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Pitfalls and Imperatives: Applying the Lessons of Nuremberg to the Yugoslav War Crimes Trials

Kevin R. Chaney*

I. Introduction

The best prophet of the future is the past.

Lord Byron

While recent events in the former Yugoslavia have cast doubt on the authority of the United Nations and the ability of that body to deal with recalcitrant belligerent powers, they have, arguably, done more than any other conflict or event since World War II to elevate the status of international humanitarian law and to awaken the world to the importance of its role in the global community. Not since 1945 has substantive and procedural international law stood to gain so much in terms of development and prestige as it does today. The battle for territory in the former Yugoslavia has created what is perhaps the ideal laboratory for testing the mettle of modern humanitarian law and the resolve of those who wield it.

The war in the former Yugoslavia has produced charges of crimes against humanity by every belligerent faction. Both Serbia and Bosnia-Herzegovina have petitioned the United Nations demanding satisfaction under international law. Additionally, Bosnia-Herzegovina instituted proceedings in the International Court of Justice against the Federal Republic of Yugoslavia (Serbia and Montenegro), alleging the latter had committed acts of genocide.¹ That the belligerent factions themselves have attempted

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1. Official Document: International Court of Justice: Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) 1993 I.C.J. 29 (Apr. 16). See also International Court of Justice: Order on Further Requests for the Indication

to invoke international law, may serve to facilitate the Security Council's task of asserting the legitimacy of the law of nations and its attempts to adjudicate and punish violators of the law in the former Yugoslavia.

The Yugoslav war crimes trials, however, present a situation far removed from that at Nuremberg. Unlike the adjudication of the Nazi war criminals, the application of international law to the Balkan situation does not involve a vanquished power. Nor do the adjudications involve the administration of justice by an occupying power. Clearly, it is under circumstances such as these that the legitimacy, credibility and binding character of humanitarian law may be best manifested. These are the qualities the Nuremberg visionaries hoped international law would develop under the direction of the first international tribunal and during the years following the war.² It is possible that much of what was sought by Robert Jackson,³ Henry Stimson,⁴ and others who worked to advance international law in the postwar years, may finally be realized as a result of the Bosnian Conflict. The United Nations is presented with an opportunity to systematically and impartially apply international humanitarian law to the conduct of sovereign states without first having to replace their governments. Thus, the body of law may be advanced, the legitimacy of that law may be established, and a more persuasively deterrent standard raised: everything hoped for by the framers of the first international tribunal.

While the response of the United Nations to events in the former Yugoslavia may deserve criticism, the Security Council has, albeit halfheartedly, taken reasonable efforts to ensure that the conduct of the various factions is subject to international humanitarian law. Whether these measures have been undertaken merely to "expiate the conscience of [the] Powers-that-run-the-world,"⁵ or

of Provisional Measures in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) reprinted in 32 I.L.M. 1599 (1993).

2. See, e.g., Henry L. Stimson, *The Nuremberg Trial: Landmark in Law*, 25 FOREIGN AFF. 179, 188-89 (1947); Robert H. Jackson, *Forward: The Nurnberg Trial Becomes an Historic Precedent*, 20 TEMP. L.Q. 167 (1946); Robert H. Jackson, *Justice Jackson's Final Report to the President Concerning the Nurnberg War Crimes Trial*, reprinted in 20 TEMP. L.Q. 338 (1946).

3. United States Supreme Court Justice, and Chief U.S. prosecutor at Nuremberg.

4. United States Secretary of War, 1940-45.

5. Surya Prakash Sinha, *Symposium: Should There Be An International Tribunal for Crimes Against Humanity? An Introductory Note*, 6 PACE INT'L L.

whether they have been determined to constitute the best course of action, the steps that have been taken by the Security Council have, from late 1992 to present, been relatively decisive and expeditious. Through several resolutions, the Security Council has condemned the violations of humanitarian law by the parties to the conflict,⁶ reaffirmed the obligation of the warring powers to abide by existing law,⁷ and sought a means of investigating and trying alleged violators.⁸ On October 6, 1992 the Security Council requested the formation of an impartial commission to investigate alleged atrocities.⁹ Eight days afterward, the Secretary General issued a report which provided for the creation of a five-member Commission of Experts.¹⁰ In a communique dated February 10, 1993, the Commission of Experts submitted an interim report to the Security Council¹¹ noting the occurrence of violations of international humanitarian law in the former Yugoslavia, including "willful killing, ethnic cleansing, mass killings, torture, rape, pillage and destruction of civilian property, destruction of cultural and religious property and arbitrary arrests."¹² The Security Council condemned the occurrences, determined that the situation constituted a threat to international peace and security, and further decided to establish a tribunal to adjudicate alleged offenders.¹³ On May 25, 1993 the Security Council responded to "continuing reports of widespread and flagrant violations of humanitarian law"¹⁴ in the former Yugoslavia by establishing the first *ad hoc* international tribunal since World War II.¹⁵ On September 17, 1993 the United

REV. 1 (1993).

6. See S.C. Res. 770, U.N. SCOR, *reprinted in* 31 I.L.M. 1468 (1992); S.C. Res. 771, U.N. SCOR, *reprinted in* 31 I.L.M. 1470 (1992); S.C. Res. 787, U.N. SCOR, *reprinted in* 31 I.L.M. 1481 (1992).

7. See S.C. Res. 764, U.N. SCOR, *reprinted in* 31 I.L.M. 1465 (1992); S.C. Res. 771, U.N. SCOR, *reprinted in* 31 I.L.M. 1470 (1992).

8. See S.C. Res. 780, U.N. SCOR, *reprinted in* 31 I.L.M. 1476 (1992).

9. See *id.*

10. Report of the Secretary-General, U.N. Doc. S/24657. For a general survey of the Commission of Experts, its historical antecedents and its investigations, see M. Cherif Bassiouni, *Current Development: The U.N. Commission of Experts Established Pursuant to Security Council Resolution 780* (1992), 88 A.J.I.L. 784 (Oct. 1994).

11. Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), U.N. Doc. S/25274 (Feb. 10, 1993).

12. *Id.*

13. See Report of the Secretary General, U.N. Doc. S/25704, *reprinted in* 32 I.L.M. 1163, at 1165.

14. *Id.*

15. S.C. Res. 827, U.N. SCOR, *reprinted in* 32 I.L.M. 1203 (1993).

Nations General Assembly elected eleven judges from eleven different countries to serve on what the Security Council denominated the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia.¹⁶ In May 1994, the Commission of Experts submitted the findings of its investigation to the office of the Prosecutor.¹⁷ Consisting of 64,000 pages of evidence and 300 hours of video tape, the Commission's findings reaffirmed and expanded its earlier report of genocide and grave breaches of international humanitarian law.¹⁸

It is not surprising that the Security Council's efforts toward the investigation and adjudication of the Balkan situation are not unlike those taken by the Allies in 1945. Nor is it surprising that reference has been made to the Nuremberg Trials and the International Military Tribunal.¹⁹ Nuremberg was the first international effort to redress violations of conventional and customary international law. Moreover, no subsequent effort has generated more critical scholarship than those historic proceedings. This critical scholarship may be counted among the most valuable sources at the disposal of the Security Council and the International Tribunal, and may serve as a suitable guide as these organs attempt to bring several sovereign states under the tenuous authority of international law.

Prudent and successful administration of a modern war crimes trial clearly depends upon a close reading of past efforts, and particularly, a close examination of the Nuremberg Trials. It appears that the Security Council, notwithstanding the glaring shortcomings of the Nuremberg effort, has already taken steps which will likely invite much of the same criticism that followed the first international war crimes trials. Substantive and warranted

16. The judges are serving a four year term which began on November 17, 1993 and they, like the judges of the I.C.J., may be re-elected at the end of their term. *Current Development: Election of the Judges of the International Tribunal for Violations of Humanitarian Law in the Former Yugoslavia*, 87 A.J.I.L. 668 (Oct. 1993). The judges on the International Tribunal are Georges Michel Abi-Saab (Egypt), Antonio Cassese (Italy), Jules Deschenes (Canada), Adolphus Godwin Karibi-Whyte (Nigeria), Germain Le Foyer De Costil (France), Li Haopei (China), Gabrielle Kirk McDonald (United States), Elizabeth Odio Benito (Costa Rica), Rustam S. Sidhwa (Pakistan), Sir Ninian Stephen (Australia), and Lal Chand Vohrah (Malaysia). *Id.*

17. Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), U.N. Doc. S/1994/674 (May 27, 1994).

18. *See id.*

19. *See, e.g.,* Bassiouni, *supra* note 10, *passim*.

criticism will, of course, further taint an already suspect effort and may threaten the legitimacy and advancement of humanitarian law.

While the degree of future success of the Yugoslav Trials can only be the subject of speculation, the steps already taken, as well as those being contemplated by the United Nations, may be measured by those steps taken fifty years ago. As the United Nations does not enjoy the advantage of an uncontested, pre-approved manual governing war crimes resolution, it is useful, eminently practical, and strongly advisable to render close examination to the critical scholarship generated by the Nuremberg Trials; and by this commentary, the Security Council and the International Tribunal should measure their every move. For, while it may seem quite cliché, history in this instance is not merely a convenient guide, it is the only guide.

II. The International Tribunal: Law and Procedure at Nuremberg

The events that prompted the formation of the International Military Tribunal (IMT) at Nuremberg are probably more familiar to most than those which led to the formation of the International Tribunal for the former Yugoslavia. The decision by the Allies to convene an international tribunal, however, went through several stages before resulting in the IMT. A brief examination of these stages provides some understanding of the Allied policy goals which produced the first international war crimes trials, and likely shaped the thinking of the framers of the recent tribunal.

As Allied forces pressed into Germany and an end to the fighting in Europe came into sight, the Allied powers faced the task of establishing an acceptable procedure for dealing with the surviving Nazi leadership. Between October 1943 and January 1944, the United States and Great Britain helped establish the United Nations War Crimes Commission, and it was officially declared in November 1943 by Washington, London, and Moscow that the German leadership would be punished for its aggression and its wartime conduct.²⁰ As hostilities in the European theater came to a close, the Allied powers were confronted with three options. They could conclude the war with a handshake, as the great powers of the nineteenth century often did, reestablishing a

20. Moscow Protocol, 1943 For. Rel. (I)749, Annex 10, 1 Nov. 1943, 3 Bevans 816, 834.

balance of power in Europe by exacting no penalty from Germany.²¹ Alternatively, the victorious powers could summarily execute the Nazi leadership. The Allies avoided the two extremes by placing Nazi leaders on trial before the world and permitting German wartime policies and conduct to be adjudicated by an international tribunal.

The dilemma prompted several suggestions. Stalin, half-jokingly, proposed the liquidation of 50,000 Nazis.²² The British government advocated the summary execution of the major war criminals and judicial proceedings for lesser ones.²³ And the United States proposed the *Morganthau Plan*, which provided for the de-industrialization of Germany to penalize the civilian population for their collective guilt, along with the wholesale arrest of members of the *Schutz-Staffel* (S.S.) and the *Sturm Abteilung* (S.A.), as well as the summary execution of the major war criminals.²⁴ Ultimately, the Allies settled upon a course of action proposed by United States Secretary of War, Henry Stimson. Under Stimson's plan, *all* alleged Nazi war criminals would be brought to trial before an international tribunal. The plan appears to have had several objectives. Foremost, judicial proceedings might avert future hostilities which were likely to result from the execution, absent a trial, of alleged offenders. Legal proceedings would bring German policies and conduct to the attention of all the world, and the trial and dissemination of information would legitimize Allied conduct during and after the war. Additionally, a trial, it was hoped, would advance and legitimize international law. Finally, and perhaps most importantly, judicial proceedings would permit the Allied powers, and the world, to exact a penalty from the Nazi leadership rather than from Germany's civilian population.

21. For a concise history of modern foreign relations, see GORDON A. CRAIG & ALEXANDER L. GEORGE, *FORCE AND STATECRAFT* (2d ed. 1990).

22. Stalin had allegedly compiled a list of 50,000 Nazi war criminals. JOE J. HEYDECKER & JOHANNES LEEB, *THE NUREMBERG TRIAL*, 77-78 (R. A. Downie Trans., 1962) [hereinafter HEYDECKER & LEEB]. During the Tehran Conference, following a banquet attended by Roosevelt and Churchill, the Soviet dictator proposed a toast, stating, "I drink to the quickest possible justice for all German war criminals. I drink to the justice of a firing squad." *Id.* When Churchill objected, Stalin again raised his glass and proclaimed, "Fifty thousand must be shot." *Id.*

23. TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 29 (1992).

24. *Id.* at 31.

In the summer of 1945, representatives from the United States, Great Britain, the Provisional Government of France and the Soviet Union gathered in London to establish the guidelines for dealing with alleged Nazi war criminals. The result of the conference was the Protocol for the Prosecution and Punishment of Major War Criminals of the European Axis,²⁵ which included an annex entitled *Charter of the International Military Tribunal*.²⁶ The Protocol and Charter collectively comprise what is commonly called the Charter of London, or the London Agreement. Eventually gathering twenty-three signatories, the Charter of London set forth four counts under which alleged war criminals could be indicted: 1) crimes against the peace;²⁷ 2) war crimes;²⁸ 3) crimes against humanity;²⁹ and 4) common plan or conspiracy.³⁰ The subject-matter jurisdiction of the Tribunal was drawn principally from the Hague Conventions of 1899 and 1907,³¹ the Geneva Conventions of 1925 and 1929,³² and the laudable, but unrealistic, Kellogg-

25. Prosecution and Punishment of Major War Criminals of the European Axis, 59 Stat. 1544 (1945).

26. Charter of the International Tribunal, 3 Bevans 1239 [hereinafter Charter].

27. Namely, planning, preparation, initiating or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or the participation in a common plan or conspiracy for the accomplishment of any of the foregoing. Charter, *supra* note 26, art. 6, para. 3.

28. Namely, violations of the laws or customs of war. Such violations shall include, but are not limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, and wanton destruction of cities, towns, or villages not justified by military necessity. *Id.* para. 4.

29. 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.* para. 5.

30. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan. *Id.* para. 6.

31. Particular emphasis was placed upon Hague IV of the 1907 Convention, the Convention Concerning the Laws and Customs of War on Land, and Hague X of the 1907 Convention, the Convention for the Adaptation to Maritime Warfare of Principles of the Geneva Convention.

32. Regarding inhumane weapons and practices, see Geneva Protocol for Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacterial Methods of Warfare, June 17, 1925, 26 U.S.T. 571, T.I.A.S. No. 8061, 94 L.N.T.S. 65 [hereinafter Geneva Protocol]; Geneva Convention, Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, T.S. 846, 2 Bevans 932 [hereinafter Geneva Convention].

Briand Pact of 1928.³³ The personal jurisdiction of the IMT extended to any persons "acting in the interests of the European Axis countries, whether as individuals or members of organizations," through the commission of the enumerated crimes.³⁴

The first international tribunal was to consist of four judges and their alternates, representing the United States, Great Britain, France and the Soviet Union, appointed by their respective countries.³⁵ The Charter provided no criteria for the selection of the Tribunal's officers, but stipulated that neither the Court, nor its members, could be challenged by the prosecution or the defendants. Article 14 of the Charter provided for the appointment of a chief prosecutor by each of the principal signatories. The four prosecutors and their staffs, acting as a committee, were charged with the investigation and prosecution of the alleged war criminals, as well as the drafting of rules of procedure which the Tribunal was empowered to accept, amend, or reject.³⁶

The drafters of the Charter, operating under the specter of pretense, took considerable pains to ensure a fair trial for those indicted. Each defendant was to be accorded a translated copy of the indictment and given the choice of conducting his own defense or utilizing the assistance of counsel.³⁷ The accused would also be granted his choice of counsel at the expense of the Allied powers,³⁸ and would be permitted access to all documentation in the possession of the prosecution. The Tribunal was given the authority to pass final, nonreviewable judgment regarding the guilt or innocence of each defendant,³⁹ and was further empowered to impose upon convicted defendants, sentences of "death and such punishment as shall be determined by it to be just."⁴⁰

33. Article I: The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another. Kellogg-Briand Peace Pact, Aug. 27, 1928, 46 Stat. 2343, T.S. 796, 2 Bevens 732.

Article II: The High Contracting Parties agree that the settlement or resolution of all disputes or conflicts of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

34. *Id.* para. 1.

35. Charter, *supra* note 26, art. 2.

36. *Id.* art. 14.

37. *Id.* art. 16. The defendants at Nuremberg enjoyed the services of twenty-seven lead counsels, fifty-four assistants, and sixty-seven secretaries. HEYDECKER & LEEB, *supra* note 22, at 94.

38. Charter, *supra* note 26, art. 30.

39. *Id.* art. 26.

40. *Id.* art. 27.

On November 20, 1945 the trials of the major war criminals commenced and were carried out over 284 days. The prosecution produced 2,630 documents, and the defense produced 2700.⁴¹ The court took statements from 240 witnesses,⁴² and received 300,000 affidavits.⁴³ Finally, on October 1, 1946 the International Military Tribunal delivered its verdicts. Of the twenty-two Nazi defendants, three were acquitted, four received prison terms not exceeding twenty years, two were sentenced to life in prison, and thirteen were sentenced to death.⁴⁴ Many lesser war criminals were tried over the next three years by military tribunals within the respective zones of occupation. Additionally, many non-German collaborators were tried for treason by their own governments.⁴⁵

III. The International Tribunal for the Former Yugoslavia

As the IMT presided over the Nuremberg proceedings, it did so without benefit of a precedent. The Security Council, on the other hand, may look to the IMT; and it appears that the Council has learned from some of the mistakes of Nuremberg for, in many respects, the Statute of the International Tribunal stands in rather sharp contrast to the Charter of the International Military Tribunal. Moreover, the circumstances under which the Yugoslav Tribunal was formed are somewhat removed from those that resulted in the IMT. These differences, coupled with the marked developments in conventional law and international organizations, has produced a judicial body unlike the Nuremberg Tribunal with respect to establishment, structure, and legal basis.

Established by Security Council Resolution 827,⁴⁶ the International Tribunal for the former Yugoslavia finds its legal basis in Chapter VII of the Charter of the United Nations. Chapter VII authorizes the Security Council, once it has determined the existence of a threat to the peace, breach of the peace, or an act of aggression, to take such measures as may be necessary to maintain or restore international peace and security.⁴⁷ It was under these

41. HEYDECKER & LEEB, *supra* note 22, at 94.

42. *Id.*

43. *Id.*

44. JUDGMENT OF THE INTERNATIONAL MILITARY TRIBUNAL, *reprinted in* 20 TEMP. L.Q. 168, 316-17 (1946).

45. *See, e.g.,* BERTRAM R. GORDON, *COLLABORATIONISM IN FRANCE DURING THE SECOND WORLD WAR* (1980).

46. S.C. Res. 827, *supra* note 15.

47. U.N. CHARTER, art. 42.

auspices that the International Tribunal was formed and legitimated.

The Statute of the International Tribunal, which was drafted in compliance with Resolution 808,⁴⁸ sets forth in thirty-four articles the composition, jurisdiction, and function of the International Tribunal.⁴⁹ The Statute places within the subject-matter jurisdiction of the Tribunal violations of the Geneva Conventions of 1949,⁵⁰ the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and its annexes,⁵¹ the 1948 Convention on the Prevention and Punishment of the Crimes of Genocide,⁵² and those crimes against humanity set forth in the Charter

48. S.C. Res. 808, U.N. SCOR, U.N. Doc. S/25704, *reprinted in* 32 I.L.M. 1163 (1993).

49. Statute of the International Tribunal, U.N. SCOR, U.N. Doc. S/25704 Annex, *reprinted in* 32 I.L.M. 1192 (1993) [hereinafter Statute].

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

(a) wilful killing; (b) torture or inhumane 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 civilians as hostages.

Id. art 2.

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

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

Id. art. 3.

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

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

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

of the Nuremberg Tribunal and Law No. 10 of the Control Council for Germany.⁵³ With regard to this jurisdiction, the wording differs from that of the Charter; however, the substance remains essentially the same. Unlike the IMT, however, the International Tribunal has not been granted jurisdiction over crimes against the peace. This distinction is the only substantive difference between the two texts with respect to subject-matter jurisdiction. Although the Statute expressly denominates the crime of genocide⁵⁴ and sets it out as a separate category in the document, essentially the same conduct is enumerated under crimes against humanity in the Charter.⁵⁵

Personal jurisdiction has not been expanded from the Charter to the Statute, but the troubling matter of individual criminal responsibility has been developed and presented in greater detail in the latter.⁵⁶ The Statute grants the International Tribunal jurisdiction over all natural persons accused of committing the enumerated acts within the territory of the former Federal Republic of Yugoslavia.⁵⁷ The temporal jurisdiction of the Tribunal is clearly delineated and limited to crimes occurring after January 1, 1991.⁵⁸ The Charter, on the other hand, permitted the IMT jurisdiction over violations occurring "before or after the war, presumably back to 1933."⁵⁹

within the group; (e) forcibly transferring children of the group to another group.

3. The following acts shall be punishable:

(a) genocide; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempt to commit genocide; (e) complicity in genocide.

Id. art. 4:

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

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

Id. art. 5.

54. *Id.* art. 4.

55. Charter, *supra* note 26, art. 6(c).

56. Statute, *supra* note 49, art. 7(1).

57. *Id.* art. 6. The Statute further sets forth in article 7 the principle of individual responsibility, irrespective of station, for violations of international law.

Id. art. 7. The former Federal Republic of Yugoslavia now consists of the independent republics of Croatia, Bosnia-Herzegovina, Macedonia, Slovenia, and the current Federal Republic of Yugoslavia (Serbia and Montenegro).

58. *Id.* art. 8.

59. Charter, *supra* note 26, art. 6(c).

Another noticeable difference between the two documents is the provision in the Statute which grants concurrent jurisdiction to national courts within the territory of the former Yugoslavia.⁶⁰ Under the Statute, the International Tribunal is given primacy over other courts, but may not try a defendant who has already been prosecuted for one of the enumerated crimes in a national court unless it is held that the proceedings were not impartial or independent, not diligently prosecuted, or "were designed to shield the accused from international criminal responsibility."⁶¹

Regarding the composition of the International Tribunal, the Security Council has taken steps to create a more universal court than that provided for under the Charter of London. Pursuant to Article 12 of the Statute, the International Tribunal is composed of eleven judges from as many countries, each of whom possesses "the qualifications required in their respective countries for appointment to the highest judicial offices."⁶² No two judges may be nationals of the same state.⁶³ Furthermore, the Statute provides for a court that is to be elected by the General Assembly.⁶⁴

The International Tribunal is divided into three organs: the Chambers, the Prosecutor, and the Registry. The Chambers is comprised of two Trial Chambers which consist of three judges each, and an Appellate Chamber which is composed of five judges.⁶⁵ The Statute consolidates the office of the Prosecutor under the directorship of one person appointed by the Security Council following nomination by the Secretary General,⁶⁶ rather than creating a cumbersome coalition by requiring each country represented on the Tribunal to provide its own prosecutor and staff. It was the bureaucracy created by four prosecutors and four staffs that presented one of the greatest obstacles to efficiency and fair proceedings at Nuremberg. The Statute further provides that the Prosecutor will work independently of the rest of the Tribunal and will not be permitted to seek or receive instruction from any outside source.⁶⁷

The third organ of the Tribunal, the Registry, serves as the administrative organ of the Court, facilitating the efforts of the

60. Statute, *supra* note 49, art. 9.

61. *Id.* art. 10, at § 2(b).

62. *Id.* art. 13, at § 1.

63. *Id.* art. 12.

64. *Id.* art. 13, at § 2.

65. *Id.* art. 13, at § 2.

66. *Id.* art. 16, at § 4.

67. *Id.* art. 16, at § 2.

Chambers and the Prosecutor.⁶⁸ Among the most notable differences between the Charter and the Statute is the inclusion in the latter of an appellate chamber. While the judgment of the IMT regarding the guilt or innocence of the Nuremberg defendants was nonreviewable, the International Tribunal for the former Yugoslavia will hear appeals from the Prosecution and defendants on the grounds of error of fact, or error with regard to a question of law resulting in a miscarriage of justice.⁶⁹

Noticeably expanded from the Charter to the Statute are the rights to be accorded the accused. Like the IMT, the Tribunal is to ensure that each defendant is provided with a detailed explanation, in a language which is known to him, of the "nature and cause of the charge[s] against him."⁷⁰ Additionally, as at Nuremberg, the accused is to be permitted the services of counsel of his own choosing, and is to be permitted the time and facilities necessary to conduct an adequate defense.⁷¹ If the accused is found guilty of a serious violation of international humanitarian law, however, the International Tribunal, unlike the IMT, may impose a sentence limited to imprisonment,⁷² presumably for life.⁷³ Additionally, the Statute provides that the accused may not be tried *in absentia*.⁷⁴ The Charter of the International Military Tribunal, in contrast, did not preclude such hearings. As a result, Martin Bormann, Head of the Party Chancellery, was tried, convicted and sentenced to death despite the Allies inability to locate him.⁷⁵

Still another difference lies in the defendant's right to not be placed in double jeopardy. Indeed, the Charter expressly states that any person convicted by the IMT may be charged subsequently by a national court for any crime other than membership in a criminal organization.⁷⁶ Consequently, Nuremberg defendants Hjalmar Schacht, Franz von Papen, and Hans Fritzsche were

68. *Id.* art. 17.

69. *Id.* art. 25, at § 1.

70. *Id.* art. 21, at § 4(a).

71. *Id.* § 4(b).

72. *Id.* art. 24, at § 1.

73. No term limits are stipulated in the Statute. The Statute grants the International Tribunal recourse to the domestic practice of the courts of the former Yugoslavia in determining suitable terms of imprisonment. *Id.* art. 24, at § 1.

74. *Id.* art. 21, at § 4(d).

75. JUDGMENT OF THE INTERNATIONAL MILITARY TRIBUNAL, *supra* note 44, at 317.

76. Charter, *supra* note 26, art. 11.

prosecuted in German courts following prosecution by the Tribunal.⁷⁷

The Statute of the International Tribunal and the Charter of the International Military Tribunal differ in many respects. The Statute is considerably more explicit regarding to subject-matter and personal jurisdiction and limits the latter to a greater degree than does the Charter.⁷⁸ The Court itself is more diverse. Its members have been seated only by the consent of the General Assembly⁷⁹ and its ability to mete out punishment is limited to imprisonment, and then only within the boundaries of Yugoslav law.⁸⁰ Furthermore, the composition of the Tribunal, which includes one independent Prosecutor and a separate appellate chamber, more closely resembles municipal judiciaries and may provide a more fair and just process than that conducted under the IMT and will likely prove more efficient. Yet many of the same weaknesses may be inherent in both instruments.

The organization of the IMT and Nuremberg proceedings have been found lacking in several respects. Not surprisingly, the Tribunal and the Nuremberg Trials have become the focus of numerous pieces of critical scholarship. In an effort to successfully adjudicate alleged war criminals of the former Yugoslavia and avoid future discredit, the International Tribunal and the Security Council would be well served by a thorough examination of the criticism prompted by the Nuremberg effort.

IV. Nuremberg in Retrospect: Critical Commentary

The Nuremberg Trials have generated literature from three principle groups of scholars. These works suggest three different perceptions of the political and legal nature of the proceedings. As may be expected, the strongest and broadest criticism of the substantive and procedural law invoked at the trials originates among German legal scholars. Also critical, although generally supportive of the proceedings for their role in the restabilization of postwar Europe, are English and American historians. Finally, the most ardent advocates of the trials generally are found among English and American jurists and legal scholars.

77. ANN TUSA & JOHN TUSA, *THE NUREMBERG TRIAL* 477-78 (1984).

78. Statute, *supra* note 49, arts. 1-7.

79. *Id.* arts. 11-12.

80. *Id.* art. 24.

A. German Legal Scholars

Nullum crimen sine lege, nulla poena sine lege.

Of the three principal groups of commentators on the Nuremberg Trials, German legal scholars have produced the harshest criticism. Almost without exception, these writings evince a decidedly realist perspective of the proceedings. The key actors are understood to be nation-states motivated by national interest, security, and power, with little genuine regard for the advancement of international law, humanitarian or otherwise. These writings generally denounce as contrived, the role that American exceptionalism,⁸¹ or more accurately, Anglo-American exceptionalism, played in the formation of the Tribunal and the execution of the proceedings. Additionally, the German authors focus little upon world public opinion as a driving force behind the trials, and often draw attention, implicitly or explicitly, to the ideology of the four Allied powers as a motivating factor.⁸²

The most frequently raised legal objection concerns the application by the Tribunal of *ex post facto* law. It is widely held among the German scholars that the law applied at Nuremberg had its origins in the *Charter of London*, drafted on August 8, 1945, rather than in existing conventional and customary law.⁸³ Implicit in this assertion is a reliance upon the doctrine of *rebus sic standibus*, or the nullification of binding treaties because of circumstances. It assumes that the Hague Conventions of 1899 and 1907, and the Geneva Conventions of 1925 and 1929 ceased to bind Germany once it was at war with other signatories to the agree-

81. For a concise and insightful treatment of the United States's self-perceived role as a moral, legal and political exemplar, see GEIR LUNDESTAD, *THE AMERICAN "EMPIRE"* (1990).

82. See, e.g., Hans Ehard, *The Nuremberg Trial Against the Major War Criminals and International Law*, 43 *A.J.I.L.* 223, 233 (1949); Otto Kranzbuhler, *Nuremberg Eighteen Years Afterward*, 14 *DEPAUL L. REV.* 333, 334 (1964) [hereinafter Kranzbuhler, *Nuremberg Eighteen Years Afterward*].

83. See Ehard, *supra* note 82 and accompanying text. See also Otto Kranzbuhler, *Nuremberg As a Legal Problem*, in *NUREMBERG: GERMAN VIEWS OF THE WAR TRIALS* (Wilbourn E. Benton & Georg Grimm eds., 1955); Kranzbuehler, *Nuremberg Eighteen Years Afterward*, *supra* note 82, at 333; Otto Pannenbecker, *The Nuremberg War-Crimes Trial*, 14 *DEPAUL L. REV.* 348 (1964); Herbert Kraus, *The Nuremberg Trial of the Major War Criminals: Reflections After Seventeen Years*, 13 *DEPAUL L. REV.* 233 (1963); Karl S. Bader, in *NUREMBERG: GERMAN VIEWS OF THE WAR TRIALS* (Wilbourn E. Benton & Georg Grimm eds., 1955).

ments. Reliance upon this principle, however, is erroneous in this instance if, as is often argued, the laws that the major war criminals were charged with violating may be held to have been *jus cogens* law. If they were indeed preemptory norms, then neither subsequent agreement, nor circumstances, nor German policy or law could supersede these laws. Thus, the Charter of London may rightfully be construed as the legal basis of the IMT, as Chapter VII of the Charter of the United Nations may be construed to be the legal basis for the International Tribunal for the former Yugoslavia, and may be looked upon as a restatement of the existing law. The instrument itself, however, clearly was not the source of the law.

The writings which acknowledge pre-Charter law as the foundation of the trials often question the application of that law to *criminal* proceedings. In other words, those scholars who recognize as binding the Hague and Geneva Conventions and the Kellogg-Briand Pact often suggest that while these agreements may have unequivocally declared aggressive war, war crimes and crimes against humanity to be immoral, and rendered such conduct illegal, they possessed no penal element, and thus no penal capacity.⁸⁴

Another point of contention for German scholars was the charge of *conspiracy* or *common plan*.⁸⁵ This charge permitted the Allied prosecutors to reach members of the various Nazi organizations who otherwise would have escaped indictment. Through the charge of conspiracy or common plan, the Tribunal was able to indict the members of the Reich Cabinet, along with the upper strata of the S.S., S.A., S.D., Gestapo, Leadership Corps, and the General Staff. While these individuals were not directly involved in the planning or commission of the enumerated crimes, they could be brought before the court for directly facilitating illegal conduct. Not only was the indictment of organizations patently novel under international law, the principle of conspiracy was exclusive to Anglo-American jurisprudence. Indeed, the charge caused considerable confusion not only for the German

84. See Kraus, *supra* note 83, at 245; Kranzbuhler, *Nuremberg Eighteen Years Afterward*, *supra* note 82, at 340; Ehard, *supra* note 82, at 236.

85. See Carl Haensel, *The Nuremberg Trial Revisited*, 13 DEPAUL L. REV. 248 (1963); Kurt Behling, *The Nuremberg Judgments*, in NUREMBERG: GERMAN VIEWS OF THE WAR TRIALS (Wilbourn E. Benton & Georg Grimm Eds., 1955); Kraus, *supra* note 83, at 245; Ehard, *supra* note 82, at 226-27, 231; Pannenbecker, *supra* note 83, at 341.

defense counsel, but for the French and Soviet prosecutors as well.⁸⁶ It has been noted that had the IMT omitted this allegedly “dubious and illegal charge” of all the defendants, only Rudolph Hess, whom Churchill considered more deserving of psychological care than punishment, would have been acquitted.⁸⁷

Also decried as novel, and as a violation of Rousseau’s Social Contract, was the practice of subjecting individual actors, including heads of state, to the law of nations.⁸⁸ German scholars have often suggested that heads of state act on behalf of their governments and, thus, should be held accountable only under the law of the actor’s nation.⁸⁹ The point, however, is moot. As Nuremberg defense attorney Herbert Krause has pointed out, “Hitler was dead when the [s]tatute was issued and it was not applicable to Admiral Dönitz, even if one wished to assume that he was Chief of State for a short time.”⁹⁰ Likewise, it has been suggested that those who carried out crimes under orders from a superior were confronted with a Hobson’s choice and should not be subjected to international law.⁹¹

Criticism abounds regarding the Tribunal’s failure to indict Allied offenders.⁹² Also criticized was the Allies’ failure to appoint a judge from a neutral country, or a judge from Germany to the IMT.⁹³ It has been suggested that once they had been thoroughly apprised of Hitler’s policies and Nazi conduct, the German people would have dealt justly with the accused.⁹⁴ The treatment administered by the German courts to those acquitted by the Tribunal is perhaps a testimony to this claim. The perfunctory execution of the Leipzig Trials by German courts following the First World War, however, may have left the Allies unpersuaded.

86. BRADLEY F. SMITH, *THE ROAD TO NUREMBERG* 52 (1981) [hereinafter *ROAD TO NUREMBERG*].

87. Pannenbecker, *supra* note 83, at 351.

88. Behling, *supra* note 85, at 177-88; Kraus, *supra* note 83, at 238; Kranzbuhler, *Nuremberg Eighteen Years Afterward*, *supra* note 82, at 339; Ehard, *supra* note 82, at 232-36; Haensel, *supra* note 85, at 251-52.

89. Kraus, *supra* note 83, at 243; Ehard, *supra* note 82, at 233; Bader, *supra* note 83, at 178; Haensel, *supra* note 85, at 253.

90. Kraus, *supra* note 83, at 239.

91. Kraus, *supra* note 83, at 238; Kranzbuhler, *Nuremberg Eighteen Years Afterward*, *supra* note 82, at 339.

92. Kranzbuhler, *Nuremberg Eighteen Years Afterward*, *supra* note 82, at 334; Ehard, *supra* note 82, at 238-39, 241; Haensel, *supra* note 85, at 258.

93. Kraus, *supra* note 83, at 247; Ehard, *supra* note 82, at 243; Haensel, *supra* note 85, at 258.

94. Behling, *supra* note 85, at 179.

In addition to frequent criticism of the conspiracy charge and the Tribunal's failure to try Allied offenders, there is another contention common to many of the German writings. It is the presumption that German municipal law should have served as a guide for the substantive and procedural law invoked at the proceedings, a claim which curiously ignores the widely accepted principle that municipal law is invoked for international adjudication only in the absence of relevant customary or conventional law.⁹⁵

German legal scholars have published the harshest and broadest criticism of the Nuremberg Trials. The proceedings have been roundly denounced as "a tool of Allied foreign policy and American occupational policy,"⁹⁶ the purpose of which was to "morally uplift and re-educate the German people" in line with western political ideals.⁹⁷ The proceedings have been called "historical trials in which one political system, namely the democratic one, held court over another system, that is, the dictatorial one."⁹⁸ Moreover, it has been suggested that international law was "knowingly disregarded" at Nuremberg,⁹⁹ and that the trials possessed little future value.¹⁰⁰ There seems to be some consensus among German commentators, however, that despite its tenuous legal basis, the IMT carried out its mission with notable objectivity and fairness and did what it could to facilitate the defense of the accused.¹⁰¹

B. *English and American Historians*

Dieser Prozess hat nur eine eisige tatsächliche Grundlage,
nicht das Recht, sondern den alten Machtgrundsatz 'Vae victis!'
Anonymous Nuremberg defendant¹⁰²

English and American historians constitute another principal group of commentators on the Nuremberg Trials. Like German

95. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987).

96. Kranzbuehler, *supra* note 83, at 106.

97. Ehard, *supra* note 82, at 233.

98. Kranzbuehler, *Nuremberg Eighteen Years Afterward*, *supra* note 82, at 334.

99. *Id.* at 335.

100. Pannenbecker, *supra* note 83, at 358.

101. See Karl-Heinz Lueders, *The Nuremberg Judgment: Penal Jurisdiction Over Citizens of Enemy States*, in NUREMBERG: GERMAN VIEWS OF THE WAR TRIALS 127-35 (Wilbourn E. Benton and Georg Grimm eds., 1955); Kraus, *supra* note 83, at 246; Haensel, *supra* note 85, at 258.

102. "This trial has only one single, actual foundation, not the law, but the old power maxim 'Vae victis!'"

legal scholars, writers within this group characteristically exhibit a realist perspective of the proceedings. Law is ultimately a political affair¹⁰³ and the focus of the trials' organizers was future international security, perhaps at the expense of present justice.¹⁰⁴ The proceedings, it is suggested, were conducted as much for political purposes as for judicial ones.¹⁰⁵ According to one Nuremberg scholar, it is only as a political event that the trials may be defended.¹⁰⁶ It has been further suggested that the legal aspects of the trials were never fixed or well-defined¹⁰⁷ and that their purpose was clearly a political one — to justify the war against Germany, to legitimize postwar Allied policies, and to help smooth America's transition to superpower status.¹⁰⁸ Toward this end, international politics were cloaked in the guise of due process,¹⁰⁹ which consisted at best, of a tendentious reading of international law.¹¹⁰

There seems to be little emphasis upon Anglo-American exceptionalism in this body of literature, save references to American predominance in the formation of the proceedings,¹¹¹ and little concern is evinced for the role played by Anglo-American ideology in planning the proceedings. There is among historians a considerable focus upon the role of public opinion in the formation and execution of the trials,¹¹² and it has been noted that the IMT faced the difficult task of weighing justice against universal outrage.¹¹³

The scholarship of this group is generally critical of the procedure implemented by the Allies. The Tribunal is criticized as

103. TUSA & TUSA, *supra* note 77, at 492.

104. Michael Biddis, *The Nuremberg Trial: Two Exercises in Judgment*, 16 J. CONTEMP. HIST. 597, 611 (1981).

105. See EUGENE DAVIDSON, *TRIAL OF THE GERMANS* (1966); BRADLEY F. SMITH, *REACHING JUDGMENT AT NUREMBERG* (1977) [hereinafter *REACHING JUDGMENT*]. See generally BRADLEY F. SMITH, *ROAD TO NUREMBERG*, *supra* note 86; TELFORD TAYLOR, *supra* note 23; Biddis, *supra* note 104.

106. DAVIDSON, *supra* note 105, at 592.

107. SMITH, *REACHING JUDGMENT*, *supra* note 105, at xvii.

108. SMITH, *ROAD TO NUREMBERG*, *supra* note 86, at 252.

109. See *id.* at 249; SMITH, *REACHING JUDGMENT*, *supra* note 105, at xiv.

110. Biddis, *supra* note 104, at 610.

111. See TAYLOR, *supra* note 23, at 4; SMITH, *ROAD TO NUREMBERG*, *supra* note 86, at 50-75.

112. See SMITH, *ROAD TO NUREMBERG*, *supra* note 86, at 9, 248; TAYLOR, *supra* note 23, at 26; GEOFFREY BEST, *NUREMBERG AND AFTER: THE CONTINUING HISTORY OF WAR CRIMES AND CRIMES AGAINST HUMANITY* 8 (1984).

113. BEST, *supra* note 112, at 8.

an inadequate forum for establishing a new order,¹¹⁴ and it has been suggested that neither the consistency nor efficiency of the judicial process was elevated through its association with international politics.¹¹⁵ Yet, no viable alternative for dealing with the alleged violators has been offered. Telford Taylor¹¹⁶ devotes some attention to developing the procedural flaws of the trials and notes that the defense counsel did not enjoy the same sources and accommodations which were granted to the prosecution.¹¹⁷ Additionally, defendants were not permitted to offer documents implicating Allied parties, nor were they granted access to the evidentiary archives. The subject-matter jurisdiction of the IMT has been criticized as well, particularly the charge of conspiracy.¹¹⁸ It is suggested that the inclusion of that charge "stretched the bounds of legal propriety."¹¹⁹ The Tribunal's indictment of those who followed the orders of their superiors,¹²⁰ as well as its failure to indict Allied offenders,¹²¹ has also been criticized.

It is often conceded, however, that the proceedings presented a favorable course of Allied action following the war.¹²² It may be argued that the trials, by drawing attention to the Nazi leadership, possibly averted "lynch justice" from being exacted from the German civilian population.¹²³ Although Henry Stimson and other ardent defenders of the trials have been criticized for their "euphoric" perspective,¹²⁴ it has been noted that the trials had to take place, if for no other purpose than psychological reasons.¹²⁵ It is also acknowledged that while Nuremberg clearly did not render perfect justice, it was perhaps the best means of preserving the value of international law.¹²⁶ Moreover, the trials provided

114. DAVIDSON, *supra* note 105, at 591-92.

115. SMITH, REACHING JUDGMENT, *supra* note 105, at 304.

116. Brig. General Taylor, Professor Emeritus at Yeshiva and war trial prosecutor, is the only legal scholar within this group of commentators. Professor Taylor takes a decidedly different approach to the trials than other English and American legal scholars.

117. TAYLOR, *supra* note 23, at 627.

118. *Id.* at 629; SMITH, ROAD TO NUREMBERG, *supra* note 86, at 52, 249.

119. SMITH, ROAD TO NUREMBERG, *supra* note 86, at 249.

120. TAYLOR, *supra* note 23, at 630.

121. DAVIDSON, *supra* note 105, at 591.

122. BEST, *supra* note 112, at 24; Biddis, *supra* note 104, at 613; SMITH, ROAD TO NUREMBERG, *supra* note 86, at 248; TAYLOR, *supra* note 23, at 630.

123. SMITH, ROAD TO NUREMBERG, *supra* note 86, at 248. *See also* BEST, *supra* note 112, at 5; DAVIDSON, *supra* note 105, at 588.

124. *See* DAVIDSON, *supra* note 105, at 588.

125. *Id.* at 586.

126. BEST, *supra* note 112, at 24.

a vent for international anger and, arguably, were a morally favorable alternative to summary execution.¹²⁷

C. *English and American Jurists and Legal Scholars*

Law follows order: it does not precede it.

Sir Hartley Shawcross

If these men are the first war leaders of a defeated nation to be prosecuted in the name of the law, they are also the first to be given a chance to plead for their lives in the name of the law.

Robert H. Jackson

From their commencement, the Nuremberg Trials have drawn their strongest support from English and American jurists and legal scholars. These writers may be distinguished from the German legal scholars and English and American historians in several respects. First, they generally evince a traditionalist perspective of the proceedings, which is particularly evident in frequent references to the role of the IMT in administering *moral* justice. It was morally imperative that a trial be conducted.¹²⁸ The crimes perpetrated by the Nazis were patently egregious and the world demanded justice, thus, the framers of the Nuremberg proceedings had a moral mandate, as well as a commission from the international community.¹²⁹ These writers generally convey what Professor Ole R. Holsti may label a *global-realist* perspective.¹³⁰ While they appear to hold realist views regarding the central problems¹³¹ and the key actors¹³² within the international system, their writings at the same time elevate the conception of a global society and recognize a degree of complex interdependence.¹³³ Additionally,

127. SMITH, ROAD TO NUREMBERG, *supra* note 86, at 259.

128. See ROBERT H. JACKSON, THE CASE AGAINST THE NAZI WAR CRIMINALS vi (1946); ROBERT E. CONOT, JUSTICE AT NUREMBERG 523 (1983); WHITNEY HARRIS, TYRANNY ON TRIAL: THE EVIDENCE AT NUREMBERG 568 (1954); Lord Justice Geoffrey Lawrence, *The Nuremberg Trial*, 23 INT'L AFF. 151-59 (1944); AIREY NEAVE, ON TRIAL AT NUREMBERG 324 (1978).

129. Henry L. Stimson, *Landmark in Law*, 25 FOREIGN AFF. 179-89, 182 (1947).

130. See generally Ole R. Holsti, *Models of International Relations and Foreign Policy*, 13 DIPL. HIST. 15 (Winter 1989); *International Relations Models, in EXPLAINING THE HISTORY OF AMERICAN FOREIGN RELATIONS 57-88* (Michael J. Hogar and Thomas G. Patterson eds., 1991).

131. The causes of war and conditions of peace.

132. Nation-states motivated by national interest and security.

133. See Stimson, *supra* note 129, *passim*; CONOT, *supra* note 128, at 522; HARRIS, *supra* note 128, at 536.

this group, while maintaining a realist commitment to the geographically-based nation-state, evinces an acknowledgment of and a commitment to the emerging global values and institutions that transcend the nation-state.¹³⁴

These writings also differ from others in that they are often characterized by an implicit acknowledgment of Anglo-American exceptionalism. Indeed, the proceedings were an American proposal, they were prompted by an Anglo-American conception of justice, and they were fashioned according to Anglo-American principles of jurisprudence. Moreover, the largely Anglo-American endeavor was nothing less than a legal milestone. This scholarship also devotes considerable attention to the role of public opinion in the formation and execution of the trials.¹³⁵ Indeed, public opinion is interwoven with moralism throughout many of the writings. Additionally, some attention is given to the role of ideology in the proceedings, as is evidenced by references to Anglo-American perceptions of justice, international law, and world order.¹³⁶

While English and American legal scholars have generally been the strongest advocates of the trials, their writings also exhibit, more so than other principal groups, a more orthodox approach to international law. Treaties and custom serve as binding law, and nation-states are to be held to the principle of *pacta sunt servanda*. Additionally, individuals, no less than states, are subject to this law.

English and American legal scholarship on the Nuremberg Trials is also characterized by a consistent, apologetical approach to criticism from the trials' detractors. A new era of global-interdependence emerged following World War I, as did a new era of warfare.¹³⁷ Modern advances in technology placed unprecedented destructive capability into the hands of individual actors, and this destructive capability demanded heightened international interaction and cooperation, as well as further development of substantive and procedural international law, to ensure global stability and national security. Increased global interaction brought the conclusion of numerous treaties and agreements codifying international custom and aspiration. These agreements included

134. See Lawrence, *supra* note 128, at 156; Stimson, *supra* note 129, at 184-85, 188-89; HARRIS, *supra* note 128, at 536.

135. See, e.g., Lawrence, *supra* note 128, at 152; Stimson, *supra* note 129, at 179.

136. See Stimson, *supra* note 129, *passim*.

137. *Id.* at 182, 184.

the Hague and Geneva Conventions, as well as the idealistic Kellogg-Briand Pact. As a signatory to each, it may be contended that Germany endorsed the very law invoked at the Nuremberg proceedings. Thus, the substantive law relied upon by the IMT, save the charge of conspiracy, was not novel, nor was it unknown to Germany.¹³⁸ Moreover, it may be argued that customary law, like the common law, could never evolve if a claim of *ex post facto* application could defeat the first case which recognized the emergence of a new rule.

Little effort has been made, however, to explain the *procedural* novelty of the trials. This may suggest a reliance upon several extenuating factors as evidence of the legitimacy of the proceedings. For example, by the time the IMT was organized in 1945, the Permanent Court of International Justice had conducted proceedings as an organ of the League of Nations for more than two decades. While the Permanent Court did not have jurisdiction over criminal acts, proposals for broadened jurisdiction were offered rather routinely, conveying to nations the possibility of expanded jurisdiction.¹³⁹ Equally significant, international legal procedure historically had been established on an *ad hoc* basis. Thus, Germany was not without warning as regards the possible inclusion of criminal conduct within international court jurisdiction, or the implementation of unprecedented procedure. Additionally, a precedent for the adjudication of alleged war criminals was established when German leaders were brought to trial, if only perfunctorily, in Leipzig following World War I. The concept of adjudicating the conduct of military leaders, therefore, clearly was not novel in 1945.

English and American legal scholars have also argued that the concept of giving precedence to international law over municipal law, and the practice of holding individuals accountable under the law of nations, was not revolutionary.¹⁴⁰ This principle was inherent in the conventions which established guidelines for the

138. See Harold Levanthal et al., *The Nuremberg Verdict*, 60 HARV. L. REV. 857-907 (1947); SHELDON GLUECK, NUREMBERG TRIAL AND AGGRESSIVE WAR 11, 105 (1946); Lawrence, *supra* note 128, at 154; Stimson, *supra* note 129, at 180; HARRIS, *supra* note 128, at 530.

139. For a concise but thorough history of substantive and procedural international criminal law, see M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 147-91 (1992).

140. See Lawrence, *supra* note 128, at 156; GLUECK, *supra* note 138, at 63, 92.

conduct of war.¹⁴¹ As early as 1887, United States Secretary of State Thomas F. Bayard observed:

[I]t is only necessary to say, that if a Government could set up its own municipal laws as the final test of its international rights and obligations, then the rules of international law would be but a shadow of a name and would afford no protection either to States or to individuals.¹⁴²

Still another perspective in the debate over primacy was offered by Sir Geoffrey Lawrence, the presiding justice on the IMT, who noted that by November 1945 the Allied powers constituted the *de facto* government of Germany and, through Germany's unconditional surrender, the Allies became the *de jure* government as well.¹⁴³ Thus, the Charter of London, which served as the restatement of the law to be applied at the trials, arguably could have been construed to have been the *municipal law* of Germany as well. Lawrence was not the only official to posit this claim. It was also advanced by the Secretary General of the United Nations in his official analysis of the IMT.¹⁴⁴

"Nullum crimen sine lege, nulla poena sine lege" was the most commonly invoked defense during the trials. Defenders of the proceedings responded by merely directing detractors to alleged *jus cogens* principles and existing conventional law, the latter of which bore signatures rendered on behalf of the people of Germany.¹⁴⁵ Harvard law professor Sheldon Glueck, exhibiting a global-interdependence perspective, further noted that *nullum crimen sine lege*, as a defense, applies only to peaceful intercourse among nations, and cannot be invoked to excuse "barbarism."¹⁴⁶

The failure of the Tribunal to indict the alleged Allied war criminals stands without justification and, indeed, no effort is made by these writers to defend this inequity. This omission, coupled with a Soviet presence on the IMT, probably did more than any other legal controversy to discredit the proceedings. It certainly

141. Stimson, *supra* note 129, at 180; GLUECK, *supra* note 138, at 63, 92; Lawrence, *supra* note 128, at 156; HARRIS, *supra* note 128, at 530-31.

142. FOREIGN RELATIONS 751, 753 (1887).

143. Lawrence, *supra* note 128, at 155.

144. SECRETARY GENERAL LIE, THE CHARTER AND JUDGMENT OF THE NUREMBERG TRIBUNAL 79 (1949).

145. See Hague IV, *supra* note 31 and accompanying text; Laws and Customs of Land on War, 36 Stat. 2277, T.S. 539, 1 Bevans 631; Geneva Convention, *supra* note 32; Genova Protocol, *supra* note 32; Kellogg-Briand Peace Pact, *supra* note 33.

146. GLUECK, *supra* note 138, at 22.

provided ample fodder for Nuremberg critics. And while this group of writers offers no excuses for the Tribunal's failure to indict alleged Allied, and most notably Soviet war criminals, Professor Glueck attempted to bring the matter into perspective:

[W]hether Russia is or is not guilty of a war of aggression is not relevant to the present issue before the court at Nuremberg. There the question is whether or not Germany and her agents are guilty of such a war. . . If the law has indeed been violated by a party temporarily outside the power of the sovereign authority, the offense still remains; there is no statute of limitations involved. In the meantime, it cannot reasonably be argued that the prosecution of so patent and chronic an aggressor as Germany should be infinitely postponed until such a time as all alleged malefactors can be haled before an international court.¹⁴⁷

Secretary of War Henry L. Stimson added:

There was, somewhere in our distant past, a first case of murder, a first case where the tribe replaced the victim's family as judge of the offender. The tribe had learned that the deliberate and malicious killing of any human being was, and must be treated as, an offense against the whole community.¹⁴⁸

V. Judging the Present by the Past

Although it may be months before the fighting in the former Yugoslavia is brought to a close, and many years before all the Balkan war criminals are brought before the Tribunal, the machinery for the process is in place and prosecution has begun. Enough steps have been taken by the UN to provide observers with sufficient data for commentary; and while a generation may pass before historians take up the task of commenting on the trials, there is already ample fodder for debate among legal scholars, particularly in light of the criticism generated by the Nuremberg proceedings. Indeed, there was a flurry of legal debate through 1993 and much of 1994, and there remains a steady stream of commentary from human rights scholars. Most within the legal profession, however, like the rest of the international community, appear to be watching and waiting for the next sequence of events

147. *Id.*

148. Stimson, *supra* note 129, at 180.

to unfold. Some insightful commentary has emerged, however, doubtless offering a foreshadowing of the scholarship to come.

The criticism that has been leveled at both the Nuremberg and Yugoslav Trials may be divided into two categories: political and legal. For the purposes of this analysis, criticism will be construed as political if it touches upon the policy concerns, foreign or domestic, of those powers represented on the IMT or the International Tribunal. Criticism will be considered legal, on the other hand, if it relates to the substantive and procedural law relied upon by either court.

A. *Political Criticism*

1. *Historic Trials*.—Like the Nuremberg Trials, the Balkan proceedings may be challenged as historic trials. It has already been suggested that the United Nation's latest effort is merely a "victor's tribunal" . . . set up belatedly by the winners of the Second World War.¹⁴⁹ Thus construed, the International Tribunal is an organ of the Western-dominated Security Council rather than one elected by, and representative of, the General Assembly. Cast in this light, the Tribunal is an affront to the sovereignty of all UN members, for its legal basis rests on nothing more than the Council's tendentious reading, and arbitrary invocation, of Chapter VII of the UN Charter.¹⁵⁰

Additionally, it may be suggested that the trials are being conducted at the behest of the Council merely in an attempt to compensate for more than four decades of institutional paralysis. Holding the several countries of the former Yugoslavia, all of which are second-world countries and none a major power, responsible for violations which have been committed with apparent impunity by major powers, suggests that Serbia, Bosnia, Croatia and Montenegro are being put on trial only because they have neither the military nor economic wherewithal to persuade the Council to do otherwise. Moreover, that China, one of the leading violators of human rights, should sit in judgment over another power which is being accused of crimes against humanity, may be perceived as tantamount to Russia's presence on the IMT.

149. Alfred P. Rubin, *International Crime and Punishment*, THE NAT'L INTEREST 73, 74 (Fall 1993).

150. See generally Payam Akhavan, *Enforcement of the Genocide Convention: A Challenge to Civilization*, 8 HARV. HUM. RTS. J. 229 (1995).

2. *Political Ideology as the Driving Factor.*—Among the political criticism common to both the German legal scholars and historians is the notion that political ideology, rather than justice, was the primary impetus for the Nuremberg Trials.¹⁵¹ Thus, the proceedings may be construed as much a political event as a legal one. Indeed, it has been noted that “those who would draw a clear distinction between law and politics are to be found more in ivory towers than in corridors of power.”¹⁵² Not surprisingly, it has also been argued that the Nuremberg Trials were merely a tool of Allied foreign policy,¹⁵³ and an attempt to educate the German people in, and compel compliance with, Western ideals.¹⁵⁴ The very composition of the present International Tribunal, eleven judges from as many countries all of whom were elected by the General Assembly of the United Nations, is certainly less inviting of such criticism than was the IMT. But its diversity notwithstanding, the Court has drawn criticism in this regard. It has been suggested that the International Tribunal is driven by political expediency rather than justice, and that it may conduct the trials in a manner “consistent with the political interests of certain powers and that is, bring the small fry [before the Court], [and] prosecute them,” while ignoring key figures who have been identified as war criminals.¹⁵⁵ Time will tell if there are grounds for this claim, but the diversity of the Court and the independence of the Prosecutor casts some doubt upon its plausibility. While the IMT could hardly be considered homogeneous, the Yugoslav Tribunal is even less so. The political and economic systems and the respective interests of the representative countries are as diverse as the Court itself. Drawn from five continents, the justices of the International Tribunal represent socialist as well as capitalist economies, and totalitarian as well as republican governments.¹⁵⁶ It is difficult to imagine a tenable claim against such a heterogeneous body on

151. Kranzbuehler, *supra* note 83, at 106; Ehard, *supra* note 82, at 233; DAVIDSON, *supra* note 105, at 592; SMITH, REACHING JUDGMENT, *supra* note 105, at xvii; SMITH, ROAD TO NUREMBERG, *supra* note 86, at 252; Biddis, *supra* note 104, at 611; TUSA & TUSA, *supra* note 77, at 492.

152. David P. Forsythe, *Politics and the International Tribunal for the Former Yugoslavia*, 5 CRIM. L. F. 401 (1994).

153. Ehard, *supra* note 82, at 233.

154. Kranzbuehler, *supra* note 83, at 106.

155. Ambassador Muhamad Sacirbey, *Remarks*, 6 PACE INT'L L. REV. 63, 67 (1994).

156. For a listing of the countries represented on the International Tribunal, see *supra* note 16.

ideological grounds. But, the key issue, of course, is the composition of the Security Council under whose authority the Tribunal was created. Professor David Forsythe makes the argument that the policy which established and drives the Tribunal is the product of a few key states.¹⁵⁷ To be sure, the Security Council is dominated by Western powers and allegations of political collusion against this body cannot be easily dismissed.

3. *An Inadequate Forum.*—The Nuremberg Tribunal has also drawn criticism for being an inadequate forum for establishing a new world order.¹⁵⁸ Interestingly, however, its detractors have proposed no alternatives. Clearly, the purpose of the Yugoslav Trials is not to establish a new world order; nevertheless, the adequacy of the International Tribunal as a forum for maintaining order and deterring future criminal acts may be called into question.

Whether or not an *ad hoc* international tribunal is a sufficient means of dealing with criminal behavior and whether such an organ presents a suitable deterrent has long been a subject of debate. A permanent venue may offer a stronger deterrent to deviant conduct, and would likely be capable of dealing more efficiently with that conduct. It has been argued recently that UN coalition military commissions and tribunals may prove a more efficacious alternative to *ad hoc* international efforts.¹⁵⁹ The creation of an international penal code may be more effective still. The International Tribunal, like the International Court of Justice, does however operate under the authority of the UN and, indeed, enjoys the same setting as the ICJ.¹⁶⁰ Absent the extension of criminal jurisdiction to the ICJ, or the creation of a permanent tribunal and the incorporation of a penal code, *ad hoc* organs such as the present one appear to offer the most efficient means toward the desired end.

B. *Legal Criticism*

1. *Ex Post Facto Law.*—Several challenges to the law invoked by the IMT have been offered by Nuremberg detractors. Foremost among these complaints was the alleged application of *ex*

157. Forsythe, *supra* note 152, at 402.

158. DAVIDSON, *supra* note 105, at 591-92.

159. See Robinson O. Everett & Scott L. Silliman, *Forums for Punishing Offenses Against the Law of Nations*, 29 WAKE FOREST L. REV. 509 (1994).

160. Statute, *supra* note 49, art. 31.

post facto law: a claim grounded in the presumption that the Charter of London, rather than existing customs and conventions, was the source of the substantive law invoked by the IMT.¹⁶¹ While the International Tribunal, like the IMT, is an *ad hoc* body, it enjoys the advantage of being able to invoke conventional human rights principles which have been standard fare in international jurisprudence for nearly a century. Moreover, the Security Council has determined to apply only that law which is “beyond any doubt part of customary law.”¹⁶² At least three possible points of contention, however, remain: First, it may be argued that the Tribunal has invoked customary law which, although applicable to international conflicts, is not applicable to internal conflicts such as that in the former Yugoslavia. The Tribunal, however, was created under color of the authority of Chapter VII, rendering the Bosnian Conflict, *ipso facto*, an international situation. It may be argued, then, that any distinction between the civil or international character of the conflict in that theater, as a practical matter, is irrelevant.

Secondly, it may be suggested, as claimed by the critics of the Nuremberg Trials, that the rules of law relied upon by the International Tribunal, conventional or customary, still contain no penal element. The Security Council, noting this deficiency, has provided for the International Tribunal to resort to municipal law, namely, the practice of sentencing in the courts of the former Yugoslavia to fill any gaps in the existing international law.¹⁶³ Without amending the existing law to include penal provisions, this compromise appears to offer the best solution. Moreover, it is counterintuitive to suggest that the United Nations should have the authority to advance and demand adherence to fundamental, inviolable human rights, but be precluded from exacting any

161. See Ehard, *supra* note 82, at 223; Kranzbuehler, *supra* note 83, at 106; Kranzbuehler, *Nuremberg Eighteen Years Afterward*, *supra* note 82, at 334; Pannenbecker, *supra* note 83, at 349; Kraus, *supra* note 83, at 245; Bader, *supra* note 83, at 177.

162. Statute, *supra* note 49, art. 1, para. 34, 35. “The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: The Geneva Conventions of August 12, 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of October 18, 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948; and the Charter of the International Military Tribunal of August 8, 1945.” *Id.* art. 1, para. 35.

163. Statute, *supra* note 49, art. 1, para. 36.

penalty from violators. Such a claim must rest upon absence of notice, notwithstanding a growing body of principles to which all member nations are required to accede, a claim which could not be advanced in good faith.

Finally, it may be contended that the International Tribunal should not have jurisdiction over acts committed before its inception. However, until the International Court of Justice is given jurisdiction over criminal matters or a permanent international criminal court is established, the international community must rely upon *ad hoc* efforts which, by their very nature, must be formed after the fact to enforce international law. To deny an *ad hoc* tribunal jurisdiction over acts which necessitated, but preceded, its formation, would merely accord prospective violators a window of opportunity to act with impunity.

2. *Individual Criminal Responsibility.*—Individual criminal responsibility for violations of international law was first advanced in the Treaty of Versailles.¹⁶⁴ Heretofore, nations, rather than individual actors, had been held solely responsible for violations of international law.¹⁶⁵ Not surprisingly, many critics of the Nuremberg proceedings challenged the London Agreement's provision for individual criminal responsibility.¹⁶⁶ The provision was attacked on two levels. First, it was decried as novel and unfounded for expanding individual responsibility to include heads of state acting on behalf of governments. Heads of state, it was claimed, acted at the behest of their countries and, as such, should not be held individually liable.¹⁶⁷ This argument was advanced notwithstanding Allied demands following World War I that the Dutch surrender Germany's Wilhelm II for trial.¹⁶⁸ The provision was also challenged on the ground that it did not acknowledge the doctrine of *respondeat superior* as a permissible defense.¹⁶⁹ Military personnel under orders to act in violation of international law were given a Hobson's choice: punishment by their own

164. See Treaty of Versailles, June 28, 1919, S. Doc. 51, 66th Cong., 1st Sess., 2 Bevans 43, at 136-37.

165. On individual responsibility under international law prior to World War I, see L. OPPENHEIM, 1 INTERNATIONAL LAW, at 19, 341 (1906).

166. Behling, *supra* note 85, at 177-88; Kraus, *supra* note 83, at 238; Kranzbuehler, *Nuremberg Eighteen Years Afterward*, *supra* note 82, at 339; Ehard, *supra* note 82, at 232-36; Haensel, *supra* note 85, at 146-52.

167. Kraus, *supra* note 83, at 243; Ehard, *supra* note 82, at 233; Bader, *supra* note 83, at 178; Haensel, *supra* note 85, at 253.

168. Treaty of Versailles, *supra* note 164, art. 227.

169. Kraus, *supra* note 83, at 238.

country, or at the hands of the international community. This dilemma notwithstanding, the principle of individual culpability under international law dates back to the Leipzig Trials which followed the First World War.

This principle is clearly one of the most notable contributions that the Nuremberg Trials has bestowed upon the International Tribunal for the former Yugoslavia. Whether or not individual responsibility, non-immunity for heads of state, or the refusal to permit *respondeat superior* as a defense against conviction were novel or unfounded in 1945, all three doctrines are, largely because of Nuremberg, generally held to be customary law.¹⁷⁰ These laws are embodied in the Statute of the International Tribunal under article seven, which further states that although the principle of *respondeat superior* may not be invoked as a defense for criminal behavior, it may mitigate punishment and may be used by the Prosecution to attach responsibility to a superior who "knew or had reason to know that [their] 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 to punish the perpetrator thereof."¹⁷¹ The precedent provided by the Nuremberg Trials, and the subsequent incorporation of the doctrine into several conventions should cause the inclusion of this principle in the Statute of the International Tribunal to be subject to less critical scholarship than was its inclusion in the Charter of the International Military Tribunal.

3. *Composition of the Court.*—Perhaps one of the most credible complaints against the Charter of London was its failure to provide for a prosecutor and judge from either Germany or a neutral country.¹⁷² The Charter provided for one prosecutor, one judge and one alternate judge from each of the four principal signatories. Had a neutral or German prosecutor presented the same claims to the Tribunal that the Allied prosecutors presented, the Nuremberg verdict likely would have carried more credibility with the German people and the proceedings may not have been viewed simply as victors' justice. The mere presence of a German judge, or perhaps even a judge from a neutral country, might have contributed considerably to the legitimacy of the Trials.

170. BASSIOUNI, *supra* note 139 and accompanying text.

171. Statute, *supra* note 49, art. 7, para. 3.

172. See Kraus, *supra* note 83, at 247; Ehard, *supra* note 82, at 243; Haensel, *supra* note 85, at 258.

The composition of the Yugoslav Tribunal stands in sharp contrast to that of its predecessor. The Security Council has taken pains to assemble a democratically elected Tribunal, but its failure to ensure the presence of a judge from the territory of the former Yugoslavia invites the same criticism suffered by the IMT. It comes, then, as little surprise that the composition of the Court was among the first points of contention for the Bosnian government. The Bosnian Ambassador to the United Nations, Muhammad Sacirbey, has alleged that the absence of a Yugoslav judge was designed to "create the impression . . . that the people of the Balkans are somehow beyond the norm of civilized behavior."¹⁷³ Obvious problems would be encountered, however, if the General Assembly were to elect a judge from any of the Balkan republics other than Slovenia or Macedonia. And until the issue of collaboration is dealt with definitively, an appointment from either of these republics may be problematic as well.

Another specter is raised by the religious diversity of the region in conflict, and the religious composition of the respective armies. The battle for control of Bosnia-Herzegovina is in large measure a religious war; it is a struggle between Bosnian Muslims and Bosnian-Serb Christians. As may be expected, the Bosnian Ambassador has criticized the United Nations on this count as well, claiming that eighty percent of the victims of the Balkan Crisis are Muslim, yet there are no Muslims seated on the Court.¹⁷⁴ He has also alleged that Professor M. Cherif Bassiouni, who has directed the investigation of the Balkan atrocities, was denied appointment as Prosecutor in part because he is a ethnically Muslim.¹⁷⁵

4. *The Role of Municipal Law.*—Among the least tenable claims against the Nuremberg proceedings was the charge that the framers of the Charter, and subsequently the IMT itself, failed to rely upon municipal law as a source of international law.¹⁷⁶ Had there been an absence of customary and conventional law, this allegation may have had some foundation. But the credibility, or incredibility, of the claim notwithstanding, the International Tribunal has the advantage of invoking law which dates back

173. Sacirbey, *supra* note 155, at 66.

174. *Id.*

175. *Id.*

176. See Behling, *supra* note 85, at 179; Kranzbuehler, *Nuremberg Eighteen Years Afterward*, *supra* note 82, at 339; Kraus, *supra* note 83, at 243; Haensel, *supra* note 85, at 251-52.

several decades and has been acceded to by almost every member of the international community. Unlike the IMT, the International Tribunal will base its proceedings upon law which the United Nations holds to be beyond dispute.¹⁷⁷ Additionally, that which is not expressly provided for by existing custom, will be drawn from the municipal law of the region in conflict, making the claim that municipal law alone should form a basis for the substantive and procedural law of the Yugoslav Trials even less tenable than it was in 1945.

5. *Selective Indictments.*—Of all the shortcomings of the Nuremberg Trials, the IMT's failure to indict Allied offenders is certainly among the most deserving of criticism. Indeed, the absence of Allied indictments has drawn criticism from the Trials' most ardent supporters as well as its detractors. American Chief Prosecutor Robert H. Jackson, in his opening argument before the IMT, noted: "While this law is first applied against German aggressors, if it is to serve any useful purpose it must condemn aggression by any other nations, including those which sit here now in judgment."¹⁷⁸ The International Tribunal for the former Yugoslavia faces a situation which is, in many respects, quite unlike that which confronted the IMT. The Bosnian Conflict has not produced a victor, and may never do so. None of the belligerent governments have been destroyed or replaced, and there is no occupational power attempting to administrate the region. If the Prosecutor is careful to indict all offenders and their conspirators, regardless of nationality or official position, then the International Tribunal should be able to avoid the criticism leveled at the IMT for its selective pursuit of justice.

Likewise, the International Tribunal must remain mindful of the needs of the defense counsel to avoid criticism similar to that drawn by the IMT. It has been suggested by Telford Taylor that the attorneys for the Nuremberg defendants did not enjoy full access to the IMT's evidentiary archives.¹⁷⁹ Again, the circumstances which distinguish the two tribunals should prove a determinative factor. Because the Tribunal for the former Yugoslavia has only one prosecutor rather than four, the Yugoslav Trials should not suffer from the same bureaucracy that plagued the Nuremberg proceedings. Furthermore, because the International Tribunal is

177. Statute, *supra* note 49, art. 1(a).

178. ROBERT H. JACKSON, 1 NUREMBERG PROCEEDINGS (1945).

179. TAYLOR, *supra* note 23, at 627.

not an organ of an occupying power or powers, and because the site of the trials is not also the seat of an occupying government, the proceedings should not present the same concerns encountered at Nuremberg. The International Tribunal is seated at the Hague;¹⁸⁰ thus, both prosecution and defense will be able to function in a neutral environment which was created solely to facilitate peaceful intercourse and dispute resolution among nations. Whatever concerns prompted allegations that the defense counsel at Nuremberg were denied full access to evidentiary archives should not be present at the Hague. If legal representatives for the Balkan defendants are granted access to the same sources as the prosecution, if there is a fair exchange of discovery, and if defendants are permitted to offer into evidence documents implicating additional parties (i.e., Montenegrans, Croats, Slovenians and Macedonians) then the International Tribunal arguably will have done everything foreseeable to guard against claims that a suitable defense for the alleged Balkan war criminals were made impracticable.

6. *Conspiracy or Common Plan.*—If there was one aspect of the Nuremberg proceedings that was patently novel, it was the inclusion of the charge of conspiracy or common plan. Consequently, it has been almost universally decried by all but the Trials' staunchest advocates.¹⁸¹ It has been claimed that the charge "stretched the bounds of legal propriety."¹⁸² Nuremberg lawyer and legal scholar Otto Pannenbecker called it "dubious and illegal."¹⁸³ The inclusion of the charge was clearly the product of English and American influence. Indeed, the doctrine of conspiracy was exclusive to Anglo-American municipal law. Consequently, its inclusion placed defense attorneys at an obvious disadvantage and left the French and Russian prosecutors somewhat confounded.¹⁸⁴

Regardless of its singularity in 1945, the charge has been included in the Statute of the International Tribunal,¹⁸⁵ and this

180. Statute, *supra* note 49, art. 31.

181. Haensel, *supra* note 85, at 250; Behling, *supra* note 85, at; Kraus, *supra* note 83, at 245; Ehard, *supra* note 82, at 226-27, 231; Pannenbecker, *supra* note 83, at 351; TAYLOR, *supra* note 23, at 629; SMITH, ROAD TO NUREMBERG, *supra* note 86, at 52, 249.

182. SMITH, ROAD TO NUREMBERG, *supra* note 86, at 249.

183. Pannenbecker, *supra* note 83, at 351.

184. SMITH, ROAD TO NUREMBERG, *supra* note 86, at 52.

185. Statute, *supra* note 49, art. 6, para. 54.

time, not without precedent, and thus not without notice. Since its international debut at Nuremberg, the concept of conspiracy or common plan has found its way into numerous multinational conventions, including the 1948 Convention on the Prevention and Punishment of the Crime of Genocide which serves as a source of subject-matter jurisdiction for the International Tribunal.¹⁸⁶ Whether or not conspiracy or common plan is a doctrine found in the municipal law of the former Yugoslavia, it has, through incorporation in the Nuremberg Trials and subsequent international agreements, become a relatively widely-known, perhaps even customary, concept in international law.

VI. Conclusion: Drawing Conclusions

The United Nations' management of the Balkan situation has drawn criticism from several scholars over the past four years. It has been suggested that the Security Council did too little, too late, in light of the carnage.¹⁸⁷ It has also been argued that the time to act was "at the end of the Croatian War when it was obvious what was going to happen to Bosnia."¹⁸⁸ The UN's commitment to the investigation and prosecution of the alleged atrocities has been called "shaky, if not shameful."¹⁸⁹ It also has been suggested that the International Tribunal was formed for diplomatic, rather than judicial, purposes: that it is public opinion, rather than justice, that is the driving force behind the Council.¹⁹⁰ Additionally, the proposed trials have been denounced altogether as an inherently hypocritical effort by enthusiasts.¹⁹¹ Still others have avoided the legal underpinnings of the Tribunal, focusing instead on the negative impact the proceedings may have upon prospects for peace in the region¹⁹² and the advancement of human rights.¹⁹³

Criticism and obvious shortcomings notwithstanding, the formation of the International Tribunal has been generally well-received. The establishment of the Court has been applauded

186. *Id.* art. 4.

187. *Panel Discussion: Bosnia, War Crimes and Humanitarian Intervention*, 15 WHITTIER L. REV. 445, 447 (1994).

188. *Id.* at 462.

189. *Id.* at 447.

190. Sacirbey, *supra* note 155, at 65.

191. Rubin, *supra* note 149, at 74-75.

192. See Anthony D'Amato, *Peace vs. Accountability in Bosnia*, 88 A.J.I.L. 500 (1994).

193. See Forsythe, *supra* note 152.

because it offers "a new lease on life" for international criminal law and "portends at least some deterrence of future violation:"¹⁹⁴ a benefit which redounds to all nations.¹⁹⁵ These are the obvious advantages to be gained from revitalizing conventional and customary law which have been too-seldom enforced for a half-century. But what are the lessons to be learned from the Nuremberg Trials, and the five decades of scholarship they generated? Through an examination of the scholarship, the pitfalls become apparent: The role of ideology in shaping the proceedings; the nature of the forum; the conducting of historic trials; reliance upon *ex post facto* law; inclusion of individual criminal responsibility; prejudicial appointment of judges; the role of municipal law; selective indictments; the inability to conduct a suitable defense; and inclusion of the doctrine of conspiracy. When the Statute of the International Tribunal is examined vis-à-vis the Charter of the International Military Tribunal, in light of post-World War II developments in international humanitarian law, the majority of the pitfalls that haunted the IMT appear to have been guarded against. Considerable pains have been taken to present the International Tribunal as a legitimate organ of the General Assembly, and not one dominated by any one nation or coalition. The substantive law to be invoked by the Tribunal dates back as much as a century, is grounded in some of history's most celebrated treaties, and is held by the General Assembly to be beyond dispute. Also beyond dispute is the matter of individual and organizational liability under the law.

The Statute is not above reproach, however. A colorable argument has been raised regarding the ideological influence driving the investigation and future prosecution.¹⁹⁶ Additionally, two major issues have been broached: The absence of Yugoslav and Muslim judges on the Tribunal, and the possibility that like Nuremberg, the Yugoslav proceedings will amount to little more than historic trials.¹⁹⁷ Although proceedings have commenced, the former may still be remedied. The latter is an unfortunate consequence of the United Nations' failure to follow through on

194. Theodore Meron, *Comments: War Crimes in Yugoslavia and the Development of International Law*, 88 A.J.I.L. 78 (1994).

195. James C. O'Brien, *Current Development: The International Tribunal for Violations of International Humanitarian Law in the former Yugoslavia*, 87 A.J.I.L. 639, 658 (1993).

196. Sacirbey, *supra* note 155, at 67.

197. *Id.* at 66.

the international legal developments forged at Nuremberg and only time will tell what kind of legacy will be left by this effort.

But what of imperatives? Now, more than in 1945, the words of Henry Stimson ring true. More than any time in history, members of the international community are placed in a state of global-interdependence. Indeed, it has been noted that nations are "no longer merely interdependent," they are inextricably linked.¹⁹⁸ Moreover, modern technology has placed unimagined destructive capabilities at the disposal of numerous countries and individuals. These factors demand heightened international cooperation and the furtherance of substantive and procedural international law, as well as the development of international judicial bodies, to ensure global stability.

Not even the staunchest supporters of the IMT have claimed that perfect justice was rendered at Nuremberg, and it may not be rendered as the trials progress at the Hague. But there remains a consensus among commentators on the Allied judicial effort: the adjudication of the Nazi war criminals played an invaluable stabilizing role in postwar-Europe. International human rights and humanitarian law have advanced markedly in the decades following the Nuremberg proceedings, with more than fifty conventions drafted under the auspices of the UN. But equally important, allegations were investigated and individuals, rather than an entire population, were tried, convicted and punished. With the conviction of nineteen Nazi defendants, the German people were, in effect, exonerated. Absent an international judicial element, vigilante justice would likely have been exacted from the German populace, possibly sparking a vicious cycle of reprisals. Imperfect as the substantive and procedural law may be, war crimes trials provide for targeted retribution and offer a relatively immediate sense of vindication. It was, arguably, the psychological benefits derived from prompt, internationally recognized and validated investigation, conviction, retribution and vindication that were the most important consequences of the Nuremberg proceedings. It is, arguably, these same psychological benefits which will bode most important in the Yugoslav Trials and most beneficial in the return to normalcy. Global stability and national security are contingent upon the actions of even the smallest international actors now more

198. Kofi Annan, *Peace-keeping in Situations of Civil War*, 26 N.Y.U. J. INT'L L. & POL. 623 (1994).

than ever before, for while international law has advanced markedly over a half-century, human nature has not.