


8-1-1994

## Balkan War Crimes Trials: Forum Selection

Matthew I. Kupferberg

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/iclr>

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

---

### Recommended Citation

Matthew I. Kupferberg, *Balkan War Crimes Trials: Forum Selection*, 17 B.C. Int'l & Comp. L. Rev. 375 (1994), <http://lawdigitalcommons.bc.edu/iclr/vol17/iss2/5>

This Notes is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College International and Comparative Law Review by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact [nick.szydowski@bc.edu](mailto:nick.szydowski@bc.edu).

# Balkan War Crimes Trials: Forum Selection

## INTRODUCTION

The present conflict among the former republics of Yugoslavia has led to human rights abuses and war crimes on a scale not seen in Europe since World War II.<sup>1</sup> Long-standing ethnic rivalries and hatreds have contributed to the creation of death camps, the mass execution and torture of civilians and prisoners of war, "ethnic cleansing," and indiscriminate shelling of civilian neighborhoods.<sup>2</sup> In response to these atrocities, the United Nations (U.N.) Security Council voted unanimously to establish an international tribunal to prosecute war crimes perpetrated during more than eighteen months of factional warfare in the former Yugoslavia.<sup>3</sup> On November 17, 1993, the first war crimes tribunal since World War II opened, and eleven judges took oaths that enabled them to indict, try, and sentence suspects for crimes against humanity in Bosnia-Herzegovina, and other former Yugoslav republics.<sup>4</sup>

The prospect of a large-scale war crimes commission raises issues of jurisdiction and forum selection that strike at the heart of international criminal law.<sup>5</sup> This law, fundamentally and necessarily, is based on the principle of the accountability of sovereign states stemming from their international legal obligations.<sup>6</sup> Human rights law confers rights and obligations upon states and human beings.<sup>7</sup>

---

<sup>1</sup> Elaine Sciolino, *Abuses by Serbs the Worst Since Nazi Era, Report Says*, N.Y. TIMES, Jan. 20, 1993, at A8.

<sup>2</sup> See Stephen Engleberger & Chuck Sudetic, *Conflict in the Balkans: In Enemy Hands, A Special Report; Clearer Picture of Bosnia Camps; A Brutal Piece of a Larger Plan*, N.Y. TIMES, Aug. 16, 1992, at A1 [hereinafter *Bosnia Camps*].

<sup>3</sup> Julia Preston, *UN to Set Up Tribunal on Yugoslav War Crimes*, BOSTON GLOBE, Feb. 23, 1993, at 1 [hereinafter *U.N. Tribunal*].

<sup>4</sup> *War-Crimes Tribunal Opens Inquiry on Yugoslav Fighting*, N.Y. TIMES, Nov. 18, 1993 [hereinafter *Tribunal Opens*].

<sup>5</sup> See generally GERHARD O. W. MUELLER AND EDWARD M. WISE, INTERNATIONAL CRIMINAL LAW (1965); OSCAR SCHACTER, INTERNATIONAL LAW IN THEORY AND PRACTICE (1991) [hereinafter *Int'l in Theory*].

<sup>6</sup> LYAL S. SUNGA, INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS 15 (Martinus Nijhoff Publishers, 1992) [hereinafter *INDIVIDUAL RESPONSIBILITY*]. The failure of states to meet their international obligations undermines international criminal law. *Id.*

<sup>7</sup> *Id.* at 16-17.

These rights and freedoms derive from such international instruments as the U.N. Charter and the Universal Declaration of Human Rights, U.N. International Covenants, European Convention on Human Rights, American Convention on Human Rights, African Charter on Human and Peoples' Rights, as well as numerous International Labour Organisation (I.L.O.) conventions which promote and protect certain human rights.<sup>8</sup> The repeated and serious violations of these international norms of behavior by the parties to the Balkan conflict demands a swift and appropriate response from the international community.<sup>9</sup>

This Note discusses the appropriate jurisdictional basis on which war crimes trials might be conducted, and the most suitable forum for such trials. Part I gives a brief overview of the history of the present Balkan conflict, and evidence of alleged criminal acts. Part II examines the basis in international law for the convening of a war crimes tribunal. In addition, Part II discusses the development of the principle of universal jurisdiction and its expanded application in the post-World War II era to war crimes and crimes against humanity. Part III evaluates the different forum prospects for Balkan war crimes. This Note concludes that the most appropriate forum in which to conduct Balkan war crimes trials would be a presently extant judicial body with cultural and political ties to the Balkan region, such as the European Court of Human Rights.

#### I. HISTORY OF THE BALKAN CONFLICT AND ALLEGATIONS OF CRIMINAL MISCONDUCT

The Yugoslav Federation, composed of six republics,<sup>10</sup> was established in 1946 after the defeat of the Axis powers.<sup>11</sup> A communist-controlled central government under President Tito attempted to promote national unity at the expense of regional and ethnic separatism.<sup>12</sup> Following Tito's death in 1980, his successors governed Yugoslavia by means of a collective presidency representing the six individual republics and two autonomous provinces.<sup>13</sup> By the end of 1989, however, a violent uprising in Rumania, the movement of

---

<sup>8</sup> *Id.*; see *infra* note 94 and accompanying text.

<sup>9</sup> See *U.N. Tribunal*, *supra* note 3.

<sup>10</sup> These republics were Serbia, Bosnia-Herzegovina, Slovenia, Croatia, Montenegro, and Macedonia.

<sup>11</sup> FRED SINGLETON, *A SHORT HISTORY OF THE YUGOSLAV PEOPLES* 209 (1985).

<sup>12</sup> *Id.* at 211.

<sup>13</sup> *Id.* at 282.

other East European states toward pluralism, and the deterioration of economic conditions in Yugoslavia prompted a fierce debate on political change in Yugoslavia and a mounting fear of ethnic strife.<sup>14</sup>

In November and December 1990, multi-party elections were held in Bosnia-Herzegovina.<sup>15</sup> After two rounds of voting on November 18 and December 16, political parties representing the various national groups<sup>16</sup> in Bosnia-Herzegovina were elected to parliamentary and governmental positions.<sup>17</sup>

In October 1991, Muslims and Croats in the Bosnian legislature joined forces to adopt a memorandum which, falling short of declaring independence, supported the republic's sovereignty and its neutrality with regard to the war in Croatia.<sup>18</sup> Serbian members of the Bosnian parliament refused to support the measure.<sup>19</sup> Rather, in November 1991, the Serbian Democratic Party, Srpska Demokratska Stranka (S.D.S.), of Bosnia-Herzegovina organized its own referendum on remaining in a common Yugoslav state, in which a substantial number of Serbs participated and voted favorably.<sup>20</sup>

After the elections and the declaration of Bosnian sovereignty, ethnic tensions in parts of Bosnia-Herzegovina increased, mainly due to escalating military activity in neighboring Croatia.<sup>21</sup> On December 20, 1991, the ethnically mixed republic of Bosnia-Herzegovina announced its decision to apply to the European Community for recognition as an independent state.<sup>22</sup> The success of the Bosnian independence referendum on March 2, 1992 resulted in the mobilization of the republic's ethnic militias and the commencement of a brutal war.<sup>23</sup> Bosnian Serb forces, aided by the well-trained and led Serbian regular forces, easily overwhelmed the poorly armed

---

<sup>14</sup> *The Story of Yugoslavia*, N.Y. TIMES, Jan. 23, 1990, at A9.

<sup>15</sup> HELSINKI WATCH, WAR CRIMES IN BOSNIA-HERZEGOVINA 23 (1992) [hereinafter WAR CRIMES].

<sup>16</sup> Bosnia-Herzegovina's total population numbered 4.35 million before the war, of which 43.7% were Slavic Muslims, 31.3% Serbs, and 17.3% Croats. *Id.* at 19.

<sup>17</sup> *Id.* at 23.

<sup>18</sup> U.S. CONGRESSIONAL COMMISSION ON SECURITY AND COOPERATION IN EUROPE, THE REFERENDUM ON INDEPENDENCE IN BOSNIA-HERZEGOVINA: FEBRUARY 29–MARCH 1, 1992 8 (1992), reprinted in WAR CRIMES, *supra* note 15, at 24.

<sup>19</sup> WAR CRIMES, *supra* note 15, at 24.

<sup>20</sup> *Id.*

<sup>21</sup> See *id.* at 24–25.

<sup>22</sup> Chuck Sudetic, *Yugoslav Breakup Gains Momentum*, N.Y. TIMES, Dec. 21, 1991, at A3.

<sup>23</sup> Laura Silber, *Bosnian Referendum Said to Support Independence*, WASH. POST, Mar. 2, 1992, at A18.

Bosnian government troops, and soon large swaths of Bosnian territory came under direct Serbian control.<sup>24</sup>

Throughout the summer and fall of 1992, human rights organizations and the Western press produced reports of atrocities perpetrated against Muslim civilians primarily by Serbian paramilitary forces based in Serbia and Serb dominated areas of Bosnia-Herzegovina.<sup>25</sup> These atrocities included sexual and other abuse of women, the detention of thousands of civilians in prison camps under brutal conditions, the summary and mass execution of thousands of these prisoners, the destruction and looting of property, torture of prisoners, and a concerted and purposeful campaign to redraw the ethnic map of the republic through a policy of "ethnic cleansing."<sup>26</sup>

There have been reports of brutalities committed by all sides in the conflict.<sup>27</sup> A U.S. Senate staff report confirmed these allegations, adding that ethnic cleansing has been carried out with widespread atrocities; random and selective killings are a routine part of the process; and in some villages there were organized massacres of the Muslim population.<sup>28</sup> Both the United States government and the human rights monitoring group, Helsinki Watch, called on the U.N. Human Rights Commission to investigate allegations of genocide

---

<sup>24</sup> *What Has the World Done for Bosnia?: A Diary of Disgrace*, N.Y. TIMES, Dec. 20, 1992, at A12.

<sup>25</sup> See generally WAR CRIMES, *supra* note 15; *War Crimes in the Former Yugoslavia*, 3/39 U.S. DEP'T OF STATE DISPATCH 721, 732 (1992) (Submission of Information to the United Nations Security Council in Accordance With Paragraph 5 of Resolution 771) [hereinafter *First Submission*]; *Supplemental Report on War Crimes in the Former Yugoslavia*, 3/44 U.S. DEP'T OF STATE DISPATCH 793, 802 (1992) (Supplemental United States Submission of Information to The United Nations Security Council in Accordance with Paragraph 5 of Resolution 771 (1992) and Paragraph 1 of Resolution 780 (1992)) [hereinafter *Second Submission*]; *Third Report on War Crimes in the Former Yugoslavia*, 3/46 U.S. DEP'T OF STATE DISPATCH 821, 825 (1992) (Second Supplemental United States Submission of Information to The United Nations Security Council in Accordance with Paragraph 5 of Resolution 771 (1992) and Paragraph 1 of Resolution 780 (1992)) [hereinafter *Third Submission*]; *Fourth Report on War Crimes in the Former Yugoslavia*, 3/52 U.S. DEP'T OF STATE DISPATCH 913, 917 (1992) (Third Supplemental United States Submission of Information to the United Nations Security Council in Accordance with Paragraph 5 of Resolution 771 (1992) and Paragraph 1 of Resolution 780 (1992)) [hereinafter *Fourth Submission*]; Tom Post, *A Pattern of Rape*, NEWSWEEK, Jan. 4, 1993, at 32; Louise Branson, *Stories Reveal the Horrifying Realities of 'Ethnic Cleansing'*, CHI. TRIB., Feb. 8, 1993, at 11.

<sup>26</sup> See *Bosnia Camps*, *supra* note 2, at A1. "Ethnic Cleansing" is the attempt by Serbs to clear Croats and Slavic Muslims out of Serb-held areas by military force. *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> John M. Goshko, *Ethnic Cleansing by Serb Militias Found to Result in Many Deaths*, WASH. POST, Aug. 19, 1992, at 15.

and other human rights abuses in Bosnia and to establish a war crimes tribunal.<sup>29</sup>

In response to these demands and allegations, the U.N. Commission on Human Rights named former Polish prime minister Tadeus Mazowiecki to investigate reported atrocities by the Serb, Croat, and Muslim factions in Bosnia.<sup>30</sup> Mazowiecki's eighteen page report found that massive and grave violations of human rights were occurring throughout the territory of Bosnia-Herzegovina, and it singled out Serb forces as guilty of the worst human rights violations in the Bosnian war.<sup>31</sup> Four U.S. reports which compiled data from a variety of sources corroborated these findings.<sup>32</sup> The reports recounted the killing and torture of thousands of men, women, and children, most of them Muslims, by Serbian irregular forces in Bosnia-Herzegovina.<sup>33</sup>

By November 1992, the Serbian military had achieved almost all of its objectives in Bosnia-Herzegovina.<sup>34</sup> Most of the territory in which the Serbs were a majority before the war had come under Serbian control.<sup>35</sup> This victory has come at a frightful price; the Bosnian Foreign Minister estimates that at least 100,000 people, mostly Muslims, were killed in Serbian attacks between March and November of 1992.<sup>36</sup>

The establishment of a war crimes tribunal is fraught with considerable practical and legal difficulties.<sup>37</sup> Although it establishes the resolve of the world community to bring military victors to judgment for their crimes, the creation of an ad hoc tribunal fails to create or strengthen a permanent judicial institution or body of law which might serve to prosecute international war crimes or violations of human rights in the future.<sup>38</sup>

---

<sup>29</sup> U.S. Seeks U.N. Probe of Atrocities, CHI. TRIB., Aug. 5, 1992, at 1; Trevor Rowe, *Genocide by Serbs Is Alleged; Rights Group Seeks War Crimes Court*, WASH. POST, Aug. 13, 1992, at A20.

<sup>30</sup> Security Council Acts Six More Times on Yugoslav Crisis, 29/4 U.N. CHRON., Dec. 1992, at 22.

<sup>31</sup> U.N. GAOR, 47th Sess., *Human Rights Questions: Human Rights Situations and Reports of Special Rapporteurs and Representatives*, U.N. Doc. A/47/418-S/24516 (1992).

<sup>32</sup> See *First, Second, Third and Fourth Submissions*, *supra* note 25.

<sup>33</sup> *Id.*

<sup>34</sup> H.D.S. Greenway, *Serbs Near Victory, But No Peace Is In Sight*, BOSTON GLOBE, Nov. 14, 1992, at 1.

<sup>35</sup> *Id.*

<sup>36</sup> Craig Whitney, *Bosnian Official Says Serbs Have Killed 100,000*, N.Y. TIMES, Nov. 14, 1992.

<sup>37</sup> See *Tribunal Opens*, *supra* note 4.

<sup>38</sup> See M. Cherif Bassiouni, *Introduction to the History of Establishing an International Criminal Court*, in III INTERNATIONAL CRIMINAL LAW: ENFORCEMENT 181 (1987) [hereinafter ENFORCEMENT].

## II. JURISDICTION AND THE PROSECUTION OF WAR CRIMES AND CRIMES AGAINST HUMANITY

### A. *The Legal Foundation of War Crimes*

Although attempts to regulate the use of force in armed conflicts date from ancient times,<sup>39</sup> the modern period has witnessed several major international agreements which endeavor to regulate various aspects of war.<sup>40</sup> In particular, the Hague Convention No. II of 1899 and the Hague Convention No. IV of 1907 declared that their aim was “. . .to revise the laws and general customs of war. . .for the purpose of modifying their severity as far as possible.”<sup>41</sup>

Article 3 of the 1907 Hague Convention stated that a belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation.<sup>42</sup> The Belligerent party shall be responsible for all acts committed by persons forming part of its armed forces.<sup>43</sup> Article 3 served to codify the customary international law principle that the State is responsible for breach of the laws and customs of war, and States may institute proceedings against suspected offenders.<sup>44</sup> The *si omnes*, or “general participation” clause of article 2, limited the applicability of the Conventions to those conflicts in which all of the parties to the conflict are also parties to the Conventions.<sup>45</sup> Thus, application of these instruments

---

<sup>39</sup> See Sumio Adachi, *The Asian Concept*, in INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW 13–19 (UNESCO ed. 1988) [hereinafter *Humanitarian Law*]; Sultan, *The Islamic Concept*, in HUMANITARIAN LAW 29–39; Partsch, *The Western Concept*, in HUMANITARIAN LAW 59–92. Examples of earlier attempts to regulate conduct in warfare include the ancient Chinese treatise by Sun Tzu entitled *The Art of War*, and Indian customs relating to the practice of war contained in the *Code of Manu*. See also M. Cherif Bassiouni, *Regulation of Armed Conflicts*, in 1 INTERNATIONAL CRIMINAL LAW: CRIMES 201 (M. Cherif Bassiouni ed., 1986) [hereinafter CRIMES].

<sup>40</sup> See *Crimes*, *supra* note 39, at 203. The Hague Conventions of 1899 and 1907 were preceded by the Declaration of Paris of 1856, the Geneva (Red Cross) Convention of 1864, the St. Petersburg Declaration of 1868, and the Declaration of Brussels of 1874. *Id.*

<sup>41</sup> JAMES BROWN SCOTT, THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907, 100 (1918) [hereinafter HAGUE CONVENTIONS].

<sup>42</sup> *Id.* at 103.

<sup>43</sup> *Id.* at 100.

<sup>44</sup> See INDIVIDUAL RESPONSIBILITY, *supra* note 6, at 21. Article 3 subsumed the responsibility of the individual to the State, and it is from the State that compensation might be demanded. *Id.*

<sup>45</sup> Yves Sandoz, *Penal Aspects of International Humanitarian Law*, in CRIMES, *supra* note 39, at 212.

in the course of a war has been rare.<sup>46</sup> Despite these limitations, the Hague Conventions established the legal foundation for the modern rules of war.<sup>47</sup>

During the First World War, allied public opinion demanded the punishment of individuals guilty of war crimes.<sup>48</sup> At the conclusion of the war, the Preliminary Peace Conference of 1919 established a fifteen-member commission (1919 Commission) to determine who were the responsible authors of the war, whether the Central Powers had breached the laws and customs of war, and what was the most suitable means of prosecution and punishment.<sup>49</sup> The 1919 Commission recommended that all enemy officials, regardless of their rank, be held accountable for breaches of the laws of war.<sup>50</sup> Although it would seem equitable that Allied officials also would be held accountable for violations of the laws of armed conflict, articles 228 to 230 of the Versailles Treaty stipulated only that the German Government recognized the right of the Allied Powers to try persons accused of war crimes.<sup>51</sup> Germany was required to extradite its citizens to the Allies for prosecution.<sup>52</sup>

The Versailles Treaty recognized the principle of the first competence of national courts, but also mentioned the idea of a “High

<sup>46</sup> See *id.* The likelihood that a participant in the conflict is not a party to the Hague Conventions is a prospect that may render the Conventions inapplicable. *Id.*

<sup>47</sup> *Id.* Sandoz summarizes these as follows:

- A) The rules to be followed by the belligerents are to be sought not only in treaties, but also in the public conscience, in “international ethics.”
- B) The sole aim of the belligerents must be to weaken the military forces of the enemy.
- C) The choice of means to attain this goal is not unlimited.

*Id.* at 213.

<sup>48</sup> *Id.*

<sup>49</sup> HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 32 (1948) [hereinafter HISTORY OF THE UNWCC].

<sup>50</sup> *Id.* at 38.

<sup>51</sup> Treaty of Peace With Germany, June 28, 1919, 225 CTS 188, UKTS 4 (1919) [hereinafter *Versailles Treaty*].

<sup>52</sup> See *id.* art. 229. Article 229 provides as follows:

Persons guilty of criminal acts against the nationals of one of the allied and Associated Powers will be brought before the military tribunals of that Power.  
Persons guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers will be brought before military tribunals composed of members of the military tribunals of the Powers concerned. . . .

*Id.*



Tribunal” for enemy citizens who committed crimes against citizens of the several allied nations.<sup>53</sup> The German Government never implemented articles 228 to 230 of the Versailles Treaty; rather, it tried all German suspects in its own courts.<sup>54</sup> The Allied Powers, under political pressure from the German public, did not object.<sup>55</sup>

During the period between the two World Wars the international community concentrated on outlawing war.<sup>56</sup> The vague nature of these declarations failed to specify the precise nature of war crimes, or provide any mechanism for enforcement of their provisions.<sup>57</sup> Early in the course of World War II, the Allies deemed it necessary to bring perpetrators of war crimes to justice.<sup>58</sup> The Allied governments convened a non-official body, the London International Assembly (Assembly), to consider further the legal concept of war crimes.<sup>59</sup>

The Assembly created a Commission which recommended the proscription of specific war crimes, rather than a continued reliance on the general definition of war crimes as “violations of the laws of war.”<sup>60</sup> Although the Commission sought a more definitive concep-

<sup>53</sup> CRIMES, *supra* note 39, at 215. The American delegation opposed the idea of an international tribunal, and indeed one was never set up. *Id.*

<sup>54</sup> HISTORY OF THE UNWCC, *supra* note 49, at 48. Nine-hundred and one cases were tried before the Supreme Court of the Reich at Leipzig, resulting in 888 acquittals or summary dismissals and 13 convictions. None of those convicted, however, served their sentences. *Id.*

<sup>55</sup> *Id.* at 52. Commentators surmise that articles 228–30 of the Versailles Treaty were not enforced because:

- 1) the sanctions were applied too late when public opinion no longer upheld them;
- 2) the Allies were no longer united after the war, and the U.S. delegation strongly opposed the creation of an international criminal court;
- 3) the world community was not yet internationally mature to understand the dangers of non-enforcement of the Treaty provisions;
- 4) Articles 228 to 230 were poorly framed, and failed to mention what law would determine penalties and were therefore impossible to carry out.

*Id.*

<sup>56</sup> INDIVIDUAL RESPONSIBILITY, *supra* note 6, at 24. The 44 states which were party to the 1928 International Treaty for the Renunciation of War as an Instrument of National Policy (94 L.N.T.S. 57, 46 Stat. 2343, T.S. No. 796) declared “that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.” This Treaty is also known as the Pact of Paris or Kellogg-Briand Pact. *Id.*

<sup>57</sup> See INDIVIDUAL RESPONSIBILITY, *supra* note 6, at 38.

<sup>58</sup> *Id.* The 1942 Declaration of St. James announced the intentions of the Allied Powers to “see to it in a spirit of international solidarity that (a) those guilty or responsible, whatever their nationality, are sought out, handed over to justice and judged, (b) that the sentences pronounced are carried out.” See HISTORY OF THE UNWCC, *supra* note 49, at 89–92.

<sup>59</sup> See INDIVIDUAL RESPONSIBILITY, *supra* note 6, at 25.

<sup>60</sup> *Id.*

tion of war crimes, it recommended a broader application of laws regulating the conduct of armed conflict.<sup>61</sup> The laws of war not only needed to focus on technical issues such as types of weaponry or tactics, but also needed to address indiscriminate mass arrests for the purpose of terrorizing the population and acts violating family honor and rights, the lives of individuals, religious convictions, and liberty of worship.<sup>62</sup>

A legal committee of the Commission established by the London International Assembly (Legal Committee) found the legal basis for this expanded definition of war crimes in the de Martens Preamble to Hague Convention No. IV of 1907.<sup>63</sup> The Preamble recognized that the definition of war crimes is not limited to the articles of the Hague Convention. Rather, the concept of war crimes is dynamic and subject to change as circumstances may require.<sup>64</sup>

The Allied governments met in London in October 1943 and established the United Nations War Crimes Commission.<sup>65</sup> This Commission was charged with the responsibility of preparing a list of war crimes and methods for all aspects of enforcement.<sup>66</sup> On August 8, 1945, Great Britain, France, the United States, and the Soviet Union signed the London Agreement, which provided that the Allies shall establish, after consultation with the Control Council for Germany, an international military tribunal for the trial of war criminals whose offenses have no particular geographical location.<sup>67</sup> This Agreement was annexed to the Charter of the International Military Tribunal (I.M.T. Charter).<sup>68</sup>

---

<sup>61</sup> *See id.* at 26.

<sup>62</sup> *Id.* at 26.

<sup>63</sup> *Id.*

<sup>64</sup> HAGUE CONVENTIONS, *supra* note 41 at 101–02.

Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the regulations adopted by them, the inhabitants and belligerents remain under the protection and the rule of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

*Id.*

<sup>65</sup> INDIVIDUAL RESPONSIBILITY, *supra* note 6, at 27.

<sup>66</sup> *Id.*

<sup>67</sup> OFFICE OF UNITED STATES CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, NAZI CONSPIRACY AND AGGRESSION 1 (1946). The London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis appears as appendix 1 of the Charter of the International Military Tribunal [hereinafter *I.M.T. Charter*]. *Id.*

<sup>68</sup> *Id.*

The I.M.T. Charter specified that clearing land by extermination of its population, if carried on in occupied territories, or against enemy persons, constitutes a "war crime."<sup>69</sup> This represented the first recognition that individual responsibility for crimes against humanity constituted a valid norm of international law.<sup>70</sup>

The I.M.T. Charter, however, was intended to apply only during World War II;<sup>71</sup> hence the close linkage between "crimes against humanity," "war crimes," and "crimes against peace."<sup>72</sup> The post-war international community, however, took positive steps to enshrine the principles enunciated in the I.M.T. Charter.<sup>73</sup> The Resolutions adopted by the United Nations General Assembly recognized the London Agreement of August 8, 1945 as being in harmony with the prevailing historical conception of international criminal law, affirmed that the enforcement of these legal norms was appropriate in

---

<sup>69</sup> *I.M.T. Charter*, *supra* note 67, art. 6. Article 6 of the I.M.T. Charter provides:

The following acts or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

- a) CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for any of the foregoing;
- b) WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

*Id.*

<sup>70</sup> INDIVIDUAL RESPONSIBILITY, *supra* note 6, at 47.

<sup>71</sup> *Id.*

<sup>72</sup> See *I.M.T. Charter*, *supra* note 67, art. 6.

<sup>73</sup> See Remigiusz Bierzaniek, *War Crimes: History and Definition*, in ENFORCEMENT, *supra* note 38, at 44-48. The United Nations General Assembly Resolution 3/I of February 13, 1946 sought to implement the aims of the Nuremburg Charter by urging Member States to continue to arrest and to extradite war criminals for prosecution to the State where they were alleged to have committed the offense; the United Nations General Assembly adopted Resolution 95/I on December 11, 1946, affirming "the principles of international law recognized by the Charter of the Nuremburg Tribunal and the Judgement of the Tribunal." The Resolution also instituted codification of the Nuremburg principles. *Id.*

the circumstances, and directed the International Law Commission (ILC) to prepare a draft code of offenses against the peace and security of mankind in accordance with the I.M.T. Charter principles.<sup>74</sup> In 1954, the ILC adopted the Draft Code at its Sixth Session.<sup>75</sup>

The Draft Code enumerated thirteen criminal acts, notably concerned with aggression or other forms of illegal intervention, genocide, other inhuman acts, acts in violation of the laws and customs of war, and inchoate offenses to commit the former.<sup>76</sup> The General Assembly could not by these resolutions create a legally binding body of international criminal law because the United Nations Charter does not grant it such powers.<sup>77</sup> Indeed, further work on the Draft Code was stymied by the failure to define “aggression,” as well as the need to establish an international criminal jurisdiction.<sup>78</sup> Twenty years later, in 1974, the United Nations General Assembly broke the stalemate when it adopted, by consensus, a definition of “aggression.”<sup>79</sup> The work of the Commission resumed in 1981,<sup>80</sup> when its members considered not only the I.M.T. Charter principles, but also considered the applicability of the Draft Code to states as well as individuals, the creation of a “General Part,”<sup>81</sup> and the expansion of the scope of offenses covered to include threats to global interests that have emerged in the past several decades.<sup>82</sup>

---

<sup>74</sup> See G.A. Res. 174 (II), U.N. Doc. A/519, at 105–10 (1947); G.A. Res. 177 (II), U.N. Doc. A/CN.4/4, at 9 (1947).

<sup>75</sup> 9 U.N. GAOR, Supp. No. 9, at 11, U.N. Doc. A/2693 (1954).

<sup>76</sup> See generally M.C. BASSIOUNI, *INTERNATIONAL CRIMINAL LAW: A DRAFT INTERNATIONAL CRIMINAL CODE* (1980) [hereinafter *DRAFT CODE*].

<sup>77</sup> Hans-Heinrich Jescheck, *The Development and Actual Significance of the International Criminal Law Recognized by the Charter for the International Military Tribunal in Nuremberg in 1945* [hereinafter *Development of ICL*], in *CRIMES*, *supra* note 39, at 84.

<sup>78</sup> Sharon A. Williams, *The Draft Code of Offenses Against Peace and Security of Mankind*, in *CRIMES*, *supra* note 39, at 111.

<sup>79</sup> G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31 at 143, U.N. Doc. A/9631 (1974). The General Assembly adopted the following definition of aggression: “Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. . . .” *Id.*

<sup>80</sup> G.A. Res. 36/106, U.N. GAOR, 36th Sess., Supp. No. 51 at 239, U.N. Doc. A/36/51 (1981).

<sup>81</sup> A “General Part” of a penal code would be an essential prerequisite for any trial before an international tribunal. It would contain provisions of a general nature applicable to all crimes, such as those respecting jurisdiction, temporal applicability of the Code, bases of criminal liability, inchoate crimes, self-defense, defense of another, necessity, immunity, punishments, and statutes of limitations.

<sup>82</sup> Daniel H. Derby, *A Framework for International Criminal Law*, in *CRIMES*, *supra* note 39, at 48.

The United Nations General Assembly also passed a resolution declaring genocide to be an international crime and instructed the Economic and Social Council to draft a convention outlawing genocide.<sup>83</sup> The Council prepared the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).<sup>84</sup> Subsequently, the General Assembly adopted the Convention, and it entered into force on July 12, 1951.<sup>85</sup> While the Geneva Conventions address certain grave breaches committed during armed conflict and occupation, genocide may be "committed in time of peace or in time of war."<sup>86</sup> The Genocide Convention defines genocide as the commission of particular acts "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group."<sup>87</sup>

Outside the auspices of the United Nations, the Geneva Conventions of 1949<sup>88</sup> and the 1977 Additional Protocols<sup>89</sup> represent a willingness on the part of the international community to undertake obligations in pursuit of a common goal: the amelioration of unnecessary suffering caused by war.<sup>90</sup> The Conventions established a

<sup>83</sup> G.A. Res. 96, U.N. GAOR, 2nd Sess., U.N. Doc. A/64 Add.1, at 188 (1946).

<sup>84</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

<sup>85</sup> G.A. Res. 260, U.N. GAOR, 3rd. Sess., U.N. Doc. A/180, at 174 (1948). The United States ratified the treaty on 25 Nov. 1988.

<sup>86</sup> See Genocide Convention, *supra* note 84, art. 1, 78 U.N.T.S. at 277.

<sup>87</sup> See *id.* art. 2. The particular acts defined in article 2 are as follows:

- (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.

*Id.*

<sup>88</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31, 6 U.S.T. 3114, T.I.A.S. No. 3362 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85, 6 U.S.T. 3217, T.I.A.S. No. 3363 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135, 6 U.S.T. 3316, T.I.A.S. No. 3364 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516, T.I.A.S. No. 3365 [hereinafter Geneva Convention IV].

<sup>89</sup> Protocol I Additional to the Geneva Conventions of 12 Aug. 1949, *opened for signature* 12 Dec. 1977, U.N. Doc. A/32/144 Annex I; Protocol II Additional to the Geneva Conventions of 12 Aug. 1949, *opened for signature* at Berne, 12 Dec. 1977, U.N. Doc. A/32/144 Annex II [hereinafter 1977 Protocol].

<sup>90</sup> See INDIVIDUAL RESPONSIBILITY, *supra* note 6, at 53. Article 89 of the 1977 Protocol provides that "in situations of serious violations of the Conventions or of this Protocol, the

system of grave breaches which envisaged prosecution and punishment of individuals who commit serious human rights violations.<sup>91</sup> The Conventions do not contain any specific elements of criminal offences; they merely impose on the contracting Parties the obligation to punish certain “grave breaches” outlined in the Conventions.<sup>92</sup> Nevertheless, the delineation of this punishable conduct is much more precise than that provided in the London Charter of 1945.<sup>93</sup>

Since World War II, the harmonization of the international administration of justice has been regulated on a treaty basis within the framework of communities of states enjoying close ties.<sup>94</sup> For example, the European Convention on Human Rights established the European Court of Human Rights, and recognized the right of the individual to bring cases involving the contravention of personal human rights before the Court.<sup>95</sup> The European Convention recognizes that articles 2–14 of the European Convention guarantee the

---

High Contracting Parties undertake to act jointly or individually, in cooperation with the United Nations and in conformity with the United Nations Charter.” 1977 Protocol, *supra* note 89, art. 89.

<sup>91</sup> See INDIVIDUAL RESPONSIBILITY, *supra* note 6, at 53.

<sup>92</sup> See, e.g., Geneva Convention I, *supra* note 88, art. 49, at 3146, T.I.A.S. No. 3362, at 34, 75 U.N.T.S. at 62. The Conventions consider the following breaches to be grave, if they have been committed against persons protected by the Conventions:

- All Conventions: willful killing;
- All Conventions: torture or any inhuman treatment, including biological experiments;
- All Conventions: wilfully causing great suffering or serious injury to body or health;
- Conventions I, II and IV: extensive destruction or appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- Conventions III and IV: compelling a protected person to serve in the forces of a hostile power;
- Conventions III and IV: willfully depriving a protected person of the rights of fair and regular trial prescribed in the Conventions;
- Convention IV: unlawful deportation or transfer of civilians;
- Convention IV: the taking of hostages.

See, e.g., Geneva Convention I, *supra* note 88, art. 50, at 3146, T.I.A.S. No. 3362, at 34, 75 U.N.T.S. at 62.

<sup>93</sup> *Development of ICL*, *supra* note 77, at 87–88.

<sup>94</sup> See, e.g., American Convention on Human Rights, *entered into force* July 18, 1978, O.A.S. Treaty Series No. 36, at 1, O.E.A./Ser. A:16, (English) *reprinted in* S. Exec. Doc. No. F, 95th Cong., 2nd Sess. (1978); Decision on Human and People’s Rights in Africa, Organization of African Unity, Assembly of Heads of State and Government (July 17–20, 1979), *reprinted in* 34 U.N. GAOR, Annex (Agenda Item 23) 92, U.N. Doc. A/34/552 (1979).

<sup>95</sup> Convention for the Protection of Human Rights and Fundamental Freedoms *opened for signature* Nov. 4, 1950, *entered into force* Sept. 3, 1953, Europe T.S. No. 5, 213 U.N.T.S. 221, *reprinted in* Council of Europe European Convention on Human Rights Collected Texts 101 (11th ed. 1976) [hereinafter European Convention].

right to life, liberty, and security of person, and prohibit the use of torture or other inhuman or degrading treatment or punishment.<sup>96</sup>

The decades following the conclusion of World War II have witnessed the continuing efforts of the world community to enshrine in international law the legal principles recognized in the Nuremberg Charter.<sup>97</sup> The efforts of the United Nations and other regional and international committees and organizations to reify these legal principles clearly expresses the emergence of certain well-recognized norms of international behavior.<sup>98</sup> The atrocities in the Balkan conflict challenge the growing consensus of the international community that such conduct is not only reprehensible, but also illegal.<sup>99</sup> The challenge before the global community is to enforce these legal norms through the exercise of appropriate jurisdiction.<sup>100</sup>

### B. *Universal Jurisdiction*

Traditionally, the jurisdiction of a State extends to the limits of its sovereignty and may not encroach upon the sovereignty of other states.<sup>101</sup> The principle of universal jurisdiction, however, provides every state with jurisdiction over a limited category of offenses generally recognized as of universal concern, regardless of the situs of the offense and the nationalities of the offender and the offended.<sup>102</sup> The ability of states to prosecute cases involving foreign offenders, foreign victims, or extraterritorial acts guarantees the enforcement of international law and, in particular, the Geneva Conventions.<sup>103</sup> The principles of state sovereignty may therefore clash with the enforcement of international law.<sup>104</sup>

Under international principles, domestic jurisdiction rests on reconciling a state's interest in a particular offense with other states' interests in that same offense.<sup>105</sup> The prosecuting state usually ex-

---

<sup>96</sup> *Id.* arts. 2-14.

<sup>97</sup> See *supra* note 73 and accompanying text.

<sup>98</sup> See generally INDIVIDUAL RESPONSIBILITY, *supra* note 6.

<sup>99</sup> See *supra* note 29 and accompanying text.

<sup>100</sup> See *U.N. Tribunal*, *supra* note 3.

<sup>101</sup> See INDIVIDUAL RESPONSIBILITY, *supra* note 6, at 100.

<sup>102</sup> See *Int'l in Theory*, *supra* note 5, at 262.

<sup>103</sup> See Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 816-17 (1988) [hereinafter *Universal Jurisdiction*].

<sup>104</sup> See Robert A. Friedlander, *Problems of Enforcing International Criminal Law*, in ENFORCEMENT, *supra* note 38, at 13.

<sup>105</sup> L. HENKIN ET AL., INTERNATIONAL LAW 823 (1987) Basically, "[t]he nature and significance of the interests of a state in exercising jurisdiction depend on the relation of the

presses its interest according to jurisdictional bases or principles that have applied primarily in criminal contexts.<sup>106</sup> These principles include the territorial principle, when an offense occurs in the prosecuting state's territory; the nationality principle, when the offender is a national of the state; the passive personality principle, when the victim is a national of the state; and the protective principle, when an extraterritorial act threatens the state's security or a basic governmental principle.<sup>107</sup> Even when these principles support a state's authority over an offense, however, other considerations may counsel against exercising jurisdiction.<sup>108</sup>

The historical connection between piracy and universal jurisdiction provides a useful model of the relationship between jurisdiction and international law, in particular because of the parallels between Balkan war crimes and acts of piracy.<sup>109</sup> Piracy is the oldest offense that invokes universal jurisdiction.<sup>110</sup> Even before international law, in the modern sense of the term, was in existence, a pirate already was considered an outlaw, a '*hostis humani generis*.'<sup>111</sup> Every state has long had legislative, adjudicatory, and enforcement jurisdiction over all piratical acts on the high seas, even when neither the pirates nor their victims are nationals of the prosecuting state, and the offense has no specific connection to the prosecuting state.<sup>112</sup> Modern courts still accept the idea that every nation's power to punish any act of piracy committed on the high seas is an exception to the nexus requirement,<sup>113</sup> which is an essential element for international law's other jurisdictional principles.<sup>114</sup>

The most compelling rationale for not limiting jurisdiction over pirates to their state of nationality lies in the fundamental nature of piratical offenses.<sup>115</sup> Piracy may comprise particularly heinous and

---

transaction, occurrence, or event, and of the person to be affected, to the state's proper concerns." *Id.*

<sup>106</sup> *Universal Jurisdiction*, *supra* note 103, at 786–87.

<sup>107</sup> *Id.* at 787–88.

<sup>108</sup> *Id.* at 788.

<sup>109</sup> *See id.* at 791.

<sup>110</sup> *Id.*

<sup>111</sup> L. OPPENHEIM, 1 INTERNATIONAL LAW 609 (8th ed. 1955). Pirates were considered *hostis humani generis*—the enemy of mankind—and subject to universal jurisdiction at least as early as the seventeenth century. *See* Dickinson, *Is the Crime of Piracy Obsolete?*, 38 HARV. L. REV. 334, 335–39 (1925).

<sup>112</sup> *Universal Jurisdiction*, *supra* note 103, at 791.

<sup>113</sup> *United States v. McRary*, 665 F.2d 674, 678 n.8 (5th Cir.), *cert. denied*, 456 U.S. 1011 (1982).

<sup>114</sup> *Universal Jurisdiction*, *supra* note 103, at 791.

<sup>115</sup> INDIVIDUAL RESPONSIBILITY, *supra* note 6, at 103.



wicked acts of violence or depredation, often committed indiscriminately against the vessels and nations of numerous states.<sup>116</sup> Piratical attacks disrupt commerce and navigation on the high seas.<sup>117</sup> Such lawlessness was especially harmful to the world at a time when intercourse among nations occurred primarily by way of the high seas, thus making piracy a concern of all states.<sup>118</sup> Allowing any state to capture and punish pirates, who could quickly flee across the seas, was basically a matter of sea-policing.<sup>119</sup> Under the most convincing rationale, then, piracy's fundamental nature and consequences explain why it has been subject to universal jurisdiction.<sup>120</sup>

The concept of universal jurisdiction evolved in the nineteenth century to include the offense of slave trading.<sup>121</sup> Great Britain initiated several treaties<sup>122</sup> which permitted the parties' naval vessels to search, detain, or send in for trial suspected merchant vessels belonging to the contracting states.<sup>123</sup> Each treaty described particular methods by which a party's naval vessels could detain a vessel flying another party's flag and, if necessary, arrest its crew.<sup>124</sup> The treaties also established means of prosecuting and punishing the captured slave traders.<sup>125</sup> Some treaties, for example, created "mixed tribunals," in which the slave traders were prosecuted in courts

---

<sup>116</sup> *Id.*

<sup>117</sup> *Universal Jurisdiction*, *supra* note 103, at 794–95.

<sup>118</sup> *Id.* at 795. As recognized by Justice Story, pirates are the enemies of all people and are punishable by every state because of the threatening acts they commit: "A pirate is deemed, and properly deemed, *hostis humani generis*. But why is he so deemed? Because he commits hostilities upon the subjects and property of any or all nations without any regard to right or duty. . . ." *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 232 (1844).

<sup>119</sup> *Universal Jurisdiction*, *supra* note 103, at 795.

<sup>120</sup> *Id.* Prof. Dickinson concludes:

So heinous is the offense [of piracy], so difficult are such offenders to apprehend, and so universal is the interest in their prompt arrest and punishment, that they have long been regarded as outlaws and the enemies of all mankind. They are international criminals. It follows that they may be arrested by the authorized agents of any state and taken in for trial anywhere. The jurisdiction is universal.

Dickinson, *supra* note 111, at 338.

<sup>121</sup> *Universal Jurisdiction*, *supra* note 103, at 799.

<sup>122</sup> See M. HUDSON, *CASES AND OTHER MATERIALS ON INTERNATIONAL LAW* 367 (3d. ed. 1951). Promoted chiefly by Great Britain, "[i]nternational co-operation for the suppression of the African slave trade was one of the most significant developments of the nineteenth century." *Id.*

<sup>123</sup> *Universal Jurisdiction*, *supra* note 103, at 799.

<sup>124</sup> *Id.*; see, e.g., Treaty for the Suppression of the African Slave Trade, Dec. 20, 1841, 92 Parry's T.S. 437, 441; Treaty for the Suppression of the African Slave Trade, Apr. 7, 1862, U.S.-Gr. Brit., 12 Stat. 1225, 1225–26, T.S. No. 126 [hereinafter *Suppression Treaty II*].

<sup>125</sup> *Universal Jurisdiction*, *supra* note 103, at 799.

jointly created and administered by the parties to the treaties.<sup>126</sup> Other treaties bound each party to employ all the means at its disposal for putting an end to the slave trade and to punish those who engaged in it.<sup>127</sup> Acting under such authority, British naval vessels seized slave traders on the high seas during the nineteenth century and punished them as if they were pirates.<sup>128</sup>

These treaties seem to recognize enforcement, legislative, and adjudicatory jurisdiction under the universality principle.<sup>129</sup> Because of the offense's heinous nature, the parties agreed to establish a common or universal jurisdiction over slave traders on the high seas.<sup>130</sup> Although slave trading, in contrast to piracy, did not threaten interstate commerce or navigation, some states viewed it as an act especially worthy of condemnation and international response.<sup>131</sup> As with piracy under customary law, the British-initiated treaties represented an early consensus among certain states that jurisdiction over slave traders was permissible, even in the absence of any direct connection between the capturing state and the slave trading.<sup>132</sup> Under treaty law, therefore, the parties could bring the slave-trading citizens of other parties to justice.<sup>133</sup>

Following the Second World War, universal jurisdiction reached offenses other than piracy and slave trading.<sup>134</sup> This expansion of

---

<sup>126</sup> *Id.* at 800; *see, e.g.*, Suppression Treaty II, *supra* note 124, art. 4. Most of the treaties creating mixed tribunals are no longer in force. *See* Draft Restatement, Sec. 522, reporter's note 3. These tribunals are analogous to the international military tribunals created after World War II, which partly based their jurisdiction over war criminals on the universality principle. *Id.*

<sup>127</sup> *See, e.g.*, General Act of the Conference of Berlin, Feb. 26, 1885, art. 9, 3 AM. J. INT'L L., SUPP. 7-25 (1909), *reprinted in* 3 UNPERFECTED TREATIES OF THE UNITED STATES OF AMERICA, 1776-1976 71, 78-79 (1977).

<sup>128</sup> *Int'l in Theory*, *supra* note 5, at 262.

<sup>129</sup> *See* M. McDUGAL ET. AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER 484-90 (1980) (noting that nations agreed to suppress slave trade by allowing searches on high seas, seizure of ships carrying slaves, and adjudication before a centralized tribunal); Bassiouni & Nanda, *Slavery and Slave Trade: Steps Towards Its Eradication*, 12 SANTA CLARA L. REV. 424, 426-27 (1972) (noting that the treaties signed to eliminate slavery specifically allowed for the search and seizure of ships thought to be transporting slaves and sometimes provided for adjudicatory machinery to decide such cases).

On the other hand, the treaties may be no more than jurisdictional agreements among the parties, made without reference to the universality principle. *See Int'l in Theory*, *supra* note 5, at 263.

<sup>130</sup> *Universal Jurisdiction*, *supra* note 103, at 800.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

the universality principle began in the post-war trials of individuals who committed various wartime offenses, including war crimes and crimes against humanity.<sup>135</sup> The parallels between piracy—the archetypal universal crime—and the Axis’ offenses are significant.<sup>136</sup> Prior to the Second World War, no specific precedent existed for subjecting war crimes and crimes against humanity to the universality principle.<sup>137</sup> Like piracy, the Axis’ offenses involved “violent and predatory action” which descended to the level of bestiality.<sup>138</sup> One commentator opined that since universality principles apply to piracy, they must *a fortiori* apply to the more serious crimes committed by the Axis powers.<sup>139</sup> The Axis’ offenses, like piracy, thus became crimes of international concern.<sup>140</sup>

The International Military Tribunal<sup>141</sup> (I.M.T.) asserted that the Allies had proper jurisdiction to define and punish war crimes, and that the exercise of this jurisdiction was not an arbitrary abuse of power on the part of the victorious nations.<sup>142</sup> The I.M.T. judgment, however, contains only one vague reference to the principal of universal jurisdiction.<sup>143</sup> If each party to the Charter can exercise such jurisdiction individually, they can agree to set up an international tribunal to exercise the jurisdiction jointly.<sup>144</sup> This indicates a limitation to the jurisdiction of the Tribunal, namely that each state as party to the international tribunal must also be able to exercise jurisdiction separately.<sup>145</sup>

---

<sup>135</sup> *Universal Jurisdiction*, *supra* note 103, at 803.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> Quincy Wright, *War Criminals*, 39 AM. J. INT’L L. 257, 283 (1945).

<sup>139</sup> J. E.S. Fawcett, *The Eichmann Case*, 38 BRIT. Y.B. INT’L L. 181, 204 (1962).

<sup>140</sup> *See* Wright, *supra* note 138, at 280.

<sup>141</sup> *See generally* T. TAYLOR, NUREMBERG TRIALS—WAR CRIMES AND INT’L LAW 241. The International Military Tribunal (I.M.T.), which tried the “major” German war criminals at Nuremberg, was created and administered jointly by the United States, Great Britain, France, and the Soviet Union. The Allies established the I.M.T. through the London Agreement, to which they annexed the Charter of the International Military Tribunal (I.M.T. Charter). *Id.*

<sup>142</sup> *International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT’L L. 172, 216 (1947) [hereinafter *I.M.T. Judgment*]. The entire proceedings of the I.M.T. may be found in a 25 volume compilation, THE TRIAL OF MAJOR GERMAN WAR CRIMINALS (1946–1951).

<sup>143</sup> *I.M.T. Judgment*, *supra* note 142, at 216. The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right to set up special courts to administer law. *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> Quincy Wright, *The Law of the Nuremberg Trial*, in INT’L LAW 239, 251 (G.O.W. Mueller & Edward M. Wise ed. 1965) [hereinafter *Law of Nuremberg*].

Israel's trial of Nazi war criminal Adolph Eichmann raised the issue of whether a state may punish individuals for crimes committed outside its boundaries.<sup>146</sup> On May 11, 1960, Israeli "volunteers" captured Eichmann in Argentina.<sup>147</sup> He was then abducted from Argentina and brought to Israel,<sup>148</sup> where he was charged with "crimes against humanity" and "crimes against the Jewish people"<sup>149</sup> under the Nazis and Nazi Collaborators (Punishment) Law.<sup>150</sup> During World War II, Eichmann was chiefly responsible for planning and supervising the extermination of six million Jews in many European countries.<sup>151</sup>

Under the ordinary theories of criminal jurisdiction, Israel would not have had the right to try Eichmann because he did not commit his crimes in Israel, he was not an Israeli citizen, his victims were not Israeli citizens, and Israel was not a sovereign state at the time the crimes were committed.<sup>152</sup> The Jerusalem District Court instead relied on the universality principle by way of an analogy to piracy.<sup>153</sup> The Court noted that crimes whose harmful and murderous effects were so embracing and widespread as to shake the international community were subject to universal jurisdiction.<sup>154</sup> International law, observed the Court, has no international court capable of prosecuting the crimes of which Eichmann was accused. Therefore, it relies on the legislative and judicial organs of states to give effect to international criminal law by prosecuting and punishing criminals.<sup>155</sup> The Court ruled that the jurisdiction to try crimes under international law is universal.<sup>156</sup>

Various post-war Conventions have addressed specifically the jurisdiction of states to define and punish offenses with which the prosecuting state has no direct connection.<sup>157</sup> In particular, the four

---

<sup>146</sup> A. Munkman, 36 INT'L. L. REP. 10 (1968).

<sup>147</sup> Attorney-General of the Gov't of Israel v. Adolph Eichmann, 36 INT'L L. REP. 5, 5 (1962) [hereinafter Eichmann].

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 7.

<sup>150</sup> *Id.*

<sup>151</sup> *See id.* at 79-226.

<sup>152</sup> INDIVIDUAL RESPONSIBILITY, *supra* note 6, at 108.

<sup>153</sup> Eichmann, *supra* note 147, at 298-300.

<sup>154</sup> *See id.* at 304.

<sup>155</sup> *See id.* at 300.

<sup>156</sup> *See id.* at 301.

<sup>157</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, adopted by G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51 at 97, U.N. Doc. A/Res/39/46 (1985), reprinted in 38 UNITED NATIONS Y.B. 813-19 (1985); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation,

Geneva Conventions of 1949 concern offenses that invoke universal jurisdiction under customary practice.<sup>158</sup> The Geneva Conventions provide that each party is under an obligation to search for persons alleged to have committed, or ordered to be committed, grave breaches, and bring such persons, regardless of their nationality, before its own courts.<sup>159</sup> Alternatively, a party may hand over such offenders to another party.<sup>160</sup> The parties also agreed to enact legislation necessary to provide effective domestic penal sanctions for grave breaches of the four conventions.<sup>161</sup> Hence, every party has legislative, adjudicatory, and enforcement jurisdiction over grave breaches of the Geneva Conventions, even if it has no connection to, and is not engaged in, the armed conflict or occupation during which the offense occurs.<sup>162</sup>

### III. ANALYSIS

Commentators have suggested three possible venues for Balkan war crimes trials: the national courts of Bosnia or other Balkan

---

Sept. 23, 1971, 24 U.S.T. 565, T.I.A.S. No. 7570, 974 U.N.T.S. 177 (entered into force Jan. 26, 1973), *reprinted in* 10 I.L.M. 1151 (1971); Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105 (entered into force Oct. 14, 1971), *reprinted in* 10 I.L.M. 133 (1971). All of these Conventions contain the following provision:

The State Party in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offense was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that state.

*See, e.g.*, Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, art. 7.

<sup>158</sup> *See supra* note 88 and accompanying text.

<sup>159</sup> Geneva Convention I, *supra* note 88, art. 49, at 3146, T.I.A.S. No. 3362, at 34, 75 U.N.T.S. at 62; Geneva Convention II, *supra* note 88, art. 50, at 3250, T.I.A.S. No. 3363, at 34, 75 U.N.T.S. at 116; Geneva Convention III, *supra* note 88, art. 129, at 3418, T.I.A.S. No. 3364, at 104, 75 U.N.T.S. at 236; Geneva Convention IV, *supra* note 88, art. 146, at 3616, T.I.A.S. No. 3365, at 102, 75 U.N.T.S. at 386.

<sup>160</sup> *Geneva Convention I, supra* note 88, art. 49, at 3146, T.I.A.S. No. 3362, at 34, 75 U.N.T.S. at 62; Geneva Convention II, *supra* note 88, art. 50, at 3250, T.I.A.S. No. 3363, at 34, 75 U.N.T.S. at 116; Geneva Convention III, *supra* note 88, art. 129, at 3418, T.I.A.S. No. 3364, at 104, 75 U.N.T.S. at 236; Geneva Convention IV, *supra* note 88, art. 146, at 3616, T.I.A.S. No. 3365, at 102, 75 U.N.T.S. at 386.

<sup>161</sup> *Geneva Convention I, supra* note 88, art. 49, at 3146, T.I.A.S. No. 3362, at 34, 75 U.N.T.S. at 62; Geneva Convention II, *supra* note 88, art. 50, at 3250, T.I.A.S. No. 3363, at 34, 75 U.N.T.S. at 116; Geneva Convention III, *supra* note 88, art. 129, at 3418, T.I.A.S. No. 3364, at 104, 75 U.N.T.S. at 236; Geneva Convention IV, *supra* note 88, art. 146, at 3616, T.I.A.S. No. 3365, at 102, 75 U.N.T.S. at 386.

<sup>162</sup> *Universal Jurisdiction, supra* note 103, at 818.

states; an *ad hoc* international tribunal; or a proposed new International Criminal Court.<sup>163</sup> The U.N. Security Council decided to pursue the second alternative.<sup>164</sup> A fourth possible alternative, however, is the creation of permanent and regional Courts of International Criminal Law.<sup>165</sup> The last alternative would obviate many of the jurisdictional problems associated with the prosecution of war crimes and crimes against humanity, and reduce some of the practical difficulties associated with such cases.<sup>166</sup> The European Court of Human Rights might serve as the model for such a court.<sup>167</sup>

#### A. *Balkan National Criminal Courts*

The prospect of war crimes trials held in one or several of the former Republics of Yugoslavia at first appears to be a very attractive prospect. Jurisdiction presumably could be based on any one of a number of theories.<sup>168</sup> In addition, domestic criminal law is almost always more developed and more sophisticated than the rudimentary norms of criminal responsibility in international law.<sup>169</sup> Moreover, domestic courts have the powerful instrumentalities of the state at their disposal to enforce penal sanctions.<sup>170</sup>

The issue here thus would not be whether a valid ground for exercising jurisdiction could be found, but whether Bosnia, for example, is the proper venue for a war crimes trial involving Serbian militiamen or Serb-dominated federal troops, or, in the alternative, whether Serbia could bring its own citizens to justice in Serbian courts. The history of the Leipzig Trials<sup>171</sup> suggests that national courts face tremendous internal political opposition when they attempt to bring to justice, under the edict of a foreign power or powers, members of their own military for war crimes.<sup>172</sup> It is unlikely

---

<sup>163</sup> Paul Lewis, *U.N. Backs Inquiry in the Balkans to Discover Possible War Crimes*, N.Y. TIMES, Oct. 7, 1992, at A6.

<sup>164</sup> *U.N. Tribunal*, *supra* note 3.

<sup>165</sup> G. O. W. Mueller and Douglas J. Besharov, *Evolution and Enforcement of International Criminal Law*, in CRIMES, *supra* note 39, at 79 [hereinafter *Evolution*].

<sup>166</sup> *See supra* Part III.D.

<sup>167</sup> *See id.*

<sup>168</sup> *See supra* note 107 and accompanying text. A Bosnian court could, for example, use the territorial principle to invoke personal jurisdiction (jurisdiction *ratione personae*) over individuals who have committed offenses wholly within its border. This would obviate the need to appeal to the more tenuous basis of jurisdiction, universal jurisdiction.

<sup>169</sup> INDIVIDUAL RESPONSIBILITY, *supra* note 6, at 115.

<sup>170</sup> *Id.*

<sup>171</sup> *See supra* note 54 and accompanying text.

<sup>172</sup> *See supra* note 55 and accompanying text.

that such a trial could take place in Serbia, given the deep nationalist feelings the Balkan conflict has engendered.<sup>173</sup> It is also doubtful whether Serbian offenders could receive a fair trial in neighboring Croatia or Bosnia. It is likely that such trials would be tainted by the appearance of "victor's justice," a charge which accompanied the Nuremberg trials.<sup>174</sup>

To obviate some of the above concerns, the Balkan states conceivably could establish a multilateral war crimes tribunal, with both justices and counsel participating from all of the parties to the conflict. Such a trial would administer the same justice to Serbian, Croatian, and Bosnian Muslim defendants, and the proceedings could be conducted under the principles outlined in the 1949 Geneva Conventions.<sup>175</sup> Due to the fact that the participants in the conflict have evidenced such a high degree of hatred of one another, however, it seems fanciful to contemplate cooperation in the prosecution of their own and each other's war criminals.

#### B. *Ad Hoc International Tribunal*

The unanimous vote of the U.N. Security Council to establish an *ad hoc* international tribunal to prosecute Balkan war criminals has evoked comparisons with the I.M.T.<sup>176</sup> Some jurisdictions have held that the I.M.T. established a precedent for the extension of the notion of universal jurisdiction and the establishment of some sort of international tribunal to prosecute Balkan war criminals.<sup>177</sup> There are, however, serious problems with extension of the I.M.T. principles to the atrocities taking place in the former Yugoslavia.

The experience of the I.M.T. does not provide support for the establishment of an *ad hoc* international tribunal.<sup>178</sup> The Nuremberg Tribunal was international in the sense that it was the creation of more than one State, it was not part of the judicial system of any one state, and it applied international, rather than national law.<sup>179</sup> None of the Judges represented any defeated State, however, or even a neutral State.<sup>180</sup> Thus, the Tribunal was not truly international in

---

<sup>173</sup> See generally, WAR CRIMES, *supra* note 15.

<sup>174</sup> See *Law of Nuremberg*, *supra* note 145, at 247-57.

<sup>175</sup> See *supra* note 158 and accompanying text.

<sup>176</sup> See *U.N. Tribunal*, *supra* note 3, at 1.

<sup>177</sup> See *Eichmann*, *supra* note 147, at 41.

<sup>178</sup> See *INDIVIDUAL RESPONSIBILITY*, *supra* note 6, at 32.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

character.<sup>181</sup> As the Tribunal itself held, the signatories of the London Agreement, by creating the I.M.T., did what any one of them might have done singly.<sup>182</sup> If the composition and trial proceedings of Nuremberg had been less partial, and if the trial had been conducted by a number of representatives from both victors and defeated alike, perhaps the Nuremberg judgment would stand today as stronger authority for the convention of an international tribunal.<sup>183</sup> It is also significant that not one Allied soldier or commander faced the I.M.T. to answer for the indiscriminate bombing of Dresden, Hiroshima, Nagasaki, or other civilian targets in Axis territory.<sup>184</sup>

Aside from the substantive defects in the composition and procedure of the Nuremberg Tribunal, there are purely formal reasons why the judgment of the I.M.T. cannot constitute a precedent in international law.<sup>185</sup> A true precedent has binding force, which means that a general legal rule established by the precedent binds the tribunal in adjudicating later similar cases.<sup>186</sup> Yet the I.M.T. was not a permanent court and no other international court with permanent criminal jurisdiction has been created to decide later similar cases.<sup>187</sup>

If an international tribunal did convene for the purpose of trying Balkan war criminals, it still would be difficult to find the grounds for its jurisdiction in the I.M.T.<sup>188</sup> The I.M.T. judgment contains only one vague reference to universal jurisdiction.<sup>189</sup> A stronger support for the invocation of universal jurisdiction by the proposed *ad hoc* international tribunal may be found in the post-war multilateral

---

<sup>181</sup> *Id.* at 33.

<sup>182</sup> See *supra* note 146 and accompanying text.

<sup>183</sup> See INDIVIDUAL RESPONSIBILITY, *supra* note 6, at 32.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 33.

<sup>186</sup> Hans Kelsen, *Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?*, 1 INT'L L. Q. 2, 153-71 (Summer 1947).

<sup>187</sup> *I.M.T. Charter*, *supra* note 67, art. 6. The Charter of the International Military Tribunal limited the jurisdiction of the tribunal to the trial and punishment of major war criminals of the European Axis countries. See *id.*

<sup>188</sup> See INDIVIDUAL RESPONSIBILITY, *supra* note 6, at 115.

<sup>189</sup> See *supra* note 143 and accompanying text. The prosecuting states had no need to raise the universality principle if they had a specific connection with an offense. Obviously, a state formerly occupied by Germany could rely upon the territoriality principle to prosecute Germans for offenses committed within that state. The jurisdiction of the I.M.T. could also be derived from the victorious Allies' assumption of whatever jurisdiction Germany would have had over the specific offenses.



conventions, particularly the Geneva Conventions.<sup>190</sup> The Geneva Conventions may be interpreted as recognizing or declaring universal jurisdiction over the offense at issue because each treaty confers domestic jurisdiction over extraterritorial offenses regardless of the actors' nationalities.<sup>191</sup>

Alternatively, the widespread acceptance of a multilateral treaty such as the Geneva Conventions indicates that the world community recognizes that universal jurisdiction exists for the violation of the grave breaches in question.<sup>192</sup> The United Nations, the legal embodiment of the international community, therefore would have the authority to exercise jurisdiction over any and all of the Yugoslav successor states. The legitimacy of any challenge to universal jurisdiction on the grounds that the parties to the conflict do not consider themselves bound by the Conventions<sup>193</sup> must be weighed against the policy of upholding fundamental norms of international behavior against an objecting state's unilateral rejection of such a norm.<sup>194</sup>

Another factor which mitigates against the creation of an *ad hoc* international tribunal is the lack of a criminal code.<sup>195</sup> Presumably, the proposed tribunal would look for grave breaches of the 1949 Geneva Conventions, and also would turn to the United Nations Commission on Genocide and violations of principles of international law recognized in the I.M.T. Charter.<sup>196</sup> It can be argued, however, that the system of grave breaches of international norms lacks the requisite specificity needed to distinguish those acts which are truly crimes against humanity from those which fall short of the accepted definition.<sup>197</sup> The large-scale organized rape of civilians, for example, is not identified explicitly as a war crime, although it may be covered by language prohibiting torture or inhumane treatment.<sup>198</sup>

---

<sup>190</sup> See *Universal Jurisdiction*, *supra* note 103, at 819.

<sup>191</sup> *Id.*

<sup>192</sup> See INDIVIDUAL RESPONSIBILITY, *supra* note 6, at 164-65.

<sup>193</sup> M.J. BOWMAN, MULTILATERAL TREATIES—INDEX AND CURRENT STATUS 146 (1984). Yugoslavia signed the Geneva Conventions on August 29, 1950.

<sup>194</sup> Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L. L. J. 457, 481 (1985).

<sup>195</sup> INDIVIDUAL RESPONSIBILITY, *supra* note 6, at 119.

<sup>196</sup> See Lewis, *supra* note 163, at A6.

<sup>197</sup> Roy Gutman, *War Crime Unit Hasn't a Clue; UN Setup Seems Designed to Fail*, NEWSDAY, Mar. 4, 1993, at 8 [hereinafter *Clue*].

<sup>198</sup> See, e.g., Geneva Convention IV, *supra* note 88, art. 27, at 3516, T.I.A.S. No. 3365, 75 U.N.T.S. at 287.

There are also political and practical difficulties with the proposed international tribunal. It is difficult to reconcile the fact that the United Nations is conducting peace negotiations with alleged war criminals, while simultaneously it is preparing to prosecute those individuals.<sup>199</sup> Critics claim that the U.N.-created Commission of Experts, which was charged with the responsibility of conducting a formal probe into the reports of death camps and ethnic cleansing, has failed to make a serious effort to prepare for war crimes trials.<sup>200</sup> The former chairperson of the panel, retired Dutch academic Frits Kalshoven, says he has received instructions from the U.N. Legal Office not to pursue Serbian politicians such as Slobodan Milosevic, the president of Serbia, and Radovan Karadzic, the leader of the Bosnian Serbs.<sup>201</sup> These allegations suggest that the U.N. is faced with a serious conflict of interest: the prosecution of war criminals with whom it is also committed to peace negotiations.

### C. *International Criminal Court*

The establishment of an international criminal court has been the goal of many scholars for a long period of time.<sup>202</sup> In the instant case, such a court presumably would be set up in the near future, and offenders would be brought before it for the timely dispensation of justice. Most efforts in that direction, however, have resulted in such *ad hoc* international tribunals as Nuremberg and Tokyo.<sup>203</sup> National prosecutions for international crimes such as the Leipzig trials and national trials for violations of laws of war did not contribute a great deal to the development of an international criminal court.<sup>204</sup>

Efforts of the United Nations which produced the 1953 Draft Statute for an International Criminal Court have been held in abeyance pending the formulation of an international criminal code which to date is embodied in the Draft Code of Offenses against the

---

<sup>199</sup> Elaine Sciolino, *U.S. Names Figures to be Prosecuted Over War Crimes*, N.Y. TIMES, Dec. 17, 1992, at A1. Secretary of State Eagleburger named Radovan Karadzic, leader of the self-proclaimed Serbian Republic of Bosnia-Herzegovina. Karadzic is a frequent visitor to the United Nations, where he is a leading figure in the on-going peace negotiations.

<sup>200</sup> See *Clue*, *supra* note 197, at 8.

<sup>201</sup> *Id.*

<sup>202</sup> M. Cherif Bassiouni, *The Prosecution of International Crimes and the Establishment of an International Criminal Court*, in ENFORCEMENT, *supra* note 38, at 9 [hereinafter *Prosecution and Establishment*].

<sup>203</sup> *Id.*

<sup>204</sup> See INDIVIDUAL RESPONSIBILITY, *supra* note 6, at 115.

Peace and Security of Mankind of 1954.<sup>205</sup> States are not likely to support the creation of an international criminal court where the crimes over which it has jurisdiction are not narrowly or well-defined because enforcement could limit the sovereignty of the State in unpredictable ways.<sup>206</sup> Numerous private non-governmental organizations have developed drafts, but none have been acted upon.<sup>207</sup>

One of the essential problems with the creation of an international criminal court is that it would have jurisdiction over a variety of crimes, some of which contain a high ideological and political content (e.g., "Aggression"), and over others involving significant economic interests (e.g., "Bribery of Foreign Public Officials" and "Environmental Protection").<sup>208</sup> The diversity of international crimes and their various levels of receptivity in the countries of the world makes it difficult to have a single International Criminal Court adjudicate cases involving heads of states and organizations and common drug traffickers.<sup>209</sup> Due to the continued opposition of states to the creation of an International Criminal Court,<sup>210</sup> and the need for a prompt trial of alleged war criminals,<sup>211</sup> this court would not be the best arrangement.

#### D. *Regional Criminal Courts of Justice*

Perhaps the most appropriate way to bring Balkan war criminals to justice is to use established regional courts of criminal justice.<sup>212</sup> The European Court of Human Rights, a well established court with an impressive body of case law to draw upon,<sup>213</sup> might be the most appropriate forum for Balkan war crimes trials. While the Court could face a serious jurisdictional challenge, it has certain practical advantages which might obviate such a difficulty.

The most serious legal difficulty would be to establish the jurisdiction of the Court. Article 66 of the European Convention<sup>214</sup> declares that its aims are limited to members of the Council of Europe, and

---

<sup>205</sup> See *Prosecution and Establishment*, *supra* note 202, at 9.

<sup>206</sup> See Gehard O.W. Mueller, *Four Decades After Nuremberg: The Prospect of an International Criminal Code*, 2 CONN. J. INT'L. L. 499, 504-05 (1987).

<sup>207</sup> ENFORCEMENT, *supra* note 38, at 185.

<sup>208</sup> *Prosecution and Establishment*, *supra* note 202, at 10.

<sup>209</sup> *Id.*

<sup>210</sup> *Evolution*, *supra* note 165, at 80.

<sup>211</sup> See *U.N. Tribunal*, *supra* note 3.

<sup>212</sup> *Evolution*, *supra* note 165, at 79.

<sup>213</sup> MARK W. JANIS & RICHARD S. KAY, *EUROPEAN HUMAN RIGHTS LAW* 93-94 (1990).

<sup>214</sup> EUR. CONV. ON H.R., COLLECTED TEXTS (1987).

neither the former Yugoslavia, nor the nations formed in its wake, are participants in this body. According to article 44 of the Convention, only the Contracting Parties or the Commission have the right to refer a case to the Court.<sup>215</sup> It is conceivable that the Court could assert jurisdiction over Balkan war criminals if requested to do so by a Contracting Party.<sup>216</sup> Jurisdiction then could be afforded under the principle of universality.<sup>217</sup> Just as in the case with piracy, the global concern with certain particularly heinous offenses permits the world community, and its constituent member states and associations, to define and punish those offenses.<sup>218</sup> Like piracy and slave trading, the Balkan atrocities threaten the legitimate interests of all nations and the established world order.<sup>219</sup> As the Jerusalem District Court noted in the case of Adolph Eichmann, the lack of an international criminal court makes it all the more incumbent upon existing judicial bodies to prosecute individuals whose misdeeds are on such a scale and magnitude that they represent crimes against humanity itself.<sup>220</sup>

The European Court, unlike the proposed *ad hoc* international tribunal, has developed an impressive body of human rights case law.<sup>221</sup> Although the Court is not bound by its previous decisions, such decisions are a repository of legal experience which embody what the Court in the past has considered to be good law and reflective of the legal and ideological outlook of the Court.<sup>222</sup> As such, the use of judicial precedent provides both the defense and the prosecution with the stability and certainty which is the essence of the orderly administration of justice.<sup>223</sup> Another strength of the European Court is that the European Convention has established procedural guidelines,<sup>224</sup> which the Court has had extensive experience developing and implementing.<sup>225</sup>

---

<sup>215</sup> EUR. CONV. ON H.R., art. 44.

<sup>216</sup> EUR. CONV. ON H.R., art. 48.

<sup>217</sup> "An international crime is presumably subject to [the] universal jurisdiction of all states." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, § 404.

<sup>218</sup> See also *supra* note 120 and accompanying text.

<sup>219</sup> See generally *U.N. Tribunal*, *supra* note 3.

<sup>220</sup> See Eichmann, *supra* note 147, at 300.

<sup>221</sup> See J. G. MERRILLS, THE DEVELOPMENT OF INT'L LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS 16 (1988) [hereinafter EUROPEAN DEVELOPMENT].

<sup>222</sup> *Id.* at 13.

<sup>223</sup> See *id.* at 13.

<sup>224</sup> EUR. CONV. ON H.R., *Title II Procedure, Ch. 1—General Rules*.

<sup>225</sup> EUROPEAN DEVELOPMENT, *supra* note 221, at 17.

An *ad hoc* international tribunal most likely would prosecute war criminals under the system of grave breaches established by the 1949 Geneva Conventions.<sup>226</sup> In contrast with the highly developed scheme of international human rights law found in the European Convention, the system of grave breaches is vague.<sup>227</sup> The enforcement scheme envisioned by the Geneva Conventions merely obligates states to cooperate with other states, upon request, in the investigations of alleged violations of the Convention; if a violation is established, the parties are required to end and repress the violation with the least possible delay.<sup>228</sup> The Court also has the option of turning to the penal codes of member states to defendants, or it may, under article 50 of the European Convention, mete out just compensation to the injured party.<sup>229</sup>

### CONCLUSION

The *ad hoc* international tribunal proposed by the United Nations Security Council is an inadequate response to the atrocities which currently are being perpetrated in the Balkan conflict. The functioning of the tribunal is being stymied by political and legal considerations. The tribunal faces the enormous and time-consuming task of selecting a legally-competent and politically feasible judiciary; establishing procedural rules; and developing a feasible enforcement scheme. It is also unlikely that the United Nations will be able to successfully broker a peace plan which includes war crimes trials for the chief negotiators of each side.

In the case of the present Balkan conflict, the warring parties might find it more attractive to hand over their nationals for prosecution to a European Court, due to the influence and proximity of their European neighbors, whose help they will need desperately if they wish to rebuild their shattered nations. The fact that such a system is already in place makes it more preferable to waiting for the convening of another temporary *ad hoc* international tribunal along the lines of I.M.T. The maturity of international criminal law

---

<sup>226</sup> See Lewis, *supra* note 163.

<sup>227</sup> EUROPEAN DEVELOPMENT, *supra* note 221, at 17.

<sup>228</sup> Geneva Convention I, *supra* note 88, art. 52, 3146, T.I.A.S. No. 3362, at 34, 75 U.N.T.S. at 62; Geneva Convention II, *supra* note 88, art. 53, at 3250, T.I.A.S. No. 3363, at 34, 75 U.N.T.S. at 116; Geneva Convention III, *supra* note 88, art. 132, at 3418, T.I.A.S. No. 3364, at 104, 75 U.N.T.S. at 236; Geneva Convention IV, *supra* note 88, art. 149, at 3616, T.I.A.S. No. 3365, at 102, 75 U.N.T.S. at 386.

<sup>229</sup> EUR. CONV. ON H.R., *supra* note 214, art. 50.

since the Nuremberg era demands that the international community turn away from a cumbersome enforcement model based on *ad hoc* tribunals, and instead move toward the development of a system of permanent regional courts of international criminal law with universal jurisdiction over international crimes. The resulting expansion and prestige of the European Court of Human Rights could establish a valuable precedent not only for Europe, but would spur the development of other regionally-based systems of human rights enforcement.

*Matthew I. Kupferberg*