

## INTERNATIONAL OBLIGATIONS TO SEARCH FOR AND ARREST WAR CRIMINALS: GOVERNMENT FAILURE IN THE FORMER YUGOSLAVIA?

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*[W]e are bound to observe [our international obligations] with the most scrupulous good faith. . . . [O]ur government could not violate [them], without disgrace.<sup>1</sup>*

-Justice Joseph Story

### I. INTRODUCTION

Death platoons reportedly marched to cadences that glorified the murder and rape of innocent women and children.<sup>2</sup> Soldiers burned families alive in their homes, crushed the heads of young children, and raped pregnant mothers in front of their families.<sup>3</sup> As many as 100,000 women were taken hostage and systematically raped

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1. The Amiable Isabella, 19 U.S. (6 Wheat.) 1, 68 (1821).

2. See Rod Nordland, 'Let's Kill the Muslims!', NEWSWEEK, Nov. 8, 1993, at 48, 48.

3. See *id.* at 48-49.

in an effort to defile and impregnate them so they would not be accepted back into their community.<sup>4</sup> Noncombatants were taken to concentration camps where they were savagely interrogated and beaten to death.<sup>5</sup> The most widely accepted estimate of war deaths in the former Yugoslavia exceeds 200,000 civilians and soldiers.<sup>6</sup>

These atrocities, and countless others, have occurred in the former Yugoslavia since war began there in March of 1992.<sup>7</sup> It is too reprehensible and appalling to imagine that they actually occurred in Europe in the early 1990s. So shocked was the international community that the Security Council established an "international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia" since 1991 (International Tribunal).<sup>8</sup>

The international community, however, has since been accused of "superb diplomatic hypocrisy" and inattention for its failure to adequately fund and support the International Tribunal.<sup>9</sup> With two court rooms, the International Tribunal can only handle sixteen trials a year.<sup>10</sup> The political will of the international community, an essential ingredient in the search for war criminals in the former Yugoslavia, has been said to be sorely lacking.<sup>11</sup> Of the seventy-four people indicted by the International Tribunal as of November 30, 1996, only seven are in custody.<sup>12</sup> The International Tribunal has been branded as "a substitute for real action to control the crimes."<sup>13</sup>

One of the main proponents of a more active Tribunal, Britain's chief prosecutor at the Nuremberg trials following World War II, be-

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4. See Patricia Forestier, *Psychiatric Genocide! How the Barbarities of 'Ethnic Cleansing' Were Spawned by Psychiatry*, FREEDOM, May 1993, at 6, 9.

5. See Robin Knight et al., *The Hunt for the Killers of Bosnia*, U.S. NEWS & WORLD REP., Apr. 10, 1995, at 52, 52.

6. See Peter Cary, *War Casualties: Bosnia by the Numbers*, U.S. NEWS & WORLD REP., Apr. 10, 1995, at 53, 53.

7. See Forestier, *supra* note 4, at 6-11, 34-35.

8. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217 mtg. at 2, U.N. Doc. S/RES/827 (1993). The official abbreviated title for this tribunal is "The International Criminal Tribunal for the former Yugoslavia" [hereinafter the International Tribunal]. 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS, at xvii n.2 (1995).

9. Nordland, *supra* note 2, at 51.

10. See Knight, *supra* note 5, at 53.

11. See *id.* at 52.

12. See *A Conviction From the Bosnia Tribunal*, N.Y. TIMES, Nov. 30, 1996, at A26. See also Robert Marquand, *Bosnia War Crimes Judge Talks of Quitting*, CHRISTIAN SCIENCE MONITOR, Oct. 22, 1996, at 1.

13. Nordland, *supra* note 2, at 51.

lieves that the International Tribunal will fail “unless those indicted for the most serious war crimes in the former Yugoslavia are arrested so they can be brought to justice.”<sup>14</sup> In the first step toward achieving this objective, a Bosnian Serb soldier, Drazen Erdemovic, was convicted by the International Tribunal on November 29, 1996,<sup>15</sup> after he plead guilty and testified against more senior-ranking war criminals.<sup>16</sup> During the attack on the city of Srebrenica in July, 1995, Erdemovic personally blindfolded and murdered between 10 and 100 Muslim men.<sup>17</sup> Although he could have been sentenced to life in prison for his role in the massacre of over 1,200 men, he received a ten-year sentence.<sup>18</sup> Such a light sentence sends the same signal of international apathy and near impunity to suspected war criminals as the unwillingness of the international community to aggressively search for and arrest those war criminals accused of the reprehensible crimes for which they have been indicted.

This Article examines whether states have met their international obligations to search for and arrest war criminals in the context of crimes within the jurisdiction of the International Tribunal. A discussion of the rule of law and the theory of government failure in Part II begins this Article by providing the analytical framework for determining whether states have met their international obligations, and if not, how substantive and procedural mechanisms might be utilized to control or influence government decisions. Parts III and IV then survey the international community’s pre-Charter practice of prosecuting war crimes and existing customary international law obligations of states to search for and arrest war criminals. Parts V and VI, the central focus of this Article, analyze the international legal obligations of states to search for and arrest persons suspected of crimes within the jurisdiction of the International Tribunal, and appraise the international community’s efforts in this regard. Part VI concludes that states have failed in their international legal obligations to search for and arrest war criminals in the former Yugoslavia, and Part VII reviews potential substantive and procedural mechanisms that might influence states to give effect to their international obligations. This Article then concludes with a few final reflections

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14. Hartley Shawcross, *Let the Tribunal Do Its Job*, N.Y. TIMES, May 22, 1996, at A17.

15. See Mike O’Connor, *Bosnia War Criminal’s Town Sees a Beginning of Justice*, N.Y. TIMES, Dec. 1, 1996, at A18.

16. See *A Conviction From the Bosnia Tribunal*, *supra* note 12, at A26.

17. See *id.*

18. See *id.*

on the deterrent value of the rule of law.

## II. THE RULE OF LAW AND THE THEORY OF GOVERNMENT FAILURE

The rule of law and democratic forms of government are not just a part of the new world order, *they are the new world order*.<sup>19</sup> The phrase “rule of law” collectively symbolizes the principle tenets of democratic governance.<sup>20</sup> Decisions of democratic governments “must be rooted in the consent of the governed, acting only through structures and procedures designed to prevent individual oppression or governmental tyranny, which protect fundamental rights and freedoms, and which are subject to appraisal by an independent judiciary rendering judgments based on law.”<sup>21</sup>

Control over government decisions is inherent in the democratic structures and procedures put into place.<sup>22</sup> The five highest-level tenets that underpin the rule of law are the following:

- government of the people, by the people, and for the people;
- separation of powers and checks and balances;
- representative democracy and procedural and substantive limits on government action against the individual (the protection of human freedom and dignity);
- limited government and federalism; and
- review by an independent judiciary as a central mechanism for constitutional enforcement.<sup>23</sup>

These major tenets include a broad range of substantive and procedural components such as the preservation of a climate of free discussion and opinion; fairness in the criminal process; protection of religious freedom; protection of civil rights; accountability of

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19. This conclusion, I believe, captures the very essence of Professor John Norton Moore’s “rule of law engagement theory,” which seeks to “actively assist with and encourage transitions to liberal democracy around the world,” and is premised upon a “growing understanding of the linkage between totalitarianism and human rights violations, democide (the massive killing by the government of a State of its own people), economic failure, environmental degradation and, most seriously, war.” John Norton Moore, *The Rule of Law and Foreign Policy*, 2 HARV. J. WORLD AFF. 92, 92-93 (1993).

20. *See id.* at 100.

21. *Id.*

22. *See id.*

23. *See id.* at 100-01.

governmental officials and protection of governmental processes; protection of the rights of the worker; civilian control of the military; protection of the environment; and, protection of economic freedom and entitlements.<sup>24</sup>

When governments make decisions outside these democratic structures and procedures,<sup>25</sup> implement the law in such a way that the costs outweigh the benefits, or simply neglect to enforce the rule of law, then government failure exists.<sup>26</sup> Government failure runs the spectrum of decisions from those of inefficient federal regulators who single-mindedly pursue a goal, such as environmental clean-up, which impose high costs without achieving significant additional safety benefits,<sup>27</sup> to those reprehensible decisions of totalitarian regimes to slaughter tens of millions of their own people or unlawfully engage in aggressive war.<sup>28</sup>

In addition to the control over government decisions inherent in the internal structures and procedures of democratic governments, international law also provides substantive and procedural control mechanisms over government action.<sup>29</sup> Substantively, for example, the Charter of the United Nations recognizes a state's inherent right of individual and collective self-defense<sup>30</sup> and prohibits the "threat or use of force against the territorial integrity or political independence of any state."<sup>31</sup> In a global context, this example reflects the most central deterrent role for the rule of law: to promote international peace and security by decisively condemning the aggressive use of

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24. See *id.* at 108-15.

25. Decisions made outside the democratic process include those "based on naked power, arbitrary fiat, political expediency or personal gain." *Id.* at 100.

26. The "theory of government failure" was explored in depth in a seminar on "The Rule of Law: Controlling Government" offered by Professor John Norton Moore at the University of Virginia School of Law during the fall of 1996. This seminar reviewed "the growing body of information about government failure internationally and domestically, examined theoretical approaches to explaining such failure, including public choice theory, and then examined the implications for the rule of law and constitutional and legal reform as applied to controlling government." John Norton Moore, *Overview to Syllabus and Assignments - The Rule of Law: Controlling Government* (Fall 1996) (on file with the *Duke Journal of Comparative & International Law*).

27. See STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 11 (1993).

28. See R.J. RUMMEL, *DEATH BY GOVERNMENT* 1-3 (1994). This text is Professor Rummel's fourth empirical study in a series on genocide and government mass murder (democide) which documents the theory that democracies are inherently nonviolent. See *id.* at xv.

29. See Moore, *supra* note 19, at 116-17.

30. See U.N. CHARTER art. 51.

31. *Id.* art. 2, para. 4.

force, while aggressively supporting the right of individual and collective self-defense.<sup>32</sup> No less important a role for the rule of law, however, is the correlative effect of deterring violations of the laws of war<sup>33</sup> while protecting human rights and human dignity.<sup>34</sup>

Procedurally, the international legal system has no enforcement mechanism independent of Member States of the United Nations.<sup>35</sup> While the Security Council has the authority to create war crimes tribunals to enforce the rule of law,<sup>36</sup> its jurisdiction to do so is limited to situations that threaten international peace and security.<sup>37</sup> Furthermore, the Security Council cannot act independent of the will of Member States.<sup>38</sup> Enforcement of international criminal law, accordingly, remains with national governments.<sup>39</sup> Since totalitarian regimes represent the form of government most likely to engage in the aggressive use of force,<sup>40</sup> democratic governments are primarily responsible for enforcing the rule of law within the international community.<sup>41</sup> Respect for and full compliance with the rule of law can only be achieved by democratic governments, however, through certain and effective enforcement of international law and the prosecution of war crimes.<sup>42</sup> Somewhere in between the two extremes on the spectrum of government failure discussed above would fall the failure of all democratic governments of the international community to systematically and effectively enforce the rule of law by prosecuting war crimes, exemplified by the situation in the former Yugoslavia.

### III. INTERNATIONAL PRACTICE AND PRECEDENT: THE PRE-CHARTER ERA

Humanitarian principles regulating the conduct of armed conflicts have been evolving for the last 7000 years.<sup>43</sup> The more serious

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32. See JOHN NORTON MOORE, *CRISIS IN THE GULF: ENFORCING THE RULE OF LAW* 6-7, 10-11, 285, 306, 338, 351 (1992).

33. See *id.* at 301, 310, 317 n.1.

34. See *id.* at 8, 66, 301.

35. See LYAL S. SUNGA, *INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS* 99 (1991).

36. See MOORE, *supra* note 32, at 298, 306, 321 n.28, 324 n.33.

37. See U.N. CHARTER art. 39.

38. See *id.* arts. 23, 27.

39. See SUNGA, *supra* note 35, at 99.

40. See RUMMEL, *supra* note 28, at 1-2.

41. See MOORE, *supra* note 32, at 304.

42. See *id.* at 310.

43. See M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL*

breaches have been criminalized and international criminal law has evolved as a “haphazard mixture of conventions, customs, general principles, the writings of scholars and the efforts of non-governmental organizations.”<sup>44</sup> War crime trials began as violations of the code of chivalry that existed during the Middle Ages.<sup>45</sup> The first recorded international war crimes prosecution was the trial of Peter von Hagenbach in 1474 by a tribunal of twenty-eight judges from the allied states of the Holy Roman Empire.<sup>46</sup> At his trial, von Hagenbach was found guilty of murder, rape, perjury, and other crimes “against the law of God and man” in the execution of a military occupation, and thereupon was stripped of his knighthood, and put to death.<sup>47</sup>

Prior to World War I, war crimes trials reflected the international community’s competence to prosecute those suspected of violating the laws and customs of war, but such prosecutions were sporadic and failed to form a body of precedent.<sup>48</sup> The discretion to prosecute suspected war criminals was left to the individual states involved in a conflict, and prosecution depended upon national legislation.<sup>49</sup> This discretion, combined with the lack of any international regulation, meant that no international obligation existed to either search for or arrest war criminals.<sup>50</sup>

The first significant international modern efforts to punish war crimes were the Leipzig trials following World War I.<sup>51</sup> The 1919 Versailles “Treaty of Peace Between the Allied and Associated Powers and Germany” obligated Germany to turn over suspected war criminals to the Allies for trial.<sup>52</sup> Germany, however, refused the Allied extradition request for 896 suspected German war criminals, and instead, chose forty-five accused to be tried by the Criminal Senate of

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CRIMINAL LAW 150 (1992).

44. *Id.* at 150-51.

45. *See id.* at 147.

46. *See* M. Cherif Bassiouni, *The Prosecution of International Crimes and the Establishment of an International Criminal Court*, in 3 INTERNATIONAL CRIMINAL LAW: ENFORCEMENT 3, 3 (M. Cherif Bassiouni ed., 1987).

47. *Id.*

48. *See* COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 583 (Jean S. Pictet ed., 1958) [hereinafter 1949 GENEVA CONVENTION IV COMMENTARY]; BASSIOUNI, *supra* note 43, at 151.

49. *See* 1949 GENEVA CONVENTION IV COMMENTARY, *supra* note 48, at 584.

50. *See id.*

51. *See* DOCUMENTS ON THE LAWS OF WAR 11 (Adam Roberts & Richard Guelff eds., 2d ed. 1989).

52. *See* 1919 Versailles Treaty of Peace Between the Allied and Associated Powers and Germany, June 28, 1919, art. 228, 225 Consol. T.S. 188, 286.

the Imperial Court of Justice of Germany.<sup>53</sup> Of these forty-five, only twelve were tried; six of these twelve were acquitted, and the other six received light sentences.<sup>54</sup> Consequently, the Allies took a different approach during World War II.

In 1942, the Allies signed a declaration in London that the punishment of war crimes was a principal goal of the Allies.<sup>55</sup> Specifically to avoid a repeat of the Leipzig trials, the Allies signed the Moscow Declaration of October 30, 1943, stating that suspected war criminals would be tried "by the people and at the spot where the crime was committed."<sup>56</sup> The Moscow Declaration also stated that crimes with no specific geographic setting would be the subject of a later joint decision.<sup>57</sup> On August 8, 1945, an agreement<sup>58</sup> was signed by the Allies establishing an International Military Tribunal to try Germans whose alleged crimes had no situs.<sup>59</sup> Annexed to the 1945 London Agreement was the Charter of the International Military Tribunal.<sup>60</sup>

The International Military Tribunal at Nuremberg conducted one trial of twenty-four German defendants.<sup>61</sup> Of these twenty-four defendants, nineteen were convicted of at least one of the four counts alleged, three were found not guilty, one defendant committed suicide before trial, and one was not tried because of old age.<sup>62</sup> Additionally, Allied agreements provided for the prosecution of defendants beyond the jurisdiction of the International Military Tribunal

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53. See DEP'T OF ARMY, PAM. 27-161-2, II INTERNATIONAL LAW 221 (1962) [hereinafter DA PAM. 27-161-2].

54. See *id.*

55. See 11 WHITEMAN, DIGEST OF INTERNATIONAL LAW 874 (1968). For a full text of the agreement, see *Punishment for War Crimes: The Inter-Allied Declaration signed at St. James's Palace, London, on 13th January, 1942, and Relative Documents* (Dep't of Public Information, The United Nations ed., undated).

56. See Declaration of Four Nations on General Security, Nov. 1, 1943, U.S.-U.S.S.R.-U.K.-R.O.C., 1 FOREIGN RELATIONS OF THE U.S. 749, 755-56 (1943); see also WHITEMAN, *supra* note 55, at 876.

57. See WHITEMAN, *supra* note 55, at 876.

58. See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter 1945 London Agreement], reprinted in THE LAWS OF ARMED CONFLICTS 911 (Dietrich Schindler & Jiri Toman eds., 3d ed. 1988).

59. See WHITEMAN, *supra* note 55, at 886.

60. See Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1545, 82 U.N.T.S. 280 [hereinafter 1945 Charter of the IMT], reprinted in THE LAWS OF ARMED CONFLICTS, *supra* note 58, at 913.

61. See DA PAM. 27-161-2, *supra* note 53, at 224.

62. See *id.* at 226.



by both international and national tribunals.<sup>63</sup> Pursuant to these provisions, twelve cases with multiple defendants were tried by international military tribunals during the "Subsequent Proceedings" at Nuremberg.<sup>64</sup> Of the 145 defendants tried during the Subsequent Proceedings, 113 were convicted of at least one count alleged, and thirty-two were acquitted.<sup>65</sup> However, the overwhelming majority of the war crime prosecutions after World War II were tried by national courts or military occupation courts.<sup>66</sup> United States military commissions, for example, tried 489 cases at Dachau, Germany involving 1672 accused.<sup>67</sup> Of these 1672 accused, 1416 were convicted.<sup>68</sup>

The International Military Tribunal for the Far East based its jurisdiction initially on the Potsdam Declaration of July 26, 1945, issued by the United States, United Kingdom, and China.<sup>69</sup> On April 3, 1946, the Allied Far Eastern Advisory Committee issued a policy decision upon which twenty-five defendants were tried and convicted.<sup>70</sup> There were no international tribunals in the Far East that supplemented the trials of the International Military Tribunal, and the trials by national courts or military commissions were not comparable to the scale of prosecutions of German war criminals.<sup>71</sup> Although the war crimes trials that immediately followed World War II were watershed precedents for establishing international authority and responsibility for the prosecution of war crimes, the issue of a state's obligation to search for and arrest war criminals was not explicitly addressed by the international community.<sup>72</sup>

#### IV. OBLIGATIONS OF STATES: THE CONTEMPORARY CHARTER ERA

Individual criminal responsibility for violations of the laws and customs of war is an undisputed part of contemporary customary in-

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63. *See id.* at 224.

64. *See id.* at 226-27.

65. *See id.* at 227-33.

66. *See* DOCUMENTS ON THE LAWS OF WAR, *supra* note 51, at 6. *See also* DA PAM. 27-161-2, *supra* note 53, at 224.

67. *See* DA PAM. 27-161-2, *supra* note 53, at 235.

68. *See id.*

69. *See id.* at 233. For the complete text of the Potsdam Declaration, see Potsdam Proclamation Defining Terms for Japanese Surrender, July 26, 1945, P.R.C.-U.K.-U.S., 3 Bevans 1204.

70. *See id.* at 234.

71. *See id.*

72. *See* GEOFFREY BEST, WAR AND LAW SINCE 1945 at 166 (1994).

ternational law.<sup>73</sup> Criminal responsibility can extend to individual combatants, government officials, and heads of state.<sup>74</sup> Furthermore, it is a recognized principle of international law that “[l]eaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes [crimes against peace, war crimes, and crimes against humanity] are responsible for all acts performed by any persons in execution of such plan.”<sup>75</sup> Since war crimes are universal crimes, suspected war criminals may be prosecuted by any state,<sup>76</sup> and a defendant convicted of a war crime may be sentenced to any punishment, including the death penalty.<sup>77</sup> Nevertheless, states have avoided war crimes trials of enemy personnel for conflicts since World War II despite the seriousness of the crimes committed.<sup>78</sup> This Part analyzes the obligations of states during the contemporary Charter era to search for and arrest persons suspected of crimes that are within the substantive criminal jurisdiction of the International Tribunal.<sup>79</sup>

#### A. Grave Breaches of the Four Geneva Conventions of 1949

World War II highlighted the lack of precision and clarity of those existing laws of armed conflict that protected victims of war and the need for more specific provisions on punishing violations of the law.<sup>80</sup> At the initiative of the International Committee of the Red Cross (ICRC), the four Geneva Conventions were drafted, adapting

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73. See *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, princ. I, [1950] 2 Y.B. INT'L L. COMM'N 374 [hereinafter *1950 Nuremberg Principles*], reprinted in *THE LAWS OF ARMED CONFLICTS*, *supra* note 58, at 923; *DOCUMENTS ON THE LAWS OF WAR*, *supra* note 51, at 12.

74. See *1950 Nuremberg Principles*, *supra* note 73, prins. III-IV.

75. Opinion and Judgment of the International Military Tribunal, Nuremberg, Sept. 30, 1946, 22 T.M.W.C. 411, *extracts reprinted in* *DOCUMENTS ON THE LAWS OF WAR*, *supra* note 51, at 155.

76. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 305 (3d ed. 1979).

77. See OFFICE OF THE JUDGE ADVOCATE GENERAL, DEP'T OF NAVY, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶ S6.2.5.7 (1989) [hereinafter *COMMANDER'S HANDBOOK (SUPP.)*].

78. See FRITS KALSHOVEN, *CONSTRAINTS ON THE WAGING OF WAR* 69 (2d ed. 1991); see also *COMMANDER'S HANDBOOK (SUPP.)*, *supra* note 77, ¶¶ S6.2.5.2-S6.2.5.3. Serious war crimes were committed during a number of international armed conflicts such as Korea, Vietnam, Palestine, Pakistan-Bangladesh-India, Cyprus, Lebanon, and the Persian Gulf. See BASSIOUNI, *supra* note 43, at 232.

79. See discussion Part V.A. *infra*.

80. See *DOCUMENTS ON THE LAWS OF WAR*, *supra* note 51, at 169.

and further developing the laws of armed conflict.<sup>81</sup> The four Geneva Conventions apply during international armed conflict and deal with the following four categories of victims of war, respectively: wounded and sick in armed forces in the field; wounded, sick and ship-wrecked in armed forces at sea; prisoners of war; and civilians.<sup>82</sup> As the first international agreement in the laws of armed conflict to exclusively address the protection of civilians, the 1949 Geneva Convention IV made a substantial contribution to the law.<sup>83</sup> Generally, protected persons under this Convention

are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.<sup>84</sup>

The four Geneva Conventions of 1949 are adhered to by more states than any other agreement on the laws of armed conflict and are declaratory of customary international law.<sup>85</sup>

The extensive provisions of the Geneva Conventions are linked by certain general principles and “common articles.”<sup>86</sup> Each of the four Geneva Conventions of 1949 contains a provision that specifies what constitutes a “grave breach” under that Convention.<sup>87</sup> Grave

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81. *See id.* Collectively, these four conventions are referred to as the four Geneva Conventions of 1949. Individual citations are as follows: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter 1949 Geneva Convention I], *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 51, at 171; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter 1949 Geneva Convention II], *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 51, at 194; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter 1949 Geneva Convention III], *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 51, at 216; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter 1949 Geneva Convention IV], *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 51, at 272.

82. *See* DOCUMENTS ON THE LAWS OF WAR, *supra* note 51, at 169.

83. *See id.* at 271-72.

84. 1949 Geneva Convention IV, *supra* note 81, art. 27, 6 U.S.T. at 3536, 75 U.N.T.S. at 306.

85. *See* DOCUMENTS ON THE LAWS OF WAR, *supra* note 51, at 169-70.

86. *See id.* at 169.

87. Art. 50 of the 1949 Geneva Convention I and Art. 51 of the 1949 Geneva Convention II contain identical provisions that define grave breaches with respect to the wounded and sick in the field and at sea. These two articles provide as follows:

breaches of the four Geneva Conventions of 1949 are within the jurisdiction of the International Tribunal.<sup>88</sup>

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Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Geneva Convention I, *supra* note 81, art. 50, 6 U.S.T. at 3146, 75 U.N.T.S. at 62; Geneva Convention II, *supra* note 81, art. 51, 6 U.S.T. at 3250, 75 U.N.T.S. at 116.

Art. 130 of the 1949 Geneva Convention III defines grave breaches with respect to the protection of prisoners of war as follows:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

*Id.* art. 130, 6 U.S.T. at 3420, 75 U.N.T.S. at 238.

Art. 147 of the 1949 Geneva Convention IV defines grave breaches with respect to the protection of civilians as follows:

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

*Id.* art. 147, 6 U.S.T. at 3618, 75 U.N.T.S. at 388.

88. See *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), 48th Sess., paras. 37-40, U.N. Doc. S/25704 (1993) [hereinafter *Report of the Secretary-General Pursuant to S.C.Res. 808*]. A draft Statute of the International Tribunal [hereinafter *Statute of the International Tribunal*] was submitted to the Security Council for its approval as an annex to the *Report of the Secretary-General Pursuant to S.C.Res. 808*. This draft was adopted in 1993 by the Security Council under its Chapter VII coercive authority by paragraph two of Security Council Resolution 827. See S.C. Res. 827, *supra* note 8, para. 2. Specifically, Article 2 of the Statute of the International Tribunal addresses grave breaches:

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

The second paragraph of common Article 49/50/129/146 sets forth the obligation of state parties to search for and arrest persons alleged to have committed such grave breaches.<sup>89</sup> This common article provides that

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.<sup>90</sup>

These obligations “for the pursuit, arrest, trial, and punishment of grave violators of the Conventions constituted one of the Convention’s more remarkable and, by all humanitarian, liberal, and non-militarist criteria, progressive elements.”<sup>91</sup> The obligation to prosecute is absolute; neither immunity nor amnesty from prosecution may be granted for grave breaches.<sup>92</sup> The text of this common article does not define in any further detail the breadth of the obligation to search for and arrest persons suspected of committing grave breaches, and it does not impose any geographic, temporal, or other limitations on this obligation. The principal difficulty of this common article, however, was the states’ determination of “how to legislate so as to catch alleged criminals and then to extradite those whom they chose not to bring to justice themselves . . . .”<sup>93</sup>

The commentary of the 1949 Geneva Convention IV published by the ICRC does not clarify the breadth of this obligation to search for and arrest persons suspected of grave breaches.<sup>94</sup> The commentary for the second paragraph of Article 146 provides:

The obligation on the High Contracting Parties to search for per-

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89. 1949 Geneva Convention I, *supra* note 81, art. 49, 6 U.S.T. at 3146, 75 U.N.T.S. at 62; 1949 Geneva Convention II, *supra* note 81, art. 50, 6 U.S.T. at 3250, 75 U.N.T.S. at 116; 1949 Geneva Convention III, *supra* note 81, art. 129, 6 U.S.T. at 3418, 75 U.N.T.S. at 236; 1949 Geneva Convention IV, *supra* note 81, art. 146, 6 U.S.T. at 3616, 75 U.N.T.S. at 386.

90. *Id.*

91. BEST, *supra* note 72, at 166.

92. See Michael P. Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?* 31 TEX. INT’L L.J. 1, 20 (1996).

93. BEST, *supra* note 72, at 165.

94. See 1949 GENEVA CONVENTION IV COMMENTARY, *supra* note 48, at 592-93.

sons accused to have committed grave breaches imposes an active duty on them. As soon as a Contracting Party realizes that there is on its territory a person who has committed such a breach, its duty is to ensure that the person concerned is arrested and prosecuted with all speed. The necessary police action should be taken spontaneously, therefore, not merely in pursuance of a request from another State.<sup>95</sup>

While this excerpt from the commentary makes it clear that this obligation is an active duty that should be acted upon spontaneously and with all speed, the second sentence interjects an undefined geographic dimension to the obligation. This language fails to clarify whether the second sentence is an example of the implementation of the obligation, or whether it is intended to suggest a geographic limitation on the obligation of a State party to search for and arrest persons suspected of grave breaches—notwithstanding the lack of any textual geographic limitation in common Article 49/50/129/146. Scholars and military manuals which discuss this obligation to search for and arrest persons suspected of grave breaches do not identify or even suggest any geographic limitations.<sup>96</sup> To the contrary, in one recent text on the importance of enforcing the rule of law in the aftermath of the 1991 Persian Gulf War, one scholar made the following conclusions:

One important point concerning war crimes trials in the Gulf crisis does not seem to be generally understood. That is, under the 1949 Geneva Conventions . . . all States Parties to the Conventions . . . are currently *obligated* to search out persons who have committed “grave breaches” of the Conventions and to either try them or extradite them for trial pursuant to the Conventions. This obligation is a major procedural mechanism under the Conventions for enforcement of their important humanitarian principles. The obligation applies to all States Parties whether or not they were parties to the conflict or the “grave breaches” took place in their jurisdiction, and it applies *now* with no need for further legal predicates.<sup>97</sup>

Furthermore, upon signing the four Geneva Conventions of 1949, no

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95. *Id.* at 593.

96. See, e.g., MOORE, *supra* note 32, at 302-03, 310; BASSIOUNI, *supra* note 43, at 503-26; BROWNLIE, *supra* note 76, at 563; Denise Plattner, *The Penal Repression of Violations of International Humanitarian Law Applicable in Non-international Armed Conflicts*, 278 INT'L REV. OF THE RED CROSS 409, 413 (1990); COMMANDER'S HANDBOOK (SUPP.), *supra* note 77, ¶ 6.2.5 n.50.

97. MOORE, *supra* note 32, at 299 (emphasis in original).

state made a reservation with regard to this textually unlimited obligation.<sup>98</sup>

Common Article 1 strongly supports the interpretation of common Article 49/50/129/146 that a state's obligation to search for and arrest persons suspected of grave breaches is universal and not limited to its own national territory. This common article provides that state parties "undertake to respect and to ensure respect for the present Convention in all circumstances."<sup>99</sup> The ICRC commentary to this common article emphasizes that this solemn obligation of a state party "to ensure respect" for the four Geneva Conventions of 1949 extends to "all those over whom it has authority," and that state parties "should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally."<sup>100</sup>

The four Geneva Conventions of 1949 set forth one method of ensuring respect for their provisions by delineating certain acts that are punishable as grave breaches<sup>101</sup> and then by imposing an absolute duty on state parties to prosecute those grave breaches.<sup>102</sup> Since the deterrent value of any proscription is fundamentally dependent upon the certainty that a given crime will be detected and that the criminal actor will be apprehended and prosecuted,<sup>103</sup> an obligation to prosecute must encompass an obligation to search for and arrest to be effective. Accordingly, a duty under common Article 1 "to ensure respect" for the four Geneva Conventions of 1949 in all circumstances and an absolute duty to prosecute grave breaches includes the obligation upon a state party to search for and arrest persons suspected of grave breaches in all territories where the state is authorized by international law to exercise jurisdiction. In the context of general human rights conventions, some scholars have taken a similar position that "the duty to ensure rights implies a duty to prosecute viola-

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98. See Claude Pilloud, *Reservations to the Geneva Conventions of 1949 II*, 181 INT'L REV. OF THE RED CROSS 163, 186-87 (1976).

99. 1949 Geneva Convention I, *supra* note 81, art. 1, 6 U.S.T. at 3116, 75 U.N.T.S. at 32; 1949 Geneva Convention II, *supra* note 81, art. 1, 6 U.S.T. at 3220, 75 U.N.T.S. at 86; 1949 Geneva Convention III, *supra* note 81, art. 1, 6 U.S.T. at 3318, 75 U.N.T.S. at 136; 1949 Geneva Convention IV, *supra* note 81, art. 1, 6 U.S.T. at 3518, 75 U.N.T.S. at 288.

100. See, e.g., 1949 GENEVA CONVENTION IV COMMENTARY, *supra* note 48, at 16.

101. See DOCUMENTS ON THE LAWS OF WAR, *supra* note 51, at 169.

102. See Scharf, *supra* note 92, at 20.

103. See 1 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 3, at 12 (14th ed. 1978); BASSIOUNI, *supra* note 43, at 499.

tors”<sup>104</sup> and that states should take “immediate and effective steps . . . to bring to justice any persons” suspected of offenses.<sup>105</sup>

As customary international law, common Articles 1 and 49/50/129/146 impose an obligation on all states to search for and arrest persons suspected of grave breaches in all territories where the state is authorized by international law to exercise jurisdiction.<sup>106</sup> This obligation to search for and arrest is very similar to, but slightly broader than that reflected in the remarks made by Mrs. Judith Miller, the General Counsel to the Department of Defense, in a recent public interview.<sup>107</sup> Focusing specifically on this issue, Mrs. Miller said

We recognize that the Geneva Conventions require states Party to search for persons alleged to have committed, or to have ordered to be committed, grave breaches of those Conventions, and to bring such persons, regardless of their nationality, before their own courts. We read these provisions as applying to the territory of the United States, not as a universal obligation or *carte blanche* to search for alleged war criminals in the sovereign territory of foreign countries.<sup>108</sup>

The important parallel in these two views is that an affirmative obligation exists to search for and arrest persons suspected of committing grave breaches, and that this obligation does not grant any independent authority for a state to implement this obligation within the sovereign territory of another state.<sup>109</sup>

The unresolved issue presented by these two views is whether the obligation to search for and arrest persons suspected of commit-

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104. See, e.g., Scharf, *supra* note 92, at 25.

105. *Id.* at 26.

106. See *supra* notes 89-100 and accompanying text. However, the two protocols to the four Geneva Conventions of 1949 fail to advance or clarify the obligation to search for and arrest war criminals. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, arts. 85-91, Dec. 12, 1977, 1125 U.N.T.S. 3, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 51, at 389, 437-42; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, art. 6, Dec. 12, 1977, 1125 U.N.T.S. 609, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 51, at 449, 453-54.

107. See Paul S. Stevens, *An Interview with Defense Department General Counsel Judith A. Miller*, A.B.A. NAT'L SECURITY L. REP. (Standing Comm. on Law and Nat. Security, Washington D.C.), vol. 18, No. 5, at 1 (1996).

108. *Id.* at 2.

109. See discussion *infra* Part IV.F. for a more detailed analysis of the limitations on extra-territorial jurisdiction of states.



ting grave breaches extends only to the national territory of a state or to all territories where a state is authorized by international law to exercise jurisdiction. It would be contrary to existing international law and practice with respect to the exercise of jurisdiction over universal crimes to interpret the language of the 1949 Geneva Convention IV Commentary as a geographic limitation on the obligation of a state to its own national territory and nowhere else. For example, all states exercise certain limited enforcement powers on the high seas over stateless vessels and non-government, foreign vessels engaged in universal crimes such as piracy, slave trading, and unauthorized broadcasting.<sup>110</sup> States have an obligation to cooperate “in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State,”<sup>111</sup> “in the suppression of illicit traffic in narcotic drugs . . . on the high seas contrary to international conventions,”<sup>112</sup> and “in the suppression of unauthorized broadcasting from the high seas.”<sup>113</sup> Similarly, during armed conflict, an occupying state has the obligation in occupied territory to search for persons alleged to have committed grave breaches and bring them before its own courts,<sup>114</sup> and has the specific authority to arrest and prosecute protected persons within occupied territory for war crimes. Finally, during U.N. peace-keeping operations in Somalia, the international community accepted the Security Council’s exercise of its coercive authority to authorize military forces to search for and arrest persons outside of their respective national territories.<sup>115</sup>

## B. Violations of the Laws and Customs of War

The laws and customs of war within the jurisdiction of the International Tribunal are codified in the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land and the regulations

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110. See BROWNLIE, *supra* note 76, at 243-57; United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 110, U.N. Doc. A/CONF.62/122, 21 I.L.M. 1261, 1289 [hereinafter 1982 UNCLOS], reprinted in UNITED NATIONS, THE LAW OF THE SEA 1 (1983).

111. 1982 UNCLOS, *supra* note 110, art. 100.

112. *Id.* art. 108.

113. *Id.* art. 109.

114. See 1949 Geneva Convention IV, *supra* note 81, art. 1, 6 U.S.T. at 3518, 75 U.N.T.S. at 288; art. 64, 6 U.S.T. at 3558, 75 U.N.T.S. at 328; art. 146, 6 U.S.T. at 3616, 75 U.N.T.S. at 386.

115. See *Statement by the President of the Security Council in support of actions to restore law and order in Somalia*, U.N. Press Release SC/5650-SOM/28 (1993), reprinted in U.N. DEP’T OF PUBLIC INFO., THE UNITED NATIONS AND SOMALIA, 1992-1996, at 270, U.N. Doc. DPI/1677, U.N. Sales No. E. 96.I.8 (1996) [hereinafter THE UNITED NATIONS AND SOMALIA]. This text is Vol. VIII of the United Nations Blue Book Series.

annexed thereto.<sup>116</sup> The Hague series of conventions and declarations began in 1899 at the initiative of Tsar Nicholas II of Russia for the purpose of limiting armaments.<sup>117</sup> The First Hague Peace Conference of 1899 resulted in the adoption of three conventions—one of which was the first successful effort to codify the existing laws and customs of war on land.<sup>118</sup> The 1907 Hague Convention IV was one of the thirteen conventions adopted by the “Second Hague Peace Conference” which continued the codification of the laws and customs of war on land.<sup>119</sup>

The text of the 1907 Hague Convention IV is short, consisting of a preamble and only nine articles.<sup>120</sup> The proscriptive core of this convention is found in its fifty-six articles of annexed regulations.<sup>121</sup> The International Military Tribunal at Nuremberg expressly held that the 1907 Hague Convention IV was declaratory of customary international law.<sup>122</sup>

Although the 1907 Hague Convention IV and its regulations do not explicitly address any obligation to search for or arrest war criminals, the competence of states to prosecute their own nationals and enemy nationals for war crimes was an accepted part of customary international law in 1907.<sup>123</sup> Notwithstanding this clear authority to prosecute all war criminals, a general customary international law

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116. See *Report of the Secretary-General Pursuant to S.C.Res. 808*, *supra* note 88, paras. 41-44. Specifically, Article 3 of the Statute of the International Tribunal provides that

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

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or 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 or private property.

117. See DOCUMENTS ON THE LAWS OF WAR, *supra* note 51, at 35.

118. See *id.* at 35, 43.

119. See *id.* at 43.

120. See Hague Convention IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 75 U.N.T.S. 287 [hereinafter 1907 Hague Convention IV], *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 51, at 44.

121. See Annex to the Convention Regulations Respecting the Laws and Customs of War on Land, *in* Hague Convention IV, *supra* note 120 [hereinafter 1907 Hague Regulations], *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 51, at 48.

122. See DOCUMENTS ON THE LAWS OF WAR, *supra* note 51, at 44.

123. See KALSHOVEN, *supra* note 78, at 68.

obligation in 1907 to prosecute war criminals “could be construed at most, if at all, with respect to a State’s nationals.”<sup>124</sup> A general customary international law obligation of a state to prosecute war criminals that are not its own nationals, or to search for and arrest them, did not exist in 1907 and was not created by the 1907 Hague Convention IV or its annexed regulations.<sup>125</sup> A duty to search for and arrest war criminals did not exist until such an obligation was created by the four Geneva Conventions of 1949, and this obligation was only explicitly imposed upon state parties with respect to persons alleged to have committed grave breaches.<sup>126</sup>

Accordingly, if an obligation to search for and arrest persons suspected of violations of the laws and customs of war exists, then it is one that has developed as a principle of customary international law since the entry into force of the four Geneva Conventions of 1949. Furthermore, such an obligation would have to be implied from a duty to prosecute violations of the laws and customs of war that are not grave breaches.<sup>127</sup> Although one scholar concluded that a rule of customary international criminal law exists that imposes a general duty on all states to prosecute all international crimes,<sup>128</sup> this duty does is not clear.<sup>129</sup> For example, while the second paragraph of common Article 49/50/129/146 imposes an obligation to search for, arrest, and prosecute or extradite persons alleged to have committed grave breaches, the third paragraph of that common article only imposes an obligation to “take measures necessary for the suppression” of war crimes other than grave breaches.<sup>130</sup> This wording is not very precise and does not explicitly impose a duty to prosecute.<sup>131</sup> As such a duty to prosecute is not implicit, it is unlikely that a customary international law obligation exists to search for and arrest persons suspected of violations of the laws and customs of war that are not otherwise grave breaches.

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124. *Id.*

125. *See id.*

126. *See id.* at 68-69.

127. *See* Scharf, *supra* note 92, at 25-26; discussion *supra* Part IV.A.

128. *See* BASSIOUNI, *supra* note 43, at 500-01.

129. *See* Scharf, *supra* note 92, at 28.

130. 1949 Geneva Convention I, *supra* note 81, art. 49, 6 U.S.T. at 3146, 75 U.N.T.S. at 62; 1949 Geneva Convention II, *supra* note 81, art. 50, 6 U.S.T. at 3250, 75 U.N.T.S. at 116; 1949 Geneva Convention III, *supra* note 81, art. 129, 6 U.S.T. at 3418, 75 U.N.T.S. at 236; 1949 Geneva Convention IV, *supra* note 81, art. 146, 6 U.S.T. at 3616, 75 U.N.T.S. at 386.

131. *See* 1949 GENEVA CONVENTION IV COMMENTARY, *supra* note 48, at 593-94.

### C. Genocide

The International Tribunal also has jurisdiction over the customary international law crime of genocide as codified by the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide.<sup>132</sup> The mass murder of millions of people by Germany during World War II led the international community to its first formal consideration of the crime of genocide.<sup>133</sup> The term genocide was used in 1945 in the indictment of the major German war criminals, and the International Military Tribunal at Nuremberg treated genocide as a crime against humanity.<sup>134</sup> During World War II, the Croatian Roman Catholics committed genocide in Yugoslavia against Serbian followers of the Orthodox Church, and the Serbian forces responded by engaging in mass murders.<sup>135</sup>

In 1946, the General Assembly unanimously affirmed that genocide is a crime under international law and called for a convention to prohibit this crime against humanity.<sup>136</sup> Two years later, a draft Convention consisting of nineteen articles was approved by the General Assembly and opened for signature.<sup>137</sup> Although the 1948 Genocide

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132. See *Report of the Secretary-General Pursuant to S.C.Res. 808, supra* note 88, para. 45. Specifically, Article 4 of the Statute of the International Tribunal provides:

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 intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
  - (a) killing members of the group;
  - (b) causing serious bodily or mental harm to members of the group;
  - (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
  - (d) imposing measures intended to prevent births within the group;
  - (e) forcibly transferring children of the group to another group.
3. The following acts shall be punishable:
  - (a) genocide
  - (b) conspiracy to commit genocide;
  - (c) direct and public incitement to commit genocide;
  - (d) attempt to commit genocide;
  - (e) complicity in genocide.

133. See DOCUMENTS ON THE LAWS OF WAR, *supra* note 51, at 157.

134. See LEO KUPER, GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY 21-22 (1981).

135. See *id.* at 89.

136. See DOCUMENTS ON THE LAWS OF WAR, *supra* note 51, at 157.

137. See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 11, 1948, 78 U.N.T.S. 277 [hereinafter 1948 Genocide Convention]. Article 4, paragraphs two and three, of the Statute of the International Tribunal proscribe those acts of genocide precisely as defined in Articles II and III of the 1948 Genocide Convention. See *supra* note 132.

Convention imposes an absolute obligation on state parties to prosecute persons accused of genocide,<sup>138</sup> it does not explicitly address an obligation to search for and arrest persons suspected of genocide.<sup>139</sup> The obligation under the 1948 Genocide Convention to search for and arrest persons suspected of genocide is derived from a state party's obligations under Article I "to prevent and to punish" genocide and Article V to enact "the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide . . . ."<sup>140</sup>

The determination that a customary international law obligation of all states to prosecute embraces the obligation to search for and arrest suspected criminals within all territories where states, either individually or collectively, are authorized by international law to exercise jurisdiction<sup>141</sup> is even more compelling for the crime of genocide.<sup>142</sup> History has demonstrated that genocide cannot occur without the participation or acquiescence of the government that has the responsibility for ensuring public order where the genocide occurs.<sup>143</sup> The obligation to search for, arrest, and prosecute those suspected of genocide must remain an obligation of the international community, because to leave it to the state where the crime occurred would allow the "absurd position of the future criminal being entrusted with ensuring his own punishment."<sup>144</sup>

#### D. Crimes Against Humanity

The final category of crimes that are within the jurisdiction of the International Tribunal are "crimes against humanity," that is, inhumane acts of a very serious nature, such as willful killing, torture or rape, aimed at the civilian population.<sup>145</sup> This term was first used in

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138. See Scharf, *supra* note 92, at 21.

139. See 1948 Genocide Convention, *supra* note 137, arts. I-XIX.

140. *Id.* arts. I, V.

141. See *supra* Part IV.A.

142. See KUPER, *supra* note 134, at 37. See also HUMAN RIGHTS WATCH, WAR CRIMES IN BOSNIA-HERCEGOVINA 2 (1992) ("Genocide is the most unspeakable crime in the lexicon. The authorization that the Convention provides to the United Nations to prevent and suppress this crime carries with it an obligation to act. The only guidance the Convention provides as to the manner of action is that it should be 'appropriate.' We interpret this as meaning it should be effective.").

143. See KUPER, *supra* note 134, at 37.

144. *Id.* at 37-38.

145. *Report of the Secretary-General Pursuant to S.C.Res. 808*, *supra* note 88, paras. 47-48. Specifically, Article 5 of the Statute of the International Tribunal provides:

The International Tribunal shall have the power to prosecute persons responsible

the 1915 joint declaration of the governments of France, Great Britain, and Russia that denounced the massacre of over a million Armenians by the Turkish Government.<sup>146</sup> The Charter of the International Military Tribunal at Nuremberg was the first international instrument that codified crimes against humanity.<sup>147</sup> During a conference in 1988 that addressed general human rights violations, leading academic and governmental experts concluded there was “no duty under customary international law to prosecute such violators and that such a duty existed only where there was a relevant treaty obligation.”<sup>148</sup> Subsequently, several of those same experts focused on the issue of crimes against humanity, and concluded that a duty does exist under customary international law to prosecute persons suspected of those crimes.<sup>149</sup> Citing sixty-four separate international conventions that establish a duty to prosecute or extradite, one scholar has concluded that such a rule of customary international criminal law does exist.<sup>150</sup> As was previously discussed for grave breaches and genocide, an obligation to prosecute embraces the obligation to search for and arrest suspected criminals within all territories where states, either individually or collectively, are authorized by international law to exercise jurisdiction.<sup>151</sup>

#### E. The Charter of the United Nations

The General Assembly adopted a resolution in 1970 that noted with regret that war criminals were not being punished and specifically addressed the issue of their arrest as follows:

*Convinced that* a thorough investigation of war crimes and crimes

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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.

146. See Scharf, *supra* note 92, at 29.

147. See *id.*

148. *Id.* at 28.

149. See *id.*

150. See BASSIOUNI, *supra* note 43, at 500-01.

151. See *supra* Part IV.A.

against humanity, as well as the arrest, extradition and punishment of persons guilty of such crimes . . . are important elements in the prevention of similar crimes now and in the future, and also in the protection of human rights and fundamental freedoms, the strengthening of confidence and the development of co-operation between peoples and the safeguarding of international peace and security, . . .

2. *Calls upon* all States to take measures, in accordance with recognized principles of international law, to arrest such persons and extradite them . . . so that they can be brought to trial and punished . . . ;

4. *Also calls upon* all the States concerned to intensify their co-operation in the collection and exchange of information which will contribute to the detection, arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity; . . .

5. *Once again requests* the States concerned, if they have not already done so, to take the necessary measures . . . for the detection, arrest, extradition and punishment of all war criminals . . .<sup>152</sup>

One year later, the General Assembly affirmed that a state's refusal "to cooperate in the arrest, extradition, trial and punishment" of persons accused or convicted of war crimes and crimes against humanity is "contrary to the United Nations Charter and to generally recognized norms of international law."<sup>153</sup> In 1973 the General Assembly noted the "special need for international action" in order to ensure the prosecution of war criminals in its resolution on "Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity."<sup>154</sup> Two of the nine principles in this Resolution provide that

1. War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment . . . .

4. States shall assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes and, if

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152. G.A. Res. 2712, U.N. GAOR, 25th Sess., 1930th plen. mtg. at 79, U.N. Doc. A/RES/2712 (1970), reprinted in *THE LAW OF WAR: A DOCUMENTARY HISTORY 757, 757-58* (Leon Friedman ed., 1972).

153. BASSIOUNI, *supra* note 43, at 504 n.107.

154. G.A. Res. 3074, U.N. GAOR, 28th Sess., 2187th plen. mtg. at 78, U.N. Doc. A/RES/3074 (1973), reprinted in BASSIOUNI, *supra* note 43, at 701.

they are found guilty, in punishing them . . . .<sup>155</sup>

While these resolutions are non-binding expressions of the will of the General Assembly,<sup>156</sup> they do identify and reinforce the principles of customary international law that states have an obligation to search for and arrest, and cooperate in an international effort to search for and arrest, war criminals.<sup>157</sup>

In contrast, Security Council resolutions adopted pursuant to the coercive authority of Article 39 of the U.N. Charter (Charter) may be legally binding obligations.<sup>158</sup> Member States of the United Nations have conferred upon the Security Council the “primary responsibility for the maintenance of international peace and security,”<sup>159</sup> and have agreed that they will “accept and carry out the decisions of the Security Council in accordance with the present Charter.”<sup>160</sup> Should the Security Council determine under Article 39 of the Charter that a threat to the peace, breach of the peace, or act of aggression has occurred, then the Security Council has the coercive authority to adopt a legally binding decision as to what measures shall be taken in accordance with Articles 41 and 42 to maintain or restore international peace and security.<sup>161</sup> The “most far-reaching use” of the Security Council’s coercive authority under Articles 39 and 41 was the creation of the International Tribunal.<sup>162</sup> Additionally, the Security Council “may establish such subsidiary organs as it deems necessary for the performance of its functions”<sup>163</sup> and may delegate the necessary authority to the subsidiary organ for it to accomplish those as-

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155. *Id.* at 79.

156. See THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 236-37 (Bruno Simma ed., 1994) [hereinafter CHARTER COMMENTARY].

157. See BASSIOUNI, *supra* note 43, at 527; CHARTER COMMENTARY, *supra* note 156, at 240.

158. See CHARTER COMMENTARY, *supra* note 156, at 605-16.

159. U.N. CHARTER art. 24, para. 1. It is important to note that this delegation of authority does not derogate from a state’s inherent right of individual and collective self-defense. See *id.* art. 51.

160. *Id.* art. 25.

161. See CHARTER COMMENTARY, *supra* note 156, at 613. Articles 39-51 are found in Chapter VII of the Charter. Accordingly, the coercive authority of the Security Council to adopt a legally binding decision as to what measures shall be taken in accordance with Articles 41 and 42 to maintain or restore international peace and security is frequently referred to as Chapter VII authority.

162. CHARTER COMMENTARY, *supra* note 156, at 626.

163. U.N. CHARTER art. 29.



signed functions.<sup>164</sup>

The coercive authority of the Security Council has also been used to authorize the arrest and prosecution of persons suspected of international crimes against noncombatants in an area of ongoing internal armed conflict.<sup>165</sup> On June 6, 1993, the Security Council unanimously reaffirmed the authority of the Secretary-General to take all measures necessary to ensure the arrest and prosecution of those persons responsible for the murder of twenty-four U.N. peacekeepers in Somalia on June 5, 1993.<sup>166</sup> This resolution served as the authority for the U.N. Special Representative to publicly call for the arrest of General Aideed,<sup>167</sup> and to conduct an aggressive series of military operations to arrest him.<sup>168</sup> Accordingly, as a coercive measure to maintain international peace and security under Article 39 of the Charter, the Security Council has the authority to impose upon states an obligation to search for and arrest persons suspected of war crimes.<sup>169</sup>

#### F. Summary of International Obligations

Customary international law, as codified by the four Geneva Conventions of 1949, imposes an obligation upon all states to search for, arrest, and prosecute or extradite those persons suspected of grave breaches. This affirmative obligation to search for and arrest "with all speed" extends to all territories where states, either individually or collectively, are authorized by international law to exercise jurisdiction. As previously discussed, such a universal obligation is based upon:

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164. See CHARTER COMMENTARY, *supra* note 156, at 482.

165. See S.C. Res. 837, U.N. SCOR, 48th Sess., 3229 plen. mtg. at 4, U.N. Doc. S/RES/ 837 (1993) [hereinafter S.C. Res. 837]; *Report Pursuant to Paragraph 5 of Security Council Resolution 837 (1993) on the Investigation into the 5 June 1993 Attack on United Nations Forces in Somalia Conducted on Behalf of the Secretary-General*, U.N. SCOR, 48th Sess., paras. 2, 4, 7, 9, U.N. Doc. S/26351 (1993), reprinted in THE UNITED NATIONS AND SOMALIA, *supra* note 115, at 296, 296-98.

166. See S.C. Res. 837, *supra* note 165. See also *Report of the Commission of Inquiry Established Pursuant to Resolution 885 (1993) to Investigate Armed Attacks on UNOSOM II Personnel*, U.N. SCOR, 49th Sess., para. 117, U.N. Doc. S/1994/653 (1994) [hereinafter *Report of the Commission of Inquiry*], reprinted in THE UNITED NATIONS AND SOMALIA, *supra* note 115, at 368, 376.

167. See THE UNITED NATIONS AND SOMALIA, *supra* note 115, at 44, 52.

168. See *Report of the Commission of Inquiry*, *supra* note 166, paras. 168-73.

169. See MOORE, *supra* note 32, at 298, 306, 321 n.28, 324 n.33.

- a textual analysis of the four Geneva Conventions of 1949;
- international custom as evidenced by the general practice of states with respect to their exercise of jurisdiction:
  - over other universal crimes on the high seas,
  - during the law of occupation,
  - to search for and arrest persons in Somalia;
- general principles of law and deterrence as recognized by civilized nations;
- state interpretation of the obligation as reflected in military manuals; and,
- the writings of scholars and publicists.

In contrast, it is unlikely that an obligation exists to search for and arrest persons suspected of violations of the laws and customs of war that are not otherwise grave breaches, even though one scholar suggests that a rule of customary international criminal law exists that imposes a general duty on all states to prosecute all international crimes.<sup>170</sup>

Customary international law, as codified by the Genocide Convention, also imposes an obligation upon all states to prosecute the crime of genocide. The universal obligation to search for and arrest those persons suspected of genocide is derived from the obligation of all states to effectively prevent and punish the crime of genocide and from the state-sponsored nature of the crime. Similarly, customary international law imposes an obligation on all states to search for and arrest persons suspected of crimes against humanity in all territories where the state is authorized by international law to exercise jurisdiction. This customary international law has been reinforced by a number of non-binding General Assembly resolutions that have called upon all states to take the measures necessary to detect and arrest war criminals, and to intensify their cooperation with one another in their efforts to detect and arrest war criminals.

Notwithstanding that a state may have the extraterritorial authority or obligation under customary international law to search for and arrest persons suspected of universal crimes, limitations nonetheless exist on the breadth of that authority. On the high seas, for example, a state may only exercise limited enforcement powers

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170. See BASSIOUNI, *supra* note 43, at 500-01.

over stateless vessels and non-government, foreign vessels engaged in universal crimes such as piracy, slave trading, and unauthorized broadcasting.<sup>171</sup> In the territory of another state, the general rule is that a state cannot take enforcement measures, that is, it cannot search for and arrest suspected war criminals, without the consent of the territorial state, which may be expressed by treaty or on an ad hoc basis.<sup>172</sup> Historically, the exercise of criminal jurisdiction by one state within the sovereign territory of another state has been one of the most controversial issues in international law.<sup>173</sup> The arrest and trial of a person suspected of a war crime who is within a state that fails to either prosecute or extradite, therefore, poses especially difficult problems because that state is likely not going to consent on an ad hoc basis to enforcement measures by another state.<sup>174</sup>

Absent consent of the territorial state, another state wanting to search for and arrest suspected war criminals can do so under the coercive authority of the Security Council, which has the authority to authorize, as well as impose an obligation on, Member States to actively search for and arrest suspected war criminals. The Security Council has exercised its coercive authority on at least one occasion to authorize states to use military forces to search for and arrest suspected war criminals in the territory of a state without that state's consent.<sup>175</sup> Although a controversial issue for state action,<sup>176</sup> scholars have long proposed that such a non-consensual, internal policing role by the United Nations to suppress acts of "genocide, gross violations of human rights by arbitrary violence and attacks on aliens within the territory" would be justified as measures to maintain or restore international peace and security.<sup>177</sup> Table 1 summarizes the international obligations of states to search for and arrest war criminals during the contemporary Charter-era.

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171. See discussion *supra* Part IV.A.

172. See BROWNIE, *supra* note 76, at 305-07, 310; SUNGA, *supra* note 35, at 100, 102-04.

173. See SERGE LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW 11 (1971).

174. See SUNGA, *supra* note 35, at 99.

175. See *supra* Part IV.E.

176. See IAN BROWNIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 298-301, 338-42 (1963).

177. D.W. BOWETT, UNITED NATIONS FORCES: A LEGAL STUDY 425-27 (1964). See also BROWNIE, *supra* note 176, at 345, 432.

TABLE

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Despite these *obligations* to search for and arrest war criminals—and the *commitment* pledged by the international community in the non-binding declarations of the General Assembly and common Article 49/50/129/146—the international community has demonstrated little resolve or action to search for and arrest persons suspected of war crimes after World War II.<sup>178</sup>

## V. THE FORMER YUGOSLAVIA: A SITUATIONAL ANALYSIS

### A. The International Criminal Tribunal for the former Yugoslavia

The war in the former Yugoslavia began in March 1992.<sup>179</sup> In October 1992, alarmed at the continuing reports of widespread violations of international humanitarian law, mass killings, and ethnic cleansing, the Security Council requested that the U.N. Secretary-General establish a commission of experts to report on the “evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia.”<sup>180</sup> After an interim report of this commission in February 1993 recommending the creation of an ad hoc international tribunal, the Security Council decided that an international tribunal shall be established and requested the Secretary-General to make a report on all matters related to the creation of such an ad hoc tribunal.<sup>181</sup>

On May 3, 1993, the Secretary-General completed his report and a proposed “Statute of the International Tribunal.”<sup>182</sup> Acting under Chapter VII of the Charter, the Security Council adopted the proposed statute, and established “an international tribunal for the sole

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178. See BEST, *supra* note 72, at 396 (“[t]his establishment [specifically referring to common Article 49/50/129/146] of a universal jurisdiction was revolutionary . . . . In practice however this noble innovation has achieved nothing . . . .”); see also KALSHOVEN, *supra* note 78, at 69 (Kalshoven concludes that “[t]o date, the practical effect of these provisions [specifically referring to common Article 49/50/129/146] has proved less than satisfactory.”).

179. See Forestier, *supra* note 4, at 6.

180. S.C. Res. 780, U.N. SCOR, 47th Sess., 3119th mtg. at 2, U.N. Doc. S/RES/780 (1992).

181. See S.C. Res. 808, U.N. SCOR., 48th Sess., 3175th mtg. at 2, U.N. Doc. S/RES/808 (1993). The final report of the commission of experts was completed in May 1994. After 18 months of studies and on-site investigations, the commission of experts concluded that “grave breaches of the Geneva Conventions and other violations of international humanitarian law have been committed . . . on a large scale, and were particularly brutal and ferocious in their execution.” *Letter dated 24 May 1994 from the Secretary-General to the President of the Security Council*, U.N. Doc. S/1994/674 (1994).

182. *Report of the Secretary-General Pursuant to S.C. Res. 808*, *supra* note 88.

purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace.”<sup>183</sup> In addition to being an enforcement measure under Chapter VII, the International Tribunal is also considered a subsidiary organ of the Security Council within the terms of Article 29 of the Charter.<sup>184</sup>

To ensure that the International Tribunal was effective and had the cooperation of all states, the Security Council made the following decision under Chapter VII of the Charter:

4. *Decides that* all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute; . . .<sup>185</sup>

Article 19(2) of the Statute of the International Tribunal specifically grants a judge of a Trial Chamber, upon confirmation of an indictment and at the request of the Prosecutor, the authority to issue an arrest warrant, and Article 29 of the Statute of the International Tribunal reaffirms the obligations of states to comply with such an order of a Trial Chamber by providing that

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

- (a) the identification and location of persons;
- (b) the taking of testimony and the production of evidence;
- (c) the service of documents;
- (d) the arrest or detention of persons;
- (e) the surrender or the transfer of the accused to the International Tribunal.<sup>186</sup>

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183. S.C. Res. 827, *supra* note 8, at 2.

184. See *Report of the Secretary-General Pursuant to S.C. Res. 808*, *supra* note 88, para. 28.

185. S.C. Res. 827, *supra* note 8, at 2.

186. Statute of the International Tribunal, *supra* note 88, arts. 19, 29.

The Secretary-General explained in the introduction to his report to the Security Council concerning the creation of an ad hoc tribunal that these obligations would be binding obligations on all states to take whatever action is required to carry out the decisions of the Security Council.<sup>187</sup> In his explanation to Article 29 of the Statute of the International Tribunal, the Secretary-General specifically explained that all states are required to take whatever steps are required to give effect to “orders issued by the Trial Chambers, such as warrants of arrest, search warrants, warrants for surrender or transfer of persons, and any other orders necessary for the conduct of the trial.”<sup>188</sup> This report placed all states on notice that orders of the Trial Chamber, to include arrest warrants, “shall be considered to be the application of an enforcement measure under Chapter VII of the Charter of the United Nations.”<sup>189</sup> This understanding has been confirmed in a recent text on the International Tribunal written by two attorneys who participated in the creation of the International Tribunal while in their official positions at the United Nations Office of Legal Affairs and the United States Department of State.<sup>190</sup> Their interpretation of Article 29 of the Statute of the International Tribunal is that it “confirms the International Tribunal’s authority to issue orders with binding effect on States . . . .”<sup>191</sup> They also concluded that when an indicted suspect is not in custody, “the effective functioning of the International Tribunal and the fulfillment of its mandate will depend on the issuance and the execution of the order for arrest . . . .”<sup>192</sup>

Since all states have jurisdiction over any war crime<sup>193</sup> and a duty to either prosecute or extradite persons suspected of having committed a war crime,<sup>194</sup> primacy of jurisdiction had to be established to ensure that the International Tribunal could order the transfer of an accused from a national court to the International Tribunal. Article 9

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187. See *Report of the Secretary-General Pursuant to S.C. Res. 808*, *supra* note 88, para. 23.

188. *Id.* para. 125.

189. *Id.* para. 126.

190. See MORRIS & SCHARF, *supra* note 8, at xiv, 311-13.

191. *Id.* at 312. See also Kenneth S. Gallant, *Securing the Presence of Defendants before the International Tribunal for the Former Yugoslavia: Breaking with Extradition*, in *THE PROSECUTION OF INTERNATIONAL CRIMES* 343, 355 (Roger S. Clark & Madeleine Sann eds., 1996) (“Once the Tribunal confirms an indictment and issues an arrest warrant and an order for surrender to the Tribunal based thereon, any state concerned is under a binding obligation to arrest the accused and transfer him or her to the seat of the Tribunal.”).

192. MORRIS & SCHARF, *supra* note 8, at 207-08.

193. See BROWNLEE, *supra* note 76, at 305; see also discussion *supra* Part IV.

194. See BASSIOUNI, *supra* note 43, at 500-01.

of the Statute of the International Tribunal recognizes the concurrent jurisdiction of the International Tribunal and national courts, but established that the International Tribunal "shall have primacy over national courts."<sup>195</sup> Accordingly, an order of the International Tribunal can preempt the jurisdiction of any national court.<sup>196</sup>

Pursuant to its authority granted in Article 15 of the Statute of the International Tribunal,<sup>197</sup> rules of procedure and evidence were adopted on February 11, 1994.<sup>198</sup> Rule 40 specifically invokes the binding authority of Article 29 of the Statute of the International Tribunal and authorizes the Prosecutor to request any state "to take all necessary measures to prevent the escape of a suspect or an accused . . . ."<sup>199</sup> This provisional measure, which is for urgent cases where a suspect may go into hiding or flee a state's jurisdiction to avoid eventual arrest, establishes an obligation on states to respond to requests from the International Tribunal.<sup>200</sup>

Rules 54 to 61 govern the procedures for orders and warrants. There is a difference between an "arrest warrant" and an "international arrest warrant." Upon indictment, the prosecutor may seek an arrest warrant pursuant to Rule 55 that is signed by a single judge and is only addressed to the "national authorities of the State in whose territory or under whose jurisdiction or control the accused resides, or was last known to be, or is believed by the Registrar to be likely to be found . . . ."<sup>201</sup> Rule 56 reiterates the obligation of states by providing the "State to which a warrant of arrest . . . is transmitted shall act promptly and with all due diligence to ensure proper and effective execution thereof, in accordance with Article 29 of the Statute."<sup>202</sup> If an arrest warrant is not executed within a reasonable time, then Rule 61 permits the Trial Chamber to issue an international arrest warrant that is addressed to *all* states.<sup>203</sup> In the process of issuing an international arrest warrant, should it be certified by a Trial

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195. Statute of the International Tribunal, *supra* note 88, art. 9.

196. See MORRIS & SCHARF, *supra* note 8, at 126.

197. See Statute of the International Tribunal, *supra* note 88, art. 15.

198. See *Rules of Procedure and Evidence*, The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. Doc. IT/32/Rev. 8 (1996) [hereinafter *Rules*].

199. *Id.* Rule 40.

200. See MORRIS & SCHARF, *supra* note 8, at 196-97.

201. *Rules*, *supra* note 198, Rule 55.

202. *Id.* Rule 56.

203. See *id.* Rule 61.



Chamber that a state has failed to fulfill its obligations, then the President of the International Tribunal is required to report such failure to the Security Council.<sup>204</sup>

## B. The Dayton Peace Agreement

After more than three years of diplomatic efforts by the international community and the U.S.-led Balkan peace talks in Dayton, Ohio, in November 1995, the Presidents of Bosnia and Herzegovina, Croatia, and the Federal Republic of Yugoslavia signed the General Framework Agreement for Peace in Bosnia and Herzegovina on December 14, 1995.<sup>205</sup> This document consists of eleven short articles setting forth general principles of agreement and refers to eleven more detailed annexes.<sup>206</sup> In Article IX of the Dayton Peace Agreement, for example, the parties acknowledged and reaffirmed “the obligation of all Parties to cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law.”<sup>207</sup> Similarly, the parties agreed in Article X of Annex 1-A to “cooperate fully with . . . the International Tribunal for the Former Yugoslavia.”<sup>208</sup>

The parties also invited the Security Council to establish a multinational Implementation Force (IFOR) under its Chapter VII authority to ensure compliance with the military aspects of the Dayton Peace Agreement that are delineated in Annex 1-A.<sup>209</sup> This force is authorized to operate under the authority and subject to the direction and political control of the North Atlantic Council (NAC) through the North Atlantic Treaty Organization (NATO) chain of

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204. See *id.* Rule 61(E).

205. See *Peace Agreements Bring a 'Long-Delayed Birth of Hope': Multinational Force Set Up in Bosnia to Replace UNPROFOR*, UN CHRONICLE, vol. XXXIII, No. 1, Spring 1996, at 25, 25 [hereinafter *Peace Agreements Bring a 'Long-Delayed Birth of Hope'*].

206. See *The General Framework Agreement for Peace in Bosnia and Herzegovina*, 50th Sess., Agenda Item 28, U.N. Doc. S/1995/999 (Dec. 14, 1995) [hereinafter *Dayton Peace Agreement*] (These eleven annexes address the following topics, respectively: 1-A, Agreement on Military Aspects of the Peace Settlement; 1-B, Agreement on Regional Stabilization; 2, Agreement on Inter-Entity Boundary Line and Related Issues; 3, Agreement on Elections; 4, the Constitution of Bosnia and Herzegovina; 5, Agreement on Arbitration; 6, Agreement on Human Rights; 7, Agreement on Refugees and Displaced Persons; 8, Agreement on the Commission to Preserve National Monuments; 9, Agreement on Bosnia and Herzegovina Public Corporations; 10, Agreement on Civilian Implementation; and 11, Agreement on International Police Task Force.).

207. *Id.* art. IX.

208. *Id.* Annex 1-A, art. X.

209. See *id.* Annex 1-A, arts. I.1, VI.

command.<sup>210</sup> The parties specifically understood and agreed that

the IFOR Commander shall have the authority, without interference or permission of any Party, to do all that the Commander judges necessary and proper, including the use of military force, to protect the IFOR and to carry out the responsibilities listed above in paragraphs 2, 3 and 4,<sup>211</sup> and they shall comply in all respects with the IFOR requirements.<sup>211</sup>

Paragraphs two through four are detailed, but include the right “to monitor and help ensure compliance by all Parties” with Annex 1-A, “to help create secure conditions for the conduct by others of other tasks associated with the peace settlement, including free and fair elections,” and to implement “further directives from the NAC [that] may establish additional duties and responsibilities for the IFOR in implementing this Annex.”<sup>212</sup> Should the parties not fully cooperate with the International Tribunal and fail to execute arrest warrants, these provisions of the Dayton Peace Agreement are a grant of authority to the Implementation Force to use military force to search for and arrest persons indicted by the International Tribunal.

On December 15, 1995, the Security Council acted under Chapter VII of the Charter and announced its support of the Dayton Peace Agreement by authorizing states to establish IFOR and reaffirmed that

all States shall cooperate fully with the International Tribunal for the Former Yugoslavia and its organs in accordance with the provisions of Resolution 827 (1993) of 25 May 1993 and the Statute of the International Tribunal, and shall comply with requests for assistance or orders issued by a Trial Chamber under article 29 of the Statute . . . ;<sup>213</sup>

Operative paragraph 15 of this resolution also authorizes all states participating in IFOR “to take all necessary measures to effect the implementation of and to ensure compliance with Annex 1-A of the Peace Agreement.”<sup>214</sup> Should the parties not fully cooperate with the

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210. *See id.*

211. *Id.* Annex 1-A, art. VI.5.

212. *Id.* Annex 1-A, art. VI.2-4.

213. S.C. Res. 1031, U.N. SCOR, 50th Sess., 3607th mtg. para. 4, U.N. Doc. S/RES/1031 (1995).

214. *Id.*

International Tribunal and fail to execute arrest warrants, this resolution is also a grant of authority to the states contributing troops to IFOR to use military force to search for and arrest persons indicted by the International Tribunal. Additionally, this resolution imposes an obligation upon all states to comply with arrest warrants issued by a Trial Chamber of the International Tribunal that is independent of the authority to search for and arrest persons suspected of war crimes granted by the parties to the Dayton Peace Agreement. On December 20, 1995, a 60,000-personnel Implementation Force was deployed in the former Yugoslavia.<sup>215</sup>

### C. The Obligation to Search For and Arrest

The Security Council, and accordingly, the International Tribunal, has the authority to impose a legal obligation upon all states, such as those participating in IFOR, to search for and arrest persons located in the territory of the former Yugoslavia.<sup>216</sup> Specifically addressing the issue of whether such arrest warrants issued by the International Tribunal to all states impose a binding obligation, Colonel John Burton, the Legal Counsel to the Chairman of the Joint Chiefs of Staff, concluded during a public presentation that

The Yugoslav War Crimes Tribunal has issued these orders [arrest warrants]. Now, orders can be issued to . . . all the Member States who are going to play a part of this NATO force. And if those orders say not only in your territory, but in any jurisdiction under your control, would they apply in Bosnia? In other words, if the United States had such an order, that in Bosnia that the United States is charged to arrest and detain these people and turn them over, would we be bound? As far as a state obligation goes, I think that the answer is, "Yes." We view these orders, and literally the Statute of the Tribunal itself, as well as the United Nations Resolution under Chapter VII that set it up, as binding.<sup>217</sup>

Colonel Burton explains, however, that this Charter obligation is a *state* obligation that does not flow to "the soldier, the platoon leader,

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215. See *Peace Agreements Bring a 'Long-Delayed Birth of Hope'*, *supra* note 205, at 26.

216. See MORRIS & SCHARF, *supra* note 8, at 208-10. See also Ruth Wedgwood, *Prosecuting War Crimes*, 149 MIL. L. REV. 217, 224 (1995) ("Ultimately, the Security Council may feel the need to consider direct execution of international arrest warrants, if that is needed to make the tribunal effective.").

217. John T. Burton, "War Crimes" During Military Operations Other Than War: Military Doctrine and Law 50 Years after Nuremberg and Beyond, 149 MIL. L. REV. 199, 203-04 (1995).

or the commander in the field.”<sup>218</sup> It is within the discretion of the state as to how it will implement their obligation.<sup>219</sup> Therefore, it is perfectly proper for states or NATO to decide that IFOR will not be assigned the mission to search for and arrest indicted war criminals so long as states take action to give effect to their obligation. In addition to these obligations that may be imposed by the Security Council and the International Tribunal, the Dayton Peace Agreement imposes an obligation upon its parties to search for and arrest war criminals.<sup>220</sup> The Dayton Peace Agreement also authorizes IFOR to search for and arrest war criminals in the former Yugoslavia.<sup>221</sup> Table 2 summarizes the international obligations and authorities of States to search for and arrest war criminals within the former Yugoslavia. These obligations and authorities are in addition to those under customary international law and international agreements discussed in Part IV-F and summarized in Table 1.

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218. *Id.* at 204. *See also* BOWETT, *supra* note 177, at 491 (“Thus, the provisions of Article 2(5) . . . and Article 25 . . . of the Charter cannot be said to inure to the individual . . .”).

219. Burton, *supra* note 217, at 205.

220. *See Dayton Peace Agreement, supra* note 206, art. IX.

221. *See id.* Annex 1-A, arts. I.1, VI.

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TABLE 2

Given that an obligation exists to follow the orders of the International Tribunal, the actual language of a specific arrest warrant must be analyzed to determine whether an obligation has been imposed. On July 11, 1996, a Trial Chamber of the International Tribunal issued an "International Arrest Warrant and Order for Surrender" to all states and to IFOR in the cases of Radovan Karadzic and Ratko Mladic.<sup>222</sup> As these international arrest warrants are addressed to all states, they serve as good models for examination.

After referring to Security Council Resolution 827, Article 29 of the Statute of the International Tribunal, and Rules 54 to 61 of the Rules of Procedure and Evidence of the International Tribunal as its source of authority, the Trial Chamber ordered states to secure the arrest of Karadzic and Mladic.<sup>223</sup> The operative language in both of the international arrest warrants is the same:

HEREBY DIRECTS the authorities and officers and agents of all States to act promptly with all due diligence to secure the arrest, detention and transfer to the Tribunal of:

Radovan KARADZIC born on 19 June 1945, in Pretnjica, in the municipality of Savnik, believed to be residing in Pale, Han Pijesak, or Jahorina;

HEREBY DIRECTS the authorities and officers and agents of all States to act promptly with all due diligence to secure the arrest, detention and transfer to the Tribunal of:

Ratko MLADIC born on 12 March 1943, in the village of Bozanovic near Kalinovik, in the Republic of Bosnia and Herzegovina, believed to be residing in Pale, Han Pijesak, Belgrade or Banja Luka, . . .<sup>224</sup>

Since the arrest warrants were issued to *all* states and to IFOR while identifying the locations of the accused in the former Yugoslavia, the Trial Chamber certainly imposed an obligation on states participating in IFOR to "act promptly with all due diligence to secure the arrest, detention and transfer [of Karadzic and Mladic] to the Tribunal . . ." <sup>225</sup> Indeed, the very purpose of the Trial Chamber issuing an international arrest warrant to all states is to overcome the failure of an

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222. International Arrest Warrant and Order for Surrender, Case Nos. IT-95-5-R61/IT-95-18-R61 (July 11, 1996) (on file with the *Duke Journal of Comparative & International Law*).

223. *See id.*

224. *Id.*

225. *Id.*

individual state to give effect to the arrest warrant issued to it.<sup>226</sup>

## VI. INTERNATIONAL INACTION AND GOVERNMENT FAILURE

Of the seventy-four people indicted by the International Tribunal as of November 30, 1996, only seven are in custody.<sup>227</sup> The Bosnian Muslims arrested and extradited two men to the International Tribunal,<sup>228</sup> and two were surrendered by Croatia;<sup>229</sup> the rest have been arrested in Europe.<sup>230</sup> For example, Dusan Tadic was arrested in February 1994 for genocide and war crimes by the German Police in Munich, Germany.<sup>231</sup> He was subsequently indicted by the International Tribunal in February 1995, and transferred by Germany to the International Tribunal in April 1995.<sup>232</sup> Closing arguments began in the seven-month trial of Dusan Tadic on November 25, 1996.<sup>233</sup> A second Bosnian Serb, identified only as Nikola J., was arrested by Germany in December 1995 and charged by German federal authorities on charges of genocide, murder, kidnapping, and extortion.<sup>234</sup>

Most of the remaining sixty-seven suspects that have been indicted for some of the worst crimes of this century roam freely in the former Yugoslavia and lead "remarkably ordinary and exceedingly

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226. See *supra* Part V.A.

227. See *A Conviction From the Bosnia Tribunal*, *supra* note 12, at A26. Since the International Tribunal has the authority to assert primacy of jurisdiction over national courts, see *supra* Part V.A., this discussion focuses on the obligation of States to search for and arrest war criminals indicted by the International Tribunal. This issue, albeit related, is separate from the prosecution of war crimes trials by the national courts of the former Yugoslavia. For a detailed discussion of the war crimes trials that are being conducted by the national courts of the former Yugoslavia, see HUMAN RIGHTS WATCH, *FORMER YUGOSLAVIA: WAR CRIMES TRIALS IN THE FORMER YUGOSLAVIA* (1995).

228. See John Pomfret, *Bosnian Serbs Begin to Work with Tribunal: Some Alleged War Criminals Questioned*, WASH. POST, Oct. 25, 1996, at A29.

229. See Stacy Sullivan, *Bosnia's Most Wanted Mostly Accessible: War Crimes Suspects Maintain High Profile in Croat-Run Town, but Police Pay No Mind*, WASH. POST, Nov. 27, 1996, at A21.

230. See Pomfret, *supra* note 228, at A29.

231. See Press and Information Office, International Criminal Tribunal for the Former Yugoslavia, Tadic Factsheet 1 (n.d.) (on file with the *Duke Journal of Comparative & International Law*).

232. See *id.*

233. See Sean Scully, *War Crimes Trial Comes to Close*, WASH. TIMES, Nov. 24, 1996, at A8. Dusan Tadic was convicted on May 8, 1997, of the murder of two policemen and of the torture and persecution of a number of Muslim civilians in Bosnia. See Marlise Simons, *U.N. Panel Convicts Bosnian Serb of War Crimes*, N.Y. TIMES, May 8, 1997, at A1.

234. See *Germany Accuses Serb of 25 Murders*, LONDON INDEPENDENT, Oct. 9, 1996, at 13.

open lives . . . .”<sup>235</sup> Two of those indicted have since worked for the Bosnian government as a deputy commander of a police station and as a labor inspector, while others continue to own or operate a restaurant, a grocery store,<sup>236</sup> a pharmacy, and a print shop.<sup>237</sup> Many are believed to be involved in organized crime, such as drug trafficking, counterfeiting, and extortion.<sup>238</sup> Others take no precautions against arrest “because no one has come looking for them.”<sup>239</sup>

NATO policy states that IFOR “will arrest such men only if they are noticed by their soldiers in the course of their normal duties and if the soldiers feel that circumstances permit.”<sup>240</sup> IFOR widely distributed wanted posters of indicted war criminals to all its personnel,<sup>241</sup> but to little effect: one IFOR soldier was quoted as having said “we don’t want to run into anyone important.”<sup>242</sup> In describing the reality of this policy, a high-ranking NATO officer jokingly explained that, “[o]f course, we’ll arrest Karadzic . . . [b]ut he may have some trouble getting past the guards at our front gate if he arrives without an appointment.”<sup>243</sup> IFOR has yet to arrest a single suspect.<sup>244</sup>

Existing customary international law and arrest warrants that impose a legal obligation on all states to search for and arrest suspected war criminals have had little effect on the international community. For example, the reaction of the international community to a very clear legal obligation in the international arrest warrants for Karadzic and Mladic has been almost apathetic—the United States was undecided over the value of arresting Karadzic, France and Germany briefly called for Karadzic’s and Mladic’s swift arrest, and other European countries remained silent.<sup>245</sup> From what was reflected in the media, states were concerned with balancing what they

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235. Steven L. Myers, *Rights Group Says Bosnian Suspects Flaunt Freedom*, N.Y. TIMES, Nov. 26, 1996, at A11.

236. *See id.*

237. *See* Sullivan, *supra* note 229, at A21.

238. *See* Elizabeth Neuffer, *Bosnia’s War Criminals Enjoy Peacetime Power*, BOSTON GLOBE, Oct. 29, 1996, at A1.

239. Sullivan, *supra* note 229, at A21.

240. *Id.*

241. *See* Chris Simon, *Wanted Officials Operate Freely*, WASH. TIMES, Nov. 3, 1996, at A8.

242. David Rieff, *Arrest Them: The Case Against the Serb War Criminals*, WASH. POST, Sept. 8, 1996, at C1.

243. Colin Soloway & Stephen J. Hedges, *How Not to Catch a War Criminal*, U.S. NEWS & WORLD REP., Dec. 9, 1996, at 63.

244. *See* Sullivan, *supra* note 229, at A21.

245. *See* Elizabeth Neuffer, *Arrest Warrants for Karadzic, Mladic: a Test for Clinton*, BOSTON GLOBE, July 14, 1996, at A2.



saw as a moral necessity with the attendant political risks associated with a mission gone bad.<sup>246</sup> Sadly, the public debate was noticeably void of any discussion of the deterrent value of enforcing the rule of law.<sup>247</sup>

In violation of their legal obligations imposed by customary international law, the arrest warrants issued by the International Tribunal and the Dayton Peace Agreement, the Bosnian Serbs continue to publicly refuse to “hand over indicted war criminals, despite renewed international pressure to do so . . . .”<sup>248</sup> In response, western leaders promised tougher economic action, but “stopped short of authorizing the thousands of well-armed NATO peacekeepers in Bosnia to seek out the wanted men . . . .”<sup>249</sup> The United States announced the following day that it plans to increase pressure on the three principal parties of the Dayton Peace Agreement to comply with their obligations and will consider imposing economic sanctions.<sup>250</sup> Some U.S. officials also proposed that specially trained police units be used to arrest war criminals, but this proposal aroused great controversy.<sup>251</sup> Similarly, Croatia has parroted the IFOR position that “it will surrender any war criminals that its authorities come across.”<sup>252</sup> Ironically, the United States criticized this position as “disingenuous.”<sup>253</sup>

This failure of the international community to search for and arrest war criminals within the jurisdiction of the International Tribunal has been universally and harshly criticized. On the day of his farewell luncheon after two years as the Chief Prosecutor of the International Tribunal, Judge Richard Goldstone condemned those states which created the International Tribunal for making it impotent through their failure to abide by their obligation to make arrests.<sup>254</sup> On her first day in office, the new Chief Prosecutor, Judge Louise Arbour, emphasized that arrests “are a very acute priority for

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246. *See id.*

247. *See id.*

248. *Bosnian Serbs Adamant About War Criminals: Western Nations Try Threat to Withhold Aid to Force Surrender*, BALTIMORE SUN, Dec. 8, 1996, at A25.

249. *Id.*

250. *See* R. Jeffrey Smith, *Push on Bosnia War Crimes Pledged: Berger Says U.S. Plans 'More Effective Steps' Against those Indicted*, WASH. POST, Dec. 9, 1996, at A2.

251. *See id.*

252. *Id.*

253. *See id.*

254. *See* Charles Trueheart, *War Crimes Prosecutor Blasts West for Inaction: S. African Says Serb Suspects Should Be Seized*, WASH. POST, Sept. 19, 1996, at A26.

the tribunal . . . [and that it] would be scandalous for the international community to have gone this far in the criminal justice process and not finish it.”<sup>255</sup> U.S. Senator Richard Lugar, member of the Foreign Relations Committee, has accused NATO “of failing to exercise its authority in hunting down war criminals.”<sup>256</sup> One former Director-General for Human Rights in Bosnia of the Organization for Security and Cooperation in Europe proposes that IFOR should abandon its “‘monitor/don’t touch’ approach for a ‘seek and detain’ policy toward war criminals.”<sup>257</sup> The Coalition for International Justice (a private advocacy group that monitors the prosecution of war criminals by the International Tribunal), Amnesty International, and Human Rights Watch have also called upon the United States to order American and NATO forces to do more to arrest indicted war criminals.<sup>258</sup>

Without significant changes to the international community’s present policy, the future of the International Tribunal looks grim. In October 1996, the President of the International Tribunal, Judge Antonio Cassese, gave the western states ten to twelve months to arrest leaders indicted for crimes against humanity in Bosnia, or he and his fellow judges “will propose to the Security Council to close down the tribunal [because it] is becoming an exercise in hypocrisy.”<sup>259</sup> President Clinton’s national security adviser-designate, Sandy Berger, stated that Americans could play at most “a ‘backup role’ in helping the U.N. war crimes tribunal ‘track down’ indicted war criminals that the Serbs refused to turn over to the judiciary body.”<sup>260</sup> NATO’s new Commander in Bosnia has announced that the Stabilization Force, which is the planned force to follow the IFOR, will continue its predecessor’s policy of only detaining war criminals if encountered “during the conduct of operations . . . .”<sup>261</sup> Finally, the three principal parties of the Dayton Peace Agreement have not shown any willingness to comply with their obligations to search for and arrest war criminals.<sup>262</sup>

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255. Charles Trueheart, *New Chief Prosecutor for Balkans Says ‘Arrests Are Acute Priority,’* WASH. POST, Oct. 1, 1996, at A14.

256. Joyce Price, *Kasich Urges Spring Pullout From Bosnia,* WASH. TIMES, Dec. 9, 1996, at A1.

257. James A. Goldston, *Crime Still Pays in Bosnia,* WALL ST. J., Nov. 26, 1996, at A20.

258. See Myers, *supra* note 235, at 11.

259. Marquand, *supra* note 12, at 1.

260. Price, *supra* note 256 at A2.

261. ‘We’re a Lot Smarter’—*The Next Phase of NATO’s Bosnia Mission: Stability,* NEWSWEEK (Europe), Dec. 16, 1993, at 20.

262. See Smith, *supra* note 250, at A2.

This analysis of the objective factors of the international community's performance permits only the conclusion that governments of the international community, both individually and collectively, have not only failed to enforce the rule of law, but have made little effort to attempt to enforce the rule of law. The International Tribunal was established in May 1993,<sup>263</sup> and the first indictments charging twenty-one suspects were confirmed in February 1995.<sup>264</sup> IFOR has had 60,000 personnel in the former Yugoslavia since December 20, 1995,<sup>265</sup> yet indicted suspects have been "operating with impunity and in high [political] office under the noses of NATO and U.S. military personnel in northern Bosnia . . . ."<sup>266</sup> The location of other suspects can be ascertained by simply calling up the operator at the town police station where they are known to live.<sup>267</sup> Private advocacy groups have been able to locate more than half of the suspects from computer databases and news reports.<sup>268</sup> Indeed, some of the indicted war criminals are so easy to find that a discussion of the *obligations to search for* them seems inappropriate. Without the support of the domestic legal system and the enforcement machinery of States, the International Tribunal cannot execute arrest warrants,<sup>269</sup> and without suspects in custody to prosecute, the International Tribunal will be a failure.<sup>270</sup> Nevertheless, States have failed to execute these international arrest warrants and bring the indicted war criminals before the tribunal.

## VII. PREVENTING GOVERNMENT FAILURE: ALTERNATIVE THINKING

One way to determine the appropriate substantive and procedural control mechanisms over government inaction is to analyze the reasons offered by governments for their failure to act. Two princi-

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263. S.C. Res. 827, *supra* note 8.

264. See Press and Information Office, International Criminal Tribunal for the former Yugoslavia, Press Release by the Prosecutor Justice Richard Goldstone 1 (Feb. 13, 1995) (on file with the *Duke Journal of Comparative & International Law*).

265. See *Peace Agreements Bring a 'Long-Delayed Birth of Hope'*, *supra* note 205, at 26.

266. Simon, *supra* note 241, at A8.

267. See Neuffer, *supra* note 238, at A1.

268. See Myers, *supra* note 235, at A11.

269. See *Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, 49th Sess., Agenda Item 152, para. 84, U.N. Doc. S/1994/1007 (1994).

270. See Shawcross, *supra* note 14, at A17.

pal reasons have been proffered to excuse international inaction. First is the fear that arresting the indicted Serb principals and other war criminals may shatter Bosnia's fragile peace.<sup>271</sup> The reaction in the wake of the International Tribunal's first conviction, however, contradicts this reasoning.<sup>272</sup> The feeling in Preville, Bosnia, and Herzegovina was that the conviction of Drazen Erdemovic was the beginning of justice.<sup>273</sup> Erdemovic's family acknowledged his crimes, and Muslim men showed understanding and forgiveness of the crimes of this ethnic Croat.<sup>274</sup>

Based upon his personal insight into the Allies' approach to the Nuremberg trials, Britain's chief Nuremberg prosecutor, Hartley Shawcross, believes that the key to maintaining Bosnia's fragile peace depends upon bringing the war criminals to justice.<sup>275</sup> Shawcross concludes that reconciliation and peace can only occur when the "individual guilt for the appalling crimes of the last few years replaces the pernicious theory of collective guilt on which so much racial hatred hangs."<sup>276</sup> The Chief Prosecutor for the International Tribunal concurred in this assessment, stating that "NATO's refusal to order its troops to arrest Bosnian Serb leaders accused of atrocities threatens to undermine the fragile peace in the Balkans."<sup>277</sup> After visiting a number of the execution sites in the former Yugoslavia, John Shattuck, the top human-rights official at the U.S. Department of State, "argued that bringing Balkan war criminals to justice is 'an essential part of the peace process,' necessary to 'lift the burden of collective guilt.'"<sup>278</sup>

The situation in Ethiopia supports this conclusion. In 1994, forty-four senior officials of the savage Marxist regime that ruled Ethiopia between 1974 and 1991 along with another 1300 henchmen and rebels were prosecuted for crimes of murder, torture, and other

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271. See *id.*; see also *Retiring NATO Commander Says Politics Helps Keep Bosnian War Criminals Free: Arrests Could Result in Serbian Unrest, Disrupted Elections*, BALTIMORE SUN, July 31, 1996, at A13 ("The outgoing NATO commander in Bosnia said yesterday that indicted war criminals are still free, in part for political reasons, including fears of unrest before September elections.").

272. See O'Connor, *supra* note 15, at A18.

273. See *id.*

274. See *id.*

275. See Shawcross, *supra* note 14, at A17.

276. *Id.*

277. Jane Perlez, *War Crimes Prosecutor Vents Frustrations*, N.Y. TIMES, May 22, 1996, at A8.

278. Melinda Liu & Stacy Sullivan, *The Dead Cry Out*, NEWSWEEK, Feb. 5, 1996, at 41, 41.

crimes against humanity.<sup>279</sup> These war crimes trials by the transitional government did not shatter the existing fragile peace—it cemented it.<sup>280</sup>

In 1994, the Carnegie Endowment for International Peace set up an International Commission on the Balkans to examine the nature and consequences of the Balkan war and how to prevent future conflict.<sup>281</sup> Although the Commission recognized the ancestral hatreds and ethnic divisions of the peoples of the former Yugoslavia, it concluded that the war “was launched with deliberation and calculation by certain political figures from the old Communist Yugoslavia—Slobodan Milosevic and Franjo Tudjman chief among them—who believed they could expand their power . . . by awakening and exploiting the nationalism of Serbs, Croats, Slovenes, and Moslems . . . .”<sup>282</sup> The Commission also concluded that “it is important to uphold the principle of international prosecution of war crimes . . . [and that the International] Tribunal has since been undermined by the . . . refusal to have NATO implement its indictments.”<sup>283</sup> One political figure, Jovan Raskovic, who had a prominent role in launching the war, announced on television on January 24, 1992, that

I feel responsible because I made the preparations for this war, even if not the military preparations. If I hadn't created this emotional strain in the Serbian people, nothing would have happened. My party and I lit the fuse of Serbian nationalism not only in Croatia but everywhere else in Bosnia-Herzegovina. It's impossible to imagine an SDP (Serbian Democratic Party) in Bosnia-Herzegovina or a Mr. Karadzic in power without our influence.<sup>284</sup>

The Director of the Citizens' Commission on Human Rights in France later observed that Jovan Raskovic, with fellow psychiatrist Radovan Karadzic, “had whipped the Serbs into a frenzy and set the stage for the Balkans' biggest bloodbath since the area was occupied by the Nazis in World War II.”<sup>285</sup> The determination that the cause of

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279. See Joshua Hammer, “I Would Like to Ask Him, ‘Why?’”, NEWSWEEK, Dec. 19, 1994, at 43, 43.

280. See *id.*

281. See William Pfaff, *The Balkans: A Political Mess With Political Solutions*, BALTIMORE SUN, Oct. 7, 1996, at A9.

282. *Id.*

283. *Id.*

284. Forestier, *supra* note 4, at 6.

285. *Id.* at 6.

this third Balkan war was so dependent upon the intentional actions of a few men strongly demands their prosecution. Crimes are committed by people, not institutions, and only through personal accountability can the rule of law have any deterrent effect. Arresting the indicted Serb principals and other war criminals that played such a prominent role in shattering Bosnia's fragile peace is the only way to preserve it.

The second reason that is often given to justify international inaction is the fear of casualties and hostages.<sup>286</sup> Judge Goldstone, the Chief Prosecutor for the International Tribunal, has said that western leaders "have made it perfectly clear to me . . . that they weren't prepared to put their soldiers at risk."<sup>287</sup> U.S. political concerns about casualties appear rooted in a fear of repeating the disastrous manhunt for the Somali warlord Mohamed Farrah Aideed that resulted in the deaths of eighteen American soldiers.<sup>288</sup> When the International Tribunal announced that international arrest warrants were to be issued the next day, however, the first military commander of IFOR, United States Admiral Leighton Smith, stated that he believed that the Bosnian Serbs Karadzic and Mladic, as well as other indicted war criminals, should be arrested, and that he was awaiting orders from NATO to do so.<sup>289</sup> The real lesson to take from Somalia is that the failure of the international community to respond to war crimes places military forces in further jeopardy by sending the signal that such crimes could be carried out with impunity.<sup>290</sup>

The Bosnian Serb police chief in Pale, which is Dr. Karadzic's stronghold, threatened that the Serbs would revive their wartime practice of taking United Nations staff hostage should the NATO-led IFOR arrest Dr. Karadzic.<sup>291</sup> Although the Bosnian Serbs have a history of taking hostages and this threat was echoed by several other local authorities in other towns,<sup>292</sup> the risk to the IFOR may not be as great as feared. The deputy military commander of the Bosnian Serb

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286. See, e.g., Shawcross, *supra* note 14, at A17; Trueheart, *supra* note 254, at A26.

287. Trueheart, *supra* note 254, at A26.

288. See Rowan Scarborough, *GIs Won't Hunt For War-Crime Suspects*, WASH. TIMES, Dec. 5, 1995, at A1.

289. See Christopher Bellamy, *The Hunter who Hopes to Catch Karadzic: Nato Chief Awaits Orders on Bosnian War Criminals*, LONDON INDEPENDENT, July 10, 1996, at 20.

290. See THE UNITED NATIONS AND SOMALIA, *supra* note 115, at 50.

291. See Liam McDowall, *Serbs Threaten to Kidnap U.N. Police to Shield Karadzic*, WASH. TIMES, July 16, 1996, at 11.

292. See Mike O'Connor, *Target for Hostage-Takers: U.N. Unit*, N.Y. TIMES, July 17, 1996, at A8.

army told the NATO ground force commander that the arrest of Karadzic “would not provoke a violent reaction among his people . . . ” and that the “Serb military was indifferent to Dr. Karadzic’s removal.”<sup>293</sup> The International Crisis Group, chaired by former U.S. Senator George Mitchell and including former Prime Ministers of France, Belgium, and Australia, also concluded in a report that “the likelihood of violence if Karadzic is arrested is minimal . . . [and the] long-term risks of leaving him at liberty outweigh the short-term risks or arresting him.”<sup>294</sup> The report recommends the arrest of Karadzic and Mladic as soon as possible.<sup>295</sup> The conclusions of the International Crisis Group also undermine the concern of the international community that the arrest of war criminals may shatter Bosnia’s fragile peace.

Several other reasons have also been used publicly to justify governmental inaction. For example, NATO has been concerned that efforts to arrest war criminals “could damage NATO’s image of impartiality among Bosnia’s factions and stoke Serbian disturbances . . . ” and international civilian agencies involved in Bosnia’s postwar reconstruction effort fear that “manhunts for indicted war criminals could jeopardize their work.”<sup>296</sup> One journalist observed that under the Dayton Peace Agreement, “responsibility for arresting war criminals is so widely shared among international, national, and local authorities that no one has done it.”<sup>297</sup> The General Counsel for the Coalition for International Justice observes that no one has taken the responsibility for arresting suspects—that “[e]verybody says it’s somebody else’s problem.”<sup>298</sup>

While all of these reasons for international inaction are valid concerns, they are based on subjective fears, vulnerable to political maneuvering, and have been challenged by those prominent jurists, statesmen, precedent, and studies discussed above. The governments of the international community have not publicly debated the long-term deterrent value of enforcing the rule of law and have avoided a public discussion of their legal obligations.<sup>299</sup> The core of the interna-

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293. Eve-Ann Prentice, *Serb Forces ‘Would Not Resist Arrest of Karadzic’*, LONDON TIMES, July 22, 1996, at 11.

294. *Id.*

295. *See id.*

296. *Retiring NATO Commander Says Politics Helps Keep Bosnian War Criminals Free*, *supra* note 271, at A13.

297. Marquand, *supra* note 12, at 1.

298. Myers, *supra* note 235, at A11.

299. *See, e.g.*, Neuffer, *supra* note 245, at A2.

tional community's inaction is a lack of political will and resolve.<sup>300</sup> Consequently, substantive and procedural mechanisms to control this example of government failure in the former Yugoslavia must overcome governmental inaction caused by a lack of political will and resolve. The goal is to encourage governments to enforce the rule of law—in particular, to actively search for and arrest persons suspected of war crimes where ever they may be found. To accomplish this goal, substantive mechanisms could create incentives for governments to enforce the rule of law, or create political costs for their failure to do so. Procedural mechanisms could minimize the role of political externalities in this enforcement process.

One substantive mechanism that could create an incentive for governments to act, and create political costs for their failure to act, would be a "Statement of Principles" that announces the unqualified individual obligation and responsibility of all states to search for and arrest war criminals. Notwithstanding existing legal obligations and General Assembly resolutions, governments have deflected what few public statements have been made about their failure to give effect to their legal obligations. Governments have been able to externalize blame because their legal obligations are not well understood or disseminated. A clear and contemporary Statement of Principles should resolve any ambiguity that may exist in the legal obligations of states.

This Statement of Principles could be constructed within a General Assembly resolution similar to Resolutions 2712 and 3074 as discussed in Part IV-E. Such a new Statement of Principles would unequivocally recognize the legal obligation of states to actively search for and arrest persons suspected of war crimes in all territories where the state is authorized by international law to exercise jurisdiction. Once disseminated, such a Statement of Principles could serve as political leverage to pressure governments which are unwilling to act.

Two procedural mechanisms that could minimize the role of political externalities in this enforcement process are trials in absentia and a permanent international criminal court. The Carnegie International Commission on the Balkans recommended trials in absentia for indicted war criminals<sup>301</sup> to demonstrate that war criminals "can be pursued and prosecuted, even when they cannot be punished."<sup>302</sup>

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300. See Knight, *supra* note 5, at 52; Sullivan, *supra* note 229, at A21.

301. See Pfaff, *supra* note 281, at A9. This approach would require an amendment to Article 20 of the Statute of the International Tribunal which prohibits trials in absentia. See Statute of the International Tribunal, *supra* note 88, art. 20.

302. Pfaff, *supra* note 281, at A9.



One risk of this approach, however, is that trials in absentia may deflate public pressure to ensure the arrest of the accused war criminals.<sup>303</sup> Similarly, a standing international criminal court would remedy the problems associated with the failure of the international community to arrest criminals indicted by the International Tribunal. Several jurists have proposed just such an idea.<sup>304</sup> The absence of a tribunal, however, is not the manifestation of government failure that has occurred in the former Yugoslavia. States created the International Tribunal to prosecute the atrocities in the former Yugoslavia, and albeit ad hoc, it is a functional tribunal capable of accomplishing its task. The essence of the government failure is the lack of political resolve to search for and arrest those indicted of war crimes,<sup>305</sup> and the lack of any other mechanism to bring them to trial. For a permanent international criminal court to be effective, it must have resort to some form of an international police force to ensure that the accused are arrested and brought before the court.

#### VIII. CONCLUSIONS AND FINAL REFLECTIONS

The international community should first look to the parties to the Dayton Peace Agreement to fulfill their obligations to search for, arrest, and surrender indicted war criminals. It is also appropriate for states within the international community, either collectively or individually, to resort to political and economic pressure on the parties to the Dayton Peace Agreement to encourage them to fulfill their obligations. Nevertheless, should such international pressure fail, and it has to date, the individual state obligations described above still remain legally binding obligations. The international community, however, has made no effort to direct NATO, arguably the world's premier coalition force, to search for and arrest a handful of indicted war criminals hiding in the open in the former Yugoslavia. NATO's failure to arrest any of the suspects roaming freely in the former Yugoslavia is not an administrative oversight, "but a reflection of the lack of resolve to bring suspects to justice."<sup>306</sup>

There exists a legal and moral imperative to uphold the rule of

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303. See Diane F. Orentlicher, *Arrest The War Criminals*, WASH. POST, Sept. 24, 1996, at A17.

304. See, e.g., Shawcross, *supra* note 14, at A17; Richard Goldstone, *Serious War Crimes Should Be Dealt With by Permanent International Criminal Court*, UN CHRONICLE, vol. XXXIII, No. 2, 1996, at 35, 35.

305. See Sullivan, *supra* note 229, at A21.

306. *Id.*

law, regardless of the consequences. When the international community fails to support the International Tribunal and allows indicted war criminals to roam free in their home state, the rule of law becomes illusory.<sup>307</sup> In contrast, enforcement of the rule of law does have a deterrent effect. During the spring of 1996, Radovan Karadzic met with a western diplomat who reported that Karadzic was so scared that the IFOR was going to grab him that he was seriously considering turning himself in to the International Tribunal.<sup>308</sup> When addressing the effectiveness of the International Tribunal, the Chief Prosecutor remarked that “[i]f there is no enforcement of international humanitarian law, people are going to ignore it. If any laws are not enforced, you might as well not have them.”<sup>309</sup> Another scholar of international criminal law observed that “a law badly enforced is worse than no law at all.”<sup>310</sup>

If the international community fails to bring to justice those indicted of the heinous crimes committed in the former Yugoslavia, the real cost “may be in giving an impression for the future that such depraved actions are acceptable and will incur no responsibility.”<sup>311</sup> If the international community is willing to embrace such government failure, it “will never achieve a meaningful rule of law or enforce humanitarian principles in settings of armed conflict.”<sup>312</sup> Without enforcement, deterrence and the rule of law will simply fade out as though by the gradual twist of a dimmer switch.

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307. See Shawcross, *supra* note 14, at A17.

308. See Soloway & Hedges, *supra* note 243, at 63.

309. Goldstone, *supra* note 304, at 35.

310. Robert A. Friedlander, *Problems of Enforcing International Criminal Law*, in 3 INTERNATIONAL CRIMINAL LAW: ENFORCEMENT 13, 14 (M. Cherif Bassiouni ed., 1987).

311. MOORE, *supra* note 32, at 303.

312. *Id.* at 306.