

**INCENTIVIZING AND PROTECTING  
INFORMANTS PRIOR TO MASS  
ATROCITIES SUCH AS GENOCIDE: AN  
ALTERNATIVE TO POST HOC COURTS  
AND TRIBUNALS**

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*“Prevention is the single most important dimension of the responsibility to protect: prevention options should always be exhausted before intervention is contemplated, and more commitment and resources must be devoted to it.”<sup>1</sup>*

International institutions are almost exclusively reactive to violations of international law.<sup>2</sup> There are very few systemic

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1. INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION & STATE SOVEREIGNTY XI (Int’l Dev. Research Centre 2001).

2. See Payam Akhavan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 AM. J. INT’L L. 501, 501 (1996). The Author argues that atrocities have been the “most effective catalyst” for building international legal institutions. *Id.* He goes on to state:

In a sense, the decision to establish these Tribunals is yet another expression of the reactive nature of the international human rights system. In the case of Rwanda in particular, there was ample opportunity, but little willingness, to take preventive action to intervene against what is perhaps the worst genocide since the Second World War. At least one year before the massacres of April 1994, which according to some estimates took the lives of as many as five hundred thousand to one million people in just three months, United Nations human rights experts and nongovernmental organizations had forewarned of an impending calamity . . . .

*Id.* (citations omitted); see also Jim O’Brien, Remarks at the Fifth Annual Ernst C. Steifel Symposium: 1945–1995: Critical Perspectives on the Nuremberg Trials and State Accountability, Panel III in 12 N.Y.L. SCH. J. HUM. RTS. 631, 657 (1995); WHITE HOUSE OFFICE OF COMMUNICATIONS, THE NATIONAL SECURITY STRATEGY 17 (2006), <http://www.whitehouse.gov/nsc/nss/2006/nss2006.pdf>. The strategy mentions prevention as a moral imperative, but then focuses on punishing perpetrators:

It is a moral imperative that states take action to prevent and punish genocide. History teaches that sometimes other states will not act unless America does its part. We must refine United States Government efforts—economic, diplomatic, and law-enforcement—so that they target those

methods of proactively trying to prevent egregious violations; rather, international law seems to take punishing violators as its sole approach.<sup>3</sup> In modern times, most of the punishment and post-event enforcement has come through international courts and tribunals.<sup>4</sup> These courts and tribunals are astoundingly

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individuals responsible for genocide and not the innocent citizens they rule. Where perpetrators of mass killing defy all attempts at peaceful intervention, armed intervention may be required, preferably by the forces of several nations working together under appropriate regional or international auspices.

We must not allow the legal debate over the technical definition of "genocide" to excuse inaction. The world must act in cases of mass atrocities and mass killing that will eventually lead to genocide even if the local parties are not prepared for peace.

*Id.*; see also Nicole M. Procida, Note, *Ethnic Cleansing in Bosnia-Herzegovina, A Case Study: Employing United Nation Mechanisms to Enforce the Convention on the Prevention and Punishment of the Crime of Genocide*, 18 SUFFOLK TRANSNAT'L L. REV. 655, 669 (1995). The Author lists the "maintenance of peacekeeping forces in troubled areas, the continuous surveillance of human rights conditions, and the effort to provide humanitarian aid" as methods that "contribute to the prevention of genocide." *Id.* However, later in the Article, the Author admits that none of these seemed effective in deterring the genocide in Bosnia. *Id.* at 679–80.

3. See Steven Lepper, Remarks at The Fifth Annual Ernst C. Steifel Symposium: 1945–1995: Critical Perspectives on the Nuremberg Trials and State Accountability, Panel III, in 12 N.Y.L. SCH. J. HUM. RTS. 453, 652 (1995); Akhavan, *supra* note 2, at 501-03 (chronicling the establishment of the International Criminal Tribunal for Rwanda and stating that despite the international community's unwillingness to intervene, it was willing to try the perpetrators after the atrocities had occurred); Rosa Brooks, *Time is Running Out for the Bad Guys*, L.A. TIMES, July 10, 2005, at M5, (tracing what has happened with many current leaders who have been responsible for atrocities).

4. See Ruti G. Teitel, *Humanity's Law: Rule of Law for the New Global Politics*, 35 CORNELL INT'L L.J. 355, 368–69 (2002); Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U.L. REV. 539, 551–77 (2005) [hereinafter Drumbl, *The Criminality of Mass Atrocity*] (discussing the use of various punishment methodologies and their effectiveness); THE ALLARD K. LOWENSTEIN INT'L HUMAN RIGHTS CLINIC & THE ALLARD K. LOWENSTEIN INT'L HUMAN RIGHTS PROJECT, AN ANALYSIS OF SELECT COMPANIES' OPERATIONS IN SUDAN: A RESOURCE FOR DIVESTMENT 5 (Yale Law Sch. 2006) ("The United Nations has turned over a list of 51 'senior Sudanese government officials, militiamen, army officers, and rebel commanders' to the International Criminal Court, which is preparing indictments against these individuals for their role in the violence." (quoting Warren Hoge, *International War-Crimes Prosecutor Gets List of 51 Sudan Suspects*, N.Y. TIMES, Apr. 6, 2005, at A6)); Vincent O. Orlu Nmehielle, *Towards an African Court of Human Rights: Structuring the Court*, 6 ANN. SURV. INT'L & COMP. L. 27, 28 (2000) (proposing an African Court of Human Rights as a way of enforcing the African Charter on Human and Peoples'

expensive<sup>5</sup> and notoriously inefficient.<sup>6</sup> More importantly, the threat of prosecution does not appear to act as an effective deterrent in preventing criminal acts.<sup>7</sup>

Nowhere has the ineffectiveness of international courts and tribunals been more dramatically demonstrated than in the area of genocide. The twentieth century was marked by numerous genocides,<sup>8</sup> the last decade of the century illustrating with stark

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Rights); Marlise Simons, *Bosnia's Genocide Case Against Serbia Starts*, N.Y. TIMES, Feb. 28, 2006, at A8 (recounting the beginning of the 13-year-old International Court of Justice case in which Bosnia is seeking financial compensation from Serbia for atrocities committed by Serbian sponsored fighters during the Bosnian conflict); Thomas Buergenthal, *Proliferation of International Courts and Tribunals: Is it Good or Bad?*, 14 LEIDEN J. INT'L L. 267, 267–71 (2001) (detailing the ever-expanding number of international courts and tribunals).

5. See Fact Sheet on ICTY Proceedings, <http://www.un.org/icty/cases-e/factsheets/generalinfo-e.htm> (charting the costs of the ICTY by year) (last visited Oct. 22, 2006); see also *Post-Conflict Challenges: The Price of Healing*, AFRICA NEWS, Aug. 4, 2006; James A. Goldston, *Justice in Cambodia: Genocide Tribunals*, INT'L HERALD TRIB., Aug. 2, 2004, at 6; David White, *Special War Crimes Court: Trials Off to Mixed Start*, FIN. TIMES, Feb. 14, 2005, at 5; Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631, 665–68 (2005) (arguing that funding, or the lack thereof, is often used as a method of controlling international courts and tribunals or expressing displeasure or approval with their decisions).

6. *UN Assembly Appraises Progress Made by War Crimes Tribunals—Judges Describe Obstacles*, M2 PRESSWIRE, NOV. 9, 1999, at 1 [hereinafter *UN Assembly Appraises Progress*]; White, *supra* note 5. Compare Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 16 (2005) [hereinafter Posner & Yoo, *Judicial Independence*] (arguing that making a tribunal independent undermines its effectiveness), with Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899, 917–19 (2005), and Eric A. Posner & John C. Yoo, *Reply to Helfer and Slaughter*, 93 CAL. L. REV. 957, 957 (2005) (continuing an ongoing debate concerning the “effectiveness” of international courts and tribunals based on the dependence of the judges).

7. *Is a U.N. International Criminal Court in the U.S. National Interest?: Hearing Before the Subcomm. on International Operations of the S. Comm. on Foreign Relations*, 105th Cong. 48 (1998) [hereinafter Bolton's Statement] (statement of John R. Bolton, Senior Vice President, American Enterprise Institute), available at <http://www.iccnw.org/documents/1stSesPrepComSenatecfr.pdf>.

8. See SAMANTHA POWER, “A PROBLEM FROM HELL”: AMERICA AND THE AGE OF GENOCIDE 503 (2002); see also GENOCIDE, WAR CRIMES AND THE WEST: HISTORY AND COMPLICITY (Adam Jones ed., Zed Books Ltd. 2004) (accounting a multitude of twentieth century genocides). See generally KURT JONASSOHN & KARIN SOLVEIG BJORNSON, GENOCIDE AND GROSS HUMAN RIGHTS VIOLATIONS: IN COMPARATIVE PERSPECTIVE

clarity the international community's ineptitude at responding to such atrocities.<sup>9</sup> The international community has shown that it can neither respond effectively to stop genocides once they have begun, nor effectively deter others who are contemplating genocide by responding after the atrocity with prosecution in international courts and tribunals. This is unacceptable. With hundreds of thousands of lives at stake, the international community must take proactive steps to not only stop and deter, but also prevent mass atrocities and genocides in the future. This Article proposes one possibility that could be both efficient and effective in accomplishing this vital task.

In offering a more proactive approach to preventing atrocities as an alternative to post hoc courts and tribunals, this proposal will not solve the major underlying problem in preventing genocide: the lack of political will. There is no doubt that until the international community decides to commit itself to taking action in the face of mass atrocity, no other solution will solve the problem. However, the actions proposed in this Article, if embraced by the international community, will at least provide an avenue of exchange for greater and more reliable information that can then be mobilized to help mitigate the problem and provide greater impetus for the international community to take action.

Further, it is clear that some leaders who commit horrible atrocities such as genocide simply will not be deterred, regardless of the mechanism set up.<sup>10</sup> For them, this proposal will also do little good. In their case, incapacitation is likely the only solution. Unfortunately, incapacitation almost always relies on international political will.<sup>11</sup> On the other hand, for those "caught up" in the planning, or forced to comply out of a sense of

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93-105 (1998) for a much broader, but less detailed, account of genocides throughout history.

9. *See generally* Procida, *supra* note 2 (chronicling the poor intervention in the genocide in Bosnia-Herzegovina).

10. *See* Bolton's Statement, *supra* note 7, at 48.

11. *See, e.g.*, Kofi Annan, Secretary-General of the UN, Address to the Stockholm International Forum in Sweden: Genocide is a Threat to Peace, Requiring Strong, United Action (Jan. 24, 2006) (transcript available at <http://www.un.org/Pubs/chronicle/2004/issue1/0104p4.asp>).

self-preservation, this proposal will provide a significant incentive to divorce themselves from such actions and become a tool of intervention to stop the atrocity before it begins. It is these partially culpable, but not undeterrable, minions of the megalomaniac on whom this proposal will have the most effect.

During the events of the 1990s, the world has learned that genocide occurs on such a broad scale that it is fair to say that many people are involved in at least the early stages and most often in the planning of the horrific acts before they are accomplished.<sup>12</sup> Armed with this information, international institutions should provide a proactive method of enticing individuals involved in the early planning stages to come forward and report proposed genocidal activities or other mass atrocities. Then these institutions must be willing to respond aggressively to prevent the activities from occurring. Such a program would not only have to provide incentives for those with information to come forward but would also have to protect them from the unscrupulous actors who will seek retribution for being discovered in their illegal acts. It is this focus on seeking preventive evidence and then securing that evidence through protection of those willing to come forward that is completely lacking as a current method to fight atrocity before it occurs. An effective pre-atrocity incentive and protection program would not only prevent long and expensive post-criminal act trials, but more importantly, it would prevent the repetition of the hundreds of thousands of deaths experienced in the genocides of the last two decades.

Part I of this Article briefly analyzes the current method of responding to mass atrocities such as genocides through international courts and tribunals, demonstrating its expense and inefficiency. Part II illustrates the need for a proactive regime that will entice those with information to come forward before the atrocities occur and the genocide has taken its toll. Part III proposes a proactive regime designed to incentivize pre-

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12. Akhavan, *supra* note 2, at 505 (“The Rwandese representative argu[ed] that an international tribunal ‘which refuses to consider the causes of the genocide in Rwanda and its planning . . . cannot be of any use . . . because it will not contribute to eradicating the culture of impunity or creating a climate conducive to national truth and reconciliation.’” (quoting U.N. Doc. S/PV.3453, at 14 (1994))).

atrocities to come forward with information and protect them once they have come forward. The Article concludes in Part IV.

### I. INTERNATIONAL RESPONSES TO GENOCIDE AND MASS ATROCITY

Since World War II, the international community has been slow to react to mass atrocities such as genocide.<sup>13</sup> Rather, despite a great deal of verbal condemnation,<sup>14</sup> the only actions taken by the international community have been reactive and have centered, at least in the last two decades,<sup>15</sup> around the formation of ad hoc international courts or tribunals to “bring to justice” those who were involved in the atrocities.<sup>16</sup> These tribunals have often met with great acclaim and proponents herald their “tremendous impact on the development of the international criminal law system.”<sup>17</sup> However, there are others who do not believe that international courts and tribunals are the right method to handle problems such as genocide.<sup>18</sup> Without even considering detractors’ legal arguments,<sup>19</sup> much of the

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13. See generally POWER, *supra* note 8 (chronicling the genocides in the 20th century and the international community’s responses).

14. See Joseph A. Keeler, *Genocide: Prevention Through Nonmilitary Measures*, 171 MIL L. REV. 135, 168 (2002).

15. See generally Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 VAND. L. REV. 1, 4 n.3 (2006) (“Karen Alter . . . estimates that 63 percent of international judicial activity has occurred in the last twelve years.” (citing Karen J Alter, *Do International Courts Enhance Compliance with International Law?*, 25 REV. ASIAN & PAC. STUD. 51, 52 (2003))).

16. See Ida L. Bostian, *Cultural Relativism in International War Crimes Prosecutions: The International Criminal Tribunal for Rwanda*, 12 ILSA J. INT’L & COMP. L. 1, 18–19 (2005).

17. Daryl A. Mundis, *The Judicial Effects of the ‘Completion Strategies’ on the Ad Hoc International Criminal Tribunals*, 99 AM. J. INT’L L. 142, 142 (2005).

18. See, e.g., Bolton’s Statement, *supra* note 7.

19. See generally Drumbl, *The Criminality of Mass Atrocity*, *supra* note 4 (analyzing the disconnect between current punishment modalities and the reality of mass atrocity); Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM. L. REV. 1751 (2005) (giving an outstanding account of the disparate approaches to atrocity punishment between national and international courts, and calling into question the legal coherence of both regimes); Alex G. Peterson, *Order Out of Chaos: Domestic Enforcement of the Law of Internal Armed Conflict*, 171 MIL. L. REV. 1,

criticism has focused on the expense and inefficiency of these tribunals,<sup>20</sup> as well as their apparent failure as a deterrent.<sup>21</sup> Opponents argue that any legal or reconciliatory benefit from these tribunals could be achieved in other ways, using a more effective method at a much cheaper cost.<sup>22</sup> A brief review of two recent ad hoc tribunals will illustrate this point.<sup>23</sup>

A. *The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (ICTY).*

In response to the genocide in Bosnia-Herzegovina that began in 1991,<sup>24</sup> the United Nations Security Council issued Resolution 808 that declared “an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the

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70–77 (2002) (discussing the political influences acting on international courts and tribunals and the effect that has on credibility).

20. Mundis, *supra* note 17, at 142; Maya Goldstein-Bolocan, Rwandan Gacaca: *An Experiment in Transitional Justice*, 2004 J. DISP. RESOL. 355, 370 (2004).

21. Bolton’s Statement, *supra* note 7.

22. See generally Goldstein-Bolocan, *supra* note 20 (arguing that the use of domestic Gacaca courts could be amended to accomplish both a retributive and reconciliatory process much more effectively than either current international or domestic courts); see also Mark A. Drumbl, *Punishing Genocide in Rwanda* (Washington & Lee Legal Studies Research Paper Series, Working Paper no. 2006-06, 2006), available at <http://ssrn.com/abstract=907667> [hereinafter Drumbl, *Punishing Genocide in Rwanda*].

23. This Article will address the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (ICTY), and the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States between 1 January and 31 December 1994 (ICTR) because of their focus on genocide. It will not address in detail other tribunals, such as The Special Court for Sierra Leone, that have not had the same focus. For information on the Special Court for Sierra Leone, see Lisa Danish, *Internationalizing Post-Conflict Justice: The “Hybrid” Special Court for Sierra Leone*, 11 BUFF. HUM. RTS. L. REV. 89 (2005).

24. See Procida, *supra* note 2, at 670–77 (providing a detailed chronology of the events leading up to the establishment of the ICTY); Keeler, *supra* note 14, at 147–54 (giving a concise history of the genocide in Bosnia).

territory of the former Yugoslavia since 1991.”<sup>25</sup> After recognizing that ethnic cleansing had been occurring, the Security Council, declared that “in the particular circumstances of the former Yugoslavia the establishment of an international tribunal would enable” the world “to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them . . . .”<sup>26</sup>

The Security Council actually organized the ICTY through Resolution 827<sup>27</sup> and has continued to amend and adapt the Tribunal through Resolutions 1166,<sup>28</sup> 1329,<sup>29</sup> 1411,<sup>30</sup> 1431,<sup>31</sup> 1481,<sup>32</sup> 1597,<sup>33</sup> and 1660<sup>34</sup> to meet its developing needs. The ICTY has established Rules of Procedure and Evidence<sup>35</sup> and Practice Directions<sup>36</sup> to facilitate its operation. After almost thirteen years in existence, however, there is a great deal of

25. S.C. Res. 808, ¶ 13, U.N. Doc. S/Res/808 (Feb. 22, 1993); *see also* Danner, *supra* note 15, at 18–22 (discussing the decision to establish the ICTY).

26. S.C. Res. 808, *supra* note 25, ¶ 9.

27. S.C. Res. 827, ¶ 13, U.N. Doc. S/Res/827 (May 25, 1993) (establishing the tribunal).

28. S.C. Res. 1166, ¶ 7, U.N. Doc. S/Res/1166 (May 13, 1998) (amending articles 11, 12, and 13 of the Charter to establish a third Trial Chamber).

29. S.C. Res. 1329, ¶ 11, U.N. Doc. S/Res/1329 (Nov. 30, 2000) (amending articles 12, 13, and 14 of the Charter to allow for ad litem judges).

30. S.C. Res. 1411, ¶¶ 2–4, U.N. Doc. S/Res/1411 (May 17, 2002) (clarifying the principle of nationality before the Tribunal).

31. S.C. Res. 1431, ¶ 6, U.N. Doc. S/Res/1431 (Aug. 14, 2002) (amending articles 13 bis and 14 concerning judges).

32. S.C. Res. 1481, ¶ 4, U.N. Doc. S/Res/1481 (May 19, 2003) (expanding the power of ad litem judges in pre-trial proceedings).

33. S.C. Res. 1597, ¶ 6, U.N. Doc. S/Res/1597 (Apr. 20, 2005) (making ad litem judges eligible for re-election).

34. S.C. Res. 1660, arts. 12–13, U.N. Doc. S/Res/1660 (Feb. 28, 2006) (concerning the composition of chambers and the powers of ad litem judges).

35. RULES OF PROCEDURE AND EVIDENCE FOR THE INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS OF HUMANITARIAN LAW COMMITTED IN THE TERRITORY OF THE FORMER YUGOSLAVIA SINCE 1991, U.N. Doc. IT/32/rev.37 (2006), *available at* <http://www.un.org/icty/legaldoc-e/basic/rpe/procedureindex.htm> [hereinafter ICTY, RULES OF PROCEDURE AND EVIDENCE].

36. ICTY, Practice Directions, <http://www.un.org/icty/legaldoc-e/basic/practice/practiceindex.htm> (last visited Oct. 22, 2006).

discussion as to its value considering its expense and ineffectiveness.<sup>37</sup>

On its website, the ICTY proclaims its core achievements: 1) spearheading the shift from impunity to accountability by “holding individuals accountable regardless of their position,”<sup>38</sup> 2) establishing an important, historically accurate record of what transpired so that “[i]t is now not tenable for anyone to dispute the reality of the crimes that were committed,”<sup>39</sup> 3) “[b]ringing justice to thousands of victims and giving them a voice,”<sup>40</sup> 4) expanding the “boundaries of international humanitarian and international criminal law” by setting a “large number of legal and institutional precedents” such as a “*general prohibition of torture* in international law which cannot be derogated from by a treaty, internal law or otherwise” and that a crime against humanity “can be committed not only as part of, but also just *during* an armed conflict,”<sup>41</sup> and 5) “[s]trengthening the rule of law” by providing “an incentive to reform the judiciaries in the former Yugoslavia” and being “involved in training legal professionals from the former Yugoslavia to enable them to deal with war crimes cases and . . . to enforce international legal standards in their local systems.”<sup>42</sup> As to the costs of these accomplishments, the ICTY argues that

[t]he expense of bringing to justice those most responsible for war crimes and for helping to cement the Rule of Law in the former Yugoslavia pales in comparison to the true cost of the crimes: the lives lost, the communities devastated, the private property ransacked and the cultural monuments and buildings destroyed forever.<sup>43</sup>

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37. See Fact Sheet on ICTY Proceedings, *supra* note 5; see also *UN Assembly Appraises Progress*, *supra* note 6.

38. Bringing Justice to the Former Yugoslavia: The Tribunal’s Core Achievements, <http://www.un.org/icty/cases-e/factsheets/achieve-e.htm> (last visited Oct. 22, 2006).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

Not everyone agrees.<sup>44</sup>

The budget for the ICTY continues to grow at a significant rate. The budget for the 2006–2007 biennium for the Tribunal is \$310,884,000, which is a 5.9% increase from the previous biennium,<sup>45</sup> over 75% of which has traditionally gone to “[s]alaries and related personnel costs”<sup>46</sup> of the 1,141 staff members.<sup>47</sup> By the end of 2007, the total costs of the ICTY will have been well over \$1 billion.<sup>48</sup> In exchange for this expense, the Tribunal has indicted one hundred sixty-two individuals, has fifty-nine of those in custody, and has completed fifty-five trials with eighteen criminals still serving their sentences.<sup>49</sup> This equates to a current cost of about \$20 million for each completed trial.<sup>50</sup> This is a staggering figure and certainly brings into focus the issue of the value of the trials given their extraordinary expense.

While the five core achievements of the ICTY are laudable, the question remains as to whether they are of sufficient value to justify the continued existence of the Tribunal. More importantly for this Article, the true question is whether these funds would be better used in designing and administering a program that proactively tries to prevent genocide by incentivizing informants to come forward with the guarantee of protection, not only sparing the money, but the lives of the thousands who were slain in this awful series of atrocities.

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44. See *UN Assembly Appraises Progress*, *supra* note 6.

45. The Secretary-General, *Budget for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 for the biennium 2006–2007*, ¶ 15, delivered to the General Assembly, U.N. Doc. A/60/264 (Aug. 17, 2005).

46. Board of Auditors, *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: Financial Report and Audited Financial Statements for the Biennium Ended 31 December 2003*, at 2, delivered to the General Assembly, U.N. Doc. A/59/5/Add.12 (Aug. 10, 2004).

47. Fact Sheet on ICTY Proceedings, *supra* note 5.

48. *Id.*

49. *Id.* (detailing key figures of ICTY cases).

50. The infamous American trial of O.J. Simpson is estimated to have only cost between \$5 and \$10 million. Martin McLaughlin & David North, *The Simpson Trial: Some Ugly Truths*, IWB ONLINE (Oct. 9, 1995), [http://www.wsws.org/public\\_html/prioriss/iwb10-9/simpson.htm](http://www.wsws.org/public_html/prioriss/iwb10-9/simpson.htm).

*B. The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States between 1 January and 31 December 1994 (ICTR).*

The ethnic killings in Rwanda that led to the genocide culminating in 1994 began as early as 1990.<sup>51</sup> Despite some warnings from various sources,<sup>52</sup> the international community responded ineffectively, and between April and July of 1994 an estimated 500,000 to 800,000 Tutsis were killed.<sup>53</sup> On November 8, 1994, in response to a formal request by the Rwandan government, the Security Council passed Resolution 955:

[The Resolution] establish[ed] an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 . . . .<sup>54</sup>

As will be discussed below, despite its initial request and enthusiasm for the project, Rwanda was very dissatisfied with the ICTR at its final creation in 1994. However, the ICTR statute was promulgated in 1994 and the seat of the court, Arusha, Tanzania, declared in UNSC Resolution 977.<sup>55</sup> The court was based very closely on the ICTY model and even shared the

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51. See Bostian, *supra* note 16, at 15–16; see also ALISON DES FORGES, LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA 4 (1999) available at <http://www.hrw.org/reports/1999/rwanda/index.htm#TopOfPage>; Keeler, *supra* note 14, 154–63 (giving a concise history of the Rwandan genocide).

52. See Bostian, *supra* note 16, at 16; DES FORGES, *supra* note 51, at 18.

53. Drumbl, *Punishing Genocide in Rwanda*, *supra* note 22, at 5; DES FORGES, *supra* note 51, at 15; Lisa Avery, *The Women and Children in Conflict Protection Act: An Urgent Call for Leadership and the Prevention of Intentional Victimization of Women and Children in War*, 51 LOY. L. REV. 103, 108 (2005).

54. S.C. Res. 955, ¶ 1, U.N. Doc. S/Res/955 (1994).

55. S.C. Res. 977, ¶ 1, U.N. Doc. S/Res/977 (1995).

same prosecutor for several years until the Security Council passed Resolution 1503<sup>56</sup> granting the ICTR its own prosecutor in hopes of expediting the trial process.<sup>57</sup>

Like the ICTY, the ICTR has been lauded by supporters as having accomplished great things since its inception, such as the authoritative declaration of rape as an act of genocide.<sup>58</sup> The ICTR website prominently displays a quote from Kofi Annan:

The International Criminal Tribunal for Rwanda delivered the first-ever judgement [sic] on the crime of genocide by an international court. This judgement [sic] is a testament to our collective determination to confront the heinous crime of genocide in a way we never have before. I am sure that I speak for the entire international community when I express the hope that this judgement [sic] will contribute to the long-term process of national reconciliation in Rwanda. For there can be no healing without peace; there can be no peace without justice; and there can be no justice without respect for human rights and rule of law.<sup>59</sup>

However, the website also contains a link to the tenth anniversary commemoration site of the genocide,<sup>60</sup> which highlights the concerns about expense and efficiency of the process that has taken so long and is still far from completion.

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56. See S.C. Res. 1503, art. 15, ¶ 12, U.N. Doc. S/Res/1503 (2003); *Rwanda: New ICTR Prosecutor Takes Up His Post*, AFRICA NEWS, Oct. 6, 2003.

57. *Kigali Welcomes Appointment of New Prosecutor for ICTR*, PANAFRICAN NEWS AGENCY DAILY NEWSWIRE, Sept. 9, 2003.

58. See Transcript of Record at 43–47, *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment (Sept. 2, 1998), available at <http://69.94.11.53/ENGLISH/cases/Akayesu/judgement/akay001.htm> (follow “AKAYSEU, Jean Paul” hyperlink). See generally Alex Obote-Odora, *Rape and Sexual Violence in International Law: ICTR Contribution*, 12 NEW ENG. J. INT’L & COMP. L. 135 (2005). But see *Rwanda: When Justice Takes Too Long*, AFRICA NEWS, Sept. 1, 2003 (“Thousands of women were raped or held in sexual slavery during the 1994 genocide. Many of them contracted HIV-AIDS as a result. Nine years after the events, less than ten people have been convicted of rape either in Rwanda or in the ICTR.”).

59. International Criminal Tribunal for Rwanda: About the Tribunal, <http://69.94.11.53/default.htm> (follow “ABOUT THE TRIBUNAL” hyperlink on the left side of screen) (last visited Oct. 22, 2006).

60. International Criminal Tribunal for Rwanda: Commemoration Site, <http://69.94.11.53/commemoration/index.asp> (last visited Oct. 22, 2006).

Initially, Rwanda sought an international tribunal as a means to “eradicate the creature of impunity, which has characterized Rwandan society since 1959.”<sup>61</sup> When the ICTR Statute was initially promulgated, Rwanda lodged its dissatisfaction with the Statute.<sup>62</sup> One of the grounds was its certain inefficiency based on the “magnitude of the task.”<sup>63</sup> “In a strongly worded protest, the [Rwandan] delegate [to the U.N.] suggested that ‘the establishment of so ineffective an international tribunal would only appease the conscience of the international community rather than respond to the expectations of the Rwandese people and of the victims of genocide in particular.’”<sup>64</sup> Rwanda’s objections seem to have been borne out as true. In 1999, five years after the International Criminal Tribunal for Rwanda had been established, it had indicted forty-eight people and tried and sentenced five of those.<sup>65</sup> In the same period of time, Rwanda’s domestic judicial system had issued more than 20,000 indictments, accepted guilty pleas in 17,847 of those cases, tried 1,989 people, and released 5,760.<sup>66</sup>

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61. Manzi Bakuramutsa, Rwandan U.N. Ambassador, Remarks at the Fifth Annual Ernst C. Steifel Symposium: 1945–1995: Critical Perspectives on the Nuremberg Trials and State Accountability, Panel III *in* 12 N.Y.L. SCH. J. HUM. RTS. 631, 643–44 (1995) (“The Rwandese, who had been taught that it was acceptable to kill as long as the victim was from a different ethnic group or from an opposition party, cannot arrive at national reconciliation unless they learn new values. National reconciliation can be achieved only if accountable justice is established and if the survivors of genocide are assured that what has happened will never happened again.”). *But see* Drumbl, *The Criminality of Mass Atrocity*, *supra* note 4, at 600–03 (arguing that in light of the ICTR, international criminal tribunals that remove the criminal process from the local populace do not “lead to the reform of criminogenic conditions” but externalize justice).

62. *See* Bostian, *supra* note 16, at 19–20.

63. Akhavan, *supra* note 2, at 506 (quoting U.N. Doc. S/PV.3453, at 15 (1994)); Bakuramutsa, *supra* note 61, at 647.

64. Akhavan, *supra* note 2, at 506 (quoting U.N. Doc. S/PV.3453, at 15 (1994)); *see also* Bakuramutsa, *supra* note 61, at 650 (“Rwanda remains convinced that the permanent interest of the international community in setting up the tribunal was to appease its conscience in view of the fact that it had not responded to save the Rwandese from genocide.”).

65. *UN Assembly Appraises Progress*, *supra* note 6.

66. *Id.*; *see also* Drumbl, *Punishing Genocide in Rwanda*, *supra* note 22, at 5–6. *See generally* Goldstein-Bolocan, *supra* note 20 (discussing the use of Gacaca as a means of accomplishing retribution and reconciliation within the Rwandan domestic legal system).

The pace of the ICTR has not increased dramatically since 1999. The ICTR has currently completed twenty-eight cases (one by the death of the accused, and five based on releases) with seven of those cases currently on appeal.<sup>67</sup> Twenty-eight cases are currently at trial, and fifteen other defendants are in custody awaiting trial.<sup>68</sup> The lack of results over the more than ten-year time period leads again to a discussion of the value of the ICTR. With total costs nearing \$1 billion and continuing to increase,<sup>69</sup> the international community must reflect on whether the benefit is worth the cost, or at least whether the ICTR is the best use of that money<sup>70</sup> and effort if the goal is to prevent future atrocities.<sup>71</sup> As one commentator has noted, this means that “it costs roughly \$25 million dollars to secure a single conviction at the ICTR.”<sup>72</sup> Perhaps more proactive methods would better serve the international community’s interests.

### C. *The Future*

There is no doubt that the International Tribunals established by the United Nations in the past two decades have been extremely expensive,<sup>73</sup> particularly as compared to

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67. International Criminal Tribunal for Rwanda: Status of Cases, <http://69.94.11.53/default.htm> (follow “CASES” hyperlink on the left side of screen; follow “Status of Cases” hyperlink) (last visited Oct. 22, 2006).

68. International Criminal Tribunal for Rwanda: Commemoration Site, *supra* note 60.

69. The budget for the 2006–2007 biennium for the ICTR is \$261,640,000, which is a 2.5% increase from the previous biennium. The Secretary-General, *Budget for the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States Between 1 January and 31 December 1994, for the Biennium 2006–2007*, ¶ 13, delivered to the General Assembly, U.N. Doc. A/60/265 (Aug. 17, 2005); see also Shana Eaton, *Sierra Leone: The Proving Ground for Prosecuting Rape as a War Crime*, 35 GEO. J. INT’L L. 873, 914 (2004).

70. See Bostian, *supra* note 16, at 20 (arguing that the money would have been better spent to “rebuild the shattered Rwandan justice system”).

71. See Drumbl, *The Criminality of Mass Atrocity*, *supra* note 4, at 588–92.

72. *Id.* at 601.

73. In “2004, the Tribunals’ annual expenditures constituted 15 percent of the entire U.N. budget.” Danner, *supra* note 15, at 25.

corresponding domestic court systems.<sup>74</sup> These costs caused the United Nations Security Council to pass resolutions calling for the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) to stop issuing new indictments by the end of 2004 and complete operations by 2010.<sup>75</sup> However, these costs do not seem sufficient to deter the international community from using courts and tribunals as the only response to genocide and other mass atrocities.

When conditions became favorable to pursue accountability in Cambodia<sup>76</sup> for the 1.7 million deaths caused by the Khmer Rouge regime between 1975 and 1979,<sup>77</sup> an international tribunal seemed the preferred answer.<sup>78</sup> Cambodia and the U.N. agreed to a plan for the tribunal,<sup>79</sup> which was ratified by the Cambodian Parliament in October, 2004.<sup>80</sup> Funding and other logistical concerns are still a problem, but recent donations seem to be helping,<sup>81</sup> especially a \$21.6 million donation from Japan<sup>82</sup>

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74. Some have argued that the ICT's reliance on the U.N. for their immense budget allows the Security Council to impose its will on the Tribunals and force them into compliant lawmaking. However, the evidence does not appear to support this argument. *Id.* at 44.

75. S.C. Res 1503, ¶ 7, U.N. Doc. S/RES/1503 (Aug. 28, 2003). For a statement by Ambassador Stephan M. Minikes, U.S. Ambassador to the Organization for Security and Cooperation in Europe concerning UNSCR, see also U.S. Supports Completion Strategy for War Crimes Tribunal, Nov. 5, 2003, <http://usinfo.state.gov/dhr/Archive/2003/Nov/06-767701.html> (indicating U.S. support for the ICT's completion strategy).

76. For a comprehensive site concerning the genocide and the proposed special court, see The Cambodian Genocide Project, <http://www.yale.edu/cgp/index.html> (last visited Oct. 22, 2006).

77. See *Senior Khmer Rouge Leader Admits Genocide Occurred Under Regime*, CHANNEL NEWSASIA, Dec. 30, 2003; Seth Mydans, *A Top Khmer Rouge Leader, Going Public, Pleads Ignorance*, N.Y. TIMES, Jan. 3, 2004, at A4; Ben Kiernan, *The Cambodian Genocide and Imperial Culture* (2005), available at <http://www.yale.edu/cgp/KiernanCambodia30thAnniversaryEssay.doc>; Seth Mydans, *Skulls Haunt Cambodia, Demanding Belated Justice*, N.Y. TIMES, Mar. 20, 2005, at A4.

78. *U.N. Approves Establishment of Khmer Rouge Tribunal*, JAPAN ECON. NEWSWIRE, May 14, 2003.

79. *Cambodia, U.N. to Formally Sign Pact on Khmer Rouge Trial*, ASIAN POL. NEWS, June 2, 2003.

80. Andrew Woodcock, *UK Contributes to Khmer Rouge Tribunal*, PRESS ASS'N, Jan. 27, 2005.

81. Niko Kyriakou, *Rights: U.N. Setting up Tribunal to Delve into Cambodia's Past*, INTER PRESS SERVICE, Mar. 29, 2005, available at <http://www.ipsnews.net/interna.asp?idnews=28069>.

amounting to almost half the initial cost of the court.<sup>83</sup> However, Pol Pot, the predominant figure in the genocide, died in 1998,<sup>84</sup> and the other dozen or so suspects are in their early seventies.<sup>85</sup> These facts seem to call into question the value that will be gained from the vast expense of such a project.<sup>86</sup> Even though the specific crimes that occurred thirty years ago cannot be prevented, perhaps the money would be better spent on a more efficient method of reconciliation, or finding ways to prevent similar events from happening elsewhere.

#### *D. Effectiveness of Current Methodologies*

One of the goals of any enforcement mechanism in law, and particularly of judicial process, is to stop current violations and to deter others from committing similar acts in the future.<sup>87</sup> If the enforcement mechanisms are incapable of doing these things, their utility is questionable. In the case of genocide, recent history has shown that the threat of prosecution and even establishment of a tribunal is not effective in either halting current atrocities<sup>88</sup> or deterring future atrocities.<sup>89</sup>

Deterrence is especially needed in the case of genocide and similar atrocities. Even a magnificently efficient court system will not bring back the millions who have suffered the ravages of genocide over the past decade, all of which occurred while international tribunals were actively operating.<sup>90</sup> A notoriously nonefficient court system will be even less effective as a deterrent.

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82. *Id.*

83. The estimate for the first three years of the tribunal is between \$56–\$60 million. James A. Goldston, *Justice in Cambodia: Genocide Tribunals*, INT'L HERALD TRIB., Aug. 2, 2004, at 6; *Numbers*, TIME ASIA, May 16, 2005, at 13.

84. See Michael B. Farrell, *For "Killing Fields" Survivors, A Sliver of Hope for Justice*, CHRISTIAN SCI. MONITOR, Mar. 3, 2004, at 14.

85. Kyriakou, *supra* note 81.

86. Farrell, *supra* note 84, at 17.

87. See Drumbl, *The Criminality of Mass Atrocity*, *supra* note 4, at 588–92.

88. Procida, *supra* note 2, at 684.

89. *Post-Conflict Challenges*, *supra* note 5.

90. *United Nations Reform: Hearing before the S. Foreign Relations Comm.*, 109th Cong. (July 21, 2005) (testimony of Newt Gingrich).

Some have argued that despite the inefficiencies of the international tribunal system, “the symbolic effect of prosecuting even a limited number of the perpetrators, especially the leaders who planned and instigated the genocide, would have a considerable impact on national reconciliation, as well as on deterrence of such crimes in the future.”<sup>91</sup> While it is nearly impossible to prove how many people have been successfully deterred from committing such atrocities, there is striking evidence that in at least one case, the actual functioning of the court has not prevented the repeat of genocide involving the very country where the Tribunal is in the process of prosecuting earlier crimes.<sup>92</sup>

There may be a number of reasons for this. At least one scholar has argued that international tribunals do not serve this deterrent effect, as the decisions are not studied, or even known, by those who are likely to commit such atrocities.<sup>93</sup> The events in Sierra Leone seem to support this conclusion:<sup>94</sup>

By January 1999, when the [Armed Forces Revolutionary Council/Revolutionary United Front] launched its “Operation No Living Thing” attack on Freetown, the ICTs had already handed down some of their key decisions regarding rape as a war crime. Moreover, two of those decisions, *Celebici* and *Furundzija*, were handed down in the months just preceding the attack. This seemed to have had no impact on the [Armed Forces Revolutionary Council/Revolutionary United Front] leadership, if they even were aware of such decisions, which itself seems unlikely.<sup>95</sup>

Further, while the continuing promulgation of international courts and tribunals increase the likelihood of leaders of

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91. Akhavan, *supra* note 2, at 509; *see also* Danner, *supra* note 15, at 6, 45, 55–59 (arguing that the decisions of the ICTR and ICTY, though not formally given the power of *stare decisis*, have been incorporated in the jurisprudence and military practices of many nations).

92. *Post-Conflict Challenges*, *supra* note 5.

93. Eaton, *supra* note 69, at 902–03.

94. *Id.* at 903.

95. *Id.* (footnote omitted).

genocides ending up in court at some point,<sup>96</sup> some would argue that such a trial is little deterrence.<sup>97</sup> The “inability to provide swift adjudication frustrates [the] deterring effect”<sup>98</sup> of trial at all. Also, in some cases at least, awaiting trial provides a much better life than the accused would otherwise enjoy. For example:

At the ICTR, prisoners who are HIV-positive receive an excellent level of health care and access to medication that few, if any, of the victims can claim . . . [p]unishment actually keeps perpetrators alive to enjoy a quality of life that exceeds that of [the] victims and might well exceed that which they would claim were they not to be “punished” at all.<sup>99</sup>

This is certainly better treatment than their victims are receiving.<sup>100</sup> Finally, it is unlikely that the fear of being tried before an international tribunal, especially when the maximum penalty is less than that allowed by a domestic tribunal,<sup>101</sup> will act as much of a deterrent on someone intent on mass atrocities or genocide.<sup>102</sup> This is strikingly illustrated by the recent events in the Democratic Republic of Congo. Between 1999 and 2002, even as the ICTR was sitting in judgment of those who committed genocide in 1994, Rwandans were engaged with Ugandan forces in the genocide of neighboring citizens from the Democratic Republic of Congo.<sup>103</sup> The atrocities were of sufficient scale to elicit a Security Council Resolution condemning the “massacres and other atrocities carried out in the territory of the

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96. Brooks, *supra* note 3.

97. Procida, *supra* note 2, at 684.

98. *Id.*

99. See Drumbl, *The Criminality of Mass Atrocity*, *supra* note 4, at 579.

100. *Rwanda: When Justice Takes Too Long*, *supra* note 58 (quoting an HIV infected rape survivor saying, “If something is not done soon there will come a time when all of [the victims] will die. Many have already died and there is simply no institution looking into this.”).

101. See Drumbl, *The Criminality of Mass Atrocity*, *supra* note 4, at 579 (noting that the ICTR cannot impose the death penalty, but Rwandan domestic courts can).

102. *Id.* at 590–91.

103. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 2005 I.C.J. 66–68 (Dec. 19), available at <http://www.icj-cij.org/icjwww/idocket/ico/icoframe.htm> (follow “Judgment of 19 December 2005” hyperlink).

Democratic Republic of the Congo,”<sup>104</sup> and ordering both the Ugandan and Rwandan forces to “make reparations for the loss of life and the property damage they have inflicted on the civilian population in Kisangani.”<sup>105</sup> If a people who recently suffered personally and as a nation from genocide and are deeply embroiled in the international and domestic prosecution of those who committed such crimes will turn to genocide again so quickly, it appears that post-atrocity adjudication is not the deterrent the international community requires.

There is another twist on the idea of deterrence with international courts and tribunals. Whereas, the court’s deterrent effect on perpetrators is doubtful, its deterrent effect on potential interveners may be more obvious. As was clearly demonstrated with the United States and the International Criminal Court (ICC), some nations may have reservations to granting broad powers to even an ad hoc tribunal.<sup>106</sup> The United States made this very clear:

[The US] fear that a Court with broad powers would impair its ability to provide global security and thereby jeopardize the global status quo led it to adopt a conservative view of the Court’s jurisdiction. The main concern of the United States was that American troops deployed across the globe would be subject to politicized prosecutions . . . .<sup>107</sup>

The apparent concern of the United States that its peacekeepers may become subject to ICC prosecution applies equally to those nations contemplating intervention in a genocide. A nation that voluntarily sends its soldiers to intervene must account for potential repercussions to its soldiers, and resulting political embarrassment, beyond those initially implicated.<sup>108</sup> Because of this, the reliance on courts and tribunals may have the inadvertent effect of acting as a

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104. S.C. Res. 1304, ¶ 13, U.N. Doc. S/RES/1304 (June 16, 2000).

105. *Id.* ¶ 14.

106. Dan Belz, *Is International Humanitarian Law Lapsing into Irrelevance in the War on International Terror?*, 7 THEORETICAL INQ. L. 97, 125 (Jan. 2006).

107. *Id.*

108. Kyriakou, *supra* note 81 (drawing attention to the support offered by the United States at various times to the regime of Pol Pot).

deterrent not only on perpetrators but also on nations who might otherwise have sent forces to intervene, but won't for fear of opening themselves up to potential prosecution in an international tribunal based on their own misconduct.<sup>109</sup>

In conclusion, it appears clear that international courts and tribunals are extremely expensive and not very efficient at providing timely prosecution of the perpetrators of mass atrocities such as genocide. Though there may be many who will still argue that such prosecutions serve a vital purpose and should be continued,<sup>110</sup> even these avid supporters could likely be persuaded to look into other methods of dealing with genocide, especially one that would promote a much more proactive focus on prevention. Surely trying to develop effective methods to prevent the atrocities from occurring is of greater value than adequately dealing with them after they have occurred. The next section turns to this focus.

## II. NEED FOR A BETTER SYSTEM THAT IS PROACTIVE

Mass atrocities, such as genocide, are horrific in their scope and consequences. As Mark Drumbl has written, "The prevailing paradigm views mass atrocity as something greater than the sum of its parts, namely each of its ordinary constituent murders. Under this paradigm, mass violence is constructed as [an] extraordinar[y] transgressi[on] of universal norms."<sup>111</sup> The sheer scale of these acts is difficult to comprehend without facing them in person.<sup>112</sup>

In Rwanda, it is estimated that as many as 800,000 Rwandans were killed within a four month period during the

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109. See *Eritrean Scholar Lashes into UN Peacekeeper's Behaviour*, BBC, May 10, 2004 (alleging the sexual abuse of a 13-year-old Eritrean girl by Danish peacekeepers as well as other atrocities from Somalia); Joseph Farah, *Those U.N. Peacekeeping Atrocities*, WORLDNETDAILY, June 25, 1997, available at [http://www.worldnetdaily.com/news/article.asp?ARTICLE\\_ID=14271](http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=14271) (cataloguing the murder of a Somalian boy by Belgian peacekeepers).

110. Akhavan, *supra* note 2, at 501.

111. Drumbl, *The Criminality of Mass Atrocity*, *supra* note 4, at 540.

112. For excellent accounts of the personal effects of genocide, see generally THE NEW KILLING FIELDS: MASSACRE AND THE POLITICS OF INTERVENTION (Nicolaus Mills and Kira Brunner eds., 2002), and PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA (1998).

1994 Rwandan Genocide.<sup>113</sup> The total deaths from the genocide amount to half of the Abututsi population in Rwanda at the time.<sup>114</sup> That is the equivalent of killing the entire population of the state of South Dakota, the fifth least-populated state in the United States.<sup>115</sup> In the case of Bosnia, “some 200,000 Bosnians were killed [and] more than 2 million were displaced” while “the United States, Europe, and the United Nations stood by.”<sup>116</sup> It is hard to justify the international community’s belated response to these genocides<sup>117</sup> when comparing it with the response to the terrorist attacks of September 11, 2001.

This is particularly true when considering that under the Genocide Convention, signatories commit to “prevent and to punish” in declared cases of genocide.<sup>118</sup> While an international court or tribunal can provide minimal punishment options to a minimum number of ringleaders,<sup>119</sup> it does nothing to prevent a genocide from occurring and, as discussed above, has little if any deterrent effect. More energy, more focus, and certainly more resources need to be put toward the commitment to prevent genocide and other mass atrocities before they occur.<sup>120</sup>

An effective early-warning system is required to truly protect the potential victims of genocide.<sup>121</sup> There is no need to

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113. Avery, *supra* note 53, at 108.

114. Bakuramutsa, *supra* note 61, at 640.

115. See United States’ Population by State, <http://www.factmonster.com/ipka/A0004986.html> (last visited Oct. 22, 2006).

116. POWER, *supra* note 8, at 251.

117. Not only did it take eighteen months to select a prosecutor for the ICTY, but “[b]y 1996, the peacekeepers on the ground in Yugoslavia had not made a single arrest. By 1997, only seven people were in custody, and most of those had surrendered voluntarily to the Tribunal.” Danner, *supra* note 15, at 24 (citations omitted).

118. See Convention on the Prevention and the Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, art. I [hereinafter Genocide Convention].

119. See Brooks, *supra* note 3.

120. See Harold Hongju Koh, *A United States Human Rights Policy for the 21<sup>st</sup> Century*, 46 ST. LOUIS U. L.J. 293, 323 (2002) (“[T]he broadest challenge the United States faces is not simply to redress past abuses, or to minimize current ones, but to develop a consistent strategy to prevent future human rights abuse, by promoting early warning, preventive diplomacy, and long-term promotion of democracy worldwide in all of its dimensions.”).

121. See Keeler, *supra* note 14, at 138; Avery, *supra* note 53, at 137–38; JONASSOHN & BJORNSON, *supra* note 8, at 93–105; INT’L COMM’N ON INTERVENTION &

wait for the atrocities to begin to take action. For example, the Genocide Convention makes not only the commission of genocide punishable, but also conspiracy to commit genocide, direct and public incitement to commit genocide, attempts to commit genocide, and complicity in genocide.<sup>122</sup> The recent events in Bosnia and Rwanda demonstrate that genocides happen in stages, often with the commission of small-scale atrocities initially to test international reaction.<sup>123</sup> In Bosnia, “[t]he Serbs ‘tested the water’ in 1991 when they tortured and killed Croats in so-called labor camps . . . . Because the Muslims and the Croats were unable to stop the Bosnian-Serbs, and the international community did not seem to care, the genocide simply accelerated.”<sup>124</sup> In the case of Rwanda, there is clear evidence that many people within the Rwandan government

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STATE SOVEREIGNTY, *supra* note 1, ¶¶ 3.10–3.11.

3.10 It is possible to exaggerate the extent to which lack of early warning is a serious problem in government and intergovernmental organization these days. More often than not what is lacking is not the basic data, but its analysis and translation into policy prescription, and the will to do something about it. Far too often—and the recent reports on the UN response to Rwanda in 1994 confirm this—lack of early warning is an excuse rather than an explanation, and the problem is not lack of warning but of timely response.

3.11 All that said, there is a need for more official resources to be devoted to early warning and analysis. Preventive action is founded upon and proceeds from accurate prediction, but too often preventive analysis, to the extent that it happens at all, fails to take key factors into account, misses key warning signs (and hence misses opportunities for early action), or misreads the problem (thereby resulting in application of the wrong tools). A number of distinct problems weaken analytic capacities to predict violent conflict: the multiplicity of variables associated with root causes of conflict and the complexities of their interactions; the associated absence of reliable models for predicting conflict; and simply the perennial problem of securing accurate information on which to base analyses and action.

This Early Warning and Analysis section from the report highlights the benefit of an insider coming forward with clear evidence, thereby removing the requirement for as much predictive analysis. *Id.*

122. See Genocide Convention, *supra* note 118, art. III; Procida, *supra* note 2, at 668 (citation omitted).

123. Keeler, *supra* note 14, at 168 (citation omitted).

124. *Id.*

knew of the plans to execute a genocide<sup>125</sup> and that “pilot projects for extermination [were] successfully tested” before the full-scale genocide of April 1994 occurred.<sup>126</sup> The hierarchy in the government and military had to be recruited to commit the genocide.<sup>127</sup> It was not until 1994 that the genocidal leaders began in earnest the mass recruitment of the Hutu populace.<sup>128</sup>

A program that provided true incentives for those on the inside of the planning stages of genocide to come forward with clear evidence, coupled with an effective protection scheme for those who do come forward, would be a step in the direction of proactive prevention rather than passive retribution.

### III. INCENTIVIZING THE INFORMANT BEFORE THE ATROCITY OCCURS AND PROTECTING HIM

As previously mentioned, “Mass atrocity could not occur without the organized cooperation of many, often numbering in the several thousands.”<sup>129</sup> This element of group participation is fairly unique to this type of crime:<sup>130</sup> “Contrasted with conventional crimes conducted by a single person or small cabal, state atrocities are instead often ‘the product of collective, systematic, bureaucratic activity, made possible only by the collaboration of massive and complex organizations in the execution of criminal policies initiated at the highest level of government.’”<sup>131</sup> Because of this need for mass recruitment to

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125. See POWER, *supra* note 8, at 333 (stating that “[l]ists of victims had been prepared ahead of time” in anticipation of the April massacres).

126. Akhavan, *supra* note 2, at 505 (pointing out that this lack of accounting for the time period in which numerous individuals were engaged in planning the genocide was one of the reasons that Rwanda objected to the final ICTR Statute (quoting U.N. Doc. S/PV.3453, at 14 (1994))); Bakuramutsa, *supra* note 61, at 645–46.

127. DES FORGES, *supra* note 51, at 6.

128. *Id.* at 10–11.

129. Osiel, *supra* note 19, at 1752 (citation omitted). The same source later states, “[A]mbitious administrators define target categories and compete for jurisdiction; different officials pass sentences or create administrative authorities; others arrest, some load onto trains, others unload, some guard, others herd people to the killing ground or into the gas chambers; still others shake the cyanide crystals into the vents.” *Id.* at 1767 (quoting CHARLES S. MAIER, *THE UNMASTERABLE PAST* 69–70 (1988)).

130. See Osiel, *supra* note 19, at 1751–53.

131. *Id.* at 1767 (quoting David Cohen, *Beyond Nuremberg: Individual*

accomplish the insidious task, there are numerous insiders who know the plan, even at the earliest stages. It is these insiders that the international community must access and enlist.

Despite the often widespread knowledge of the plans for mass atrocities, both inside and outside the government structure, there is often little usable information available to the international community. For example, in the case of Bosnia, thousands of acts of genocide occurred without the U.N. feeling they had sufficient information to take effective action,<sup>132</sup> even though they knew atrocities were occurring as early as April 1992.<sup>133</sup> Often the problem is the source of the information. Either the information is not confirmable or the source is considered unreliable.<sup>134</sup> This highlights the desperate need for someone on the inside to come forward and provide clear evidence as to the plans and execution of these activities. A true insider would provide information that overcomes both of these hurdles and would present the international community with a clear and reliable picture of the atrocities that are planned or already occurring, as well as who is responsible for them.

A program that incentivizes insiders to come forward with prosecutable evidence during the planning stages is a vital step toward preventing rather than merely responding to such egregious behavior. Current international law and policy seek ways “to elicit the bystander’s altruism and thereby override the risks he faces in acting to prevent harm.”<sup>135</sup> Quite obviously, these methodologies are insufficient, and a more effective incentive system must be utilized. As Mark Osiel puts the question, “How might the law more effectively induce such bystanders to honor their duty, in a way commensurate with the actual wrongfulness of its violation?”<sup>136</sup> The answer is to provide

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*Responsibility for War Crimes, in* HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA 53 (Carla Hesse & Robert Post, eds., 1999)).

132. See Procida, *supra* note 2, at 679–80.

133. See POWER, *supra* note 8, at 264–69 (providing a detailed analysis of the information about Bosnian atrocities available to the international community and also discussing why action was not taken immediately).

134. See INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, *supra* note 1, ¶¶ 3.10–3.12 (noting the difficulties in obtaining accurate and reliable information).

135. Osiel, *supra* note 19, at 1844.

136. *Id.* at 1858. Osiel turns his attention mainly to post-event remedies but does

not only alluring incentives to come forward but also sufficient assurances of protection after coming forward, so that the insider will be willing to take the risks. Osiel points out in answering his own question that it is more effective to rely on market forces than on altruism.<sup>137</sup>

A remarkable illustration of this need occurred in advance of the genocide in Rwanda. Prior to the atrocities actually occurring, the U.N. Commander, Major General (MG) Dallaire,<sup>138</sup> was informed by “high-ranking military officers from within the Hutu government” that Hutu militias were planning massacres.<sup>139</sup> Further, in January 1994, an insider informant, known only as Jean-Pierre, provided excellent intelligence to MG Dallaire concerning the training and arming of “highly efficient death squads” who were “mak[ing] lists of the Tutsis in their various communes” that “could kill a thousand Tutsis in Kigali within twenty minutes of receiving the order.”<sup>140</sup> In exchange for feeding this information, Jean-Pierre requested to have “all his Rwandan francs exchanged for U.S. dollars and to be given passports for himself and his family to a friendly Western nation.”<sup>141</sup> MG Dallaire was able to take some limited actions based on this accurate and timely information,<sup>142</sup> but he was not able to provide the requested travel arrangements for Jean-Pierre because “New York [the U.N.] said it could not become involved in ‘covert’ activities such as providing him with travel documents.”<sup>143</sup> By the end of January, Jean-Pierre had

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argue that incarceration is not sufficient and that the international community has to take a more creative approach to punishment. *Id.* at 1846–50.

137. *Id.* at 1855–58.

138. MG Dallaire has recently released a book describing his experiences in Rwanda. ROMEO DALLAIRE, SHAKE HANDS WITH THE DEVIL: THE FAILURE OF HUMANITY IN RWANDA (2003).

139. POWER, *supra* note 8, at 343.

140. DALLAIRE, *supra* note 138, at 142.

141. *Id.* at 143.

142. *See Id.* at 146 (describing how MG Dallaire, after cabling the U.N. with the information, received a return cable telling him to do nothing and to inform the local Rwandan authorities of the information). This highlights the problem of political will, discussed below.

143. *Id.* at 150.

faded away, never to be found or heard of again.<sup>144</sup> MG Dallaire concludes his account by writing, “Whether he had engineered an escape on his own or was uncovered and executed, I have never been able to find out. The more troubling possibility is that he simply melted back into the Interahamwe, angry and disillusioned at our vacillation and ineffectiveness, and became a génocidaire.”<sup>145</sup>

These examples illustrate the need to appropriately incentivize insiders to come forward as informants and then provide adequate measures of protection once they do. While political will is still the most important element of preventing genocide, surely the more accurate and reliable information that can be presented to the international community, the more likely the international community will be to take some form of decisive action. The rest of this part of the Article analyzes these issues in greater detail and argues for a system that incentivizes insider informants through various means, including assurances of protection. Such a program would have potentially had a profound effect on MG Dallaire and his ability to intervene prior to the genocide, and also may have acted as a strong deterrent on the genocidal conspirators as well as spurred the international community into action.

#### A. *An International “Whistleblower” System*

In order for incentives to work, they must be sufficient to encourage the insider with information to come forward.<sup>146</sup> These incentives would be akin to the “whistleblower” systems that are found in most modern countries.<sup>147</sup> The idea behind a whistleblower system is that someone on the inside knows what wrongful acts are either being planned or have occurred.<sup>148</sup>

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144. *Id.* at 151.

145. *Id.*

146. *See, e.g.,* Chris Strohm, *Security Agency Whistleblowers Seek Stronger Protections* (Feb. 14, 2006), available at <http://www.govexec.com/dailyfed/0206/021406c1.htm>.

147. *See, e.g.,* Whistleblower Protection Act, 5 U.S.C. §§ 1201–1222 (1989); Public Interest Disclosure Act, 1998, c. 23, §§ 43A–43H, 43J–43L (Eng.), available at <http://www.opsi.gov.uk/acts/acts1998/19980023.htm>.

148. *See Developments in the Law: Corporations and Society*, 117 HARV. L. REV.

Whistleblower legislation incentivizes the inside individual to come forward and provide the information to facilitate intervention before the event or prosecution after the event.<sup>149</sup> Whistleblower legislation not only provides financial or other incentives to come forward, but also provides protections to those who do come forward as a further means of securing their cooperation.<sup>150</sup> A similar system could work effectively on an international scale as well in an effort to interrupt mass atrocities such as genocide.

The idea of an international whistleblower program is not without some antecedents. Corporate America, including international corporations, uses whistleblowers as third party enforcement authorities.<sup>151</sup> Whistleblower systems have proven effective in getting people involved in crimes to come forward after the events in a truth and reconciliation type program.<sup>152</sup> The United Nations has even recognized the value of whistleblowers and has proposed legislation for domestic regimes in an attempt to promote anticorruption.<sup>153</sup> In the United States' 2003 Women and Children in Conflict Protection Act,<sup>154</sup> the Coordinator is urged to encourage the UNHCR and other Nongovernmental Organizations (NGOs) to develop a whistleblower system<sup>155</sup> to encourage victims to come forward in an environment of confidentiality and free of retribution.<sup>156</sup> While this does not establish clear incentives to come forward as this Article proposes, and is targeting victims rather than

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2227, 2244–45 (2004).

149. See Nicholas A. Goodling, Note, *Nigeria's Crisis of Corruption – Can the U.N. Global Programme Hope to Resolve the Dilemma?*, 36 VAND. J. TRANSNAT'L L. 997, 1020 (2003).

150. See 5 U.S.C. § 2302(b)(8)–(9) (1966).

151. See *Developments in the Law*, *supra* note 148, at 2244–45 (discussing a recent attempt to install a similar liability on corporate attorneys).

152. Bill Keller, *South Africa Imperative: Confess and Be Forgiven*, N.Y. TIMES, Oct. 4, 1992, at E6; *Rwanda: Gacaca Justice Made in Prison*, AFRICA NEWS, Jan. 20, 2003.

153. See Goodling, *supra* note 149, at 1020.

154. Women and Children in Conflict Protection Act of 2003, S. 1001, 108th Cong. (2003) [hereinafter Conflict Protection Act].

155. *Id.* § 305 (a)(1).

156. Avery, *supra* note 53, at 129.

insiders, it is recognition of the value of the whistleblower principle in situations of mass atrocities or genocide.

The vital advance in this area, however, must be to turn the focus to prevention and intervention, rather than prosecution and reconciliation.<sup>157</sup> As has been illustrated earlier in the Article, the costs of mass atrocity and genocide in terms of time and money spent prosecuting after the fact, and more importantly, in human lives and damage to the collective conscience, are too expensive to continue to pay.<sup>158</sup> Proactive methods of discovery that provide prosecutable evidence and support intervention are of inestimable value and must be pursued.

How would such a system work? Though there are numerous ways to create and manage an effective system of incentives, one way would be through the newly formed Human Rights Council.<sup>159</sup> The Council is currently responsible for “promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner”<sup>160</sup> and does this by “address[ing] situations of violations of human rights, including gross and systematic violations, and mak[ing] recommendations thereon. It should also promote the effective coordination and the mainstreaming of human rights within the United Nations system.”<sup>161</sup> The Council is further tasked to “[c]ontribute, through dialogue and cooperation, towards the prevention of

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157. See Koh, *supra* note 120, at 323 (“The sobering fact is that the problem is usually not an absence of information. Rather, the problem is getting the right information into the right hands at the right moment, before large-scale abuses actually take place, in time to generate political will necessary to head off the explosion of atrocities.”).

158. See, e.g., *Post-Conflict Challenges*, *supra* note 5 (discussing economic costs of ICTR and ICTY); Genocide in the 20th Century, <http://www.historyplace.com/worldhistory/genocide/index.html> (last visited Oct. 22, 2006) (detailing number of deaths in recent major genocidal incidents).

159. See Press Release, United Nations General Assembly, General Assembly Establishes New Human Rights Council by Vote of 170 in Favour to 4 Against, With 3 Abstentions (Mar. 15, 2006) (available at <http://www.un.org/News/Press/docs/2006/ga10449.doc.htm>) (announcing establishment of new Human Rights Council).

160. G.A. Res. 977, ¶ 2, U.N. Doc. A/RES/60/251 (Apr. 3, 2006).

161. *Id.* ¶ 3.

human rights violations and respond promptly to human rights emergencies”<sup>162</sup> and to “[m]ake recommendations with regard to the promotion and protection of human rights.”<sup>163</sup> This clearly gives a preventive, as well as remedial, role in human rights to the Council.

In keeping with this charge, the Human Rights Council could be the clearing house for insider allegations. The Council could create hotlines where people can make anonymous calls to begin the process of coming forward with evidence. Multiple methods of communicating this information could be used and published widely, particularly in those countries that the Council thinks are at risk for atrocities or genocide to occur. By working through regional organizations and representatives of the Office of the High Commissioner for Human Rights dispersed across the globe, the Council can broaden its reach and accessibility to ensure that an insider knows how to come forward and can easily do so.

Once the Council has been informed of a plan to commit mass atrocities or genocide, and presented evidence in support of the allegations, it should be required to forward that information to the Security Council, Secretary-General, High Commissioner,<sup>164</sup> and the International Criminal Court.<sup>165</sup> As the Security Council, Secretary-General, and High Commissioner determine the political actions to take on the information, the International Criminal Court can be evaluating the evidence and preparing a recommendation for the Security Council. Once the individual has come forward, the ICC could play the major role in the process as discussed below. It is uniquely qualified to do so not only because of its innovative organization, but also because it may end up as the forum for prosecution of those who

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162. *Id.* ¶ 5(f).

163. *Id.* ¶ 5(i).

164. *See* The High Commissioner, <http://www.ohchr.org/english/about/hc/index.htm> (describing briefly the office and position of the High Commissioner of Human Rights) (last visited Oct. 22, 2006).

165. *See* International Criminal Court, <http://www.icc-cpi.int/home.html> (giving news and highlights of the ICC) (last visited Oct. 22, 2006).

are planning to commit the atrocities<sup>166</sup> if domestic courts are “unable or unwilling”<sup>167</sup> to do so.

With a system of reporting in place, and an organization ready to respond to the reports, it now becomes important to provide the insider with incentives to come forward. While some may do so for altruistic reasons,<sup>168</sup> it is important to attract even those who require some additional incentives to come forward. Coupled with the promise of protection from retribution discussed below, perhaps the most universal incentive is monetary reward. A fund would need to be established, or perhaps existing ICC funds could be augmented,<sup>169</sup> from which to pay those who come forward with sufficient evidence. While some may have moral or ethical issues with paying an insider who may have even participated in the early stages of a genocide, it is justifiable considering the opportunity to save the lives of the thousands who might not be killed if the plan is interrupted. Further, considering the billions of dollars already

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166. See Rome Statute of the International Criminal Court, art. 5, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (giving the Court jurisdiction over genocide, crimes against humanity, war crimes, and the crime of aggression).

167. Dr. Roy Lee, Remarks at Panel: The International Criminal Court: Contemporary Perspectives and Prospects for Ratification, in 16 N.Y.L. SCH. J. HUM. RTS. 505, 508 (2000); see also Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 423–25 (1998); David J. Scheffer, Ambassador, Address to Vanderbilt University Law School: Advancing U.S. Interests with the International Criminal Court, in 36 VAND. J. TRANSNAT'L L. 1567, 1572–73 (2003); Michael Newton, *Comparative Complimentarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 26–27 (2001). But see Keeler, *supra* note 14, at 171 (arguing that the ICC will be ineffective without some further enforcement mechanism because as long as those committing the genocide are winning, it is unlikely that the ICC will be able to pursue prosecutions); W. Chadwick Austin & Antony Barone Kolenc, *Who's Afraid of the Big Bad Wolf? The International Criminal Court as a Weapon of Asymmetric Warfare*, 39 VAND. J. TRANSNAT'L L. 291 (2006) (arguing that the ICC may be used as a tool of asymmetric warfare against the United States).

168. See generally Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99 (2000) (comparing various state and federal whistleblower statutes, and finding that those statutes combining incentives and protection were far more successful than those relying on protection only).

169. See International Criminal Court: Trust Fund for Victims, <http://www.icc-cpi.int/vtf.html> (describing briefly the purpose and establishment of the fund, and its current balance and pledges).

spent on international tribunals,<sup>170</sup> the cost of this expense would likely be minimal.

Immunity for previous acts is also likely to be an effective incentive. The breadth of the immunity offered would need to be discussed, but some form of immunity is certainly likely to attract disaffected members of the criminal enterprise. The immunity would have to cover both domestic and international criminal proceedings to be effective, which would require some Security Council implementation or intervention, but the value of immunity as an incentive is uncontested.

Other incentives can and should be developed that will attract the insider to come forward as early in the process as possible. Adequately incentivizing those involved in the development of the plans to come forward with evidence will undoubtedly produce beneficial results in the fight against genocide. The insider would have to demonstrate a willingness to assist in any necessary investigation and testify at any later criminal proceedings as part of the incentive package. The greater the incentives, the more likely the insider will be to come forward and the more likely the international community will have sufficient evidence to intervene and prevent the mass atrocity from occurring.

It is important to note that the Human Rights Council does have a system of reporting human rights violations, known as the "1503 procedure," which is currently in place and has received quite a bit of use in its history.<sup>171</sup> The procedure was established in 1970<sup>172</sup> and then revised in 2000 by resolution 2000/3 of the Economic and Social Council<sup>173</sup> and is designed to

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170. See *Post-Conflict Challenges*, *supra* note 5 (giving an estimate of the ICTY and ICTR budget at \$275 million annually).

171. See Zdzislaw Kedzia, *United Nations Mechanisms to Promote and Protect Human Rights*, in HUMAN RIGHTS: INTERNATIONAL PROTECTION, MONITORING, ENFORCEMENT 3, 69 (Janusz Symonides ed., 2003) (noting that "the '1503 procedure' processed 98,799 communications in 2000; 29,726 in 2001; and 18,492 in 2002.").

172. See U.N. Econ. & Soc. Council [ECOSOC] Res. 1503 (XLVIII), U.N. Doc. E/4832/Add.1 (May 27, 1970), available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/1970.1503.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/1970.1503.En?OpenDocument).

173. U.N. Econ. & Soc. Council [ECOSOC] Res. 2000/3, U.N. Doc. E/2000/L.5 (May 3–10 and June 16, 2000), available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.RES.2000.3.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.RES.2000.3.En?OpenDocument).

provide a “channel for individuals and groups to bring their concerns about alleged human rights violations directly to the attention of the [Human Rights Council].”<sup>174</sup> However, the process is extremely cumbersome, technical, and would not have been of any assistance in the case of Jean-Pierre in Rwanda that was previously mentioned.<sup>175</sup>

To begin with, a prospective claimant must determine under which body of international law he desires to file the claim. For example, if he wants to file a complaint under an international human rights treaty, he would have to file it with a different organization than if he were filing it directly with the Human Rights Council or the Commission on the Status of Women.<sup>176</sup> This would require a pretty savvy complainant or require the complainant to go through some other organization such as an NGO who can provide assistance.

Additionally, before a claim’s merits can be considered, those who review it must be satisfied that it meets certain requirements of admissibility.<sup>177</sup> These requirements are quite arduous and would undoubtedly have deterred Jean-Pierre if he were faced with them. They include the requirement of exhaustion of local remedies and a legal analysis of whether the claim is compatible under relevant international treaties.<sup>178</sup> If a claim passes this time-consuming hurdle it may be forwarded to the alleged perpetrator state for comment, or it may be considered by the reviewing committee as to the true merits of the claim.<sup>179</sup> If the committee determines that the claimant has been the victim of a human rights abuse, it will inform the claimant and the perpetrating state of its finding and then follow up with the state after a period of time to see if remedial actions have been taken.<sup>180</sup>

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174. Kedzia, *supra* note 171, at 69.

175. *See supra* note 143 and accompanying text.

176. *See* Fact Sheet No. 7/Rev. 1, Complaint Procedures, <http://www.unhcr.ch/html/menu6/2/fs7.htm> (providing simplified explanations of the process under Res. 1503 and selected human rights treaties).

177. *See* Kedzia, *supra* note 171, at 69–70; Fact Sheet No.7/Rev. 1, *supra* note 176.

178. *See* Fact Sheet No. 7/Rev. 1, *supra* note 176.

179. *Id.*

180. *Id.*

Though this complaint process may work well for some types of complaints, it would certainly not have worked in the case of Jean-Pierre in Rwanda. Instead, a much more responsive system needs to be put in place, as suggested above. In the time it would have taken Jean-Pierre to file his complaint using the 1503 procedures, the genocide would have been over, and hundreds of thousands of Tutsis would already have been killed.

Even if the international community creates a wonderfully efficient method of reporting plans for the commission of mass atrocities or genocide, it would not be enough to sufficiently entice the informed insider to come forward. Again, as clearly illustrated by the situation with Jean-Pierre in Rwanda, the need to provide some guarantee of protection for the informant is fundamental to making this proactive system effective.

### *B. Protecting the Whistleblower*

Creative incentives will do much to encourage insiders to come forward, but nothing will be as effective as the promise of personal protection. Whether an insider comes forward with evidence because of monetary reasons, other incentives, or for altruistic reasons, he or she will still need assurances of protection from those seeking retribution before coming forward.<sup>181</sup> MG Dallaire's experience with Jean-Pierre in Rwanda is instructive. Though Jean-Pierre demonstrated a sense of altruism by his apparent disgust for what was happening,<sup>182</sup> his willingness to provide information was directly tied to the provision of travel documents with their promise of personal protection.<sup>183</sup> Once the possibility of getting personal protection disappeared, so did Jean-Pierre.<sup>184</sup> This example of the impact of providing protection as a method of incentivizing informants is profound.

If this example is typical, personal protection is the most important—and potentially the only really effective—incentive

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181. See ALEX ALVAREZ, GOVERNMENTS, CITIZENS, AND GENOCIDE: A COMPARATIVE AND INTERDISCIPLINARY APPROACH 115–17 (2001) (relating interviews of individuals who participated in the genocide out of a sense of personal preservation).

182. DALLAIRE, *supra* note 138, at 142.

183. *Id.* at 143.

184. *Id.* at 150–51.

to get informed insiders to come forward before the atrocity has occurred, and it must become the cornerstone of any proactive methodology of preventing mass atrocities such as genocide. If the international community is going to respond to its agreed responsibility to prevent and not just punish genocide, it must find effective ways to incentivize insiders to come forward early enough in the process to allow effective preventive action. This will not happen unless the international community provides real protection for those who can provide verifiable information on the planned mass atrocity and those responsible for planning it.

As stated above, there is more than one way to provide this vital service of whistleblower protection. One potential way is an international witness protection program. In fact, some systems designed to meet this need have already been created, though with limited effectiveness. Both the ICTY<sup>185</sup> and ICTR<sup>186</sup> have a Victim Witness Protection program that handles relocation of witnesses as part of the trial process. These programs have not been particularly successful due to a number of reasons, including the lack of financing,<sup>187</sup> but they recognize the essential nature of a protection program when prosecuting international crimes. Concerning the fate of female victims of rape in Sierra Leone, Shana Eaton wrote, "If victim-witnesses who do come forward are not provided full protection, including anonymity, they may be stigmatized and unable to return to their homes."<sup>188</sup> This same principle would be true of whistleblowers who uncovered plans for genocide or other mass atrocities and were willing to come forward. As Mark Osiel writes, "Group members who share such potential evidence with nonmembers risk ostracism, banishment, and sometimes far worse."<sup>189</sup>

Here again, the ICC has useful practices that can already be

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185. ICTY, RULES OF PROCEDURE AND EVIDENCE, *supra* note 35, R. 34.

186. INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA: RULES OF PROCEDURE AND EVIDENCE, R. 34, U.N. Doc. ITR/3/REV.1 (1995); Fact Sheet 9, Witnesses and Victims Support Section, *available at* <http://www.un.org/icty/glance-e/index.htm>.

187. Eaton, *supra* note 69, at 893–95.

188. *Id.* at 917.

189. Osiel, *supra* note 19, at 1854.

applied to meet this vital need. Paragraph 6 of Article 43 of the Rome Statute states:

The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma,<sup>190</sup> including trauma related to crimes of sexual violence.

While this contemplates mostly a trial process protection, it could be extended to cover whatever reasonable circumstances were required to elicit the insider's evidence and then guarantee his safety.<sup>191</sup>

Having the ICC act as the clearing house makes sense for several other reasons. Initially, once an insider comes forward, some evaluation will have to be made of his allegations. The ICC has access to trained mass atrocity prosecutors and other experts who have dealt with such crimes in other circumstances,<sup>192</sup> who are the ideal people to determine the initial validity of a claim. Since the planners of the mass atrocity or genocide may end up before the ICC at some point, either as a result of early intervention or as a result of post hoc prosecution if the international community fails to intervene in time,<sup>193</sup> this would give prosecutors an early opportunity to gather evidence and maintain witnesses necessary to prosecution.

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190. Rome Statute, *supra* note 166, art. 43.

191. Note that article 68, paragraph 4 states, "The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling [sic] and assistance as referred to in article 43, paragraph 6." *Id.* art. 68. See also International Criminal Court: Victims and Witnesses Protection, <http://www.icc-cpi.int/victimsissues/witnessprotection.html> (last visited Oct. 22, 2006). Recommendations from the Victim Witness Unit could be expanded to cover incentivizing insiders to come forward.

192. See International Criminal Court: Roster of External Legal Experts, [http://www.icc-cpi.int/otp/otp\\_roster.html](http://www.icc-cpi.int/otp/otp_roster.html) (detailing reasons and selection process for experts to whom ICC may turn when dealing with novel or complex situations).

193. See Rome Statute, *supra* note 166, art. 5 (giving the ICC jurisdiction over genocide, crimes against humanity, war crimes, and the crime of aggression).

One of the potential collateral risks of establishing a witness protection program is that it would also incentivize some to make false claims. This could occur for personal or political reasons, but it would undoubtedly occur. Having the ICC involved would help minimize the effects of false claimants on the system. First of all, the ICC, in conjunction with the experts from the Human Rights Council or its regional representatives, will be well placed to assess the validity of the claim. If they deem the claim to be false, they will also be well placed to assess the motivation for the false claim. If the motivation is pernicious, they can either choose to prosecute the false claimant under international law,<sup>194</sup> or they could turn him back to the domestic legal system that is likely to have a crime under which a false claimant could be prosecuted. It is likely that the latter course of action would work as a significant deterrent to false claimants because the government that was wrongly accused of planning genocide would have quite an interest in prosecuting the case.

Though the incentive of protection that would necessarily include travel to a different country and limited financial incentives would attract some false claimants, the time, effort, and money spent on separating them from the true claimants would be worth it if the process assisted in the proactive prevention of genocide or other mass atrocities. This seems like a small price to pay to gain access to the true informer who can provide valuable information that may spur the international community to act proactively.

Of all the potential incentives, providing personal protection to the informant will go the farthest to bring the insider forward. For some who detest the planned genocidal actions but fear to speak because of possible retribution, protection becomes the paramount hurdle to coming forward. Once protection is offered, insiders will have much more incentive to come forward with evidence of the criminal plans. This is not only important for the insider to know, but also for the perpetrators to know.

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194. No such crime currently exists at any of the international criminal tribunals; however, the Rome Statute could be amended to add a crime if the problem became serious enough.

### C. *The Deterrent Value*

As this Article has already argued, current methods of responding to genocide with international tribunals that cost hundreds of millions of dollars and take decades to complete have not proven an effective deterrent to mass atrocity such as genocide.<sup>195</sup> In fact, in many cases, the alleged perpetrators are far better off at an international tribunal than in domestic courts.<sup>196</sup> Incentivizing informants to come forward early in the process and widely publishing the incentives for those who come forward may act as a more effective deterrent.

One of the keys to the “whistleblower” system being effective is its wide publication.<sup>197</sup> Only if it is widely published and easily initiated will insiders feel drawn to take part.<sup>198</sup> This same publicity that will attract the insider to come forward will also act as a restraint on the planner who must recruit large numbers of people to participate in his crime. If Slobadan Milosevic and his underlings would have had to constantly worry if one of the members of their organization was on the verge of calling an easily accessible number and providing information on their illegal activities, it may have slowed them down or at least contracted their circle and, thus, the scope of their actions. The same is true of Rwanda, though possibly to a lesser degree. As mentioned at the beginning of this Article, it may be that some people are undeterrable and the only solution is to incapacitate them within society.<sup>199</sup> In such cases, only international political will and military capability can effectively

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195. *See supra* Part I.

196. *See supra* notes 166–67 and accompanying text; *see also* Matthew J. Soloway, *Cambodia's Response to the Khmer Rouge: War Crimes Tribunal vs. Truth Commission*, 8 *APPEAL* 32, 38–40 (2000) (discussing Pol Pot's 1978 trial *in absentia* and death sentence, Cambodia's recent request for international tribunals similar to ICTR and ICTY, and the U.N.'s insistence on certain precautions to avoid another “sham trial”); Justice Richard Goldstone, *The Trial of Saddam Hussein: What Kind of Court Should Prosecute Saddam Hussein and Others for Human Rights Abuses?* 27 *FORDHAM INT'L L.J.* 1490, 1490–92, 1501 (discussing various domestic and international options for trying Saddam Hussein, but telling a cautionary tale about some of the failures of using domestic judges in Kosovo trials).

197. Callahan & Dworkin, *supra* note 168, at 103.

198. *Id.*

199. *See* Bolton's Statement, *supra* note 7, at 50–51.

intervene. However, in the cases where the person is deterrable, knowing that someone involved in the planning is being offered protection for information may have a significant effect on those planning mass atrocities such as genocide.

As will be discussed, this will most likely only be an effective deterrent if the international community shows the proclivity to act decisively when insiders come forward. On the other hand, with the international community's fickle track record,<sup>200</sup> a person planning genocide will never know if his plan will be the one that will spur the Security Council to take action. He must decide if he is willing to take that risk.

#### *D. Lack of Political Will*

Even an effective early warning system, such as a whistleblower system with appropriate protections for those who come forward, will not solve the problem of mass atrocity or genocide if there is a lack of international political will to engage in the situation.<sup>201</sup> While it seems clear that arming the international community with specific information would only help encourage action, it will not guarantee action. Joseph Keeler, recognizing this important point in the fight against genocide, has proposed a Protocol to the Genocide Convention that would establish a U.N. organization specifically designed to prevent genocide.<sup>202</sup> The Protocol would also establish mandatory actions upon the "occurrence of certain events."<sup>203</sup>

Solving the problem of mounting political will is beyond the scope of this Article. As Nicole Procida has pointed out, "Prompting the U.N. to address a genocide conflict and remain actively involved requires extensive publicity."<sup>204</sup> Further, it must coincide with "national interests."<sup>205</sup> There is no doubt that a host of insiders who come forward with damning information

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200. Procida, *supra* note 2, at 662.

201. See Bakuramutsa, *supra* note 61, at 645 (arguing that the international community was aware of the risks of genocide in Rwanda as early as 1991 but did nothing).

202. Keeler, *supra* note 14, at 176–77.

203. *Id.* at 181–85.

204. Procida, *supra* note 2, at 670 (citation omitted).

205. See POWER, *supra* note 8, at 310–12.

may be ineffective in spurring the Security Council to action. However, a vocal host of insiders with clear prosecutable information have a better chance than if that same host of insiders remain part of the silent genociders or just disappear as Jean-Pierre did.

Further, perhaps the most effective incentive is to actually take action on the whistleblower's information. Though this can only be established through a historical pattern, once whistleblowers realize that if they come forward the international community will actually take action and prevent the atrocity, they will be encouraged to come forward, and those contemplating mass atrocities will be significantly deterred. On the other hand, if the information is available and known, and no action is taken, not only will similarly situated insiders remain silent,<sup>206</sup> but the perpetrators will act with even greater recklessness in their egregious conduct.

#### IV. CONCLUSION

Over the past century, and particularly the past two decades, the international community has witnessed horrific atrocities that have been carried out on a large scale and have resulted in unbelievable human suffering. The response has been to look on with horror, condemn the actions as violations of international law, and then spend billions of dollars and take decades to prosecute those responsible, while doing little to prevent similar events from happening again. It is time to look for another solution.

The most important goal of the international community ought to be to prevent the genocide from occurring, even if that means that those who planned it are not prosecuted. The chance to save the lives of potential victims is the greatest reward for taking preventive action. As these mass atrocities can only occur after large scale planning and the recruitment of large numbers of participants, interrupting the atrocity in the planning and recruitment stage is the key to preventing genocide and saving

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206. See Strohm, *supra* note 146 (recounting security-agency whistleblower testimony, including an assertion that failure to protect whistleblowers will discourage future employees from reporting wrongdoing that needs to be addressed).

countless lives. A system that provides incentives for insiders to come forward and then protects them from retribution is one way in which the international community can interrupt the atrocity process.

To be effective, the “whistleblower” system must be adequately advertised, provide palpable incentives, and guarantee the safety of the informant. It must also engage the international community, including the Security Council, and be backed by the possibility of quick and effective action. The United Nations’ Human Rights Council and International Criminal Court are two institutions that could ensure the effectiveness of this program. If nothing else, the establishment of such a program may act as a deterrent on individuals or groups contemplating genocide.

Whatever the costs of this incentive program, it is likely to be cheaper and more efficient than the current international tribunal system and more importantly, the millions who have perished in the last two decades will not be followed by additional millions in the next two decades.