

# ALL THE MISSING SOULS

A PERSONAL  
HISTORY  
*of the*  
WAR CRIMES  
TRIBUNALS

DAVID SCHEFFER



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## **All the Missing Souls**



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*TO MY PARENTS,*

*FOR THEIR STRENGTH OF CHARACTER*

*MY WIFE MICHELLE,*

*FOR HER UNFAILING LOVE AND SUPPORT*

*MY DAUGHTER KATE AND SON HENRY,*

*FOR THEIR PATIENCE AND GOOD CHEER*

We heard Serb voices—"Come surrender!"—and whoever did,  
they disappeared.

*A Bosnian farmer explaining why he fled his home in July 1995 as  
Srebrenica's Muslims were being slaughtered in a nearby warehouse*

We have upwards of 100,000 men that we cannot account for...  
We have no idea where those men are now.

*The author describing the unknown fate of  
Kosovar-Albanian men on April 18, 1999*

THIS BOOK HONORS THE VICTIMS OF ATROCITY  
CRIMES DURING THE 1990S—THE MURDERED, THE  
INJURED, THE DISPOSSESSED, AND THOSE MISSING  
FOR A DAY OR FOR ETERNITY. THEY ALL SUFFERED  
ON MY WATCH AS AMERICA'S FIRST WAR CRIMES  
AMBASSADOR, BUT THEIR SOULS WERE NOT  
FORGOTTEN IN THE TRIBUNALS OF JUSTICE BUILT  
DURING THAT DECADE.

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## INTRODUCTION

# AMBASSADOR TO HELL

ISAIAH PROPHESED, “AND THE LOFTINESS OF MAN SHALL BE BOWED DOWN, and the haughtiness of man shall be made low.”<sup>1</sup> That prediction bore truth in my lifetime and on my watch.

I recall Freetown, Sierra Leone, in February 1999. A teenage girl named Nancy lay before me in the shade of a small overcrowded hospital where mutilated victims, some only children, waited for miracles that never arrived. Their bodies were grotesquely disfigured. Nancy, in shock, remained mute. Drug-crazed rebel boys had brutally gang-raped her and poured molten plastic into her eyes during their rampage through the city. For me, Nancy’s plight once again evoked the horror of atrocities that erupted at massive crime scenes throughout the 1990s.

I also remember a steep hillside north of Srebrenica in eastern Bosnia where, on a hot August day in 2000, I stood witness to the first day that forensics experts were examining hundreds of skeletons of Bosniaks (Bosnian Muslims) dumped from a winding dirt road after they had been massacred by Bosnian Serb militia at a warehouse in the valley below five years earlier. Only ethnic Serbs lived in the area after the fall of Srebrenica in July 1995, and nobody had bothered to report the existence of an entire hillside of human bones. One Bosniak refugee returning that month to his home nearby had immediately alerted war crimes investigators. Another returnee told me, “We have to return to our homes here. We can look at Serb eyes because they are the guilty ones. We’ll always look at their eyes and they’ll be ashamed.” She described how the men and boys of Srebrenica fled north as she heard their cries from the woods, “Help me! Don’t leave me here!” Then, she muttered, “the Serbs would ambush and kill them.”

Often, while listening to senior officials sitting comfortably in the White House Situation Room explain why other national priorities trumped atrocities and the pursuit of war criminals, I wanted Nancy and the other mutilated bodies and missing souls of girls, boys, women, and men of Bosnia, Rwanda, eastern Congo, and Sierra Leone to file silently through that wood-paneled room and remind policy-makers of the fate of ordinary human beings. Who among the powerful would embrace the new imperative to confront *hostis humani generis*, the enemy of all mankind? Who would compel atrocity lords to heel before the bar of justice?

During the last decade of the twentieth century, one of the most ambitious judicial experiments in the history of humankind—a global assault on the architects of atrocities—found its purpose as mass killings and ethnic cleansing consumed entire regions of the earth. The grand objective since 1993 has been to end impunity at the highest levels of government and the military not only for genocide, which captures the popular imagination with its heritage in the Holocaust, but also for the far less understood offenses of crimes against humanity and even war crimes. Because such crimes coexist as heinous acts in almost every atrocity zone, and because the criminal tribunals built in recent years have bundled them together in complex prosecutorial strategies, I use the term *atrocity crimes*, which I describe in greater detail in the postscript concluding this book.

The futile slogan of “never again” after World War II collapsed under the weight of atrocity crimes occurring again and again. Yet, with some kinship to the postwar military tribunals at Nuremberg and Tokyo, an unprecedented number of international war crimes tribunals appeared during the 1990s to bring to justice the leading perpetrators of such heinous crimes and end any legal basis for impunity. Such justice may seem self-evident today, but in the last decade of the twentieth century the outcome was unknown. The challenges were colossal in those years, as hundreds of thousands of individuals participated in the murder and ethnic cleansing of millions. The vision of achieving justice was daunting. Often the easier path would have been to cut peace deals with the leading criminals. If the tribunals’ work had been left to domestic courts, particularly in devastated societies, there simply would not have been any justice at all. A choice had to be made, and the international community finally was prepared to make that choice. Either there would be a court where leaders who planned and carried out atrocity crimes would be prosecuted, or they would walk free with impunity.

The task was not to construct a new legal order of perfect justice where every war criminal from the top leaders on down to the foot soldiers would be prosecuted. Rather, the challenge centered on building tribunals that would hold political and military leaders to account for the atrocity crimes unleashed on innocent civilian populations for which they were primarily responsible. By the turn of the century, it was no longer plausible to argue that there was a logical or moral basis for leadership impunity. Many political and military leaders undoubtedly will escape any reckoning before a court of law, but that will be for reasons other than the bankrupt theory of leadership impunity that used to enable them to commit the worst possible crimes against humankind.

I had the lead American job of building five separate war crimes tribunals. From 1993 through 1996, I was senior adviser and counsel to Dr. Madeleine Albright, America's ambassador to the United Nations, and wielded primary responsibility for her atrocity crimes work. In 1997, when Albright became the secretary of state, I was nominated by President Bill Clinton and confirmed by the Senate as the first-ever U.S. ambassador-at-large for war crimes issues. On the one hand, this initiative marked a sad commentary on the state of the world at the close of the twentieth century—fifty years or so after the Holocaust and the Nuremberg and Tokyo tribunals and two decades after the atrocity crimes that devastated Cambodia during the rule of Pol Pot. On the other hand, my ambassadorship demonstrated that the United States recognized the gravity of the situation and rose to the challenge. No other nation had seen fit to designate anyone as an ambassador to cover atrocity crimes.

At the age of forty-three, I embarked on one of the darkest possible diplomatic assignments. My job, in union with dedicated colleagues in New York and Washington and an ad hoc cast of foreign diplomats and government officials, was to build new courts of justice that would prosecute war criminals and deter further carnage. Some described me as the Ambassador to Hell, but in my more optimistic moments I was a carpenter of war crimes tribunals, each one requiring new architectural plans and novel attempts at credible justice amidst carnage and mayhem.

This book is the story of how the war crimes tribunals—the International Criminal Tribunals for the former Yugoslavia (the Yugoslav Tribunal) and Rwanda (the Rwanda Tribunal), the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia (the Cambodia Tribunal), and the International Criminal Court—were conceived and built to end

the impunity of political and military leaders. Initiatives to construct similar tribunals for the atrocities that occurred prior to or during my watch in southern Sudan, the Democratic Republic of the Congo, East Timor, Chechnya, and Iraq proved futile by the turn of the millennium. That is a different story. In this book, I write both as a diplomat who helped lead the tribunal-building project and as a scholar who strives to understand the legal and political significance of both the achievements and failures of the enterprise I call “credible justice.”

More important, what follows is a historical narrative of how international justice evolved exponentially during the decade of the 1990s and into the twenty-first century and brought to an end the presumption of impunity for atrocity crimes. It is the story of the political decisions that shaped the tug-of-war between peace and justice during that dynamic period in world history. The tribunal era, launched in 1993, arose from the unleashing of colossal death and destruction that seemed almost surreal in the wake of the Cold War. During my eight-year watch in the United States government from 1993 to early 2001, failures far exceeded successes. Millions of non-combatant civilians perished, and thousands of settlements, towns, and cities were laid waste. Atrocity crimes exceeded the number of international peace agreements, new democracies, and major new symphonies and operas.

But in the twilight of a bloody century that had experienced the extinction of countless Congolese, the atrocities against the Armenians, the Stalinist purges, the Nanking massacre, the Holocaust, Chairman Mao’s Cultural Revolution, Pol Pot’s harvest of death, Uganda’s suicide under Idi Amin, the Ethiopian nightmare under Mengistu, disappearances in Honduras, Chile, and Argentina, and Saddam Hussein’s genocidal assault on the Kurds, there was much more death and destruction yet to come. Large-scale atrocities erupted in the Balkans, including Kosovo, and in Rwanda, Burundi, Sudan, Congo, Sierra Leone, Liberia, Ethiopia and Eritrea, Angola, East Timor, Iraq, Afghanistan, Burma, and Chechnya. A few of these were extensions of earlier conflicts and internal massacres. But most were freshly minted butcheries. Despite the information revolution, the economic prosperity, the military superiority of modern armies, and the enlightened diplomacy of the new world order following the Cold War, the killing, mutilating, and wanton destruction proliferated. Only a few atrocities met a rapid response from diplomats and civilized warriors.

While the killing machines kicked into high gear, the law that “governs” such atrocities grew during the 1990s. International lawyers and diplomats

began to make good on the immediate post–World War II era when laws protecting civilians and other noncombatants were codified. My challenge was to enforce a revitalized set of laws against individual war criminals, including political and military leaders who had traditionally enjoyed *de facto* immunity from prosecution. So while the killing and mutilations and massive destruction erupted weekly across several continents, international law enforcement matured in parallel as a highly favored retaliatory response to some of the atrocities. International criminal tribunals became a reality, with their prosecutors forcing themselves upon governments to compel cooperation. Local prosecutors suddenly realized they too could project themselves onto the global scene if only they would indict someone like Augusto Pinochet of Chile under the rubric of “universal jurisdiction.” International investigations of the Mafia and the Cali Cartel lost their luster as the world turned its attention to the chase for war criminals.

But a nagging challenge remained: would the creation of war crimes tribunals actually deter future war criminals? Cynics delighted in raising the deterrence question every step of the way during the 1990s. I repeatedly had to prove a negative—that would-be perpetrators of atrocity crimes stayed their hand because of the threat of an international prosecution. Deterrence is a relative concept. How effectively has the death penalty or the multiplicity of municipal, state, and federal courts deterred murderers in American society? Have the criminal courts of Detroit ended all violence and theft there? Seeking evidence of rapid deterrence in the war crimes tribunals is like the quest for instant gratification by teenagers and egotistical professionals—it is a bizarrely twisted objective fraught with inflated expectations and unpredictable outcomes. The Yugoslav Tribunal certainly was conceived with the goal of having some kind of deterrent impact on the fighting in the Balkans, but no one could predict how much it would influence the depraved minds at work in the region or whether there would result any sudden cessation of heinous violence.

I posit, but cannot prove, that after several decades, or even most optimistically after several years, a country once consumed by atrocities stands a chance of having learned the lessons of deterrence and being transformed into a society that holds war criminals in contempt and breeds them no more. The war crimes tribunals were not designed, and should not be burdened, with all responsibility for creating a culture of deterrence and hence of peace and stability. They can play an important part in that endeavor, but failed states and conflict-ridden societies require far more from the international

community and from their own indigenous sources of modernity to establish progressive societies. Thrusting the burden of ending all atrocities on the backs of the tribunals is naive at best and dangerous at worst.

The defeated citizens of Germany and Japan after World War II largely despised the Nuremberg and Tokyo military tribunals, which themselves inspired no decisive break from the past in those societies.<sup>2</sup> But later generations absorbed the historical significance of the tribunals and became champions of human rights and justice. Germany's support of the International Criminal Court is unwavering today. I often observed German negotiators invoking the memory of Nuremberg as if it were their redemptive predicate for a permanent court. Japanese society appears even now more accepting of its soldiers' wartime atrocities. But Japan became a remarkably nonaggressive nation (at least militarily), joined the International Criminal Court, and strongly supports international justice initiatives such as the Cambodia Tribunal. Such projustice outcomes may be many years or decades coming for Sudan or the Democratic Republic of the Congo or Serbia. But imagine how differently events would have unfolded if the atrocity masterminds of the Balkans, Rwanda, and West Africa had not been isolated and brought to credible justice by the war crimes tribunals since 1993.

There already are signs of deterrence emerging from the work of the International Criminal Court. For example, the court's arrest warrants against leaders of the Lord's Resistance Army (LRA) in Uganda helped drive the LRA into serious negotiations and inspire defections. In the documentary film *The Reckoning*,<sup>3</sup> Patrick Makasi, the former director of operations of the LRA until his defection in October 2007, admits, "In the bush, ICC is always the main discussion. Sometimes they talk about it five times a day. We hear that once you are taken to the ICC, you are as good as dead, and we hear there are already people taken to face ICC trials.... We hear that once you're taken there you have no more choice. I guess that's why [LRA leader] Joseph Kony fears the ICC. Maybe he knows more. Joseph Kony is afraid of ICC." Fear does not necessarily translate to deterrence, but it is a powerful wedge on war criminals.

I write in this book of crime scenes and victims, of the corridors of power and how policy-makers confronted megacrimes, how war criminals were pursued, and how courts to prosecute these war criminals were created against daunting odds. My primary research tool was personal notebooks covering eight years of work. I also drew upon declassified State Department cables.<sup>4</sup> Make no mistake—building the war crimes tribunals was a

collective effort with dedicated, indeed at times zealous, advocates for international criminal justice from other governments, the United Nations, civil society, and among scholars and jurists spanning the globe. But I represented the most powerful nation, the United States, under the leadership of President Bill Clinton and Ambassador (later secretary of state) Madeleine K. Albright. Their commitment to international justice made a significant difference in what unfolded during the Clinton administration, even though, as related on these pages, they sometimes weakened in their resolve.

No one, including myself, is blameless for the worst atrocities that took place, and this book will describe mistakes and lost opportunities bluntly. But I embarked on a mission for justice that drew from the lessons of the Nuremberg and Tokyo trials and yet proved more challenging—in law and enforcement—than the task that confronted my predecessors after World War II. Theirs was victors' justice; mine was the long tedious struggle for international justice often targeting indicted fugitives either on the run or shielded by their own power. No one could dictate the outcome.

A world burdened with atrocities can challenge the legality, morality, and even the honor of modern war as it seeks to end the killing. During the 1990s conventional warfare morphed into state-sponsored massive crimes. The political responsibility of governments bowed to the judicial accountability of tribunals. Christian notions of the "just war," which were revived during the Gulf War of 1990–1991 and again with Operation Iraqi Freedom in 2003, became hopelessly entangled with proliferating rules to protect civilians during hostilities. This tectonic shift initially caught everyone off guard. While the laws of armed conflict mandate civilized means of conducting warfare, during the last two decades a frightening number of combatants, led by a new cast of war criminals, fought in defiance of those laws, brutally assaulting large numbers of civilians, destroying private property, and obliterating the environment. Nothing was left to the imagination.

We struggle anew with the nagging paradox of law and war, a seeming conflict that humankind has confronted for centuries. The challenges of armed combat grow with the number and intensity of internal civil wars, the callous targeting of civilians as a war aim or to fulfill a quest for power, and the desperate need for nations to intervene militarily to stop atrocities. These challenges also are defined by how the U.N. Charter limits armed conflicts and with the possibilities presented by technologically wondrous weaponry. At the same time the legal code has grown to regulate warfare despite the emergence of new atrocities. The formula to end impunity for



atrocities crimes is deeply rooted in the rules to regulate war between civilized and not-so-civilized armies and in the deepening influence of human rights law. As we venture deeper into the twenty-first century, there undoubtedly will be just wars to wage, but we must understand how to wage them justly. When President Obama invoked the “just war” doctrine in his acceptance speech for the Nobel Peace Prize in November 2009, he put the issue squarely on the table, once again.<sup>5</sup>

I learned through extraordinary journeys that *international justice* has as much to do with the vagaries of global politics and our own moral strength as it does with treaties, courtrooms, prosecutors, judges, and defendants. The modern pursuit of international justice is the discovery of our values, our weaknesses, our strengths, and our will to persevere and to render punishment.

My own journey to Hell and back had no shortage of “reality checks” framing the grim business of confronting atrocities crimes. My boss, Madeleine Albright, was the most powerful woman in the world at the time, and I was honored to work for her. She often construed herself as the “mother of the war crimes tribunals,” and in our final days together she scribbled that I was the “father of the war crimes tribunals.” Working for Albright took me into almost every corner of America’s far-flung foreign policy during the first term of the Clinton administration (1993–1996). Her ambassadorship to the United Nations created a “candy store of issues,” as she described it, that propelled us through every day. As her representative on the Deputies Committee of the National Security Council, I participated in practically every major foreign-policy decision of Clinton’s first term, and played my role in how the other deputies and the principals debated the hundreds of options through the years.

Albright displayed great cunning in her public service, and she brilliantly mastered both the Washington bureaucracy and the U.N. behemoth in New York. I marveled at how she could coax the most obstinate opponent into conceding vital points, while pitching over the cliff those who dared to presume that she, a woman in a man’s world of diplomacy, had a weak spine. Some of my most enjoyable moments were when I played a bit part in her theater of misperceptions. During my early years with Albright, I would witness a group of men (and typically only men) enter her office at the State Department in Washington and plop down on comfortable couches for a