note 8, arts. 15, 53-54.

331. Rome Statute, *supra* note 8, arts. 16, 18, 39-40.

332. See *Morris v. Olson*, 487 U.S. 654 (1988) (Scalia, J. dissenting). In the wake of the impeachment of President Clinton, the Independent Counsel statute was

by the Rome Statute to investigate any allegation of aggressive war, crimes against humanity, war crimes, and genocide that involves a national of or the territory of a state party to the statute.³³³ From the experience of the ICTY, it is unlikely that the ICC prosecutor can persuade all nations to cooperate with his or her investigations. Nonetheless, there are no other checks on the ICC prosecutor's powers, the threat of dismissal notwithstanding.³³⁴

The ICC is a permanent institution intended to push the frontiers of international law. If the ICC were an ad hoc tribunal, then the flaws in the statute might not undermine its limited purpose. The majority of nations at the Rome Conference voted to make the ICC prosecutor independent of the Security Council,³³⁵ but the purpose of the ICC is not "to make us feel good, but to succeed."³³⁶ As a matter of function, the ICC prosecutor will often not be able to exercise jurisdiction over a criminal suspect without the cooperation and support of the most powerful members of the Security Council. While the majority of the nations at the Rome Conference historically had reason to distrust the Security Council's ability to pursue justice dispassionately and apolitically,³³⁷ the Security Council's flaws do not mean that the ICC prosecutor will not have to depend on the Security Council. Without the Security Council's support, the ICC prosecutor is less of a prosecutor and more of an international protester-at-large.

The hope of many at the Rome Conference was to create an office of ICC prosecutor free from international power politics.³³⁸ If Japan can exact a condition for its own surrender after two atomic attacks, however, then it appears that humanity will never govern itself in a political vacuum. The "key obstacle" to an international criminal court is that "its activities could touch on highly political interests over which some states are not willing to relinquish control."³³⁹ By

allowed to expire by Congress. Beverly Lumpkin, *Case Closed: Independent Counsel Law Set to Expire this Week*, ABCNews.com, June 29, 1999, <http://abcnews.go.com/sections/us/dailynews/counsel990629.html>

333. Rome Statute, *supra* note 8, arts. 11-15.

334. The American method of tempering unwanted activities of the United Nations has been to withhold its share of the organization's funding. Compare Cliff Kincaid, *The United Nations Debt: Who Owes Whom?*, Cato Policy Analysis no. 304 (1998) with *The United Nations Financial Crunch: The U.S. Role in Creating the Crisis*, <http://www.clw.org/un/uncrisis.html> (last visited March 2, 2001). The ICC, however, is authorized to receive donations, raising fears that its offices and resources could be bought by governments, donors, or non-government organizations.

335. Kirsch & Holmes, *supra* note 214, at 4.

336. Christopher L. Blakesley, *Report of the International Law Association: Published Jointly with Association Internationale de Droit Penal, 13 Nouvelles Etudes Penales 1997: Jurisdiction, Definition of Crimes, and Triggering Mechanisms*, 25 DENV. J. INT'L L. & POL'Y 233, 233-34 (1997).

337. See Kirsch & Holmes, *supra* note 214, at 4.

338. See *id.* at 8.

339. Charney, *supra* note 4, at 455.

separating the office of ICC prosecutor from the powers that control most of the world's military transport, modern aircraft and ships, armored vehicles, and combat-ready infantry, the Rome Conference may have created an independent office, but not necessarily an effective one. The ICC prosecutor will be under constant pressure to chastise and embarrass the strong countries—indicting members of the Chinese *politburo* for their persecution of Tibetans or investigating American cruise missile launches against the Sudan.³⁴⁰ Meanwhile, the ICC prosecutor must gain the trust and cooperation of the same countries in order litigate criminal trials for human rights violations. The ICC itself has no sabre to rattle.

V. CONCLUSION

As much as international lawyers might praise the ICC as founded upon the principles of Nuremberg, those principles do not guarantee effectiveness. In fact, in absence of similar circumstances, they almost guarantee disappointing results. Nuremberg is not a realistic model for future international criminal tribunals. Rarely in history are three powerful allies and host of other nations united to force the unconditional surrender of so formidable an enemy. Rarely will that enemy collapse so utterly and completely, leaving thousands of evidentiary documents by which to try the leaders for war crimes. It is doubtful that in the postmodern era that a superpower such as the United States could act decisively with the same balance of moral confidence and legal realism.

The ICC can only be as effective as it is coercive, and it cannot be coercive without the assertive cooperation of the military and police forces operating in the vicinity of the jurisdiction it assumes. As the meager and slow results of the ICTY show, international criminal law cannot be effective so long as the conflicting peoples remain at war and military forces protect their leaders from judicial service. The victors in the Second World War were able to exact justice in international criminal court against the leaders of an enemy that had surrendered unconditionally, but that same criminal liability was not imposed upon the victors themselves. Today, Russian cooperation with an international court to investigate Russian atrocities committed against Chechens is just as unthinkable as U.S. military expedition to subdue the warring parties in that quarter. Likewise,

340. Lucier, *supra* note 320, at 13. Jerome Zeifman, former Watergate committee counsel, has filed charges before the ICTY that threaten President Clinton and Secretary of Defense William Cohen with indictments for war crimes. *Id.* He called upon Justice Louise Arbour to step down from the case against President Clinton because she comes from a NATO nation. *Id.* The salaries of the fourteen justices of ICTY, five of whom are from NATO countries, are paid in part by NATO countries. *Id.*

Chinese atrocities against the Tibetans will never be prosecuted. China is too powerful to be brought to its knees and too large to be occupied. Tibet is too remote to benefit from any coercive powers the ICC may muster.

It is just as unlikely that war criminals in the future will deliberately create so convincing a paper trail. Most war crimes other than genocide require little documentation. Nuremberg was successful in a large part because the documents, rather than the testimony of witnesses, damned those indicted. The Nazis had few opportunities to dispute witnesses' testimony; they were hanged by the cold efficiency of their own meticulous record keeping. Their documents silenced their propaganda. Seldom will the ICC prosecute defendants so cooperative.

Politics is the art of the possible, and the development and enforcement of international criminal law depends on the unified political will and military power of the alliance that creates the international tribunal.³⁴¹ The Nuremberg tribunal, and to a lesser extent, the Tokyo tribunal, are generally looked upon as successful instruments of justice and precedents for international criminal law, and it is hoped now that the ICTY and ICTR will achieve similar success. Courts, however, are only as credible as the powers that enforce their judgments. In the cases of the former Yugoslavia and Rwanda, the conditions that existed at Nuremberg are repeated in part but not in whole. Therefore, the United Nations should be prepared for more limited success. Likewise, the permanent ICC under the Rome Statute of 1998 promises to build upon the successes of the ICTY and ICTR, but it faces similar constraints. In most cases, the ICC will be unable to secure control of territories and suspects without the armed support of Security Council nations. Meanwhile, its dependence on the cooperation of nations with conflicting interests, will combine with a lack of structural accountability in the prosecutor's office to undermine its effectiveness and credibility.

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341. Charney, *supra* note 4, at 455 (arguing that "the key obstacle" to an international criminal court is that "its activities could touch on highly political interests over which some states are not willing to relinquish control").

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