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Intervention in the Yugoslav Civil War: The United Nations' Right to Create an International Criminal Tribunal

I. Introduction

The ongoing and seemingly endless civil war in the territory of the former Federal Republic of Yugoslavia officially began on June 25, 1991, when two republics, Slovenia and Croatia, declared their independence and provoked the collapse of the nation.¹ The fighting republics committed and are still committing countless atrocities, including murder, rape, torture, and "ethnic cleansing."² In response, the United Nations Security Council (Council) established an international tribunal to prosecute war crimes perpetrated during the Yugoslav war.³ The tribunal is the first internationally mandated forum established by the United Nations (UN) to prosecute crimes against humanity since the Nuremberg trials of top Nazi leaders after World War II.⁴

This Comment examines the conflict in the territory of the former Yugoslavia and the reaction to it by the international community. Part II recounts the history of the country's breakup and its aftermath and explores the actions the European Community and the UN have taken. Part III examines the International Tribunal (Tribunal) created to prosecute violators of international humanitarian law in the former Yugoslavia, focusing on its creation, scope, and functions. Part IV discusses the Council's bases for intervention in the Yugoslav conflict and for the creation of the Tribunal, including a consideration of the Council's actions in Iraq and Somalia and the establishment of other international military tribunals. Part V examines the effectiveness of the Tribunal and evaluates other options presently available for the redress of war crimes in the former Yugoslavia. Finally, Part VI analyzes the arguments for and against establishing the Tribunal and concludes that

1. Roy Gutman, *Independence Declared; Slovenia, Croatia Leave Yugoslavia; War Is Feared*, NEWSDAY, June 26, 1991, at 4.

2. Julia Preston, *U.N. Security Council Establishes Yugoslav War Crimes Tribunal, Judicial Panel Is 1st Such Body Since Nuremberg*, WASH. POST, Feb. 23, 1993, at A1. "Ethnic cleansing" refers to the forced removal of one ethnic group by another. Stephanie Nebehay, *UN War Crimes Experts Investigating 98 Mass Graves*, Reuter Libr. Rep., Sept. 1, 1993, available in LEXIS, Nexis Library, INT'L File.

3. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 1-2, U.N. Doc. S/RES/827 (1993).

4. Preston, *supra* note 2.

it is unlikely that the Tribunal will serve the justice it was created to provide.

II. Background and History

A. *Ethnic and Religious Rivalries in Yugoslavia*

Prior to the commencement of the current civil war, the Socialist Federal Republic of Yugoslavia consisted of the six republics of Croatia, Slovenia, Serbia, Bosnia-Herzegovina, Montenegro, and Macedonia and the two autonomous regions of Kosovo and Vojvodina.⁵ In 1918, the World War I Allied powers created this multinational state, and from its inception Yugoslavia was destined for disaster.⁶ An oppressive Serbian monarch first ruled the country.⁷ Communist leader Josip Broz Tito replaced this monarch and reigned for nearly forty years.⁸ Tito's death in 1980 brought about the initial decline of the communist state,⁹ leaving the nation without any political organization to hold its diverse territories together.¹⁰ In 1990, the strength of communism in the region further diminished when Croatia and Slovenia voted new, non-communist parties into office.¹¹ As the influence of communism declined, ethnic and religious rivalries intensified and ultimately culminated in a vicious civil war.¹²

The current turmoil throughout the former Yugoslavia represents a struggle that is neither recent nor surprising. The antagonism between Serbia and Croatia arose centuries ago at the time of the Ottoman and Hapsburg empires, which drew the boundary lines between the two republics.¹³ The "centuries-old ethnic and religious differences [among the republics] that had been kept in check during four decades of

5. Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569, 570 (1992). The population of the territory is estimated at 24 million. *Id.*

6. See David Lawday, *Doomed by an Ancient Disease*, U.S. NEWS & WORLD REP., May 17, 1993, at 34-35.

7. *Id.*

8. Gutman, *supra* note 1. Tito, a Croat, tried to decrease Serbia's power while increasing his own by turning the various ethnic groups in Yugoslavia against one another. Lawday, *supra* note 6, at 35.

9. Pascal Privat & Theodore Stanger, *Yugoslavia: Bloodshed in the Balkans*, NEWSWEEK, Sept. 9, 1991, at 40.

10. Lawday, *supra* note 6, at 35.

11. Privat & Stanger, *supra* note 9.

12. *Id.*

13. David Lawday & Srdjan Trifkovic, *The Fire This Time*, U.S. NEWS & WORLD REP., July 15, 1991, at 33.

centralized communist rule” are now finally re-emerging.¹⁴ Slovenia and Croatia’s predominantly Roman Catholic and Western-oriented populations are clashing with Serbia’s dominant Orthodox Christian population.¹⁵ There is also a large and volatile Serbian minority in Croatia who recently declared their union with Serbia, thereby magnifying the friction.¹⁶ Furthermore, while the six republics of the former Yugoslavia are of common Slav origin, the territories share no other common element of a conventional nation; neither history, religion, language, alphabet, nor economic status is common to all the republics.¹⁷ As a result, the once unified Yugoslavia has become a group of neighboring territories without a mechanism or desire to remain united.

In recent years, Slovenia, Croatia, and Serbia have fought bitterly about restructuring the former communist federation of Yugoslavia.¹⁸ As communism deteriorated, these rival republics and their freely elected leaders moved in their own directions.¹⁹ Croatia and Slovenia, which declared themselves independent on June 25, 1991, campaigned for a loose association of sovereign states in place of the current federation.²⁰ At the other extreme, Serbia demanded that Croatia and Slovenia retract their declarations of independence in order to maintain the tight federation.²¹

In addition, these republics have disputed the control of the collective presidency, which governed Yugoslavia’s federal government prior to the breakup of the nation.²² This Presidency rotated among the heads of the republics and autonomous territories.²³ As part of the

14. Ray Moseley, *Yugoslav, Slovenia Forces Clash*, CHI. TRIB., June 28, 1991, at 1.

15. Gutman, *supra* note 1. Slovenia has a population of 1.94 million of whom 90% are ethnic Slovenes and small percentages are ethnic Serbs, Croats, and Hungarians. Weller, *supra* note 5, at 569. Croatia has a population of 4.68 million 85% are ethnic Croats and 11.5% are ethnic Serbs. *Id.* Serbia has a population of 9.8 million, two-thirds of whom are ethnic Serbs. *Id.*

16. Gutman, *supra* note 1. Krajina and Petrinja are two of the regions in Croatia where ethnic Serbs are predominant. Weller, *supra* note 5, at 569.

17. Lawday, *supra* note 6, at 35.

18. Gutman, *supra* note 1. Other sources of conflict are the disparity in economics, politics, and religion. Lawday & Trifkovic, *supra* note 13.

19. Lawday & Trifkovic, *supra* note 13. Croatia and Slovenia have stronger economies than Serbia and hoped to rebuild old commercial ties with Western Europe. Lawday, *supra* note 6, at 35.

20. Lawday & Trifkovic, *supra* note 13.

21. *Id.* at 34. Serbian President Milosevic pledged that Serbs will not live in an alien state and declared that republics with Serbian minorities had to transfer these minority areas to Serbia if they intended to secede from the country. *Id.* at 35.

22. Weller, *supra* note 5, at 569.

23. *Id.*

normal rotation of the Presidency, Croat Stjepan Mesic was scheduled to enter office in May 1991.²⁴ Serbia's President Slobodan Milosevic blocked Mesic's entrance into office and refused to accept him as President of the country, which ultimately incited Croatia to declare independence.²⁵ However, Milosevic's attempts to keep Mesic out of office were only temporarily successful. Yugoslavia's federal Presidency remained vacant only for a brief period, after which the federation elected Mesic as President.²⁶ On July 8, 1991, shortly before Mesic was elected, a truce was imposed that brought relative peace to Slovenia.²⁷ However, the fighting between the Croats and the Serb rebels in Croatia continued.²⁸

B. *The Final Breakup of the Yugoslav State*

As the fighting in Croatia escalated, the Bosnians²⁹ grew concerned that Serbia and Croatia would attempt to divide Bosnia-Herzegovina (Bosnia) between them.³⁰ Since Bosnia is an ethnic melting pot of Muslims, Serbs, and Croats, the Bosnians believed that Serbia and Croatia might decide to appropriate the areas where their ethnic groups were dominant.³¹ The Bosnians sought international recognition when it became clear that Serbian President Milosevic had no intention of protecting their rights in his quest for a "Greater Serbia."³² In a referendum on February 29, 1992, an overwhelming majority of Bosnian Muslims and Croats voted for independence from Yugoslavia, believing that sovereignty was the only means of preserving their republic.³³ On March 3, 1992, the tiny republic of Montenegro voted to remain in

24. Moseley, *supra* note 14. In some cases, Mesic is also referred to as "Stipe Mesic" or "Stjepan Mesic." See Gutman, *supra* note 1; Weller, *supra* note 5, at 570, 574.

25. Gutman, *supra* note 1.

26. See Moseley, *supra* note 14; Weller, *supra* note 5, at 574.

27. Privat & Stanger, *supra* note 9.

28. *Id.*

29. For purposes of this Comment, the term "Bosnians" refers to the inhabitants of Bosnia-Herzegovina, including Muslims, Serbs, and Croats, unless otherwise specified.

30. Tim Judah, *Muslims and Croats Vote for Bosnia Independence*, THE TIMES (London), Mar. 2, 1992, at 11.

31. Lawday & Trifkovic, *supra* note 13, at 35. Bosnia-Herzegovina is 40% Muslim, 32% Serb, and 18% Croat. *Id.* The republic has a population of 4.1 million. Weller, *supra* note 5, at 569.

32. Tom Post et al., *Making War on Muslims*, NEWSWEEK, Aug. 10, 1992, at 40. The term "Greater Serbia" refers to Milosevic's plan to join all the areas populated by Serbs in the former Yugoslavia into one state. See Lawday & Trifkovic, *supra* note 13, at 35.

33. Judah, *supra* note 30. About 60% of the electorate voted on the referendum, indicating the strong support for independence. *Id.*

Yugoslavia, holding on to its close ties with Serbia.³⁴ Serbia and Montenegro formed an alliance that is the basis of the new Yugoslavia.³⁵

In response to the collapse of Yugoslav unity, Serbian President Milosevic declared that Serbs from all areas of the former nation had to join together to form a single Serbian state.³⁶ This prompted the Serbs to enact their land-grabbing plan for a "Greater Serbia," which involved carving out areas of Bosnia inhabited primarily by Serbs and annexing this land for their own republic.³⁷ Meanwhile, the Croats developed a similar plan for a "Greater Croatia."³⁸ By the Fall of 1992, Bosnia essentially ceased to exist as a nation after the Serbs and Croats seized control of large areas of the republic.³⁹ It seems that Bosnia is destined to remain a permanently divided nation because the Serbs and Croats continue to attack Bosnia's remaining Muslim enclaves and refuse to negotiate the return of the land captured in Bosnia.⁴⁰

In April 1992, the United States and other nations recognized Serbia, Croatia, and Bosnia-Herzegovina's independence.⁴¹ As a result, the territory that once comprised the nation of Yugoslavia was transformed into five separate entities including the three independent countries of Slovenia, Croatia, and Bosnia-Herzegovina; the remnants of the Yugoslav state, made up of the republics of Serbia and Montenegro; and the secessionist republic of Macedonia.⁴²

C. Sanctions and Attempted Relief Efforts

The outbreak of the fighting on June 27, 1991, between Slovenia, Croatia, and Serbia caught the attention of the international community,

34. *Montenegro Votes to Stay in Yugoslavia*, Reuter Libr. Rep., Mar. 2, 1992, available in LEXIS, Nexis Library, INT'L File.

35. *Id.*

36. Lawday, *supra* note 6, at 35.

37. *Id.* As of March 1993, Serbia's army occupied 70% of Bosnia-Herzegovina, leaving only Sarajevo and isolated areas of the region in the hands of the Bosnian government. Bruce W. Nelan, *More Harm Than Good; Bosnia's Brutal Tragedy Grows Worse While the U.S. and Its Allies Resolve to Remain Spectators*, TIME, Mar. 15, 1993, at 40.

38. Lawday, *supra* note 6, at 35. The Serbs and Croats succeeded in carving up Bosnia, even though the Bosnian Muslims outnumbered both Bosnian Serbs and Croats. *Id.*

39. Stephen Budiansky, *When Hope Runs Out*, U.S. NEWS & WORLD REP., May 24, 1993, at 36, 37.

40. *Id.* at 36.

41. David Binder, *U.S. Recognizes Three Yugoslav Republics as Independent*, N.Y. TIMES, Apr. 8, 1992, at A10. After recognizing the republics, the United States lifted the sanctions involving economic aid and trade benefits against Slovenia, Croatia, Bosnia-Herzegovina, and Macedonia. *Id.*

42. *Id.*

in particular the European Community (EC) and the UN. Within seventy-two hours of Serbia's attack on Slovenia, the EC sent a group of Foreign Ministers on two missions to Yugoslavia.⁴³ The Slovenes, Croats, and Serbs agreed to numerous cease-fires, but the parties did not comply with their obligations under the agreements.⁴⁴ Unfortunately, a peace conference at the Hague on September 7, 1991, also failed to stop the fighting in Croatia, even though cease-fire agreements were renewed.⁴⁵

As the situation deteriorated, the UN Security Council received requests from some of its members to convene a meeting and take action in the Yugoslav conflict.⁴⁶ On September 25, 1991, the Council responded to these requests and met to discuss the situation in Yugoslavia.⁴⁷ At the beginning of the meeting, in an unprecedented move, the Yugoslav Representative to the UN requested that an embargo be placed on weapons and military equipment delivered to all parties in Yugoslavia and that all states refrain from escalating the already increasing tensions in the nation.⁴⁸ In response to that request, the Council passed Resolution 713 and, under its Chapter VII powers,⁴⁹ established a general and complete embargo on all deliveries of weapons

43. Weller, *supra* note 5, at 571. The European Community involved itself in the crisis, even though Yugoslavia was not one of its members. *Id.* At this point, the name "Yugoslavia" refers to the nation as it existed prior to the declarations of independence by Slovenia, Croatia, and Bosnia.

44. *Id.* at 571-77. The first cease-fire agreement, signed on July 7, 1991, provided for the withdrawal of Yugoslav forces from Slovenia. *Id.* at 573; *Yugoslavia: EEC Adopts Cautious But Dogged Stance*, Eur. Information Service; Eur. Rep., July 10, 1991, available in LEXIS; Europe Library, EURRPT File. Another attempted cease-fire agreement, on September 2, 1991, called for a cease-fire in Croatia and specifically provided for the demobilization of Croatian forces, the return of Yugoslav forces to their barracks, and the deployment of observers to oversee compliance with the cease-fire. *Political Cooperation: Need for an Agreement on the Cease-Fire in Yugoslavia*, Eur. Information Service; Eur. Rep., Sept. 4, 1991, available in LEXIS, Europe Library, EURRPT File.

45. Weller, *supra* note 5, at 577.

46. *Id.* See, e.g., *Letter Dated 19 September 1991 from the Permanent Representatives of Austria to the United Nations Addressed to the President of the Security Council*, U.N. SCOR, 46th Sess., at 1, U.N. Doc. S/23052 (1991); *Letter Dated 20 September 1991 from the Permanent Representatives of Hungary to the United Nations Addressed to the President of the Security Council*, U.N. SCOR, 46th Sess., at 1, U.N. Doc. S/23057 (1991).

47. U.N. SCOR, 46th Sess., 3009th mtg., U.N. Doc. S/PV.3009 (1991) [hereinafter S/PV.3009].

48. *Id.* The sanctions requested refer to the Serbs, Croats, and Bosnians in the territory of the former Yugoslavia.

49. Chapter VII of the UN Charter authorizes the Council to determine the existence of threats to the peace and then to decide what measures should be taken to restore international peace and security. U.N. CHARTER arts. 39-42. These powers are discussed in detail in Part III of this Comment.

INTERNATIONAL CRIMINAL TRIBUNAL

and military equipment to Yugoslavia in order to establish peace and security in the nation.⁵⁰

During the next year, the Council implemented three additional stages of sanctions against the Federal Republic of Yugoslavia (now Serbia and Montenegro),⁵¹ again acting under its Chapter VII powers. The first stage of sanctions included import and export bans on commodities and products, refusals to provide financial or economic resources, bans on aircraft flights from or into the Federal Republic of Yugoslavia, and prohibitions on the Federal Republic's participation in sporting events.⁵² The second stage established a ban on military flights in the airspace of Bosnia-Herzegovina to insure the safe delivery of humanitarian assistance to that area.⁵³ The third stage included prohibitions on the transshipment of certain goods through the Federal Republic of Yugoslavia and required the inspection of all maritime shipping moving in and out of the Federal Republic to insure compliance with previous embargoes.⁵⁴

In addition to imposing sanctions, the Council implemented numerous relief efforts aimed at preventing future violence and destruction. On February 21, 1992, the Council reiterated its concern that the situation in Yugoslavia constituted a threat to international peace and security.⁵⁵ In order to create an atmosphere suitable for negotiating a peace settlement, the Council established a UN Protection Force in accordance with the UN peace-keeping plan.⁵⁶ Unfortunately, these protection forces have been unable to suppress the large scale fighting in many areas, such as Croatia, where the Serbian and Croatian armies have been involved in conflict.⁵⁷

50. S.C. Res. 713, U.N. SCOR, 46th Sess., 3009th mtg. at 3, U.N. Doc. S/RES/713 (1991).

51. At this time, the United States and the EC formally recognized the independence of Slovenia, Croatia, and Bosnia, and the Federal Republic of Yugoslavia now refers primarily to Serbia and Montenegro. See Binder, *supra* note 41; *supra* text accompanying notes 34 and 35.

52. S.C. Res. 757, U.N. SCOR, 47th Sess., 3082d mtg. at 3-5, U.N. Doc. S/RES/757 (1992).

53. S.C. Res. 781, U.N. SCOR, 47th Sess., 3122d mtg. at 2, U.N. Doc. S/RES/781 (1992).

54. S.C. Res. 787, U.N. SCOR, 47th Sess., 3137th mtg. at 3-4, U.N. Doc. S/RES/787 (1992). This provision applies to the embargoes established in resolutions 713 (1991) and 757 (1992). See S.C. Res. 713, U.N. SCOR, 46th Sess., 3009th mtg. at 3, U.N. Doc. S/RES/713 (1991); S.C. Res. 757, U.N. SCOR, 47th Sess., 3082d mtg. at 3-5, U.N. Doc. S/RES/757 (1992).

55. S.C. Res. 743, U.N. SCOR, 47th Sess., 3055th mtg. at 1, U.N. Doc. S/RES/743 (1992).

56. *Id.* at 2. The purpose of this peace-keeping operation is to "create the conditions of peace and security" in the former Yugoslavia. U.N. SCOR, 46th Sess., Annex III at 15-16, U.N. Doc. S/23280/Annex (1991). UN troops were to designate "Protected Areas" to be demilitarized to ensure that the people living there were protected from attack. *Id.*

57. See Jeff Trimble, *Into the Valleys of Death*, U.S. NEWS & WORLD REP., June 21, 1993, at 45-47.

Since the beginning of the conflict, the UN has made numerous attempts at implementing cease-fire agreements.⁵⁸ The Council has urged strict compliance with these agreements⁵⁹ and has demanded that the parties comply with the UN peace-keeping plan in Croatia and with their cease-fire obligations.⁶⁰ Although the Croats, Serbs, and Bosnians have signed more than a dozen cease-fire agreements, many violations have occurred and are still occurring. While the UN continues its attempts to prevent further fighting and bloodshed in the former Yugoslavia through sanctions, peacekeeping forces, and cease-fire agreements, the end of the war does not appear any closer and the goal of restoring peace to this Slavic region seems an unrealizable dream.

III. The International Tribunal to Prosecute Violations of International Law in the Former Yugoslavia

A. *Creation of the Commission of Experts and the International Tribunal*

As a result of the failed attempts to restore peace and security in the former Yugoslavia, the Council considered establishing a tribunal to prosecute the Croats, Serbs, and Muslims for the countless atrocities that have been and continue to be committed against thousands of civilians and prisoners-of-war.⁶¹ These crimes involve grave breaches of the Geneva Conventions,⁶² violations of the Convention Against

58. On October 18, 1991, the Serbs and the Croats agreed to an immediate and unconditional cease-fire in Croatia. See *Report of the Secretary-General*, U.N. SCOR, 46th Sess., Annex III at 23, U.N. Doc. S/23169/Annex (1991). Another agreement signed at Geneva on November 23, 1991, provided for the withdrawal of the Yugoslav National Army (JNA) from Croatia. See *Report of the Secretary-General*, U.N. SCOR, 47th Sess. at 1-3, U.N. Doc. S/23513 (1992). But not long after it was signed, there were reports that both the Serbs and the Croats were violating the agreement. *Id.* Then again, on April 12, 1992, the leaders of the three main parties in Bosnia, the Croats, the Serbs, and the Bosnians, signed a cease-fire agreement. See *Report of the Secretary-General*, U.N. SCOR, 47th Sess., Annex II at 11, U.N. Doc. S/23836/Annex (1992).

59. S.C. Res. 743, *supra* note 55. This resolution refers specifically to the cease-fire agreements signed on November 23, 1991, and January 2, 1992.

60. S.C. Res. 807, U.N. SCOR, 48th Sess., 3174th mtg. at 1, U.N. Doc. S/RES/807 (1993). On February 19, 1993, the Council expressed deep concern about the parties' repeated violations of cease-fire agreements. *Id.*

61. See Patrick Worsnip, *Proposed War Crimes Tribunal Faces Big Hurdles, Experts Say*, Reuter Libr. Rep., Feb. 19, 1993, available in, LEXIS, Nexis Library, INT'L File; Evelyn Leopold, *U.N. Security Council to Vote on War Crimes Court*, Reuter Libr. Rep., Feb. 21, 1993, available in, LEXIS, Nexis Library, INT'L File [hereinafter *Vote on War Crimes Court*].

62. See Geneva Convention Relative to the Treatment of War Prisoners, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter *Third Geneva Convention*]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter *Fourth Geneva Convention*].

INTERNATIONAL CRIMINAL TRIBUNAL

Genocide,⁶³ and other serious crimes against humanity and the laws of war.⁶⁴ Human rights groups have blamed the Serbs in Croatia and Bosnia for most of the atrocities, but Croat and Muslim forces are by no means innocent victims.⁶⁵

All three ethnic groups have committed crimes including beatings, killings, rapes, torture, pillage, and the wanton destruction of property.⁶⁶ In addition, they have carried out the policy of "ethnic cleansing" in Croatia and Bosnia, which is a form of genocide and has entailed razing cities to the ground, torturing prisoners of war, and forcibly removing civilians from their homes because of their religious or ethnic backgrounds.⁶⁷ Ethnic cleansing has also included the rape of Muslim women, which constitutes another form of genocide.⁶⁸

Despite the international community's increasing knowledge of these atrocities, two steps preceded the creation of the tribunal for the prosecution of the responsible parties. First, a mechanism for recording the crimes being committed in the former Yugoslavia was required. Thus, on October 14, 1992, the Secretary-General established a Commission of Experts (Commission) comprised of five members to examine and analyze evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia.⁶⁹ Individual

63. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 278, 28 I.L.M. 763 [hereinafter Convention Against Genocide].

64. Evelyn Leopold, *U.N. Council Authorises Yugoslav War Crimes Court*, Reuter Libr. Rep., May 26, 1993, available in LEXIS, Nexis Library, INT'L File.

65. *Vote on War Crimes Court*, *supra* note 61.

66. *Id.*; Leopold, *supra* note 64. See Third Geneva Convention, *supra* note 62, art. 3, 6 U.S.T. at 3318, 3320, 75 U.N.T.S. at 136, 138; Fourth Geneva Convention, *supra* note 62, art. 3, 6 U.S.T. at 3518, 3520, 75 U.N.T.S. at 288, 290 (prohibiting murder, mutilation, cruel treatment, and torture of persons taking no active part in the hostilities).

67. See Patrick Worsnip, *supra* note 61; Leopold, *supra* note 64. The discriminatory policy of "ethnic cleansing" is in violation of the Geneva Conventions because it is aimed at people based upon their religious or ethnic backgrounds. See Third Geneva Convention, *supra* note 62, art. 3, 6 U.S.T. at 3318, 3320, 75 U.N.T.S. at 136, 138; Fourth Geneva Convention, *supra* note 62, art. 3, 6 U.S.T. at 3518, 3520, 75 U.N.T.S. at 288, 290 (providing that civilians shall be treated humanely without any adverse distinction founded on race, color, religion or faith, or any other similar criteria).

68. Godfrey Hodgson, *Whose Justice Is It Anyway?*, INDEPENDENT ON SUNDAY, Jan. 24, 1993, at 22. Article II of the Convention Against Genocide defines genocide as "causing serious bodily or mental harm to members of the group" with the intent to destroy a national, ethnic, racial, or religious group. Convention Against Genocide, *supra* note 63, art. II, 78 U.N.T.S. at 280, 28 I.L.M. at 763-64.

69. *Report of the Secretary-General on the Establishment of the Commission of Experts*, U.N. SCOR, 47th Sess. at 2, U.N. Doc. S/24657 (1992) [hereinafter *Commission*]. The Secretary-General created this commission in response to a request by the Security Council in Resolution 780. *Id.*

states, international humanitarian organizations, and other groups began collecting this information and submitting it to the Commission for review.⁷⁰ In addition, the Commission itself began compiling a database of cases of murder, rape, torture, and "ethnic cleansing."⁷¹ After evaluating the gathered information, the Commission will provide the Secretary-General with its conclusions on the evidence of grave breaches of international law in the region.⁷² This evidence may then be used to prosecute those responsible for the crimes committed.

Second, before actually creating the tribunal, the Council requested that the Secretary-General submit a report on the possibility of establishing such a tribunal, including specific proposals and options for its implementation.⁷³ In his report on May 3, 1993, the Secretary-General noted that the normal procedure for establishing an international tribunal involved an international body drafting and ratifying a treaty.⁷⁴ Nevertheless, because of the lengthy process involved in creating and ratifying a treaty and the urgency of the situation in the territory of the former Yugoslavia, the Secretary-General recommended that the Council establish the International Tribunal under its Chapter VII powers in the UN Charter.⁷⁵

The Council has broad and far-reaching authority under Chapter VII. However, before using its Chapter VII powers, the Council must first "determine the existence of any threat to the peace, breach of the peace, or act of aggression."⁷⁶ The Council may then decide what measures should be taken in order "to maintain or restore international peace and security."⁷⁷

70. *Id.* See S.C. Res. 780, U.N. SCOR, 47th Sess., 3119th mtg. at 1-2, U.N. Doc. S/RES/780 (1992); S.C. Res. 771, U.N. SCOR, 47th Sess., 3106th mtg. at 2, U.N. Doc. S/RES/771 (1992) (calling upon the designated parties to collate information relating to violations of international law and to provide the evidence to the Commission).

71. Nebehay, *supra* note 2.

72. *Commission*, *supra* note 69, at 2.

73. *Id.*

74. *Report of the Secretary-General Pursuant to Resolution 808 (1993)*, U.N. SCOR, 48th Sess. at 6, U.N. Doc. S/25704 (1993) [hereinafter *Report*]. One advantage to this approach is that it provides the opportunity to perform a detailed examination of the issues relating to establishing an international tribunal. *Id.* at 7. Furthermore, states participating in the negotiations have sufficient time to decide whether or not they want to become parties to the treaty. *Id.* The disadvantage of this procedure is the substantial amount of time required to establish a treaty and then to obtain the required number of ratifications. *Id.*

75. *Id.*

76. U.N. CHARTER art. 39.

77. *Id.* Articles 41 and 42 of the UN Charter limit the Council's latitude in deciding what measures are to be taken. Article 41 permits the Council to implement non-military measures in order to enforce its decisions including, but not limited to, the complete or partial interruption of economic relations and means of communications and the severance of diplomatic relations. U.N.

INTERNATIONAL CRIMINAL TRIBUNAL

Using this procedure, the Council established a tribunal to maintain or restore international peace and security.⁷⁸ The advantage of this approach was that the Council's decision becomes effective immediately since all member states are required to carry out decisions made pursuant to Chapter VII.⁷⁹ Thus, after two years of violence, bloodshed, and destruction in the former Yugoslavia, the Council relied on its Chapter VII powers to create an international tribunal to prosecute those responsible for grave breaches of international humanitarian law in the former Yugoslavia in accordance with the Secretary-General's report.⁸⁰

B. Functions of the International Tribunal

The preamble to the Statute of the International Tribunal (Statute) states the objective of the Tribunal as "the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."⁸¹ Under the provisions of the Statute, the Tribunal has the power to prosecute persons committing or ordering the commission of grave breaches of the Geneva Conventions of 1949,⁸² violating the laws or

CHARTER art. 41. Article 42 provides for the use of military action by air, sea, or land if action provided for in Article 41 would be inadequate. U.N. CHARTER art. 42.

78. See *Report*, *supra* note 74, at 7.

79. See *id.*

80. S.C. Res. 827, *supra* note 3. In addition, the Council adopted the Statute of the International Tribunal annexed to the Secretary-General's report, which includes provisions on subject matter jurisdiction, personal jurisdiction, individual criminal responsibility, and the organization of the Tribunal. *Report*, *supra* note 74, Annex.

81. *Statute of the International Tribunal*, U.N. SCOR, 48th Sess., Annex at 36, U.N. Doc. S/25704/Annex (1993) [hereinafter *Statute*].

82. The following acts against persons or property are protected under the Statute:

- (a) wilful killing;
- (b) torture or inhuman treatment, including biological experiments;
- (c) wilfully causing great suffering or serious injury to body or health;
- (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
- (g) unlawful deportation or transfer or unlawful confinement of a civilian;
- (h) taking hostages as civilians.

Id. art. 2, at 36. See Third Geneva Convention, *supra* note 62, 6 U.S.T. 3316, 75 U.N.T.S. 135; Fourth Geneva Convention, *supra* note 62, 6 U.S.T. 3516, 75 U.N.T.S. 287.

customs of war,⁸³ committing genocide,⁸⁴ or committing crimes against humanity.⁸⁵

The Statute provides for individual criminal responsibility as opposed to collective governmental responsibility. Persons planning, instigating, ordering, committing, or otherwise aiding and abetting in the planning, preparation, or execution of an aforementioned crime are individually accountable for their crimes.⁸⁶ An accused person's official position as Head of State or Government does not relieve that person of criminal responsibility nor does it mitigate his or her punishment.⁸⁷ Acts committed by a subordinate do not relieve a superior from criminal responsibility.⁸⁸ Moreover, a subordinate acting pursuant to an order of a Government or superior does not escape culpability.⁸⁹

83. Violations of the laws or customs of war include but are not limited to the:

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

Statute, supra note 81, art. 3, at 37.

84. *Id.* art. 4, at 37-38; *see* Convention Against Genocide, *supra* note 63, arts. II, III, 78 U.N.T.S. at 280, 28 I.L.M. at 763-64.

85. Crimes against humanity include the following crimes committed in an armed conflict, either international or internal, when directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.

Statute, supra note 81, art. 5, at 38.

86. *Id.* art. 7, ¶ 1, at 38.

87. *Id.* art. 7, ¶ 2, at 39.

88. *Id.* art. 7, ¶ 3, at 39. This accountability is limited to superiors who "knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or punish the perpetrators thereof." *Id.*

89. *Statute, supra* note 81, art. 7, ¶ 4, at 39. The fact that an accused acted pursuant to superior orders may be considered in the mitigation of punishment. *Id.*

INTERNATIONAL CRIMINAL TRIBUNAL

One major difference between this Statute and statutes of earlier war crimes tribunals is that, in the case of Yugoslavia, the accused may not be tried in absentia.⁹⁰ This change was necessary because trials in absentia may run counter to the long-settled principles of justice and due process in national and international law.⁹¹ Another significant difference is that the Tribunal may only impose the penalty of imprisonment on convicted individuals.⁹² Since the UN has no prisons of its own, the Statute provides for the imprisonment of convicted individuals in specific countries. The Tribunal will designate the country in which a convicted prisoner will serve his or her sentence from a list of states that have indicated a willingness to accept such individuals.⁹³

IV. Bases for Intervention and the Creation of the International Tribunal in the Former Yugoslavia

A. *The Security Council's Power to Intervene Under the UN Charter*

According to the rules of the UN Charter, the Council's actions are subject to the principle of nonintervention, which prohibits interference with the domestic affairs of any state.⁹⁴ However, an important exception to this doctrine provides that the principle of nonintervention

90. *Id.* art. 21, at 44. Article 21 declares that an accused has the right to be present at the hearing and to defend himself in person or through legal assistance of his own choosing. *Id.* However, the Charter of the International Military Tribunal at Nuremberg provided for trials of war criminals in absentia. Charter of the International Military Tribunal, Aug. 8, 1945, art. 12, 59 Stat. 1546, 1548, 82 U.N.T.S. 284, 290 [hereinafter London Charter].

91. Louis René Beres, *Iraqi Crimes During and After the Gulf War: The Imperative Response of International Law*, 15 LOY. L.A. INT'L & COMP. L.J. 675, 676 (1993).

92. *Statute*, *supra* note 81, art. 24, at 45. The Tribunal may also order the return to the rightful owner of any property and proceeds acquired by criminal conduct. *Id.* In contrast, prior war crimes tribunals had the right to impose death or other just punishment on convicted defendants. *See, e.g.*, London Charter, *supra* note 90, art. 27, 59 Stat. at 1552, 82 U.N.T.S. at 300; International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevens 20, 31.

93. *Id.* art. 27, at 46. Eligibility for pardon or commutation of sentence is based upon the applicable law of the state in which the convicted is imprisoned. *Id.* art. 28, at 46. The Tribunal will decide whether to grant a pardon or commute the sentence based upon the interests of justice and general principles of law. *Id.*

94. Jost Delbrück, *A Fresh Look at Humanitarian Intervention Under the Authority of the United Nations*, 67 IND. L.J. 887, 891-92 (1992). The principle of nonintervention is found in Article 2 of the UN Charter, which reads:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

U.N. CHARTER art. 2, ¶ 7.

"shall not prejudice the application of enforcement measures under Chapter VII."⁹⁵ In essence, this exception permits the Council to enact measures that interfere with the internal affairs of a state in order to maintain or restore international peace and security.⁹⁶ Whether the Council would need to rely on this exception for creating the Tribunal, however, is questionable because the Council's decision that a particular situation constitutes a threat to the peace, based upon Article 39, implies that the matter is not a domestic one.⁹⁷

When contemplating action under the Charter, the Council must determine first whether the acts under consideration fall within the domestic jurisdiction of a state. One could argue that human rights govern the relationship between a government and its citizens and, therefore, are a purely domestic concern.⁹⁸ However, it is doubtful that cases of grave violations of fundamental human rights constitute domestic matters. In most cases, human rights violations involve threats to international peace and security⁹⁹ and, therefore, fall outside the domestic jurisdiction of a state.¹⁰⁰ For example, persecuted individuals may try to leave their abusive nations and migrate into neighboring states, causing massive immigration problems. In addition, conflicts themselves may overflow into adjacent states. Consequently, Chapter VII authorizes the UN to intervene in the internal affairs of a country for violations of human rights where those violations may jeopardize the peace and security of other nations.¹⁰¹ Furthermore, the General Assembly and the Security Council have held that human rights violations do not constitute matters essentially within the domestic jurisdiction of the state involved because member states are bound by UN Charter provisions that protect human rights.¹⁰²

95. U.N. CHARTER art. 2, ¶ 7.

96. Chapter VII of the UN Charter requires the Council to ascertain threats to the peace and then to select proper actions to remedy such threats. U.N. CHARTER art. 39.

97. Delbrück, *supra* note 94, at 892. See U.N. CHARTER art. 2, ¶ 7; U.N. CHARTER art. 39.

98. Delbrück, *supra* note 94, at 892.

99. The phrase "threat to international peace and security" has been interpreted to include situations that by their nature could potentially become a threat to international peace. See *id.* at 898.

100. *Id.* at 892. It should be noted, however, that some analysts believe that there exist grave violations of fundamental human rights that do not entail direct threats to international peace. See *id.*

101. *Id.* One rationale for the protection of human rights violations under international law is that certain crimes, when committed under the authority of the state, become matters of international concern because of the assumed international impact of this behavior. See Beres, *supra* note 91, at 677-78.

102. Delbrück, *supra* note 94, at 893. Article 1(3) and Article 55 are two provisions of the UN Charter that protect human rights. *Id.* Both of these articles provide that the UN should encourage

1. *The Security Council's Intervention Under Chapter VII in Past Internal Conflicts.*—The UN has only invoked Chapter VII of the Charter and adopted sanctions for grave human rights violations in a few instances.¹⁰³ The first cases of UN intervention involved the policies of apartheid in Southern Africa.¹⁰⁴ In these cases, the Council enacted sanctions against the Ian Smith regime in Southern Rhodesia (Zimbabwe)¹⁰⁵ and against the apartheid regime in South Africa.¹⁰⁶ The Council justified this intervention by characterizing these policies as “disturbance[s] of international peace” and “threat[s] to international peace” and security.¹⁰⁷ However, the UN only characterized these policies of apartheid, not all grave human rights violations, as threats to international peace and security entitling intervention under Chapter VII.

The Council's intervention powers then lay dormant until the Iraq-Kuwait conflict. As a result of both the end of the Cold War and the newly established consensus among the Soviet Union, the United States, and other Western powers, the UN was able to take action inside a sovereign member state, Iraq, to protect minority groups from human rights violations amounting to acts of genocide.¹⁰⁸

On August 2, 1990, the armed forces of Iraq invaded its neighboring state, Kuwait, and caused extensive casualties.¹⁰⁹ The worst brutality occurred early in Iraq's occupation of Kuwait. For instance, the Iraqi invaders ripped off fingernails, shot individuals in the head, wounded people with axes, drilled holes in kneecaps, filled intestines with air, burned bodies with acid, cut off ears, and gorged off eyes.¹¹⁰ In addition, Iraqi soldiers raped Kuwaiti women and Filipino

“respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” U.N. CHARTER art. 1, ¶ 3; U.N. CHARTER art. 55.

103. Delbrück, *supra* note 94, at 894.

104. *See id.*

105. *See id.* at 894 & n.30, 899; S.C. Res. 253, U.N. SCOR, 23d Sess., 1428th mtg. at 5, U.N. Doc. S/RES/253 (1968) (extending the previous oil embargo of S.C. Res. 221, U.N. SCOR, 21st Sess., 1277th mtg. at 5, U.N. Doc. S/RES/221 (1966), and calling for extensive additional economic sanctions against Southern Rhodesia).

106. *See* Delbrück, *supra* note 94, at 894 & n.30, 899; S.C. Res. 418, U.N. SCOR, 32d Sess., 2046th mtg. at 5, U.N. Doc. S/RES/418 (1977) (calling for a mandatory arms embargo against South Africa).

107. Delbrück, *supra* note 94, at 894, 899.

108. *Id.* at 888.

109. Michael R. Gordon, *Iraq Army Invades Capital of Kuwait in Fierce Fighting*, N.Y. TIMES, Aug. 2, 1990, at A1. Iraqi President Saddam Hussein claimed that revolutionaries had overthrown the Kuwaiti Government and that Kuwait had asked Iraq for help. *Id.* Kuwait, a sovereign state since its independence from Britain in 1961, has a population of 1.9 million, while Iraq has 17 million inhabitants. *Id.*

110. Steven Strasser et al., *Kuwait: Rape of a Nation*, NEWSWEEK, Mar. 11, 1991, at 36.

housemaids at will.¹¹¹ Aside from the violence against individuals, the Iraqi occupiers looted Kuwaiti homes, set one-third of Kuwait's oil wells ablaze, and destroyed hotels, government buildings, and the parliament.¹¹²

In response, the Council activated its powers under Chapter VII and passed a series of resolutions in order to restore peace and security in the region and to expel the Iraqi invaders from Kuwait.¹¹³ On the day of the initial attack on Kuwait, the Council passed Resolution 660, which condemned the invasion and ordered Iraq to withdraw immediately and unconditionally.¹¹⁴ Four days later, when Iraq failed to comply with the demand for withdrawal, the Council again invoked its Chapter VII powers, ordering all member states to impose strict economic sanctions against Iraq and to protect the legitimate government of Kuwait.¹¹⁵ On November 29, 1990, the Council passed Resolution 678, authorizing member states to use "all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area," if Iraq failed to comply by January 15, 1991.¹¹⁶

On January 16, 1991, the allied forces began bombing Iraq and Kuwait in an effort to liberate Kuwait.¹¹⁷ A month later, after extensive bombing and a massive land attack that left allied forces occupying part of Southern Iraq, Iraq withdrew its troops from Kuwait.¹¹⁸ On March 3, 1991, Iraq notified the UN that it would

111. *Id.*

112. *Id.*

113. Joseph E. Mayk, Note, *Crimes Against Peace: An Analysis of the Nuremberg Prohibition on Planning and Waging Aggressive War and its Applicability to the Gulf War*, 24 RUTGERS L.J. 253, 253 (1992). In this case, there was no question that the Council could intervene under Chapter VII because the conflict was not internal.

114. S.C. Res. 660, U.N. SCOR, 45th Sess., 2932d mtg. at 1, U.N. Doc. S/RES/660 (1990).

115. S.C. Res. 661, U.N. SCOR, 45th Sess., 2933d mtg. at 1-3, U.N. Doc. S/RES/661 (1990). These sanctions included import and export bans and a denial of financial and economic resources to Iraq. *Id.*

116. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg. at 1, U.N. Doc. S/RES/678 (1990). The phrase "all necessary means" was not defined, nor was it clear what controls the Security Council could exercise. Benjamin B. Ferencz, *The Nuremberg Principles and the Gulf War*, 66 ST. JOHN'S L. REV. 711, 723 (1992).

117. Andrew Rosenthal, *War in the Gulf: The Overview — U.S. and Allies Open Air War on Iraq; Bomb Baghdad and Kuwait Targets; 'No Choice' But Force, Bush Declares; No Ground Fighting Yet; Call to Arms by Hussein*, N.Y. TIMES, Jan. 17, 1991, at A1. Resolution 678 authorized the use of force against Iraq after January 15, 1990, and required the states involved to keep the Council informed of all actions taken under the resolution. See S.C. Res. 678, *supra* note 116.

118. Youssef M. Ibrahim, *After the War; Iran Organizes and Arms Rebels Fighting Hussein, Diplomats Say*, N.Y. TIMES, Mar. 20, 1991, at A1.

INTERNATIONAL CRIMINAL TRIBUNAL

comply with all Security Council resolutions and Iraqi military leaders accepted the allied terms for ending the Persian Gulf War, including the prompt return of all prisoners and Kuwaiti civilian detainees.¹¹⁹ In a resolution on April 3, 1991, the Council demanded that Iraq recognize the agreed borders with Kuwait; destroy all its chemical, bacteriological, and nuclear weapon materials; accept on-site inspections; and renounce all acts of terrorism.¹²⁰

Although Iraq agreed to end the war, two Iraqi groups were not as willing to stop the fighting. Shiite fundamentalists and Kurds attacked the Iraqi loyalist troops.¹²¹ Hussein was forced to deflect simultaneous attacks from the Shiite rebels in the south of Iraq and the Kurd rebels in the north.¹²² In retaliation, Hussein's troops attacked and slaughtered the rebel fighters, killing many civilians in the process.¹²³

In response to this massacre in Iraq, the Council passed Resolution 688 on April 5, 1991, characterizing the persecution of the Kurds and other Iraqi civilians as a threat to "international peace and security in the region."¹²⁴ The repression of Iraqi civilians led to a massive flow of refugees across international borders which threatened peace and security in the region.¹²⁵ The Council expressed its deep disturbance with the magnitude of human suffering and demanded that Iraq stop the oppression and permit international humanitarian organizations to help the victims.¹²⁶ Without expressly referring to Chapter VII of the Charter, the Council implied its reliance on Article 39 as the legal basis

119. *Identical Letters Dated 21 March 1991 From the Permanent Representative of Iraq to the United Nations Addressed Respectively to the Secretary-General and the President of the Security Council*, U.N. SCOR, 46th Sess., at 3, U.N. Doc. S/22370 (1991); *Letter Dated 3 March 1991 From the Permanent Representative of Iraq to the United Nations Addressed to the President of the Security Council*, U.N. SCOR, 46th Sess., at 1-2, U.N. Doc. S/22320 (1991).

120. S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg. at 4-6, U.N. Doc. S/RES/687 (1991). This resolution also emphasized the goal of establishing a zone in the Middle East free from weapons of mass destruction and a global ban on chemical weapons. *Id.*

121. See R.W. Apple, Jr., *After the War: The Overview; U.S. Says Iraqi Generals Agree to Demands 'On All Matters'; Early P.O.W. Release Expected*, N.Y. TIMES, Mar. 4, 1991, at A1 (explaining that the Shiite fundamentalists are religiously opposed to Saddam Hussein, a Sunni Muslim). See also, Karl E. Meyer, *Kurds Are Not Pawns*, N.Y. TIMES, Mar. 6, 1991, at A24. Kurds account for 15% of Iraq's 19 million people. *Id.*

122. *After the War: Iraq; Iraqi Loyalists Pound Shiite Mosques, Rebels Say*, N.Y. TIMES, Mar. 12, 1991, at A13 [hereinafter *After the War*]. Iran organized and armed many of the Iraqi rebels who led the revolt against Hussein: Ibrahim, *supra* note 118.

123. *After the War, supra* note 122. For example, Hussein's troops shelled Shiite Muslim mosques causing the deaths of both Shiite fighters and civilians. *Id.*

124. S.C. Res. 688, U.N. SCOR, 46th Sess., 2982d mtg. at 1-2, U.N. Doc. S/RES/688 (1991).

125. *Id.*

126. *Id.*

for its actions under Resolution 688 and its intervention in the internal conflict.¹²⁷

More recently, the Council expanded Chapter VII's application to impose sanctions for violations of humanitarian law in Somalia. While the Somalis are a homogeneous people and might be expected to live in unity, their history has been replete with discord.¹²⁸ When Somalia was colonized in the late nineteenth century, its borders were defined and many Somali nomads found themselves citizens of neighboring Kenya and Ethiopia.¹²⁹ In 1960, Somalia was liberated and reunified, but leaders soon realized they were unable to run a Western democracy and discontent with the new government increased.¹³⁰

In October of 1969, the President was assassinated and Major General Mohammed Siad Barre imposed a dictatorship.¹³¹ At first, the Soviet Union supported Siad Barre's regime. However, in 1977, the Soviets withdrew their aid when Siad Barre invaded Ethiopia, a Soviet ally.¹³² The United States then befriended Siad Barre, sending his regime significant military assistance and, in return, taking over the old Soviet military facilities in Somalia.¹³³ After ten years of military backing, Siad Barre's massacre of rival clans and politicians caused the United States to cease providing aid.¹³⁴

Siad Barre's regime further deteriorated as Somalia's rival clans joined together to oust the dictator.¹³⁵ After three years of civil war that killed thousands, destroyed much of the country, and sent hundreds of refugees into neighboring states, Siad Barre fled Somalia in January

127. Delbrück, *supra* note 94, at 895.

128. Sophronia Scott Gregory, *How Somalia Crumbled*, TIME, Dec. 14, 1992, at 34. Although the Somalis have similar language and religion, limited natural resources and internal disputes have created an atmosphere of constant struggle among the various clans in Somalia. *Id.*

129. *Id.* At the time of colonization, Britain controlled the northern third and Italy the southern portion of Somalia. *Id.* After World War II, parts of Somalia were handed over to Ethiopia to atone for pre-war European aggression and the remainder of the nation was controlled by Italy. *Id.*

130. Gregory, *supra* note 128.

131. *Id.* Siad Barre's principal goal was to create a Greater Somalia by uniting the nation with Somali areas of Ethiopia and Kenya. *Id.*

132. Gerry O'Sullivan, *Against the Grain: Another Cold War Casualty*, THE HUMANIST, Jan.-Feb. 1993, at 36, 37. The Soviets provided Siad Barre with heavy artillery that, in turn, was given to the Somali guerrillas in Ethiopia, who were fighting for rights of secession. Gregory, *supra* note 128.

133. Gregory, *supra* note 128.

134. *Id.* However, the United States had already trained Siad Barre's officers and provided them with weapons to terrorize rival clans in Somalia. *Id.* Furthermore, there is evidence suggesting U.S. complicity in the slaughter as recently as 1990, long after the alleged suspension of aid to Siad Barre. O'Sullivan, *supra* note 132.

135. Gregory, *supra* note 128.

INTERNATIONAL CRIMINAL TRIBUNAL

1991.¹³⁶ With Siad Barre out of power, the various clans returned to fighting each other for control of the country, and full-scale war broke out in November 1991 between factions of the two most prominent warlords, General Mohammed Farah Aidid and Ali Mahdi Mohammed.¹³⁷ The degree of human suffering as a result of Somalia's civil war was horrifying as millions of Somalis died because of widespread famine.¹³⁸

On January 23, 1992, the Council determined that the situation in Somalia, including the massive loss of life and material damage, constituted a threat to international peace and security because of its effect on the stability in the region.¹³⁹ Citing its Chapter VII responsibility to maintain international peace and security, the Council implemented a general and complete embargo on all deliveries of weapons and military equipment to Somalia.¹⁴⁰ Then, on April 24, 1992, in response to the deteriorating situation, the Council established a UN Operation in Somalia (UNOSOM).¹⁴¹ The goals of the operation were to monitor the cease-fire agreements, promote political settlement, and provide humanitarian assistance.¹⁴² On December 14, 1992, the Council authorized military action and the "use of all necessary means" under Chapter VII in order to establish a secure environment for humanitarian relief operations in Somalia.¹⁴³

One year later, the Council noted with deep regret and concern that the absence of rule of law continued in Somalia as did violations of international humanitarian law.¹⁴⁴ Under its Chapter VII powers, the Council emphasized the importance of disarming the Somalis and demanded that all Somali parties comply with cease-fire obligations.¹⁴⁵ In further response to the armed attacks against UNOSOM personnel by the United Somali Congress, the Council reaffirmed the Secretary-

136. *Id.*

137. *See id.*; *The Crisis That the World Ignored: The UN and Somalia*, WORLD PRESS REV., Oct. 1992, at 11.

138. *The Crisis That the World Ignored: The UN and Somalia*, *supra* note 137.

139. S.C. Res. 733, U.N. SCOR, 47th Sess., 3039th mtg. at 1-2, U.N. Doc. S/RES/733 (1992).

140. *Id.*

141. S.C. Res. 751, U.N. SCOR, 47th Sess., 3069th mtg. at 1-2, U.N. Doc. S/RES/751 (1992).

142. *Id.*

143. S.C. Res. 794, U.N. SCOR, 47th Sess., 3145th mtg. at 3, U.N. Doc. S/RES/794 (1992).

144. S.C. Res. 814, U.N. SCOR, 48th Sess., 3188th mtg. at 1, U.N. Doc. S/RES/814 (1993).

145. *Id.* at 4-5.

General's power to take action by any necessary means against those responsible for the armed attacks.¹⁴⁶

As these events illustrate, the Council has expanded the use of its Chapter VII powers to intervene in conflicts previously deemed domestic matters. These conflicts generally involved internal situations in which governments committed violations of their own citizens' human rights. The determination of a threat to international peace and security was on the one hand based on the actual effects of an internal conflict on neighboring countries. For instance, often massive refugee influxes occurred. On the other hand, violations of international human rights, even when domestic in scope, were viewed as a concern of the international community. Thus, based on past instances of Council intervention, it now appears that the Council is authorized to intervene in an internal conflict in which a government violates the human rights of its own inhabitants.

2. *Invoking Chapter VII in the Yugoslav Conflict.*—What began as an internal dispute among the republics of the former Yugoslavia has taken on the character of a threat to international peace.¹⁴⁷ This threat includes not only the suffering of individuals, groups, or peoples within the former Yugoslavia, but also the dangers to neighboring territories.¹⁴⁸ For example, the Serb-Croat struggle could easily spill over into a broader regional conflict. If violence were to spread to Kosovo, the predominantly Albanian province in southern Serbia, refugees and fighting could cross into Macedonia and Albania.¹⁴⁹ Greece and Bulgaria might then renew their rival claims to the Yugoslav republic of Macedonia, and ethnic Hungarians in the Yugoslav region of Fojvodina might persuade Budapest to make plans for territorial adjustments.¹⁵⁰ In fact, the United States, the former USSR, and the United Kingdom, among other nations, acknowledged the international dimension of this conflict stemming from refugee flows, energy shortfalls, and spillovers of fighting into neighboring states and voiced these concerns to the Security Council.¹⁵¹

146. S.C. Res. 837, U.N. SCOR, 48th Sess., 3229th mtg. at 1-2, U.N. Doc. S/RES/837 (1993).

147. Delbrück, *supra* note 94, at 900.

148. Weller, *supra* note 5, at 580. A similar analysis was used in the case of the massacre of Kurds in Iraq. *Id.* See S.C. Res. 688, *supra* note 124.

149. Budiansky, *supra* note 39, at 37.

150. Privat & Stanger, *supra* note 9, at 41.

151. S/PV.3009, *supra* note 47, at 53, 57, 59.

INTERNATIONAL CRIMINAL TRIBUNAL

The Council agreed that the fighting in the former Yugoslavia continued to cause a loss of human life and substantial damage to the nation, leading to serious consequences for other countries in the region, in particular, in the border areas of neighboring countries.¹⁵² In response, the Council passed countless resolutions that imposed sanctions against the new Yugoslavia (Serbia and Montenegro), implemented numerous relief efforts in the territory of the former Yugoslavia, and attempted to enforce cease-fire agreements.¹⁵³ However, despite these efforts, the violence and destruction in the former Yugoslavia continued. Subsequently, the Council created the International Tribunal, an act it has never before taken. In fact, no international organization has created an international tribunal since the allied powers created the Nuremberg Tribunal after World War II.

Thus, the issue that arises is whether or not the Council was justified in pursuing these methods of intervention under its Chapter VII powers.¹⁵⁴ The determination of the existence of a threat to the peace fulfills the Council's duties under Article 39 and invokes the remaining provisions of Chapter VII of the UN Charter.¹⁵⁵ The Council's decision that the Yugoslav conflict poses a threat to the peace is consistent with the Council's determinations in similar situations. In both the Iraqi and Somali conflicts, as in Yugoslavia, the internal disputes involved violations of the inhabitants' human rights and had international implications.¹⁵⁶ The Council determined that both situations presented a "threat to the peace" permitting action according to Chapter VII.

By recognizing the international dimensions of the Yugoslav civil war, the Council determined that the former Yugoslavia's situation was within the reach of Chapter VII.¹⁵⁷ Therefore, the Council was authorized to take action in order to "maintain or restore international peace and security" in accordance with Chapter VII's guidelines. The Council then implemented sanctions and relief efforts and attempted to enforce cease-fire agreements under the Council's intervention powers. Since similar measures were taken in Iraq and Somalia, there is little

152. S.C. Res. 713, *supra* note 50, at 1.

153. See subpart II(C) of this Comment for a more detailed explanation of the UN's efforts in the former Yugoslavia.

154. It is important to remember the expansive powers the Council has to "decide what measures not involving the use of armed force are to be employed to give effect to its decisions [that a threat to the peace exists]" and that "it may call upon the Members of the United Nations to apply such measures." U.N. CHARTER art. 41.

155. See Delbrück, *supra* note 94, at 891; Weller, *supra* note 5, at 579.

156. See previous section for a complete analysis of these two conflicts.

157. See S.C. Res. 713, *supra* note 50.

doubt that the Council was authorized to follow this course of action. However, there is uncertainty as to the propriety of the Council's creation of an international tribunal, since the UN has never before created an ad hoc criminal tribunal to prosecute human rights violators.

While the UN has never used its Chapter VII powers to establish an international criminal tribunal, there is legal justification for the creation of an ad hoc tribunal to prosecute human rights abusers.¹⁵⁸ First, the Convention Against Genocide specifically allows for an international tribunal to enforce the provisions of the convention. Article VI of the Convention provides that trials for violations of the Convention shall be conducted "by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction."¹⁵⁹ Furthermore, the Council has used its Chapter VII powers in other situations to establish subsidiary organs of the UN for a variety of purposes.¹⁶⁰ For example, in reference to the Iraq-Kuwait conflict, the Council established a special commission to perform on-site inspections of Iraq's biological, chemical, and missile capabilities, attempting to restore international peace and security to the area.¹⁶¹ In the case of Yugoslavia, the Council established a subsidiary organ of a judicial nature as an enforcement measure under Chapter VII.¹⁶²

Since the Council must decide what acts should be taken to restore peace to the former Yugoslavia, the creation of a war crimes tribunal is consistent with the requirements of Chapter VII and prior Council actions.¹⁶³ Therefore, it may be argued that the Council is authorized to establish an international tribunal to prosecute human rights violators under the UN Charter. However, in addition to the Charter, there are two other important bases that give support to the Council's decision to create the Tribunal in the former Yugoslavia. The first is the precedent established by the creation of the international military tribunals to prosecute war criminals in Germany and the Far East. The second is principles of international law.

158. Beres, *supra* note 91, at 687.

159. Convention Against Genocide, *supra* note 63, art. VI, 78 U.N.T.S. at 280, 282, 28 I.L.M. at 765.

160. *Report, supra* note 74, at 8.

161. *Id.* See S.C. Res. 687, *supra* note 120, at 5. The other duties of the commission include carrying out the destruction or removal of chemical and biological weapons and aiding Iraq to develop a plan for monitoring Iraq's compliance with the resolution. *Id.* at 5-6.

162. *Report, supra* note 74, at 8.

163. *Id.*

INTERNATIONAL CRIMINAL TRIBUNAL

B. The International Military Tribunals in Germany and Tokyo

In 1945, the four Allied Powers; the United Kingdom, the United States, France, and the Soviet Union; signed the London Agreement, which created a code of international crimes and an international criminal court (the International Military Tribunal) for the prosecution of Nazi war criminals.¹⁶⁴ The purpose of the International Military Tribunal (IMT) was “the just and prompt trial and punishment of the major war criminals of the European Axis.”¹⁶⁵ The London Charter declared three categories of crimes within the jurisdiction of the Tribunal: “crimes against peace,” “war crimes,” and “crimes against humanity.”¹⁶⁶ The creation of the IMT was a significant event because “for the first time, four of the most powerful nations . . . agreed . . . upon the principle of individual responsibility for the crime of attacking international peace.”¹⁶⁷

The London Charter was not an arbitrary exercise of power, but an expression of the existing principles of international law and a codification of the prevailing norms.¹⁶⁸ Declaring that a war crime was

164. The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279. The London Agreement, adopted on August 8, 1945, consists of two parts. *Id.* The first part called for the establishment of an International Military Tribunal. *Id.* The second part, the Charter of the International Military Tribunal, set forth the crimes within the jurisdiction of the court. *Id.* Nineteen other governments expressed adherence to the court and its code, including Yugoslavia. The Nuremberg Trial, 6 F.R.D. 69, 76 (1946).

165. London Charter, *supra* note 90, art. 1, 59 Stat. at 1546, 82 U.N.T.S. at 284.

166. *Id.*, art. 6, 59 Stat. at 1547, 82 U.N.T.S. at 286, 288. Article 6 provides for individual responsibility for the following acts:

(a) *Crimes against peace*: namely, planning, preparation, initiation or waging a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) *War crimes*: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to . . . murder or ill-treatment of prisoners of war . . . plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) *Crimes against humanity*: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Id.

167. Robert K. Jackson, *Statement of Chief U.S. Counsel Upon Signing of the Agreement*, 19 TEMP. L.Q. 169, 169 (1946).

168. Ferencz, *supra* note 116, at 714. The London Charter articulated norms that had been emerging over a long period of time. *Id.* at 712. In addition, they were supported by a substantial body of treaties, pacts, conventions, and declarations that proscribed actions similar to those set forth

a criminal offense was not a novel idea.¹⁶⁹ The Hague and Geneva Conventions as well as other codes of conduct deemed the commission of atrocities during wartime a punishable military crime.¹⁷⁰ A crime against humanity was distinguishable from an ordinary felony or war crime in that its offensiveness was so great that it shocked the conscience of mankind.¹⁷¹ It was a crime against all humanity, not only against the citizens of an individual state. The Nuremberg trials extended the scope of this widely recognized crime, holding national leaders accountable for massive violations of human rights even if committed against their own citizens.¹⁷²

The Nuremberg trials began on November 20, 1945, with twenty-one of the leading Nazi criminals charged with various crimes set forth in the London Charter.¹⁷³ To insure the fairness of the proceedings, the courtroom was opened to the public, the prosecution relied on documentary evidence from captured German archives, and every accused person was guaranteed an absolutely fair trial.¹⁷⁴ In the interest of justice, the London Charter permitted accused persons to be tried in absentia.¹⁷⁵ On October 1, 1946, the trials concluded with eleven death sentences, seven varying terms of imprisonment, and three acquittals.¹⁷⁶

in the London Charter. *Id.*

169. *Id.* at 713. The IMT held that the specifications of war crimes in the Hague and Geneva Conventions were declaratory of the laws and customs of war that forbid the mistreatment of prisoners of war and killings that are not justified by military necessity. Whitney R. Harris, *A Call for an International War Crimes Court: Learning from Nuremberg*, 23 U. Tol. L. Rev. 229, 249 (1992).

170. Ferencz, *supra* note 116, at 713. See Third Geneva Convention, *supra* note 62, 6 U.S.T. 3316, 75 U.N.T.S. 135; Fourth Geneva Convention, *supra* note 62, 6 U.S.T. 3516, 75 U.N.T.S. 287.

171. Ferencz, *supra* note 116, at 713.

172. *Id.* The IMT recognized aggression as the supreme international crime and determined that it would be unjust to permit high-ranking officials to escape punishment merely because no one had previously been convicted of that offense. See *id.*; *The Nuremberg Trial*, 6 F.R.D. 69, 108-10 (1946).

173. Harris, *supra* note 169, at 244. Twenty-four men were originally indicted, but before the trial began the court dismissed two of the defendants. *Id.* at 245. Gustav Krupp von Bohlen und Halbach was dismissed as too infirm to stand trial and Robert Ley committed suicide. *Id.* In addition, the court tried Martin Bormann in absentia, convicted him, and sentenced him to death. *Id.* See *The Nuremberg Trial*, 6 F.R.D. 69 (1946).

174. Ferencz, *supra* note 116, at 715.

175. *Id.* at 714; See London Charter, *supra* note 90, art. 12, 59 Stat. at 1548, 82 U.N.T.S. at 290.

176. Harris, *supra* note 169, at 245-46. The three men acquitted were Hans Fritzsche, Franz von Pappen, and Hjalmar Schacht. *Id.* For a discussion of the findings and decisions of the IMT for the accused organizations and individual defendants, see *The Nuremberg Trial*, 6 F.R.D. 69, 147-86 (1946).

INTERNATIONAL CRIMINAL TRIBUNAL

In 1946 a similar international military tribunal was established in Tokyo for the trial of major war criminals in the Far East.¹⁷⁷ This tribunal was patterned after the Nuremberg Tribunal and applied the principles of law declared by that court.¹⁷⁸ In November 1948, the tribunal sentenced seven Japanese wartime leaders to death, and the leaders were subsequently hanged.¹⁷⁹

These military tribunals form a strong basis for arguing that an international body may create an ad hoc criminal tribunal for the prosecution of war crimes. The Council established the Tribunal to prosecute individuals for serious violations of international human rights in the territory of the former Yugoslavia. Similar to the charters of the Nuremberg and Tokyo tribunals, the charter of the Yugoslav Tribunal provides for the punishment of specific crimes that are firmly based in international law. Therefore, the Nuremberg and Tokyo tribunals establish a precedent for the UN to follow and justify its formation of the Yugoslav Tribunal.

C. *International Conventions and International Criminal Law*

While also leading to the convictions of major war criminals, the trials at Nuremberg and Tokyo after World War II had another, more important underlying achievement; they laid the foundation for principles of international law regarding war crimes.¹⁸⁰ The UN General Assembly directed the UN International Law Commission to formulate the principles of international law that were recognized in the London Charter and in the judgment of the IMT at Nuremberg.¹⁸¹ Among other things, these principles held perpetrators of international crimes

177. International Military Tribunal for the Far East, *supra* note 92.

178. See Harris, *supra* note 169, at 249. Other war crimes proceedings also have applied the rules laid down by the IMT at Nuremberg, including United States tribunals and French and British tribunals that tried German war criminals. *Id.*

179. Hodgson, *supra* note 68. General Tojo was one of the seven leaders hung. *Id.*

180. See Bruce W. Nelan, *Crime Without Punishment; The U.S. Has Charged Yugoslav Leaders With Atrocities in Bosnia, But the Criminals May Never be Brought to Justice. Does the West Have the Will to Follow Through?*, TIME, Jan. 11, 1993, at 21.

181. G.A. Res. 177, U.N. Doc. A/519, at 111-12 (1947). In addition, the Commission was directed to prepare a draft code of offenses against the peace and security of mankind. *Id.*

The General Assembly had previously affirmed these principles, known as the Nuremberg Principles, as international law. See *Report of the International Law Commission*, U.N. GAOR, 5th Sess., Supp. No. 12, at 11, U.N. Doc. A/1316 (1950) [hereinafter Nuremberg Principles]. In addition, principles in the Nuremberg IMT Charter were built into the UN Charter, which declares:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

U.N. CHARTER art. 2, ¶ 4.

individually responsible for their acts¹⁸² and were applied in the trials of Nazi civilian, government, and military leaders at Nuremberg.¹⁸³ These principles formed the basis of the Statute of the Yugoslav Tribunal and will likewise be applied in any trial against war criminals in Yugoslavia.

Furthermore, any case against Milosevic or others figures in the Yugoslav war would rest upon grave breaches of international agreements.¹⁸⁴ For instance, the 1907 Hague Convention protects prisoners of war and prohibits attacks on undefended civilian targets.¹⁸⁵ The shelling of towns and villages and the pillage and wanton destruction of property in the former Yugoslavia are all violations of this Convention.¹⁸⁶ The basic principles of the Hague Convention were expanded in the 1949 Geneva Conventions, which established strict guidelines for the treatment of prisoners of war¹⁸⁷ and civilians caught in war zones.¹⁸⁸ Generally, these two Geneva Conventions require that all persons not actively taking part in hostilities must be treated humanely.¹⁸⁹ More specifically, the Geneva Conventions prohibit the following acts with respect to persons not actively involved in a conflict: (a) violence to life and persons, in particular murder, mutilation, cruel treatment, and torture; (b) the taking of hostages; and (c) outrages upon personal dignity, including humiliating and degrading treatment.¹⁹⁰ The mass killings, beatings, rapes, and imprisonment of civilians in

182. See Nuremberg Principles, *supra* note 181, at 11; G.A. Res. 95(I), U.N. GAOR, 1st Sess. at 188, U.N. Doc. A/46/Add.1 (1946).

183. Frank Lawrence, Note, *The Nuremberg Principles: A Defense for Political Protesters*, 40 HASTINGS L.J. 397, 398 (1989). See *The Nuremberg Trial*, 6 F.R.D. 69 (1946).

184. See Ron Masland & Margaret Garrard Warner, *Will There Be 'A Second Nuremberg'*, NEWSWEEK, Jan. 4, 1993, at 36.

185. Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

186. *Id.* arts. 25, 28, 36 Stat. at 2302-03, 1 Bevans at 648-49. Specifically, Article 25 of the Convention provides, "The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited." *Id.* Article 28 states, "The pillage of a town or place, even when taken by assault, is prohibited." *Id.* For information on the crimes that have been committed in the former Yugoslavia, see Hodgson, *supra* note 68; Leopold, *supra* note 64.

187. Third Geneva Convention, *supra* note 62, 6 U.S.T. 3316, 75 U.N.T.S. 135.

188. Fourth Geneva Convention, *supra* note 62, 6 U.S.T. 3516, 75 U.N.T.S. 287.

189. Third Geneva Convention, *supra* note 62, art. 3, 6 U.S.T. at 3318, 3320, 75 U.N.T.S. at 136, 138; Fourth Geneva Convention, *supra* note 62, art. 3, 6 U.S.T. at 3518, 3520, 75 U.N.T.S. at 288, 290.

190. Third Geneva Convention, *supra* note 62, art. 3, 6 U.S.T. at 3318, 3320, 75 U.N.T.S. at 136, 138; Fourth Geneva Convention, *supra* note 62, art. 3, 6 U.S.T. at 3518, 3520, 75 U.N.T.S. at 288, 290.

concentration camps under appalling conditions are all direct violations of these conventions.¹⁹¹

In addition, the 1948 Convention Against Genocide bans certain acts committed "with intent to destroy, in whole or in part, a national, ethnic, racial or religious group" and requires the UN to take appropriate action to prevent and suppress acts of genocide.¹⁹² The policy of ethnic cleansing,¹⁹³ ethnically motivated massacres, mass rapes of Muslim women, and the expulsion of civilians in the former Yugoslavia all violate the Convention Against Genocide because they are ethnically and religiously motivated acts.¹⁹⁴ As evidenced by these conventions, there is ample precedent under international law for prosecuting those responsible for the heinous crimes being committed in the former Yugoslavia.

V. Effectiveness of the International Tribunal in Prosecuting Violations of International Law in the Former Yugoslavia

A. *Benefits of the Tribunal*

When the victorious allied powers established the IMT at Nuremberg, they reaffirmed an ancient and peremptory principle of law: no crime without punishment.¹⁹⁵ While international law and public opinion condemn war crimes, the perpetrators of these crimes more often than not go unpunished.¹⁹⁶ The most glaring recent example of the need for an international criminal court arises from the commission of massive crimes against humanity in the territory of the former Yugoslavia.¹⁹⁷ If the Tribunal is successful, the trials will provide a

191. *Vote on War Crimes Court*, *supra* note 61; Leopold, *supra* note 64; Nelan, *supra* note 180.

192. Convention Against Genocide, *supra* note 63, arts. II, VIII, 78 U.N.T.S. at 280, 282, 28 I.L.M. at 763-66. The Convention prohibits genocide, which includes killing or causing serious bodily harm to members of a group and deliberately inflicting on a group conditions intended to bring about its physical destruction. *Id.*

193. Ethnic cleansing is defined as the forced removal of people from their homes because of their religious or ethnic background. Nebehey, *supra* note 2.

194. See generally Hodgson, *supra* note 68; Leopold *supra* note 64; Mark Heinrich, *U.N. Says Bosnian War Criminals Could Dodge Capture*, Reuter Libr. Rep., Apr. 25, 1993, available in LEXIS, Nexis Library, INT'L File.

195. Beres, *supra* note 91, at 675.

196. *The Rules of War*, THE TIMES (London), Sept. 2, 1993, at 17. An ad hoc tribunal is preferred to a permanent tribunal for the prosecution of war criminals because war crimes are committed in divergent contexts, making a permanent court too inflexible. *Id.*

197. Benjamin B. Ferencz, *An International Criminal Code and Court: Where They Stand and Where They're Going*, 30 COLUM. J. TRANSNAT'L L. 375, 396 (1992) [hereinafter *An International Criminal Court*].

measure of justice in the former Yugoslavia and accountability for crimes against humanity.¹⁹⁸

According to human rights groups, the utility of the Tribunal reaches far beyond the trial itself. First, the investigations the Commission of Experts performs will create and preserve a historical record of the events in the former Yugoslavia.¹⁹⁹ Second, the investigations of war crimes will help defuse ethnic tensions in the region and ease group hatred by individualizing guilt.²⁰⁰ Finally, the indictments alone will be sanctions against the accused, turning these individuals into political pariahs and effectively forcing them to remain in the country.²⁰¹

Some claim that another benefit of setting up an international criminal court is that it will resolve the dilemma of a "victors' justice," evident at the Nuremberg trials, since the trials will be conducted by neutral parties.²⁰² Others, however, argue that any international court will impose the justice of the victors. Advocates of the Tribunal respond that even if the Tribunal imposes a victors' justice, if this is the view of the majority of humanity, the trials are performed in a fair manner, and the Tribunal proves to be a deterrent to potential criminals, that complaint may be inconsequential.²⁰³

B. *Limitations of the Tribunal*

Despite its advantages, the Tribunal faces formidable legal, practical and political complications that may result in the Tribunal being largely ineffectual.²⁰⁴ First, in order for the Tribunal to operate successfully, the court must secure jurisdiction over the political leaders responsible for many of the atrocities. One significant problem in obtaining jurisdiction over any accused is that the suspects are not in the custody of the UN as the Nazi leaders were in the custody of the Allies who

198. Aryeh Neier, *Judgment in Sarajevo? For the Serb's Victims, a War Crimes Tribunal Is the Last Hope*, WASH. POST, Apr. 18, 1993, at C3.

199. Stephen S. Rosenfeld, *Where's the War Crime Court*, WASH. POST, July 30, 1993, at A21. This historical record will individualize what is too often seen as collective guilt. *Id.*

200. Julie Mertus, *Evidence Must Be Gathered Now to Prosecute Balkan War Crimes Proof of Wrongdoing Is Vanishing and Witnesses Scattering While the U.N. Discusses and Dithers*, PHILADELPHIA INQUIRER, Sept. 2, 1993, at A23.

201. *Id.* An indictment combined with an arrest warrant would subject an individual to immediate detention if the accused left the boundaries of the state. *Id.*

202. Hodgson, *supra* note 68.

203. *Id.*

204. Ian Black, *UN Lays Plans for War Crimes Trials — Bosnia*, GUARDIAN, May 26, 1993, at 8.

INTERNATIONAL CRIMINAL TRIBUNAL

occupied Germany.²⁰⁵ The UN forces in Yugoslavia do not have the authority to arrest suspects and voluntary cooperation seems unlikely.²⁰⁶ In addition, Yugoslavia²⁰⁷ has already declared it will not comply with extradition demands.²⁰⁸ Unless the criminals leave their countries, there is little hope of bringing those accused of violating humanitarian law to trial.²⁰⁹

One solution to the jurisdiction problem might be to execute detailed indictments against those individuals who are principally responsible for the war crimes. Although only a few suspects may actually be brought to trial, even one conviction would have a great impact on the international community because it would prove the validity of the Tribunal's goals.²¹⁰ Madeline Albright, U.S. Ambassador to the UN, asserted that although it may be difficult to bring suspects to trial, once the prosecutor issues indictments, these individuals would become "international pariahs."²¹¹ In addition, sanctions could be imposed on a state that harbors war criminals until the suspects are turned over for prosecution.²¹²

Second, the threat of prosecution of major political leaders may be bargained away as part of a peace settlement in the Balkans.²¹³ The Serbs, Croats, and Muslims may grant each other political absolution in order to reach a peace agreement.²¹⁴ Indeed, some opponents to the creation of the Tribunal believe that the UN should focus on ending the war and that attempting to prosecute political leaders will impede the peace settlement process.²¹⁵

205. *Vote on War Crimes Court*, *supra* note 61. Perhaps more importantly, the Serbs are currently winning the Yugoslav war and there has never even been an attempt to prosecute the victors of a war. Mertus, *supra* note 200.

206. Worsnip, *supra* note 61.

207. The name Yugoslavia now refers to the republics of Serbia and Montenegro. *See supra* text accompanying notes 34 and 35.

208. Black, *supra* note 204.

209. *The Rules of War*, *supra* note 196.

210. *Id.*

211. Leopold, *supra* note 64. According to Albright, "international pariah" means that the accused individual may be able to hide within the borders of Serbia or parts of Bosnia or Croatia, but will be imprisoned for the rest of their lives within their own land. *Id.*; *See S.C. Res. 827, supra* note 3 (obligating all UN members to assist the Tribunal by handing over accused persons).

212. Mertus, *supra* note 200.

213. Masland & Warner, *supra* note 184. Some diplomats claim that the Tribunal is only a bargaining chip in the peace negotiations. Mertus, *supra* note 200.

214. Rosenfeld, *supra* note 199.

215. *See Neier, supra* note 198. Some believe that if the price for peace is permitting leaders to grant each other immunity from prosecution, it should be paid. *Id.* Others, however, assert that absolution should not be granted because there is no provision for the forgiveness of war crimes in international law. *Id.*

Third, as a practical matter, documenting war crimes in the Balkans is far more difficult than building a case against the Nazis was.²¹⁶ At Nuremberg, much of the evidence was obtained from captured German High Command files, but no such documentation is available in Yugoslavia.²¹⁷ Although it is possible to identify massive victimization, it is extremely difficult to establish the chains of command and command responsibility.²¹⁸ This presents an obstacle to prosecuting leading figures who ordered subordinates to commit violent acts.²¹⁹ In addition, evidence of war crime is disappearing daily as survivors are scattering across the globe.²²⁰ Unless the international community acts now, any elaborate legal machinery developed to try war crimes will fail because the evidence needed will be unobtainable.²²¹

Fourth and finally, factors including significant costs, limited resources, and large time commitments weigh against the success of the Tribunal. The Commission of Experts does not have the proper staff or resources to interview witnesses and gather evidence.²²² The Commission and the UN have been forced to rely upon the aid of other international organizations to compile forensic evidence, collect bullets, and interview survivors.²²³ Surprisingly, there have even been accusations that Britain and France, both permanent members of the UN, have not been giving their support to the Commission by collecting evidence.²²⁴

C. *Alternative Remedies*

Not only does the Tribunal have its procedural limitations, but there are many who contest the creation of an ad hoc criminal tribunal for the prosecution of international humanitarian law violations. Some opponents of the Tribunal in Yugoslavia suggest that there are other viable options available to rectify the situation. While these alternative

216. Masland & Warner, *supra* note 184.

217. Worsnip, *supra* note 61.

218. *Vote on War Crimes Court*, *supra* note 61.

219. Heinrich, *supra* note 194.

220. Mertus, *supra* note 200.

221. *Id.*

222. Roy Gutman, *War Crime Unit Hasn't a Clue, UN Setup Seems Designed to Fail*, NEWSDAY, Mar. 4, 1993, at 8. Rumors have been spread that "authoritative persons" in the UN instructed the chairman of the UN panel not to pursue convictions of Serbian political leaders. *Id.*

223. Mertus, *supra* note 200.

224. Patrick Bishop, *Netherlands: International — Britain 'Snubbed War Crimes Team'*, DAILY TELEGRAPH, Dec. 4, 1993, at 16. Professor Kalshoven, the former Chairman of the Commission of Experts, resigned because of the European nations' lack of cooperation. *Id.*

INTERNATIONAL CRIMINAL TRIBUNAL

means of redress may be appropriate in other circumstances, they are inadequate for the purposes of punishing criminals in the Yugoslav war.

One alternative proposed is the prosecution of criminals in the national courts of states where war criminals are found. This seems a dubious solution in Yugoslavia because the proponents of the policy of "ethnic cleansing" are currently winning the war. As the individuals committing the crimes gain power in the region, the probability that domestic courts could bring them to trial decreases.²²⁵ However, Germany may be leading the way toward prosecution of the former Yugoslavia's war criminals living in other countries. In February 1994, Germany's federal prosecutor's office arrested a Serb living in Germany and charged him with assisting in genocide for torturing and mistreating prisoners in a Yugoslav detention camp.²²⁶ The Serb suspect may be prosecuted in a German court if enough evidence is obtained.²²⁷

Another option suggested is the prosecution of war criminals in the International Court of Justice (ICJ) at the Hague. The ICJ, however, does not have penal or criminal jurisdiction and is, therefore, an unsuitable forum for the redress of war crimes.²²⁸ Even if the UN expanded the ICJ's jurisdiction to include criminal matters, the consent of the parties is required for the ICJ's decision to be binding.²²⁹ There is little probability that a defendant would consent to the jurisdiction of the ICJ. As a final limitation, the Statute of the ICJ²³⁰ precludes prosecution of individuals and only grants standing to States.²³¹ Thus, the ICJ is not an available remedy for the prosecution of individuals for war crimes. While the Yugoslav Tribunal has its limitations, it seems to be the most viable option since it is unlikely that either of these alternatives could effectively remedy human rights abuses in the former Yugoslavia.

225. Neier, *supra* note 198.

226. Michael Christie, *Germany: Kinkel Says Will Pursue Bosnia War Crimes Suspects*, Reuter Libr. Rep., Feb. 24, 1994, available in LEXIS, Nexis Library, INT'L File. Dusko Tadic was arrested under a law that permits suspects to be tried in Germany for violations of international law committed abroad. *Id.* Germany is also investigating 50 other Serb suspects that are rumored to have taken refuge in Germany. *Id.*

227. *Id.*

228. Beres, *supra* note 91, at 687.

229. *Making the Case Against Saddam Hussein*, LEGAL TIMES, Feb. 4, 1991, at 10.

230. See Statute of the International Court of Justice, June 26, 1945, art. 34, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1153.

231. Michael D. Greenberg, Note, *Creating an International Criminal Court*, 10 B.U. INT'L L.J. 119, 121 (1992).

VI. Conclusion

Despite good intentions and expanding commitments, efforts to maintain peace in the post-cold war world are failing.²³² The UN has dispatched troops in Bosnia and Croatia to keep a peace that does not exist, with inadequate arms and rules of engagement that prevent them from halting the bloodshed.²³³ The UN simply lacks the commitment, organization, training, and money to police today's ethnic conflicts and civil wars.²³⁴

Undoubtedly, the Serbs as well as the Croats and Muslims have committed grave violations of human rights law for which the perpetrators should be prosecuted. The victims of these horrendous crimes deserve reparations. The Council's Chapter VII powers — specifically Article 39 — and the Council's actions in other conflicts both indicate that the Council may create an ad hoc criminal tribunal as a measure aimed at restoring "international peace and security."

Despite many public declarations in support of criminal trials in the case of the Iraq-Kuwait conflict, those who had the power to act did not.²³⁵ Saddam Hussein escaped punishment for committing crimes similar to those for which the Nazi leaders were tried at Nuremberg.²³⁶ It is ironic that such a great military victory was followed by a human rights disaster.²³⁷ Admittedly, public pressure for the trial of major Nazi war criminals in Germany was enormous, but the lesson to be learned from the IMT is that a viable code and court can be created in a very short time if there is the political will to do so.²³⁸

At this point, the UN has elected a prosecutor²³⁹ and the judges to serve on the Tribunal, but not much else has been done to put the judicial process in motion.²⁴⁰ Not a single case file has been created, nor has a single defendant been named.²⁴¹ The Tribunal's progress has

232. Trimble, *supra* note 57, at 45.

233. *Id.* at 47.

234. *Id.* at 45.

235. Ferencz, *supra* note 116, at 727.

236. Harris, *supra* note 169, at 231.

237. Ferencz, *supra* note 116, at 727.

238. *An International Criminal Court*, *supra* note 197, at 383.

239. Andrew Kelly, *U.N. Convenes Yugoslavia War Crimes Tribunal, Amid Doubts*, Reuter European Community Rep., Nov. 17, 1993, available in LEXIS, Nexis Library, INT'L File. The Tribunal's prosecutor is Venezuelan Attorney General Ramon Escovar Salom. *Id.* Legal experts anticipate that Escovar Salom will face significant obstacles in bringing the suspects before the Tribunal. *Id.*

240. *Id.* On November 17, 1993, the UN Yugoslav War Crimes Tribunal held its inaugural session and swore in the 11 judges of the Tribunal. *Id.*

241. Mertus, *supra* note 200. A number of leaders have been named as suspects, including

INTERNATIONAL CRIMINAL TRIBUNAL

been slowed by the same lack of political will that has crippled other UN efforts in the region.²⁴²

It is now generally recognized that an effective international criminal code and court are essential components of a civilized world order.²⁴³ There are those, however, who believe that it was not proper for the UN to create the Tribunal in the case of Yugoslavia. The Tribunal obviously faces significant problems and limitations that may impede its success and prevent justice from being served for the countless victims of the Yugoslav conflict. Nevertheless, the creation of the Tribunal is not without its benefits. Evidence of the blatant violations of international law in the former Yugoslavia is being compiled and documented and, thus, preserved. If nothing else is gained, maybe the evidence compiled will serve to admonish present and future generations of the evil that we are capable of manifesting.

Barbara M. Tocker

Serbian President Slobodan Milosevic, Bosnian Serb leader Radovan Karadzic, and Bosnian Serb General Ratko Mladic. See Black, *supra* note 204; *Vote on War Crimes Court*, *supra* note 61; John F. Burns, *Key Figures May Elude Bosnia War Crimes Trial*, SAN FRANCISCO CHRON., Apr. 27, 1993, at A9.

242. Mertus, *supra* note 200. The UN has issued baseless declarations denouncing acts of aggression, threatening counter-attacks, and declaring "safe havens" in the former Yugoslavia. *Id.*

243. *An International Criminal Court*, *supra* note 197, at 399.

