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NOTES

BEATING PLOWSHARES INTO SWORDS— RECONCILING THE SOVEREIGN RIGHT TO SELF-DETERMINATION WITH INDIVIDUAL HUMAN RIGHTS THROUGH AN INTERNATIONAL CRIMINAL COURT: THE LESSONS OF THE FORMER YUGOSLAVIA AND RWANDA AS A FRONTISPIECE

INTRODUCTION

*“And he shall judge among people and rebuke strong nations afar off; and they shall beat their swords into plowshares, and their spears into pruninghooks: nation shall not lift up a sword against nation neither shall they learn war any more.”**

This century has seen two attempts to bring about worldwide consensus¹ among nation-states to promote universal peace and to

* *Micah 4:3* (King James). See *Isaiah 2:4*.

¹ See LELAND M. GOODRICH & ANNE P. SIMONS, *THE UNITED NATIONS AND THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY* 9 (1955) (discussing short-lived post World War I League of Nations initiative preceding inception of United Nations); Carol Weis Brod, *Minorities and Diversities: The Remarkable Experiment of the League of Nations*, 8 *CONN. J. INT'L L.* 359, 359 (1993) (noting creation of League of Nations and protection of minorities in nation-states after WWI); Keith L. Sellen, *The United Nations Security Council Veto in the New World Order*, 138 *MIL. L. REV.* 187, 226-27 (1992) (describing two attempts at establishing central international authority); cf. AMRY VANDENBOSCH & WILLARD

avert global Armageddon and mankind's self-extinction in its wake.² The first attempt was the ambitious yet ultimately failed League of Nations initiative.³ Its noble legacy paved the way to the enduring yet limited effectiveness⁴ at a second revitalized attempt through the United Nations ("UN").⁵ The onset of the Cold War⁶ severely compromised the authority of the UN's ideologi-

N. HOGAN, *THE UNITED NATIONS BACKGROUND, ORGANIZATION, FUNCTIONS, ACTIVITIES* 93 (1952) (examining UN's collective security principle).

² See U.N. CHARTER art. 1, para 3. The Charter describes one of the core imperatives to be furthered through the U.N. as a result of the apocalyptic legacy left by World War II as the ability "to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion . . ." *Id.*; see also Andrew S. Miller, *Universal Soldiers: U.N. Standing Armies and the Legal Alternatives*, 81 *Geo. L.J.* 773, 773 (1993). The author explains the authority of the U.N. to deploy military force in furtherance of peaceful international goals. *Id.* See generally *An Agenda for Peace: Preventive Diplomacy, Peacemaking, Report of the Secretary-General, U.N., G.A., 47th Sess.*, at 12-13, U.N. Doc. A/47/277 (1992). The U.N. Secretary-General, in a ground-breaking report commissioned by the Security Council, called on member states to sign Article 43 Agreements and assume a permanent legal obligation to make forces, assistance, and facilities available to the Security Council. *Id.*; *Declaration of the Right of Peoples to Peace*, G.A. Res. 39/11, 39 U.N. GAOR, 39th Sess., No. 51, at 220, U.N. Doc. A/39/51 (1985). This Resolution reaffirmed that one of the principal aims of the UN is "the preservation of the right of peoples to peace and the promotion of its implementation constitute[s] a fundamental obligation of each State." *Id.*

³ See Eugene V. Rostow, *Agora: The Gulf Crisis in International and Foreign Relations Law, Continued: Until What? Enforcement Action or Collective Self-Defense?*, 85 *Am. J. INT'L L.* 506, 507 (1991) (explaining League of Nations only contained powers of persuasion while United Nations can employ enforcement measures); cf. Jost Delbruck, *The Role of the United Nations in Dealing with Global Problems*, 4 *IND. J. GLOBAL LEGAL STUD.* 277, 277 (1997) (examining UN's role in diminishing states' rights and sovereignty). See generally Robert M. Cassidy, *Sovereignty Versus the Chimera of Armed Humanitarian Intervention*, 21-Fall *FLETCHER F. WORLD AFF.* 47, 47 (1997) (exploring possible subversion of national sovereignty in favor of humanitarian efforts).

⁴ See Lloyd N. Cutler, *The Internationalization of Human Rights*, 1990 *U. ILL. L. REV.* 575, 575-76 (discussing coming together of nation-states to justify and limit "the just war" through League of Nations and thereafter United Nations); Sellen, *supra* note 1, at 227 (citing world's second attempt at centralized international authority through United Nations); see also Jost Delbruck, *A Fresh Look at Humanitarian Intervention Under the Authority of the United Nations*, 67 *IND. L.J.* 887, 891 (1992) (stating U.N. possesses broader authority to act against aggression than League of Nations); Rostow, *supra* note 3, at 507 (noting enforcement powers of U.N.).

⁵ See U.N. CHARTER art. 2, para 7 (directing that principle of non-intervention in States' domestic affairs apply to all U.N. bodies, thus precluding their inclusion within General Assembly's powers of discussion and recommendation); see also Christine Bourloyannis, *The Security Council of the United Nations and the Implementation of International Humanitarian Law*, 20 *DENV. J. INT'L L. & POL'Y* 335, 335 (1992) (noting that in its first twenty years United Nations played *de minimis* role in implementing international humanitarian law); Sellen, *supra* note 1, at 187-88 (discussing how Cold War limited effectiveness of Security Council). *But see also* Sellen, *supra* note 1, at 220 (recognizing U.N.'s ability to fulfill its original mandate).

⁶ See Oscar Schacter, *United Nations Law in the Gulf Conflict*, 85 *Am. J. INT'L L.* 452, 470-71 (1991) (stating that Cold War served to impede concept of collective security and Gulf War demonstrated that Security Council, no longer hindered by Cold War, could create sanctions of binding character and authorize military operations); see also David P. Fidler, *Caught Between Traditions: The Security Council in Philosophical Conundrum*, 17

cally-torn Security Council,⁷ as its permanent members, feuding superpowers, constantly teetered on the brink of mutual annihilation.⁸ Ultimately, with the end of the Cold War, the fall of the communist bloc stranglehold on Eastern Europe,⁹ and the concomitant resurgence of war crimes and genocide,¹⁰ the UN's role has uneasily shifted from that of impartial arbiter to would-be military enforcer.¹¹

MICH. J. INT'L L. 411, 411 (1996) (describing increased activity of Security Council and scrutiny on U.N. since end of Cold War); Bernard Kishoiyian, *The United Nations: Meeting the Challenges of the Post-Cold War World*, 87 AM. SOC'Y INT'L L. PROC. 268, 277-78 (1993) (discussing overwhelming volume of activity for U.N. since close of Cold War). *cf.* Lawrence Friedman, *The Gulf War and the New World Order*, 33 SURVIVAL 195, 195 (1991) (describing events of Iraq's invasion of Kuwait as "test case" for new world order).

⁷ See Fidler, *supra* note 6, at 412 (noting that in years immediately after end of Cold War activity of Security Council dramatically increased, subjecting it to "the spotlight of diplomatic and scholarly scrutiny"); see also Bruce Pruitt-Hamm, *Humanitarian Intervention in S.E. Asia in the Post Cold War World*, 3 PAC. RIM L. & POL'Y J. 183, 183 (1994) (analyzing continuing dilemma for international law between fighting for justice while striving for peace); *cf.* Richard Lee Gaines, *On the Road to a Pax U.N.: Using the Peace Tools at our Disposal in a Post-Cold War World*, 25 N.Y.U. J. INT'L L. & POL. 543, 544 (1993) (discussing structure for international peace and security).

⁸ See Krause, *supra* note 6, at 273 (noting that in post-Cold War era, "late-modern" age of "transformation of the global political system" U.N. organization "has been the site for contention between clashing views of the future"); see also Mats R. Bernal, *The Security Council, Peacekeeping and Internal Conflict After the Cold War*, 7 DUKE J. COMP & INT'L L. 71, 72 (1996) (examining relative ineffectiveness of post-Cold War U.N. peacekeeping efforts); Bernard Kishoiyian, *The United Nations Meeting the Challenge of the Post-Cold War World*, 87 AM. SOC'Y INT'L L. PROC. 268, 269 (1993) (questioning role of U.N. in post-Cold War era and examining organization's reformation); *cf.* Inis L. Claude, Jr., *The United Nations of the Cold War: Contributions to the Post-Cold War Situation*, 18 FORDHAM INT'L L.J. 789, 789 (1995) (discussing developments important for future roles of world organization).

⁹ See Vjekoslav Radovic, *Eastern Europe: Upheavals in Eastern Europe Mark End of Communism Says Dijlas*, REUTERS NEWS SERVICE, Dec. 31, 1989, available in LEXIS, Nexis Library, News File (reporting Milovan Dijlas' forecast of communist demise due to anti-communist upheavals across Eastern Europe); Schacter, *supra* note 6, at 451 (asserting that fall of Eastern Europe aided U.N. in better realizing its long term goals); see also Stojan Cerovic, *The Rise of Serbian Nationalism*, 26 N.Y.U. J. INT'L L. & POL. 527, 527-29 (1994) (suggesting that communism could not survive strength of nationalistic feelings); Marlise Simons, *Upheaval in the East; Yugoslavia Catching East Europe's Political Fever*, N.Y. TIMES, Jan 21, 1990, § 1, at 1 (describing Yugoslavia's move towards self-determination).

¹⁰ See Roger Cohen, *End of Cold War Offers Chilling New Dangers*, PLAIN DEALER (Cleveland), Nov. 26, 1994, at 15A (describing eruption of ethnic and religious conflicts after collapse of Communism); *Yugoslav Police Try to Prevent Flareups Between Ethnic Groups*, CHIC. TRIB., Aug. 18, 1990, at 9 (reporting strong support by state-run media in Serbia for Croatian Serbs and characterization of Croatian government as "fascist"); see also Kathy Lewis, *Bush Says Aid, Sanctions Must Work in Bosnia: Military Leaders Plan for Yugoslavia Blockade*, DALLAS MORNING NEWS, July 10, 1992, at 1A (noting that crimes and atrocities developed from rampant nationalism after end of Cold War); *cf.* Nesho Djuric, *Serbia Sends Police to Strife-Torn Region*, THE RECORD (No. N.J.), Mar. 26, 1990, at A06, available in 1990 WL 6909470 (describing ethnic tensions in former Yugoslavia).

¹¹ See U.N. CHARTER art. 43, para. 1. The Security Council has the vested authority to raise and mobilize a U.N.-backed military force. *Id.*; U.N. CHARTER art. 42, para. 2. The Council has wide latitude to undertake collective (military) measures against aggression. *Id.*; see also Martti Koshenniemi, *A Symposium on Reenvisioning the Security Council: The*

Of the UN's six major entities,¹² the General Assembly and the Social and Economic Council are the two principal components responsible for monitoring international human rights violations.¹³ The UN's various commissions and their subsidiary monitoring committees¹⁴ are delegated the responsibility of conducting studies and investigations, compiling findings—regarding international human rights violations, for example—and drafting proposals for ratification by member States.¹⁵ Nevertheless, to date, neither the General Assembly nor any of its subsidiary monitoring committees has successfully enforced the condemnations of the international human rights violations committed in the former Yugoslavia and Rwanda.¹⁶ This problem of ineffectiveness exists be-

Place of Law in Collective Security, 17 MICH. J. INT'L L. 455, 456-58 (1996). The article chronicles the military and non-military actions of the U.N. since 1988. *Id.*; Oscar Schacter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 122 (1986). The author emphasizes that states try to avoid condemnation by an international organ, and that such condemnation, although not binding, still imposes political costs. *Id.* But see VANDENBOSCH & HOGAN, *supra* note 1, at 300. The authors observe that the world community created the Commission on Human Rights as a preventative measure against war, thereby recognizing that the power to respond to aggression alone is not a cure. *Id.*

¹² See generally U.N. CHARTER arts. 1-32 (setting forth composition, hierarchy, roles, and functions of U.N.); Antonio Cassese, *A New Approach to Human Rights: The European Convention for the Prevention of Torture*, 83 AM. J. INT'L L. 128, 128-45 (1989) (citing specific conventions recognizing rights of women, minorities, refugees, civil rights, and right against torture); Nicole M. Procida, Note, *Ethnic Cleansing in Bosnia-Herzegovina, A Case Study: Employing United Nations Mechanisms to Enforce the Convention on the Prevention and Punishment of the Crime of Genocide*, 18 SUFFOLK TRANSNAT'L L. REV. 655, 659 (1995) (discussing six principal U.N. organs and numerous committees that deal with human rights).

¹³ See U.N. CHARTER art. 1, para 3 (encouraging respect for human rights and fundamental freedoms for all); *Id.* arts. 10-13 (discussing functions and powers of General Assembly); Procida, *supra* note 12, at 659 (discussing how General Assembly and Social and Economic Council deal with human rights violations). See generally U.N. CHARTER arts. 1-32 (delineating hierarchy and structure of U.N. organs and subsidiaries).

¹⁴ See Elizabeth J. Evatt, *International Machinery on Human Rights*, 4 Q. INST. TECH. L.J. ANN. 55, 56 (1988) (delineating structure and functions of U.N. human rights organizations); see also Martin A. Olz, *Non-Governmental Organizations in Regional Human Rights Systems*, 28 COLUM. HUM. RTS. L. REV. 307, 308-12 (1997) (detailing functions of non-governmental organizations that promote human rights); cf. B.G. Ramcharan, *Reforming the United Nations to Secure Human Rights*, 4 TRANSNAT'L L. & CONTEMP. PROBS. 503, 504 (1994) (examining changes that can bolster effectiveness of human rights organizations).

¹⁵ See Rupa Bhattacharyya, *Symposium on Humanitarian Intervention and International Criminal Justice: Establishing a Rule-of-Law International Justice System*, 31 TEX. INT'L L.J. 57, 61-62 (1996) (discussing ad hoc tribunals as "a beginning" towards establishing international criminal tribunal to deal with situation in former Yugoslavia); see also VANDENBOSCH & HOGAN, *supra* note 1, at 112 (discussing responsibilities and authority of U.N. organs); *Id.* at 300 (outlining creation of Commission of Human Rights).

¹⁶ See Evatt, *supra* note 14, at 56 (analyzing mechanisms involved in human rights covenants for investigating alleged violations in which most conventions contain committee of experts which supervise implementation of conventions and reports to General Assembly); Yogesh K. Tyagi, *The Concept of Humanitarian Intervention Revisited*, 16 MICH. J. INT'L L. 883, 884-86 (1995) (discussing reasons why U.N. gets involved in humanitarian intervention efforts); see also Bourloyannis, *supra* note 5, at 335 (indicating that states agree to

cause the promulgation of human rights guidelines via the UN's authority has not been augmented by a similarly authoritative initiative for their effective enforcement.¹⁷ The harsh reality of this problem is underscored by the UN's uphill struggle to carry out indictments against the architects of mass rape and genocide in the regions of the former Yugoslavia and Rwanda.¹⁸ This bleak picture has been further frustrated by the intense, trans-generational ethno-racial hatred deeply mired in the violent histories of these two countries¹⁹—which has proven doggedly impervious to the UN's authority.

fact-finding missions for human rights violations to avoid bad publicity). See generally Ruth E. Gordon, *Intervention By the United Nations: Iraq, Somalia and Haiti*, 31 TEX. INT'L L.J. 43, 51-56 (1996) (concluding that U.N. could be more effective in dealing with humanitarian interventions).

¹⁷ See Benjamin B. Ferencz, *The Draft Code of Offenses Against Peace and Security*, 75 A.J.I.L. 674, 674-75 (1981) (noting International Law Commission created in 1947 to prepare code of offenses remains incomplete); Barry M. Schiller, *Life in a Symbolic Universe: Comments on the Genocide Convention and International Law*, 9 SW. U. L. REV. 47, 68 (1977) (questioning Convention's ability to punish genocide perpetrators without international criminal justice system); see also Note, *Genocide: A Commentary on the Convention*, 58 YALE L.J. 1142, 1151-57 (1949) (describing U.N.'s request to study feasibility of world court to punish violators of humanitarian law); cf. Tyagi, *supra* note 16, at 906-07 (pointing out many inadequacies and weaknesses in international law preventing U.N. humanitarian operations from leading to peace).

¹⁸ See Payam Akhavan, *The International Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 AM. J. INT'L L. 501, 501 (1996) (describing policies of Rwandan and Yugoslavian Tribunals and import of their coexistence); Richard Goldstone, *Assessing the Work of the International War Crimes Tribunal*, 33 STAN. J. INT'L L. 1, 2 (1997) (addressing achievements and failures of Yugoslavian and Rwandan War Crimes Tribunals established by UN Security Council); Richard Goldstone, *Symposium: Prosecuting International Crimes: An Inside View*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 1, 2 (1997) (discussing the advantages of ad hoc tribunals and international community's commitment to punishing war criminals); Madeline Morris, *By Force of Arms: Rape, War and Military Culture*, 45 DUKE L.J. 651, 651-54 (1996) (evaluating proposals that seek to reduce war-time rapes by military personnel).

¹⁹ See Ruti Teitel, *Identifying and Prosecuting War Crimes: The Former Yugoslavia and Rwanda*, 12 N.Y.L. SCH. J. HUM. RTS. 631, 631 (1996) (exploring issues surrounding war crimes, genocide and crimes against humanity); see also Linda Maguire, *Power Ethnicized: The Pursuit of Protection and Participation in Rwanda and Burundi*, 2 BUFF. J. INT'L L. 49, 50 (1995) (outlining intricacies of inter-ethnic violence in Rwanda and Burundi); Eric Black, *The Balkans*, STAR TRIB. (Minneapolis-St. Paul), Apr. 15, 1993, at 24A, available in 1993 WL 11324104 (explaining historical origins of intense and bitter hatred between closely knit Serb and Croat peoples).

I. BACKGROUND AND HISTORICAL PERSPECTIVE

A. *Resurrecting the Specter of Genocide: Yugoslavia*

The wave of "self-determination" sweeping across Europe²⁰ on the heels of the Iron Curtain's fall,²¹ on the one hand served as the basis for formerly repressed peoples to reassert their unique cultural and political identities.²² In the case of the former Yugoslavia, however, this "wave" also stirred the slumbering specter of centuries-old hatred, polarizing its ethno-religious populations into distinct, nationalist movements.²³ Initially, this resulted in the violent dissolution and reorganization of the former Yugoslavian polity into the three new States of Croatia, Slovenia and Bosnia-Herzegovina.²⁴ The price of this newly-asserted sovereign au-

²⁰ See *Albania: Albanian Leader Dismisses Unrest Reports, Denounces Yugoslavia*, REUTER NEWS SERVICE, Jan. 15, 1990, available in LEXIS, News Library, News File (reporting that Soviet reforms unleashed waves of popular unrest throughout Eastern Europe); see also Bob Keeler, *After the Fall, Chaos, Violence, Uncertainty Follow the Soviet Union's Collapse*, NEWSDAY (New York), Dec. 31, 1992, at 95, available in 1992 WL 7575675 (recounting fragmentation of nations within one year after demise of Soviet Union); Arthur Schlesinger, Jr., *Self-Determination: Yes, but. . .*, WALL ST. J. (Europe), Sept. 30, 1991, at 6, available in 1991 WL-WSJE-2012469 (stating that dissolution of Soviet Union led to disintegration of Iron Curtain); Jon Stewart, *U.S. Indecision Contributing to World's Growing Disarray*, S.F. CHRON., Mar. 14, 1994, at A11 (relating World Affairs Council discussion on problems in Europe since end of Cold War and development of new political order).

²¹ See Cohen, *supra* note 10, at 15A (noting systematic disintegration of Soviet Union, Czechoslovakia, and Yugoslavia since fall of Communism); David Kennedy, *Turning a Market Democracy: A Tale of Two Architectures*, 32 HARV. INT'L L.J. 373, 373 (1991) (examining scope of changes in Europe since fall of Berlin Wall and what future holds); Schlesinger, *supra* note 20, at 6 (tracing back fall of Soviet Union historically); see also Francis A. Gabor, *Reflections on the Freedom of Movement in Light of the Dismantled "Iron Curtain"*, 65 TUL. L. REV. 849, 850 (1991) (addressing freedom of movement concept after fall of "iron curtain").

²² See Klas Bergman, *Yugoslav President Calls for Talks*, CHRISTIAN SCI. MONITOR, Feb. 9, 1990, at 3 (addressing Yugoslav parliament, Yugoslavia's President commented that: "Nationality has been placed above everything else and has become more important than democracy, economic success, and individual human rights"); Peter Humphrey, *Romania: Balkans Seek to Heal Rifts and Enter Europe*, REUTER NEWS SERVICE, Oct. 23, 1990, available in 1990 WL 427897 (reporting that Communism's collapse in Eastern Europe unleashed nationalist and ethnic turmoil in Southeastern Europe); see also Nathaniel Berman, *Between "Alliance" and "Localization": Nationalism and the New Oscillationism*, 26 N.Y.U. J. INT'L L. & POL. 449, 470 (1994) (stating that "[i]n the Europe of today, after the wave of freedom it has just experienced, the right of peoples to self-determination cannot be challenged anywhere").

²³ See Berman, *supra* note 22, at 470 (asserting that self-determination was product of nationalism which ultimately leads to violence); John Tagliabue, *Conflict in Yugoslavia*, N.Y. TIMES, July 3, 1991, at A6 (characterizing political successors in Yugoslavia as former communist turncoats actively evoking old national aspirations); see also Bergman, *supra* note 22, at 3 (relating Yugoslavian President's emphasis on importance of "nationality" even above individual human rights); Black, *supra* note 19, at 24A (describing history of Yugoslavia and splits between its diverse ethno-religious factions).

²⁴ See Terry Atlas, *U.S. Set to Recognize 3 Yugoslav Republics*, CHI. TRIB., Apr. 7, 1992, at 3 (describing U.S. policy in recognizing new states previously part of former Yugoslavia); Yehuda Z. Blum, *U.N. Membership of the "New" Yugoslavia: Continuity or Break*, 86 AM. J.

tonomy was all-out civil war, incited by the likes of former Communist Party boss, Slobodan Milosevic, recasting himself as a heroic cultural revivalist,²⁵ and the opportunistic military tyrant, Radovan Karadzic, rallying ethnic hatred under a banner of "nationalism."²⁶ In particular, the "ethnic cleansing" campaign,²⁷ achieved primarily through the mass rape of Muslim women, and generally attributed to Karadzic, has been the focus of great inter-

INT'L L. 830, 830 (1992) (noting recognition of three new member states into U.N.); see also Black, *supra* note 19, at 24A (examining current war between different states of former Yugoslavia); cf. Blaine Harden, *Balkan Elections Signal Failure of "Yugoslavism"*, WASH. POST, May 1, 1990, at A14 (reporting protest demonstrations by ethnic Albanians were violently suppressed by Serbian police after attempt by Milosevic to install puppet Serbian government in Kosovo, area populated by 1.7 million Albanian majority); Andrej Gustinic, *500,000 Serbs Protest Strike By Ethnic Albanians*, WASH. POST, March 1, 1989, at A19 (discussing Slovenia and Croatia's fear that Milosevic wanted to restore Serbia's dominance in Yugoslavia).

²⁵ See Tagliabue, *supra* note 23, at A6 (referring to former Communist turncoats as evoking nationalism); see also Berman, *supra* note 22, at 470-71 (describing power of nationalism in Balkan Republic); Cerovic, *supra* note 9, at 527-30 (detailing rise of nationalism in former Yugoslavia); Bergman, *supra* note 22, at 3 (suggesting that "nationalism" is considered more important than democracy in new Balkan Republics); Aleksa Dijlas, *A Profile of Slobodan Milosevic*, FOREIGN AFF. SUM., 1993, at 95 (discussing Milosevic's ideological transition from Communism to nationalism).

²⁶ See *Genocide: Ethnic Cleansing in Northwestern Bosnia*, CROATIAN INFO. CENTER, 107, 107 (1993) [hereinafter CROATIAN INFO. CENTER]. Radovan Karadzic has publicly voiced his belief that only Serbians should populate his republic. *Id.* Karadzic publicly admitted that he envisioned ninety-five percent of the Serbian Republic's population would be of Serbian origin. *Id.* The great heterogeneity and non-Serbian dominance prior to armed conflict of areas now claimed by Karadzic's forces, however, belies a policy of ethnic cleansing being carried out by the Serbs. *Id.*; see also II HELSINKI WATCH, WAR CRIMES IN BOSNIA-HERCEGOVINA 8-9 (1993). To date no reports have indicated that Serb leaders have held accountable any member of their forces for human rights violations. *Id.*; cf. Roy Gutman, *Viewpoints: U.S. Indifference Crippled Bosnia*, NEWSDAY (New York), Sept. 16, 1993, at 99, available in 1993 WL 11393846. The author discusses the extreme nationalist ideology that leads to ethnic cleansing. *Id.*

²⁷ See *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780* (1992), at 33, available in U.N. Gopher/Current Information/Secretary-General's Reports. U.N. experts assert that parties to the Bosnian armed conflict have engaged in "ethnic cleansing," which "means rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from that area." *Id.*; *Human Rights in the Former Yugoslavia: Report of the Special Rapporteur of the Commission on Human Rights*, U.N. GAOR, 47th Sess., Item 97, U.N. Doc. A/47/666 (1992) [hereinafter *Human Rights Report*]. The report defines ethnic cleansing as the elimination of one ethnic group from the same territory that is controlled by another ethnic group. *Id.*; Roger Cohen, *Serb Defector Offers Evidence on War Crimes*, N.Y. TIMES, Apr. 13, 1995, at A12. A defector from the Yugoslavian Secret Police produced documents indicating that Yugoslavian authorities were explicitly directing the ethnic cleansing campaign carried out by the Bosnian Serbs holding command and control authority over both the armed forces and de facto government structures. *Id.*; see also H.D.S. Greenway, *Balkan Divide Is Again Europe's Flashpoint in a Post-Soviet Void: Yugoslavia Is Again Splintered Into its Tribes*, BOSTON GLOBE, Dec. 4, 1992, at 18, available in 1992 WL 4204145. The article defines ethnic cleansing in the former Yugoslavia as the forced removal of Croats and Muslims from their homes by Serbian forces. *Id.*; Gutman, *supra* note 26, at 99. The author analogizes the ethnic cleansing of Bosnia to that of Nazi Germany over fifty years ago. *Id.*

national attention and outrage.²⁸ Ironically, despite this attention, the extant reaction by way of UN initiatives has engendered limited success.²⁹

B. A Veritable Holocaust Revisited: Rwanda

Contemporaneous with the horrific events taking place in Bosnia, a strikingly similar scenario of genocide was unfolding in the African nation of Rwanda.³⁰ In early 1994, a tragic civil war fueled by age-old ethnic rivalry, tore Rwanda asunder.³¹ The hostilities quickly resulted in the dislocation and political extermination of more than 500,000 innocent civilians comprised mostly of two eth-

²⁸ See Cohen, *supra* note 27, at A1 (reporting that former member of Serbian secret police turned over documents to tribunal thereby incriminating Milosevic for authorizing war crimes); see also Rachel Bart, *Using American Courts to Prosecute International Crimes Against Women: Jane Doe v. Radovan Karadzic and S. Kadic v. Radovan Karadzic*, 3 CARDOZO WOMEN'S L.J. 467, 467 (1996) (citing most egregious human rights violations of women in this century and arguing for more effective prosecution of military officials who orchestrated systematic rape of Muslim women in former Yugoslavia); Sharon A. Healey, *Prosecuting Rape Under the Statute of the War Crimes Tribunal for the Former Yugoslavia*, 21 BROOK. J. INT'L L. 327, 327 (1995) (examining legal precedent for prosecuting Serbian officials for mass rapes committed in former Yugoslavia); cf. Michelle Brandt, *Doe v. Karadzic: Redressing Non-State Acts of Gender-Specific Abuse Under the Alien Tort Statute*, 79 MINN. L. REV. 1413, 1415 (1995) (outlining framework for adjudication of war crimes under Alien Tort Statute).

²⁹ See II HELSINKI WATCH, *supra* note 26, at 242. It was reported that "[i]n southeastern Bosnia, Serbian forces use rape as one of many methods of torturing and humiliating women." *Id.* Further, many women and their families are forcibly expelled from their villages, put into detention facilities, and "[t]he women are sexually mistreated during their detention . . . and many are gang-raped . . ." *Id.*; Roy Gutman, *A Daily Ritual of Sex Abuse*, NEWSDAY (New York), Apr. 19, 1993, at 5, available in 1993 WL 11367180. The author cites the rapes of Bosnian women by members of the Serb military. *Id.* See generally *Human Rights Report*, *supra* note 27, at 6. The report sets forth the Special Rapporteur's accounts of human rights violations in the former Yugoslavia.

³⁰ See Akhavan, *supra* note 18, at 502 (describing co-existence of Yugoslavian and Rwandan tribunals); Paul J. Magnarella, *Expanding the Frontiers of Humanitarian Law: The International Criminal Tribunal for Rwanda*, 9 FLA. J. INT'L L. 421, 421 (1994) (analyzing innovations reflected in policies of international criminal tribunal for Rwanda); see also Payam Akhavan, *Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda*, 7 DUKE J. COMP. & INT'L L. 325, 325 (1997) (discussing Rwandan tribunal and its potential impact on peace in Lake Region of Africa); Michael G. Karnavas, *Rwanda's Quest for Justice: National and International Efforts and Challenges*, 21-MAY CHAMPION 16, 17 (1997) (examining how justice can be carried out given government involvement in Rwandan genocide).

³¹ See Akhavan, *supra* note 18, at 502-06 (citing factors that led to civil war, atrocities that followed and subsequent establishment of Rwandan Tribunal); William Schabas, *Justice, Democracy, and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems*, 7 CRIM. L.F. 523, 524 (1996) (outlining causes of Rwanda's civil war, effect that atrocities committed will have on international community, and policies established to confront such situations). See generally Melissa Gordon, *Justice on Trial: The Efficacy of the International Criminal Tribunal for Rwanda*, 1 I.L.S.A. J. INT'L & COMP. L. 217, 217 (1995) (detailing need for Rwandan Tribunal and for ICC); Faculty, Judge Advocate General Law School, *International Criminal Tribunal for Rwanda 1995 in Review*, 1996-APR ARMY LAW. 40, 41 (1996) (noting successes and failures of Rwandan Tribunal).

nic factions: Tutus and moderate Hutus.³² As a result, an ad hoc criminal court, in effect a complement to the International War Crimes Tribunal for the former Yugoslavia [hereinafter "ICTY"), was created in 1994 for Rwanda by the UN Security Council to indict the perpetrators of the widespread ethnic slaughter.³³ In February of 1997, however, a two-month investigation conducted by the UN Inspector General revealed "widespread mismanagement" and "rule-breaking" in which no "single administrative area" of the Rwandan Tribunal [hereinafter "ICTR"] "functioned effectively."³⁴

C. *Desperate Times and Desperate Measures*

In no uncertain terms, the foregoing bespoke of the relative ineffectiveness of the Rwandan War Crimes Tribunal in routing out war criminals and delivering justice.³⁵ Indeed, the limited juridi-

³² See Mary Ellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 CORNELL INT'L L.J. 505, 506 (1993) (focusing on how individuals' membership in specific groups can drastically affect ways they are treated in given situations); see also M.A. Stapleton, *World Justice Requires Full-Time Body: Advocate*, CHI. DAILY L. BULL., Feb. 14, 1997, at 3 (describing work of preparatory committee examining feasibility of establishing permanent international criminal tribunal); cf. Tara Sapru, *Into the Heart of Darkness: The Case Against the Foray of the Security Council into the Rwandan Crisis*, 32 TEX. INT'L L.J. 329, 331 (1997) (examining constitutionality of U.N.'s establishment of International Tribunal for Rwanda).

³³ See Akhavan, *supra* note 18, at 502 (describing goals and responsibilities of Rwandan Tribunal); see also Gordon, *supra* note 31, at 219 (emphasizing urgency for Rwandan Tribunal as well as for ICC); Dennis J. Mitchell, *All Is Not Fair in War: The Need for a Permanent War Crimes Tribunal*, 44 DRAKE L. REV. 575, 576-77 (1996) (examining prior War Crimes Tribunals and feasibility of establishing permanent ICC). See generally Mark Von Sternberg, *A Comparison of the Yugoslavian and Rwandan War Crimes Tribunals: Universal Jurisdiction and the Elementary Dictates of Humanity*, 22 BROOK. J. INT'L L. 111, 111 (1996) (analyzing subject matter jurisdiction of both Yugoslavian and Rwandan War Crimes Tribunals under Chapter VII of U.N. Charter).

³⁴ See Makau Mutua, *Never Again: Questioning the Yugoslav and Rwanda Tribunals*, 11 TEMP. INT'L & COMP. L.J. 167, 168 (1997) (casting doubts on effect ICTY and ICTR will have on human rights violations as barbaric as those committed in Yugoslavia and Rwanda); Stapleton, *supra* note 32, at 3 (asserting that Rwandan and Yugoslavian tribunals were mismanaged and criticized as being ineffective); see also Winston P. Nagan, *Strengthening Humanitarian Law: Sovereignty, International Criminal Law and the Ad Hoc Tribunal for Former Yugoslavia*, 6 DUKE J. COMP. & INT'L L. 127, 127 (1995) (emphasizing importance of strong humanitarian law that will deter atrocities like those of Rwanda); William A. Schabas, *Sentencing By International Tribunals: A Human Rights Approach*, 7 DUKE COMP. INT'L L. 461, 461-62 (1997) (addressing issues raised in sentencing offenders before international war crimes tribunals).

³⁵ See Mariann Meier Wang, *The International Tribunal for Rwanda: Opportunities for Clarification, Opportunities for Impact*, 27 COLUM. HUM. RTS. L. REV. 177, 177-78 (1995) (conceding existence of problems with Tribunals overall, but calling for support from international community in order for Rwandan Tribunal to assist in rebuilding Rwandan justice system); see also Kimberly Barnes, *International Law, the United Nations, and Intervention in Civil Conflicts*, 19 SUFFOLK TRANSNAT'L L. REV. 117, 118 (1995) (proposing solution to conflict that exists between international law and reaction of international community to

cal effectiveness of both the ICTY and the ICTR became self-evident almost from their respective inceptions.³⁶ Reacting in large part to mounting concerns over the War Crimes Tribunals' virtually nonexistent authority, and thereby foreseeing the urgency to implement a more permanent juridical remedy, on November 8, 1996, the International Law Commission of the UN finally adopted a draft code of "crimes against the peace and security of mankind."³⁷ In due course, by December 17, 1996, taking another affirmative step toward the contemplated promulgation of an International Criminal Court [hereinafter "ICC"], the UN General Assembly adopted Resolution 51/207, calling for a diplomatic conference in Rome, Italy in 1998.³⁸ The goal of the proposed conference will be to iron out the details and open for signature a convention that would at last establish the long awaited ICC.³⁹

civil wars); cf. David P. Forsythe, *Politics and the International Tribunal for the Former Yugoslavia*, 5 CRIM. L.F. 401, 401 (1994) (describing political factors involved in establishment and disposition of Yugoslavian War Crimes Tribunal).

³⁶ See Wang, *supra* note 35, at 188-89 (describing problems with Rwandan War Crimes Tribunal); see also Sheila O'Shea, *Interaction Between International Criminal Tribunals and National Legal Systems*, 28 N.Y.U. J. INT'L L. & POL. 367, 367-68 (1996) (examining ad hoc tribunals and provisions designed to foster cooperation between these tribunals and national legal systems). *But see* Goldstone, *supra* note 18, at 12 (discussing pitfalls overcome in establishing war crimes tribunals as well as assessing accomplishments).

³⁷ See U.N. Draft Code of "Crimes Against Mankind" Sent to General Assembly, WEST'S LEGAL NEWS, Nov. 13, 1996, at 12079, available in 1996 WL 655008 (providing insight into "Crimes Against Mankind Code" proposed by U.N.); see also John Linarelli, *An Examination of the Proposed Crime of Intervention in the Draft Code of Crimes Against the Peace and Security of Mankind*, 18 SUFFOLK TRANSNAT'L L. REV. 1, 4 (1995) (detailing Draft Code provisions and Code's anticipated impact on international community); Ndiva Kofeli-Kale, *Patrimonicide: The International Economic Crime of Indigenous Spoliation*, 28 VAND. J. TRANSNAT'L L. 45, 48 (1995) (analyzing impact of Code of Crimes Against Peace and Security of Mankind on national sovereignty); Rosemary Rayfuse, *The Draft Code of Crimes Against the Peace and Security of Mankind: Eating Disorders at the International Law Commission*, 8 CRIM. L.F. 43, 44 (1997) (discussing draft code, its evolution and possible import of code in its final form).

³⁸ See *Establishment of an International Criminal Court*, G.A. Res. 51/207, U.N. GAOR, 51st Sess., 88th Plenary mtg., Agenda Item 147, at 1, U.N. Doc. A/51/207 (1996) (convening for ratification via Resolution 51/207, 1998 Convention to establish ICC); see also Richard J. Wilson, *A Permanent International Criminal Court: Soon to Be a Reality*, 4 HUM. RTS. BRIEF 1 (1997) (announcing U.N.'s long-awaited resolution demonstrating consensus among member nations to implement ICC); Christopher Keith Hall, *The First Two Sessions of the U.N. Preparatory Committee on the Establishment of an International Criminal Court*, 97 AM. J. INT'L L. 177, 178 (1997) (outlining progress made at U.N.'s International Criminal Court preparation meetings); Rayfuse, *supra* note 37, at 44 (citing evolution of draft code as well as its impact in completed form).

³⁹ See Wilson, *supra* note 38, at 1 (discussing proposed diplomatic conference in Rome, Italy in 1998 in anticipatory ratification of ICC convention); see also M. Cherif Bassiouni, *Establishing an International Criminal Court: Historical Survey*, 149 MIL. L. REV. 49, 53 (1995) (assessing previous attempts at carrying out international justice and looking at possibilities for future organizations and their likelihood of success); Nancy E. Guffey-Landers, *Establishing an International Criminal Court: Will it Do Justice?*, 20 MD. J. INT'L L. & TRADE 199, 201 (1996) (discussing existing system for carrying out international jus-

For conciseness' sake, the scope of this Note will limit itself to examining the utility of the proposed ICC in particular view of the unpunished atrocities committed in the former Yugoslavia. More specifically, this Note will examine the UN's relatively passive stance⁴⁰ in light of the ongoing wave of war crimes and genocidal atrocities unleashed on Bosnian civilians.⁴¹ Clearly, the magnitude of such crimes,⁴² as evidenced by their ferocity and frequency in this century alone,⁴³ and the UN's relative ineffectiveness as global peacekeeper,⁴⁴ justifies the promulgation of an independent

tice and analyzing proposals for international criminal court); Michael P. Scharf, *The Politics of Establishing an International Criminal Court*, 6 DUKE J. COMP. & INT'L L. 167, 167 (1995) (exploring political currents at work in establishment of International Criminal Court).

⁴⁰ See U.N. CHARTER art. 2, paras. 1, 7 (recognizing sovereign equality of all states and principle of non-intervention, and intervention in affairs of member states requires Security Council to conclude that matter on which it intends to act is not matter essentially within domestic jurisdiction of state); Mary Ellen O'Connell, *Continuing Limits on UN Intervention in Civil War*, 67 IND. L.J. 903, 909 (1992) (noting that U.N. did not play role in early part of Balkans war); see also Mark Helprin, *Beyond the Cold War: Foreign Policy in the 21st Century: Stay Out of Bosnia*, WALL ST. J., Sept. 9, 1993, at A20 (advocating that U.N. and United States not get involved in Bosnian civil war); Elizabeth Neuffer, *U.N. Says Effort in Bosnia Is Hurt By Lack of Troops*, BOSTON GLOBE, Feb. 25, 1994, at 8, available in WL 5982271 (describing U.N. Member states as refusing to commit troops to Bosnia). But see Josh Friedman, *U.N. Authorizes Use of Force in Bosnia Havens*, L.A. TIMES, June 5, 1993, at 1, available in 1993 WL 2308316 (noting actions taken by U.N., its goals and future steps in protecting safe havens established in Bosnia).

⁴¹ See II HELSINKI WATCH, *supra* note 26, at 50. The Watch cites "civilians . . . being summarily executed as part of an 'ethnic cleansing' campaign." *Id.* Other reports indicated that Bosnian-Serb forces conducted mass executions of whole non-Serb village populations to "cleanse" areas. *Id.* at 63; Keeler, *supra* note 20, at 95. The author relates that brutality and ethnic cleansing in Bosnia have resulted from nationalist movements. *Id.*; see also Greenway, *supra* note 27, at 18. Yugoslavia's tortured sociopolitical history inevitably led to the brutality of war and ethnic cleansing. *Id.*

⁴² See *Helsinki International Federation for Human Rights*, ANN. REP. OF ACTIVITIES, 67, 68 (1992) [hereinafter *Helsinki Report*, 1992]. Recognizing the widespread proliferation of atrocities on civilians, the U.N. Commission on Human Rights condemned the systematic killing, torture, rape, and forced displacement associated with ethnic cleansing for which the Serb leadership and military forces in Bosnia were responsible. *Id.*; see also II HELSINKI WATCH, *supra* note 26, at 242. The report details the torture and human rights violations in Bosnia. *Id.*; *Human Rights Report*, *supra* note 27, at 6. The Special Rapporteur recounted barbaric acts of "ethnic cleansing" being committed in the former Yugoslavia. *Id.*

⁴³ See Schacter, *supra* note 11, at 125. The continued frequency of violent international acts demonstrates the failure of the U.N.'s collective security system. *Id.* Emerging from the Nuremberg Nazi trials were the principles that "affirmed in unmistakable terms that aggressive war is illegal and that persons responsible for such wars are guilty of an international crime." *Id.* at 113; see also Larry A. McCullough, *International and Domestic Criminal Law Issues in the Achille Lauro Incident: A Functional Analysis*, 36 NAVAL L. REV. 53, 54 (1986). The frequency of terrorist attacks in the mid-1980's signified the beginning of a new era whose violence the world political order found itself ill-prepared to prevent. *Id.*

⁴⁴ See LEO KUPER, *THE PREVENTION OF GENOCIDE* 164 (1989). The ratification of a Human Rights Convention is no guarantee against human rights violations. *Id.* Historically, U.N. intervention has been limited to humanitarian relief and diplomatic processes, falling short of military intervention. *Id.* Therefore, a major rift exists between the ideals

judicial authority⁴⁵ by way of an ICC⁴⁶ through Resolution 51/207.⁴⁷ In view of this, the proposed implementation of an ICC will elevate the UN's credibility and authority within the sphere of world affairs.

In sum, the UN's delayed reaction to widely publicized acts of Bosnian genocide and its failure to take affirmative steps in enforcing the recent indictments of Bosnian war criminals like Serb President Karadzic, have further undermined the UN's already tenuous credibility and authority in the eyes of the global community and exemplify the dire need for an ICC.⁴⁸ Part I of this Note

expressed in human rights covenants and their practical implementation. *Id.* See generally Kelly A. Childers, *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, 117 (1994). The article discusses the role of peacekeepers in the new world order and suggests new ways for them to address their missions. *Id.*

⁴⁵ See *Historical Survey of the Question of International Criminal Jurisdiction, Memorandum Submitted by the Secretary-General*, at 8-9, U.N. Doc. A/CN.4/7/Rev. 1 (1949). Prompted in part by the "victor's justice" legacy of the post-WWII war crimes prosecutions, the General Assembly pushed for a statute and a draft code towards the establishment of a permanent ICC. *Id.* Broad international representation on an International Criminal Court would mark a much needed departure from post-World War II war crimes tribunals which were composed entirely of representatives of the victorious Allied nations. *Id.* at 26; see also Johan D. van den Vyven, *Sovereignty and Human Rights in Constitutional and International Law*, 5 EMORY INT'L L. REV. 321, 326 (1991). The author states that ancient scholars considered the judiciary to be the ultimate repository of sovereignty. *Id.*

⁴⁶ See M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL 3 (1987) (positing that Nuremberg and Tokyo Tribunals represented only one stage in development of system of international criminal law which is to be ultimately administered through permanent International Criminal Court); cf. Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6 DUKE J. COMP. & INT'L L. 11, 42 (1995) (suggesting that since U.N. has become center of collective security system, it should supervise implementation of laws of war).

⁴⁷ See Wilson, *supra* note 38, at 1 (reporting on upcoming 1998 UN diplomatic conference for ratification of ICC); *Difficulty of Providing Military Support for Humanitarian Operations While Ensuring Impartiality*, M2 PRESSWIRE, May 23, 1997, available in 1997 WL 10370311 (reporting that establishment of war crimes tribunals to adjudicate violations of humanitarian law were critical step towards removing impunity and improving protection of victims); see also U.S. Policy Towards Bosnia, 1996, *Hearing of the House Committee on International Relations*, FED. NEWS SERVICE, April 23, 1996, available in Lexis Nexis Library, News File (stating that ICC must be established to take into account atrocities carried out over years and to ensure lasting peace); cf. Trevor Royle, *Who Should Punish Monsters Like Pol Pot for their Terrible Crimes Against Humanity?*, SCOTLAND ON SUNDAY, Aug. 3, 1997, at 15 (noting that obstacles of enforcement of new world order and necessity of gaining permission of national governments before investigating can be overcome by appointment of court independent of Security Council).

⁴⁸ See *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, U.N. Doc. A/49/342, S/1994/1007, at 49 (1994) [hereinafter *Report of the International Tribunal*] (reporting on the ICTY's progress in the prosecution of war crimes committed against civilians of former Yugoslavia thereby demonstrating ICTY's relative ineffectiveness and undermined credibility); see also Stefanie Grant, *Human Rights: Hague Court Tackles Both Yugoslav and Rwandan Crimes*, INTER PRESS SERV., April 7, 1995, available in 1995 WL 2260282 (assessing that ICTY was "bedeviled" by unrealistic expectations promulgated by overzealous media creating public misconcep-

has sought to cursorily review the complex ethnic, social and political mechanics of the Balkan and Rwandan crises. Part II examines the controversial role of the ICTY, a well-intentioned yet ineffective tool in curbing war crimes, and as an opus toward the re-enfranchisement of the UN's authority. Part III argues that the relative failure of the ICTY to respond to Bosnian atrocities mandates the promulgation of a judicially autonomous ICC, superseding the UN's current scope of authority, to re-establish and maintain world order in ultimate fulfillment of the UN Charter. This essay concludes that in light of the UN's failed ICTY initiative, an ICC, presiding unhampered by current UN constraints, will help restore the UN's authority and credibility in the international arena.

II. BOSNIA: THE TRAGEDY THAT COULD HAVE BEEN AVERTED

A. *War Crimes and Genocide in the Former Yugoslavia: Political Opportunists Inculcate Ethnic Hatred*

The recent ethnic and territorial claims being made to the land called Bosnia-Herzegovina have a long and bloodied history.⁴⁹ The peoples of the former Yugoslavian Republic consist predominantly of Muslims, Croats, Slovenes and Serbs.⁵⁰ While they all share a

tion that "press reporting can seamlessly translate into hard evidence necessary for criminal prosecution"; Sarah Helm, *Balkan Atrocities Before the Courts*, INDEPENDENT (London), Nov. 5, 1995, at 13 (reporting that Serbian testimony began to correct perceived imbalance of justice which had undermined ICTY's credibility); Andrew Kelly, *U.N. War Crimes Tribunal Building Authority*, REUTERS NEWS SERV., April 26, 1996, available in LEXIS, Nexis Library, News File (noting that since ICTY's inception its authority and credibility were compromised by financial problems, resignation of its first prosecutor, and reluctance of foreign peace force in Bosnia to track down and arrest war criminals).

⁴⁹ See Michael Barutciski, *Politics Overrides Legal Principles: Tragic Consequences of the Diplomatic Intervention in Bosnia-Herzegovina (1991-1992)*, 11 AM. U. J. INT'L L. & POL'Y 449, 470 (1994) (outlining history of Balkans region); Tomislav Sunic, *The Missing Links in Yugoslavia's Tragedy*, WASH. TIMES, Aug. 16, 1994, at A17 (providing summary of modern state of affairs between peoples of former Yugoslavia leading to Bosnian conflict) [Sunic is an official in Croatia's Ministry of Foreign Affairs in Zagreb]; see also Black, *supra* note 19, at 24A (giving historical overview of Balkan conflict); Greenway, *supra* note 27, at 18 (detailing history of Balkan conflict); cf. A. Mark Weisburd, *The Emptiness of the Concept of Jus Cogens As Illustrated by the War in Bosnia-Herzegovina*, 17 MICH. J. INT'L L. 1, 2-9 (1995) (chronicling fighting and animosity among Bosnia-Herzegovina's ethno-racial factions).

⁵⁰ See Peter J. Cannon, *The Third Balkan War and Political Disunity: Creating a Confederated Cantonal Constitutional System*, 5 J. TRANSNAT'L L. & POL'Y 373, 405 (1996). It is postulated that:

The demographic distribution of the major ethnicities reveal that they are spread throughout the various regions. Prior to the current war, the Serbs accounted for 13.2% of Kosovo, 54.4% of Vojvodina, 11.5% of Croatia, and 32% of Bosnia-Herzegovina. The Croats, the second most numerous of peoples in the Balkans, are dispersed

common language and Slavic cultural background, the Muslims are Islamic converts of Ottoman Turkish descent, the Serbs are Orthodox Christians, and the Slovenes and Croats are Catholics.⁵¹ This religious and ethnic diversity within such close territorial borders has often made for a very volatile political climate.⁵² Indeed, the assassination of Austrian Archduke Ferdinand, the catalyst of World War I, was an early political statement by Serbs seeking to assert territorial independence.⁵³ In effect, this single event presaged decades of inescapable ethnic and religious hostil-

throughout. In Croatia, Croats make up approximately 75% of the population. They account for 18.4% of Bosnia-Herzegovina, 1.4% of Montenegro, 2.9% of Slovenia, .5% of Serbia, and 5.4% of Vojvodina. Finally, the Muslims account for the largest percent of Bosnia-Herzegovina with 39.5%, while occupying small percentages elsewhere.

Id. at 405; Erik D. Gordy, *Yugoslavia's History of Cooperation*, CHI. TRIB., Mar. 19, 1993, at 19, available in 1993 WL 11051386. The author notes that despite their long history of ethno-religious conflict, the former Yugoslavia's three predominant ethnicities have a history of interacting on a relatively peaceful and civilly cooperative basis. *Id.*; Sunic, *supra* note 49, at A17. Sunic, however, posits that in the former Yugoslavia, each ethnic group pretended to love another ethnic group, while secretly thinking of how to part company with the other. *Id.*; see also Bergman, *supra* note 22, at 3. Bergman cites the rift within the former Yugoslavia, noting that "the northern republics of Slovenia and Croatia urg[ed] a peaceful solution, while Serbian leader Slobodan Milosevic [gave] no indication of any readiness to compromise." *Id.*

⁵¹ See I HELSINKI WATCH, WAR CRIMES IN BOSNIA-HERZEGOVINA 20 (1992) (detailing ethno-religious backgrounds of peoples of former Yugoslavia); see also Cerovic, *supra* note 9, at 527 (explaining reasons behind Balkans conflict and noting that former Yugoslavia was country "forged" from diverse minorities); Christian J. Garris, Comment, *Bosnia and the Limitations of International Law*, 34 SANTA CLARA L. REV. 1039, 1087 (1994) (stating that "[r]eligion has not been an essential factor in the history of Yugoslavia and of Bosnia in particular; lines were [artificially] drawn on the basis of religion resulting in the present seemingly unresolvable schisms between Muslims, Orthodox Serbs, and Catholic Croats"). See generally Lisa L. Schmandt, *Peace with Justice: Is it Possible for the Former Yugoslavia?*, 30 TEX. INT'L L.J. 335, 337 (1995) (asserting that different religions and ethnic history have fostered hatred among groups).

⁵² See *Into Bosnia*, ECONOMIST, July 4, 1992, at 14 (noting that despite limited occurrences of intermarriage between three major ethnicities, "intensity of ethnic and religious rivalry has not diminished, nor has the ferocity with which it is expressed"); see also CROATIAN INFO. CENTER, *supra* note 26, at 107 (discussing how ethnic and religious differences have made for hostile, feuding atmosphere in Bosnia). But see Gordy, *supra* note 50, at 19 (noting despite ethno-religious differences, there is tendency for harmony among diverse Bosnian population).

⁵³ See BARBARA JELAVICH, HISTORY OF THE BALKANS 296 (1989) (noting forced geopolitical co-existence of diverse peoples constitutes shaky basis for peace); see also *Austrian Pressure on Serbia*, TIMES (London), July 24, 1997, at 23, available in 1997 WL 9217960 (noting assassination of Archduke Ferdinand gave dual monarchy excuse to attack Serbia); John McLaughlin, *Midday in the Garden of Evil and Evil*, FORBES, Sept. 23, 1996, at S128, available in 1996 WL 15116043 (arguing that publicly displayed bust of Gavrilo Princip, Serbian nationalist who assassinated Archduke Ferdinand thereby sparking WWI, shows roots of Bosnian conflict); Jack Wood, *Deep Roots and Far From a "Soft" Opinion— This Area is Something of an Odd Man Out in Business Academia*, FIN. TIMES (London), Nov. 3, 1993, at II (indirectly attributing 1993 death of Serbian boy to 1914 assassination of Archduke Ferdinand).

ity.⁵⁴ Inevitably, in World War II, the Nazi takeover of the Yugoslavian Republics served as a stark foreshadowing of current events—the “ethnic cleansing” of Serbs, Gypsies, and Jews.⁵⁵ At the close of WWII, Marshal Tito’s communist partisans⁵⁶ succeeded in consolidating Bosnia-Herzegovina, Croatia, Serbia, Slovenia, Montenegro, and Macedonia, into a shaky “Yugoslavian” confederation.⁵⁷ This goal, however, was achieved at the costly price of countless atrocities against Muslims and Croats as well as an estimated 1.7 million death toll.⁵⁸ In no uncertain terms, these singular events have served as the veritable backdrop for the cata-

⁵⁴ See WAR CRIMES IN BOSNIA-HERCEGOVINA, *supra* note 51, at 20 (describing local political events in Europe directly leading to outbreak of World War I); see also JELAVICH, *supra* note 53, at 296 (noting forced geopolitical co-existence of diverse peoples is shaky basis for peace); Weisburd, *supra* note 49, at 2-9 (chronicling the fighting in Bosnia-Herzegovina and showing breakdown of peoples in former Yugoslavia); cf. Bergman, *supra* note 22, at 3 (noting that wave of nationalism sweeping Balkan states probably superseded such practical concerns as protection of individual human rights).

⁵⁵ See Andrew Bell-Fialkoff, *A Brief History of Ethnic Cleansing*, 72 FOREIGN AFF., Summer 1993, at 116-17 (detailing campaign of genocide unleashed on Bosnian civilians); see also II HELSINKI WATCH, *supra* note 26, at 50, 63 (noting that few if any of architects of ethnic cleansing have been brought to justice); Schmandt, *supra* note 51, at 377-78 (remarking that Bosnia-Herzegovina was scene of fierce battles between Serbs and Croats during WWII); Keeler, *supra* note 20, at 95 (discussing “ethnic cleansing” which has occurred since demise of Soviet Union).

⁵⁶ See JELAVICH, *supra* note 53, at 296 (relating how after WWII, attempting to heal national strife, Marshall Tito organized Yugoslavia into six federal republics); see also Paul Baskin, *Bosnian Political Scene Heats Up as Muslim Slav-Croat Truce Holds*, B.C. CYCLE, Oct. 25, 1992, available in LEXIS, Nexis Library, News File (discussing work of Croatian Defense Council through months of heavy Serbian attacks on Jajce, town where Tito declared founding of former Yugoslavia in 1941); Julian Coman, *Myth of Manhood Takes Course of Least Resistance*, EUROPEAN, August 28, 1997, at 16 (recounting Marshall Tito’s communist partisan’s laying claim to large areas northeast of Slovenia); Michael Dobbs, *Can We Make a Bosnian Miracle?; Only If We Recognize that Prosperity Is the Key to Peace*, WASH. POST, Dec. 15, 1995, at C01 (noting that task awaiting American peacekeeping troops is comparable to that faced by Marshall Tito’s communist partisans after WWII).

⁵⁷ See JELAVICH, *supra* note 53, at 296 (considering ramifications of Tito’s forced unification initiative); Gordy, *supra* note 50, at 19 (arguing that Tito’s multi-ethnic partisan force, promising equality for all national groups, set up unified Yugoslavia); Sunic, *supra* note 49, at A17 (noting that “[t]he principles of ‘brotherhood and unity’, which were subsequently imposed by force on the Yugoslav constituent peoples by [Tito] could hardly mask profound cultural differences among diverse Yugoslav ethnic groups”); see also Weisburd, *supra* note 49, at 2-9 (citing historical events which led to formation of Bosnia-Herzegovina). *But see* Gordy, *supra* note 50, at 19 (discussing cooperative effort of members of former Yugoslavia in forming “confederation”).

⁵⁸ See PETER W. GALBRAITH & MICHELLE MAYNARD, THE ETHNIC CLEANSING OF BOSNIA-HERCEGOVINA 32 (Report prepared Staff of Senate Comm. On Foreign Relations, 102d Cong., 2d Sess., S. Prt. 102-103) (1993) (noting high cost of genocide incurred in forming Yugoslavian polity has reaped resounding consequences in modern times); see also JELAVICH, *supra* note 53, at 296 (citing events which have led to outbreak of hatred among different ethnic and religious factions in former Yugoslavia); Schmandt, *supra* note 51, at 377-78 (recounting that modern day warfare in Bosnia-Herzegovina was virtually repeat performance of same battles during WWII between Serbs and Croats occurring in same geographical area).

clysmic eruption of fifty years of pent-up hatred through a relentless campaign of torture, murder, mass rape, and "ethnic cleansing."⁵⁹

B. Deconstructing the Yugoslavian Construct

The 1990 dissolution of the Yugoslavian polity, officially marked by the multiparty elections held by the six republics,⁶⁰ paved the way for nearly six years of unrelenting warfare.⁶¹ As a consequence of the dissolution, civil war broke out in Bosnia-Herzegovina in the Summer of 1991.⁶² This was followed by ever-increasing reports of atrocities being perpetrated by the Bosnian Serb military.⁶³ The apparent goal of the military was to carve out an

⁵⁹ See Schmandt, *supra* note 51, at 337-38 (discussing that in countering Ustasa and Nazi attacks against Serb nationalists, Cetniks committed atrocities against Muslims and Croats in Bosnia-Herzegovina which fostered much of ethnic hatred now evident in Bosnia-Herzegovina); see also JELAVICH, *supra* note 53, at 296 (suggesting forced unification of former Yugoslavia's diverse ethnicities in WWII was directly responsible for modern war crimes and ethnic cleansing campaign); *Into Bosnia*, *supra* note 52, at 14 (noting that "intensity of ethnic and religious rivalry has not diminished. . ."). But see WAR CRIMES IN BOSNIA-HERCEGOVINA, *supra* note 51, at 20 (citing relative civil harmony in Balkans prior to breakup of former Yugoslavia notwithstanding inter-ethnic diversity).

⁶⁰ See Gideon A. Moor, *The Republic of Bosnia-Herzegovina and Article 51: Inherent Rights and Unmet Responsibilities*, 18 FORDHAM INT'L L.J. 870, 873-74 (1995) (recounting collective disintegration of communist rule throughout all former Yugoslavian Republics and universal efforts towards democratization through free elections); see also Cohen, *supra* note 10, at 15A (describing eruption of ethnic and religious conflicts after collapse of Communism); Lewis, *supra* note 10, at 1A (noting that genocidal atrocities were result of intense nationalism after end of Cold War).

⁶¹ See Moor, *supra* note 60, 873-77 (recounting atrocities having taken place since dissolution of Yugoslavian polity); see also Schmandt, *supra* note 51, at 377-78 (discussing history of "ethnic cleansing" in Balkans and 1990 breakup of former Yugoslavian polity); Cohen, *supra* note 10, at 15A (citing actions citizens have taken to protect their families since fighting began in Balkans); Lewis, *supra* note 10, at 1A (recounting American efforts to enforce U.N. sanctions and feed starving Bosnians); cf. Weisburd, *supra* note 49, at 2-9 (chronicling conflicts and atrocities occurring in Balkans over course of 1990 to 1995).

⁶² See Procida, *supra* note 12, at 671 (recounting outbreak of civil war in 1991 and how Croats and Serbs sought their own nation-states); see also R.C. Longworth, *Yugoslavia's Outlook Darkens as Presidential Deadlock Persists*, CHI. TRIB., May 18, 1991, at 4 (explaining as consequence of war breaking out how one Croat lawyer was blocked from becoming President); cf. Celestine Bohlen, *Yugoslavia Fails to Fill Presidency*, N.Y. TIMES, May 18, 1991, at A1 (citing inability to fill presidential post as major cause of fighting and crumbling of federal structure).

⁶³ See *Report of the International Tribunal*, *supra* note 48 (reporting on the ICTY's limited success in prosecution of war crimes in former Yugoslavia); Anthony Lewis, *Abroad, at Home; Leadership and Duty*, N.Y. TIMES, Oct. 9, 1995, at A17 (discussing atrocities carried out in name of ethnic purity); *First Americans Arrive in Bosnia; Advance Survey Team Laying the Groundwork for U.S. Peacekeepers*, CHI. TRIB., Nov. 30, 1995, at 8 (quoting Secretary Boutros Boutros-Ghali regarding atrocities in Bosnia: "The full horror has yet to be properly investigated and revealed"); cf. Norman Kempster, *Eagleburger Seeks Balkan Atrocity Trials*, L.A. TIMES, Dec. 19, 1992, at A1 (comparing Yugoslavian ethnic horror to Nazi war crimes); John Pomfret, *"Cleansed" Town a Wasteland Now; Serbs Holding Srebrenica*, INT'L HERALD TRIB., Jan. 18, 1996, available in LEXIS, Nexis, World Library,

“ethnically homogeneous” homeland by “cleansing” it of Muslims, Croats, and all non-Serb peoples.⁶⁴ In October of 1992, after more than a year of engaging in ineffective scare tactics in light of well-documented atrocities, the UN Security Council (“Council”) finally decided to act.⁶⁵ Giving in to international pressure and to the pleas of countless Bosnian victims themselves, the Council finally convened a war crimes commission to “investigate” and “collect evidence” of human rights violations to determine the extent of criminal responsibility.⁶⁶ It was not until February of 1993, however, that the Council “officially” declared “ethnic cleansing” in Bosnia to be a “threat to international peace and security.”⁶⁷ Only at this

Allnews File (stating that after brutal “cleansing” of 40,000 Muslims, only 6,000 survived in former enclave adjoining very site where those slaughtered were buried in mass graves).

⁶⁴ See CROATIAN INFO. CENTER, *supra* note 26, at 107 (reporting Radovan Karadzic as publicly proclaiming that only Serbians should populate his republic); II HELSINKI WATCH, *supra* note 26, at 63 (asserting that Bosnian-Serb military forces were responsible for atrocities of mass rape, torture, and summary executions of civilians in highly calculated campaign to “ethnically cleanse” population of “non-Serbs”); Cohen, *supra* note 27, at A12 (reporting that Yugoslavian defector confirmed Bosnian Serbs officially carried out “ethnic cleansing” as means to control armed forces and de facto government); see also Keeler, *supra* note 20, at 95 (arguing that war crimes and ethnic cleansing were consequence of ethnically-rooted nationalism); cf. Procida, *supra* note 12, at 670-74 (discussing role of U.N. in preventing and punishing genocide in light of unrelenting Bosnian Serb campaign of ethnic cleansing); Lewis, *supra* note 10, at 1A (reporting that U.S. President Bush was asked by Bosnian President Alija Izetbegovic for military help to destroy Serbian weapons). See generally HELSINKI REPORT, 1992, *supra* note 42, at 67-68 (discussing human rights violations committed by Serbian military forces).

⁶⁵ Report of Secretary-General Pursuant to Paragraph 2 of S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., at 5, U.N. Doc. S/25704 (1993) [hereinafter Report of Secretary-General] (endorsing war crimes commission to “investigate” and “collect evidence” of alleged human rights violations in former Yugoslavia based on recommendation of U.N. Secretary-General); see also Procida, *supra* note 12, at 673-75 (discussing U.N.’s imposition of numerous “paper” and economic sanctions and employment of stall tactics before realizing more aggressive tactics were necessary to stem bloodshed); cf. S.C. Res. 713, U.N. SCOR, 46th Sess., 3009th mtg., U.N. Doc. S/RES/713 (1991), available in 31 I.L.M. 1427, 1431 (1992) (endorsing presence of peace-keeping force in former Yugoslavia for humanitarian non-military purposes).

⁶⁶ See Report of Secretary-General, *supra* note 65, at 4 (discussing events leading to long overdue installation of “war crimes commission”); see also Procida, *supra* note 12, at 675-77 (relating U.N.’s long overdue attempts to begin to bring perpetrators of ethnic cleansing to justice). See generally James Bone, U.S. Reveals Catalogue of Bosnian Atrocities, TIMES (London), Oct. 23 1992, available in 1992 WL 10909882 (discussing details of massacres, rapes and torture to be investigated by new U.N. war crimes commission).

⁶⁷ See U.N. CHARTER art. 39. In pertinent part, Article 39 provides that:

The Security Council shall determine the existence of any threat to the peace, breach of peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security. [emphasis added]

Id.; Stanley Meisler, UN Approves Tribunal for Balkan War Crimes, CHI. SUN-TIMES, Feb. 23, 1993, at 8. The U.N. officially established the War Crimes Tribunal for the former Yugoslavia (“ICTY”) on February 22, 1993. *Id.*; see also Michael G. Karnavas, *The International Criminal Tribunal*, 20-DEC. CHAMPION 20, 21 (1996). In its “ambitious undertaking” establishing the ICTY, it is asserted that the Security Council dispensed with “normal pro-

juncture did the Council finally resolve to establish a War Crimes Tribunal.⁶⁸ Meanwhile, as the UN carefully pondered its next course of action, the Bosnian body count grew, and, unexpectedly, yet another specter of genocide emerged, relentlessly tearing asunder the African nation of Rwanda.⁶⁹

C. *Makeshift Solutions: The Joint War Crimes Tribunals*

Suddenly faced with quickly mounting Rwandan atrocities as well, the Council inevitably resolved to also institute an "independent" Rwandan War Crimes Tribunal ("ICTR").⁷⁰ The Coun-

tycol" in the interests of more "urgently" addressing the grave human rights violations in the former Yugoslavia. *Id.* at 20-21; Barbara M. Tocker, *Intervention in the Yugoslav Civil War: The United Nations' Right to Create an International Criminal Tribunal*, 12 *DICK. J. INT'L L.* 527, 547 (1994). Due to the ineffectiveness of "countless resolutions" imposing "sanctions against the new Yugoslavia," as well as peaceful attempts at cease-fires, in view of human rights violations there, the U.N. resolved to establish the ICTY. *Id.*

⁶⁸ Security Council Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., at 23, U.N. Doc. S/RES/808 (1993). On February 22, 1993, the Security Council adopted Resolution 808, by which it proposed to establish an International War Crimes Tribunal to prosecute those "responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991." *Id.* See Karnavas, *supra* note 67, at 21. On August 13, 1992, the Security Council expressed "grave alarm" at reports of human rights violations. *Id.* Nonetheless, another nine months passed before the Tribunal was definitively implemented via U.N. Security Council Resolution 827 of May 25, 1993. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993), available in 32 *I.L.M.* 1203, 1203-5 (1993); see also U.N. CHARTER art. 39. In order for the Security Council to impose an embargo on a member state pursuant to article 39, it must determine the existence of a "threat to international peace and security." *Id.*

⁶⁹ See *U.N. to Investigate Killings in Rwanda*, L.A. TIMES, July 22, 1994, at 22, available in 1994 WL 2181847 (adopting resolution ordering investigation of large scale tribal massacres in Rwanda based on U.N. human rights envoy's reports depicting planned and systematic acts of genocide); Wang, *supra* note 35, at 177 (arguing that April 6, 1994 plane crash death of Rwanda's President directly led to killing of 500,000 Rwandans and mass displacement of about six million others); Roger Winter, *Journey into Genocide: A Rwanda Diary*, WASH. POST, June 5, 1994, at C01, available in 1994 WL 2290881 (describing first hand eyewitness account of calculated slaughter of Rwandan civilians as "eerily reminiscent" of Nazi "Final Solution"); see also Akhavan, *supra* note 18, at 501 (characterizing November 1994 establishment of International War Crimes Tribunal for Rwanda ("ICTR") as "yet another expression of reactive nature of international human rights system").

⁷⁰ See *Security Council Resolution 955 (Nov. 8, 1994) Establishing the International Tribunal for Rwanda ("ICTR"), Including the Annexed Statute of the Tribunal*, S.C. Res. 955, U.N. SCOR, 49th Sess., 3452d mtg., at 3, U.N. Doc. S/RES/955 (1994), reprinted in 33 *I.L.M.* 1598, 1601 (1994) [hereinafter *ICTR Statute*] (declaring U.N.'s sole purpose in implementing ICTR was to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in Rwanda); Richard D. Lyons, *U.N. Approves Tribunal on Rwandan Atrocities*, N.Y. TIMES, Nov. 9, 1994, at A12 (reporting Security Council vote to create ICTR to try those accused of atrocities in Rwanda despite Rwandan delegate concerns that ICTR initiative lacked death penalty). *But see Rwandan Mayor Appeals for International Action on Genocide*, P.R. NEWSWIRE, March 23, 1995, available in LEXIS, Nexis Library, PRNEWS File (arguing that ICTR established to prosecute perpetrators of Rwandan genocide will be ineffective until countries housing escaped criminals act to apprehend criminals and bring them to justice); Akhavan, *supra* note 18, at 501 (criticizing U.N.'s delayed reaction to mounting Rwandan atrocities as providing or-

cil soon acknowledged, however, that said Tribunal's coexistence with the War Crimes Tribunal for the former Yugoslavia ("ICTY") "dictated a similar legal approach [as the ICTR]" and maintaining "certain organizational and institutional links" so that the "unity of legal approach," and the "economy and efficiency of resources" would be secured.⁷¹ Mirroring this determination, Article 12(2) of the Rwandan Statute further mandates that the ICTY's appeals chamber membership "also serve as the member[ship] of the appeals chamber of the [ICTR]."⁷² Additionally, Article 15(3) of Rwandan Statute requires that the ICTY prosecutor simultaneously act as the ICTR prosecutor, although "[h]e or she shall have additional staff. . . to assist with prosecutions before the [ICTR]."⁷³

ganization with "ample opportunity, but little willingness, to take preventative action" against worst genocide since WWII); Schiller, *supra* note 17, at 68 (questioning U.N.'s ability to punish genocide perpetrators without international criminal justice system); Tyagi, *supra* note 16, at 906-07 (stating that inadequacies in international law prevent U.N. humanitarian operations from leading to peace).

⁷¹ See *Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955* (1994), U.N. SCOR, 50th Sess., at 3, para 9, U.N. Doc. S/1995/134 (1995) (expressing U.N.'s need, generally, to unify investigatory and prosecutorial efforts of ICTR with those of ICTY in interests of expediency and justice); *Id.* at 2 (reaffirming that ICTR was established to restore peace as well as to ensure cooperation of Rwanda and neighboring states in apprehending perpetrators of genocide); see also Catherine Cisse, *The International Tribunals for the Former Yugoslavia and Rwanda: Some Elements of Comparison*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 103, 108 (1997) (drawing from tragic lesson of protracted two-stage Resolution process to establish ICTY, in establishing ICTR, U.N. adopted more expedient "one-Resolution" process). But see Rod Dixon, *Developing International Rules of Evidence for the Yugoslav and Rwanda Tribunals*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 81, 82 (1997) (proposing that problematic lack of "coherent set of international rules of evidence" plaguing ICTY and ICTR Courts necessitates international evidentiary scheme patterned after more common national systems of criminal law and procedure); *Id.* at 82 (pointing out that ultimately reputations of ICTY and ICTR "will depend on how evidence proving the guilt or innocence of the accused is presented and evaluated").

⁷² See *ICTR Statute*, *supra* note 70, at 1606. Specifically, Article 12(2) the ICTR Statute sets forth:

The members of the Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law Committed in the Territory of the Former Yugoslavia since 1991 [ICTY] . . . shall also serve as the members of the Appeals Chamber of the International Tribunal for Rwanda.

Id. at 1606; see also *id.* art. 1. Article 1 provides: "The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute." *Id.*; cf. *id.* art. 13(2). The elected judges of both the ICTY and the ICTR meet in the Hague. *Id.*

⁷³ *Id.* at 1608 (noting dual prosecutorial role required under ICTY/ICTR Statutes). See Schabas, *supra* note 34, at 481 (pointing out problem that as ICTY and ICTR jurisdiction are geographically determined, likelihood that each Court will impose "a different sentence on individuals merely because of the place where the crime was committed is difficult to reconcile with the notion of equality before the law"); Wang, *supra* note 35, at 198 (noting formidable difficulties in investigation of crimes in former Yugoslavia as sole prosecutor with handful of assistants impeded by limited finances and inaccessibility to crime areas, victims and forensic evidence); cf. Minna Schrag, *The Yugoslav Crimes Tribunal: A Prosecutor's View*, 6 DUKE J. COMP. & INT'L L. 187, 189 (1995) (relating observation that "the

While the genocide proscriptions in both Statutes effectively track the same language under the Genocide Convention,⁷⁴ there are nonetheless important distinctions between the ICTR and the ICTY Statutes concerning the pivotal question of subject matter jurisdiction.

In the first instance, the ICTR Statute, unlike the ICTY Statute, eliminates the Article 3 prerequisite of "armed conflict" in determining what constitutes "crimes against humanity."⁷⁵ This notwithstanding, the ICTR Statute does prescribe a causal nexus between inhumane acts committed on a discriminatory basis.⁷⁶

manner in which the Tribunal was organized, with the judges appointed more than a year before the Prosecutor, [was] like trying to build a house from the roof down").

⁷⁴ See, e.g., ICTR Statute, *supra* note 70, at 1602-03. Article 2 of the Statute provides:

1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the 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.

3. The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.

Id. at 1602-03; see also Convention on the Prevention and Punishment of Genocide, December 9, 1948, 78 U.N.T.S. 277, entered into force on January 12, 1951 [hereinafter Genocide Convention]. Articles II and III of the Genocide Convention respectively provide that:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the 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 physical destruction in whole or in part; . . . The following acts shall be punishable: (a) Genocide; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide. . .

Id. arts. II and III.

⁷⁵ See *ICTR Statute*, *supra* note 70, at 1603. Article 3 of the ICTR

Statute provides:

Crimes Against Humanity. The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread attack against any civilian population on national, political, ethnic, racial or religious grounds: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation; (e) Imprisonment; (f) Torture; (g) Rape; (h) Persecution on political, racial and religious grounds; (i) Other inhumane acts.

Id. art. 3; see also Dorinda Lea Peacock, "It Happened and It Can Happen Again": The International Response to Genocide in Rwanda, 22 N.C. J. INT'L L. & COM. REG. 899, 901 (1997). While the Genocide Convention was drawn as a direct reaction to the Nazi atrocities of WWII, the U.N.'s belabored response, pursuant to the Convention, to the recent resurgence of genocide reduces the impassioned post-Holocaust avowal of "never again" to a hollow plea. *Id.*

⁷⁶ See *ICTR Statute*, *supra* note 70, at 1603. In pertinent part, Article 3 of the ICTR Statute provides: 1. Genocide means any of the following acts committed with the *intent to destroy, in whole or in part, a national, ethnical, racial or religious group* . . . [emphasis added]. *Id.* art. 3; see also Akhavan, *supra* note 18, at 501 n.14. While the ICTR Statute,

Most noteworthy, though, is that the ICTR's subject matter jurisdiction encompasses proscriptions unique to the ICTR Statute's Article 4 and those found in both the 1949 Geneva Conventions and the 1977 Protocol II.⁷⁷ Nevertheless, the "grave breaches" language under the Geneva Conventions were of no moment in view of the fact that the Rwandan atrocities by definition constituted an "internal" as opposed to an "international" conflict.⁷⁸ Not sur-

unlike Article 5 of its ICTY counterpart, expressly requires ethno-racially or religiously motivated inhumane acts, in contrast, article 6(c) of the Nuremberg Charter, after which the ICTR and ICTY were modeled, does not make "the existence of discriminatory grounds" a precondition to "crimes against humanity." *Id.* But see Sapru, *supra* note 32, at 343-44. In the case of Rwanda, "the Genocide Convention as well as Resolution 955 [would] require a showing that the Hutu *intended* to kill the Tutsi because they were Tutsi." *Id.* at 343 [emphasis added]. The legal problem is that since the murderers, at least in theory, could claim to not have been able to identify the "victims as Tutsi [when] they were killing them, the Genocide Convention cannot be used to prosecute the atrocities in Rwanda." *Id.* at 343-44.

⁷⁷ See *ICTR Statute*, *supra* note 70, at 1604. Article 4 of the ICTR Statute provides:

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

- (a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
- (b) Collective punishments;
- (c) Taking hostages;
- (d) Acts of terrorism;
- (e) Outrage upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- (f) Pillage;
- (g) The passage of sentences 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;
- (h) Threats to commit any of the foregoing acts.

Id. art. 4; see also Von Sternberg, *supra* note 33, at 111. In contrast to the ICTR, then, the jurisdiction of the ICTY was predicated on Chapter VII of the UN Charter. *Id.*; cf. Roberts, *supra* note 46, at 65. Because many of the Rwandan international human rights violations also violate its local law, and since the ICTR was established at Rwanda's request, it suggests a "desire to bring massive human rights violations . . . in internal armed conflicts, within the ambit of international rules." *Id.*

⁷⁸ See *Prosecutor v. Tadic*, U.N. Doc. IT-94-1-AR72, at 73, para. 141 (1995), reprinted in 35 I.L.M. 32, 72. In *Tadic*, the appellate chamber of the ICTY unanimously held:

It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 [of the ICTY Statute] more narrowly than necessary under customary international law.

Id.; see also Theodor Meron, *International Criminalization of Internal Atrocities*, 89 Am. J. Int'l L. 554, 559 (1995). As the ICTR makes "no allusion to the international or non-international character of the conflict," the broad "crimes against humanity" language of Article 3 of the ICTR "enhances the possibility of arguing that crimes against humanity . . . can be committed even in peacetime." *Id.* Moreover, "[t]he tangled meshing of crimes against humanity and human rights violations in Rwanda militates against requiring that the former

prisingly, then, the UN Secretary General, reporting on the ICTR Statute, observed that “[the Council] elected to take a more expansive approach to . . . the applicable law than the one underlying the statute of the [ICTY].”⁷⁹ In the final analysis, however landmark in their breadth, not only was the promulgation of the ICTY and ICTR Statutes painfully slow, but these effectively served as little more than topical antiseptics in the treatment of the malignancy of genocide.

be linked with war.” *Id.* at 557; Convention 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, available in 1950 WL 7476 (TIA) [hereinafter Geneva Convention]. In pertinent part, the Convention sets forth:

ARTICLE 13

The present Convention shall apply to the wounded and sick belonging to the following categories:

- (1) Members of other militias and members of other volunteer corps, including those of organized resistance movements . . .

ARTICLE 14

Subject to the provisions of Article 12, the wounded and sick of a belligerent who fall into enemy hands shall be prisoners of war, and the provisions of international law concerning prisoners of war shall apply to them.

ARTICLE 15

At all times, and particularly after an engagement, Parties to a conflict shall, without delay, take all possible measures to search for and collect the wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled.

Id. arts. 13, 14, 15, at 3-4. Article 3 further provides that: “In case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to” abide a minimum set of criteria for the care of the injured and sick. *Id.* art. 3, at 1.

⁷⁹ See *Report of the Secretary-General pursuant to Paragraph 5 of Security Council Resolution 955*, *supra* note 71, at 3. In view of the pressing need to take a more expansive approach via the ICTR, the Security Council requested “the Secretary-General to implement this resolution urgently and in particular to make practical arrangements for the effective functioning of the [ICTR], including recommendations to the Council as to possible locations for the seat of the International Tribunal at the earliest time . . .” *ICTR Statute*, *supra* note 70, at para. 5. Subsequently, the Secretary-General also noted that the establishment of the ICTR served the dual purpose of restoring peace in the region of Rwanda and, importantly, in ensuring cooperation among Rwanda and neighboring nations in locating suspected war criminals. *Id.*; *Report of the Secretary-General pursuant to Paragraph 5 of Security Council Resolution 955*, *supra* note 71, at 2. From the very outset, Rwanda’s own government, unlike the parties to the Balkan conflict, had in fact requested U.N. intervention through the installation of a War Crimes Tribunal. *Id.*; Cisse, *supra* note 71, at 107. Moreover, in light of the perceived ineffectiveness of the ICTY, the U.N. Secretary-General urged the Security Council take measures to “ensure that the individuals responsible [for Rwandan atrocities would be] . . . brought to justice before an independent and impartial international criminal tribunal.” U.N. Security Council, Letter Dated, 1 October 1994, from the Secretary-General Addressed to the President of the Security Council, at 148, U.N. Doc. S/1994/1125 (1994).

D. *The U.N.'s Inaction and Subsequent Embargo Denied
Bosnia the Right to Self-Defense and Escalated
Instances of Genocide*

Throughout the Security Council's protracted process of deliberation and indecision regarding the institution of the ICTY (and the ICTR), flagrant acts of genocide and human rights violations escalated unchecked in Bosnia and Rwanda.⁸⁰ More important, the situation of mounting atrocities was further aggravated by the Council's 1991 imposition of an arms embargo on Bosnia.⁸¹ This embargo effectively barred any outside importation of arms to assist in the Bosnian war effort.⁸² The embargo, however, was in direct contravention of Bosnia's recognized UN member status pursuant to its declaration of sovereignty in 1990.⁸³ Ironically,

⁸⁰ See U.N. Secretary-General, *Eighth Periodic Report on the Situation of Human Rights in the Territory of Former Yugoslavia*, 49th Sess., at 7, U.N. Doc. S/1994/967 (1994) (reporting on ongoing commission of ethnic cleansing in areas under control of Bosnian Serb forces); *Sixth Periodic Report on the Situation of Human Rights in the Territory of Former Yugoslavia*, U.N. Commission on Human Rights, 50th Sess., Agenda Item 12, at 8 [hereinafter *Sixth Periodic Report*] (relating international observers' accounts of detention camps characterizing conditions therein as "very bad" where prisoners suffered from cold, hunger, abuse, and lack of basic necessities); see also Peacock, *supra* note 75, at 901 (discussing implications of U.N.'s belabored response to Rwandan instances of genocide of Holocaust-like proportions).

⁸¹ See S.C. Res. 713, *supra* note 65, at paras. 3-6. Adopted on September 25, 1991, in pertinent part, Resolution 713 mandates "under Chapter VII of the Charter of the United Nations, that all States shall for the purposes of establishing peace and stability in Yugoslavia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia until the Security Council decides otherwise following consultation between the Secretary-General and the Government of Yugoslavia." *Id.* at para. 6; see also U.N. CHARTER art. 51 which prohibits the U.N. from impeding a member nation to act in self-defense; Procida, *supra* note 12, at 673-75. The U.N.'s imposition of "paper" sanctions served as stall tactics prolonging the inevitable necessity for military action. *Id.*

⁸² See S.C. Res. 713, *supra* note 65, at para. 6 (commanding that all U.N. members refrain from continuing to import weapons into war-torn former Yugoslavia); see also Aaron K. Baltes, *Prosecutor v. Tadic: Legitimizing the Establishment of the International Criminal Tribunal for the Former Yugoslavia*, 49 ME. L. REV. 577, 580 (1997) (outlining history leading up to 1991 U.N. arms embargo). But see David Wippman, *Defending Democracy Through Foreign Intervention*, 19 HOUS. J. INT'L L. 659, 668 (1997) (explaining that despite 1991 embargo U.N. did in fact authorize aid, but that aid was to Bosnian Serbs, not to Bosnian government).

⁸³ See U.N. CHARTER art. 51. Article 51 recognizes the inherent right of all U.N. member nations to engage in acts of self-preservation and self-defense, presumptively unencumbered by any U.N. measure, resolution or Charter provision. *Id.*; David Wippman, *Change and Continuity in Legal Justifications for Military Intervention in International Conflict*, 27 COLUM. HUM. RTS. L. REV. 435, 453 (1996). The Bosnian government was reported to have argued that the 1991 U.N. arms embargo violated Bosnia's inherent right to receive aid. *Id.*; see also Philip J. Cohen, M.D., *Ending the War and Securing Peace in Former Yugoslavia*, 6 PACE INT'L L. REV. 19, 21-22 (1994). Dr. Cohen argues that:

The UN's recognition of Croatia and Bosnia-Herzegovina, coupled with the continuation of an arms embargo on these states, has proven an incompetent exercise of authority. The net effect has been to encourage one-sided Serbian aggression by obstructing

this "declaration" entitled Bosnia to the "right to self-defense" as provided for under Article 51 of the UN Charter,⁸⁴ particularly in view of the incontrovertible reports of international war crimes.⁸⁵ Unfortunately, the end result was that not only did the Council fail to actively defend Bosnia, but, in violation of Article 51, by way of a UN-imposed arms embargo restriction, the Council effectively prevented Bosnia from defending itself.⁸⁶ Perhaps most important, in the final analysis, the embargo was an inexpedient and

the self-defense of Muslims and Croats, even as they are victims of genocide. Since September 1991, the U.S., E.C., and later the U.N., have interfered in the Balkans by imposing an arms embargo that extended to the victims of genocide but have not intervened on the victims' behalf. With no serious help ever offered to stop Serbian aggression, a power vacuum has been created in the Balkans, with the opportunity for terrorist states to extend their influence in the region.

Id.; U.N. CHARTER arts. 25, 49. Read in tandem, these articles clearly support the conclusion that as the U.N. sanction of an arms embargo was imposed under Chapter VII of the U.N. Charter, it was therefore binding on all U.N. member states, including the U.S., E.C. and all parties to the Balkan conflict. *Id.*

⁸⁴ See U.N. CHARTER art. 51 (providing in second clause that member state has right to exercise self-defense "until the Security Council takes the measures necessary to maintain international peace and security." *Id.*; Jose E. Alvarez, *Judging the Security Council*, 90 AM. J. INT'L L. 1, 6 (1996) (arguing that Security Council's arms embargo violated Bosnia's Article 51 right to defend itself against genocide in view of Council's failure to implement countermeasures on behalf of Bosnia to reinstate peace and security in Balkans); Ibrahim J. Gassama, *World Order in the Post-Cold War Era: The Relevance and Role of the United Nations After Fifty Years*, 20 BROOK. J. INT'L L. 255, 330 n.73 (1994) (observing that as "situation in Bosnia continued] to deteriorate . . . there [had] been calls from . . . U.S. Congress for U.S. to ignore a UN arms embargo and supply arms to Bosnian Muslims"); Michael P. Scharf and Joshua L. Dorosin, *Interpreting UN Sanctions: The Rulings and Role of the Yugoslavia Sanctions Committee*, 19 BROOK. J. INT'L L. 771, 775 (1993) (requesting that ICJ enjoin embargo, Bosnian government argued that relevant U.N. "resolutions must be construed to allow states to provide Bosnia-Herzegovina with military [aid]" pursuant to its Article 51 right to self-defense); see also Miller, *supra* note 2, at 773 (citing U.N. interest in maintaining international peace which led to arms embargo); cf. Bourloyannis, *supra* note 5, at 335-44 (relating international humanitarian law since 1949 to Balkans crisis).

⁸⁵ See *Sixth Periodic Report*, *supra* note 80, at 8 (relating vivid third party accounts of inhumane health and living conditions of Bosnian detention camp prisoners); see also Moor, *supra* note 60, at 903 (noting that U.N. Special Rapporteur, via Sixth Periodic Report, was especially critical of U.N.'s marked inefficacy in taking appropriate measures to curtail mounting Balkan atrocities); *Report on the Situation of Human Rights in the Territory of the Former Yugoslavia, U.N. Commission on Human Rights*, 1st Special Sess., Agenda Item 3, at 2, U.N. Doc. E/CN.4/1991/S-1/9 (1992) [hereinafter *First Report*] (concluding that "[m]assive and grave violations of human rights [were] occurring throughout the territory of Bosnia and Herzegovina"). *But see* Moor, *supra* note 60, at 873 (recognizing that as "arms embargo terminated Bosnia's Article 51 right to exercise self-defense, the United Nations took measures intended to maintain international peace and security").

⁸⁶ See Roger Cohen, *Serbs Close in on Bosnian Town; U.N. and NATO Unable to Act*, N.Y. TIMES, Nov. 29, 1994, at A1 (criticizing imposition of arms embargo on Bosnia which prevented necessary aid to Bosnia in abrogation of its right to self-defense under Article 51); see also U.N. CHARTER art. 51 (providing that nothing in U.N. "Charter shall impair the inherent right of . . . self-defense" where Member nation is attacked); *U.N. Admits Bosnia, Croatia and Slovenia*, L.A. TIMES, May 23, 1992, at A6 (reporting that in his address to U.N. General Assembly, Bosnian Foreign Minister, Haris Silajdzic hopelessly pleaded: "We call on this body to come to our aid in the hour of our greatest need"). See generally Elaine Sciolino, *Bosnian Asks GOP Lawmakers to Help End Arms Embargo*, N.Y.

improvident exercise of UN authority bespeaking of the entity's relative ineffectiveness.⁸⁷ In actuality, instead of an anticipated cease-fire, the embargo hastened the opposite result of escalating atrocities against an already defenseless Bosnia.⁸⁸

Article 51 of the U.N. Charter guarantees member states a right to defend themselves.⁸⁹ That right cannot be terminated or abridged until the Security Council has taken affirmative steps to protect a member state from military aggression.⁹⁰ The Council's failure to expedite the restoration of peace and security in Bosnia violated Article 51's criteria for terminating a state's right to self-defense.⁹¹ And despite Bosnia finally being allowed to exercise its

TIMES, Jan. 31, 1995, at A3 (noting that Bosnian Prime Minister lobbied Congress to lift arms embargo on Bosnia if U.N. was unable to get Bosnian Serbs to agree to peace plan).

⁸⁷ See M. Jennifer MacKay, *Economic Sanctions: Are They Actually Enforcing International Law in Serbia-Montenegro*, 3 TUL. J. INT'L & COMP. L. 203, 223 (1994) (noting that insofar as centrally situated European countries like Bosnia and Serbia-Montenegro were formerly related, it was "difficult to isolate Serbia commercially and to enforce embargoes, without also cutting off Bosnia"); see also Ziyad Motala and David T. Butle Ritchie, *Self-Defense in International Law, The United Nations, and the Bosnian Conflict*, 57 U. PRTR. L. REV. 1, 2 (1995) (asserting that U.N. "Resolution 713 arguably prevented the legitimate government of Bosnia-Herzegovina from procuring arms from the international community and effectively defending its territorial integrity. . ."). But see Craig Scott et al., *A Memorial for Bosnia: Framework of Legal Arguments Concerning the Lawfulness of the Maintenance of the United Nations Security Council's Arm Embargo on Bosnia and Herzegovina*, 16 MICH. J. INT'L L. 1, 59-60 (1994) (arguing contrarily that embargo "[d]id not fetter Bosnia's inherent right to self-defense under Article 51. . .").

⁸⁸ See William Aceves, *Affirming the Law of Nations in U.S. Courts: The Karadzic Litigation and the Yugoslav Conflict*, 14 BERKELEY J. INT'L L. 137, 143 (1996) (reporting that by availing themselves of U.N.-imposed embargo and "[a]ided by Serbian government, the Bosnian Serbs soon gained control over many disputed areas"); Amy Lou King, *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, 368 (1993) (arguing that reliance on "sanctions against Serbia [did] not stop the war," but merely served as "readily convenient response" enabling "UN and international community to forestall direct involvement"); see also Scharf and Dorosin, *supra* note 84, at 775 (explaining effect of Security Council's Resolutions on embargo); cf. Laurie A. Cohen, *Application of the Realist and Liberal Perspectives to the Implementation of War Crimes Trials: Case Studies of Nuremberg and Bosnia*, 2 UCLA J. INT'L L. & FOREIGN AFF. 113, 146 (1997) (noting that "[c]ontinued escalating violence led UN to attempt economic sanctions, humanitarian relief operations, and political negotiations").

⁸⁹ See U.N. CHARTER art. 51 (recognizing inherent right of self-defense of U.N. member nations); see also U.N. CHARTER art. 2, preamble (exhorting that principle of non-intervention under Article 2, Paragraph 7 apply to all U.N. bodies); cf. U.N. CHARTER art. 1, para. 3 (promoting international cooperation and encouraging respect for human rights).

⁹⁰ See U.N. CHARTER art. 51. Article 51 specifically provides: "Nothing in the present Charter shall impair the inherent right of the individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security." *Id.*; S.C. Res. 713, *supra* note 65, at paras. 1-6. The U.N. urged feuding factions in Yugoslavia to settle disputes through negotiations in view of the escalating conflict which posed a threat to international peace and security. *Id.*

⁹¹ See U.N. CHARTER art. 51 (acknowledging U.N. member states' right of self-preservation); see also S.C. Res. 713, *supra* note 65 (declaring that all deliveries of weapons shall be

Article 51 right to self-defense by the Security Council's delayed retraction of its arms embargo in late 1995, the inestimable instances of rape, torture and genocide can never again be vindicated.⁹²

E. The UN's Failure to Enforce Indictments of War Criminals Through the Yugoslavian War Crimes Tribunal Compromised its International Authority and Credibility

Whereas the Nuremberg International Military Tribunal was established according to treaty,⁹³ the War Crimes Tribunal for the former Yugoslavia was instead created in 1992 upon the recommendation of the Secretary General and through Security Council Resolution 827.⁹⁴ The Secretary's establishment of the War Crimes Tribunal under Chapter VII of the UN Charter was intended to give the Security Council "broad responsibility" for

suspended although failing to implement any military action to stop violations); cf. Bourloyannis, *supra* note 5, at 335 (noting U.N.'s most important objective of maintaining international peace and security undermined fundamental principle of non-use of force).

⁹² See *Security Council Resolution Terminating Embargo on Deliveries of Weapons and Military Equipment to Former Yugoslavia*, S.C. Res. 1021, U.N. SCOR, 50th Sess., 3595th mtg., at 1-2, para. 1, U.N. Doc. S/RES/1021 (1995) (retracting arms embargo implemented under prior S.C. Resolution 713); see also U.N. CHARTER art. 51 (prohibiting U.N. from impeding member nations to act in own self-defense); Security Council Resolution 713, *supra* note 65 (setting forth resolution first establishing controversial Bosnian arms embargo).

⁹³ See Hague Convention (No. IV) Respecting the Laws and Customs of War on Land, 36 Stat. 2277, T.S. No. 539 [hereinafter Hague Convention (No. IV)] (noting that "Nuremberg . . . Tribunal specifically recognized 1907 pact as declaratory of customary international law and thus binding on all nations, regardless of their [UN] signatory status"); Charter of the International Military Tribunal, art. 6, 1 I.M.T. 173, 174-75 [hereinafter Military Tribunal Charter] (defining jurisdiction and functions of IMT and crimes against peace, war crimes, and crimes against humanity for which Nazis were indicted); see also Lara Lieberman, *From Nuremberg to Bosnia: Consistent Application of International Law*, 42 CLEV. ST. L. REV. 705, 705 (1994) (discussing effect of ad hoc Tribunal in 1945-46 on fundamental moral principles of international human rights law).

⁹⁴ See *Statute of the International Tribunal*, art. 1, adopted as per S.C. Res. 827, U.N. SCOR, para. 2, Doc. S/25626 (1993), available in 32 I.L.M. 1159, 1170 (formally establishing "competence" of ICTY and setting forth specific scope of its subject matter jurisdiction); see also *Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia*, para. 2, U.N. Doc. S/25704 (1993), available in 32 I.L.M. 1159, 1164 [hereinafter *Secretary-General ICTY Report*] (recognizing obligation of Secretary-General pursuant to U.N. Resolution 808 to propose options "for the effective and expeditious implementation of the decision to establish [ICTY]"); see also U.N. CHARTER Chap. VII (granting Security Council wide powers to implement measures to restore and maintain international peace and security); cf. Lieberman, *supra* note 93, at 706 (noting establishment of War Crimes Tribunal).

maintaining and "restoring international peace and security".⁹⁵ This noble goal of renewed peace, however, has yet to materialize.⁹⁶ Hence, in view of the foregoing, the first problem impeding the effectiveness of the War Crimes Tribunal is one of "jurisdictional" limitation.⁹⁷

The Tribunal's subject matter jurisdiction encompasses infractions under the 1949 Geneva Convention, including violations of the laws or customs of war, genocide, and crimes against humanity.⁹⁸ All of these offenses are proscribed both by the rules of "customary international humanitarian law" and the *nullum crimen sine lege* doctrine,⁹⁹ and are binding on all nations, regardless of UN membership. The catch-22 is that the promulgation of the ICTY as a reaction to war crimes committed within the territory of

⁹⁵ See *Secretary-General ICTY Report*, *supra* note 94, at para. 2 (presenting report of proposals to Security Council for implementation of ICTY as mandated by UN Resolution 808); S.C. Res. 827, *supra* note 94, at para. 2 (reaffirming decision via UN Resolution 808 that an international tribunal be established for prosecution of persons responsible for serious violations of international humanitarian law); see also U.N. CHARTER Chapter VII (imparting to Security Council broad powers to carry out function of maintaining and restoring international peace and security). See generally Karl A. Hochkammer, *Yugoslav War Crimes Tribunal: The Compatibility of Peace, Politics and International Law*, 28 VAND. J. TRANSNAT'L L. 119, 148-49 (1995) (discussing actions leading up to adoption of Resolution 827).

⁹⁶ See Roy Gutman, *War Crimes Unit Hasn't a Clue, U.N. Setup Seems Designed to Fail*, N.Y. NEWSDAY, Mar. 4, 1993, at 8 (stating that tribunal has been ineffective due to lack of staff and inability to follow "hot trails"); see also Hochkammer, *supra* note 95, at 148-49 (stating how Tribunal's hasty construction and complicated rules in negotiating peace settlements may prevent prosecution of war criminals). But see Mark A. Bland, *An Analysis of United Nations International Tribunal to Adjudicate War Crimes in the Former Yugoslavia, Parallels, Problems, Prospects*, 2 IND. J. GLOBAL LEG. STUD. 233, 245 (1994) (citing reasons why Nuremberg Tribunal arrangement does not serve as precedent in international law); Bonnie Santosus, *An International Criminal Court: "Where Global Harmony Begins"*, 5 Touro INT'L L. REV. 25, 36 (1994) (noting that certain countries like U.S. favor jurisdictional limitations on an ICC which has led to inability of U.N. to formulate ICC to prosecute human rights offenders).

⁹⁷ See Bland, *supra* note 96, at 245 (discussing War Crimes Tribunal's jurisdictional problem of not being able to grant binding judgments); see also Hochkammer, *supra* note 95, at 151-52 (noting that Tribunal's subject matter jurisdiction is limited by time and location); Santosus, *supra* note 96, at 36 (recognizing concerns over potential jurisdictional problems).

⁹⁸ See Bland, *supra* note 96, at 247 (discussing limited jurisdictional bases from Geneva Convention); see also Hague Convention (No. IV), *supra* note 93, at 2277 (citing nations who are members of convention and parties to treaty); Military Tribunal Charter, *supra* note 93, at art. 6 (describing specific nature of Tribunal's subject matter jurisdiction).

⁹⁹ See Roger S. Clark and Madeleine Sann, *Coping with Ultimate Evil Through the Criminal Law*, 7 CRIM. L.F. 1, 8 (1996) (noting that Article 3 of War Crimes Tribunal Statute does not violate principle of *nullum crimen sine lege*, which doctrine provides no crime is chargeable absent an applicable law); see also Kevin R. Chaney, *Pitfalls and Imperatives: Applying the Lessons of Nuremberg to the Yugoslav War Crimes Trials*, 14 DICK. J. INT'L L. 57, 79-81 (1995) (discussing history of *nullum crimen sine lege* defense); Liebman, *supra* note 93, at 728 (citing probability that Yugoslavian conflict participants will likely rely on *nullum crimen sine lege* defense).

the former Yugoslavia confined the ICTY's territorial jurisdiction and enforcement powers strictly within the fictional boundaries of that former Republic.¹⁰⁰ This suggests a second problem: the absence of an effective means of enforcing convictions—the void created by the ICTY's severely circumscribed jurisdiction.

By April of 1997, of the seventy-five individuals indicted by the War Crimes Tribunal for the former Yugoslavia only seven were in custody, none of whom had yet been convicted.¹⁰¹ Most notable among the seventy-five indictments were the joint arrest warrants issued against Bosnian Serb President, Radovan Karadzic, and Bosnian Serb military leader, Ratko Mladic.¹⁰² To date, while numerous federal claims have been brought against them in the United States under the Aliens Tort Act,¹⁰³ neither Karadzic nor Mladic, has been apprehended or brought to justice under the authority of the War Crimes Tribunal.¹⁰⁴ As a consequence, the Tri-

¹⁰⁰ See Hochkammer, *supra* note 95, at 151 (noting how Tribunal's jurisdiction was limited to violations occurring only within certain territorial boundaries); see also Hague Convention (No. IV), *supra* note 93, at 2277 (establishing supra-territorial principle of customary international law as binding on all nations); Military Tribunal Charter, *supra* note 93, at 174-75 (defining jurisdiction of IMT in trying instances of genocide and Nazi war crimes as restricted to members of Axis Power countries); cf. *General Framework Agreement for Peace*, Nov. 21, 1995, art. 9 (mandating cooperation with all entities authorized by Security Council "pursuant to the obligation of all parties to cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law").

¹⁰¹ See Morris B. Abram, *Will War Criminals Escape Justice?*, WALL ST. J., Apr. 1, 1997, at A18, available in 1997 WL-WSJ 2415146 (warning that hands-off NATO policy of refusing to arrest indicted war criminals stymied efforts of ICTY insofar as of April 1, 1997 "[o]nly seven of the 75 war criminals indicted [were] in custody, not one of them arrested by NATO troops"); Gutman, *supra* note 96, at 8 (discussing rumors of "persons" in U.N. panel intentionally not pursuing convictions of Serbian Leaders); see also Clark & Sann, *supra* note 99, at 5 (stating that as of June 1996 over 75 indictments were handed down); *Id.* at 6 (noting that while several arrest warrants had been executed, leaders Karadzic and Mladic were still at large).

¹⁰² See Bernard Meltzer, "War Crimes": *The Nuremberg Trial and the Tribunal for the Former Yugoslavia*, 30 VAL. U. L. REV. 895, 908 (1996) (reporting that as promoters of ethnic cleansing, Karadzic and Mladic have been indicted); see also Clark & Sann, *supra* note 99, at 5 (noting that Karadzic and Mladic, two most reprehensible violators, were still at large despite their primary responsibility for masterminding policies which led to massive human rights violations); cf. David P. Kunstle, *Kadic v. Karadzic: Do Private Individuals Have Enforceable Rights and Obligations Under the Aliens Torts Claims Act?*, 6 DUKE J. COMP. & INT'L L. 319, 319 (1996) (discussing Karadzic's court cases and crimes charged therewith).

¹⁰³ See 28 U.S.C. § 1350 (1993) (originally enacted as Alien Tort Claims Act, June 25, 1948, ch. 646, 62 Stat. 934) (providing that "[federal] district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States"); Torture Victim Protection Act of Mar. 12, 1992, Pub. L. 102-256, 106 Stat. 73, § 2(a)(1) (providing that "individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture, in a civil action [will] be liable to that individual").

¹⁰⁴ See Meltzer, *supra* note 102, at 909-10 (noting that despite Karadzic and Mladic having been indicted by ICTY, neither had been arrested and that both remained in power);

bunal, in abrogation of its very mandate, has compromised the UN's authority and thwarted international justice by failing to compel the enforcement of indictments against the key architects of Bosnian war crimes and genocide.

Based on most international legal standards, the Tribunal's issuance of an arrest warrant constitutes a request for extradition, subject to refusal only upon a showing that the warrant gravely contravenes local law.¹⁰⁵ Viewed in this light, the recent position of the Federal Republic of Yugoslavia ("FRY"), for example, to not surrender its citizens because its constitution forbids the extradition of nationals, is a legally insufficient basis for failing to obey the Tribunal's juridical orders.¹⁰⁶ The fact of the matter is that, barring some serious legal impediment, requests for the surrender of persons indicted by the Tribunal are binding under Chapter VII of the UN Charter and take precedence over a member nation's local authority.¹⁰⁷ Nevertheless, the Security Council, in clear ab-

see also Clark & Sann, *supra* note 99, at 5 (discussing large number of indicted war criminals still at large); Kunstle, *supra* note 102, at 319 (noting U.S. federal court jurisdiction over claims against Karadzic).

¹⁰⁵ See Christopher L. Blakesley, *Obstacles to the Creation of a Permanent War Crimes Tribunal*, 18 Fall FLETCHER F. WORLD AFF. 77, 78 (1994) (discussing obstacle of conflict between international and domestic laws); Caroline D. Krass, *Bringing the Perpetrators of Rape in the Balkans to Justice: Time for an International Criminal Court*, 22 DENV. J. INT'L L. & POL'Y 317, 322-34 (1994) (describing how court system in Bosnia differs from other States' court systems including that of U.S.). See generally U.N. CHARTER Chapter VII (setting forth international obligations concerning peace and security); Supplementary Convention on Extradition, March 14, 1983, Sweden-U.S., Treaty Doc. No. 98-4, 98th CONG. 1st Sess. (1983) (providing example of U.S. policy to extradite foreign nationals).

¹⁰⁶ See O'Shea, *supra* note 36, at 386. Ironically, the "Yugoslavian government maintain[ed] that the [ICTY] is 'contrary to the provisions of the Constitution of the Federal Republic of Yugoslavia, which prohibits extradition of Yugoslav nationals.'" *Id.* at 386. (quoting Letter from the Deputy Prime Minister and Minister for Foreign Affairs of the Federal Republic of Yugoslavia to the Secretary-General (May 17, 1993), U.N. Doc. A/48/170, S/25801, at 3 (1993) [hereinafter Letter dated 17 May 1993]). In this regard, the Deputy Prime Minister specifically asserted that "the Security Council [had] no mandate to establish an international tribunal, nor does Chapter VII of the [UN] Charter provide for the establishment of the [ICTY]." *Id.* O'Shea, *supra*, at 386. In a similar light, "the United States has signed an executive agreement with the [ICTY] not merely to implement Resolution 827, but because no authority exists under U.S. law to extradite without an express legislative or treaty stipulation." *Id.*; see also Blakesley, *supra* note 105, at 104. The author relates the issue of limiting jurisdiction under the International Tribunal. *Id.*; Bland, *supra* note 96, at 273. The author recounts the extradition of Serbian war criminals and the laws different countries are enacting to facilitate such extradition. *Id.*

¹⁰⁷ See G.A. Res. 2840 (XXVI), U.N. GAOR, 26th Sess., Supp. No. 29, at 79, U.N. Doc. A/8429 (1971) (affirming that states' refusal "to cooperate in the arrest, extradition, trial and punishment" of persons accused or convicted of war crimes against humanity is "contrary to the U.N. Charter and to generally recognized norms of international law"); see also Krass, *supra* note 105, at 350 (discussing that even if powerful officials are not prosecuted, actual rapists could be); Robert Kushen and Kenneth J. Harris, *Surrender of Fugitives by the United States to the War Crimes Tribunals for Yugoslavia and Rwanda*, 90 AM. J. INT'L

rogation of Chapter VII, has somehow allowed the Tribunal to concede its superior authority in this matter by kowtowing to local pressure and failing to enforce arrest warrants.¹⁰⁸ This has resulted in criminal indictments for genocide effectively going ignored and international justice being trounced in the process.¹⁰⁹

F. Promises Broken: The Ill-fated Dayton Peace Initiative

This, in turn, leads us to a third problem: The Tribunal's decision not to actively seek to implement the enforcement of its indictments not only contradicted its very mission, but also contravened the 1995 Dayton peace initiative.¹¹⁰ Under the Dayton

L. 510, 511 (1996) (explaining obligation of states to cooperate with Tribunals as imposed by U.N. Charter and Security Council Resolutions).

¹⁰⁸ See U.N. CHARTER Chapter VII (granting UN Security Council broad enforcement powers in maintaining international security); Clark & Sann, *supra* note 99, at 6 (noting that despite Tribunal's execution of arrest warrants, Karadzic and Mladic went unapprehended); Gutman, *supra* note 96, at 8 (explaining ineffective authority of ICTY); see also Blakesley, *supra* note 105, at 91 (noting domestic versus international law conflict); Bruno Milinkovic, *Yugoslavia: Mixed Reaction to War Crimes Tribunal Visit*, INTER. PRESS SERVICE, Oct. 11, 1994, available in LEXIS, News Library, CURNWS File (explaining war crime suspects not extradited by home country will be subject to international indictment backed by Interpol). *But see* Christopher C. Joyner, *Strengthening Enforcement of Humanitarian Law: Reflections on the International Tribunal for the former Yugoslavia*, 6 DUKE J. COMP. & INT'L L. 79, 101 (1995) (discussing obstacles to Tribunal having orders enforced effectively, such as lack of financial support).

¹⁰⁹ See Simon Chesterman, *Never Again . . . And Again: Law, Order and the Gender of War Crimes and Beyond*, 22 YALE J. INT'L L. 299, 316 (1997) (warning by ICTY Chief Prosecutor Arbour that unless ICTY is given assistance in bringing indicted war criminals to trial, "its perceived failure may exacerbate the tensions that it was designed to appease"); Amy E. Ray, *The Shame of it: Gender-Based Terrorism in the Former Yugoslavia and the Failure of the International Human Rights Law to Comprehend the Injuries*, 46 AM. U. L. REV. 793, 840 n.30 (1997) (noting that ICTY Statute makes "no provisions for obtaining custody of the accused, [and that] such cooperation is crucial if many of those indicted for war crimes are ever to be brought to justice"); see also International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991: Rules of Procedure and Evidence, Rule 61, UN Doc. IT/32 (1994), reprinted in 33 I.L.M. 484 [hereinafter Tribunal Rules] (declaring that where reasonable service of indictment is not practical, indictment shall be submitted to ICTY trial chamber, and upon determination of indictment's "reasonableness," trial chamber shall issue international arrest warrant through Interpol).

¹¹⁰ See General Framework Agreement for Peace in Bosnia and Herzegovina, December 14, 1995, 35 I.L.M. 75 (Jan. 1996) [hereinafter Framework Agreement] (implementing workable plan after Dayton Agreement providing for peaceful coexistence of Muslim, Serb, and Croat peoples and end of ethno-religious hostilities); Peace Implementation Conference for the Bosnian General Framework Agreement: Conclusions of the London Meeting, December 12, 1995, 35 I.L.M. 223, 225 (Jan. 1996) [hereinafter Peace Conference] (summarizing desired achievements and long-term goals as result of brokered peace in Bosnia and Herzegovina); Dayton Agreement on Implementing the Federation of Bosnia and Herzegovina, November 10, 1995, 35 I.L.M. 170, 172 (Jan. 1996) [hereinafter Dayton Agreement] (recognizing establishment of Federation of Bosnia and Herzegovina as prerequisite to peace in region); see also Robin Knight, *Can There Be Justice as Well as Peace in Bosnia?*, U.S. NEWS & WORLD REP., Dec. 4, 1995, at 30 (reporting that Milosevic agreed at Dayton Peace talks to cooperate fully with U.N. War Crimes Tribunal).

Agreement, the heads of the FRY, Croatia, and Bosnia-Herzegovina agreed to cooperate with and be bound by the mandates of the War Crimes Tribunal.¹¹¹ It is undisputed that these states freely agreed to subject themselves to the authority of the War Crimes Tribunal.¹¹² The inevitable question then becomes: Why has the Tribunal not taken the FRY, Croatia, and Bosnia-Herzegovina to task by aggressively pursuing the enforcement of its arrest warrants within their borders? One view is that the Tribunal has been handcuffed by the "paper tiger" constraints of its own doctrine and unwarranted subordination to dubious local wartime authorities.¹¹³ A more incisive perspective to this dilemma, how-

¹¹¹ See Framework Agreement, *supra* note 110, at 75 (instating plan to end hostilities among former Yugoslavian republics); Peace Conference, *supra* note 110, at 223 (reconciling peaceful goals of previously warring factions to end of fostering stability and security in Balkans); Dayton Agreement, *supra* note 110, at 172 (recognizing establishment of Federation between Bosnia and Herzegovina as prerequisite to peace in respective Republics); see also John Pomfret, *The Dayton Hurrahs v. Bosnian Reality: Can Serbian Leader Deliver Peace?*, WASH. POST, Nov. 23, 1995, at A35 (emphasizing importance of Milosevic carrying out promise of compliance with plan and replacement of Karadzic and Mladic).

¹¹² See Dayton Agreement, *supra* note 110, at 172 (declaring that signatories freely "agreed to radical steps to achieve the political, economic and social integration of the Federation"); see also O'Shea, *supra* note 106, at 376 (stating that "as required by Resolution 827, all domestic legislation enables countries to cooperate with the [ICTY]" and to "transfer suspects" over to Hague). *But see* Dusan Cotic, *A Critical Study of the International Tribunal for the Former Yugoslavia*, 5 CRIM. L.F. 223, 235 (1994) (suggesting that although on record three Balkan governments agreed to cooperate, judging from Bosnian Serb government refusal to extradite accused war criminals, Croatia and Bosnia would likely follow suit); *Karadzic Won't Cooperate with U.N. Tribunal*, REUTERS WORLD SERV., May 26, 1993, available in LEXIS, World Library, TXTLNE File (reporting that Karadzic asserted that, until Bosnian-Serb Republic has been recognized by U.N., alleged criminals would be dealt with by "our own national judiciary").

¹¹³ See Bland, *supra* note 96, at 271 (predicting that despite "laudable move" of creating ICTY, "[p]ressure to negotiate an agreeable settlement to the bloody two-year-old war, coupled with demands for immunity from suspected war criminals-peace negotiators, will probably undermine any possibility of trying those responsible"); Kenneth S. Gallant, *Securing the Presence of Defendants Before the International Tribunal for the Former Yugoslavia: Breaking with Extradition*, 5 CRIM. L.F. 557, 562 (1995) (arguing that international obligation to surrender suspects to ICTY/ICTR is superior to any domestic law that might otherwise prevent surrender or extradition); see also Gordon, *supra* note 31, at 228 (observing that in Rwanda "primacy of ICTR [might] cause conflict with the domestic courts anxious to prosecute all culprits" as ICTR not is "openly accepted by all Rwandans"); Gerry J. Simpson, *Didactic and Dissident Histories in War Crimes Trials*, 60 ALB. L. REV. 801, 837 (1997) (noting that "[d]omestic laws have been applied in an irregular and often dubious manner to a very small number of suspected war criminals" and that "[m]unicipal tribunals have been proven unsatisfactory, subjective and selective in their definitions of war crimes and crimes against humanity"). *But see* Mark S. Martins, *National Forums for Furnishing Offenses Against International Law: Might U.S. Soldiers Have their Day in the Same Court?*, 36 VA. J. INT'L L. 659, 659 (1996) (asserting that ICTY "reflects great interest in meeting procedural aspect of challenge" of trying war criminals, and that "rules of procedure and evidence represent a robust framework of due process").

ever, is gained through a close reading of the ICTY Statute's accompanying Rules of Procedure and Evidence ("P&E Rules").¹¹⁴

First, in the event a state takes no action "within a reasonable time" upon the issuance of an ICTY warrant, Rule 59(B) of the ICTY's P&E¹¹⁵ ambiguously asserts that such inaction be "deemed a failure to execute the warrant" and that the ICTY "may notify the Security Council accordingly."¹¹⁶ Subsequently, where such failure to execute a warrant is due to the "failure or refusal of a State to cooperate" with the ICTY, under the similarly ambiguous mandate of P&E rule 61(E),¹¹⁷ the ICTY's only recourse ap-

¹¹⁴ See International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991: Rules of Procedure and Evidence (adopted Feb. 11, 1994), available in 33 I.L.M. 484 (1994) [hereinafter P&E Rules]. The Rules were adopted on February 11, 1994. *Id.* at Bruce Zagaris, Introductory Note. Zagaris remarks that P&E rules are historically significant "for public international law . . . because of the relative novelty of the [ICTY] and perhaps, even more importantly, for the precedent they set for the establishment of a permanent ICC". *Id.* While the ICTY's competence is presumed superior to national courts, Rule 9 anticipates that "if within 60 days after an [ICTY] request for deferral has been made the national state fails to respond satisfactorily, the [ICTY] may request [that its] President [] report the matter to the Security Council [for appropriate action]." *Id.* at 486. *But see Cotic, supra* note 112, at 233. Above and beyond any consideration of the P&E Rules, a prevailing view among Serbian legal experts is that the Security Council exceeded its mandate altogether in setting up ICTY (and ICTR) under Chapter VII of the UN Charter, since such Tribunals are not "subsidiary organs" of the Security Council. *Id.* Rather, the "establishment of the [ICTY] is viewed as an assertion of political supremacy over small nations that would not be attempted in relation to big powers." *Id.*

¹¹⁵ See P&E Rules, *supra* note 114, Rule 59. Part A provides: "Where the State to which a warrant of arrest has been transmitted has been made unable to execute the warrant, it shall report forthwith its inability to the Registrar, and the reasons therefor." *Id.* at 518.

¹¹⁶ *Id.* at 518. Part B provides: "If, within a reasonable time after the warrant of arrest has been transmitted to the State, no report is made on action taken, this shall be deemed a failure to execute the warrant of arrest and the Tribunal, through the President, may notify the Security Council accordingly." *Id.* *But see* Schmandt, *supra* note 51, at 363. As one plausible rationale for this dilemma, Schmandt proposes that in view of the "world's lack of commitment after acknowledging such horrendous crimes," the catch-22 obstacle is that "indicting political leaders in the midst of negotiations could certainly have a chilling effect on [those] negotiations." *Id.*

¹¹⁷ See P&E Rules, *supra* note 114, Rule 61(E). Paragraph E provides:

If the Prosecutor satisfies the Trial Chamber that the failure to effect personal service was due in whole or in part to a failure or refusal of a State to cooperate with the Tribunal in accordance with Article 29 of the Statute, the Trial Chamber shall so certify, in which event the President shall notify the Security Council.

Id. at 519-20; *see also* Mutua, *supra* note 34, at 181-82. The ICTY prosecutor depends on the cooperation of the very States of the former Yugoslavia "the perpetrators of war crimes themselves, for assistance to apprehend suspects and to gain access to evidence." *Id.* at 181. However, as the meager numbers of those war criminals rounded up shows, "states have been reluctant to assist the [ICTY] in tracking down suspects" and "[i]n some cases states have refused to cooperate." *Id.* at 182. To further complicate matters, "[s]hort of imposing economic or other sanctions, a course of action that is unlikely, the United Nations cannot force compliance by a recalcitrant state." *Id.*

pears to be "to notify the Security Council."¹¹⁸ A cursory reading of these rules quickly demonstrates the lack of a necessary and effective enforcement mechanism which has compromised the purported judicial authority of the ICTY. In support of the ICTY, Art. IX of the Dayton initiative's General Framework Agreement ("GFA")¹¹⁹ requires such signatories as the Bosnian authorities to fully cooperate with and grant unrestricted access to the ICTY.¹²⁰ Presumably, under a joint reading of the ICTY/P&E and GFA, then, Serbia, Croatia, Bosnia, and the FRY are all required to surrender persons indicted for war crimes upon the request of the Tribunal.¹²¹ Clearly, this ideal has yet to be realized, as the ICTY's "authority" has been skirted and impeded at every turn, due in part to the "toothless" language of the ICTY/P&E rules.¹²²

¹¹⁸ See P&E Rules, *supra* note 114, Rule 61(E), at 520 (providing that failure or refusal of state to effect personal service of ICTY arrest warrant shall be sufficient cause for ICTY President to notify UN Security Council); see also Gallant, *supra* note 113, at 560 (commenting that Rule 61(E) "change in terminology reflects important conceptual and operative differences between transfer or surrender under the [ICTY] Statute and under traditional extradition").

¹¹⁹ See Framework Agreement, *supra* note 110, art. IX, at 90. Article IX sets forth that: The Parties shall cooperate fully with all entities involved in implementation of this peace settlement, as described in the Annexes to this Agreement, or which are otherwise authorized by the United Nations Security Council, pursuant to the obligation of all Parties to cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law.

Id.

¹²⁰ See *id.*; see also Walter Gary Sharp, Sr., *International Obligations to Search For and Arrest War Criminals: Government Failure in the Former Yugoslavia?*, 7 DUKE J. COMP. & INT'L L. 411, 443 (1997). Beyond acknowledging and reaffirming "the obligation of all Parties to cooperate in the investigation and prosecution of war crimes and other violations of international law," under Article X of Annex 1-A, the parties further agreed to fully cooperate with ICTY procedures. *Id.*; Paul C. Szasz, *The Protection of Human Rights Through the Dayton/Paris Peace Agreement on Bosnia*, 90 AM. J. INT'L L. 301, 301 (1996). The Bosnia Proximity Peace Talks culminated in the initialing of the General Framework Agreement for Peace on November 21, 1995, near Dayton, Ohio by the representatives of the principal Balkan States, and as witnessed by representatives of the EU. *Id.*; see also William L. Hurlock, *The International Court of Justice: Effectively Providing A Long Overdue Remedy for Ending State-Sponsored Genocide (Bosnia-Herzegovina v. Yugoslavia)*, 12 AM. U. J. INT'L L. & POL'Y 299, 299 (1997). The General Framework Agreement was subsequently signed in Paris, France on December 14, 1995, "officially" ending the ethnically-driven hostilities in the former Socialist Federal Republic of Yugoslavia. *Id.*

¹²¹ See P&E Rules, *supra* note 114, Rule 61(E), at 519-20 (setting forth procedure whereby ICTY President was required to notify UN Security Council in event of member state's failure to serve ICTY-issued arrest warrant); Framework Agreement, *supra* note 110, art. IX (mandating full cooperation of all signatories in implementation of peace settlement); see also P&E Rules, *supra* note 114, Rule 57 (explaining procedure for arrest, detention, and transfer of accused to Hague seat of ICTY); *id.* Rule 58 (declaring that Article 29 of ICTY Statute shall preempt any impediments under national law otherwise blocking extradition).

¹²² See P&E Rules, *supra* note 114, Rule 59(B), at 518 (proposing that in event State fails to execute ICTY arrest warrant, ICTY President "may notify the Security Council accordingly") [emphasis supplied]; see also Framework Agreement, *supra* note 110, art IX, at 90

In fact, as it will be discussed presently, further indicia of the ICTY's compromised enforcement authority is evinced from the conflicting and otherwise "absent" language of Security Council Resolution 103¹²³ and the UNPROFOR/IFOR initiative.¹²⁴

(declaring that all parties freely agree to be bound by pact and to cooperate in apprehension of war criminals); Krass, *supra* note 105, at 350 (noting that perceived problems with ICTY include "obtaining custody of defendants, the difficulties with establishing a chain of command, and the tribunal's potential interference with the peace process"); *id.* (asserting that ICTY was criticized for being "politicized and dominated by states whose nationals [were] not subject to the tribunal's jurisdiction" and because ICTY's "jurisdiction [was] limited to crimes committed in the former Yugoslavia since 1991"); Howard S. Levie, *A Comparison with the Past and a Look at the Future*, 21 SYRACUSE J. INT'L L. & COM. 1, 23 (1995) (noting that given tight socioeconomic interdependence, Yugoslavian territories cannot be expected to surrender personnel to ICTY for prosecution).

¹²³ See S.C. Res. 1034, U.N. SCOR, 50th Sess., 3612th mtg., at 1, U.N. Doc. S/RES/1034 (1995) [hereinafter Resolution 1034]. Apart from "affirming," "reaffirming," "urging," "condemning," and "strongly condemning," conspicuously absent from Resolution 1034's mandates are any viable means of enforcement. *Id.* [emphasis supplied]; Szasz, *supra* note 120, at 314. Through Resolution 1034, the Security Council "merely noted approvingly that the [Dayton] Peace Agreement prohibits persons sentenced or indicted by the [ICTY] from holding public office in Bosnia." *Id.* Resolution 1034, however, "conspicuously failed to specify any additional powers or tasks to assist the [ICTY]" in fulfillment of its juridical mission. *Id.*

¹²⁴ See U.N. S.C. Res. 743, *Establishing the United Nations Protection Force*, U.N. SCOR, 47th Sess., 3055th mtg., at 1, U.N. Doc. S/RES/743 (1992), available in 31 I.L.M. 1427, 1447-48 (1992) [hereinafter UNPROFOR]. In pertinent part, Resolution 743 provides:

The Security Council, reaffirming its resolutions . . . Convinced that the implementation of the United Nations peace-keeping plan . . . will assist the Conference on Yugoslavia, including the mechanisms set forth within it, to ensure a peaceful settlement . . .

1. Approves the report of the Secretary-General of 15 February 1992 (S/23280);
2. Decides to establish, under its authority, a United Nations Protection Force (UNPROFOR) in accordance with the above-mentioned report and the United Nations peace-keeping plan and requests the Secretary-General to take the measures necessary to ensure its earliest possible deployment[.]

Id. at 1447-48; see also *Report of the Secretary-General on the Transition from UNPROFOR to IFOR and Addendum on Cost Estimates, Including Security Council Resolutions 1031 (1995) and 1035 (1995), Addressing the Political Settlement in the Former Yugoslavia and the Transfer of Power from UNPROFOR to IFOR (13-21 December 1995)*, S.C. Res. 1035, U.N. SCOR, 50th Sess., 3613th mtg., at 1, U.N. Doc. S/RES/1035 (1995), available in 35 I.L.M. 235, 235 [hereinafter *Report on the UNPROFOR/IFOR Transition*]. S.C. Resolution 1035 sets out in pertinent part:

The Security Council, Recalling its resolution 1031 (1995) of 15 Dec. 1995 recalling also the General Framework Agreement . . .

2. Decides to establish, for a period of one year from the transfer of authority from the United Nations Protection Force to be known as the International Police Task Force (IFOR), a United Nations civilian police force to be known as the International Police Task Force (IPTF) to be entrusted with the tasks set out in Annex 11 of the Peace Agreement . . .

Id.; see also Alan K. Henrikson, *The United Nations and Regional Organizations: "King-Links" of a "Global Chain"*, 7 DUKE J. COMP. & INT'L L. 35, 36 (1996). On December 20, 1995, a changing of the guard was completed whereby UNPROFOR "was succeeded by an alliance-based multinational Implementation Force (IFOR) commanded by NATO and with the UN's authority." *Id.* But see Walter Gary Sharp, Sr., *Protecting the Avatars of International Peace and Security*, 7 DUKE J. COMP. & INT'L L. 93, 160-61 (1996). At a 1996 commencement address given in Germany to American students, Judge Richard Goldstone,

In the first instance, on December 21, 1995, on the heels of the signing of the Dayton Peace Agreement (the GFA), the UN Security Council issued Resolution 1034.¹²⁵ The apparent impetus of the Resolution was to rubber stamp the GFA's reaffirmance that no persons indicted by the Tribunal be allowed to serve in public office in Bosnia.¹²⁶ One immediate drawback of this Resolution, however, was the conspicuous absence of any affirmative language specifying any supplementary powers or means of assisting the Tribunal to carry out its mandate vis-à-vis the goals established by the GFA.¹²⁷ On its face, this would proffer yet another explanation as to the dilemma of the Tribunal's relative ineffectiveness.

G. *Of Paper Tigers, Tin Soldiers and Opportunities Lost*

On the other hand, the UNPROFOR/IFOR initiative provides an even more compelling insight as to the War Crimes Tribunal's handcuffed efforts in effecting the arrest of indicted war criminals

Chief Prosecutor of the ICTY, "urged IFOR to take a more robust approach in arresting suspects and condemned IFOR's policy of refraining from action because of the dangers involved." *Id.* at 160-61.

¹²⁵ See Resolution 1034, *supra* note 123, at 235. The net effect of Resolution 1034 was to rubber stamp the Dayton Peace Agreement and to endorse the establishment of IFOR. *Id.*; Szasz, *supra* note 120, at 314. In a lengthy Resolution 1034, the Security Council "merely noted approvingly that the Peace Agreement prohibits persons sentenced or indicted by the Tribunal from holding public office in Bosnia." *Id.* The Council, however, "conspicuously failed to specify any additional [enforcement] powers or tasks to assist the Tribunal" in fulfilling its mission. *Id.* But see *Peace Agreements Bring a "Long-Delayed Birth of Hope": Multinational Force Set Up in Bosnia to Replace UNPROFOR*, U.N. CHRON. March 22, 1996, at 25, available in 1996 WL 10924410. A more enthusiastic appraisal of Resolution 1034's promulgation suggests that the Bosnian Serb party might in all seriousness even consider the Security Council's "strong urging" to "give immediate and unimpeded access" into war-torn areas to U.N. personnel "for the purposes of the investigation of atrocities." *Id.*

¹²⁶ See Stephen Albert, *The Dayton Agreement: Peace with Dishonor*, ARAB AM. NEWS, Dec. 8, 1995, at 6, available in 1995 WL 15280591 (criticizing that from very start ICTY and Dayton Peace Talks proceeded on two separate tracks, insofar as "[i]nternational law has meaning only if there are effective mechanisms for its enforcement—something clearly lacking in the rift between ICTY and Peace Accord"); *U.S. Steps Up Pressure on Milosevic to Oust Karadzic*, AGENCE FR.-PRESSE, May 22, 1996, available in 1996 WL 3858494 (reporting that U.S. pressured Serbian President Milosevic to remove "hardline Bosnian Serb Leader Karadzic" under threat of sanctions).

¹²⁷ See *War Crimes Chief to Call for Sanctions Against Serbs*, AGENCE FR.-PRESSE, June 6, 1996, available in 1996 WL 3866541 (reporting that Chief Justice Cassese of ICTY called for reimposition of sanctions against Bosnian Serbs who had "failed to hand over indicted war crime suspects" and who had been generally uncooperative); see also *Bosnian Serbs Against Sending Brethern to War Crimes Tribunal*, AGENCE FR.-PRESSE, May 3, 1996, available in 1996 WL 3848550 (quoting Bosnian Serb Premier Kasagic as arguing: "We do not refuse to cooperate with the [ICTY], but sending alleged war criminals is a more difficult question since it is against our constitution"). But see Sharp, *supra* note 120, at 443 (describing virtually unbridled authority of IFOR Commander to deploy military power at his discretion in order to protect IFOR and insure it carried out its mandate).

in the area of the former Yugoslavia.¹²⁸ The original objective of UNPROFOR, and its successor, IFOR, established under the consensus of the five permanent members of the Security Council, was threefold.¹²⁹ UNPROFOR/IFOR sought to diffuse the humanitarian consequences of the conflict, to contain it within the territory of the former Yugoslavia, and to facilitate a peaceful resolution of the hostilities.¹³⁰ In addition to having been described as being purely "reactive," more important, these goals also failed to define a clear political objective on the part of the external UN powers in implementing UNPROFOR/IFOR.¹³¹ Specifically, dur-

¹²⁸ See Berdal, *supra* note 8, at 77. One plausible scenario proffered to help explain this dilemma is that, in view of the questionable multinational effort waged against Iraq in the Gulf War, there was no great haste or determination among parties external to the Balkan conflict to enter that fray. *Id.* Nor, for that matter, did anyone hasten to take sides or to interpret the jumbled priorities of self-determination, *ius cogens*, and "ethnic cleansing" as merely a "black and white issue calling for enforcement action." *Id.*; see also Henrikson, *supra* note 124, at 36. Chief ICTY Prosecutor Goldstone has been highly critical of IFOR insofar as IFOR's "hands-off" policy in the Balkans has impeded the mission of the ICTY. *Id.* But see Albert, *supra* note 126, at 6. The troubling issue of IFOR's abject failure to enforce arrest warrants is far outshaded by the greater peril that peace and security possibly may never be achieved in the Balkans due to the philosophical rift between a very pragmatic ICTY's efforts being undercut by an ambitious yet toothless U.N. peace initiative. *Id.*

¹²⁹ See Berdal, *supra* note 8, at 76-77 (setting forth and explaining nature of tri-partite enforcement objective via UNPROFOR's presence in Balkans).

¹³⁰ *Id.* at 76-77. Specifically, Berdal explains that, from 1991 through 1995, the consensus among the five permanent members of the Security Council regarding:

[T]he U.N.'s role in the former Yugoslavia under the aegis of the United Nations Protective Force (UNPROFOR) was confined to three basic objectives: (1) relieving as far as possible the humanitarian consequences of the war; (2) containing the conflict to the territories of the former Yugoslavia; and (3) encouraging and facilitating a negotiated solution among parties.

Id. But see King, *supra* note 88, at 358. Painting a more positive version of a bleak picture of the overall UNPROFOR/IFOR enforcement debate, King argues that since UNPROFOR's inception, the Security Council in fact focused its efforts on "enforcing, expanding, and reinforcing UNPROFOR's mandate" to foster an environment of peace and security. *Id.* To better achieve the foregoing aim, particularly in view of providing humanitarian aid in the face of mounting atrocities in Bosnia-Herzegovina, the laissez-faire rationale goes that "the Council deferred the task of negotiating an overall political settlement of the conflict to the [EC], urging the three communities in Bosnia to participate in the ongoing discussions." *Id.*

¹³¹ See Berdal, *supra* note 8, at 77. Supporting this very conclusion, in 1994 William Shawcross remarked that, in fact, "the Western powers [had] 'never defined a political objective for former Yugoslavia.'" *Id.*; Stephen A. Wangsgard, *Secession, Humanitarian Intervention, and Clear Objectives: When to Commit United States Military Forces*, 3 TULSA J. COMP. & INT'L L. 313, 333-34 (1996). Similarly, the Clinton Administration was criticized for failing "to articulate clear and convincing policy objectives for intervening in Bosnia." *Id.*; cf. Jill M. Sheldon, *Nuclear Weapons and the Laws of War: Does Customary International Law Prohibit the Use of Nuclear Weapons in all Circumstances?*, 20 FORDHAM INT'L L.J. 181, 208 (1996). It is argued that the "laws of war establish restrictions on the conduct of hostilities, and attempt to balance the necessities of war with humanitarian principles." *Id.* In this regard, therefore, "[b]y regulating when states may initiate war and states' subsequent actions during war, the laws of war seek to limit armed conflicts." *Id.*

ing the years of its operation (from 1992-95), the lack of a clearly defined objective plus the contradictory mandate that it take a more aggressive stance without compromising its original peacekeeping status, frustrated UNPROFOR's long-term peace enforcement efforts.¹³² A 1995 U.N. report described the dilemma shouldered by UNPROFOR as one which required it to assume normal peacekeeping rules while implementing functions adopted under Chapter VII of the UN Charter.¹³³

The consequences of this contradictory mandate were subsequently inherited by UNPROFOR's successor, IFOR.¹³⁴ In 1995,

¹³² See Berdal, *supra* note 8, at 78 (noting that while UNPROFOR sought to reconcile its contradictory aims it was forced to contend with concomitant conflicting pressure from U.N. members "to take more forceful action" without compromising its peacekeeping mandate); Elgin Clemons, *No Peace to Keep: Six and Three Quarters Peacekeepers*, 26 N.Y.U. J. INT'L L. & POL. 107, 123 (1993) (observing that in view of highly political nature of peacekeeping actions in "civil war settings" recently, efforts of U.N. are more likely to fail than "glorified sentry missions" of past); see also *id.* at 134 (describing Dag Hammarskjold model of "aggressive peacekeeping" whereby neutral peacekeepers' "military presence" presumed to deter continued hostilities).

¹³³ See Berdal, *supra* note 8, at 78 (quoting Report of the Secretary-General Submitted Pursuant to Security Council Resolution 982 (1995)). As characterized by Berdal, the scope of the Report went thus:

While the function UNPROFOR was tasked to implement was adopted under Chapter VII of the [UN] Charter . . . , the resolution determining its deployment assumed normal peacekeeping rules of engagement. UNPROFOR's mandate became further complicated by resolutions referring to Chapter VII for security and freedom of movement purposes, without clearly defining the tasks or ramifications emanating from them.

Id.; see also Christine Gray, *Host State Consent and United Nations Peacekeeping in Yugoslavia*, 7 DUKE J. COMP. & INT'L L. 241, 258 (1996). Despite the fact that UNPROFOR was originally deployed as a peacekeeping force which acted only pursuant to the consent of host states, the U.N. later invoked Chapter VII authority thereby binding the host states to cooperate with UNPROFOR. *Id.*; Antonio F. Perez, *On the Way to the Forum: The Reconstruction of Article 2(7) and Rise of Federalism Under the United Nations Charter*, 31 TEX. INT'L L.J. 353, 450 n.304 (1996). It is theorized that the U.N.'s "peacekeeping authority" does not derive from any one article under the Charter, but that such authority is implicit in the Security Council's mandate under the Charter "to maintain international peace and security in accordance with the Charter's purposes and principles." *Id.*

¹³⁴ See UNPROFOR, *supra* note 124, at 1447-48. UNPROFOR was implemented as a multinational peacekeeping force in an attempt to restore peace and security in the war torn former Yugoslavia. *Id.*; see also Report on the UNPROFOR/IFOR Transition, *supra* note 124, at 238. The Secretary reports that:

One of the matters yet to be finalized is the composition of IFOR. I am not therefore in a position to report with certainty which of the UNPROFOR contingents will participate in IFOR and, as a result, how many of the troops currently serving in UNPROFOR will need to be withdrawn from the theatre. However, on the basis of consultations with troop-contributing countries, it can be assumed that the larger part of the UNPROFOR units will transfer to IFOR.

Id. at art. II, para. 9; Joe Byrnes Sills, *United Nations Peacekeeping: The Years Past, the Years Ahead*, 24 DENV. J. INT'L L. & POL'Y 451, 454 (1996). UNPROFOR's original mandate in Croatia was to maintain a cease-fire and foster an environment conducive to a "political settlement." *Id.* Subsequently, UNPROFOR's mandate was extended to Bosnia-Herzegovina and ultimately expanded "to include border control, protecting the 'safe areas', supervising the withdrawal of heavy weapons from the exclusion zones, and assisting in the implementation of the cessation of hostilities agreements." *Id.*

the UN Security Council relegated UNPROFOR's "peace enforcement" authority to NATO which was reconfigured in the form of IFOR.¹³⁵ From the very outset, however, despite its formidable military presence in Bosnia, IFOR was reported as having "balked" at the prospect of seeking out and apprehending indicted war criminals or of protecting reputed crime areas, both in direct contravention of its mandate.¹³⁶ One can only speculate as to what motivated IFOR to commit such a direct breach of its mandate. Keeping in mind the ends sought through the Dayton Agreement, one might hazard the guess that the arrest of high ranking Bosnian Serb officials for war crimes could precipitate a threatened or actual withdrawal of Bosnia-Herzegovina from the Peace Accord.¹³⁷ A logical conclusion to be drawn then is that the shaky peace achieved in Bosnia through the Dayton Agreement is to be kept at all costs—even if it means allowing indicted war criminals Karadzic and Mladic to skirt international justice and thumb their noses at the authority of the ICTY and the credibility of the UN in the process.

¹³⁵ See Berdal, *supra* note 8, at 84 (noting that as of late 1995, UNPROFOR had been replaced "by a much more robust" IFOR operating under direction and control of NATO); see also Major Michael A. Newton, *Continuum Crimes: Military Jurisdiction Over Foreign Nationals Who Commit International Crimes*, 153 MIL. L. REV. 1, 92 n.180 (1996) (noting that although operating pursuant to Safety Convention, U.S. armed forces and UNPROFOR/IFOR forces were not under direct U.N. control; rather, authority to deploy forces "arises from mandates of Security Council exercising its Chapter VII enforcement powers").

¹³⁶ See James Podgers, *The International Criminal Tribunals for the Former Yugoslavia and Rwanda Hold the Key to the Next Advance in International Law*, 82-APR A.B.A. J. 52, 61 (1996). It was reported that NATO peacekeepers, including about 20,000 U.S. troops sent to former Yugoslavia, "balked" at either seeking out war criminals or at protecting sites of reported crimes. *Id.* Defending this "inaction", NATO/IFOR commanders rationalized that taking such actions "would constitute 'mission creep' and jeopardize the safety of their troops." *Id.*; see also Robert O. Weiner and Fionnuala Ni Aolain, *Beyond the Laws of War: Peacekeeping in Search of a Legal Framework*, 27 COLUM. HUM. RTS. L. REV. 293, 312 (1996). A more egregious account from 1995 tells of a Dutch battalion of UNPROFOR "charged with defending the Muslim population of Srebrenica," which failed to "prevent the disappearance of literally thousands of young Muslims rounded up by Bosnian Serb forces []." *Id.*; cf. Anthony Clark Arend, *The United Nations, Regional Organizations, and Military Operation*, 7 DUKE J. COMP. & INT'L L. 3, 21 (1996). By 1996, UNPROFOR's position was extremely weakened and its authority "murky" to the point where Bosnian Serbs resorted to "holding UN peacekeepers hostage to deter further NATO action." *Id.*

¹³⁷ See Podgers, *supra* note 136, at 61. Bosnian Serbs threatened to withdraw from the Dayton Accord upon the arrest of two top Serbian military officials suspected of war crimes. *Id.* Eventually, so that the Bosnian Serbs might abide by the Accord, the Bosnian government was forced to agree that it would make no further arrests. *Id.* at 62; see also Sharp, *supra* note 120, at 454. Moreover, it was feared that the arrest of indicted officials could "shatter Bosnia's fragile peace" and precipitate further hostilities. *Id.* But see *id.* at 456-57. Despite these misgivings, a Bosnian Serb military official informed NATO that Karadzic's arrest would not provoke a violent reaction among the Bosnian Serbs, and that the Serb military was indifferent to Karadzic being deposed. *Id.*

On a final note, it has also been suggested that the telling answer to the foregoing dilemma may lie within the contradictory official language of the IFOR mandate itself.¹³⁸ Suffice it to say that, regardless of the attributable source of the problem, the War Crimes Tribunal's abject ineffectiveness in meting out international justice demonstrates the urgency for a stronger long-term solution in the form of an independent International Criminal Court.¹³⁹ The overwhelming international consensus regarding the need to prosecute war criminals and human rights violators in the former Yugoslavia now affords the UN the propitious opportunity to create such a permanent International Criminal Court.¹⁴⁰

¹³⁸ See S.C. Res. 1035, *supra* note 124, at 256. Through Resolution 1035, the UN Security Council officially declared its mandate:

Decid[ing] to establish, for a period of one year from the transfer of authority from the United Nations Protection Force to the multinational implementation force (IFOR), a United Nations civilian police force to be known as the International Police Task Force (IPTF) to be entrusted with the tasks set out in Annex 11 of the Peace Agreement and a United Nations civilian office with the responsibilities set out in the report of the Secretary-General, and to that end endorses the arrangements set out in the report of the Secretary-General.]

Id. at para. 2; Berdal, *supra* note 128, at 89-89. Similarly, the UNPROFOR mandate adopted under Chapter VII of the UN Charter, "assum[ing] normal peacekeeping rules," is also muddled by implementing UN Resolutions which make concomitant references to Chapter VII within a "security and freedom of movement" context. *Id.* (quoting Report of the Secretary-General Submitted Pursuant to Security Council Resolution 982 (1995)). *But see* NATO, *U.N. Court Reach Agreement on Arresting War Crimes Suspects*, AGENCE FR.-PRESS, May 9, 1996, available in 1996 WL 3851628. European news agencies reported that after months of inactivity by NATO regarding the arrest of war criminals indicted by the ICTY, the ICTY and NATO signed an agreement "outlining what the peace force in Bosnia should do to bring suspected war criminals to justice." *Id.* But according to NATO, for the most part, all the pact sought to accomplish was to "establish[] a code of conduct for the 60,000-strong peace force[.]" *Id.* Indeed, while under the pact "IFOR will continue to support as fully as possible the ICTY (and) provide surveillance of sites which are of interest," NATO nevertheless "stress[ed] that IFOR is not obliged to hunt down the 54 Serbs, Croats and Moslems from Bosnia and three federal Yugoslav officers indicted by the court." *Id.* A review of these objectives together with IFOR's official mandate, as set forth in UN Resolution 1035, suggests that NATO, in clear contravention of Resolution 1035, unilaterally abdicated from its law enforcement responsibility thereunder, ignoring and thereby trumping altogether the UN Security Council's authority to establish IFOR. *Id.*

¹³⁹ See Wilson, *supra* note 38, at 1 (citing anticipated diplomatic conference in Rome, Italy in 1998 for ratification of ICC convention); see also M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT'L & COMP. L. REV. 1, 20-23 (1991) (examining various models upon which to establish international court); Guffey-Landers, *supra* note 39, at 201 (analyzing proposals for international criminal court vis-à-vis existing system for carrying out international justice); cf. Sontosus, *supra* note 97, at 32 (stating that if ICC existed victors' psychological dilemma would be partly obviated).

¹⁴⁰ See Benjamin B. Ferencz, *An International Criminal Code and Court: Where They Stand and Where They're Going*, 30 COLUM. J. TRANSNAT'L L. 375, 397 (1992) (noting that members of General Assembly from Netherlands, Canada, Georgia and Italy called on International Law Commission to develop International Criminal Court with aim of prosecuting political and military leaders who ordered or condoned atrocities); Rose Marie Karadshah, *Creating an International Criminal Court: Confronting the Conflicting Criminal Procedures of Iran and the United States*, 14 DICK. J. INT'L L. 243, 251 (1996) (discussing

The efficacy of such a forum will inevitably turn on separating the legal process of indictments and prosecutions from the immediate political conflict, and more important, the legal process from the actual negotiation process itself.¹⁴¹

III. AN INTERNATIONAL CRIMINAL COURT: FROM PLOWSHARES TO SWORDS

A. *Reevaluating Juridical Priorities: Moving Away from "Victor's Justice"*

Ideally, the War Crimes Tribunal's successful prosecution of human rights violators would signal the dawning of a new age in the annals of international justice, whereby "might" would no longer necessarily make "right," and where military and political power would ultimately be subordinated to a higher law.¹⁴² But the world in which we live is far short of ideal. This, however, did not stop United States Supreme Court Justice Frank Murphy from foreshadowing just such an eventuality in his famous dissent

four major positions taken by U.N. states concerning creation of ICC); see also G.A. Res. 2840, *supra* note 107, at 79 (declaring that state's refusal to cooperate in extradition of war criminals violates UN Charter). *But see* Blakesley, *supra* note 105, at 78 (stating that "primacy of a permanent tribunal may be unacceptable to some UN Charter states").

¹⁴¹ See Krass, *supra* note 105, at 352 (recognizing independent ICC would rid itself of ad hoc ICTY constraints by being "free of partiality and politicization" and therefore being "more [able] to resolve cases on the merits"); Sontosus, *supra* note 97, at 32 (stating that if ICC were implemented ethical dilemma of victors would be partly obviated); see also Timothy C. Evered, *An International Criminal Court: Recent Proposals and American Concerns*, 6 PACE INT'L L. REV. 121, 158 (1994) (arguing that establishment of permanent court would better address concerns of international community); Krass, *supra* note 105, at 354 (noting that those states unwilling to extradite war criminals might otherwise "cede jurisdiction to an international criminal court").

¹⁴² See Michael D. Greenberg, *Creating an International Criminal Court*, 10 B.U. INT'L L.J. 119, 130 (1992). Political neutrality would be vital to an ICC's authority and endurance in that, to the extent that such a court is indeed "objective [it would] enjoy no more international support than a court merely appearing to embrace such equity." *Id.*; see also William N. Granaris, *The New World Order and the Need for an International Criminal Court*, 16 FORDHAM INT'L L.J. 88, 110 (1992). Moreover, an ICC's neutral approach would likely obviate reliance on a given nation's superior military or economic power. *Id.*; cf. Ferencz, *supra* note 140, at 397. Ironically, during the 1992 meeting of the UN General Assembly, the President of Bosnia and Herzegovina himself "requested an international war crimes tribunal . . . as a prerequisite for peace[.]" *Id.* *But see* Michael Scharf and Valerie Epps, *The International Trial of the Century?: A "Cross-Fire" Exchange on the First Case Before the Yugoslavia War Crimes Tribunal*, 29 CORNELL INT'L L.J. 635, 643 (1996). Since the ICTY was designed to function "independently of political considerations," and free of Security Council authority, theoretically, nothing prevented the ICTY "from prosecuting Russian, British, or American citizens that . . . participated as mercenaries in the fighting in the former Yugoslavia." *Id.*

in *In re Yamashita*.¹⁴³ There, Justice Murphy objected to the concept of the "victor's justice" characteristic of the post-WWII Nazi war crimes trials.¹⁴⁴ Criticizing the majority's stance, Justice Murphy emphasized that for order ever to prevail among the international community on the basis of "human dignity," of paramount importance is that the punishment of those guilty of war crimes be devoid of the "ugly stigma" of revenge and vindication.¹⁴⁵ Indeed, it has been argued that absent the encumbrance of "victor's justice" and political restraints, charges of war crimes could also have been brought against WWII's Allied powers by prosecutors.¹⁴⁶ For example, the internment of American citizens of Japanese and Italian ancestry, the dropping of two atomic bombs on Japanese civilians, and the firebombing of Dresden, were official U.S. acts readily classifiable as "war crimes."¹⁴⁷ This

¹⁴³ See *In re Yamashita*, 327 U.S. 1, 29-30 (1946) (Murphy, J., dissenting) (decrying highly prejudicial repercussions of so-called "victor's justice"); Fred Barbash, *War Tribunal Targets Three Bosnian Serbs Top Leaders Linked to "Mass Killings"*, WASH. POST, Apr. 25, 1995, at A1 (reporting that indictments were expected to be issued in mid-1995 against twenty-seven Bosnian Croats for their 1993 assault on Bosnian village resulting in deaths of 114 Muslim civilians); see also Framework Agreement, Nov. 21, 1995, *supra* note 110, art. 9 (mandating cooperation in prosecution of war crimes and violations of international humanitarian law). But see Santosus, *supra* note 96, at 28 (pointing out that despite its desirability International Criminal Court is not unanimously supported).

¹⁴⁴ *Yamashita*, 327 U.S. at 29-30 (Murphy, J., dissenting) (recognizing potential pitfalls and conflicts of "victor's justice" relating to post-WWII Nuremberg trials and imploring implementation of international justice devoid of "stigma of revenge and vindictiveness" on victor's part); see also Bland, *supra* note 96, at 260 (recognizing extant notion of "victor's justice" even today impeding success and objectivity of ad hoc tribunals).

¹⁴⁵ See *Yamashita*, 327 U.S. at 29-30 (Murphy, J., dissenting). To this end, Justice Murphy urged the majority to "insist . . . that the highest standards of justice be applied in th[e] trial of an enemy commander conducted under the authority of the United States." *Id.* To do otherwise, warned Justice Murphy, would allow "stark retribution . . . to masquerade in a cloak of false legalism." *Id.* at 30; see also Roberts, *supra* note 46, at 24. Roberts discusses the politicized one-sidedness of the former Nuremberg and Tokyo WWII tribunals. *Id.* But see Sheldon Glueck, *The Nuremberg Trial and Aggressive War*, 59 HARV. L. REV. 396, 452 (1946). Early on it was recognized that, despite charges of "victor's justice," albeit in a limited sense, the Nuremberg proceedings were conducted according to prevailing common law notions of due process which provided the accused with their day in court. *Id.*; Bernard D. Meltzer, *A Note on Some Aspects of the Nuremberg Debate*, 14 U. CHI. L. REV. 455, 469 (1946-47). Even conceding that the Allies' "selective prosecution" was tantamount to victor's justice, it has been argued that the "greater depravity of the Nazis" justified the Allies' "comparatively minor deviations from accepted usages [which otherwise would] not have occurred." *Id.*

¹⁴⁶ See Scharf & Epps, *supra* note 142, at 643 (suggesting that tribunal like ICTY functioning "independently of political considerations" is free to prosecute all perpetrators of war crimes regardless of their respective nations' role in conflict); cf. Steven Fogelson, *The Nuremberg Legacy: An Unfulfilled Promise*, 63 S. CAL. L. REV. 833, 859-61 (1990) (arguing that Nuremberg was "merely a political 'show trial' meant to carry out the will of the victors"). But see Meltzer, *supra* note 145, at 469 (justifying Allies' "selective prosecution" in view of Nazis' unprecedented depravity).

¹⁴⁷ See Fogelson, *supra* note 146, at 859-860 (discussing how critics have argued that Allied Powers exercised arbitrary and illegal "victor's justice" over defeated Axis Powers);

line of reasoning is readily applicable to the acts of the various political players embroiled in the recent Balkan conflict.¹⁴⁸

Hence, while Serbian humanitarian law violations arguably have been the most pronounced,¹⁴⁹ a blanket recognition by the War Crimes Tribunal that all sides—be they Serb, Croat, Muslim, French or British, or any other actors in the conflict—have contributed to the atrocities, would lend greater credibility to the Tribunal's authority as an impartial dispenser of justice.¹⁵⁰ In an

James Brooke, *After Silence, Italians Recall the Internment*, N.Y. TIMES, Aug. 11, 1997, at A10 (recounting involuntary internment of Italian-Americans in Missoula, Montana during WWII); see also Roberts, *supra* note 46, at 24 (noting criticism of Nuremberg trials based on indifference to war crimes committed by Allies); Kristen M. Schuler, *Equal Protection and the Undocumented Immigrant: California's Proposition 187*, 16 B.C. THIRD WORLD L.J. 275, 289 (1996) (quoting Roger Daniels, *Why It Happened Here, in RACISM IN CALIFORNIA: A READER IN THE HISTORY OF OPPRESSION* 167 (Roger Daniels & Spencer C. Olin, Jr. eds., 1972)) (suggesting "exclusion and internment of Japanese-Americans . . . [was] most widespread disregard of personal rights since slavery"); cf. Santosus, *supra* note 96, at 32 (stating that "a permanent ICC would leave nations with less discretion to adjudicate criminal cases in which they take an interest"). But see *Korematsu v. United States*, 323 U.S. 214, 217-18 (1944) (holding that involuntary internment of American citizens of Japanese ancestry during WWII was reasonably related to prevention of espionage and sabotage and was therefore justified under war power of Congress).

¹⁴⁸ See Schmandt, *supra* note 51, at 341-43. During the Balkan conflict, in addition to the thousands of civilians maimed and slaughtered "in the two-year siege of Sarajevo," there were also widespread reports of young girls and women being raped and killed for sport. *Id.* at 342. The nature and frequency of these war crimes suggested "that individual soldiers as well as entire military units [did] not anticipate disciplinary action from their superiors." *Id.* at 343; see also Kathleen M. Pratt and Laurel E. Fletcher, *Time for Justice: The Case for International Prosecutions of Rape and Gender-Based Violence in the Former Yugoslavia*, 9 BERKELEY WOMEN'S L.J. 77, 86 (1994). Not to be overlooked is the fact that, despite the majority of rapes and ethnic atrocities being attributable to Bosnian Serbs, the very same crimes, albeit to a lesser degree, were also perpetrated by "Bosnian Muslim and Croatian forces against Serbian women." *Id.* See generally Payam Akhavan, *Enforcement of the Genocide Convention: A Challenge to Civilization*, 8 HARV. HUM. RTS. J. 229, 239-40 (1995). In Resolution 935, the Commission of Experts' interim report verified a systematic campaign of genocide against the Tutsi group of Rwanda and urged the Security Council to implement what was to become the ICTR. *Id.*

¹⁴⁹ See 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, 248 (1994) (discussing reports of Serbian human rights violations targeted at Bosnian Muslims civilians); Michael P. Scharf and Lawrence D. Roberts, *The Interstellar Relations of the Federation: International Law and "Star Trek": The Next Generation*, 25 U. TOL. L. REV. 577, 612 (1994) (noting gross human rights violations encompassing over two million displaced people); see also CROATIAN INFO. CENTER, *supra* note 26, at 107 (effectively heralding "ethnic cleansing", Karadzic openly proclaimed that only Serbians should populate his new republic); Roger Cohen, *End of Cold War Offers Chilling New Dangers*, PLAIN DEALER (Cleveland), Nov. 26, 1994, at 15A (recalling fall of communism in eastern bloc countries and concomitant resurgence of violent ethno-racial nationalist movements);

¹⁵⁰ See Krass, *supra* note 105, at 318. In order "to bring perpetrators of rape to justice," it has been argued that a judicial forum, among other things, must "be impartial . . . avoid politicization . . . [and] have an enforcement mechanism[.]" *Id.*; Paul D. Marquardt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 33 COLUM. J. TRANSNAT'L L. 73, 100 (1995). Given crises where opposing powers are unwilling to concede to themselves the sovereign authority to sit in judgment of each other, "an international court could dispense not only justice, but peace," as well as providing "valuable credibility

ideal world, the “evenhanded enforcement” of international humanitarian law would take precedence over the “one-sided prosecution” of genocide and war crimes like that which occurred at Nuremberg.¹⁵¹ Suffice it to say, due to its impracticability, this idealistic eventuality has been an elusive one. Rather, under a more practical assessment of recent current events, the “evenhanded enforcement” of humanitarian law will be effectively accomplished through the imminent promulgation of an impartial and permanent International Criminal Court.¹⁵²

B. Carving Out a New Instrument from Old Doctrine

One of the main goals of the new world awareness forged through the UN was to avert mankind’s self-annihilation through modern global warfare.¹⁵³ Consistent with this premise, a key con-

and legitimacy to help stem fears of retaliation by the victors.” *Id.*; see also Bhattacharyya, *supra* note 15, at 75. Not to be discounted in this regard is the distinct probability that the implementation of a biased tribunal embodying notions of victor’s justice “would cast international criminal law as no more than a tool of American foreign policy.” *Id.*; Gordon Ireland, *Ex Post Facto from Rome to Tokyo*, 21 *TEMPLE L.Q.* 27, 56-57 (1947-48). On the heels of the Nuremberg decisions it was posited that the “equitable principle of ‘unclean hands’ would not provide a relevant defense . . . selective prosecution is only of concern in so far as it undermined the Tribunal’s moral credibility.” *Id.* But see Chesterman, *supra* note 109, at 310. Regarding the ICTY and the ICTR, the U.N., it is argued, appears to have been “more prepared to forgo bringing war criminals to ‘justice’ in order to preserve hopes of peace in the Balkans.” *Id.*

¹⁵¹ See Ireland, *supra* note 150, at 56-57 (addressing equitable principle of “unclean hands” and concept of “victor’s justice”); see also *In re Yamashita*, 327 U.S. 1, 30 (1946) (Murphy, J., dissenting) (warning that majority’s decision was akin to political retribution masquerading in “cloak of false legalism”); Fogelson, *supra* note 146, at 860 (discussing exercise of arbitrary and illegal “victor’s justice” over defeated powers). But see Martins, *supra* note 113, at 671 (suggesting that as Nuremberg Tribunal offered “full array of procedural protections,” court was devoid of outcome-determinative procedures giving rise to “victor’s justice”).

¹⁵² See Schmandt, *supra* note 51, at 351 (arguing further that: “[a] tribunal in Yugoslavia that can evenly apply international law to all guilty parties without the onus of selective enforcement will add strength to human rights norms and facilitate future enforcement”); see also Santosus, *supra* note 96, at 25 (explaining existence of many potential albeit solvable problems in establishing international criminal court). But see Blakesley, *supra* note 105, at 81-82 (posing question of whether “history of so many attempts and so few successes [at establishing ICC] suggests that the time is ripe for a permanent tribunal or that a complete change in the international system is required before one will succeed”); Monroe Leigh, *Evaluating Present Options for an International Criminal Court*, 149 *MIL. L. REV.* 113, 114 (1995) (noting that while U.S. supports ICC’s establishment, “it is a chief critic of the 1994 Draft Statute . . . [and] wishes to limit the role of the Court by denying it jurisdiction over broad categories of cases”); Simpson, *supra* note 113, at 838 (pointing out that “in light of Nuremberg and Tokyo, there is no guarantee that the international or cosmopolitan will necessarily be free of the preferences, prejudices and biases of the national”).

¹⁵³ See U.N. CHARTER art. 1, para. 3 (describing post-WWII imperatives of U.N. as achievement of international cooperation in solving problems of humanitarian character and promotion of human rights and basic freedoms regardless of race, sex, language, or

cern of the new alliance was to ensure that the atrocity of genocide, visited principally on European Jews during the Nazi Holocaust of WWII, never rear its ugly head again.¹⁵⁴ Ideally, a starting point in attaining this goal would be the uniform recognition and protection of "international human rights" as *jus cogens* or "peremptory norms" of international law by the world community.¹⁵⁵ *Jus cogens* rules "derive from principles that the legal conscience of mankind deem[s] absolutely essential to coexistence in the international community."¹⁵⁶ *Jus cogens* norms are deemed to

religion); *Declaration of the Right of Peoples to Peace*, *supra* note 2, at 14 (reaffirming via Resolution that principal aim of U.N. was maintenance of international peace and security). *But see* Helen M. Cousineau, *The Nuclear Non-Proliferation Treaty and Global Non-Proliferation Regime: A U.S. Policy Agenda*, 12 B.U. INT'L L.J. 407, 408 (1994) (arguing that despite end of Cold War and fading "risk of strategic nuclear war between superpowers . . . hazards posed by [] dissemination of Soviet-produced nuclear weapons . . . [into] unstable and hostile hands remains currently a top security concern for all nations"); Jost Delbruck, *Globalization of Law, Politics, and Markets — Implications for Domestic Law: A European Perspective*, 1 IND. J. GLOBAL STUD. 9, 14 (1993) (noting that although specter of nuclear annihilation today is remote, "universal peace and security are still in jeopardy"); Samuel K. Murumba, *Grappling with a Croatian Moment: Sovereignty and the Quest for a Normative World Order*, 19 BROOK. J. INT'L L. 829, 844 (1993) (recounting that despite U.N.'s promulgation to avert another Holocaust, by post-WWII inception of Cold War "UN itself was thoroughly paralyzed: the General Assembly, by ideological blocs; the Security Council, by the Superpower veto").

¹⁵⁴ See VANDENBOSCH & HOGAN, *supra* note 1 (noting collective security principle element of UN Charter); *cf.* Chaney, *supra* note 99, at 78 (noting that "new era of global interdependence emerged following WWI, as did a new era of warfare"); Miller, *supra* note 2, at 773 (discussing cooperation to make Security Council into military force to suppress aggression across globe). *But see Human Rights in the Former Yugoslavia: Report of the Special Rapporteur of the Commission on Human Rights*, U.N. GOAR, 47th Sess., Item 97, at 6-7, U.N. Doc. A/47/666 (1992) [hereinafter *Human Rights Rapporteur*] (chronicling full-blown resurgence of WWII Holocaust-like specter of genocide reincarnated under Serbian guise of "self-determination").

¹⁵⁵ See U.N. CHARTER art. 1, para. 3 (describing core imperatives to be furthered through U.N. as result of apocalyptic legacy left by World War II); U.N. CHARTER art. 2, para. 7 (directing that matters of states' domestic affairs be precluded from scope of General Assembly's purview of discussion and recommendation); Kunstle, *supra* note 102, at 319 (recounting horrors of "ethnic cleansing" campaign alleged to have been implemented and ordered by Radovan Karadzic, President of self-proclaimed Bosnian-Serb Republic of Srpska, under pseudo-nationalistic guise of "self-determination").

¹⁵⁶ See Viktor Mayer-Schonberger and Tere E. Foster, *More Speech, Less Noise: Amplifying Content-Based Speech Regulations Through Binding International Law*, 18 B.C. INT'L & COMP. L. REV. 59, 90 (1995). *Jus cogens* is closely interrelated with Dutch jurist Hugo Grotius' 1625 conception of international law. *Id.*; Vienna Convention on the Law of Treaties, 23 May 1969, U.N. Doc. A/CONF. 39/27, in force 27 January 1980, 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679 (1969) [hereinafter Vienna Convention]. Under the Vienna Convention, *jus cogens* is defined as: "[A] norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Id.* art. 53; *see also* Committee of United States Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 935 (D.C. Cir. 1988). The court suggested that the U.S. may have violated "peremptory norms of international law . . . referred to as *jus cogens* (or 'compelling law'), which enjoy the highest status in international law and prevail over both customary international law and treaties." *Id.*

be the highest rules of international law.¹⁵⁷ The universality of *jus cogens* norms lies in their binding, mandatory, and peremptory nature.¹⁵⁸ Thus, *jus cogens* will void otherwise valid international treaties, agreements, instruments, acts or orders where the latter conflict with or contravene the norms of the former.¹⁵⁹

Of course, the recognition of these "inalienable" *jus cogens* rights can be achieved on an international scale only once UN member (as well as non-UN member) nations agree to make universal concessions.¹⁶⁰ To begin with, all nations would need to

¹⁵⁷ See Karen Parker and Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 415 (1989) The authors note the words of a Mexican delegate to the UN Conference on the Law of Treaties when she spoke of *jus cogens*. *Id.* The adoption of *jus cogens* is urged as one way to enhance human rights protection domestically, as "*jus cogens* norms exist and are enforceable independently of treaties, and are immune from many judicial doctrines that have frustrated redress." *Id.*; see also Philippe Lieberman, *Expropriation, Torture, and Jus Cogens Under the Foreign Sovereign Immunities Act: Siderman De Blake v. Republic of Argentina*, 24 U. MIAMI INTER-AM. L. REV. 503, 513 (1993). A *jus cogens* norm is binding on all states absolutely, irrespective of states' consent. *Id.* Thus, the Restatement treats *jus cogens* norms as "peremptory" since "no derogation from them is permissible." *Id.*; David Wippman, *Treaty-Based Intervention: Who Can Say No?*, 62 U. CHI. L. REV. 607, 618 (1995). Accordingly, since *jus cogens* norms constitute "a body of higher law," they "automatically prevail[] in the event of any conflict between states." *Id.*

¹⁵⁸ See Vienna Convention, *supra* note 156, art. 53. Article 53 of the Convention declares that:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

Id.; see also Mayer-Schonberger & Foster, *supra* note 156, at 92. *Jus cogens* norms are "characterized as having the effect of an international constitution." *Id.* As a result, any "[i]nternational law violating such peremptory norms is void, as are national laws that violate the national constitution." *Id.* But see Beth Van Schaack, *The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot*, 106 YALE L.J. 2259, 2261 (1997). As demonstrated by the "jurisdictional principle applied to acts of genocide, . . . [t]he *jus cogens* prohibition of genocide . . . is broader than the [Genocide] Convention's prohibition[.]" *Id.*

¹⁵⁹ See Report of the International Law Commission on the Second part of its Seventeenth Session and on its Eighteenth Session, U.N. Doc. A/6309/Rev. 1 (1966), reprinted in 2 Y.B. INT'L L. COMM'N 169, 247, U.N. Doc. A/CN/SER.A/1966/Add.1 (declaring that "[a] treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted . . ."); Parker & Neylon, *supra* note 157, at 416 (reaffirming that "binding nature of *jus cogens* limits the substance of valid treaties or international agreements" thereby rendering "agreements that conflict with its norms void"); see also Kha Q. Nguyen, *In Defense of the Child: A Jus Cogens Approach to the Capital Punishment of Juveniles in the United States*, 28 GEO. WASH. J. INT'L L. & ECON. 401, 416 (1996) (explaining that "*jus cogens* norms invalidate all state actions that are inconsistent with their terms" since aim of former is to "preserve the fundamental interests of the community of nations").

¹⁶⁰ See U.N. CHARTER arts. 1, 2, 4. By allowing themselves to be bound by U.N. treaties, member States presumably "concede" or cede in part their sovereign or *jus cogens* right to self-determination. *Id.*; see also *id.* at art. 2. Paragraph 6 of Article 2 states that the U.N.'s

concede that the *jus cogens*-like "right to one's homeland is a necessary prerequisite to the enjoyment of most other human rights."¹⁶¹ The denial of the right to live in one's homeland by forced dislocation, then, implicates the inalienable right to self-determination, in clear abrogation of *jus cogens* or "peremptory norms" of international law.¹⁶² Furthermore, the forcible expulsion from one's homeland, along with deprivation of self-determination, also involves the concomitant deprivation of internationally recognized civil, political, and sociocultural rights.¹⁶³ It is therefore submitted that such principals should be embraced with caution—as exemplified by the scourge of war crimes and dislocation visited upon Bosnians.

member organizations: "[S]hall ensure that states which are not Members of the United Nations act in accordance with [the UN Charter's principles] so far as may be necessary for the maintenance of international peace and security." *Id.* art. 2, para. 6. Further, through Paragraph 1 of Article 48, member nations agree that: "The actions required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations . . ." *Id.* at art. 48, para 1. *But see id.* art. 51. Notwithstanding the foregoing declarations, Article 51 clarifies that: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member nation of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." *Id.*

¹⁶¹ See Alfred De Zayas, *The Right to One's Homeland, Ethnic Cleansing, and the International Criminal Tribunal for the Former Yugoslavia*, 6 CRIM. L.F. 257, 257-258 (1995) (recognizing that without right to one's homeland, persons can be deprived of right to exercise civil, political, and cultural rights); William A Schroeder, *Nationalism, Boundaries and the Bosnian War: Another Perspective*, 19 S. ILL. U. L.J. 153, 158 (1994) (noting how Serbs, similar to Jews of WWII, only "see safety" when their land is not occupied by others); *id.* at 159 (stating that forcing people off their land is common, widespread and established); see also Hector Gros-Espiell, *Self-Determination and Jus Cogens*, in U.N. LAW/FUNDAMENTAL RIGHTS 167 (Antonio Cassese ed., 1979) (discussing that denial of right to live in one's homeland necessarily entails violation of such rights as right to self-determination, which many consider to be *jus cogens*, or peremptory norm of international law); Tyagi, *supra* note 16, at 884-86 (discussing growing concern to protect human rights globally in retrospect of past crisis); cf. Roger J.R. Levesque, *Future Visions of Juvenile Justice: Lessons from International and Comparative Law*, 29 CREIGHTON L. REV. 1563, 1569 (1996) (stating that "international human rights law no longer limited to laws between nations").

¹⁶² See De Zayas, *supra* note 161, at 257-58 (positing that denial of right to homeland violates individual human rights); GROS-ESPIELL, *supra* note 161, at 167 (denying individuals' right to homeland violates right of self-determination); Weisburd, *supra* note 49, at 1-9 (asserting that U.S. and Security Council of U.N. are promoting formula for settling conflict which requires acquiescence to acts which are of *jus cogens* character); see also *Human Rights Rapporteur*, *supra* note 154, at 6-7 (explaining that Serbs systematically performed "ethnic cleansing" under guise of "self-determination" tactic to create their own nation-state).

¹⁶³ See Christopher M. Goebel, *A Unified Concept of Population Transfer (Revised)*, 22 DENV. J. INT'L L. & POL'Y 1, 22-23 (1993) (recognizing that people are deprived of fundamental human rights when removed from their homeland); Alan C. Laifer, Note, *Never Again? The "Concentration Camps" in Bosnia-Herzegovina: A Legal Analysis of Human Rights Abuses*, 2 NEW EUR. L. REV. 159, 171 (1994) (arguing that such removal is not only deprivation of human rights but also constitutes genocide); see also De Zayas, *supra* note 161, at 270 (asserting that right to one's homeland is "human right").

1. "The Jus Cogens Paradox": The Faux-Pas of Self-Determination

In the case of Bosnia, the *jus cogens* principles of the right to one's homeland or to "self-determination" have operated on two levels: both as distorted tools rationalizing the unjustifiable ends of genocide, and as impediments to carrying out international justice.¹⁶⁴ Specifically, the atrocities visited on Bosnian civilians in asserting a *jus cogens*-like right to "ethnic self-determination" in the name of a new homeland have really been an overt campaign of genocidal "ethnic cleansing."¹⁶⁵ As such, under a *jus cogens* analysis, these humanitarian law violations have fallen outside the purview of international impunity normally accorded sovereign acts of self-determination.¹⁶⁶ Accordingly, this actuality warranted the intervention of an international forum of justice by way of the War Crimes Tribunal for the former Yugoslavia.¹⁶⁷ The burning question which remains unclear, however, is why, in the

¹⁶⁴ See *Human Rights Rapporteur*, *supra* note 154, at 6-7 (finding that Serbs justified "ethnic cleansing" atrocities as acts of "self-determination"); Louis R. Beres, *On International Law and Nuclear Terrorism*, 24 GA. J. INT'L & COMP. L. 1, 33 (1994) (stating that *jus cogens* has been used to justify assassinations); see also Karen Parker, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 463 n.137 (1989) (suggesting *jus cogens* may be used to justify assassinations).

¹⁶⁵ See Winston P. Nagan, *Strengthening Humanitarian Law: Sovereignty, International Criminal Law and the Ad Hoc Tribunal for the Former Yugoslavia*, 6 DUKE J. COMP. & INT'L L. 127, 129-30 (1995) (stating that self-determination claim is fraudulently used to justify acts of genocide in Bosnia); Weisburd, *supra* note 49, at 41-42 (asserting that self-determination rules are part of *jus cogens* and Bosnian genocides are violative of both); see also *Report on the Situation of Human Rights in the Territory of the Former Yugoslavia*, U.N. Secretary-General, at 72, U.N. Doc. A/48/92 (1992) (describing rape as tool of "ethnic cleansing," Special Rapporteur reported: "[r]ape has been used as one method to terrorize civilian populations in villages and forcing ethnic groups to leave"); Jordan J. Paust, *The Complex Nature, Sources and Evidences of Customary Human Rights*, 25 GA. J. INT'L & COMP. L. 147, 153-54 (1996) (stating that genocide crimes in former Yugoslavia are violations of *jus cogens*).

¹⁶⁶ See De Zayas, *supra* note 161, at 295 (noting that "ethnic cleansing in former Yugoslavia can be prosecuted as crime against humanity" which "constitutes genocide within the meaning of the Genocide Convention"). See generally Antonio Cassese, *The Self-Determination of Peoples*, in THE INTERNATIONAL BILL OF RIGHTS 92 (Louis Henkin ed., 1981) (acknowledging international human rights violations as not falling under states' sovereign immunity protection).

¹⁶⁷ See Tamara L. Tomkins, *Prosecuting Rape as a War Crime: Speaking the Unspeakable*, 70 NOTRE DAME L. REV. 845, 850 (1995) (stating that conceded purpose of war crimes tribunal is to mete out retribution and punishment so as to deter future atrocities); Michael D. Greenberg, Note, *Creating an International Criminal Court*, 10 B.U. INT'L L.J. 119, 133-34 (1992) (stating that such Court would achieve purpose, but also would only be applicable to limited conflicts); see also Tomkins, *supra*, at 851 (clarifying that despite their conceded deterrence purposes, future international tribunals "interested in prosecuting rape [as a war crime], but unwilling, or unable, to acknowledge the circumstances which gave rise to it, . . . may actually serve to legitimize the notion that rape is . . . an inevitable byproduct of war").

wake of the Tribunal's identification and indictment of the masterminds behind the Bosnian genocide, there have not been any formal attempts to enforce the arrest warrants for these undisputed criminals.¹⁶⁸ It is submitted that the answer once again lies within the principle of *jus cogens*¹⁶⁹—which can be easily manipulated and subverted as an ideological ploy by a sovereign state in circumventing the enforcement of “customary” international law against itself.

Customary international law has been described as “the general practice of states which, over a period of time, become[s] binding law through repetition and adoption.”¹⁷⁰ In this light, *jus cogens* norms are also viewed as “the highest rules of [customary] inter-

¹⁶⁸ See Anthony Lewis, *Winking at Karadzic*, N.Y. TIMES, Oct. 28, 1996, at A19. It is argued that by not sanctioning ICTY arrest warrants, the Clinton administration sought to avoid a political blow-up in Bosnia and to not “rock the boat” before Election Day. *Id.* The U.S. forces’ affirmative decision not to execute the War Crimes Tribunal arrest warrant against Karadzic, who had been traveling freely in clear view of international peace-keeping authorities, destroyed all that was achieved at the Dayton Peace Conference, and amounted to “stand[ing] by while the inventors of ‘ethnic cleansing’ continue[d] that murderous process and mock[ed] justice for themselves.” *Id.*; see also Kenneth S. Gallant, *Substantive and Procedural Issues: Securing the Presence of Defendant’s Before the International Tribunal for the Former Yugoslavia: Breaking with Extradition*, 5 CRIM. L.F. 557, 565 (1994). The Tribunal’s Rules of Procedure and Evidence provide that if, within a reasonable amount of time, no action is taken on arrest warrants, then the Security Council is to take steps to rectify the situation. *Id.*; Christopher C. Joyner, *Strengthening Enforcement of Humanitarian Law: Reflections on the International Criminal Tribunal for the Former Yugoslavia*, 6 DUKE J. COMP. & INT’L L. 79, 90-91 (1995). The execution of arrest warrants are to be done with due diligence, according to the Tribunal’s Rules of Procedure and Evidence. *Id.* See generally Bruce Zagaris, *International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991: Rules of Procedure and Evidence*, 33 I.L.M. 484 (1994). Zagaris sets forth introductory explanations for and the text of the Rules of Procedure and Evidence under which the ICC will operate. *Id.*

¹⁶⁹ See Gallant, *supra* note 168, at 567-68 (stating that “*jus cogens* norm has arisen requiring that states either [prosecute or] extradite” persons accused of crimes); Joyner, *supra* note 168, at 91 n.44 (asserting that violation of Rules of Evidence and Procedure’s requirement to enforce warrants could be construed as violation of *jus cogens* as well); Nagan, *supra* note 34, at 129-30 (noting fraudulent use of *jus cogens* principle to justify Bosnian genocide).

¹⁷⁰ U.N. Conference on the Law of Treaties, U.N. GAOR, 1st and 2d Sess., Vienna Mar. 26-May 24, 1968, U.N. Doc. A/CONF./39/11/ Add. 2 (1971), at 294 (Statement of Mr. Suarez, Mexican delegate) (arguing further that *jus cogens* means “those rules which derive from principles that the legal conscience of mankind deem absolutely essential to the coexistence in the international community”); see also Mark R. Von Sternberg, *A Comparison of the Yugoslavian and Rwandan War Crimes Tribunals: Universal Jurisdiction and the “Elementary Dictates of Humanity”*, 22 BROOK. J. INT’L L. 111, 156 n.14 (1996) (quoting Mexican delegate’s statement and noting that “term *jus cogens* is used interchangeably with such terms as ‘peremptory norms’ and ‘fundamental human rights’”); cf. Christopher P. Cline, Note, *Pursuing Native American Rights in International Law Venues: A Jus Cogens Strategy After Lyng v. Northwest Indian Cemetery Protective Association*, 42 HASTINGS L.J. 591, 598 (1991) (explaining that this definition focuses on international effect of *jus cogens*, but also has individual effect).

national law," which are binding on all states absolutely.¹⁷¹ Again, it is recognized that "[i]f the will of a State conflicts with a *jus cogens* norm," the mandatory operation of *jus cogens* will require the State to acquiesce to that norm.¹⁷² Ironically, the result in the Bosnian crisis has been just the opposite: the binding nature of the *jus cogens*-like, sovereign right to self-determination has been turned on its head to thwart the juridical mission of the War Crimes Tribunal.¹⁷³ As an illustration, judicial mandates (to arrest and/or extradite indicted war criminals) have been ignored where such mandates have contravened even the most dubious practices (e.g., relocation and "ethnic cleansing") carried out under the *jus cogens*-like imprimatur of State "sovereignty."¹⁷⁴ What is

¹⁷¹ See Parker & Neylon, *supra* note 157, at 417. "Once an international norm becomes *jus cogens*, it becomes absolutely binding on all states." *Id.* at 418; Wippman, *supra* note 157, at 618. "Peremptory norms" or "*jus cogens*" are deemed innate to humankind and therefore "nonderogable." *Id.*; see also Vienna Convention, *supra* note 156, art. 64. Article 64 provides: "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates." *Id.*

¹⁷² See W. Paul Gormley, *The Right to Life and the Rule of Non-Derogability: Peremptory Norms of Jus Cogens*, in THE RIGHT TO LIFE IN INTERNATIONAL LAW 120, 122 (B.G. Ramcharan ed., 1985) (noting that *jus cogens* norms restrict will of states); Parker & Neylon, *supra* note 157, at 416 (asserting that *jus cogens* norms' scope is supra-sovereign); see also Michael D. Hodges, *The Rights and Responsibilities of Using an International Waterway*, 4 J. INT'L L. & PRAC. 375, 382 (1995) (stating that *jus cogens* invalidates conflicting rules consented to by states in treaties and customs); Von Sternberg, *supra* note 170, at 152 (noting that *jus cogens* has such universally binding authority that states cannot deviate from its jurisprudential norm); Wippman, *supra* note 157, at 615 (asserting that because *jus cogens* is peremptory in nature it overrides states' laws); Jeanne M. Woods, *Presidential Legislating in the Post-Cold War Era: A Critique of the Barr Opinion on Extraterritorial Arrests*, 14 B.U. INT'L L.J. 1, 14 (1996) (stating that all states are bound to respect certain nonderogable norms, i.e. *jus cogens*).

¹⁷³ See John B. Attanasio, *Rapporteur's Overview and Conclusions: Of Sovereignty, Globalization, and Courts*, 28 N.Y.U. J. INT'L L. & POL. 1, 19-20 (1996) (reporting that many nations treat War Crimes Tribunal model as "foreign court" and act of sending own nationals to tribunal is viewed "as extradition to another country rather than complying with a transfer order of an international tribunal"); Alex C. Lakatos, *Evaluating the Rules of Procedure and Evidence for the International Tribunal for the Former Yugoslavia: Balancing Witnesses' Needs Against Defendants' Rights*, 46 HASTINGS L.J. 909, 922 (1995) (cautioning that given "significant precedential value," ICTY needs "to make every effort to strive for legitimacy" throughout Balkans and world because if ICTY "is a paper tiger, it may well do more harm than good"). *But see* Jordan J. Paust, *Peace-Making and Security Council Powers: Bosnia-Herzegovina Raises International and Constitutional Questions*, 19 S. ILL. U. L.J. 131, 140 (1994) (suggesting that ICTY might balk on deciding such questions as whether "Security Council restraint of self-defense is necessarily impermissibly thwarting of the *jus cogens* prohibition of aggression"); *id.* (predicting further that ICTY would avoid issue as to "whether the more general right of self-defense reflected in Article 51 of the Charter is itself a *jus cogens* norm that preempts Security Council powers"); Schmandt, *supra* note 51, at 360 (arguing that if ICTY "fails in its mission, the international community's lack of commitment may be the overwhelming cause").

¹⁷⁴ See MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 34 (2d ed. 1988) (explaining that "[j]us cogens . . . is the notion that there exist some rules of international law so fundamental that they prohibit acts by states even if such conduct is expressly sanctioned by state consent"); see also Nagan, *supra* note 34, at 129-30 (stating that self-deter-

often conveniently overlooked in this process, however, is that human rights are "supra-sovereign," and therefore must be safeguarded above and beyond a state's sovereignty.¹⁷⁵ Nonetheless, indicted war criminals like Karadzic surely have been made aware of this catch-22 interplay of *jus cogens* vis-à-vis the right to self determination and no doubt continue to capitalize on it so as to thwart international justice.¹⁷⁶ As a result, heinous crimes against humanity have gone unpunished and continue to mount well into the next millennium, simply because the international community has been too blinded by its paper treaties, political correctness, and protracted deliberations to be burdened with implementing any real solutions.¹⁷⁷

2. *Jus Cogens* as a Basis for International Jurisdiction

The prosecutorial and enforcement goals of the Yugoslavian War Crimes Tribunal are incompatible with, and indeed,

mination claim is fraudulently used to justify widespread acts of genocide in Bosnia); Weisburd, *supra* note 49, at 1-9 (asserting that U.N.'s formula for settling Bosnian conflict would force acquiescence to certain *jus cogens* violations).

¹⁷⁵ See Parker & Neylon, *supra* note 157, at 435. To this specific end, Article 1 of the Geneva Conventions places a duty on the U.S. government to respect and "ensure respect" of the Conventions, "since such an obligation does not derive only from the Convention themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression." *Id.*; see also Berta Esperanza Hernandez-Truyol, *International Law, Human Rights, and Laterit Theory: Civil and Political Rights — an Introduction*, 28 U. MIAMI INTER-AM. L. REV. 223, 226 (1997). The "foundation for human rights" has been described as "the individual's 'status qua individual' within the international community and the dignity and justice owed to persons based upon that status." *Id.* In this regard, as fundamental human rights are "indisputably suprasovereign" in nature, "state sovereignty [must necessarily] cede[] to human rights protections [altogether]." *Id.* at 241.

¹⁷⁶ See Attanasio, *supra* note 173, at 19-20 (reporting that many nations, e.g., Federal Republic of Yugoslavia, Bosnia-Herzegovina, view act of surrendering nationals to ICTY "as extradition to another country rather than complying with a transfer order of an international tribunal"); see also Gallant, *supra* note 113, at 567-68 (discussing extradition and prosecution and lack of general international law obligation on states to follow such procedures). *But see* Joyner, *supra* note 168, at 90-91 (outlining rules of procedure and evidence adopted by tribunal in 1994).

¹⁷⁷ See Dr. Krefsimir Pirfsl, *Remarks Made at Pace University School of Law on October 23, 1993*, 6 PACE INT'L L. REV. 69, 76-77 (1994) (asserting that international documents are too weak in their structure and wording, causing many crimes to go unpunished); Sage R. Knauff, Note, *Proposed Guidelines for Measuring the Propriety of Armed State Responses to Terrorist Attacks*, 19 HASTINGS INT'L & COMP. L. REV. 763, 769 (1996) (stating that conventions and treaties are valuable steps towards prevention and punishment of terrorism, but their enactment leaves many crimes unpunished); Brenton L. Saunders, Comment, *The World's Forgotten Lesson: The Punishment of War Criminals in the Former Yugoslavia*, 8 TEMP. INT'L & COMP. L.J. 357, 375 (1994) (stating that international crimes often go unpunished because treaties are written for specific conflict, thus inapplicable to other conflicts); see also Geoffrey R. Watson, *Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction*, 17 YALE J. INT'L L. 41, 68 (1992) (stating that lack of punishment of many international crimes is due to there being no state that wishes to exercise jurisdiction).

subordinate to the higher sovereignty principles behind the *jus cogens* norm of Bosnia-Herzegovina's right to national self-determination.¹⁷⁸ Hence, the justicial efforts of the Tribunal have, as a practical matter, been thwarted by the primacy of that sovereignty's right to national self-determination.¹⁷⁹ The basic obstacle here lies in the fact that the present War Crimes Tribunal is based on, draws its authority from, and is therefore limited by existing UN conventions.¹⁸⁰ Specifically, the dilemma is that under the current UN convention establishing the ICTY,¹⁸¹ this Tribunal's jurisdictional reach only extends to crimes committed by a state through its agents, and not to individuals acting autonomously, outside any official state authority.¹⁸² This constraint, by defini-

¹⁷⁸ See U.N. Security Council Resolution 808, *supra* note 68 (proposing establishment of International War Crimes Tribunal to prosecute perpetrators of ethnic cleansing and genocide in former Yugoslavia). *But see* O'Shea, *supra* note 106, at 386 (reporting FRY government's position regardless of "supra-sovereignty" argument was that ICTY contravened anti-extradition provisions of Federal Constitution); *id.* (noting that in light of absence of "express legislat[ion] or treaty" in U.S. conceding to ICTY's extradition authority, U.S. also likely to follow suit by refusing to comply with any such ICTY order); Saunders, *supra* note 177, at 375 (predicting that ICTY would "be of little or no utility" in bringing perpetrators of genocide to justice as "amnesty [would likely] be granted as part of a peace settlement to all those accused of war crimes").

¹⁷⁹ See generally GORMLEY, *supra* note 172, at 122-23 (noting that principle of *jus cogens* impinges on sovereign self-determination); JANIS, *supra* note 174, at 26-31 (positing that *jus cogens* norms supersede supra-sovereign authority). *But see* Hochkammer, *supra* note 95, at 154 (asserting that, as ICTY Statute was based on Nuremberg model, which only provides for prosecution of leaders of defeated nations, where accused war criminal remains in powerful government position, "it will be virtually impossible for [ICTY] to gain custody of the defendant").

¹⁸⁰ See *Prosecutor v. Dusko Tadic A/K/A "dule"*, IT-94-1-AR72, at 12 (Oct. 2, 1995), reprinted in *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 7 CRIM. L.F. 51, 51 (1996) (stating that Tribunal is deficient because it was established by resolution of UN Security Council, and not by treaty, consensual act of nations, or by amendment to U.N. Charter); Akhavan, *supra* note 148, at 240-41 (explaining many benefits of establishing Tribunal by treaty rather than by resolution of Security Council); Judge Richard J. Goldstone, *The International Tribunal for the Former Yugoslavia: A Case Study in Security Council Action*, 6 DUKE J. COMP. & INT'L L. 5, 6 (1995) (suggesting Tribunal would be most successful if permanently established by treaty); Monroe Leigh, Conference Paper, *Evaluating Present Options for an International Criminal Court*, 149 MIL. L. REV. 113, 116-17 (1995) (stating that establishment of Tribunal would have stronger legal foundation if by treaty or convention, rather than how it was done, by resolution of Security Council).

¹⁸¹ See Security Council Resolution 808, *supra* note 68 (adopting proposal for establishment of "paper" authority War Crimes Tribunal for atrocities committed in area of former Yugoslavia since 1991); Statute of the International Tribunal, art. 1, adopted as per S.C. Res. 827, U.N. SCOR, para. 2, *supra* note 95 (setting forth actual guidelines for operation and administration of ICTY).

¹⁸² See Von Sternberg, *supra* note 33, at 155 (noting that "jurisdiction under the Nuremberg Charter's provision governing 'crimes against humanity' seems highly vulnerable;" to wit: as "Bosnian Serbs are not a state party, no official policy of discrimination appears possible"); see also *Prosecutor v. Dusko Tadic*, *supra* note 180, at 12 (asserting reasons for deficiencies of Tribunal that prosecuted Tadic); Saunders, *supra* note 177, at 375 (asserting that alleged criminal ringleaders of Balkan atrocities participating in peace initiatives will likely claim amnesty for themselves and their cronies).

tion, will forever impede the "evenhanded enforcement" of international humanitarian law in the Balkans, as individual actors can always claim that they were either acting pursuant to "orders" or under the color of law, thereby escaping personal liability for their acts.¹⁸³ Accordingly, in Bosnia, the justicial goals of humanitarian law can best be achieved by a Tribunal that can evenly enforce international law against all guilty parties—irrespective of political affiliation or whether their acts were committed in an official "state" capacity.¹⁸⁴ Implementing an International Criminal Court will surpass this very hurdle limiting the current Yugoslavian War Crimes Tribunal's effectiveness.

Criminal violations of *jus cogens* norms, like ethnic cleansing and genocide, are unmistakable disruptions of international order, transcending all State boundaries and local laws, theoretically compromising the collective human rights of all citizens therein.¹⁸⁵ Accordingly, within a *jus cogens* context, the ideas of

¹⁸³ See Schmandt, *supra* note 51, at 351 (comparing current War Crimes Tribunal to that of Nuremberg and characterizing latter as lacking evenhanded enforcement of international human rights law); see also Gallant, *supra* note 113, at 565 (discussing Tribunal's rules and suggesting improvements of enforcement measures); Saunders, *supra* note 177, at 375 (claiming that failure to use principles of international law established at Nuremberg allows for continual acts of war crimes); cf. Goldstone, *supra* note 180, at 6 (describing tribunals set up under Chapter VII of UN Charter in attempt to establish permanent international court of criminal justice).

¹⁸⁴ See Schmandt, *supra* note 51, at 351 (stating that Tribunal will be most effective if it is applied to all parties, thus no immunity for victors); see also *In re Yamashita*, 327 U.S. 1, 29 (1946) (Murphy, J., dissenting) (asserting that in order to develop international community with basic recognition of human dignity, it is essential to temper justice "by compassion rather than by vengeance"). There has been a sense of even treatment by the tribunal, as there have been indictments of victors and victims. See, e.g., Joyner, *supra* note 108, at 79-80 (noting that there have been indictments of Bosnian Serbs, Bosnian Croats, and Serbs); *Bosnian Croats Indict Iztetbegovic for Genocide*, XINHUA ENG. NEWSWIRE, Oct. 13, 1996, available in 1996 WL 11989200 (reporting indictment of two Muslim military leaders); Marlise Simons, *Conflict in the Balkans: War Crimes: U.N. Tribunal Indicts Bosnian Serb Leader and Commander*, N.Y. TIMES, July 26, 1995, at A9 (stating that 24 Bosnian Serbs were indicted by Tribunal for war crimes, crimes against humanity, and genocide); See generally William Drozdiak, *U.N. Crimes Tribunal Indicts Six Bosnian Croats*, WASH. POST, Nov. 14, 1995, at A08, available in 1995 WL 9272304 (reporting arrest of six Bosnian Croats).

¹⁸⁵ See Parker & Neylon, *supra* note 157, at 455 (arguing that "jus cogens allows for universal jurisdiction," and that "[t]he idea of universal jurisdiction and individual responsibility for violations of international law developed largely with the laws of war"); see also *Prinz v. Germany*, 26 F.3d 1166, 1181 (D.C. Cir. 1994) (Wald, J., dissenting) (declaring that if violations of *jus cogens* are permitted, "ordered society as we know it would cease"); Christopher W. Haffke, Comment, *The Torture Victim Protection Act: More Symbol Than Substance*, 43 EMORY L.J. 1467, 1514 (1994) (stating that violations of *jus cogens* will disturb international order); Philippe Lieberman, Case Comment, *Expropriation, Torture, and Jus Cogens Under the Foreign Sovereign Immunities Act: Siderman De Blake v. Republic of Argentina*, 24 U. MIAMI INTER-AM. L. REV. 503, 538 (1993) (stating that "[v]iolations of *jus cogens* norms disrupt international order[,] they impact all states and all persons").

“universal jurisdiction” and “individual responsibility” for criminal violations of international law are inextricably linked; criminal responsibility attaches personally to those indicted, and is not limited to the official acts of a state actor.¹⁸⁶ As an illustration, the ad hoc criminal court established under the Nuremberg Charter formally emphasized imparting “individual responsibility” for violations of international law.¹⁸⁷ Presiding over the prosecution of World War II Nazi war criminals, the court reasoned that the essence of the UN Charter establishing its jurisdiction is that an individual’s “international duties” supersede “national obligations of obedience” imposed by his respective State.¹⁸⁸ Thus, as an individual’s *jus cogens* responsibilities transcend his national boundaries, it follows that jurisdiction over violations of such international norms must therefore be treated as universal.¹⁸⁹

¹⁸⁶ See Fogelson, *supra* note 146, at 895-96 (stating that international violators of *jus cogens* were held individually liable under international law following World War II); Mark A. Gray, *The International Crime of Ecocide*, 26 CAL. W. INT’L L.J. 215, 265-66 (1996) (asserting that state liability is derived from individuals’ actions, thus both must be held liable); Parker & Neylon, *supra* note 157, at 455 (stating that individuals are personally liable for international violations of *jus cogens*); Von Sternberg, *supra* note 33, at 154 n.158 (reporting that idea of individual liability for international law violations developed over time with laws of war as reinforced in modern era forced by Nuremberg Charter).

¹⁸⁷ See Von Sternberg, *supra* note 33, at 170; see also *Charter of the International Military Tribunal*, in force August 8, 1945, 59 Stat. 1544, E.A.S. No. 472, U.N.T.S. 279, reprinted in 3 BEVANS 1238, Nuremberg Charter (establishing Nuremberg Tribunal); Fogelson, *supra* note 147, at 895-96 (stating that international violators of *jus cogens* were held individually liable under international law following World War II); Parker and Neylon, *supra* note 157, at 455 (stating that tribunal established at end of World War II exercised jurisdiction over war criminals, individually); Von Sternberg, *supra* note 170, at 154 n.158 (relating individual liability for international law violations).

¹⁸⁸ Parker & Neylon, *supra* note 157, at 463 n.293 (citing *United States v. Goering*, 6 FRD 69, 110 (1946) as relying on Nuremberg Charter, art. 6, 59 Stat. at 1547 and art. 8, 59 Stat. at 1548 in its holding); *id.* (citing U.S. Army Field Manual Sec. 498, 27-10, *The Law of Land Warfare* (1956) (“[a]ny person, whether a member of the armed forces or a civilian, who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment. Such offenses in connection with war comprise: a. crimes against peace. b. crimes against humanity. c. war crimes . . .”).

¹⁸⁹ See Adam C. Belsky et al., Comment, *Implied Waiver Under FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CAL. L. REV. 365, 410 (1989) (stating that universal jurisdiction permits any nation to exercise jurisdiction over violators of certain fundamental international norms); Fogelson, *supra* note 146, at 884-85 (stating that universal jurisdiction is permitted even when international borders are not crossed, so long as criminal act meets certain threshold); Von Sternberg, *supra* note 33, at 125 (stating that if conflicts determined to be war international in scope, then universal jurisdiction can be exercised); see also Parker and Neylon, *supra* note 157, at 455 (asserting that universal jurisdiction and individual responsibility for violations of international law developed largely with laws of war).

Of paramount importance is that a *jus cogens* violation claim may be brought without reliance on treaties or conventions.¹⁹⁰ The harm caused by *jus cogens* violations affects all persons, be they actual victims, or incidental ones; since all are harmed, all have standing for redress.¹⁹¹ It is therefore irrelevant whether the government in question has ratified a particular international treaty or not.¹⁹² To the foregoing ends, it clearly would be consistent with the mandate of Article VII of the UN Charter to extend these *jus cogens* principles of "universal jurisdiction" as the doctrinal bases in establishing a permanent and independent International Criminal Court.¹⁹³

C. *Ushering in a New World Order Under an International Criminal Court*

As a practical matter, future international cooperation must rest upon shared ideals such as peace, economic prosperity, and personal security.¹⁹⁴ Thus, if a "new world order" typifying such

¹⁹⁰ David Boling, *Mass Rape, Enforced Prostitution, and the Japanese Imperial Army: Japan Eschews International Legal Responsibility?*, 32 COLUM. J. TRANSNAT'L L. 533, 568-569 (1995) (stating that *jus cogens* is superior to treaties, thus treaties that attempt to extinguish liability for violations of *jus cogens* are deemed void); Karen Parker and Jennifer F. Chew, *Compensation for Japan's World War II War-Rape Victims*, 17 HASTINGS INT'L & COMP. L. REV. 497, 539 (1994) (stating that treaties that attempt to permit *jus cogens* violators to avoid liability are void); Parker & Neylon, *supra* note 157, at 449 (noting that a claim based on *jus cogens* violations is actionable independent of treaties).

¹⁹¹ See *Concerning The Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 325-28 (Ammoun, J., separate opinion) (stating that standing exists in cases of *jus cogens* violations, even when there is no direct harm inflicted on plaintiff); Beth Gammie, *Human Rights Implications of the Export of Banned Pesticides*, 25 SETON HALL L. REV. 558, 601 (1994) (stating that International Court of Justice does not restrict standing to only those people who are suffering due to *jus cogens* violations); Gray, *supra* note 186, at 257-58 (stating that all states acquire standing, in cases of *jus cogens* violations); Parker and Neylon, *supra* note 157, at 454 (arguing that every person has right to standing in cases of violations of *jus cogens* norms). *But see* Weisburd, *supra* note 49, at 33-34 (stating that standing, in cases of *jus cogens* violations is limited by Vienna Convention to states particularly affected by violations only).

¹⁹² See Parker & Neylon, *supra* note 157, at 448 (stating that *jus cogens* violations are actionable even when treaties are enacted to refuse action); *see also* Boling, *supra* note 190, at 569 (noting that treaties that specifically purport to extinguish liability for *jus cogens* violations would be void); Parker and Chew, *supra* note 190, at 539.

¹⁹³ See Boling, *supra* note 190, at 569 (noting that treaties are deemed void if they excuse liability for *jus cogens* violations); Parker and Chew, *supra* note 190, at 539 (stating that if treaties allowing for excusal of liabilities incurred by *jus cogens* violations were not voided, it would result in legal catastrophe); Parker & Neylon, *supra* note 157, at 449 (noting that "[a] claim based on a *jus cogens* violation is actionable independently of a treaty . . ." and that "[i]t is therefore irrelevant whether the government in question has ratified a particular treaty, whether the treaty is self-executing or not, or whether there is implementing legislation").

¹⁹⁴ See Jimmy Gurule, *Terrorism, Territorial Sovereignty, and the Forcible Apprehension of International Criminals Abroad*, 17 HASTINGS INT'L & COMP. L. REV. 457, 494 (1994)

ideals is to emerge, such an order need serve the overall interests of the nations of the world at large.¹⁹⁵ Moreover, within the context of international law violations, the *jus cogens* principle of “universal jurisdiction” is inextricable from the notion of “individual responsibility.”¹⁹⁶ To this end, an ICC would serve as an independent common forum to prosecute such crimes as terrorism, rape, torture and “ethnic cleansing.”¹⁹⁷ Accordingly, such court’s prosecutorial power would need to break free of the one-sided, ad hoc effectiveness which limited the post-World War II “victor’s justice” tribunals at Nuremberg and Tokyo.¹⁹⁸ Empowered with ju-

(stating that “[i]nternational cooperation is necessary to maintain world order”); Michael D. Greenberg, Note, *Creating an International Criminal Court*, 10 B.U. INT’L L.J. 119, 126 (1992) (arguing that “[o]n a jurisprudential level, an international criminal court could provide a common forum for the prosecution of crimes which threaten the security of the citizens of all nations”); Alfred P. LeBlanc, Jr., Note, *United States v. Alvarez-Machain and the Status of International Law in American Courts*, 53 LA. L. REV. 1411, 1416 (1993) (claiming that international cooperation and mutual respect between states is vital for success of future world order); cf. Anne-Marie Slaughter, *The Liberal Agenda for Peace: International Relations Theory and the Future of the United Nations*, 4 TRANSNAT’L L. & CONTEMP. PROBS. 377, 418 (1994) (suggesting that, aside from exercising militaristic options, U.N. could serve as “source of basic services for nongovernmental activity in transnational society, and a source of basic services for individuals and groups whose governments have failed them . . .”).

¹⁹⁵ See, e.g., Greenberg, *supra* note 194, at 126 (stating that success of new world order is contingent upon such order functioning on many levels and benefiting majority of nations); Schmandt, *supra* note 51 (arguing world Tribunal’s success would hinge on its equal application to victors as well as losers); Slaughter, *supra* note 194, at 418 (delineating non-aggression alternatives of U.N. in protecting individual human rights as to promote new world order). See generally U.N. CHARTER art. 1, para. 3 (promoting imperative of “respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion . . .”); U.N. CHARTER art. 2, para. 7 (precluding matters of states’ domestic affairs from General Assembly’s power of recommendation).

¹⁹⁶ See Belsky et al., *supra* note 189, at 410 (explaining that under concept of universal jurisdiction violations of certain fundamental international norms will be subject to jurisdiction anywhere); Fogelson, *supra* note 146, at 884-85 (asserting that where crimes are universally recognized, opprobrious will fall under universal jurisdiction whereby any state capturing violator may try and punish such criminal on behalf of all other nations); Von Sternberg, *supra* note 33, at 125 (citing examples of violations giving rise to universal jurisdiction); see also Parker & Neylon, *supra* note 157, at 455 (stating that violations of *jus cogens* norms disrupt international order, thus affecting all states and persons, therefore justifying universal jurisdiction).

¹⁹⁷ See Greenberg, *supra* note 142, at 126 (claiming International Criminal Court could provide forum for punishing crimes which threaten security of citizens of all nations); see also Gurule, *supra* note 194, at 494 (describing international law right of territorial sovereignty as not absolute); LeBlanc, *supra* note 194, at 1416 (criticizing Supreme Court’s unsolicited role in international law enforcement).

¹⁹⁸ See Greenberg, *supra* note 142, at 128 (positing what is needed to provide effective international tribunal); Parker & Neylon, *supra* note 157, at 455 (describing essence of tribunal established by Nuremberg Charter after WWII); see also Leigh, *supra* note 180, at 116-17 (arguing that Tribunal would have stronger legal foundation if based on treaty rather than U.N. resolution); Lt. Col. Robert T. Mounts et al., *Panel II: War Crimes and Other Human Rights Abuses in the Former Yugoslavia*, 16 WHITTIER L. REV. 387, 419-20 (1995) (stating that Security Council must have been “un-focused” when establishing War

risdiction over a wide berth of international issues, an ICC would ensure basic, "supra-sovereign," socioeconomic rights and interests on a global scale.¹⁹⁹ Such interests include the promulgation of a politically neutral criminal court, the deterrence of international crime, and the comprehensive compilation of an international criminal code.²⁰⁰

The implementation of an ICC, however, will not be without its problems.²⁰¹ For instance, a primary obstacle to the ICC's creation will be the development of a common international criminal code acceptable to a consensus of nations.²⁰² Instances of international conflicts of laws surely would arise rather routinely where some domestic policy legally acceptable to one nation would be in contravention of the laws of another.²⁰³ Thus, the prospect of one State being made to face potentially criminal sanctions of other

Crimes Tribunal similar to Nuremberg Tribunal, as it overlooked limited effectiveness of Nuremberg Tribunal).

¹⁹⁹ See Greenberg, *supra* note 142, at 130 (discussing aspects of international criminal tribunal and international criminal law); see also Gallant, *supra* note 113, at 565 (citing problems arising under Chapter VII of UN Charter); cf. Von Sternberg, *supra* note 33, at 152 (asserting need for universal principle that protects interests deemed "absolutely essential to coexistence in the international community"). See generally U.N. CHARTER art. 1, para. 3.

²⁰⁰ Greenberg, *supra* note 142, at 126 (stating these three ideals). See Neil Kritz, Symposium, *Panel II: Comparative Analysis of International and National Tribunals*, 12 N.Y.L. SCH. J. HUM. RTS. 545, 621 (1995) (quoting U.N. Commission of Experts report stating that international criminal tribunal would have advantages such as "independence, subjectivity, and impartiality"); see also Leigh, *supra* note 152, at 116 (observing that while "Draft Statute does not correspond to any particular criminal justice system" its framers nonetheless "attempted to balance different conceptions of criminal justice . . . to win the support of the international community").

²⁰¹ See Bland, *supra* note 96, at 245 (noting Tribunal's jurisdictional problem of being unable to grant binding judgments); Santosus, *supra* note 96, at 44 (explaining that there are many potential problems with establishing international criminal court, however, they are all solvable); see also Blakesley, *supra* note 105, at 78 (noting domestic-international law rift). But see M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT'L & COMP. L. REV. 1, 1 (1991) (suggesting that any problems that may lie ahead in regards to international criminal court, have already been considered and essentially solved).

²⁰² See Bassiouni, *supra* note 139, at 3 (asserting Nuremberg and Tokyo tribunals were only beginning stage in development of international criminal system promulgated by way of permanent international criminal court); see also Blakesley, *supra* note 105, at 77-80 (conceding need for permanent war crimes tribunal that must meet certain protective criteria); David B. Pickard, Comment, *Security Council Resolution 808: A Step Toward a Permanent International Court for the Prosecution of International Crimes and Human Rights Violations*, 25 GOLDEN GATE U. L. REV. 435, 441-47 (1995) (noting that primary obstacles to implementing international criminal court are lack of consensus as to what governing law should be and stubbornness of nations in refusing to surrender limited sovereignty).

²⁰³ See Santosus, *supra* note 96, at 35-36 (pointing out concerns of state sovereignty and jurisdiction among individual nations); see also Blakesley, *supra* note 105, at 78 (noting domestic-international law rift); Pickard, *supra* note 202, at 440-43 (describing lack of consensus as obstacle to what governing law should be).

member States would deter the former from acquiescing to the authority of an international criminal code.²⁰⁴ This notwithstanding, unlike an ad hoc court operating under the restrictions of a UN convention or treaty, a permanent ICC would settle such jurisprudential issues as judicial competence, *res judicata* and, most importantly, the rights and duties of individuals from a supra-sovereign perspective of international law.²⁰⁵ Finally, and most importantly, the lack of an ICC significantly continues to frustrate the effective enforcement of international human rights laws, thereby making adherence to Conventions promulgated by the UN wholly dependent upon the good faith of signatories.²⁰⁶

CONCLUSION

The long and bloodied history of the ethnic and territorial claims that have been violently asserted in Bosnia-Herzegovina has served as the backdrop for the eruption of decades of pent-up hatred through a ruthless scourge of rape, torture and genocide. The UN's delayed preemptive military intervention in curtailing international human rights violations in Bosnia-Herzegovina in the wake of this bloodshed, not only violated that member nation's right to self-defense, but thereby escalated those instances of genocide. Further, the failure to enforce the International War

²⁰⁴ See M. Cherif Bassiouni and Christopher L. Blakesley, *The Need for an International Criminal Court in the New International World Order*, 25 VAND. J. TRANSNAT'L L. 151, 171-72 (1992) (stating that State refusal to acquiesce could pose problem, however, solutions have been proposed to overcome such obstacles); Greenberg, *supra* note 142, at 134 (noting primary obstacle to creation of international criminal court is development of international criminal code acceptable to majority of nations). *But see* Procida, *supra* note 12, at 669 n.66 (explaining that non-existence of international court hinders full enforcement of Genocide Convention).

²⁰⁵ See, e.g., Chaney, *supra* note 99, at 92 (citing pitfalls that ICTY inherited from Nuremberg trials as comprising "reliance on ex post facto law . . . prejudicial appointment of judges . . . [and] selective indictments . . ."); Greenberg, *supra* note 142, at 141 (commenting that in view of Iraqi atrocities committed against domestic Kurdish population Saddam Hussein and high-ranking Iraqi officials were prime candidates subject to ICC jurisdiction); *cf.* Lieberman, *supra* note 157, at 538 (asserting *jus cogens* violations disrupt international order); Parker & Neylon, *supra* note 157, at 455 (stating that "*jus cogens* allows for universal jurisdiction").

²⁰⁶ See Procida, *supra* note 12, at 669 n.66 (discussing generally pitfalls engendered by absence of permanent ICC); *see also* Blakesley, *supra* note 105, at 78 (discussing obstacles to creation of permanent War Crimes Tribunal due to national-international law rift); Bourloyannis, *supra* note 5, at 335 (noting limited effectiveness of U.N.'s first twenty years in implementing international humanitarian law); Pickard, *supra* note 202, at 441-47 (describing major problems hindering promulgation of ICC as lack of international consensus and states' refusal to relinquish sovereignty). *But see* Bassiouni, *supra* note 139, at 1 (suggesting problems regarding international criminal court already essentially solved).

Crimes Tribunal's indictments of war criminals has further compromised the UN's credibility and authority in the ambit of world affairs.

The "evenhanded enforcement" of international human rights law must take precedence over the one-sided prosecution of war criminals so as to avoid the danger of dispensing a skewed "victor's justice." This danger will be effectively averted by the implementation of an ICC. The authority of such a court would also insure the proper operation of universal *jus cogens* norms in allowing Bosnia to realize its own self-determination as a sovereign state. Since *jus cogens* rights and obligations extend beyond national boundaries, jurisdiction over violations of these rights will be universal and actionable independent of any treaties. The *jus cogens* principles of supra-sovereign, universal jurisdiction can be readily extended to serve as the doctrinal bases for a permanent ICC in upholding universal human rights norms.

The promulgation of the International War Crimes Tribunal was a much-needed first step in curbing the ever-present specter of "ethnic cleansing" and in bolstering the re-enfranchisement of the UN's authority. An autonomous ICC, however, superseding the existing "paper" authority scope of the UN's ICTY and ICTR, will clearly be required in order to restore credibility in the UN's authority and to elevate it to the deserved status of final arbiter of international affairs in the advancement of a New World Order.

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