

1995

The Yugoslav War Crimes Tribunal: The Compatibility of Peace, Politics, and International Law

Karl A. Hochkammer

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vjtl>



Part of the [International Law Commons](#), and the [Military, War, and Peace Commons](#)

Recommended Citation

Karl A. Hochkammer, The Yugoslav War Crimes Tribunal: The Compatibility of Peace, Politics, and International Law, 28 *Vanderbilt Law Review* 119 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol28/iss1/3>

This Note is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Transnational Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

NOTE

The Yugoslav War Crimes Tribunal: The Compatibility of Peace, Politics, and International Law

ABSTRACT

Since 1991, a brutal war has raged among ethnic groups of the former Yugoslavia. Outraged by the atrocities that have pervaded the war, the United Nations established an international tribunal in 1993 to adjudicate violations of international humanitarian law committed in the Yugoslav conflict. Although well-intentioned, the Yugoslav Tribunal nevertheless may fail to accomplish its goals. A number of practical and legal obstacles may impede its success. In particular, the United Nations lack of physical control over the combatants in the Yugoslav conflict may frustrate the Tribunal's ability to bring accused war criminals to justice. This Note surveys the problems that the Yugoslav Tribunal may encounter in attempting to prosecute violations of international humanitarian law. It examines the successes and failures of past war crimes tribunals and analyzes the integrity of the law the Yugoslav Tribunal will apply. This Note concludes that even if the Yugoslav Tribunal fails in its immediate goal of prosecuting war criminals, it may nevertheless expedite a peaceful resolution to the conflict and strengthen the stature of international humanitarian law.

TABLE OF CONTENTS

I.	INTRODUCTION.....	120
II.	A BRIEF CHRONOLOGY OF THE BREAK-UP OF YUGOSLAVIA.....	125

III.	TWENTIETH CENTURY EXPERIENCE WITH WAR CRIMES TRIBUNALS.....	130
A.	<i>World War I</i>	132
B.	<i>World War II</i>	140
IV.	THE FORM AND FUNCTION OF THE YUGOSLAV TRIBUNAL..	147
A.	<i>UN Security Council Actions Leading to Resolution 827</i>	148
B.	<i>The Structure, Procedures, and Territorial Jurisdiction of the Tribunal</i>	150
1.	Territorial Jurisdiction and Structure of the Tribunal.....	151
2.	Procedures of the Tribunal	153
C.	<i>Subject Matter Jurisdiction of the Tribunal</i>	155
V.	HARD CHOICES: THE AGENDA FOR PEACE, PEACEKEEPING, AND PEACEMAKING.....	164
VI.	CONCLUSION	170
	POSTSCRIPT.....	172

I. INTRODUCTION

Despite attempts by the European Community and the United Nations to mediate a peaceful, diplomatic settlement,¹ an ethnic war has raged in the former Socialist Federal Republic of Yugoslavia (SFRY) since June 1991.² This war has forced the United Nations to take the extraordinary step of convening a war crimes tribunal, the first of its kind since the end of World War II. In 1993, the United Nations established the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia³ (Yugoslav Tribunal or Tribunal) to adjudicate atrocities, such as the Serbian policy of "ethnic cleansing,"⁴ committed in the Yugoslav conflict.

1. See Amy Lou King, Note, *Bosnia-Herzegovina—Vance-Owen Agenda For A Peaceful Settlement: Did The U.N. Do Too Little, Too Late, To Support This Endeavor?*, 23 GA. J. INT'L & COMP. L. 347, 349 (1993).

2. Marcus Tanner, *Slovenia is at War*, INDEPENDENT (London), June 28, 1991, at 1.

3. At the first session of the Tribunal, held from Nov. 17-30, 1993 at The Hague, The Netherlands, the Tribunal settled on the official name, "The International Tribunal for Crimes in Former Yugoslavia." See U.N. Doc. SC/5760 (Dec. 1, 1993).

4. King, *supra* note 1, at 348. Ethnic cleansing is a formal domestic policy of removing "undesirable" minority populations from a given territorial unit on the basis of religion, ethnicity, political affiliation, or ideology to create homogeneity in the larger population. Andrew Bell-Fialkoff, *A Brief History of Ethnic Cleansing*, FOREIGN AFF., Summer 1993, at 110. Although all sides have

The success of the Tribunal bears not only on the credibility of the United Nations, but also on the legitimacy of international humanitarian law. Although the end of the Cold War has purportedly spawned a New World Order⁵ under which force may be used as a "servant of justice" to punish human rights violations,⁶ the historical incompatibility of peacemaking and war crimes prosecution still threatens to jeopardize the United Nations ability to prosecute such violations.⁷ Thus, the establishment of the Tribunal tests the United Nations political will to bring the accused before it, as well as the force and effect of international humanitarian law.⁸

Political leaders and legal commentators generally view the Tribunal with optimism.⁹ Nevertheless, some critics deem the Tribunal an empty gesture through which Europe and the United States hope to assuage their guilt for failing to act when the war erupted, thereby permitting the carnage that continues to this day.¹⁰ Both critics and proponents recognize that, like any international jurisprudential body, the Tribunal must overcome significant practical, political, legal, and technical obstacles¹¹ that may eviscerate the United Nations goal of bringing accused war criminals to justice.¹²

committed serious violations of human rights, the Serbian policy of ethnic cleansing was the impetus for the establishment of the Tribunal. Christopher C. Joyner, *Enforcing Human Rights Standards in the Former Yugoslavia: The Case For an International War Crimes Tribunal*, 22 DENV. J. INT'L L. & POL'Y 235, 236 (1994).

5. At the beginning of the Gulf War, President George Bush commented that "we have before us the opportunity to forge for ourselves and for future generations a new world order, a world where the rule of law, not the law of the jungle, governs the conduct of nations." *War in the Gulf: The President, Transcript of the Comments by Bush on the Air Strikes Against the Iraqis*, N.Y. TIMES, Jan. 17, 1991, at A14.

6. Payam Akhavan, *Punishing War Crimes in the Former Yugoslavia: A Critical Juncture for the New World Order*, 15 HUM. RTS. Q. 262, 289 (1993).

7. See *infra* part V.

8. Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, FOREIGN AFF., Summer 1993, at 122, 126.

9. See, e.g., Akhavan, *supra* note 6, at 263-64. See Bill Schiller, *Uncertainty Dogs Start of War Crimes Tribunal*, TORONTO STAR, Nov. 18, 1993, at A19.

10. See, e.g., Anthony D'Amato, Comment, *Peace vs. Accountability in Bosnia*, 88 AM. J. INT'L L. 500 (1994); Ian Traynor, *War-crimes Court Takes First Faltering Steps; But Hague Tribunal Is Under-Funded, Under-Staffed and Confronted by Opposition in the West*, GAZETTE (Montreal), Nov. 19, 1993, at D15.

11. M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT'L & COMP. L. REV. 1, 11 (1991).

12. John Pomfret, *War Crimes' Punishment Seen Distant; Balkan Probe Lacks Funds and Backing*, WASH. POST, Nov. 11, 1993, at A39.

Since its inception, the Tribunal has encountered practical problems with obtaining evidence and financing.¹³ In addition, political disputes among national governments over the desirability of having a war crimes tribunal have further threatened the Yugoslav Tribunal's viability.¹⁴ The United States and the European Community have strongly preferred a political settlement to the conflict because of its unwillingness to commit troops to a full-scale military intervention.¹⁵ Although a political settlement without war crimes trials would avoid inevitable disputes among the leaders of Serbia, Croatia, and Bosnia over whose nationals should be subject to war crimes prosecution, giving up the Tribunal as part of a peace settlement would render meaningless the goals of international peace and respect for human dignity set forth in the Charter of the United Nations.¹⁶

The legal and technical obstacles standing before the Tribunal may be attributable to the United Nations limited role as a peacekeeping entity. The United Nations has had little direct military involvement in the Yugoslav conflict, and consequently lacks control over individuals and documents located in the SFRY.¹⁷ This lack of control and the apparent unwillingness of the international community to commit military forces to end the Yugoslav conflict severely undermine the Tribunal's ability to gain custody of accused war criminals and to obtain the evidence necessary to prosecute them.¹⁸

In contrast, the Nuremberg and Tokyo war crimes trials after World War II demonstrate that physical control over the combatants and the corresponding power to impose criminal sanctions are essential to the success of a war crimes tribunal.¹⁹ The unconditional surrender of the Axis forces after World War II prevented bargaining over war crimes trials among the victors and the defeated nations. Because the alleged war criminals no longer controlled their governments at the end of the war, they were powerless to challenge the Allies' plans to prosecute them.²⁰ History demonstrates that the power to impose justice is crucial to the successful prosecution of war crimes: It minimizes the political obstacles that stand in the way of such judicial

13. R.C. Longworth, *Peace vs. Justice: DePaul Professor Fears UN Sabotaged His Inquiry Into Yugoslav War Crimes*, CHI. TRIB., Sept. 2, 1994, at 1C.

14. *Id.*

15. See Gary J. Bass, *Courting Disaster: The U.N. Goes Soft on Bosnia Again*, NEW REPUBLIC, Sept. 6, 1993, at 13.

16. Akhavan, *supra* note 6, at 283.

17. See *infra* notes 183-96 and accompanying text.

18. *Id.* See also D'Amato, *supra* note 10, at 501.

19. See *infra* part III.B.

20. *Id.*

proceedings and allows the judicial process to proceed unhindered by challenges and delays raised by accused parties.²¹

This Note describes the historical incompatibility between peacemaking and war crimes prosecution that the UN Security Council and the Tribunal must overcome to fulfill the United Nations larger mission of maintaining peace in the post-Cold War era.²² For example, even supporters of the Yugoslav Tribunal concede that, despite the Tribunal's relatively sound legal foundation, the United Nations weak enforcement power will undermine its ability to gain custody of the accused and the threat of prosecution will merely trap the accused international pariahs within the borders of their home states.²³ Pessimists, looking at the *realpolitik* of the situation, believe that the United Nations dual goals in the Yugoslav conflict of achieving a political settlement and prosecuting war criminals are mutually incompatible.²⁴ Both sides of the debate recognize that the potential effectiveness of the Tribunal hinges on the limited power of the United Nations, which as a neutral third-party has no physical or political control over the Yugoslav conflict.²⁵

Irrespective of the Tribunal's success in prosecuting accused war criminals, the Tribunal is important to the future growth and acceptance of international humanitarian law because "law develops out of a dynamic where historical opportunity provides the occasion for evolving a new sort of legal understanding and development that can then provide a more settled foundation for

21. See Bassiouni, *The Time Has Come for an International Criminal Court*, *supra* note 11, at 2-5 (providing examples of war crimes prosecutions after battlefield victories). D'Amato argues that after World War II, the defeated Axis powers were in no position to use the planned war crimes tribunals as a bargaining chip in negotiating peace with the Allies. D'Amato, *supra* note 10, at 501.

22. See Kelly A. Childers, Comment, *United Nations Peacekeeping Forces in the Balkan Wars and the Changing Role of Peacekeeping Forces in the Post-Cold War World*, 8 TEMP. INT'L & COMP. L.J. 117, 129-31 (1994).

23. Meron, *supra* note 8, at 134.

24. The Bosnian Ambassador to the United Nations, Muhamad Sacirbey, said the Tribunal is "a way to substitute for real action to confront and stop the [war] crimes. By constantly telling the world media that the war criminals will be brought to justice, the most powerful members of the Security Council have tried to avoid the responsibility of bringing them to justice and putting the crimes to a stop today. . . . [T]he first step in dealing with any crime is to stop it, not to set up a legal system by which you prosecute it." Muhamad Sacirbey, Remarks, *Should There Be an International Tribunal for Crimes Against Humanity*, 6 PACE INT'L L. REV. 63, 65 (1994).

25. Kresimir Pirsl, Remarks, *Should There Be an International Tribunal for Crimes Against Humanity*, 6 PACE INT'L L. REV. 69, 70-71 (1994).

behavior in the future."²⁶ Thus, the Tribunal is significant because its very existence will at the very least facilitate negotiations toward a peace settlement, promote the protection of human rights in time of war through the war crimes prosecutions, and deter future human rights abuses.²⁷ The best possible result of the Tribunal would be a revival of the principles of human rights first enunciated at Nuremberg and a rededication to preventing inhumane acts of injustice during times of conflict.²⁸

Part II of this Note provides a brief overview of the events precipitating the dissolution of the former Yugoslavia and describes existing conditions as of November 1, 1994. Part III analyzes the successes and failures of war crimes trials as tools for peace settlements. Part IV discusses how the Yugoslav Tribunal will function and reviews the law it will apply. Part V evaluates the role of the UN Security Council in making peace in the post-Cold War era, and addresses the need for the Security Council's permanent members to negotiate peace in the former Yugoslavia, without risking the integrity of the international human rights regime. This Note concludes that the United Nations and the international community as a whole must elevate the interests of international humanitarian law above their own respective national interests for the Tribunal to be a viable part of the peacemaking process in the former Yugoslavia and in the future.

26. M. Cherif Bassiouni, *Nuremberg: Forty Years Later*, in *Panel Session: Forty Years After the Nuremberg and Tokyo Tribunals: The Impact of the War Crimes Trials on International and National Law*, 80 AM. SOC'Y INT'L L. PROC. 56, 59 (1986).

27. D'Amato, *supra* note 10, at 503. D'Amato argues that three warring parties, each of whom committed war crimes, threatened with war crimes trials have a dual incentive to give concessions in peace negotiations. *Id.* at 503-04. One party may be willing to give up territory or other spoils of war if other parties agree to drop demands for war crimes trials. *Id.* War crimes thus become a "cost of war," forcing combatants to give up something that war is expected to grant them. This forced exchange undermines the argument that war crimes are a military necessity, as the advantages of committing war crimes will be relinquished in a final peace settlement. *Id.* at 505-06. This line of reasoning is especially relevant to the Yugoslav conflict because the Serbs use "ethnic cleansing" to consolidate their holdings over the very territory they may be forced to give up in a peace settlement. Therefore, ethnic cleansing loses any political or military justifications it may have in the mind of the Serbs, and ceases to be a viable policy for future combatants. *See id.* *But see* Joyner, *supra* note 4, at 272 ("It would be wrong to trade away the Tribunal's proceedings in exchange for Serbian concessions in negotiations for bringing about an end to hostilities. Resort to brutal, unlawful means to accomplish an unlawful geopolitical end should not be rewarded by casting aside the institutional means for obtaining just restitution under international law.").

28. *See* Joyner, *supra* note 4, at 272.

II. A BRIEF CHRONOLOGY OF THE BREAK-UP OF YUGOSLAVIA

The Socialist Federal Republic of Yugoslavia (SFRY) was formed from the rubble of the Austro-Hungarian Empire after World War I.²⁹ Prior to its dissolution in 1991, the SFRY consisted of six republics—Slovenia, Croatia, Serbia, Bosnia-Herzegovina, Montenegro, and Macedonia—and two autonomous regions—Kosovo and Vojvodina.³⁰

Political instability and ethnic tension plagued the SFRY from its inception until Marshall Tito established a communist government in 1947.³¹ In 1980, after the death of Tito, tension among the three major ethnic groups in the SFRY—the Croats, Bosnian Muslims, and Serbs—resurfaced.³² The ethnic unrest contributed to the decentralization of the federal government as the more prosperous republics of Croatia and Slovenia objected to subsidizing the economies of less industrialized republics like Serbia, while Serbia wanted to retain control over the federal government to ensure that economic support.³³

While the Republic of Serbia consolidated political control over the remaining republics by the late 1980s, the SFRY's governing party³⁴—the League of Communists of Yugoslavia—had

29. See John Webb, Note, *Genocide Treaty—Ethnic Cleansing—Substantive and Procedural Hurdles in the Application of the Genocide Convention to Alleged Crimes in the Former Yugoslavia*, 23 GA. J. INT'L & COMP. L. 377, 381-86 (1993).

30. The SFRY had a population of approximately 23.69 million. Marc Weller, Note, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569 (1992). The new "rump Yugoslavia" consists of Serbia and Montenegro, as well as Kosovo and Vojvodina. *Id.* at 595.

31. Webb, *supra* note 29, at 385.

32. Tito's strong personality held the country together, and his death precipitated an economic crisis and increased ethnic tension between Serbs and Albanians in the province of Kosovo. See Stephen L. Burg, *Nationalism and Democratization in Yugoslavia*, WASH. Q., Autumn 1991, at 8. Increasingly, Croats, Slovenes, and Muslims began to view the Serbs as dominating the SFRY and attempting to gather all control of the federal government into their hands. *Id.*

33. Webb, *supra* note 29, at 385 n.41.

34. The SFRY had been led by a presidential council, the chair of which rotated among the representatives of the republics and autonomous regions. Philip J. Cohen, *Ending the War and Securing Peace in Former Yugoslavia*, 6 PACE INT'L L. REV. 19, 26 n.19 (1994). Each of the six republics of the SFRY had one vote within the federal presidency. *Id.* The two autonomous regions, Kosovo and Vojvodina, also had one vote each, for a total of eight votes. *Id.* In 1989, the Serbs dissolved the legislatures of Kosovo and Vojvodina and gained control of their votes. *Id.* With the solid support of Montenegro, Serbia effectively controlled four of the eight votes in the federal presidency and could block policies it opposed. *Id.* at 26. For a brief discussion of the break-up of the SFRY and the early days of the conflict, see Douglas Eisner, *Humanitarian Intervention in the Post-Cold War Era*, 11 B.U. INT'L L.J. 195, 215-19 (1993).

begun to disintegrate because of inter-ethnic squabbling.³⁵ In January 1990, in an attempt to save itself, the League voted to end its monopoly on political power and instituted multi-party elections in the republics.³⁶ In these elections, the Communists lost control of the Slovenian government.³⁷ By the end of 1990, the Communists had also lost power in the Republics of Croatia,³⁸ Bosnia-Herzegovina,³⁹ and Macedonia.⁴⁰

These shifts in political power precipitated the dissolution of the SFRY. In June 1990, the Republic of Slovenia declared itself fully sovereign,⁴¹ and on September 27, 1990, it became the first republic to renounce the supremacy of federal law within its territory.⁴² In a December 23, 1990 referendum, Slovenian citizens voted heavily in favor of independence.⁴³ Meanwhile, on December 22, 1990, the parliament of the Republic of Croatia also declared federal legislation inferior to its own.⁴⁴

Although Serbia, Slovenia, and Croatia attempted to agree on a future form of government for the SFRY, the effort failed when Slovenia and Croatia advocated a loose confederation that would have limited Serbia's control.⁴⁵ Displeased with the proposal,

35. See BRANKA MAGAS, *THE DESTRUCTION OF YUGOSLAVIA: TRACKING THE BREAK-UP 1980-92*, 327, 343-53 (1993). Originally, Slovenia and Croatia sought to reform the SFRY by allowing a free market economy and democracy. Cohen, *supra* note 34, at 26. Serbia and Montenegro, on the other hand, tried to preserve the communist system and used their votes in the federal presidency to reject the Slovene-Croat proposal. *Id.*

36. See MAGAS, *supra* note 35, at 244-45. Only 28 of a total of 1,654 delegates voted against the measure, after a volatile debate in which personal insults were common. Marlise Simons, *Upheaval in the East: Yugoslavia; Yugoslav Communists Vote to End Party Monopoly*, N.Y. TIMES, Jan. 23, 1990, at A9.

37. See MAGAS, *supra* note 35, at 244-45.

38. *Croatia Becomes 2nd Yugoslav Province to Oust Communists*, CHI. TRIB., May 11, 1990, at 4.

39. *Nationalists Sweep Elections In Bosnia*, WASH. TIMES, Dec. 5, 1990, at A2.

40. John Tagliabue, *Macedonians Vote for Independence*, N.Y. TIMES, Sept. 10, 1991, at A1.

41. Nesho Djuric, *Slovenia Declares Sovereignty, Seeks Confederation*, UPI, July 3, 1990, available in LEXIS, News Library, UPI File. The declaration of sovereignty passed by a vote of 187-83. *Id.* The declaration imposed the requirement that federal law be consistent with the laws and constitution of Slovenia to be enforceable in the Republic. *Id.*

42. *Id.*

43. The vote was 88.5% in favor of independence. Weller, *supra* note 30, at 569.

44. Weller, *supra* note 30, at 569. Serbs in Croatia declared an autonomous region of their own in October. Laura Silber, *Serbs Proclaim Autonomy in Croatia*, FIN. TIMES (London), Nov. 2, 1990, at 7.

45. Weller, *supra* note 30, at 569-70. Croatia and Slovenia wanted a loose confederation and more democratic institutions in their republics in order to end the economic strain placed upon them by economically weaker Serbia. Serbia demanded a strong centralized communist system that would ensure its

Serbia severed negotiations and, claiming that the internal borders of Yugoslavia were purely administrative, asserted that it would seek to create a Greater Serbia.⁴⁶ On March 18, 1991, the Serbian leadership, through the Yugoslav People's Army—and in flagrant disregard of the Yugoslav Constitution—imposed martial law over the SFRY.⁴⁷

The final blow to the SFRY occurred on May 15, 1991, when Serbia and Montenegro blocked the election of Stipe Mesic of Croatia to the Chair of the Presidency.⁴⁸ On June 25, 1991, after further negotiations had failed, Slovenia and Croatia declared their independence.⁴⁹ Two days later, civil war erupted when the Serb-controlled Yugoslav People's Army attacked Slovenia.⁵⁰ Slovenia declared war against the rump Yugoslavia (Serbia, Montenegro, Kosovo, and Vojvodina)⁵¹ controlled by Serbia, and requested international mediation.⁵² Shortly into the war, ethnic Serbs living in Croatia began a policy of ethnic cleansing, slaughtering Muslims and Croats in parts of Croatia,⁵³ and the

continued access to the resources of more industrialized northern republics. Webb, *supra* note 29, at 386 n.43.

46. MAGAS, *supra* note 35, at 242. This action by the Serbs was not a total surprise because Serbia had historical designs on complete and total control over the federal government. In 1917, when the Yugoslav state was created out of the Austro-Hungarian Empire, Serbia achieved its dream of uniting the Southern Slavs, held since it broke free from the Ottoman Empire in the early nineteenth century. William Pfaff, *Invitation to War*, 72 FOR. AFF. 97, 103-04 (1993). The new Yugoslav state had a Serbian king, and Serbs were in complete control. *Id.* Thus, the Serb's control of the Yugoslav People's Army (JNA) alliance precipitated the war to regain hegemony over other parts of the SFRY. See MAGAS, *supra* note 35, at 269-70 (discussing the role of the JNA in the early stages of the break-up). In fact, the Serbian Academy of Arts and Sciences issued a memorandum in 1989 that advocated joining areas of the SFRY with a Serb minority into a single state on the pretext of protecting their minority rights. Cohen, *supra* note 34, at 27. The disarmament of the Croat Territorial Defense Force began that year and was nearly completed when Croatia held elections in 1990. *Id.* As Serb minorities in Croatia began fighting Croat authorities, the JNA intervened to end the fighting, but covertly supported the Serbs. *Id.*

47. Weller, *supra* note 30, at 570.

48. Alan Ferguson, *Yugoslav Council Refuses to Elect Croat as Leader*, TORONTO STAR, May 15, 1991, at A21.

49. Nesho Djuric, *Slovenia, Croatia Declare Independence From Yugoslavia*, UPI, June 25, 1991, available in LEXIS, News Library, UPI File.

50. MAGAS, *supra* note 35, at 327-33.

51. See *supra* note 30.

52. Tanner, *supra* note 2.

53. Bell-Fialkoff, *supra* note 4, at 116. The policy of ethnic cleansing was rooted in history: In 1941, the Croatian minister of education said "one third of the Serbs we shall kill, another we shall deport, and the last we will force to embrace the Roman Catholic religion and thus meld them into Croats." *Id.*

Serb population of Bosnia-Herzegovina began its initial attempt to consolidate the territory under its control.⁵⁴

As the war escalated, still other republics of the SFRY declared their independence. Bosnia-Herzegovina's Muslims and Croats⁵⁵ held a referendum on independence in March 1992.⁵⁶ Bosnian Serbs boycotted the referendum and sought to establish their own independent state within Bosnia-Herzegovina.⁵⁷ Shortly after the referendum, on April 6, 1992, the European Community recognized Bosnia-Herzegovina as an independent state;⁵⁸ the United States and Croatia followed suit the next day.⁵⁹ Full-scale war broke out among the Serbs, Muslims, and Croats when the Bosnian Serbs declared their own independent Serbian Republic of Bosnia-Herzegovina on April 7, 1992.⁶⁰ Ten days later, the republics of Serbia and Montenegro declared a new "Federal Republic of Yugoslavia."⁶¹ Although fighting among the fledgling nations began as a virtual free-for-all,⁶² by June 20, 1992, Bosnia had cemented an alliance with Croatia, which was also fighting ethnic Serbs within its own territory, and declared a

54. For a discussion of the armed conflicts and subsequent atrocities that occurred immediately after Bosnian independence was declared, see HELSINKI WATCH, *WAR CRIMES IN BOSNIA-HERZEGOVINA* 27-29 (1992).

55. Pfaff, *supra* note 46, at 101-02. The only real difference between Serbs, Croats, and Muslims is their history; "[t]he notion of an exclusive, and exclusionary, ethnic existence for each of the Yugoslav peoples is an invention." *Id.* at 101. The South Slavs, as these people are collectively known, all speak the same language. The Serbs use the Cyrillic alphabet, whereas the Croats and Muslims use the Latin alphabet, a remnant of the split of the Roman Empire that placed the Croats within the jurisdiction of Rome and the Serbs under Byzantine rule. *Id.* at 102. The Muslims are supposedly descendants of the Bogomils, a group of heretics who, subsequent to persecution by the Orthodox church, converted to Islam as the Ottoman Empire gained control of the Balkans. *Id.* at 102-03.

56. Tim Judah, *Muslims and Croats Vote for Bosnia Independence*, *TIMES* (London), March 2, 1992.

57. HELSINKI WATCH, *supra* note 54, at 26.

58. Eisner, *supra* note 34, at 225 n.150. In addition, Bosnia, Slovenia, and Croatia were formally admitted to the United Nations on May 22, 1992, after the European Community had recognized them from January to March. *Id.*

59. *U.S. Recognizes Croatia, Slovenia, and Bosnia-Herzegovina*, Agence France Presse, Apr. 7, 1992, available in LEXIS, News Library, Non-US File.

60. HELSINKI WATCH, *supra* note 54, at 30. On this day, the Yugoslav People's Army stationed in Bosnia-Herzegovina, Serb-held areas in Croatia, and Serbia itself, attacked Bosnian Croats, Croat regular army forces sent from Croatia, and Moslem forces in Bosnia-Herzegovina. *Id.*

61. John F. Burns, *Confirming Split, Last 2 Republics Proclaim a Small New Yugoslavia*, *N.Y. TIMES*, Apr. 28, 1992, at A1.

62. HELSINKI WATCH, *supra* note 54, at 30.

state of war.⁶³ Since then, the majority of the fighting has been confined to Bosnia and parts of Croatia.⁶⁴

The United Nations reaction to the Yugoslav conflict typified the world's rush to condemn Serbian aggression, but reluctance to intervene.⁶⁵ Fighting in the former Yugoslavia proceeded for several months before the United Nations took action. The Security Council left the task of trying to resolve the conflict initially to the European Community,⁶⁶ and later to NATO.⁶⁷ Eventually, on September 25, 1991, the UN Security Council intervened by passing Resolution 713, which established an arms embargo against all combatants.⁶⁸ Finally, in February 1992, the United Nations dispatched the UN Peacekeeping Force pursuant to Security Council Resolution 721.⁶⁹

Since the beginning of the armed conflict in 1991, the Bosnian government, the Bosnian Serbs, and Croatia have repeatedly rejected peace proposals drafted by the European Community and the United Nations.⁷⁰ The Serbs maintain that

63. *Id.* at 31.

64. *See, e.g., Fighting Continues in the Former Yugoslavia*, Cable News Network, Jan. 27, 1993, available in LEXIS, News Library, Script File

65. Eisner, *supra* note 34, at 216.

66. *See King, supra* note 1, at 350-51.

67. *See Weller, supra* note 30.

68. U.N. SCOR, 46th Sess., 3009th mtg., U.N. Doc. S/RES/713 (1991). Interestingly, the arms embargo was suggested by the Yugoslav representative to the United Nations. In the debate on this resolution, members of the Security Council did not question the Yugoslav representative's authority to speak for all the parties to the conflict and many expressly considered the conflict internal rather than international. *See generally Weller, supra* note 30, at 577-81.

69. U.N. SCOR, 47th Sess., 3018th mtg., U.N. Doc. S/RES/721 (1992). The mandate of the UN Peacekeeping Force (UNPROFOR) is limited to peacekeeping, not peacemaking, because the United Nations does not want to appear to favor any single side involved in the conflict. UNPROFOR's task is to assist the United Nations High Commissioner of Refugees in providing humanitarian relief to besieged civilian populations, to monitor troop movements, and to ensure compliance with UN Security Council Resolutions. *See, e.g., Judy Dempsey, Bosnian Peace Force May Prove Too Small: A Look at the UN Soldier's Role*, FIN. TIMES, Sept. 16, 1992, at 4.

70. *See Bosnian War: A Chronology of Conflict and Disunity*, Deutsche Presse Agentur, August 4, 1994, available in LEXIS, News Library, Curnws File. Meanwhile, the killing continues, much as it has throughout this century. *Id.* at 117. *See also HELSINKI WATCH, supra* note 54, at 21 n.21 (providing an extensive chronicle of violations of international humanitarian law). Helsinki Watch concludes that "[a]ll of the parties to the conflict have committed [grave breaches of international humanitarian law] and all should be held accountable and prosecuted for their abuses before impartial tribunals that afford the protection of due process of law." *Id.* at 198.

During World War II, the Nazis initiated a campaign to eradicate the Serbs, carried out by their allies—the Hungarians and the Bulgarians—both of whom

past injustices justify the current round of killings, and other combatants have replied in kind.⁷¹ At the time of this writing, the United Nations strategy has been to use the weapons of poverty and isolation to force ethnic Serbs toward a peace settlement.⁷² Although negotiations toward a settlement continue, recent advances by Bosnian government forces have forced the Serbs to rededicate themselves to fighting. An end to the war in the near future seems unlikely.⁷³ Increasingly, public opinion in the United States has shifted toward lifting the arms embargo against Bosnia, and letting Bosnia fight the Serbs toward the negotiating table.⁷⁴

III. TWENTIETH CENTURY EXPERIENCE WITH WAR CRIMES TRIBUNALS

In the twentieth century, the international community has contemplated establishing an international body to adjudicate war crimes⁷⁵ under international law only twice prior to the establishment of the Yugoslav Tribunal. It successfully implemented such an adjudicative body only once—after World War II.⁷⁶ Although the proceedings after the Second World War

occupied parts of Yugoslavia. Bell-Fialkoff, *supra* note 4, at 117. One in ten Serbs died in World War II. *Id.*

71. Nancy Nusser, *Never Again? Old Hatreds Fuel the Killing*, ATLANTA J. & CONST., Nov. 19, 1992 at A19. The Serbs living in Bosnia-Herzegovina oppose Bosnian independence and prefer to have a close association with Serbia because they fear persecution, based on their experiences during World War II. HELSINKI WATCH, *supra* note 54, at 46-47. They also believe that, as Serbs, they have the right to live in one state with other Serbs: "insofar as other nationalities have sought to secede from Yugoslavia, the Serbs have a right to secede from Croatia, Bosnia-Herzegovina, or any other Yugoslav republic." *Id.* Thus, the Serbian forces have engaged in the strategy of occupying the area in Bosnia-Herzegovina and Croatia where a large number of Serbs live and removing all other ethnic groups to facilitate annexation by Serbia proper. *Id.*

The position of the Croats, on the other hand, is not as clear as that of the Serbs or the Bosnians who wish to be independent. Some Croats support an independent Bosnian state, while others want to see the western part of Bosnia-Herzegovina annexed by Croatia. *Id.* at 41-46. Indeed, Bosnian-Croats proclaimed the "Community of Herceg-Bosna" which is to function as an autonomous province within the state of Bosnia-Herzegovina. *Id.* The Croatian government's position vacillates between these two positions. *Id.*

72. David Rohde, *This Land is Serb Land, Come Guns or Negotiators*, CHRISTIAN SCI. MONITOR, Dec. 29, 1994, at 6.

73. *See 4 Killed in Violence in Savajevo: Bosnians Promise They Will Retaliate*, ST. LOUIS POST-DISPATCH, Nov. 9, 1994, at 12A.

74. *See, e.g.,* Austin Bay, *Arm Bosnians in this 'Graveyard of Good Guys,'* HOUS. CHRON., Dec. 6, 1994, at 11.

75. The term "war crimes" encompasses primarily violations of the rights of individuals and thus crosses into the realm of international humanitarian law. *See infra* part IV.C (discussing the nature of international humanitarian law).

76. *See infra* part III.B.

established a legal precedent for the Yugoslav Tribunal,⁷⁷ an examination of earlier attempts to establish international war crimes tribunals illustrates the political and practical difficulties that the Yugoslav Tribunal may face.

The first attempt came at the end of World War I in 1918.⁷⁸ The victorious Allied and Associated Powers, principally motivated by Great Britain, inserted provisions in the Treaty of Versailles that required Germany to surrender high-ranking military figures, including German Kaiser Wilhelm II, for war crimes trials.⁷⁹ After several years of failing to enforce these provisions strictly, the Allies abandoned the idea of war crimes prosecutions, hoping to preserve the peace.⁸⁰ The second attempt, after World War II, was more successful.⁸¹ Upon the unconditional surrender of the Germans and the Japanese, the Allies, this time led by the United States, tried and convicted a significant number of war criminals.⁸²

An analysis of these past experiences with war crimes tribunals reveals that the unconditional surrender of one party is a condition precedent to the successful prosecution of accused war criminals. The trials of Nazi and Japanese war criminals

77. Prior to Nuremberg, the Hague Convention (IV) of 1907 Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, was the primary international convention dealing with the laws of war. The humanitarian abuses during World War II led to the modern concept of human rights as *ius cogens* norms, which may not be ignored by the world community, and since Nuremberg, international humanitarian law has been extensively codified in international conventions. Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 543 (1993). Post World War II codifications of human rights are the Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention (I)]; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in the Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention (IV)]; Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 [hereinafter Genocide Convention]; Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 (1979); the Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 (1979).

78. See *infra* part III.A.

79. *Id.*

80. *Id.*

81. See *infra* part III.B.

82. *Id.*

after World War II succeeded, in part, because all defeated governments ceased to exist at the end of the war, giving the victorious powers complete physical and political control of the defeated nations.⁸³ The continued existence of the defeated German government at the end of World War I precluded the possibility of "victors' justice," which was crucial to the success of the trials after World War II at Nuremberg and Tokyo.⁸⁴ No international tribunal has ever succeeded without a "broadly supported," victorious coalition that "has defeated an obvious aggressor and violator of the laws of war and humanity so decisively as to place it in a state of *debellatio*."⁸⁵

The Yugoslav Tribunal represents the first attempt by a non-combatant—the United Nations—to try individuals for crimes committed in a war in which there will be no clear victor,⁸⁶ and in which the accused themselves will control the peace negotiation process.⁸⁷

A. World War I

After the First World War, the Allied and Associated Powers resolved to create an international tribunal to prosecute individuals accused of violating the laws of war.⁸⁸ The attempt to

83. See generally Elizabeth L. Pearl, Note, *Punishing Balkan War Criminals: Could the End of Yugoslavia Provide an End to Victors' Justice?*, 30 AM. CRIM. L. REV. 1373, 1401 (1993). Pearl argues that the lack of "victors' justice" in prosecuting individuals for war crimes raises serious problems with planning who and how many people to prosecute; gaining custody of high-level governmental officials; timing the trials to avoid inciting further violence; avoiding the criticism of cultural imperialism; and obtaining evidence as well as custody of persons accused of crimes. Pearl concludes that the international community should be very careful in engaging in these prosecutions in order to vindicate international humanitarian law without undermining it with shoddy justice. *Id.*

84. "Victors' justice" is an argument raised by critics of war crimes trials who "[d]oubt the motives of the prosecutors . . . [and] perceive potential unfairness in the war crimes punitive process because it involves the trying of the vanquished by the victors. The result, they argue, is that the trials are concerned with punishment at the expense of impartial findings of fact." Pearl, *supra* note 83, at 1399. *But see* Akhavan, *supra* note 6, at 282 n.53 (arguing that such an argument is too simplistic to have any merit because it ignores the fact that the right to have a trial is waivable under international law).

85. William V. O'Brien, *The Nuremberg Precedent and the Gulf War*, 31 VA. J. INT'L L. 391, 398 (1991).

86. Pearl, *supra* note 83, at 1400. Pearl rightly warns that even though the Tribunal represents the first time the United Nations has the moral superiority, prestige, and "sheer willpower" to initiate war crimes trials, unless it is impartial and tries criminals from all sides, the fact that it is not a party to the war will have a detrimental effect on the status of international law. *Id.*

87. D'Amato, *supra* note 10, at 501.

88. JAMES F. WILLIS, PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR I (1982) [hereinafter PROLOGUE]. Prior to World War I, war crimes were traditionally prosecuted by the

try war criminals failed for a number of reasons, including: the enormity of the undertaking;⁸⁹ deficiencies in international law and in the specific provisions of the Treaty of Versailles,⁹⁰ which proved to be unworkable;⁹¹ the failure of the Allies to present a united front to the Germans and to take strong measures to enforce the treaty;⁹² and strong German nationalism.⁹³ The victors' lack of control over affairs within Germany ultimately defeated the Allied attempt to bring accused war criminals to justice.⁹⁴

The modern concept of a war crimes tribunal originated at the Paris Peace Conference in January 1919, when the victorious Allies appointed the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (Commission on Responsibility).⁹⁵ The Commission on Responsibility was charged with determining the extent to which Germany and its allies violated the laws and customs of war, assessing the level of individual responsibility, and drafting a statute for a tribunal to

accused's own nation or by military reprisals by the offended state. Hugh H. L. Bellot, *War Crimes: Their Prevention and Punishment*, 2 THE GROTIUS SOCIETY 31, 34-35 (1916). At the conclusion of hostilities, it was customary to grant amnesty to all persons accused of war crimes. PROLOGUE, *supra*, at 19.

89. Originally, the Allies demanded the surrender of 854 men for trial. PROLOGUE, *supra* note 88, at 113. Ultimately, the Allies demanded that the Germans try 45 cases, of which only 12 were actually tried at Leipzig, with six of the trials ending in conviction. Two of those convicted later escaped prison. *Id.* at 126.

90. Treaty of Peace with Germany, June 28, 1919, 11 Martens Nouveau Recueil (ser. 3) 323, reprinted in 13 AM. J. INT'L L. 151 (Supp. 1919) (official documents) [hereinafter Treaty of Versailles].

91. The Treaty of Versailles articles governing war crimes trials were poorly thought out and failed to provide the Allied military tribunals with jurisdiction and the power to impose penalties. UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 52 (1948) [hereinafter UNITED NATIONS WAR CRIMES COMMISSION].

92. See *infra* notes 113-17 and accompanying text.

93. PROLOGUE, *supra* note 88, at 124. Willis cites German nationalism as the primary element contributing to the failure of war crimes trials: "Germans momentarily forgot their many antagonisms as they united to oppose Allied demands. . . . In the trauma of defeat, German nationalists, to protect the image of the army, had already convinced themselves of the truth of two myths: Germany bore no responsibility for the war, and the army had been 'stabbed in the back.'" *Id.* at 125. These two beliefs played a significant role in the rise of Adolph Hitler and the Nazis during the inter-war era. For a discussion of the political and social climate of Weimar Germany, see generally EBERHARD KOLB, THE WEIMAR REPUBLIC (P.S. Falla trans., 1988).

94. Pearl, *supra* note 83, 1389-90.

95. Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties: Report Presented to the Preliminary Peace Conference, Mar. 29, 1919, reprinted in 14 AM. J. INT'L L. 95 (1920) [hereinafter Commission on Responsibility Report].

try accused war criminals.⁹⁶ Concluding that "[e]very belligerent has, according to international law, the power and authority to try the individuals alleged to be guilty of [war crimes] . . . if such persons have been taken prisoners or have otherwise fallen into its power,"⁹⁷ the Commission recommended that any peace treaty provide for an international tribunal to prosecute war criminals.⁹⁸ The Commission on Responsibility proffered a series of acts deemed war crimes, which were subsequently codified into international law.⁹⁹ The Commission grouped these acts into four

96. *Id.*

97. *Id.* at 121.

98. *Id.* at 121. The United States, Great Britain, France, Italy, and Japan were to appoint three judges each. Belgium, Greece, Poland, Portugal, Romania, Serbia, and Czechoslovakia were to appoint one judge each. *Id.* at 122.

99. The following acts were deemed war crimes:

- (1) Murders and massacres; systematic terrorism
- (2) Putting hostages to death
- (3) Torture of civilians
- (4) Deliberate starvation of civilians
- (5) Rape
- (6) Abduction of girls and women for the purpose of enforced prostitution
- (7) Deportation of civilians
- (8) Internment of civilians under inhuman conditions
- (9) Forced labor of civilians in connection with the military operations of the enemy
- (10) Usurpation of sovereignty during military occupation
- (11) Compulsory enlistment of soldiers among the inhabitants of occupied territory
- (12) Attempts to denationalize the occupants of occupied territory
- (13) Pillage
- (14) Confiscation of property
- (15) Exaction of illegitimate or of exorbitant contributions and requisitions
- (16) Debasement of the currency, and issue of spurious currency
- (17) Imposition of collective penalties
- (18) Wanton devastation and destruction of property
- (19) Deliberate bombardment of undefended places
- (20) Wanton destruction of religious, charitable, educational, and historic buildings and monuments
- (21) Destruction of merchant ships and passenger vessels without warning and without provision for the safety of passengers or crew
- (22) Destruction of fishing boats and of relief ships
- (23) Deliberate bombardment of hospitals
- (24) Attack on and destruction of hospital ships
- (25) Breach of other rules relating to the Red Cross
- (26) Use of deleterious and asphyxiating gases
- (27) Use of explosive or expanding bullets, and other inhuman appliances
- (28) Directions to give no quarter
- (29) Ill-treatment of wounded and prisoners of war
- (30) Employment of prisoners of war on unauthorized works
- (31) Misuse of flags of truce
- (32) Poisoning of wells.

categories: (1) offenses committed in prison camps against civilians and soldiers of the Allies; (2) offenses committed by officials who issued orders in the German campaign against Allied armies; (3) offenses committed by all persons of authority, including the German Kaiser, who failed to stop violations of laws and customs of war despite knowledge of those acts; and (4) any other offenses committed by the Central Powers that national courts should not be allowed to adjudicate.¹⁰⁰

Because of serious disagreement among the Allies on the desirability of a war crimes tribunal,¹⁰¹ the recommendations of the Commission on Responsibility were incorporated only to a limited extent into the Treaty of Versailles.¹⁰² This limited incorporation was fatal because the treaty provisions pertaining to war crimes ultimately proved unworkable in the post-war political context.¹⁰³

Article 227 of the Treaty was the most remarkable of its provisions. It formally indicted the German Kaiser, Wilhelm II, and provided for a special tribunal to try him.¹⁰⁴ Article 227 also

Id. at 114-15.

100. *Id.* at 121-22. At the end of World War I in 1919, the major international instruments relating to the laws of war were the two Hague Conventions on the Laws and Customs of War on Land of 1899 and 1907. PROLOGUE, *supra* note 88, at 5. Other sources of information on the laws of war included national military manuals and Geneva Conferences beginning in 1864. See James W. Garner, *Punishment of Offenders Against the Laws and Customs of War*, 14 AM. J. INT'L L. 70 (1920) (general discussion of laws and customs of war in various states military regulations at the outbreak of the war in 1914).

101. The United States disagreed with the Commission's recommendation to subject heads of state to prosecution by an international tribunal. It argued that heads of state are protected by sovereign immunity and are responsible only to their own people and domestic judicial systems. *Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities*, April 4, 1919, Annex II, reprinted in 14 AM. J. INT'L L. 127, 147-48 (1920). The United States also opposed the creation of an international tribunal because such a body lacked any precedent in international law and violated the United States constitutional prohibition of applying law *ex post facto*. *Id.* at 146-47. In addition, the United States objected to the application of the doctrine of negative criminality because it could only be applied when the accused knew in advance that violations of the laws and customs of war were subject to criminal sanctions. *Id.* at 143. Finally, the United States objected to the application of "laws [and principles] of humanity," which were imprecise and lacked a "fixed and universal standard." *Id.* at 144.

102. PROLOGUE, *supra* note 88, at 52-62.

103. *Id.*

104. Treaty of Versailles, *supra* note 90, art. 227. Article 227 charged the tribunal with trying the Kaiser "guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality." This charge, because it was based on morality and not law, deprived the former Kaiser of legal protection because he could not appeal any judgment with a legal argument. This policy

called upon the government of the Netherlands, which had granted the Kaiser asylum after he abdicated control of the German government,¹⁰⁵ to surrender him to the Allies for trial.¹⁰⁶

Articles 228 to 230 addressed the prosecutions of other German officers for violations of the laws and customs of war. Article 228 required the German government to recognize the right of the Allies to try Germans accused of violating the laws and customs of war, and to surrender all individuals accused of war crimes to the Allies for punishment in accordance with the newly formulated laws promulgated by the Commission on Responsibility.¹⁰⁷ Article 229 provided that any Allied power that accused a German of war crimes against its nationals was entitled to try him before its own national military courts. When more than one Allied power was involved, the accused would be brought before a tribunal comprised of individuals from the military courts of the concerned Allied nations.¹⁰⁸ Finally, Article 230 required Germany to surrender any and all information requested for the prosecution of accused officers and for the identification of additional war criminals.¹⁰⁹

The effort to create a war crimes tribunal after World War I was met with the qualified optimism of some commentators.¹¹⁰ Since the beginning of the war, these commentators believed that politically motivated inaction in prosecuting war crimes would set a bad precedent for future wars, namely, meeting aggression with complacency.¹¹¹ However, by the end of the war on November 11,

smacked of "victor's justice" and easily could have been avoided had the Allies accepted the Commission's recommendation and tried the former Kaiser for violations of the laws and customs of war, thereby providing him with legal protections and avoiding any *ex post facto* issue. PROLOGUE, *supra* note 88, at 80-81.

105. The Netherlands, traditionally a "refuge for the vanquished," recognized that the Allies could not agree on how to handle the ex-Kaiser and "concluded that it could safely reject any request for the surrender of the Kaiser." *Id.* at 98. Interestingly, a group of American soldiers led by Colonel Luke Lea, a former United States Senator and publisher of the Nashville *Tennessean*, attempted to abduct the Kaiser and bring him to Paris. They succeeded in gaining entry to the estate where the Kaiser was located, but were surrounded by Dutch troops and forced to withdraw. The Allies never came closer to gaining custody of the Kaiser. *Id.* at 100-01.

106. Treaty of Versailles, *supra* note 90, art. 227.

107. *Id.* art. 228.

108. *Id.* art. 229.

109. *Id.* art. 230.

110. See, e.g., Bellot, *supra* note 88, at 54.

111. *Id.* Bellot remarked:

It rests, therefore, with the Allied Governments, after carefully weighing the probabilities, to decide whether the strict enforcement, after due notice, of the generally accepted laws and usages of war would be likely to place some limit to their violation by the enemy, or whether such action

1918, public opinion, which had strongly favored war crimes trials, dissipated, and the victorious Allies found themselves unable to remain united in their commitment to such trials.¹¹² In addition, the Allied Powers lack of control over substantial parts of the German Reich and their inability to arrest the Kaiser—the chief war criminal in the eyes of the Commission on Responsibility and the British public¹¹³—jeopardized the idea of war crimes prosecution. Any Allied attempt to begin war crimes trials would require significant political maneuvering to obtain Germany's cooperation.¹¹⁴ The United States and Great Britain

would be more likely to result in reprisals upon the prisoners in the hands of the Central Empires. Whatever may be the immediate decision, however, of the Entente Powers, the public opinion of the civilised world will not rest satisfied unless, upon the termination of the conflict, not only the instigators but also the actual perpetrators of the more heinous offences against the usages of war are brought to trial before some impartial tribunal.

Unless such action be taken—and the tendency in official quarters will no doubt be towards smoothing over these troublesome terms in the peace settlement—precedents will have been created which will render war in the future even more terrible to the non-combatants, belligerent and neutral alike. . . . The right to commit atrocities in the name of military necessity, claimed by the Central Powers, must not go unchallenged.

Id.

112. PROLOGUE, *supra* note 88, at 52-62.

113. See PROLOGUE, *supra* note 88, at 52-62 (describing the politics of the British election of 1918, in which Prime Minister Lloyd George exploited British animosity towards the Kaiser and promised to bring him to justice for his crimes); *id.* at 87-91 (reproducing *Punch* cartoons that indicate the prevailing British public opinion of the Kaiser during the war).

114. See generally HAJO HOLBORN, A HISTORY OF MODERN GERMANY 1840-1945, 504-32 (1982) (discussing the events of the fall of the Imperial German government at the end of World War I). On October 28, 1918, at the insistence of the Allies with whom the German government was negotiating an armistice, a new German constitution went into effect, making the Reich a constitutional monarchy similar to that of Great Britain. *Id.* at 504-09. The Kaiser's prestige among the German people had waned during the armistice negotiations because President Woodrow Wilson implied that peace could not be made while Kaiser Wilhelm still sat on the throne. *Id.* at 509-10. In November 1918, a group of sailors revolted against the government in the northern German port of Kiel and demanded the release of hundreds of sailors who had refused to obey orders. *Id.* at 511-12. At about the same time, Bavaria and Berlin shook with revolution as socialists took control of the governments. *Id.* at 512-19. The Social Democrats who had gained control demanded that the Kaiser abdicate in favor of the Crown Prince, but the Kaiser refused. *Id.* at 513-14. Nevertheless, on November 9, 1918, Chancellor Prince Max von Baden announced the Kaiser's abdication on the assumption that he would abdicate. *Id.* at 514-15. These events led to the end of imperial Germany; a republic was proclaimed, the socialists took control of the government, and the armistice was signed on November 11, 1918. *Id.* at 515-18. Under the Armistice, the Allies took control of the Rhine, and the rest of Germany was soon consumed by civil war. *Id.* at 518-32.

were convinced that a failure of the war crimes trials would call the terms of the entire peace settlement into question; hence, they did not aggressively pursue Germany to hand over accused war criminals.¹¹⁵

The victors' lack of control over affairs within Germany proved to be the downfall of the Allied attempt to bring accused war criminals to justice.¹¹⁶ When revolution shook Germany after the war, prompting the Kaiser to abdicate and flee to the Netherlands, the possible spread of Bolshevism and general unrest became more immediate concerns to the Allies than their desire to try the Kaiser and other war criminals.¹¹⁷ The Allies eventually abandoned the idea of enforcing Articles 228 to 230, fearing that enforcement would spark either civil war within Germany or a new war between the Allies and Germany.¹¹⁸ The Allies eventually permitted the Germans themselves to try accused war criminals.¹¹⁹ However, the German trials, conducted at Leipzig in 1921, resulted in few convictions and light sentences.¹²⁰

115. *Id.* at 113.

116. Pearl, *supra* note 83, 1389-90. See also PROLOGUE, *supra* note 88, at 113-25 (describing the disagreement between the French and the British over whether and how to enforce the war crimes articles of the Treaty of Versailles in light of the fragile political situation inside Germany and their fear that the Bolsheviks might take over amidst the chaos that would result from enforcement).

117. This discontent stemmed, in part, from the harsh terms of the Treaty of Versailles. See generally PROLOGUE, *supra* note 88, at 98-112.

118. *Id.* at 113, 116. The Germans made it clear to the Allies that surrendering their accused war criminals presented a serious threat to Germany's internal stability, which was already seriously compromised. See Remigiusz Bierzanek, *War Crimes: History and Definition*, in 3 INTERNATIONAL CRIMINAL LAW: ENFORCEMENT 29, 35, 181-85 (M. Cherif Bassiouni ed., 1987).

119. See PROLOGUE, *supra* note 88, at 113-25. By 1920, Wilson was ill and the United States Senate had refused to give its advice and consent to the Treaty of Versailles. The implementation of the Treaty was left to France and Great Britain. France claimed that Articles 227-30 were included in the Treaty only because of British desires. France was willing to waive these articles if the German government paid "compensation" for the waiver. The British, on the other hand, wanted the Germans to surrender a few high-level officials in order to make an example of them. Germany took advantage of this impasse because "[n]o German government could survive a surrender of its citizens to a foreign tribunal . . . and because no Allied government could renounce the penalty clauses completely." *Id.* at 118. Thus, in December 1919, the German *Reichstag* passed a law giving jurisdiction over war criminals to Germany's Supreme Court at Leipzig. The British and French still disagreed; the French wanted Germany to default on the trials and then keep control over the occupied territories, whereas the British wanted to try a few Germans. Finally, to avoid undermining the entire peace settlement, the Allies agreed to let the Germans conduct the trials with Allied oversight. *Id.* at 126.

120. *Id.* at 126. The German government had originally promised that "Germany would give all conceivable guarantees of the impartial and firm execution of the proceedings, especially through the assistance of official

The post-World War I attempt to conduct war crimes trials illustrates the difficulties that the United Nations may face in administering the Yugoslav Tribunal. Like the Allies after World War I, the United Nations does not control the national governments of soldiers and officers accused of war crimes.¹²¹ Moreover, the United Nations primary focus on the crimes of only one party to the war, Serbia, creates the danger that any decision by the Tribunal will be dismissed as biased.¹²² The factual similarities between the circumstances at the end of World War I and those in the former Yugoslavia today should alert the United Nations to the difficulties it may encounter in prosecuting war criminals.¹²³

Nevertheless, the United Nations should also note that, although the World War I tribunal failed with respect to its immediate task of prosecuting accused war criminals, it still served a valuable function in building lasting peace. The Allies initially insisted on war crimes trials, but later relinquished their right to try war criminals to ensure the integrity of the peace settlement.¹²⁴ Thus, the Allied Powers experience with the tribunal demonstrates that the very threat of war crimes trials may serve as a bargaining chip that eventually can be traded for peace.¹²⁵ Indeed, some commentators contend that following through on threatened war crimes trials may actually undermine peace efforts: Insisting on prosecuting high-level government officials, who would otherwise be willing to accept a peace settlement in exchange for amnesty from prosecution, would

representatives of the interested opposition states." Bierzanek, *supra* note 118, at 35-36.

121. Meron, *supra* note 8, at 123. "Except in the case of a total defeat or subjugation—for example, Germany after World War II—prosecutions of enemy personnel accused of war crimes have been both rare and difficult." *Id.*

122. The United Nations Commission on Human Rights appointed Mr. Tadensz Mazowiecki as the Special Rapporteur charged with the task of investigating human rights abuses in the former Yugoslavia. The Special Rapporteur submitted a series of reports which concluded that the primary victims of human rights abuses are Bosnian Muslims who suffer under the Serbian policy of ethnic cleansing. The Special Rapporteur acknowledged that as the war continues, all sides increasingly are committing human rights abuses. See Joyner, *supra* note 4, at 248-51.

123. "The Versailles Treaty after World War I illustrates the case of a defeated but not wholly occupied state. . . . On the other hand, after the four principal victorious and occupying powers established an international military tribunal (IMT) following World War II. . . . [it] functioned reasonably well; the Allies had supreme authority over Germany and thus could often find and arrest the accused, obtain evidence and make arrangements for extradition. . . ." Meron, *supra* note 8, at 123-25.

124. See *supra* notes 113-17 and accompanying text.

125. See generally D'Amato, *supra* note 10.

prolong the conflict instead of expediting a settlement.¹²⁶ From a *realpolitik* perspective, each side may have more to lose politically by insisting on prosecutions than it would stand to gain.

B. World War II

At the end of World War II in 1945, the victorious Allies were in complete control of Germany and Japan, both of which had surrendered unconditionally.¹²⁷ The Allies' wartime goal of conducting war crimes trials¹²⁸ was realized in trials after the war at Nuremberg and Tokyo.¹²⁹ Wary of the precedent set by the failed attempt to hold war crimes trials under the Treaty of Versailles and by unsuccessful efforts of the League of Nations,¹³⁰ the Allies organized courts and conducted trials in Nuremberg

126. Barbara Franklin, *Bosnia: The New Nuremberg*, NAT'L L.J., Sept. 26, 1994, at A1.

127. PROLOGUE, *supra* note 88, at 175. The Allies demanded an unconditional surrender by Germany, and got it: "Because the Second World War was waged to a total victory, the victors were . . . able to carry out their plans virtually unopposed [by a functioning, albeit defeated, government], achieving results that the earlier effort [after World War I] did not." *Id.* In Japan, on the other hand, the peace settlement was actually negotiated; however, negotiations were conducted very quickly, and the Japanese government was not in a position to haggle with the Allies over the issue of war crimes trials. D'Amato, *supra* note 10, at 501.

128. President Roosevelt issued a statement on October 7, 1942, in which he stated, "I now declare it to be the intention of this Government that the successful close of the war shall include provision for the surrender to the United Nations of war criminals." Statement by the President, *reprinted in* REPORT OF ROBERT H. JACKSON, REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 9 (1945) [hereinafter JACKSON REPORT].

129. The Japanese surrender was not totally unconditional because Emperor Hirohito was allowed to remain on the throne. D'Amato, *supra* note 10, at 501; DONALD A. WELLS, *WAR CRIMES AND LAWS OF WAR* 97 (2d ed. 1991). This Note does not discuss the Tokyo trials because they were riddled with legal flaws, making them of questionable precedential value for any future war crimes trials. In fact, after the Tokyo trials, defense counsel for each defendant filed an appeal, complaining of unfairness. *Id.* at 102-03. For a detailed discussion of the proceedings at Tokyo, see generally RICHARD H. MINEAR, *VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL* (1971).

130. The League of Nations attempted to establish an international criminal court and even opened a convention for signature in 1937. See M. Cherif Bassiouni, *Introduction to the History of Establishing an International Criminal Court*, in 3 INTERNATIONAL CRIMINAL LAW: ENFORCEMENT 118, 181-85 (M. Cherif Bassiouni ed., 1987). India was the only state to ratify the convention before World War II scuttled the effort. *Id.* For an overview of recent efforts to establish an international criminal court, see M. Cherif Bassiouni, *The Need for an International Criminal Court in the New International World Order*, 25 VAND. J. TRANSNAT'L L. 151 (1992); Benjamin B. Ferencz, *An International Criminal Code and Court: Where They Stand and Where They're Going*, 30 COLUM. J. TRANSNAT'L L. 375 (1992); M. Cherif Bassiouni, *supra* note 11.

and Tokyo,¹³¹ supported by the United States Treasury and aided by the copious documentation of war crimes maintained by the defeated governments themselves.¹³²

The trials at Nuremberg were a watershed in the history of international law because, "confronted with a choice between the release, summary punishment and trial of the Nazis, the Allies chose to provide the Nazis what they had denied their own opponents—the protection of the Law."¹³³ Although the Nuremberg trials were admittedly biased—in the words of one Nuremberg judge,¹³⁴ "vengeance and vindication necessarily required the sacrifice of legal principle"¹³⁵—they nevertheless spawned a human rights revolution that has "provided symbolic assurance of the value of human dignity of individuals while having limited practical significance."¹³⁶

The Nuremberg Charter,¹³⁷ which authorized the International Military Tribunal at Nuremberg, identified three types of crimes for which the defeated Germans were ultimately tried: (1) crimes against peace,¹³⁸ (2) war crimes,¹³⁹ and (3)

131. WELLS, *supra* note 129, at 97-98. As of January 1949, the Allies had held 2,116 military trials, 950 of which were conducted by the United States. *Id.* at 101.

132. Franklin, *supra* note 126, at A1.

133. Matthew Lippman, *Nuremberg: Forty Years Later*, 7 CONN. J. INT'L L. 1, 37 (1991) (quoting Henry L. Stimpson, *The Nuremberg Trial: Landmark in Law*, 25 FOR. AFF. 179, 179-80 (1947)).

134. *Id.* at 37. See generally JACKSON REPORT, *supra* note 128, at 97-118 (reviewing discussions among delegates of the United States, France, the USSR, and Great Britain over the need for an independent judicial body to convict the accused, rather than relying on political convictions).

135. Lippman, *supra* note 133, at 45. For a discussion of the legal irregularities that occurred at Nuremberg, see generally *id.* at 37-45. These irregularities included the use of unheard-of legal doctrines against the Germans, the lack of any detailed legal analysis in the judgments rendered, and the use of evidence as a secondary consideration in determining guilt. *Id.*

136. *Id.* at 53.

137. Charter of the International Military Tribunal, Aug. 8, 1945, 82 U.N.T.S. 284, reprinted in JACKSON REPORT, *supra* note 128, at 422 [hereinafter Nuremberg Charter].

138. *Id.* art. 6(a). Crimes against peace were defined as "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing." *Id.*

139. *Id.* art. 6(b). War crimes were defined as "violations of the laws or customs of war," including, but not limited to, "murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity." *Id.*

crimes against humanity.¹⁴⁰ At the time of the Nuremberg trials, however, crimes against peace and crimes against humanity were novel concepts in international law. The doctrine of *nullum crimen sine lege, nulla poena sine lege (nullum crimen sine lege)*¹⁴¹ prohibits the prosecution of crimes not clearly established in law; therefore, the legality of prosecuting accused German war criminals for crimes against peace and humanity is questionable. This weakness has allowed critics of the Nuremberg proceedings to attack the legal basis of the International Military Tribunal on several grounds. First, critics have argued that the accused were unfairly prosecuted *ex post facto*.¹⁴² Second, the various international conventions on the laws and customs of war that were in force in 1945 did not provide for criminal sanctions if they were violated.¹⁴³ Finally, as a corollary, some critics have argued that the Allied Powers had no legal right to try the defeated Germans and, thus, exercised arbitrary and illegal victor's justice.¹⁴⁴ Generally regarded as procedurally fair, even by those who defended the accused,¹⁴⁵ the International Military Tribunal

140. *Id.* art 6(c). Crimes against humanity were defined as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated." *Id.* Cf. Genocide Convention, *supra* note 77.

141. "Unless there is a law, there can be no crime; unless there is a law, there can be no punishment." MINEAR, *supra* note 129, at 61. Bassiouni explains that "it is a principle generally recognized in criminal law that crimes must be clearly defined and that sanctions must be specified before one can be held responsible for committing a proscribed act." M. Cherif Bassiouni, *Crimes Against Humanity*, in INTERNATIONAL CRIMINAL LAW 51, 59 (M. Cherif Bassiouni ed., 1987). The two parts of the doctrine, although distinct, are very similar; because many commentaries simply refer to *nullum crimen sine lege*, the doctrine will be denoted in this manner for the remainder of this Note. See, e.g., *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. SCOR, 48th Sess., at 9, U.N. Doc. S/25704 (1993), U.N. SCOR, 48th Sess., revised by U.N. DOC. S/25704/Corr. 1 (1993) [hereinafter *Secretary-General's Report*]. For a discussion of the legal issues that arose from the indictments and proceedings at Nuremberg, see generally M. Cherif Bassiouni, *Crimes Against Humanity*, *supra*, at 58-65.

142. FREDERICK H. MAUGHAM, U.N.O. AND WAR CRIMES (Greenwood Press ed., 1975) (1951).

143. For a vehement condemnation of the prosecution of crimes against humanity and crimes against peace at Nuremberg, see *id.*

144. Steven Fogelson, Note, *The Nuremberg Legacy*, 63 S. CAL. L. REV. 833, 860 (1990). See also MINEAR, *supra* note 129, at 35-73 (discussing the problems of applying a new body of international law, created especially for the proceedings at Nuremberg and Tokyo); Bassiouni, *Nuremberg: Forty Years Later*, *supra* note 26, at 64.

145. Fogelson, *supra* note 144, at 860. Otto Pannenbecker, defense counsel for one of the Nazi defendants at Nuremberg, stated: "As to the

was able to overcome these allegations in its published opinions.¹⁴⁶ However, such criticisms have continued to plague the Nuremberg legacy and may play a role in the proceedings of the Yugoslav Tribunal as well.¹⁴⁷

The Nuremberg trials and subsequent developments in international humanitarian law provide a legal precedent for the Yugoslav War Crimes Tribunal. Since the end of World War II, international humanitarian law has refined and codified the concepts of "war crimes" and "crimes against humanity,"¹⁴⁸ consequently, the prosecution of these crimes by the Yugoslav Tribunal should not be subject to challenge under the doctrine of *nullum crimen sine lege*.¹⁴⁹ The concept of genocide, on the other

application of the Anglo-Saxon system at Nuremberg, there was no disadvantage for those accused before the Tribunal." *Id.* (citation omitted).

146. For a discussion of the legal justifications for applying the newly created doctrines of crimes against peace and humanity, see Bassiouni, *Nuremberg: Forty Years Later*, *supra* note 26, at 61-63; Bierzanek, *supra* note 118, at 52-70.

147. See, e.g., Meron, *supra* note 8, at 128 ("The first international tribunal established by the international community since World War II should apply only those provisions of international law that are clear and generally accepted and establish the individual criminal liability of persons, not just the civil responsibility of the state.").

The Yugoslav Tribunal has been called "trickier than Nuremberg" because of uncertainty over which law actually applies to the conflict in the former SFRY and the lack of a clear chain of command, especially with regard to the Bosnian Serbs. Frankin, *supra* note 126, at A1. For example, it is likely that the defense will argue that the Statute of the Tribunal, discussed *infra*, at notes 160, 179-255 and accompanying text, does not uniformly apply international humanitarian law worldwide. *Id.* In addition, the probability that, unlike at Nuremberg, the chain of command—and therefore responsibility for ordering illegal actions—is not well-documented will contribute to serious delays in actual litigation, as will the tightness of the rules of evidence and procedure for the Tribunal. *Id.* Finally, because genocide requires a specific intent, the lack of the above conditions will make it much more difficult to prove accusations thereof. *Id.*

148. The General Assembly of the United Nations unanimously "affirm[ed] the principles of international law recognized by the Charter of the Nuremberg Tribunal and judgment of the Tribunal" in 1946. See *Affirmation of the Principles of International Law Recognized by the Charter of Nuremberg Tribunal*, G.A. Res. 95, U.N. GAOR, 1st Sess., at 188, U.N. Doc. A/64/Add.1 (1946). The international agreements listed *supra* note 77 also owe their existence to proceedings at Nuremberg. War crimes and crimes against humanity are similar concepts dealing with how people and property are to be treated by belligerent states in the course of conducting war. Christopher Greenwood, *The International Tribunal for Former Yugoslavia*, 69 INT'L AFF. 641, 645 (1993). The overlap occurs because war crimes extend beyond mere acts committed in the heat of battle and include any act constituting a grave breach of the laws of war, as long as the *mens rea* requirement is met.

149. The third type of crime prosecuted at Nuremberg, crimes against peace, was defined in Article 6(a) of the Nuremberg Charter, *supra* note 137. It has not been incorporated directly into the statute of the Yugoslav Tribunal

hand, although codified in the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention),¹⁵⁰ has not yet been subject to judicial interpretation, leaving its status in international law relatively unclear.¹⁵¹

The post-World War II human rights movement and the multilateral human rights conventions signed since the war are based on the human rights principles first enunciated at Nuremberg.¹⁵² One of the most significant legacies of Nuremberg is that individuals are now considered bound by the international human rights regime in the same manner as nation states.¹⁵³ The tragedy of the Nuremberg legacy is that despite the numerous violations of international conventions that have since occurred, no individual has ever been prosecuted for violating them,¹⁵⁴ perhaps because the world has not seen an unconditional

because no international conventions specifically make waging an aggressive war illegal and because of disagreement among states on the meaning of "aggression." Despite attempts to define illegal aggression since the establishment of the United Nations, no international conventions are in force, with the exception of the Kellogg-Briand Pact, which renounced war as "an instrument of foreign policy." General Treaty for Renunciation of War as an Instrument of Foreign Policy, art. I, entered into force July 24, 1929, 46 Stat. 2343, 94 L.N.T.S. 57.

Article 2(4) of the United Nations Charter similarly provides that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. CHARTER art. 2(4). In 1974, the General Assembly passed a resolution defining aggression as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. . . ." G.A. Res. 3314, U.N. GAOR, 29th Sess., Annex, at 1, U.N. Doc. A/RES/3314 (XXIX) (1974).

The Yugoslav Tribunal's statute does not give it jurisdiction to prosecute "crimes against peace" because of the uncertain position of the concept in international law. See Bassiouni, *Nuremberg: Forty Years Later*, *supra* note 26, at 61. In addition, if the Tribunal had jurisdiction over crimes against peace, it would have to investigate the causes of the conflict, thus involving itself in the political aspects of the conflict, which it must avoid at all costs. James C. O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT'L L. 639, 645 (1993).

150. Genocide Convention, *supra* note 77.

151. For a discussion of problems facing a judicial body interpreting the provisions of the Genocide Convention, see generally Webb, *supra* note 29, at 389-99. For a discussion of modern developments in establishing norms of international law outside the treaty process, see Charney, *supra* note 77.

152. Lippman, *supra* note 133, at 51. The human rights movement is based, in part, on "the desire to ensure that there would be no repetition of the type of atrocities and abuses which were committed by the German regime, as well as the pragmatic concern that abuses of state power would lead to internal strife and renewed international instability." *Id.*

153. Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1 (1982).

154. Pearl, *supra* note 83, at 1397.

surrender at the end of a war since 1945.¹⁵⁵ Recent examples of attempts to establish other war crimes tribunals include efforts after the Gulf War¹⁵⁶ and Rwanda.¹⁵⁷

155. D'Amato, *supra* note 10, at 501.

156. Pearl, *supra* note 83, at 1397. The Gulf War of 1991 was the first post-Cold War military action justified, in part, by international humanitarian law. Following the conflict, in which United Nations forces were led by the United States, Great Britain, and France to remove Iraqi forces from Kuwait, legal commentators such as Louis René Beres sought the establishment of war crimes trials for the prosecution of the Iraqi leadership, but their calls went unheeded. *See, e.g.,* Louis René Beres, *Iraqi Crimes and International Law: The Imperative to Punish*, 21 DENV. J. INT'L L. & POL'Y 335 (1993); Louis René Beres, *Prosecuting Iraqi Crimes: Fulfilling the Expectations of International Law After the Gulf War*, 10 DICK. J. INT'L L. 425 (1992); Louis René Beres, *Toward Prosecution of Iraqi Crimes Under International Law: Jurisprudential Foundations and Jurisdictional Choices*, 22 CAL. W. INT'L L.J. 127 (1991). Although the United Nations coalition had several high-level Iraqi officials in custody, no steps were taken to try any of them for war crimes despite congressional debates on the issue. *Id.* The limited objective of removing Iraqi forces from Kuwait, the resulting cease-fire agreement, and the fact that coalition forces themselves committed some egregious acts in which civilians were killed, led to the decision to forgo prosecutions. *Id.* Nevertheless, the situation in the former Yugoslavia is even less amenable to war crimes trials because, unlike the Gulf War in which the United Nations was a party to the cease-fire, the United Nations has left the task of establishing a peaceful settlement to the parties of the conflict, who are also the individuals responsible for committing war crimes; therefore, the United Nations is not in a position to demand the terms of peace. The complete military defeat of Iraq obviated the need for war crimes trials to induce a peace settlement. *Id.*

On August 2, 1990, Iraqi forces invaded Kuwait—its southern neighbor—claiming it as the nineteenth province of Iraq. After Iraq ignored a series of Security Council Resolutions condemning Iraq's actions and demanding a return to the status quo, the United Nations initiated offensive military operations to "liberate" Kuwait on January 16, 1991. S.C. Res. 661 (8/6/90), U.N. SCOR, 2933d mtg., U.N. Doc. S/RES/661 (1990), *reprinted in* 29 I.L.M. 1325 (acting under Chapter VII of the United Nations Charter and calling for economic sanctions against Iraq); S.C. Res. 662 (8/9/90), U.N. SCOR, 2934th mtg., U.N. Doc. S/RES/662 (1990), *reprinted in* 29 I.L.M. 1327 (declaring Iraq's annexation of Kuwait null and void); S.C. Res. 664 (8/18/90), U.N. SCOR, 2937th mtg., U.N. Doc. S/RES/664 (1990), *reprinted in* 29 I.L.M. 1328 (demanding that Iraq (1) allow third-country nationals to leave Iraq and Kuwait and allow them access to consular officials; (2) "take no action to jeopardize the safety, security or health" of those third-country nationals; and (3) withdraw its orders closing diplomatic and consular missions in Kuwait, reaffirming Resolution 662's declaration that the annexation of Kuwait is void); S.C. Res. 665 (8/25/90), U.N. SCOR, 2938th mtg., U.N. Doc. S/RES/665 (1990), *reprinted in* 29 I.L.M. 1329 (calling upon member states deploying naval forces "to use such measures commensurate to the specific circumstances as may be necessary" to halt shipping in compliance with the terms of Resolution 661 and to coordinate their actions using, as appropriate, mechanisms of the Military Staff Committee); S.C. Res. 666 (9/13/90), U.N. SCOR, 2939th mtg., U.N. Doc. S/RES/666 (1990), *reprinted in* 29 I.L.M. 1332 (regarding the humanitarian situation in Kuwait and the failure of Iraq to comply with Resolution 661); S.C. Res. 667 (9/16/90), U.N. SCOR, 2940th mtg., U.N. Doc. S/RES/667 (1990), *reprinted in* 29 I.L.M. 1332 (condemning Iraqi

aggression against diplomatic personnel and abductions of foreign nationals and demanding their release and the cessation of all such activities); S.C. Res. 670 (9/25/90), U.N. SCOR, 2943d mtg., U.N. Doc. S/RES/670 (1990), *reprinted in* 29 I.L.M. 1334 (strengthening the embargo against Iraq set forth in Resolution 661, threatening sanctions against member states who violate the embargo, and stating that Iraq is liable under Geneva Convention IV for violations); S.C. Res. 674 (10/29/90), U.N. SCOR, 2951st mtg., U.N. Doc. S/RES/674 (1990), *reprinted in* 29 I.L.M. 1561 (demanding that Iraq cease taking hostages, fulfill its obligations under Geneva Convention IV, allow third-state nationals to depart Kuwait, allow Kuwaitis access to food and water, and requesting the Secretary-General to report to the Security Council regarding his efforts to achieve a peaceful solution); S.C. Res. 677 (11/28/90), U.N. SCOR, 2962d mtg., U.N. Doc. S/RES/667 (1990), *reprinted in* 29 I.L.M. 1564 (condemning Iraqi attempts to alter Kuwait's demographic population and the destruction of civil records). On November 29, 1990, acting under Chapter VII of the United Nations Charter, the Security Council gave Iraq until January 15, 1991 to comply with previous resolutions and authorized all member states "to use all necessary means" to enforce them and restore peace to the area. U.N. SCOR, 45th Sess., 2963d mtg. at 1, U.N. Doc. S/RES/678 (1990), *reprinted in* 29 I.L.M. 1565 (1990). In the following weeks, UN forces succeeded in removing Iraqi forces from Kuwait. On March 3, 1991, Iraq accepted a permanent cease-fire that left the Iraqi army and government intact.

The humanitarian crisis that resulted from the Iraqi invasion of Kuwait gained international attention when, in March 1992, Iraq's military suppressed a Kurdish uprising in the northern area of Iraq bordering Turkey, forcing huge numbers of Kurds to flee their villages for the relative safety of the mountains near the Iraq-Turkey border. Ved P. Nanda, *Tragedy in Northern Iraq, Liberia, Yugoslavia, and Haiti- Revisiting the Validity of Humanitarian Intervention Under International Law- Part I*, 20 DENV. J. INT'L L. & POLY 305, 330-31 (1992). The Security Council responded with a resolution declaring the massive displacement of Iraqi citizens a threat to international peace and security, and demanded that Iraq cease the military operations against the Kurds and allow international human rights observers into the area to aid the refugees. U.N. SCOR, 46th Sess., 2982d mtg., U.N. Doc. S/RES/688 (1991), *reprinted in* 30 I.L.M. 858 (1991). The United States, Great Britain, and France installed troops in safety zones in northern Iraq, even though the Resolution did not authorize the use of force. Nancy D. Arnison, *International Law and Non-Intervention: When Do Humanitarian Concerns Supersede Sovereignty?*, 17 FLETCHER F. WORLD AFF. 199, 204 (1993). For the first time in the history of the United Nations, threats to international peace and security were tied to violations of international humanitarian law and human rights advocates were elated. *Id.*

As of 1991, the principles of crimes against humanity, war crimes, and crimes against peace first enunciated at Nuremberg attained the status of peremptory norms of international law. According to international law, peremptory norms mandate universal enforcement, jurisdiction, and responsibility because they are absolutely binding, allowing no form of derogation whatsoever. Beres, *Iraqi Crimes and International Law*, *supra*, at 338. Proponents argue for instituting judicial proceedings against alleged Iraqi war criminals because the world community has the responsibility to enforce violations of the principles first enunciated at Nuremberg and later codified into international law. Beres, *Prosecuting Iraqi Crimes*, *supra*, at 497-503. Furthermore, judicial proceedings should occur notwithstanding Iraq's emergence from the war largely unoccupied and with its government still intact. *Id.* This argument distinguishes the legal and geopolitical factors, and requires the international community to use political and diplomatic persuasion to force the Iraqi government to hand over alleged war criminals. Professor Beres suggests the possibility of reintroducing military forces

IV. THE FORM AND FUNCTION OF THE YUGOSLAV TRIBUNAL

The United Nations responded to the world's outrage over the carnage in the former Yugoslavia by creating the first war crimes tribunal since the end of World War II. Almost immediately after its creation, the Yugoslav Tribunal was criticized as an empty gesture of the UN Security Council, intended merely as a public relations ploy.¹⁵⁸ Admittedly, the Tribunal's hasty construction and complicated role in negotiating a peace settlement may

into Iraq to gain custody of the accused, but concludes that such an action is "unlikely for both tactical and political reasons." See Beres, *Iraqi Crimes and International Law*, *supra*, at 350-51. Beres suggests that forcible abduction, trials *in absentia*, or assassination of accused war criminals are all proper responses to war crimes. Although each response presents different legal questions, Beres concludes that none is insurmountable. See *id.* at 351-57.

The United Nations has given no indication, however, that it is willing to move forward with prosecutions of Iraqis accused of violating humanitarian law, despite being obligated to do so under international law. See Jean-Marie Henckaerts, *Deportation and Transfer of Civilians in Time of War*, 26 VAND. J. TRANSNAT'L L. 469, 493 (1993) ("[P]ursuant to Article 146 of Geneva IV, states even have a duty to prosecute those who commit the grave breaches [of humanitarian law] . . . But whether this will actually take place is not exclusively a matter of law. International politics will first determine whether the prosecution would be opportune and practically possible.").

This state of affairs is clearly upsetting to Beres, who argues that "Time is running out! Saddam Hussein and the surviving members of his Revolutionary Council, by evading prosecution, would defile justice and leave international law weak and tragically undermined." Beres, *Iraqi Crimes and International Law*, *supra*, at 336. A major lesson from past international war crimes tribunals is the necessity of the international community being completely committed to the prosecution of human rights violations. AMERICAN BAR ASS'N, REPORT ON THE INTERNATIONAL TRIBUNAL TO ADJUDICATE WAR CRIMES COMMITTED IN THE FORMER YUGOSLAVIA 8 (1993) [hereinafter ABA REPORT]. Aside from maintaining an embargo against Iraq, the United Nations only attempt at punishing the Iraqi government for their war of aggression was to create a compensation commission charged with the task of administering a fund intended to pay out reparations for direct injuries to foreign governments, nationals, and foreign corporations during the Iraqi occupation of Kuwait. The compensation fund and commission were established by Resolution 687. U.N. SCOR, 46th Sess., 2981st mtg., at 5, 7, U.N. Doc. S/RES/687 (1991), *reprinted in* 30 I.L.M. 846 (1991). The Compensation Commission is a subsidiary organ of the Security Council and is comprised of 15 members. The Commission oversees a fund into which Iraq is required to pay up to 30% of its oil revenues. U.N. SCOR, 46th Sess., 3004th mtg., at 1, U.N. Doc. S/RES/1705 (1991), *reprinted in* 30 I.L.M. 1715 (1991). Because Iraq has not sold oil on the international market since 1990, the Security Council provided for the release of Iraqi oil proceeds frozen in banks located in member states until other funds become available from new oil sales. Henckaerts, *supra*, at 495.

157. On November 8, 1994, the UN Security Council voted to establish a war crimes tribunal for Rwanda for crimes committed during that country's 1994 civil war. Richard D. Lyons, *U.N. Approves Tribunal in Rwandan Atrocities*, N.Y. TIMES, Nov. 9, 1994, at A12.

158. See *infra* notes 24-25 and accompanying text.

preclude the effective prosecution of war crimes. The best hope for the Tribunal is that its very existence will force combatants to settle for peace. The mere threat of war crimes prosecution may compel warring parties to cease combat and to relinquish their spoils of war in exchange for amnesty from prosecution. Rather than undermining the force and effect of international humanitarian law, such a result could deter future combatants from committing war crimes, as the threat of war crimes prosecution would jeopardize and perhaps outweigh the potential rewards of armed conflict.

A. UN Security Council Actions Leading to Resolution 827

Security Council Resolution 827¹⁵⁹ establishes the Yugoslav War Crimes Tribunal and contains the Statute of the International Tribunal, which sets forth the Tribunal's structure, jurisdiction, and procedures.¹⁶⁰ The adoption of Resolution 827 represents the culmination of a year-long process of United Nations fact-finding and deliberation.

After repeated attempts to reach a political settlement failed, the Security Council became involved in enforcing international humanitarian law in the Yugoslav conflict. On July 13, 1992, the Security Council passed Resolution 764,¹⁶¹ declaring international humanitarian law binding on all warring parties in the former Yugoslavia and placing responsibility for violations on individual actors. One month later, on August 12, 1992, the Security Council unanimously adopted Resolution 771,¹⁶² pursuant to Chapter VII of the United Nations Charter.¹⁶³ This

159. U.N. SCOR, 48th Sess., 3217 mtg., U.N. Doc. S/RES/827 (1993).

160. Statute of the International Tribunal, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. SCOR, 48th Sess., Annex at 36, U.N. Doc. S/25704 (1993), U.N. SCOR, 48th Sess., revised by U.N. DOC. S/25704/Corr. 1 (1993) [hereinafter Statute].

161. U.N. SCOR, 47th Sess., 3093d mtg., at 3, U.N. Doc. S/RES/764 (1992), reprinted in 31 I.L.M. at 1465 (1992). Resolution 764 emphasized that "persons who commit or order the commission of grave breaches of the [1949 Geneva] Conventions are individually responsible in respect of such breaches." *Id.* Individual responsibility for violations of international humanitarian law is one of the most important legacies of the Nuremberg trials. The reasoning behind applying criminal penalties to individuals who commit grave violations of international humanitarian law is that "such crimes are not committed by abstract legal entities but rather by individuals whose accountability before the international community thus strips their action of its purported legitimacy and makes them liable to punishment by national or international action." M. Cherif Bassiouni, *Crimes Against Humanity*, *supra* note 141, 65-66.

162. U.N. SCOR, 47th Sess., 3106th mtg., U.N. Doc. S/RES/771 (1992), reprinted in 31 I.L.M. at 1470 (1992).

163. Chapter VII of the United Nations Charter is entitled, "Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression."

resolution calls on states and international human rights organizations to collect documentation of human rights abuses in the former Yugoslavia and to forward it to the Council.¹⁶⁴ Resolution 771¹⁶⁵ also demanded that all military forces active in Bosnia-Herzegovina observe humanitarian law and threatened further Security Council action to ensure compliance.¹⁶⁶

Shortly thereafter, the United Nations established a Commission of Experts to begin collecting data on human rights violations in Bosnia-Herzegovina.¹⁶⁷ The Commission was charged with collecting information from international human rights groups, conducting independent investigations of the data, and presenting the gathered information to the Secretary-General of the United Nations.¹⁶⁸ In response to the Commission's final

Under Chapter VII, the Security Council is given the authority to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and can make recommendations or decide what action is necessary to "maintain or restore international peace and security." U.N. CHARTER art. 39. Article 41 provides for the Security Council to employ "measures not involving the use of armed force" to enforce its decision and, if such measures are ineffectual, Article 42 allows the Security Council to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security." *Id.* Article 42 was invoked by the Security Council in its resolution authorizing military action against Iraq after its invasion of Kuwait. *Id.* See S.C. Res. 678, U.N. SCOR, 45th Sess., 2963rd mtg., U.N. Doc. S/RES/678 (1990), reprinted in 29 I.L.M. 1565 (1990); see also *supra* part III.C.

164. This course of events closely paralleled Security Council action taken nearly two years prior to the conflict with Iraq. See James C. O'Brien, *Current Developments: The International Tribunal For Violation of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT'L L. 639, 641 (1993).

165. S.C. Res. 771, *supra* note 162.

166. *Id.* para. 7.

167. U.N. SCOR, 47th Sess., 3119th mtg., at 2, U.N. Doc. S/RES/780 (1992), reprinted in 31 I.L.M. 1476 (1992). The Commission of Experts was appointed on October 26, 1992, pursuant to a report submitted by the Secretary-General. *Report of the Secretary-General on the Establishment of the Commission of Experts Pursuant to Paragraph 2 of Security Council Resolution 780 (1992)*, U.N. SCOR, 47th Sess., U.N. Doc. S/24657 (1992). On February 9, 1993, the Commission of Experts (Commission) submitted its Interim Report, which concluded that grave breaches of international humanitarian law had indeed taken place in the former Yugoslavia; the report stated that "it would be for the Security Council or another competent organ of the United Nations to establish [an ad hoc international] tribunal in relation to events in the territory of the former Yugoslavia. The Commission observes that such a decision would be consistent with the direction of its work." *Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, U.N. SCOR, 48th Sess., at 20, U.N. Doc. S/25274 (1993).

168. It has been suggested that the creation of the Commission alone has prevented some further violations of international humanitarian law. O'Brien, *supra* note 149, at 641. For the official history and documents of the World War II War Crimes Commission, see UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 91; S.C. Res. 780, *supra* note 167.

report,¹⁶⁹ the Security Council unanimously adopted Resolution 808 on February 22, 1993.¹⁷⁰ In that Resolution, the Council established an international tribunal "for the prosecution of persons responsible for serious violations of international humanitarian law in the territory of the former Yugoslavia since 1991."¹⁷¹ The Resolution further requested the Secretary-General to submit a report on the implementation of the Yugoslav Tribunal.¹⁷² The Secretary-General's report contained a proposed Statute of the Tribunal (Tribunal Statute or Statute),¹⁷³ which the Security Council adopted intact in Resolution 827.¹⁷⁴

B. *The Structure, Procedures, and Territorial Jurisdiction of the Tribunal*

The structure of the Tribunal and its purported power to supersede the national judicial systems that traditionally administer laws of war may pose the most significant obstacles to compelling compliance with the Tribunal's demands.¹⁷⁵ The Tribunal has jurisdiction over five sovereign states (Bosnia-Herzegovina, Croatia, Macedonia, Slovenia, and the *new* rump Yugoslavia), all of which must cooperate if the Tribunal is to function properly.¹⁷⁶ The Tribunal's authority for its jurisdiction is founded on the widely accepted, modern belief that national legal systems are subservient to international legal regimes, a belief not necessarily shared by the combatants.¹⁷⁷ Although national sovereignty should not justify a refusal to surrender nationals accused of war crimes, attempting both to negotiate peace and to bring accused war criminals to justice before an international tribunal may be incompatible goals; sovereign nations may be reluctant to participate in an international legal

169. The Commission's report did not contain information sufficient for initiating prosecution of any individuals because it was not intended for such a purpose. The Commission was fraught with difficulties ranging from inadequate staffing, funding, and disputes over its mandate. Nevertheless, given that the report was completed by an independent and impartial body (not human rights organizations who have an interest in prosecutions), the information it contains will be more difficult for the international community to dismiss. O'Brien, *supra* note 149, at 642.

170. U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (1993).

171. *Id.*

172. *Id.* at 2.

173. Statute, *supra* note 160.

174. S.C. Res. 827, *supra* note 159.

175. See Alfred P. Rubin, *An International Criminal Tribunal for Former Yugoslavia?*, 6 PACE INT'L L. REV. 7, 9 (1994).

176. *Id.*

177. See Alfred P. Rubin, *Enforcing the Rules of International Law*, 34 HARV. INT'L L.J. 149, 159-60 (1993).

regime under which an international bureaucracy administers laws of war.¹⁷⁸

1. Territorial Jurisdiction and Structure of the Tribunal

As an ad hoc body, the scope of the Tribunal's jurisdiction is limited in time and location.¹⁷⁹ The Tribunal may prosecute only crimes that have occurred in the former Yugoslavia since January 1, 1991.¹⁸⁰

The structure of the Tribunal consists of three principal organs: the Chambers, the Prosecutor, and the Registry.¹⁸¹ The Chambers are comprised of two three-member Trial Chambers and a five-member Appeals Chamber charged with adjudicating cases.¹⁸² The Prosecutor¹⁸³ investigates allegations and prepares indictments for cases to be prosecuted.¹⁸⁴ The Registry assists

178. Rubin, *International Criminal Tribunal*, *supra* note 175, at 17.

179. Statute, *supra* note 160, art. 1.

180. *Id.* The Tribunal has jurisdiction over all war crimes and crimes against humanity that have occurred since January 1, 1991, more than six months before Slovenia seceded and war broke out. O'Brien, *supra* note 149, at 645.

181. Statute, *supra* note 160, art. 11.

182. *Id.* art. 12. Article 13 of the Tribunal Statute sets forth the qualifications of judges and the procedure for electing them. The qualifications are similar to those required for judges on the International Court of Justice. See STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, 59 Stat. 1055, T.S. 993, art. 2. Judges for either tribunal must have "high moral character," a knowledge of international law, and "the qualifications required in their respective countries for appointment to the highest judicial offices." The 11 judges were finally elected by the United Nations General Assembly on September 17, 1993. The judges are: Georges Michel Abi-Saab (Egypt), Antonio Cassese (Italy), Jules Deschenes (Canada), Adolphus Godwin Karibi-Whyte (Nigeria), Germain Le Foyer De Costil (France), Li Haopei (China), Abrielle Kirk McDonald (United States), Elizabeth Odio Benito (Costa Rica), Rustam S. Sidhwa (Pakistan), Sir Ninian Stephen (Australia), and Lal Chand Vohrah (Malaysia). Surya Prakash Sinha, Symposium, *Should There Be an International Tribunal for Crimes Against Humanity?*, *Introductory Note*, 6 PACE INT'L L. REV. 1, 3-4 n.8 (1994); Julia Preston, *U.N. Elects 11 Judges for War Crimes Court: Texas Jurist Chosen for Balkans Tribunal*, WASH. POST, Sept. 18, 1993, at A15.

183. M. Cherif Bassiouni, who directed the activities of the War Crimes Commission, was suggested as the Prosecutor, but was not given the position. He believes Great Britain opposed him. On August 15, 1994, Richard J. Goldstone took office as the Prosecutor. Wilbur G. Landrey, *War Crimes Tribunal: More Than a Fig Leaf?*, ST. PETERSBURG TIMES, Sept. 4, 1994, at 1A.

184. *Id.* art. 16. Choosing the Prosecutor was a matter of great difficulty for the Security Council. Secretary-General Bhoutros-Ghali had proposed to name M. Cherif Bassiouni as Prosecutor. The European members of the Council opposed his nomination, however, fearing that he would be biased because he is a Muslim. See Preston, *supra* note 182. Ramon Escovar Salom of Venezuela was eventually named Prosecutor, but then he left to take a position as Interior Minister in the Venezuelan Cabinet. Gary Regenstreif, *Yugoslavia War Prosecutor Joins Venezuela*

both the Prosecutor and the Chambers, in addition to performing other administrative duties, such as requesting governments to provide information on the identity of the accused, to serve documents, and to extradite the accused.¹⁸⁵ To enforce the Tribunal's extradition requests, the Registry must rely on its power of indictment, the cooperation of concerned governments, and threatened sanctions by the UN Security Council for failure to comply.¹⁸⁶

Cabinet, Reuters World Service, Jan. 31, 1994, available in LEXIS, News Library, Non-US File.

185. Statute, *supra* note 160, art. 29. The ABA Report recommends that the Registry be divided and include separate staffs for the Chambers and the Prosecutor because, as defined in the Statute, there is a potential for a "material reduction in substantive fairness." The ABA emphasizes that, as a shared body, the Registry could get caught in a conflict of interest between fulfilling its duties to the Chambers and to the Prosecutor. Such a conflict undermines the Registry's impartiality and threatens the rights of the accused. See ABA REPORT, *supra* note 156, at 18-19.

186. Article 29 is entitled "Cooperation and Judicial Assistance." It provides:

1. States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
 - (a) the identification and location of persons;
 - (b) the taking of testimony and the production of evidence;
 - (c) the service of documents;
 - (d) the arrest or detention of persons;
 - (e) the surrender or the transfer of the accused to the International Tribunal.

Obtaining the cooperation of the governments involved in the conflict has been identified as one of the major problems facing the Tribunal, especially with regard to Serbia. In order to get cooperation, the United Nations has to proceed very carefully and use a "judicious combination of incentives on the one hand, and intimidation on the other. . . . short of military intervention." Akhavan, *supra* note 6, at 281. Akhavan recommends that the United Nations adopt a "hierarchical approach' towards the prosecution of war criminals; prosecution could begin with lower-ranking officials and gradually work upwards to the higher echelons of the political leadership." *Id.* at 282.

The Tribunal is a subsidiary organ of the Security Council, which is charged with the enforcement of the decisions of the Tribunal. Madeleine Albright, the United States Ambassador to the United Nations, has stated that the end of sanctions against Serbia and Montenegro depends on their cooperation with the Tribunal and that the United States "will not support easing or lifting sanctions by the Security Council if, for example, Serb elements obstruct that work [of the Tribunal]." *Cooperation on War Crimes Necessary for Lifting of Sanctions*, Agence France Presse, Jan. 7, 1994, available in LEXIS, News Library, Non-US File.

2. Procedures of the Tribunal

The Tribunal retains concurrent jurisdiction with the national courts of states that have emerged from the SFRY since its collapse.¹⁸⁷ While individual states may try a person accused of war crimes under their own law, the Tribunal has the power to declare a national judicial proceeding null and void and to institute an independent trial.¹⁸⁸ In practice, this power may place accused war criminals in double jeopardy if they have been tried and acquitted by national courts. The Tribunal Statute provides that if the Tribunal determines that the national court proceedings were flawed, the accused may be retried before the Tribunal.¹⁸⁹ Thus, the Tribunal Statute grants the Tribunal the unprecedented power to render a national judicial process invalid.¹⁹⁰

Before trying an accused war criminal, however, the Tribunal must obtain physical custody of the defendant—Article 210 of the Tribunal Statute prohibits trials *in absentia*.¹⁹¹ The Statute of the Tribunal contains no provisions for obtaining custody of the

187. Statute, *supra* note 160, art. 8.

188. *Id.* arts. 9-10. Article 9 gives the Tribunal primacy over national courts. Under Article 10, which codifies the principle of *non bis in idem* (not twice for the same thing), the Tribunal may try a person who was tried by the national courts for the same acts, but not for the same offense. Conversely, Article 10 further provides that national courts may not try an individual who has already been brought before the Tribunal. These provisions are intended to prevent the repetition of events that occurred after World War I, when the Germans tried their own war criminals at Leipzig and imposed light sentences. Statute, *supra* note 160, art. 10(2)(b).

189. Statute, *supra* note 160, art. 10(2)(b).

190. See Greenwood, *supra* note 148, at 654.

191. The prohibition against trials *in absentia* contained in Article 210(4)(d) "represents a substantial advance in this regard over the Nuremberg proceedings," which allowed for trials without the defendant present and convicted Martin Bormann *in absentia*. O'Brien, *supra* note 149, at 656. As noted by the Secretary-General in his report, this prohibition is also required by the International Covenant on Civil and Political Rights, art. 14, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, 177, *reprinted in* 6 I.L.M. 368, 373 (1967). The Tribunal has decided, however, to make public the evidence of war crimes committed by accused individuals who are not before the Tribunal. Sabine Gillot, *Tribunal Will Reveal War Crimes Evidence Against Absent Defendants*, Agence France Presse, Feb. 11, 1994 available in LEXIS, News Library, Non-US File.

The argument against *in absentia* trials emphasizes the need to ensure that due process requirements are met and to avoid the "smell of show trials." Public statements on indictments also diminish the need for *in absentia* trials because media coverage may encourage governments who have custody over accused individuals to surrender them. In addition, if trials are conducted *in absentia*, later proceedings may illuminate procedural irregularities, resulting in acquittals. See O'Brien, *supra* note 149, at 656-57.

accused;¹⁹² it relies solely on the cooperation of the combatants. The Secretary-General's report indicates that "it is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused,"¹⁹³ apparently addressing concerns such as the possibility that United Nations personnel may abduct accused individuals and deliver them to the Tribunal.¹⁹⁴

Although these provisions safeguard the rights of the accused, they may substantially impair the Tribunal's ability to try war criminals.¹⁹⁵ If an accused war criminal remains in a powerful position in his government, it will be virtually impossible for the Tribunal to gain custody of the defendant. Thus, because the Tribunal Statute is based on the Nuremberg model, which provides for the prosecution of leaders of a *defeated* nation, only persons in the custody of their enemies or third parties are likely candidates for war crimes trials.¹⁹⁶

192. Statute, *supra* note 160, art. 21. Article 20 provides in pertinent part:

1. The trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.
2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal, be taken into custody, immediately informed of the charges against him and transferred to the International Tribunal.

193. *Secretary-General's Report*, *supra* note 141, para. 106.

194. This issue recently received great international attention in the wake of the abduction of Dr. Humberto Alvarez-Machain by U.S. agents in Mexico and his return to the United States to stand trial as an accessory to the murder of a U.S. DEA agent. See *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992). While the majority approved of the abduction while construing the United States-Mexico Extradition Treaty, it acknowledged that extraterritorial abduction might violate customary international law. *Id.* at 2196. For an example of the concern that extraterritorial law enforcement actions have generated, see Eric Bentley, *Toward an International Fourth Amendment: Rethinking Extraterritorial Searches and Seizures Abroad After Verdugo-Urquidez*, 27 VAND. J. TRANSNAT'L L. 329 (1994).

195. Susan Moran, *Jury is Out on Bosnia War Crimes Tribunal: Doubts Over Ability to Try Those Who Have Committed Atrocities*, INSIGHT, August 30, 1993, at 12. Moran argues that extraditing Serbian President Slobodan Milosevic and Bosnian Serb leader Radovan Karadzic is next to impossible because of their stronghold on power and the United Nations lack of enforcement mechanisms to gain access to the necessary documents. Because extradition is voluntary, Moran reports that the Croats will refuse to extradite any of their nationals accused of crimes by the Tribunal if the Serbs refuse first. Cf. Graham Barrett, *Netherlands: Doubts Cloud War Crime Court*, Reuter Textline, Nov. 19, 1993, available in LEXIS, World Library, Allwld File ("A number of international legal experts are already deriding the idea that any of the big suspects will end up on trial, saying that none of them is likely to volunteer to attend [proceedings before the Tribunal] and that the former Yugoslav republics would not allow them to be extradited.")

196. Rubin, *supra* note 175, at 9.

Once a defendant is in custody, the Tribunal Statute offers only procedural protections for the rights of the defendant, some of which are granted at the discretion of the Chambers. For example, the Statute provides for defense counsel if the Chambers decides "the interests of justice so require."¹⁹⁷ To ensure greater protections for defendants, the American Bar Association (ABA) has recommended that the UN Security Council amend the Statute to provide for an Office of Defense Counsel, which would "enhance the adversarial nature of the Tribunal."¹⁹⁸ According to the ABA, the Office of Defense Counsel would function in a manner similar to that of a public defender's office in the United States, which accepts "the representation of the first defendant 'through the door'.¹⁹⁹

If the Tribunal finds an individual guilty of war crimes, it may sentence him.²⁰⁰ The convicted party will serve his sentence in the prison of a state that has declared a willingness to accept such convicts.²⁰¹ The law of the state of incarceration applies to the conditions of imprisonment and parole;²⁰² however, if the convict becomes eligible for parole under the law of the state of incarceration, the President of the Tribunal must consult with the Tribunal judges and make a final decision on whether to approve or deny the parole "on the basis of the interests of justice and general principles of law."²⁰³

C. *Subject Matter Jurisdiction of the Tribunal*

The Tribunal's subject matter jurisdiction is established by the rules of international humanitarian law codified in the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 (Geneva Convention I),²⁰⁴ the Hague Convention Respecting the Laws and Customs of War on Land (Hague Convention IV),²⁰⁵ the Convention on the Prevention and Punishment of the Crime of

197. Statute, *supra* note 160, art. 21(4)(d).

198. ABA REPORT, *supra* note 156, at 20.

199. *Id.*

200. Once convicted, a person may be sentenced to prison and/or required to "return any of the property and proceeds acquired by criminal conduct." Statute, *supra* note 160, art. 24(3).

201. *Id.* art. 27. As of this writing, no states have consented to the use of their prison facilities.

202. *Id.*

203. *Id.* art. 28.

204. Geneva Convention (I), *supra* note 77. See Statute, *supra* note 160, art. 2.

205. Hague Convention (IV), *supra* note 77. See Statute, *supra* note 160, art. 3.

Genocide (Genocide Convention),²⁰⁶ and the Charter of the International Military Tribunal.²⁰⁷ The Secretary-General's report declares that international humanitarian law as it "exists in the form of both conventional law and customary law"²⁰⁸ operates as the Tribunal's subject matter jurisdiction. Under the Tribunal Statute, "international humanitarian law" covers three specific areas: armed conflict, genocide, and crimes against humanity.²⁰⁹ Articles 2 through 5 define the competence of the Tribunal as *ius cogens* international humanitarian law in order to avoid the problems of *nullum crimen sine lege* (no crime without law).²¹⁰ Nevertheless, significant gaps exist that may create problems related to the principle of *nullum crimen sine lege*.²¹¹

Articles 2 through 5 of the Tribunal's Statute set forth the principal mandate of the Tribunal—to criminalize the policy of "ethnic cleansing."²¹² Article 2, entitled "Grave Breaches of the Geneva Conventions of 1949,"²¹³ embodies "the core of the customary law applicable in international armed conflicts."²¹⁴ Article 2 provides:

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (a) willful killing;
- (b) torture or inhuman treatment, including biological experiments
- (c) wilfully causing great suffering or serious injury to body or health;
- (d) extensive destruction and appropriation of property, not justified by the military necessity and carried out unlawfully and wantonly;

206. Genocide Convention, *supra* note 77. See Statute, *supra* note 160, art. 4.

207. Nuremberg Charter, *supra* note 137. See Statute, *supra* note 160, art. 5. Because these conventions may apply concurrently, one act may constitute separate crimes, and the accused may be prosecuted more than once before the Tribunal. Such multiple prosecutions are possible because war crimes and crimes against humanity overlap.

208. *Secretary-General's Report*, *supra* note 141, para. 33.

209. Greenwood, *supra* note 148, at 644. See also Statute, *supra* note 160, arts. 2-5.

210. Statute, *supra* note 160, arts. 2-5.

211. See generally ABA REPORT, *supra* note 156, at 11-16 (discussing the law to be applied by the Tribunal).

212. S.C. Res. 827, *supra* note 159.

213. Statute, *supra* note 160, art. 2.

214. *Secretary-General's Report*, *supra* note 141, para. 37.

- (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- (f) wilfully depriving a prisoner of war or a civilian of the rights of a fair and regular trial;
- (g) unlawful deportation or transfer or unlawful confinement of a civilian;
- (h) taking civilians as hostages.²¹⁵

Article 2 applies only to "grave breaches"²¹⁶ against persons or property protected by the Geneva Conventions, and imposes three additional requirements: (1) the violation must occur during an international armed conflict; (2) the defendant must be connected to a party involved in the conflict; and (3) the victim must be a protected person under one of the Conventions.²¹⁷

Article 2 of the Statute of the Tribunal contains a substantial loophole that may undermine the applicability of international humanitarian law to the conflict in the former Yugoslavia. Although the SFRY and all of its successor states are parties to the 1949 Geneva Conventions,²¹⁸ Article 2 may not apply to the conflict in the former Yugoslavia if the conflict is deemed internal, as opposed to international, and therefore not subject to the provisions of the Geneva Conventions.²¹⁹ If the conflict is characterized as internal, an accused war criminal appearing before the Tribunal theoretically could defend his prosecution by

215. Statute, *supra* note 160, art. 2.

216. For example, Article 147 of Geneva Convention (IV) defines "grave breaches" as:

any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhumane treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Geneva Convention (IV), *supra* note 77, art. 147.

217. Greenwood, *supra* note 148, at 650.

218. *Id.* at 647-48. Customary international law generally provides that successor states are parties to the conventions to which the mother state was a party. Accordingly, Bosnia, Croatia, and Slovenia have all made declarations of accession to the treaty obligations of the SFRY. *Id.* at 648.

219. *Id.* The conflict in the former Yugoslavia has elements of both international and internal conflicts. *Id.* at 648-49. See also O'Brien, *supra* note 149, at 647.

arguing that his actions were not subject to the rules of international warfare.²²⁰

Article 3 of the Statute of the Tribunal addresses this potential loophole by broadening the jurisdiction of the Tribunal.²²¹ Article 3, entitled "Violations of the Laws or Customs of War," codifies the laws of war set forth in the 1907 Hague Convention (IV),²²² which are unquestionably part of customary international law.²²³ Article 3 provides:

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack or bombardment, by whatever means, of undefended towns, villages, dwellings or other buildings;
- (d) seizure of, or destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art or science;
- (e) plunder of public or private property.

This article is extremely broad, primarily because the term "shall include, but not be limited to" expands the scope of the article beyond the specifically listed violations.

The broad scope of Article 3 was intended to expand the subject matter jurisdiction of the Tribunal beyond the grave breaches listed in Article 2.²²⁴ However, the breadth of Article 3 raises the specter of *nullum crimen sine lege* and may effectively limit the article's application. If a defendant's act does not rise to the level of a grave breach within the meaning of Article 2, the Tribunal may try to prosecute the act under the broader provisions of Article 3. However, an act that does not constitute a

220. See O'Brien, *supra* note 149, at 647.

221. This issue was debated by the Security Council before issuing Resolution 827. The members of the Council recognized the fact that, if the conflict were to be characterized as internal rather than international, the Geneva Conventions would not apply, and the Tribunal would not have jurisdiction over the crimes committed in Bosnia-Herzegovina, the scene of the worst atrocities. Greenwood, *supra* note 148, at 650-51.

222. Hague Convention IV, *supra* note 77.

223. This convention was intended for use in the planned post-World War I war crimes trials and was used at Nuremberg and Tokyo. In fact, the Nuremberg Tribunal held that the 1907 Hague Convention was part of international law. Walter G. Sharp, *The Effective Deterrence of Environmental Damage During Armed Conflict: A Case Analysis of the Persian Gulf War*, 137 M.L. L. REV. 1, 11 (1992).

224. In the Security Council debate on Resolution 827, the United States, France, and Great Britain maintained that to cover crimes outside the scope of Article 2 of the Tribunal Statute, Article 3 of the Statute specifically included violations listed in Article 3 of the Geneva Conventions and Additional Protocol I. Greenwood, *supra* note 148, at 650 n.33.

grave breach under Article 2 of the Tribunal Statute, and is not specifically listed under Article 3, might not be subject to prosecution because it is not sufficiently established as a war crime under international law.²²⁵

After reviewing Article 3 of the Tribunal's Statute, the American Bar Association proposed amendments to solve this problem by adding violations specified in Article 23 of the Hague Regulations.²²⁶ These additional violations mirror the violations of the Geneva Conventions listed in Article 2 of the Statute, thereby eliminating the jurisdictional loophole that may arise if a defendant argues that the Tribunal lacks jurisdiction to prosecute crimes not specifically listed in Article 3 of the Tribunal Statute.²²⁷

The prosecution of individuals charged with acts of genocide is the most problematic aspect of the Tribunal's subject matter jurisdiction. Article 4 provides for the prosecution of acts of genocide as set forth in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).²²⁸ The Genocide Convention represents the only codification of crimes against humanity since Nuremberg,²²⁹ and it has never been enforced because of conceptual imprecision in

225. This possibility arises because the use of the phrase "but not limited to" extends the application of Article 3 of the Statute to breaches of the Geneva Conventions that are not characterized as "grave breaches," and any other relevant customary international law regarding the conduct of war which is vague. Therefore, interfering with humanitarian aid may constitute a breach of Article 3. O'Brien, *supra* note 149, at 646-47. United States Ambassador to the United Nations, Madeleine Albright, has said that the United States considers any interference with the delivery of humanitarian aid to be a war crime. David B. Ottoway, *U.S. Warns Serbia on War Trials*, WASH. POST, Jan. 16, 1994, at A19.

226. ABA REPORT, *supra* note 156, at 13-14. The ABA would amend article 3 to read:

- (f) filling or wounding treacherously individuals belonging to the hostile nation or army;
- (g) killing or wounding an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion;
- (h) declaring that no quarter will be given;
- (i) making improper use of a flag of truce, of the national flag, or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Red Cross or Red Crescent;
- (j) declaring abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party.

Id. at 14.

227. *Id.* at 15.

228. Statute, *supra* note 160, art. 4.

229. Bassiouni, *Nuremberg: Forty Years Later*, *supra* note 26, at 8. See also Webb, *supra* note 29, at 391-92.

its substantive articles and weak enforcement provisions.²³⁰ Article 4(2) of the Tribunal Statute, taken directly from Article 2 of the Genocide Convention, provides:

Genocide means only of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) killing members of a group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group to another group.²³¹

Article 4(3) further provides that the related acts of "conspiracy to commit genocide," "direct and public incitement to commit genocide," "attempt to commit genocide," and "complicity in genocide" are punishable.²³²

Under Article 4, for an act to qualify as an act of genocide, the prosecution must show: (1) the victim or victims were members of a national, ethnic, racial, or religious group;²³³ (2) the defendants intended to destroy that group, either completely or in part; and (3) the defendants committed acts in furtherance of that intent to annihilate the victim group.²³⁴ Although the drafters of the Genocide Convention intended to cover "crimes against humanity" as defined by the Nuremberg Charter,²³⁵ the Convention does not encompass the extermination of social or political groups. Furthermore, the Genocide Convention does not require the existence of war as a prerequisite, nor does it allow for the prosecution of killing on a massive scale without the requisite intent.²³⁶

230. The Genocide Convention is very imprecise and has weak enforcement provisions. Its status in international law is questionable, even though all parties to the war in the former Yugoslavia are parties to this Convention. Bassiouni, *Nuremberg: Forty Years Later*, *supra* note 26, at 8. See also Webb, *supra* note 29, at 387-89. *Secretary-General's Report*, *supra* note 141, para. 45. But see Meron, *supra* note 8, at 131 (the prohibition against genocide is binding on all states regardless of the existence of a convention).

231. Statute, *supra* note 160, art. 4, para. 2.

232. *Id.* art. 4, para. 3.

233. Presumably the victim's national, ethnic, racial, or religious group is different from that of the accused.

234. Webb, *supra* note 29, at 390-93.

235. See *supra* note 140.

236. Bassiouni, *Nuremberg: Forty Years Later*, *supra* note 26, at 8. See also Webb, *supra* note 29, at 391-92.

The Tribunal has yet to resolve whether "ethnic cleansing" constitutes genocide within the meaning of the Genocide Convention.²³⁷ The Genocide Convention endorses the idea of individual responsibility,²³⁸ and also includes a provision recognizing the jurisdiction of an international legal tribunal.²³⁹ The International Court of Justice has recognized a grave risk of genocide in Bosnia-Herzegovina, but has issued only preliminary relief, enjoining Yugoslavia from committing or encouraging acts of genocide.²⁴⁰

Article 5 of the Tribunal's Statute is a catch-all provision designed to close any gaps created by judicial interpretation of Articles 2, 3, and 4. Article 5 grants the Tribunal the authority to prosecute crimes against humanity.²⁴¹ Acts constituting crimes against humanity, war crimes, and genocide are very similar, differing only in terms of the context in which the acts are committed.²⁴² Article 5 provides:

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial or religious grounds;

237. See generally Webb, *supra* note 29 (discussing the interpretation of the Genocide Convention).

238. Genocide Convention, *supra* note 77, art. 4.

239. The International Court of Justice cannot hear claims against individuals, and absent an international tribunal, individuals accused of genocide may only be tried in national courts. *Id.* See also Webb, *supra* note 29, at 393-94.

240. International Court of Justice (Bosnia and Herzegovina v. Yugo.) (Order on request for the indication of provisional measures), para. 52, *reprinted in* 32 I.L.M. 888, 901 (1993).

241. The definition of crimes against humanity used in Article 5 comes directly from Law No. 10 of the Control Council for Germany. The definition derived from Law No. 10 is much broader than the definition set forth in the Nuremberg Charter. Allied Control Council No. 10, Dec. 20, 1945, *reprinted in* 3 INTERNATIONAL CRIMINAL LAW: ENFORCEMENT, *supra* note 118, at 129. UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 91, 212-15. *Cf. supra* note 140, for the definition of crimes against humanity used in the Nuremberg Charter.

242. "[G]enocide is different from crimes against humanity in that, to prove it, no connection with war need be shown, and, on the other hand, genocide is aimed against groups, whereas crimes against humanity do not necessarily involve offenses against or persecutions of groups." Akhavan, *supra* note 6, at 277 (citation omitted).

- (i) other inhumane acts.

This definition of crimes against humanity is similar to common Article 3 of the Geneva Conventions.²⁴³ Article 5 of the Tribunal Statute was designed specifically in response to "ethnic cleansing," subjecting the practice to prosecution regardless of whether the conflict is deemed international or internal.²⁴⁴ Although the Secretary-General intended the article to be broad, Article 5 is actually more restrictive than the previous four articles, as it covers only attacks against civilian *populations*—not individual civilians—that are "committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds."²⁴⁵

The inclusion of "other inhumane acts" in Article 5(i) indicates that the list of crimes in Article 5 is not exhaustive.²⁴⁶ As with Article 3, this rather open-ended and undefined provision makes the Yugoslav Tribunal vulnerable to charges of violating the principle of *nullum crimen sine lege*.²⁴⁷ The Secretary-General attempted to clarify Article 5(i) by relying on the International Court of Justice opinion that common Article 3 of the Geneva Conventions is "a minimum yardstick" that "reflect[s] what the Court in 1949 called 'elementary considerations of humanity,'" considerations that have arguably changed in the intervening years.²⁴⁸ These elementary considerations of humanity are indeed broad and possibly subject to dispute because they stem from "the useages [sic] established among civilized peoples, from the laws of humanity and the dictates of public conscience."²⁴⁹

The ABA recommended amending Article 5 to clarify which acts constitute crimes against humanity and to insulate the Yugoslav Tribunal from criticisms of violating the doctrine of *nullum crimen sine lege*.²⁵⁰ The ABA urged the Security Council

243. *Secretary-General's Report*, *supra* note 141, at 13.

244. *Id.*

245. *Id.*

246. Statute, *supra* note 160, art. 5(i).

247. ABA REPORT, *supra* note 156, at 14.

248. *Military and Parliamentary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27), *reprinted in* 25 I.L.M. 1023, 1073 (1986).

249. *Id.* (quoting Geneva Convention I, art. 63; Convention II, art. 62; Convention III, art. 142; and Convention IV, art. 158).

250. ABA REPORT, *supra* note 156, at 15. According to the ABA Task Force, Article 5(a) through (e) should remain the same, but the rest of the Article should be amended. Their proposal would read (changes in italics):

- (f) torture *and mutilation*;
 (g) rape, *including enforced prostitution and enforced pregnancy, and other forms of sexual assault*;
 (h) persecution on political, racial and religious grounds;
 (i) *taking of hostages*;

to expand subparagraph (g) to cover forced prostitution, forced pregnancy, and other "widespread sexual abuses."²⁵¹ In addition, the ABA suggested replacing subparagraph (i) with crimes listed in common Article 3 of the Geneva Conventions—crimes that are not listed in Article 5, subparagraphs (a) through (h) of the Tribunal Statute. By replacing subparagraph (i), the ABA hoped to close most of the gaps and to ensure that the additional crimes are within the Tribunal's jurisdiction, in the event that the conflict is deemed internal and Article 2 becomes inapplicable.²⁵²

In the final analysis, the subject matter jurisdiction of the Tribunal may sufficiently provide for alternate and multiple means of prosecuting atrocities committed under the policy of ethnic cleansing.²⁵³ Despite several problems stemming from ambiguous terminology and the lack of judicial interpretation of the instruments on which Articles 2 through 5 are based, the subject matter jurisdiction of the Tribunal stands on a firm legal foundation.²⁵⁴ The Tribunal appears relatively immune from critics' claims that its subject matter jurisdiction violates the principle of *nullum crimen sine lege*. Although applying the provisions of these four articles in actual cases will require a certain degree of judicial activism, the strength of international

(j) *outrages upon personal dignity, in particular humiliating and degrading treatment;*

(k) *passing of sentence and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.*

Id. at 15-16. Interestingly, in the attempt to clarify crimes against humanity in the Statute, the ABA's recommendations are almost as unclear as the original "other inhumane acts" language.

251. *Id.* at 15.

252. *Id.* Remember, Article 2 only applies to grave breaches of the Geneva Conventions committed in international armed conflict. The Secretary-General and the ABA Task Force agree that it should not matter whether the conflict is internal or international for crimes against humanity to be prosecuted. There is also support for the position that crimes against humanity do not even require the precondition of armed conflict. See Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991). On the other hand, the lack of judicial interpretation of crimes against humanity since the end of World War II requires the Statute of the Tribunal to be very precise to avoid having a case thrown out on a technicality of treaty interpretation.

253. Greenwood, *supra* note 148, at 651-52. Greenwood points out that "ethnic cleansing involves acts which would fall within all four categories covered by the statute, i.e. the killing, torture or deportation of protected persons (Article 2), the plunder of private property (Article 3), most of the actions which amount to genocide (Article 4), and most, if not all, of those falling within the definition of crimes against humanity (Article 5)." *Id.* at 652.

254. *Id.*

humanitarian law stands to be reinforced regardless of the outcome of this experiment.

V. HARD CHOICES: THE AGENDA FOR PEACE,
PEACEKEEPING, AND PEACEMAKING

According to the UN Charter, the primary objective of the United Nations is to "maintain international peace and security,"²⁵⁵ including the promotion of "universal respect for, and observance of, human rights."²⁵⁶ Nevertheless, despite the comprehensive body of international law governing warfare and human rights developed since the inception of the United Nations, approximately one hundred armed conflicts have occurred since 1945.²⁵⁷ In addition, because UN member states often fail to fulfill their affirmative duty to comply with international law,²⁵⁸ critics have accused the United Nations of failing to hold international actors accountable for violations of human rights and the laws of war.²⁵⁹ In light of its history of not compelling compliance with the international human rights regime, two simultaneous tasks lie before the United Nations with respect to the war in the former Yugoslavia: (1) enforcing international humanitarian law, and (2) maintaining peace through the peacemaking and peacekeeping processes.²⁶⁰ The primary issue facing the United Nations in the former Yugoslavia is whether these objectives are compatible or mutually exclusive.²⁶¹

The end of the Cold War,²⁶² at least in theory, has provided the Security Council with an opportunity to establish firmly in

255. U.N. CHARTER art. 1, para. 1.

256. *Id.* art. 55(c).

257. Hans-Peter Gasser, *Ensuring Respect for the Geneva Conventions and Protocols: The Role of Third States and the United Nations*, in 2 EFFECTING COMPLIANCE 15, 16 n.3 (Hazel Fox & Michael A. Meyer eds., 1993).

258. U.N. CHARTER art. 56.

259. *But see* Gasser, *supra* note 257, at 37-39. Gasser asserts that during the Gulf Conflict the Security Council was "slow in recognising its function as one of the agents mandated to promote respect for international humanitarian law by the parties to the conflict," but nevertheless applied "humanitarian law throughout without naming it." *Id.* at 38.

260. *Id.* at 17.

261. Sir Hersch Lauterpacht once wrote, "if international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law." *Id.* at 14 n.4 (quoting H. Lauterpacht, *The Problem of the Revision of the Law of War*, 29 BRIT. Y.B. INT'L L. 360, 382 (1962)).

262. The "new world order" is characterized by two countervailing trends: (1) increased instability caused by the "vigorous renaissance" of the concept of sovereign nation-states; and (2) creation of new and reinforcement of old international institutions to create international political stability. *See* Jost

international law the laws of war and human rights.²⁶³ Nevertheless, negotiating a peaceful settlement in the former Yugoslavia may require foregoing the prosecution of important war criminals for violations of international humanitarian law in order to satisfy the international community's desire for a quick, diplomatic settlement.²⁶⁴ Arguably, the United Nations may be able to use the Yugoslav Tribunal as a tool to establish a peaceful settlement and simultaneously to discourage future combatants from engaging in war crimes.²⁶⁵ Such an effort would further integrate the international human rights regime into international law by indicating to potential combatants that the international community is at least willing to consider enforcing the laws of war and human rights, thereby making violations of those laws potentially very costly.²⁶⁶

In post-Cold War years, the Security Council has evolved into an effective tool for enforcing international law.²⁶⁷ The Security Council has four key functions in maintaining international peace and security: preventive diplomacy, peacemaking, peacekeeping, and peace-building.²⁶⁸ The UN Secretary-General's vision of the post-Cold War United Nations includes a particularly dominant role for the United Nations, and the Yugoslav Tribunal²⁶⁹ in

Delbruck, *A More Effective International Law or a New "World Law"?—Some Aspects of the Development of International Law in a Changing International System*, 68 IND. L.J. 705 (1993).

263. See, e.g., *id.* Along with many others, Delbruck argues that "[t]he rigid bi-polar power structure which stabilized the international system for over forty years, but at the same time allowed for little flexibility in the conduct of international relations, has given way to an open, and to some extent, unstable political setting." *Id.* at 705. This instability has provided an opening for the United Nations to act in new ways and perhaps to fulfill the dreams of its founders: "to save succeeding generations from the scourge of war, . . . to reaffirm faith in fundamental human rights . . . and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained. . . ." U.N. CHARTER pmbl.

264. Great Britain, for instance, reportedly attempted to prevent the investigation of allegations of war crimes because it interfered with "the overriding objective" of "keep[ing] the diplomatic game going." Roy Gutman, *BBC: Britain Blocked Bosnia Crime Tribunal*, NEWSDAY, Dec. 13, 1993, at 6.

265. D'Amato, *supra* note 10, at 501.

266. Joyner, *supra* note 4, at 272-73.

267. See David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552, 553 (1993). The UN has established over 26 peacekeeping operations since 1945. *An Agenda for Peace: Preventative Diplomacy, Peacemaking and Peace-Keeping, Report of the Secretary-General*, U.N. GAOR, 47th Sess., para. 15, U.N. Doc. S/24111 (1992), reprinted in 31 I.L.M. 953, 958-59 (1992) [hereinafter *Agenda for Peace*].

268. *Agenda for Peace*, *supra* note 267, at paras. 46-47.

269. In the post-Cold War era, "the greatest risks of starting future wars will likely be those associated with ethnic disputes and the new nationalism that

peacekeeping and peace-building.²⁷⁰ The Secretary-General defines peacekeeping as "the deployment of a United Nations presence in the field, . . . normally involving United Nations military and/or police personnel."²⁷¹ This conception of peacekeeping indicates that the United Nations is prepared to impose or make peace²⁷² by "bring[ing] hostile parties to agreement" under Chapter VI of the UN Charter.²⁷³ Once warring parties have come to a peace agreement, the United Nations is to begin its function of "post-conflict peace-building."²⁷⁴

In the former Yugoslavia, the United Nations failed to engage in preventive diplomacy,²⁷⁵ and it must now focus on making, keeping, and building peace. The United Nations peacekeeping mission in the Yugoslav conflict was to include facilitating peace negotiations, delivering humanitarian assistance, protecting civilian populations, and promising future judicial action.²⁷⁶

seems to be increasing in many areas—motivations that have been historically associated with human rights violations." John H. Barton & Barry E. Carter, *International Law and Institutions for a New Age*, 81 GEO. L.J. 535, 555 (1993). As such ethnic and nationalistic tensions are not easily resolved, international institutions and international law "are able to play only a part in their practical resolution." *Id.* at 556. In this sense, the Tribunal is definitely part of a UN-brokered political solution to the problems in the former Yugoslavia. For an example of the further use of war crimes trials as part of the peace process, see the discussion of constituting a tribunal for Rwanda. See *supra* note 157.

270. See, e.g., Meron, *supra* note 8, at 122-23.

271. *Agenda for Peace*, *supra* note 267, para. 20.

272. W. Michael Reisman, *Peacemaking*, 18 YALE J. INT'L L. 415, 416 (1993).

273. *Agenda for Peace*, *supra* note 267, para. 20. The first means of peacemaking, according to the Secretary-General's report, is to send disputes to the International Court of Justice and to encourage all states to take its jurisdictional pledge by the year 2000. *Id.* para. 39(a). Reisman remarks that "[t]his is nice but not a very realistic aspiration and it is hardly the stuff to quicken one's pulse. Moreover, it has little to do with peacemaking. Even after the Court delivered a hypothetical judgment, peacemaking could still be required." Reisman, *supra* note 272.

274. Examples of peace-building are given in the Secretary-General's report. This process includes "rebuilding the institutions and infrastructures of nations torn by civil war and strife; and building bonds of peaceful mutual benefit among nations formerly at war." *Agenda for Peace*, *supra* note 267, para. 15. This process is currently underway in Somalia and has been severely criticized.

275. See, e.g., Meron, *supra* note 8, at 122-23 ("[T]he Security Council's decision to establish a war crimes tribunal reflects the failure of the Security Council's primary mission to end the conflict and atrocities.")

276. See *Report on First Session of International Tribunal for War Crimes in Former Yugoslavia*, Federal News Service, United Nations Package, Dec. 27, 1993, available in LEXIS, News Library. The Security Council's effectiveness in creating successful peacekeeping operations in regional conflicts depends on several factors, including the degree to which the permanent members can divorce their national interests from the problem at hand and provide unwavering diplomatic support for any peace plan to which its members agree. *Secretary-General Pérez de Cuéllar's 1988 Report on the Work of the Organization*, in THE UNITED NATIONS AND A JUST WORLD ORDER 504, 513 (Peter Falk et al. eds., 1991).

Until the recent NATO activity enforcing the Security Council's Resolution to help civilian populations,²⁷⁷ the United Nations has failed with regard to all of the above.²⁷⁸ The United Nations failure may be due to its reluctance to involve itself in the Yugoslav conflict. The United Nations appears to be waiting for the conflict to subside before it will take forceful, affirmative action to stop the fighting;²⁷⁹ the United Nations intervention will inevitably come too late to prevent massive suffering in the former SFRY.²⁸⁰ The United Nations limited action has therefore been criticized as nothing more than a scheme by which the international community hopes to ease its collective conscience.²⁸¹

The United Nations peacemaking efforts in the former Yugoslavia have fared no better than its attempt at peacekeeping.²⁸² The Secretary-General attributes the failure of the peacemaking effort to a "lack of political will of parties to seek a solution" under Chapter VI of the United Nations Charter, and the "indifference of the international community to a problem, or the marginalization of it."²⁸³ The Secretary-General's analysis, however, ignores the crucial tripartite relationship among the United Nations, international politics, and the local politics of member states.

Although local politics in particular have stymied past and present peacemaking attempts,²⁸⁴ the success of any United Nations attempt to make and build peace in the former Yugoslavia depends foremost on the perceived legitimacy of the Security

277. See Michael Gordon, *Conflict in the Balkans; NATO Craft Down 4 Serb Warplanes Attacking Bosnia*, N.Y. TIMES, March 1, 1994, at A1.

278. E.g., Boris Johnson, *Busy Doing Nothing While Bosnia Bleeds*, SUNDAY TELEGRAPH, Jan. 30, 1994, at 19, available in LEXIS, News Library (discussing disagreement among the United States, France, and Great Britain on appropriate action in Bosnia).

279. William J. Durch, *Introduction*, in THE EVOLUTION OF UNITED NATIONS PEACEKEEPING 7 (William J. Durch ed., 1993).

280. See King, *supra* note 1, at 349 (chiding the United Nations for failing to engage in preventive diplomacy and leaving it to the European Community instead).

281. E.g., Terry Atlas, *Atrocity Docket; UN has done Little to Prosecute Villains in Bosnia*, CHI. TRIB., Feb. 13, 1994, at C1.

282. See Reisman, *supra* note 272, at 417. Overshadowed by the Cold War, the establishment of the United Nations marked "almost revolutionary change" in international law because, for the first time, the use of force was "centralized . . . to the extent that military enforcement measures may be applied only under the authority of the UN Security Council" or under Article 51 (self-defense). Delbruck, *supra* note 262, at 721.

283. *Agenda for Peace*, *supra* note 267, para. 41.

284. Reisman, *supra* note 272.

Council in the eyes of the world.²⁸⁵ The Security Council clearly has the authority to establish ad hoc judicial bodies such as the Yugoslav Tribunal,²⁸⁶ and failure to use that authority may jeopardize its integrity.²⁸⁷

Of course, blind adherence to the objectives of the Tribunal must not be permitted to undermine the peace process in the former Yugoslavia. If a peace settlement includes terms for the Tribunal that are unacceptable to any party for any reason, the war in the SFRY could be prolonged unnecessarily. Moreover, if war crimes trials are indeed included as part of a final settlement, the United Nations may be wise to abandon prosecution, much as the Allies did after World War I, if war crimes trials stand to imperil future peacekeeping and peace-building efforts. Thus, the Tribunal must serve as an integral part of any peace negotiation and ensure that later prosecutions are viewed as just by the combatants, thereby reinforcing the Security Council's role in ending wars of aggression.²⁸⁸

Although the Yugoslav Tribunal began as a means of providing humanitarian relief, because of the "obvious incongruence between pursuing a political settlement option and a justice option,"²⁸⁹ politicization of the Tribunal may represent a significant danger to the successful prosecution of alleged war criminals.²⁹⁰ Looking ahead to future tribunals, the establishment of the Yugoslav Tribunal represents a willingness on the part of the Security Council to go beyond merely promulgating resolutions, economic sanctions, and actively providing humanitarian relief,²⁹¹ and instead actually to enforce peace through international humanitarian law. The effectiveness of the Tribunal, however, ultimately depends on the political

285. Caron, *supra* note 267, at 554.

286. See ABA REPORT, *supra* note 156, at 9-11; *Secretary-General's Report*, *supra* note 141, paras. 18-30. Under Article 39 of the UN Charter, the Security Council has the power to decide how to maintain international peace and security using the enforcement measures listed in Article 41 of the UN Charter. Because the methods listed in Article 41 are not exclusive and do not include entities such as the Tribunal, past Security Council practices and the exigencies of the situation in the former Yugoslavia are sufficient legal bases for the establishment of the Tribunal.

287. Caron, *supra* note 267, at 560-61.

288. Akhavan, *supra* note 6, at 283-89.

289. M. Cherif Bassiouni, *quoted in* Gary J. Bass, *Courting Disaster: The U.N. Goes Soft on Bosnia Again*, NEW REPUBLIC, Sept. 6, 1993, at 13.

290. See, e.g., O'Brien, *supra* note 149, at 659.

291. *But see* Lucia Mouat, *Rights Groups to UN Troops: Police Thyself*, CHRISTIAN SCIENCE MONITOR, Jan. 27, 1994, at 6. UN troops charged with delivering humanitarian relief have themselves been the subject of complaints regarding their alleged use of brothels populated by Croatian and Moslem prisoners, and profiteering on the black market. A United Nations probe is currently underway.

situation in which it operates and on the firm commitment of the members of the Security Council.²⁹²

In 1943, just prior to the establishment of the United Nations, United States Secretary of State Cordell Hull envisioned an international body that would “sanitize and order world politics” so that “there will no longer be any need for spheres of influence, for alliances, for balances of power . . . by which in the unhappy past the nations strove to safeguard their security or to promote their interests.”²⁹³ In such a world, the United Nations makes international peace and multilateral action under its auspices and, independent of the interests of the great powers, maintains this peace.²⁹⁴ According to Hull, multilateral action has “intrinsic merit” because it is designed to implant democracy in formerly undemocratic nations.²⁹⁵

In contrast to this vision, the recent Gulf War was really the result of unilateral action, albeit cloaked in multilateralism,²⁹⁶ and demonstrated that United Nations action is effective only where the individual interests of the members of the Security Council converge and they actually agree.²⁹⁷ The failure of the United States, the great power behind organizing the United

292. The means by which the United Nations has entered into the Yugoslav conflict is designed to minimize costs on the international community in terms of military expenses and the lives of UN troops. Unfortunately, this approach places a greater burden on the civilians within the combat zone but appears to be the future of UN intervention—with the exception of the Korean War, every time the UN has intervened it has been after the fact. Dorch, *supra* note 279, at 6-7. It follows that the overriding concern is peace and all else comes second.

293. Ernest W. Lefever, *Reigning in the U.N.: Mistaking the Instrument for the Actor*, 72 FOR. AFF. 17 (1993) (quoting Secretary of State Cordell Hull).

294. *See id.* at 18-19.

295. *Id.* at 19.

296. Lori Fisler Damrosch, *The Role of the Great Powers in United Nations Peace-Keeping*, 18 YALE J. INT'L L. 429, 430 (1993). In this conception of the big power model, first seen in the Korean War, “a leading power assumes the initiative and undertakes most of the burdens of mounting a large-scale military action, invites participation or contribution from a range of other states, and obtains a Security Council resolution endorsing the collective effort.” Under these circumstances, the United Nations role in the entire activity, when dominated by one power, is merely as the body that authorized the action. *Id.* It is important to recognize that “[a] unanimous Security Council vote authorizing measures to deal with a threat to or breach of the peace does not necessarily mean that these measures are right or just.” Lefever, *supra* note 293, at 19.

297. *See* Lefever, *supra* note 293, at 19. This political obstacle to the effectiveness of the Security Council has not diminished with the end of the Cold War. It cannot be emphasized enough that “[t]he political consensus among the five permanent members of the Council obtained during the ‘hot phase’ of the Gulf crisis cannot be taken as a guarantee that the paralyzing use of the veto power is a matter of the past.” Delbruck, *supra* note 262, at 722 (footnote omitted). For a discussion of the veto power of the permanent members of the Security Council and suggestions for reform, see Caron, *supra* note 267.

Nations effort to remove Iraqi forces from Kuwait—and the main supporter of the Yugoslav Tribunal—to pursue criminal prosecutions for violations of international humanitarian law after the Gulf War illustrates the requirement of convergent national interests among the members of the Security Council before it can act effectively in making peace.²⁹⁸

VI. CONCLUSION

The establishment of the Yugoslav Tribunal is one facet of the Security Council's larger task of rebuilding the nations arising out of the ashes of the SFRY.²⁹⁹ Although the concept of peacemaking is not clearly defined by the Secretary-General,³⁰⁰ the Tribunal is clearly a part of a larger United Nations effort to create stability in the former Yugoslavia through the enforcement of international humanitarian law.³⁰¹ The hope for future stability in the international community, which is secured in part by prosecuting those individuals responsible for violating international humanitarian law during a bloody European conflict, is not new.³⁰² The forces that dashed those hopes in the past are still at work today and, although much has been written on the practical difficulties that face the Yugoslav Tribunal, history's lessons to be learned from past failures are all too often

298. The United States did float some trial balloons regarding prosecuting Iraqi leaders, but did not follow through. For example, President George Bush stated before the General Assembly that:

Iraq and its leaders must be held liable for these crimes of abuse and destruction. But this outrageous disregard for basic human rights does not come as a total surprise. Thousands of Iraqis have been executed on political and religious grounds and even more through a genocidal, poison gas war waged against Iraq's own Kurdish villagers."

Frank C. Newman, *Redress for Gulf War Violations of Human Rights*, 20 DENV. J. INT'L L. & POLY 213 (1992) (quoting President George Bush, *The U.N.: World Parliament of Peace*, DEP'T STATE DISPATCH, Oct. 1, 1990, Current Policy No. 1303).

299. See O'Brien, *supra* note 149, at 658-59 (1993).

300. See *supra* note 283.

301. According to O'Brien:

The people who have been victimized by atrocities in the former Yugoslavia . . . deserve to see that justice is sought. They should be allowed to turn their attention to building the future, not to seeking vengeance for the past. . . . International humanitarian law, as reflected in the statute of the tribunal, can deter some atrocities and mete out punishment for others. In so doing, it can help the people of the region take forward with them fewer burdens from this conflict than they otherwise would.

O'Brien, *supra* note 149, at 659.

302. See *supra* part III.

ignored and threaten the success of this most recent endeavor to establish a war crimes tribunal.

Codifying international humanitarian law and ensuring that prior war crimes tribunals provide precedents for the current Tribunal avoids the possibility that the accused will invoke the doctrine of *nullum crimen sine lege* or contest the Tribunal's jurisdiction over them as individuals. It must be emphasized that the Tribunal is an ad hoc subsidiary organ of the Security Council of the United Nations, and the Security Council is ultimately responsible for enforcing any decisions that the judges of the Tribunal issue. In order for the Security Council to act successfully, all of its members must believe it is in their national interests to act,³⁰³ and the members must be willing to take the political risk of confrontation with the governments that refuse to cooperate with the Tribunal.

The most tragic outcome of the conflict in the former Yugoslavia, regardless of the outcome of war crimes prosecutions, would be for the international community to forget the atrocities that occurred.³⁰⁴ If the United Nations and the rest of the international community are serious about preventing future gross violations of human rights, the Yugoslav Tribunal should be viewed as a precursor to the eventual establishment of an international criminal court,³⁰⁵ charged with the task of prosecuting violations of international law, such as those that are currently occurring in the former Yugoslavia. The Secretary-General emphasized in his report on the Tribunal Statute that "[t]he decision [to establish the Tribunal] does not relate to the establishment of an international criminal court of a permanent nature."³⁰⁶ Nevertheless, the experience of the Yugoslav Tribunal in overcoming the political difficulties and problems of developing an effective criminal procedure should be used as evidence that such a court is viable and necessary for the New World Order.

303. O'Brien argues that "[a]ll states have their self-interest at stake: viable international humanitarian law will one day protect their own citizens, as well as deter violations that may quickly threaten international peace and security." O'Brien, *supra* note 149, at 658-59.

304. See Akhavan, *supra* note 6, at 283.

305. See, e.g. M. Cherif Bassiouni & Christopher L. Blakesley, *The Need for an International Court in the New International World Order*, 25 VAND. J. TRANSNAT'L L. 147 (1992).

306. *Secretary-General's Report*, *supra* note 141, para. 12.

POSTSCRIPT

On February 13, 1995, the Yugoslav Tribunal formally indicted twenty-one Serbs for crimes against humanity committed at a concentration camp in Bosnia.³⁰⁷ Of the accused, only one individual, Dusdan Tadic, is in custody in Germany. His extradition from Germany to the Netherlands, where the Tribunal sits, will not occur until spring 1995.³⁰⁸ The only person charged with the crime of genocide is the camp commander, Zeljko Meakic.³⁰⁹ According to a Tribunal official, the only person likely to be tried is Mr. Tadic.³¹⁰ Recent attempts to obtain a peace settlement by offering to lift the sanctions against Serbia, along with questions about the Tribunal's budget, threaten to put a premature end to the Tribunal.³¹¹ According to the U.S. State Department, however, if Serbia accepts the offer to lift sanctions, war crimes trials will not be abandoned in exchange for a settlement.³¹²

Karl Arthur Hochkammer

307. Ronald van de Krol, *War Tribunal Indicts 21 Serbs*, FIN. TIMES, Feb. 14, 1995, at 2.

308. *Id.*

309. *Indicated Serbs Spurn UN War Crimes Tribunal*, INDEPENDENT (London), Feb. 14, 1995, at 9.

310. *Id.*

311. Elizabeth Neuffer, *War Crimes Tribunal Under Siege: Despite New indictments, UN Body Fears Loss of International Funds, Backing*, BOSTON GLOBE, Feb. 19, 1995, at 29.

312. *Relief for Serbia to be Offered, Official Says*, L.A. TIMES, Feb. 15, 1995, at A11.