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An Analysis of the United Nations International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia: Parallels, Problems, Prospects

MARK A. BLAND*

“You cannot qualify war in harsher terms than I will. War is cruelty, and you cannot refine it.”
William Tecumseh Sherman

I. INTRODUCTION

Wartime atrocities against humankind have existed for millennia and are a regrettable, yet attendant, component of any war. Certain acts of war have always provoked outrage, although only recently has indignation at such acts been expressed by uninvolved third parties. Enforcement by sovereign States of the laws and customs of war has similarly existed for many years, yet prosecuting the offenders has often been less than successful. As Theodor Meron notes, “except in the case of a total defeat or subjugation—for example, Germany after World War II—prosecutions of enemy personnel accused of war crimes have been both rare and difficult.” Indeed, the “Allied International Military Tribunal (IMT) established at Nuremberg in 1945 would appear to be a true anomaly: no similar international war crimes tribunal preceded it and none has followed. However, the past inability of the world community to establish a permanent international criminal court that would, among other duties, prosecute those who violate the laws of war, should not discourage the United Nations from

* J.D. Candidate, 1995, Indiana University School of Law, Bloomington; B.A. with High Honors, 1991, Michigan State University.
4. Id. at 124-25.
charging and attempting to prosecute those individuals responsible for the
appalling atrocities being committed in the former Yugoslavia. In a
laudable move, the Security Council on February 22, 1993, resolved to
create an international tribunal to prosecute the Yugoslav offenders;\(^5\) it
subsequently adopted the Statute of the International Tribunal on May 25,
1993.\(^6\) Unfortunately, almost six months passed before the Tribunal
convened its first session in The Hague on November 17, 1993. Further, the
session was primarily ceremonial and no actual business was conducted.\(^7\)
Indeed, the fact that the Tribunal’s first formal substantive session was
scheduled for April 24, 1994,\(^8\) almost one year after it was established,
seems to validate the beliefs of those who view the static Tribunal as a
wholly ceremonial body designed to appease the conscience of an
international community whose initial moral outrage at the atrocities has
gradually deteriorated into apathy and resigned acceptance.

Yet, should the Tribunal ever begin to deliberate in earnest, it will first
need to surmount a variety of hurdles not faced by its predecessor at
Nuremberg. The Tribunal’s triers of fact are neither the victorious nations
nor do they represent victims of wartime atrocities in the former Yugoslavia.
Thus, they have no personal, vested interest in bringing the accused to trial.
Securing the defendants will be a much more difficult (if not impossible)
task than it was for the Allies after World War II. Obtaining probative
evidence will be a race against the ability of the violators to destroy
incriminating documents. Petty politicking and world disinterest may
eviscerate the potential mandate of the Tribunal, while the United Nations’
need to negotiate a peace settlement with the offenders themselves may very
well destroy any remaining incentive for the Tribunal to begin work in
earnest.

This Note contrasts and compares the nascent United Nations
International Tribunal to Adjudicate War Crimes Committed in the Former
Yugoslavia with the International Military Tribunal established by the Allies
at Nuremberg in 1945. What are the parallels between the two tribunals?

\(^7\) Jeffrey Bleich, We Must Not Let Ourselves Forget Bosnian War Crimes, L.A. DAILY J.,
\(^8\) Kriegsverbrecher-Tribunal in Den Haag: USA wollen Zeugenaussagen vorlegen; UNO-
Botschafterin Albright: Unaussprechliche Grausamkeiten, Süddeutsche Zeitung, Jan. 18, 1994, available
in LEXIS, World Library, SDZ File [hereinafter Kriegsverbrecher-Tribunal].
Did both confront similar hurdles at their inception? Or did the creation of each tribunal give rise to respectively unique problems? How much of a substantive legal basis does the Nuremberg experience provide for the United Nations International Tribunal? Finally, what are the prospects for the current United Nations International Tribunal? Part II briefly examines the events that led to the drafting of the London Charter, which created the Allied International Military Tribunal, and then gives a general overview of the Yugoslav conflict and of the U.N. action that created the current Tribunal. Part III discusses the essence of the principles that evolved from the Nuremberg trial, the problems inherent in the process, and the impact of the Tribunal’s actions. Part IV first outlines the jurisdictional bases of the U.N. International Tribunal and then examines the hurdles the Tribunal must overcome in order to ensure its effectiveness and legitimacy within the world community. Part V concludes by examining the current status of the United Nations International Tribunal and argues that the moral obligations advanced in favor of pursuing the Tribunal’s mandate outweigh the ominous ramifications of doing nothing at all.

II. THE ESTABLISHMENT OF THE TRIBUNALS

A. Overview

The events that led to the creation of the International Military Tribunal at Nuremburg (IMT) and the United Nations International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia were markedly different. The IMT arose in the aftermath of a horrific world war where both the Allies and Axis committed atrocities but where only the victors (the Allies) prosecuted the vanquished (the Axis). The newly-created United Nations had neither the resources nor the immediate worldwide support necessary to establish a war crimes tribunal. Thus, the victorious Allies were a natural choice to mete out some form of punishment.

In contrast, the current situation in the former Yugoslavia is a self-contained war where the eventual "victor" (if, indeed, there is one) would probably be the United Nations and not the Serbs or Bosnian Serbs, Croats, or Muslims. The United Nations now has clear legal authority to prosecute war criminals under its own charter, the 1948 Genocide Convention, the four Geneva Conventions of 1949 and subsequent Additional Protocols I and II of 1977, and the 1984 Torture Convention, among others. Furthermore, no
other international organization has the influence or experience of the United Nations. Thus, it is not surprising that the United Nations was the preeminent force behind the establishment of an international tribunal to try violators of the laws and customs of war in the former Yugoslavia.

B. The International Military Tribunal at Nuremberg

By late 1942, the Allied powers had begun to notice the various acts of cruelty and barbarism that the Nazis were carrying out against Jews, Gypsies, Jehovah’s Witnesses, and homosexuals. On October 30, 1943, American President Franklin Roosevelt, British Prime Minister Winston Churchill, and Soviet Premier Joseph Stalin signed the Moscow Declaration, in which the Allies formally resolved to prosecute war criminals. However, there was no one common design for the punishment of the defeated Nazis: the British and the Americans initially preferred summary execution while the French and Soviets were inclined to support the idea of a trial. Eventually, the United States altered its stance and, in a memo dated April 30, 1945, argued that an execution-style judgment would be a crass political act that might transform the Nazis into martyrs and provide a platform for those intent on revitalizing national socialism. An international trial “would provide an historical record, would help develop international standards of legal conduct, and would serve as a deterrent to future leaders contemplating similar actions.”

By the summer of 1945, the Allied powers’ disagreements over punishment had been reconciled and representatives of the United States, the Soviet Union, France, and Great Britain met in London to formulate the principles under which a trial of the major Nazi war criminals would be

12. Lippman, supra note 11, at 20.
15. Id. at 21.
conducted. On August 8, 1945, the United States, France, Great Britain, and the Soviet Union signed the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers. This so-called "London Agreement" constituted two parts: the Agreement itself, and the Charter of the Tribunal. The Agreement advocated establishing an international military tribunal for the trial of war criminals whose offenses had no specific geographical location, while the Charter, which was annexed to the Agreement, set out the constitution, jurisdiction, and functions of the envisioned tribunal. Provision was made for other Member States of the United Nations to adhere to the Agreement, and by the Nuremberg judgment date of October 1, 1946, nineteen such States had done so.

The Allies agreed that the Tribunal would consist of four members, each with an alternate; one member and one alternate were to be appointed by each of the Agreement signatories. Decisions were to be by majority vote, conviction would require at least three affirmative votes, and the Tribunal was to be in session for a one-year period. Article VI of the Charter set out the three categories of crimes for which the accused Nazis would be tried: 1) Crimes Against Peace—planning, initiating, and waging wars of aggression, or in violation of treaties, or the conspiracy to do so; 2) War Crimes—violations of the laws and customs of war with an emphasis on ill-treatment of prisoners of war and civilians in occupied countries; and 3) Crimes Against Humanity—the murder of civilians based on religious, political, or racial grounds. In addition to enumerating the categories of crimes for which the accused Nazi leaders would be tried, the Allies also specified in the Charter that 1) the principal leaders of state were not exempt from prosecution; 2) obedience to superior

17. Harris, supra note 9, at 242-43.
18. Yugoslavia was one of the States. The others were Greece, Denmark, the Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxembourg, Haiti, New Zealand, India, Venezuela, Uruguay, and Paraguay. INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS, I at 9 (1947), reprinted in Whitney R. Harris, Justice Jackson at Nuremberg, 20 INT’L LAW. 867, 876 n.20 (1986).
19. Harris, supra note 9, at 243.
20. WELLS, supra note 2, at 99.
21. Harris, supra note 18, at 877.
22. WELLS, supra note 2, at 99.
23. Id. at 99-100.
orders would not be a viable excuse, though in extenuating circumstances it might mitigate a sentence;24 3) accomplices were responsible for all acts performed by any person in the course of a common plan or conspiracy to commit a specific crime;25 and 4) the Tribunal had the authority to declare that a group or organization to which an accused belonged was a criminal organization.26 Further, the Tribunal was required to state the bases for its findings of guilt and innocence,27 and was accorded the right to impose any punishment it deemed just, including execution.28 The seat of the Tribunal was established at Berlin,29 and Nuremberg was chosen as the place of trial because of the availability of the Palace of Justice and its adjoining prison in the suburb of Furth.30 The stage was set for the first day of trial, November 20, 1945.31

C. The United Nations International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia

The summer of 1991 was a volatile one for the former Yugoslavia. Croatia and Slovenia declared independence on June 2532 and a sporadic civil war began in Croatia between the majority Croats and the Serb minority, who had the backing of the Serb-dominated Yugoslav Federal Army. The political disputes between the federal Yugoslav government and the governments of the individual republics that led to the secession of Croatia and Slovenia also affected the republic of Bosnia-Herzegovina. This Republic was a centrally-located region composed of 4.35 million people, 43.7% of whom were Slavic Muslims, 31.3% Serbs, and 17.3% Croats.33 The Serb-dominated Yugoslav Federal Army, fearful of losing additional

24. Id. at 100.
25. Harris, supra note 9, at 243.
28. Id. art. 27.
29. Harris, supra note 9, at 243.
30. Harris, supra note 18, at 878.
31. Harris, supra note 9, at 244.
territory to breakaway republics, especially crucial air base facilities and arms production centers located in Bosnia-Herzegovina, increased its support to the Bosnian Serbs, who began to take a hard-line approach in their negotiations with secession-minded groups in Bosnia.\(^{34}\)

On October 15, 1991, the republic of Bosnia-Herzegovina proclaimed its sovereignty and initiated the process to secede from what remained of Yugoslavia.\(^{35}\) Pressure from all sides immediately began to mount upon the Bosnian government. The European Community required that Bosnia hold an independence referendum before it would recognize Bosnia as a sovereign State. The Bosnian Serbs, knowing they had the support of the Yugoslav Federal Army, were ready to resort to arms to prevent the republic from seceding.\(^{36}\) Serbia, for its part, instituted an economic blockade against Bosnia-Herzegovina in an effort to coerce the region to remain in the now Serb-dominated Yugoslavia.\(^{37}\) Nonetheless, the Bosnian government proceeded with the independence referendum on March 1, 1992. The Bosnian Serbs boycotted the vote,\(^{38}\) limiting the total turnout to only sixty-three percent of Bosnia's total population. The ninety-nine percent majority of voters in favor of independence was, therefore, not at all representative.\(^{39}\) The European Community formally recognized Bosnia-Herzegovina as a sovereign State on April 6, 1992, effectively providing the Serbs with a pretext to begin a full-scale assault against the fledgling republic.\(^{40}\)

By the summer of 1992, the situation in Bosnia had deteriorated to such a degree that, on July 29, Muhamed Sacirbey, Ambassador and Permanent Representative of Bosnia and Herzegovina, sent a letter to the United Nations Security Council requesting its intervention.\(^{41}\) Shortly thereafter,

\(^{34}\) Id. at 3.
\(^{36}\) Pajić, supra note 33, at 3.
\(^{38}\) Pajić, supra note 33, at 3.
\(^{39}\) Webb, supra note 35, at 378.
\(^{40}\) Pajić, supra note 33, at 4.
the Security Council passed Resolution 771, paragraph five of which called upon States and international humanitarian organizations to make available to the Council any substantiated information in their possession or submitted to them relating to the commission of human rights violations in the former Yugoslavia.\textsuperscript{42} The United Nations Commission on Human Rights decided to appoint a Special Rapporteur, Tadeusz Mazowiecki, the former Prime Minister of Poland, to investigate violations of humanitarian law in the former Yugoslavia (particularly in Bosnia-Herzegovina) and to provide a preliminary report to the Secretary-General by August 28, 1992.\textsuperscript{43} His report reached the obvious conclusion that most of former Yugoslavia, especially Bosnia, was the "scene of massive and systematic violations of human rights, as well as serious grave violations of humanitarian law," and that harassment, discrimination, torture, and violence against the Muslim population were commonplace.\textsuperscript{44}

The Security Council acted again in early October 1992, adopting Resolution 780. It requested that the Secretary-General create an impartial commission of experts to examine and analyze information collected in accordance with Resolution 771, together with additional information obtained through their own investigations. The experts were to provide the Secretary-General with their conclusions on the human rights situation in the former Yugoslavia.\textsuperscript{45} Pursuant to Resolution 780, Secretary-General Boutros-Ghali appointed a five-member commission later that month.\textsuperscript{46}

After repeatedly demanding that the warring parties in the former Yugoslavia refrain from violating international humanitarian law and the established customs and laws of war, the Security Council, on February 22, 1993, resolved to create an international tribunal to prosecute the offenders. Additionally, it requested that the Secretary-General formulate a proposal to carry out this resolution.\textsuperscript{47} Some three months later, on May 25, 1993, after having approved the Secretary-General's report, the Security Council adopted the Statute of the International Tribunal. Its purpose was to

\textsuperscript{46} Pearl, \textit{supra} note 37, at 1376.
prosecute those individuals responsible for serious violations of international humanitarian law committed in the former Yugoslavia from January 1, 1991, until the eventual restoration of peace.\textsuperscript{48}

Unfortunately, the expectation that the Tribunal would convene shortly after its creation, quickly establish rules of procedure and evidence, and issue detailed indictments against known violators of human rights in the former Yugoslavia, has never materialized into a reality. Politicking,\textsuperscript{49} lack of funds and personnel, and the world community’s increasing resigned acceptance of the rape camps, the forced sodomy and castration, and the calculated ethnic cleansing of Muslims, have all allowed the Tribunal to delay taking active steps to bring the war criminals to justice.\textsuperscript{50}

The apparent apathy of the international community to the situation in the former Yugoslavia has given the Tribunal an unclear mandate to function as anything more than a ceremonial body. It was only in September 1993 that eleven judges were elected by the General Assembly to serve four-year terms expiring November 17, 1997.\textsuperscript{51} After a formal opening ceremony in The Hague on November 17, 1993, the Tribunal adjourned. It has since been working on its rules of procedure and evidence,\textsuperscript{52} and is scheduled to hold its first formal, substantive session on April 24, 1994.\textsuperscript{53} The delay has increased because the Tribunal’s ability to issue the necessary detailed indictments for violators of human rights in the former Yugoslavia has been undermined by the recent resignation of the U.N.-appointed prosecutor for the Tribunal.\textsuperscript{54} A war crimes tribunal unable to issue indictments and secure defendants is like a cobra in a glass cage:

\begin{footnotes}
\item[50] Bleich, supra note 7, at 6.
\item[52] Id.
\item[53] Kriegsverbrecher-Tribunal, supra note 8.
\end{footnotes}
potentially threatening but inevitably harmless. Indeed, even if the Tribunal should overcome these procedural hurdles, it still must confront other, more formidable, substantive obstacles. Many questions are raised: What charges will be filed against the defendants? What substantive law provides a valid basis for the Tribunal’s authority? How does one procure evidence before it disappears forever? How does one ensure a fair and impartial trial? What defenses should be allowed?

In 1945, the International Military Tribunal at Nuremberg confronted these same questions. However, the IMT, because of its unique, precedent-setting nature, was in the unenviable position of having to start from scratch in all respects. The United Nations International Tribunal on the former Yugoslavia is in no such position because the Allies at Nuremberg have already set the stage. The legal authority for a war crimes tribunal, an issue that implicated the very validity of the process and results at Nuremberg, now has a firm grounding in the U.N. Charter itself, the codified Nuremberg Principles, the Genocide Convention of 1948, the four Geneva Conventions of 1949 and Additional Protocols I and II of 1977, the Torture Convention of 1984, and other international law codifications adopted since 1945. The nature of the defined crimes has expanded from “Crimes Against Peace,” “War Crimes,” and “Crimes Against Humanity” to include “grave breaches” of certain fundamentals of international humanitarian law. Additionally, the problem of ex post facto application of laws at the Nuremberg trial is no longer an issue since the laws under which any future Yugoslav defendants would be prosecuted were already in existence when such potential defendants committed their crimes.

III. THE SUBSTANCE OF NUREMBERG

A. The Nuremberg Principles

The Nuremberg trial of major Nazi leaders was innovative for its time. Despite various criticisms that questioned the legal validity and credibility of the process at Nuremberg, the trial before the IMT and the numerous later trials conducted by the American, British, and French in their respective occupied zones, definitively established individual responsibility

55. See discussion infra part B.
for war crimes, crimes against peace, and crimes against humanity. The Nuremberg trials made clear that even the highest State official would be liable for the systematic commission of gross violations of human rights. This return to fundamental principles of international law was a complete rejection of "the extreme positivist assertion that the State, supreme within its own sphere, sovereign and equal to other States in international law, shields its officials from international sanction by virtue of State privileges and immunities." In late 1946, the United Nations General Assembly adopted Resolution 95(I), which approved and codified the principles of the Charter and Judgment of the IMT at Nuremberg. The first Nuremberg Principle stated that any individual who commits an act that constitutes a crime under international law is personally responsible for the act and is subject to severe penal sanction. The fundamental rule underlying Principle I is that "international law may impose duties on individuals directly without interposition of internal law." An individual who has committed an international crime that is punishable under international law is liable for his act, regardless of the provisions of internal law—this principle is credited with having established the "supremacy" of international law over national law. The Tribunal also ruled that individuals are accountable for crimes committed by them as heads of State or as responsible government officials. Under Principle III, the fact that a person acted in this capacity while committing a gross violation of human rights does not relieve him

57. Id. at 48.
59. Harris, supra note 9, at 248.
61. Id. at 222.
62. Id.
63. Harris, supra note 9, at 249.
from international responsibility. Indeed, the Tribunal explicitly rejected the concept that wars are fought by States, which alone must answer for their consequences, and instead held that leaders who plan and wage aggressive war or direct others to commit crimes must answer personally for their actions.64

Principle IV stated that “the fact that a person acted pursuant to an order of his Government or of a superior does not free him from responsibility under international law. It may, however, be considered in mitigation of punishment, if justice so requires.”65 The idea is that “superior’s orders” is not a defense, provided that a moral choice was possible at the time the crime was committed.

Finally, Principle V addressed the issue of fairness and impartiality during a trial conducted for gross violations of international humanitarian law. Individuals charged with war crimes should not be dealt with summarily, but rather should have a fair trial during which they are presumed innocent until evidence establishes guilt beyond a reasonable doubt. This principle lessens the likelihood that petty revenge will supplant justice.66

B. The Legacy of Nuremberg

The Nuremberg Principles have had a profound impact on international criminal jurisprudence. Not only have the principles established by Nuremberg been incorporated into many domestic legal systems,67 but they have also influenced the Charter of the United Nations68 and the meaning and legal status of many of the norms69 found in the 1948 Genocide Convention,70 the four 1949 Geneva Conventions and their 1977 Additional

64. Id.
65. ILC Rep. on the Formulation of Nürnberg Principles, supra note 60, reprinted in SUNGA, supra note 56, at 49 n.71.
66. Harris, supra note 9, at 249.
67. SUNGA, supra note 56, at 49.
68. The United Nations was created primarily by the United States, the Soviet Union, Great Britain, and France, the same actors who drafted the Nuremberg Charter. Both charters are directly derived from the Moscow Declaration of October 30, 1943, and it is thus not surprising that several of the principles contained in the Nuremberg Charter are also evident in the United Nations Charter. Fogelson, supra note 10, at 871.
69. SUNGA, supra note 56, at 50.
Protocols I and II,\textsuperscript{71} and the 1984 United Nations Convention Against Torture.\textsuperscript{72} The norms apparent in these and other multilateral human rights treaties adopted since Nuremberg are evidence that the majority of nations recognize the significance of the Nuremberg Principles in contemporary international law.\textsuperscript{73}

The Nuremberg Charter by itself, however, is neither a true precedent in international law nor very strong authority for the principle of individual responsibility for war crimes.\textsuperscript{74} Although the IMT at Nuremberg was international,

[in the sense that it was the creation of more than one State, was not part of the judicial system of any one State, and it applied international, rather than national law, the fact that none of the Judges were of a nationality of one of the defeated States or even of a neutral State, contradicts the notion that the Tribunal was truly international in character.\textsuperscript{75}]

The partiality of the IMT is thus more indicative of ad hoc national military tribunals and not of a truly impartial international tribunal such as the United Nations International Tribunal.\textsuperscript{76}

There are additional, purely formal reasons why the judgment of the Nuremberg Tribunal is not a precedent in international law. A true precedent has binding force upon later adjudications of a similar nature.

\begin{itemize}


\item[73.] Fogelson, supra note 10, at 875.

\item[74.] SUNGA, supra note 56, at 32.

\item[75.] Id.

\item[76.] Id. at 33.
\end{itemize}
However, the IMT was not a permanent court and no other international court with permanent criminal jurisdiction over individuals has been created since Nuremberg. Thus, the judgment of the IMT cannot constitute a truly binding and authoritative precedent in international law.  

Nonetheless, the consensus today is that the Nuremberg Principles themselves are an integral component of general international law and that individual responsibility for war crimes has become widely accepted as an international legal norm, despite the lack of a permanent judicial body to enforce it.  

Thus, the Nuremberg Principles, in conjunction with the U.N. Charter, the Genocide, Geneva, and Torture Conventions, various international criminal law codifications, and recent U.N. Resolutions addressing the situation in Bosnia-Herzegovina, provide sufficient legal justification to indict, arrest, and prosecute those individuals in the former Yugoslavia who have either committed or sanctioned barbaric acts in direct violation of international human rights law and the laws and customs of war.

IV. THE UNITED NATIONS INTERNATIONAL TRIBUNAL TO ADJUDICATE WAR CRIMES COMMITTED IN THE FORMER YUGOSLAVIA: CORRECTING NUREMBERG'S DEFECTS, CONFRONTING NEW CHALLENGES

Despite the general acceptance by the world community of the human rights concepts embodied by the Nuremberg Principles, the war crimes trial itself still remains controversial. Most of the criticism concerns the unprecedented nature of the Nuremburg proceedings, the possible lack of judicial impartiality, and the prosecution and conviction of the Nazi leaders for violating the novel legal doctrine of Crimes Against Peace.  

Indeed, the ex post facto application of Allied-formulated laws, the tenuous legal foundation for the Tribunal's existence and authority, and the presence on the bench of judges from nations that had just vanquished the defendants in a bloody, prolonged war, are all factors that have tended to diminish the validity and impact of the Nuremberg precedent.

Fortunately, the new U.N. International Tribunal has neither the problem of legal justification that plagued the Nuremberg indictments nor the concern

77. Id.
78. Id. at 35.
79. Lippman, supra note 11, at 63.
of "victors' justice" that implicated the impartiality and fairness of the Nuremberg trials as a whole. A sufficient legal basis to indict and prosecute Yugoslav war criminals exists in the numerous Conventions, Protocols, and international humanitarian law codifications that have entered into force since 1945. The United Nations itself, through its Charter and recent Resolutions on the Yugoslav conflict, has uncontested authority to create a war crimes tribunal. Further, because the United Nations is an impartial body representative of the international community at large, it is not susceptible to charges of meting out "victors' justice."

Nonetheless, the newly-created Tribunal confronts obstacles foreign to its Nuremberg counterpart. Evidence of human rights violations is either scarce or rapidly disappearing, the ability to apprehend violators is doubtful, and the effectiveness of the Tribunal has been undermined by lack of funding, personnel, and world interest. Indeed, the very existence of the Tribunal is vulnerable to the overriding desire of the United Nations to effect a comprehensive peace agreement for the region. Thus, any negotiations most probably will include granting amnesty to war crimes offenders. The remainder of this Note will address 1) the legal bases available to the U.N. International Tribunal; 2) the obstacles the U.N. Tribunal will need to surmount in order to validate its mandate; and 3) the prospects for the creation of a permanent international criminal court that would have jurisdiction over war crimes and other offenses.

A. Jurisdictional Bases

1. The Charges

The world community has known for some time of atrocities committed in the former Yugoslavia, particularly in Bosnia-Herzegovina. Torture, summary executions, internment in concentration camps reminiscent of Nazi Germany, systematic mass rape, forced prostitution, inhuman treatment of prisoners and civilians, and destruction or confiscation of private property not justified by military necessity have all been documented and would qualify as war crimes under Nuremberg, customary international law, and the "grave breaches" provisions of the 1949 Geneva Conventions and 1977
Additional Protocols I and II thereto. Further, the fact that these crimes have been committed on a mass scale implicates charges of genocide and crimes against humanity.

Many, if not all, of these crimes are the result of the "ethnic cleansing" of Bosnia-Herzegovina by Bosnian Serbs. Professor Meron defines this practice as consisting of:

Harassment, discrimination, beatings, torture, summary executions, expulsions, forced crossings of the lines between combatants, intimidation, destruction of secular and religious property, mass and systematic rape, arbitrary arrests and executions, deliberate military attacks on civilians and civilian property, uses of siege and cutting off essential supplies destined for civilian populations.

Although ethnic cleansing has existed in one form or another for more than 2700 years, it was only toward the beginning of the twentieth century that the complete destruction of an ethnic group became an actual goal of some States.

The current practice of ethnic cleansing in the former Yugoslavia has focused particular attention on rape as a punishable crime of violence. Overwhelming evidence of mass rape perpetrated against Bosnian Muslim women has resulted in an increased readiness to clarify the status of rape as a crime under international humanitarian law. Although rape is not listed as a "grave breach" of fundamental rights under the Fourth Geneva Convention or Additional Protocol I, it is explicitly prohibited by both. Additionally, there is a growing recognition in the world community that rape committed during war falls under the Nuremberg Tribunal's definitions of war crimes and crimes against humanity. Similarly, rape used as a
tool of ethnic cleansing would constitute a form of crimes against humanity and possibly even a form of genocide if the rape is part of a campaign to destroy a religious or ethnic group.89

2. *The Conflict in the Former Yugoslavia as an International War*

Whether international humanitarian law as embodied in the Nuremberg Principles and successor human rights conventions applies to the current atrocities in Bosnia-Herzegovina may depend on whether that region’s apparent “civil” war qualifies as a truly “international” conflict. Clarifying the status of the conflict is crucial, for the norms of humanitarian law differ in their treatment of war categorized as international or internal.90

Traditional international law recognized the three following basic categories of internal conflict: rebellion, insurgency, and belligerency.91 However, this system of classifying internal war has become largely useless today for three reasons. First, nations have tended to avoid express bestowals of status upon the factions involved in an internal war.92 Second, the lack of a centralized authority for making and processing claims under the three internal conflict categories has prevented the development of standards for differentiation between permitted and forbidden acts.93 Third, major State actors have rejected in practice and doctrine the policy of impartiality under the traditional international law system, instead choosing to support wars of national liberation, which makes adherence to the established rules a self-destructive act for the remainder of the world community.94

In light of the foregoing, it is not surprising that a new, more flexible international law approach toward civil war has developed.95 This approach seeks to promote and facilitate the classification of a civil war within a specific context that allows the establishment of governmental

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92. *Id.* at 124.
93. *Id.* at 124-25.
94. *Id.* at 125.
interaction between the opposing parties to the conflict. The goal is to reach an agreeable intermediate position between the factions by encouraging the exchange of claims and counterclaims from both sides and recommending policy prescriptions involving possible third-party intervention.

Despite the fact that none of the parties to the conflict in the former Yugoslavia has established a mutually acceptable policy conducive to "legislative interaction" under this new approach, and probably will not do so until a peace accord is reached, the consensus in the world community is that the fighting in Bosnia still constitutes an international armed conflict to which the laws of war and the rules governing war crimes are applicable. Not only have all sides to the conflict agreed to honor the broader, more detailed norms that govern international conflicts, but the United Nations Commission of Experts appointed by the Secretary-General in October of 1992 has also concluded that the standards applicable to international conflicts should apply in this case. Thus, the applicability of international humanitarian law to the conflict in the former Yugoslavia is a moot point.

3. The Legal Precedent Available to the U.N. Tribunal

a. Introduction

An initial issue and one of primary concern is whether the international agreements signed by the former Socialist Federal Republic of Yugoslavia (SFRY) are binding on the new independent States created by its dissolution, namely Croatia, Slovenia, the Federal Republic of Yugoslavia (Serbia and Montenegro), and Bosnia-Herzegovina. The SFRY ratified the 1948 Genocide Convention, the four 1949 Geneva Conventions on

96. Id.
97. Id.
98. Id. at 328.
99. Id. at 329.
100. Id.
101. Meron, supra note 3, at 128.
103. Id.
105. Genocide Convention, supra note 70.
the Laws of War\textsuperscript{106} and the Additional Protocols I and II, \textsuperscript{107} the 1954 Hague Convention on Cultural Property,\textsuperscript{108} and the 1984 Torture Convention.\textsuperscript{109}

However, State accession to treaties ratified by predecessor States is ordinarily not automatic except in relation to those treaties that involve pre-existing international boundaries.\textsuperscript{110} Nonetheless, it is arguable that all successor States are presumed to accept the international humanitarian law obligations of their predecessor States, although no such binding requirement exists.\textsuperscript{111}

In pacts concluded on November 27, 1991, and May 22, 1992, Croatia, Serbia, and all the parties involved in the Bosnia-Herzegovina conflict agreed to honor the majority of the protective provisions of the 1949 Fourth Geneva Convention and the 1977 Additional Protocol I, except those sections listing "grave breaches."\textsuperscript{112} However, this exclusion is to no avail: Professor Meron notes that the Fourth Geneva Convention as a whole "concerns customary law and, in many respects, even peremptory norms that cannot be excluded by agreements."\textsuperscript{113} In addition, all States involved in the conflict have agreed to be bound by the obligations of the former Yugoslavia under the four Geneva Conventions and have accepted the "Statement of Principles" declared by the London Conference on Yugoslavia on August 26, 1992, "concerning compliance with international humanitarian law and personal responsibility for violations of the conventions."\textsuperscript{114}

A second concern that should be addressed is the issue of improper ex post facto prosecution of war criminals. Critics of the Nuremberg trials viewed the application of international humanitarian law to the Nazi leaders as retroactive in violation of the principle \textit{nulla poena sine lege} (no punishment without law), whose purpose is to protect against liability for acts committed without belief that they were illegal when performed.\textsuperscript{115}

\begin{flushleft} \footnotesize
110. Gilbert, \textit{supra} note 104, at 1237.
111. \textit{Id.}
112. Meron, \textit{supra} note 3, at 129.
113. \textit{Id.}
114. \textit{Id.}
\end{flushleft}
Today, however, the principle of individual responsibility under international humanitarian law for serious human rights violations is generally accepted, as is the list of treaty and customary provisions that defines war crimes and crimes against humanity. Punishment by the *ex post facto* application of law is thus not an issue for the U.N. International Tribunal.

**b. The Hague Conventions of 1907**

The Hague Conventions of 1907 were fundamental in the evolutionary process of the laws of war and represented the beginning of international legal recognition of war crimes and crimes against humanity. Of the many Hague Conventions, the most important was undoubtedly The Hague Convention IV of 1907 Respecting the Laws and Customs of War on Land, which codified the principles of war on land and set out a basic international normative core for the later Nuremberg trials. Although the former Yugoslavia was not formally a party to The Hague Convention IV of 1907, it did ratify The Hague Convention II of 1899, which was the forerunner to the later Hague Convention IV and contains many similar provisions. In addition, the Nuremberg International Military Tribunal specifically recognized the 1907 pact as declaratory of customary international law and thus binding on all nations, regardless of their signatory status.

**c. The Nuremberg Precedent**

The U.N. International Tribunal derives additional legal justification from the codified Nuremberg Principles and from the Nuremberg Charter’s three categories of offenses (Crimes Against Humanity, War Crimes, Crimes Against Peace). The application of these categories to the atrocities in

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120. Pearl, *supra* note 37, at 1386 n.86.
121. *Id.*
122. For a more detailed discussion of the codified Nuremberg Principles themselves, see discussion *supra* part III.A.
the former Yugoslavia should present few problems. "Crimes Against Humanity," encompassing murder, enslavement, deportation, other inhumane acts committed during war, and persecution of civilians based on political, racial, or religious grounds, would apply to the current widespread practices of ethnic cleansing and mass rape in Bosnia. Proof of systematic governmental planning of the atrocities is required; however, the character and evident systematic nature of many of the crimes in Bosnia more than attest to the obvious Bosnian Serb and Serbian governmental roles.

"War Crimes," violations of the laws and customs of war by soldiers and civilians including murder, murder or ill-treatment of prisoners of war, killing of hostages, and wanton destruction of cities, towns, and villages, would apply to the atrocities committed in concentration camps throughout the former Yugoslavia and to general human rights violations and destruction of cities (e.g., Sarajevo) not justified by military necessity. War crimes require no proof of systematic governmental planning of the offenses.

"Crimes Against Peace," defined in article 6(a) of the Nuremberg Charter as planning, initiating, or waging a war of aggression, or a war in violation of international treaties or agreements, usually concern only high-ranking members of the military or the executive of the State. This category of crimes could apply to both the Serbian and Croatian leaders who started the war and to the Bosnian Serb military commanders or government executives who have prolonged the conflict.

d. The United Nations Charter

The United Nations Charter, formed simultaneously with the Nuremberg Charter, embodies several of the Nuremberg Principles and provides additional legal justification for the U.N. International Tribunal. The U.N. Charter states that "all Members shall refrain in their international relations

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123. Nuremberg Charter, supra note 16, art. 6(c).
124. Meron, supra note 3, at 130.
125. Nuremberg Charter, supra note 16, art. 6(b).
126. Meron, supra note 3, at 130.
127. Nuremberg Charter, supra note 16, art. 6(a).
128. Gilbert, supra note 104, at 1238.
129. Id.
130. See supra note 68.
from the threat or use of force against the territorial integrity or political independence of any state. Article 39 authorizes the U.N. Security Council to decide what measures must be taken for the maintenance of international peace and security, while article 41 lists possible enforcement measures. Establishing an ad hoc international war crimes tribunal to prosecute gross human rights abuses in the former Yugoslavia would be an appropriate enforcement measure under article 41 for the maintenance and restoration of international peace and security in the region. Although the majority of atrocities are due to ethnic tensions that undoubtedly will endure even after a peace settlement is reached, the establishment of a tribunal that can sanction individuals who violate international humanitarian law would effectively punish the offenders, contribute to restoring and maintaining international peace and security, and serve the peacekeeping function of the Security Council set forth in U.N. Charter articles 24 and 39.

e. The Genocide Convention of 1948

Genocide, "the deliberate and systematic destruction of a racial, political, or cultural group," is conceptually linked to crimes against humanity but has been accorded special attention only since the extermination of 6 million Jews during the Nazi regime. Because there is no internal source of control or punishment when a State itself engages in genocide, any punishment necessarily must come from outside the State—this is where international law has a role to play.

On December 11, 1946, the United Nations General Assembly, with the Holocaust and the Nuremberg prosecutions as background, unanimously adopted Resolution 96(I), which established “genocide” as a crime under

131. U.N. CHARTER art. 2, para. 4.
133. U.N. CHARTER art. 41.
135. Id. at 10; U.N. CHARTER, supra note 131, arts. 24, 39.
138. Id. at 10.
international humanitarian law that entails the national and international responsibility of individual persons and States. The General Assembly, on December 9, 1948, adopted a draft of the Convention on the Prevention and Punishment of the Crime of Genocide, which came into force on January 12, 1951. Yugoslavia was one of the original signatories (August 29, 1950).

The Genocide Convention, as the first and perhaps most important of the instruments the General Assembly passed shortly after Nuremberg, established the basic premises that have guided the development of a system of international criminal law. Article I affirms that genocide, "whether committed in time of peace or in time of war, is a crime under international law" that ratifying parties must prevent and punish. On the other hand, article II, the substantive core of the Genocide Convention, defines "genocide" as a variety of acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

a) Killing members of the group;
b) Causing serious bodily or mental harm to members of the group;
c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
d) Imposing measures intended to prevent births within the group;
e) Forcingly transferring children of the group to another group.

The word "intent" is key: without the requisite intent to destroy a group, the heinous act cannot qualify as genocide.

Does the practice of ethnic cleansing in the former Yugoslavia provide an appropriate situation for the application of article II of the 1948 Genocide Convention? Is there a sufficient legal justification? One could argue "yes" to both questions for the following three reasons: 1) there is an established

140. Genocide Convention, supra note 70.
141. Webb, supra note 35, at 387 n.53.
142. Lippman, supra note 11, at 48.
143. Genocide Convention, supra note 70, art. I.
144. Id., art. II.
and identifiable national, ethnic, racial, or religious group as the victim; 2) there is an obvious intent to destroy the group or groups in whole or in part; and 3) there are identifiable acts in conjunction with the intent to destroy the identified group victim.\textsuperscript{146}

Bosnian Muslims, Croats, and Serbs are distinguishable as separate religious, ethnic, national, and cultural groups and, as such, are identifiable victims who fall under article II's definition of a "group."\textsuperscript{147} Furthermore, the practice of ethnic cleansing by paramilitary forces against the Bosnian Muslims, Croats, and Serbs, when not motivated by political or territorial gain but rather by an intent to eradicate the civilian population of a group victim within the meaning of article II, qualifies as the sanctionable crime of genocide.\textsuperscript{148} Finally, the heinous acts of civilian killings, torture, mass and systematic rape in detention centers and elsewhere, the creation of refugees, terrorization, and the calculated slaughter of males together with the systematic rape of women within a defined group as a means of preventing further births within that group, clearly fall within the list of genocidal acts set out in article II.\textsuperscript{149}

\textit{f. The 1949 Geneva Conventions and 1977 Additional Protocols I and II}

The four 1949 Geneva Conventions and subsequent Protocols I and II provide an additional legal basis for the U.N. International Tribunal to bring charges against violators of human rights in the former Yugoslavia. These treaties, each of which the former Yugoslavia ratified, generally provide additional formal protection for the wounded and sick,\textsuperscript{150} prisoners of war,\textsuperscript{151} and civilians.\textsuperscript{152} They also further codify international war crimes law by labelling violations of certain basic human rights norms as "grave breaches,"\textsuperscript{153} namely:

\begin{itemize}
\item \textsuperscript{146} Webb, supra note 35, at 399.
\item \textsuperscript{147} Id. at 399-400.
\item \textsuperscript{148} Id. at 400-01.
\item \textsuperscript{149} Id. at 402-03.
\item \textsuperscript{150} Geneva Conventions I and II, supra note 71.
\item \textsuperscript{151} Geneva Convention III, supra note 71.
\item \textsuperscript{152} Geneva Convention IV, supra note 71.
\item \textsuperscript{153} Meron, supra note 3, at 129.
\end{itemize}
Willful killing, torture, or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, extensive destruction and appropriation of property not justified by military necessity, unlawful deportation or transfer, and unlawful confinement. 154

Two of the four Geneva Conventions are particularly applicable to the victims of ethnic cleansing in the former Yugoslavia. The Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III) 155 states that "prisoners of war must at all times be humanely treated"; 156 that "women shall be treated with all the regard due their sex"; 157 and that "the basic daily food rations shall be sufficient in quantity, quality and variety to keep prisoners of war in good health and to prevent loss of weight or the development of nutritional deficiencies." 158 These specific provisions directly implicate conditions in the numerous detention centers and concentration camps spread across Bosnia and outlying areas.

The Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV) 159 proscribes "individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country," 160 in addition to "any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State." 161 These provisions would apply to the forced removal and deportation of Bosnian Muslims and to the extensive destruction and appropriation of private property belonging to Bosnian Muslims by Bosnian Croats and Serbs.

Finally, the two protocols later annexed to the original four Geneva Conventions of 1949 provide further legal justification for prosecuting those responsible for the commission of atrocities in the former Yugoslavia. The
1977 Protocol Relating to the Protection of Victims of International Armed Conflicts (Protocol I) expands the scope of protection accorded prisoners of war under Geneva Convention III by including wars fought for self-determination. Of particular relevance are those parts that provide that “civilian objects shall not be the object of attack or reprisals”; that “starvation of civilians as a method of warfare is prohibited”; and that “women shall be the object of special respect and shall be protected in particular against rape.”

The Protocol Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) supplements Common Article Three of the four Geneva Conventions. This Common Article Three prohibits, among other things, “a) violence to life and person; b) taking of hostages”; and “c) outrages upon personal dignity.” The Protocol II itself outlaws “violence to the life, health, and physical or mental well-being of persons; collective punishments; taking of hostages; acts of terrorism; outrages upon personal dignity; slavery . . . ; pillage; [and] threats to commit any of these acts.” This litany of proscribed actions directly implicates the current practice of ethnic cleansing, particularly in Bosnia-Herzegovina, where mass and systematic rape, general intimidation of civilians, and plunder of private property have become widespread.

**g. The Torture Convention of 1984**

On December 10, 1984, the United Nations General Assembly approved the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Since that date, torture has been an international crime, whether in time of war or peace, and, as such, “overlaps with the ‘grave breaches’ provisions of the 1949 Geneva Conventions and the 1977 Additional Protocols.” The Torture Convention itself states

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164. Protocol I, supra note 71, art. 52, quoted in Pearl, supra note 37, at 1395.
165. Protocol I, supra note 71, art. 54, quoted in Pearl, supra note 37, at 1395.
166. Protocol I, supra note 71, art. 76(1), quoted in Pearl, supra note 37, at 1395-96.
168. Pearl, supra note 37, at 1396 n.171.
169. Protocol II, supra note 71, art. 4, quoted in Pearl, supra note 37, at 1396.
170. Torture Convention, supra note 72.
171. BASSIOUNI, supra note 60, at 477.
that violent physical abuse becomes torture when it causes "severe pain and suffering, whether physical or mental" and is intentionally inflicted on the person to intimidate, coerce, or punish.\textsuperscript{172} Article 2(3) imposes individual responsibility by disallowing the defense of "superior's orders": "An order from a superior officer or a public authority may not be invoked as a justification of torture."\textsuperscript{173} In addition, under article 2(2) a State Party to the Torture Convention must take "effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."\textsuperscript{174}

Many of the human rights abuses in the former Yugoslavia constitute torture under the Torture Convention definition when inflicted with the requisite intent. Rape, forced prostitution and pregnancy, and other forms of sexual abuse are all acts of physical and psychological violence that inflict severe physical and mental pain and suffering.\textsuperscript{175} The U.N. International Tribunal has sufficient evidence of intentional sexual abuse committed in the former Yugoslavia to apply the provisions of the Torture Convention, in conjunction with the pertinent articles of the four Geneva Conventions and Additional Protocols I and II, against those individuals responsible for the acts.

\textit{h. The Statute of the U.N. International Tribunal}

The most recent and obvious basis for the Tribunal’s jurisdiction is the "Statute of the International Tribunal," adopted on May 25, 1993.\textsuperscript{176} Secretary-General Boutros-Ghali, in a detailed report issued May 3, 1993,\textsuperscript{177} concluded that establishing an international war crimes tribunal by Security Council resolution would be the most effective and expeditious means of carrying out the U.N. Charter’s Chapter VII enforcement measures.\textsuperscript{178} He further concluded that establishing such a tribunal by a
decision of the Security Council pursuant to Chapter VII would be legally justified based on the "object and purpose" of the decision itself and on previous Security Council determinations that: 1) the conflict in the former Yugoslavia constitutes a threat to international peace and security; 2) all parties to the conflict are bound to comply with international humanitarian law; and 3) the establishment of a war crimes tribunal would contribute to the restoration of international peace and security by ending the violations of fundamental human rights in the former Yugoslavia.\textsuperscript{179} The Statute of the International Tribunal's legal basis in Chapter VII of the U.N. Charter and in previous resolutions concerning the conflict in the former Yugoslavia\textsuperscript{180} thus justifies the Security Council's establishment of the United Nations International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia.

B. The Effectiveness of the U.N. International Tribunal

1. Preface

The United Nations, by creating a legally valid international war crimes tribunal to indict, prosecute, and sentence individual violators of international humanitarian law in the former Yugoslavia, possesses an unprecedented opportunity in its role as representative of the world community to fulfill its moral imperative to "promot[e] and encourag[e] respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."\textsuperscript{181} Moreover, the establishment of the U.N. International Tribunal provides a means of defining individual criminal responsibility in such a way that political leaders and military commanders who order the commission of crimes or who know of them but fail to take the steps necessary to prevent or repress them are themselves culpable.\textsuperscript{182}

However, the United Nations International Tribunal must surmount a variety of obstacles before it can truly measure up to its envisioned potential

\textsuperscript{179} VII's enforcement provisions.
\textsuperscript{180} See supra notes 42, 45, and 47.
\textsuperscript{181} U.N. CHARTER, supra note 131, art. 1(3).
and assume an effective and credible role. The “success” of Nuremberg was marred by the application of ex post facto laws and by allegations of judicial partiality derived from “victors’ justice.” The U.N. International Tribunal confronts very different, but no less daunting, hurdles than those that existed nearly fifty years ago at Nuremberg. The following Note section examines these new issues.

2. Lack of Authority and the Need to Negotiate Peace May Eviscerate the Tribunal’s Mandate

One significant problem for the Tribunal is its minimal authority to punish, paper threats notwithstanding. Defendants who fail to appear before the Tribunal once called or who ignore subpoenas risk little: “the states that shelter them merely face Security Council sanctions; their leaders risk nothing worse than isolation.” Serbia, instigator and supporter of the most heinous atrocities, is already under U.N. sanctions and has little reason to regard the United Nations seriously in light of the U.N.’s appalling ineffectiveness in Bosnia-Herzegovina. Further, because the Tribunal may not try defendants in absentia (in contrast to Nuremberg), unless the indicted offenders on all sides surrender, there will be no trials anyway.

In addition, the prospect of trials ever occurring is weakened by the need to negotiate a comprehensive peace with the same individuals who are responsible for the war crimes. Professor M. Cherif Bassiouni notes that “there is an obvious incongruence between pursuing a political settlement option and a justice option. Up to a point, they can be pursued in tandem. There comes a point where they may become incompatible.” Arguably, whenever a Yugoslav peace agreement is on the table, the Tribunal will assume a secondary role, a political reality that demonstrates one fundamental difference between the Nuremberg Tribunal and the new United Nations Tribunal: the former pursued those who had lost the war, whereas the latter must prosecute the self-proclaimed victors. The

184. Id.
185. Id.
186. Id.
187. Meron, supra note 3, at 133.
189. Id.
Bosnian Serbs will almost certainly insist on assurances of immunity before they sign a peace agreement.\textsuperscript{190}

Should this scenario arise, the United Nations International Tribunal must consider the ramifications of forgoing justice for peace. Is there a moral obligation for a civilized society to respect and enforce the laws it creates in the name of basic human rights and dignity? Or should those who commit atrocities during war be allowed to “extort amnesty in exchange for peace?”

3. Relevant Evidence is Unavailable or Fast Disappearing

The U.N. International Tribunal confronts a monumental hurdle in its quest to gather incriminating evidence for use at trial. Unlike the Nuremberg Trials, where prosecutors had the benefit of the Nazis’ propensity for recording their heinous acts in diaries and memoranda,\textsuperscript{192} the ability to find evidence in the former Yugoslavia leaves much to be desired. To make matters worse, the United Nations Commission of Experts charged with providing evidence of violations is equipped with forces that are dwarfed in comparison to the hundreds of lawyers and investigators that were available for the Nuremberg prosecution in 1945.\textsuperscript{193} In general, the ability to obtain tangible evidence has been hampered by 1) a lack of control over areas where offenses have been committed;\textsuperscript{194} 2) blatant tampering by Serbs with files containing crucial information on atrocities committed during the conflict;\textsuperscript{195} and 3) gathering of evidence by nongovernmental

\textsuperscript{190} Moron, supra note 3, at 133.
\textsuperscript{191} Neier, supra note 182, at 825.
\textsuperscript{192} Brudno, supra note 115, at 635.
\textsuperscript{193} Moron, supra note 3, at 125.
\textsuperscript{194} For example, one of the best pieces of evidence for the Tribunal is a mass grave outside Vukovar, Croatia, reportedly full of approximately 200 Croatians dragged from a hospital and summarily executed by Serbs with AK-47s. Bass, supra note 49, at 14. Yet, because the area is not secure, outsiders investigating war crimes take their lives into their own hands. Further, as Professor and Commission of Experts member M. Cherif Bassiouni points out, simple logistics in such a situation are a nightmare: “You’ve got 174 bodies in a country, torn by war, where you can’t even get a plastic bag. What are you going to wrap the bodies in? Where will they be taken? How will you get them there? Who will perform tests?” Rosemarie Buchanan, Battling the Crimes of War, STUDENT LAW., May 1993, at 14, 15.
\textsuperscript{195} For example, on October 19, 1992, Serbian President Slobodan Milošević reportedly seized control of his country’s governmental files, many of which contained information on war crimes committed during the current fighting. \textit{Morning Edition} (Nat’l Public Radio Broadcast, Oct. 23, 1992), transcript \textit{available in} LEXIS, News Library, NPR File, \textit{reprinted in} Pearl, supra note 37, at 1406.
organizations (NGOs), which do not always have the ability to marshal evidence for criminal proceedings.\textsuperscript{196}

The picture, however, is not entirely bleak. Professor Bassiouni, a member of the United Nations Commission of Experts, has established and oversees an ever-expanding war crimes computer database at De Paul University's International Human Rights Institute.\textsuperscript{197} On January 17, 1994, 1000 pages of documents comprising 400 eyewitness accounts of atrocities committed in Bosnia were made available to the Tribunal by U.S. Ambassador to the United Nations Madeleine Albright, while in early February the contents of 500 refugee interviews were turned over to the Tribunal for consideration.\textsuperscript{198} Also, in early February 1994, an international team of criminal prosecutors arrived in Croatia to take the depositions of approximately 200 alleged rape victims.\textsuperscript{199} These women's testimonies could provide the basis for the individual prosecution of senior Bosnian-Serb military and political leaders for supporting the use of mass and systematic rape as a component of ethnic cleansing.\textsuperscript{200}

4. \textit{Obtaining Personal Jurisdiction over the Defendants Will Be Difficult if Not Impossible}

Naming the defendants to be prosecuted by the Nuremberg International Military Tribunal was relatively simple: those individuals indicted had been selected from the top leadership of the Nazi regime and represented all of the organizations labelled criminal in the indictment itself.\textsuperscript{201} The trials of lesser criminals were left to the countries in which their crimes had been

\textsuperscript{196} Professor Meron notes that "the information normally gathered by NGOs and the evidence necessary to secure a criminal conviction are significantly different." Meron, supra note 3, at 132. Nonetheless, bodies like the Zenica, Bosnia-based "War Crimes Commission" are gathering evidence crucial to laying the foundation for war crimes trials. This group, which has investigators throughout Bosnia and Croatia, has produced a list of 1350 war criminals, 120 mass graves, and 20,000 murders. Michael Christie, \textit{Kinkel Says Will Pursue Bosnia War Crimes Suspects}, Reuters World Service, Feb. 24, 1994, available in LEXIS, News Library, W IRES File. The Bosnian government itself has a list of 11,000 suspects. Catherine Toups, \textit{Database of War Crimes Lays Groundwork for Trials}, \textit{WASH. TIMES}, Feb. 15, 1994, at A1.

\textsuperscript{197} Atlas, supra note 89, at 6. U.N. Secretary-General Boutros-Ghali agreed that the De Paul institute would become the U.N. agent for assimilating reports on atrocities committed in the former Yugoslavia.

\textsuperscript{198} \textit{Kriegsverbrecher-Tribunal}, supra note 8.

\textsuperscript{199} Atlas, supra note 89, at 1.

\textsuperscript{200} Id. at 6.

\textsuperscript{201} Harris, supra note 9, at 245.
committed. There are far fewer high-profile defendants to indict in the case of the former Yugoslavia. In December 1992, the Bush Administration named five specific individuals and then referred to other individuals only by the acts they had committed. What differentiates the U.N. International Tribunal from the Nuremberg IMT is that in theory the former is supposed to try all defendants, not just the major political and military leaders—there are no additional, country-specific tribunals to try the lesser criminals.

Exercising personal jurisdiction over those charged with violating international humanitarian law in the former Yugoslavia will be a daunting task. Perhaps key will be the issuance of highly detailed indictments, through which the prosecution could pressure Serbia (or other States harboring accused individuals) to extradite named defendants. A State that refused to turn over a named defendant to stand trial would face international sanctions. However, a State like Serbia, which is already under U.N. sanctions, will undoubtedly trivialize any indictment and demand amnesty in exchange for peace. In addition, the region of the former Yugoslavia is not under the control of powers who could bring the defendants to trial (as was the case at Nuremberg). Finally, the chances of prosecuting indicted defendants is lessened by the Statute of the International Tribunal itself, which prohibits trials in absentia. Because Serbia and other States may choose to harbor indicted war criminals, sanctions notwithstanding, the U.N. International Tribunal ultimately may be unable to obtain even the slightest form of personal jurisdiction over anybody at all.

202. Id. at 240.
203. These five were Serbian President Slobodan Milosević, Bosnian-Serb leader Radovan Karadžić, General Ratko Mladić, commander of the Bosnian-Serb military forces, and two Serb paramilitary leaders, Vojislav Seselj and Zeljko Raznatović. Annika Savill and Tony Barber, West Intensifies the Pressure over Bosnia, THE INDEPENDENT (London), Dec. 17, 1992, at 1.
204. Some of these individuals were the commander of a Serb-run detention camp; a Bosnian Serb who confessed to killing 230 civilians; members of a Croatian paramilitary force accused of attacking a bus convoy of Serbian women and children, killing half of them; and the commander of a Croat-run detention camp where 15 Serbs were beaten to death. Elaine Sciolino, U.S. Names Figures It Wants Charged with War Crimes, N.Y. TIMES, Dec. 17, 1992, at A1, A22.
205. Neier, supra note 182, at 825.
206. Id.
5. The Requirement of Fairness and Impartiality

In order to constitute a valid precedent for future ad hoc tribunals or for a permanent international criminal court, the United Nations International Tribunal must ensure that all defendants receive a fair and impartial trial before a neutral and representative panel of judges. The Tribunal must observe the basic fundamentals of due process, including the defendants' right to counsel, to present evidence on their own behalf, to cross-examine hostile witnesses, and to appeal to an appropriate appellate court. Fairness and credibility also dictate that all parties involved in the current conflict—Serbs, Croats, and Bosnian Serbs, Croats, and Muslims—be investigated and prosecuted for verifiable war crimes.

The Statute of the International Tribunal, like the Nuremberg Charter, contains provisions explicitly designed to ensure a fair trial. For example, under the Statute the accused has the following rights: 1) an entitlement to a fair and public hearing on the charges brought against him; 2) the benefit of a presumption of innocence; 3) the right to choose counsel and to communicate with him; 4) the right to be informed in detail and in a language he understands of the charges brought against him; 5) the right to trial without undue delay; 6) the right to be present at his own trial; 7) the right to examine witnesses against him and to obtain the attendance of witnesses on his behalf; 8) the right to the free assistance of an interpreter if necessary; and 9) freedom from compulsion to testify against himself or to confess guilt.

In addition, the Tribunal may not impose the death penalty, but may only hand down jail terms to be served in the prisons of countries offering

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209. Meron, supra note 3, at 125.
210. Id.
211. Statute of International Tribunal, supra note 176.
213. Statute of the International Tribunal, supra note 176, art. 21(2).
214. Id., art. 21(3).
215. Id., art. 21(4)(b).
216. Id., art. 21(4)(a).
217. Id., art. 21(4)(c).
218. Id., art. 21(4)(d).
219. Id., art. 21(4)(e).
220. Id., art. 21(4)(f).
221. Id., art. 21(4)(g).
222. Kriegsverbrecher-Tribunal, supra note 8.
penal facilities. Finally, the Statute prevents subsequent trials in any national courts for serious violations of international humanitarian law, limits the power of the Tribunal to retry persons already prosecuted for the same offense before a national court, and provides for an Appeals Chamber to hear appeals from individuals convicted by the Tribunal.

6. Possible Solutions

a. The U.N. International Tribunal

The Tribunal represents an excellent opportunity to vindicate international humanitarian law by prosecuting those individuals responsible for committing serious human rights abuses in the former Yugoslavia. Its moral imperative, backed by a legally valid United Nations mandate, enables the Tribunal to reaffirm the sanctity of basic human rights for all individuals, regardless of race, nationality, gender, or ethnicity.

Unfortunately, however, the prospects for the Tribunal's success are rather bleak. As noted above in B (2), (3), and (4), significant obstacles exist that in all likelihood will prevent the Tribunal from assuming any manner of effective, precedent-setting role. As the war continues and casualties mount on all sides, there will be an increasing emphasis on effecting a comprehensive peace. The need to negotiate peace with the same individuals charged with war crimes presents a regrettable dilemma: how to prosecute Yugoslav war criminals when assurances of immunity will almost certainly be a precondition to any peace agreement they sign?

In addition, problems in the following areas will eviscerate any existing U.N. mandate: 1) acquiring, cataloging, and preserving pertinent incriminating evidence; 2) obtaining personal jurisdiction over any named defendants; 3) overcoming global apathy toward the situation in the former Yugoslavia; 4) securing a neutral Tribunal setting closer to the conflict in order to maximize accessibility to the trial; and 5) agreeing on a time of trial.

223. Regenstreif, supra note 54. In early 1994 construction began on a holding pen intended to house suspected war criminals for trial. The pen, composed of twelve cells, is situated next to a prison in The Hague and will be guarded by United Nations military personnel. Ex-Yougoslavie, supra note 54.

224. Statute of the International Tribunal, supra note 176, art. 10(1).

225. Id., art. 10(2).

226. Id., art. 25(1).
that will be neither too soon before hostilities cease nor too late after a peace settlement already has been reached. The U.N. International Tribunal will be relegated to the role of farcical marionette: good for show but dependent on others for life and easily discardable when no longer needed.

b. A Permanent International Criminal Court

The success of the ad hoc United Nations International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia may have direct implications for the creation of a permanent international criminal court. Attempts to create a tribunal of this nature to deter aggression and terrorism date to the years following World War I. However, it was not until the genocide and atrocities of World War II were disclosed that the Allies created such a court: the International Military Tribunal at Nuremberg\(^{227}\), which at best was an ad hoc solution. Yet, despite the unanimous affirmation of the Nuremberg Principles by the United Nations in late 1946,\(^{228}\) some sovereign States, particularly those who had emerged from World War II as military powers, were not prepared to be bound by a universal rule of international criminal law.\(^{229}\) Nonetheless, the newly-created U.N. International Law Commission (ILC) concluded that a permanent international criminal court was needed and could be created.\(^{230}\) In response, the U.N. General Assembly prepared two drafts of an international criminal court statute in 1951 and 1953,\(^{231}\) both of which were subsequently tabled pending definition of the crime of “aggression.”\(^{232}\)

A primary reason for the General Assembly’s inaction over the last forty years has been its inability to reach a consensus on the contents of a Draft Code of Crimes, which would provide the jurisdictional basis for a permanent international criminal court. Minimal progress has occurred since the U.N. General Assembly tabled the 1954 Draft Code of Offences Against


\(^{228}\) See G.A. Res. 95(I), supra note 58.

\(^{229}\) Ferencz, supra note 227, at 383.

\(^{230}\) SUNGA, supra note 56, at 118.

\(^{231}\) Id.

the Peace and Security of Mankind. In 1982, the ILC appointed Doudou Thiam, a former Minister of Sénégal, as Special Rapporteur for the draft code; each year thereafter he issued reports describing problems or offering drafts of the provisions the ILC members were debating. The August 1990 Iraqi invasion of Kuwait prompted calls for a “New World Order” where the rule of law would replace the law of the jungle. By July 1991, the ILC, under pressure to produce something tangible, succeeded in completing a first reading of a Draft Code of Crimes. However, the ILC did not submit draft articles for a permanent international criminal court in this report.

The recent atrocities in the former Yugoslavia have renewed interest in the creation of a permanent international criminal court. On November 25, 1992, the U.N. General Assembly adopted a resolution that requested the ILC to make the formulation of a draft statute a priority. During the 1993 summer session of the ILC, a Working Group on the Draft Statute for an International Criminal Court completed a report and draft statute, which were to be considered by the General Assembly during its forty-eighth session. The Draft Statute established the composition of the Court, the standards for election and dismissal of judges, a list of crimes defined by treaties over which the Court has jurisdiction, and other rules governing jurisdictional issues.

Yet, despite the recent progress made toward creating a permanent international criminal court, many States most likely will be loath to take any decisive action toward establishing such a court, regardless of how effective the current ad hoc U.N. International Tribunal is. This resistance could exist for a number of reasons: 1) States may be reluctant to limit their sovereignty by supporting the creation of an international criminal

234. Ferencz, supra note 227, at 378-79.
235. Id. at 379.
236. Id. at 380.
239. Id., art. 5.
240. Id., arts. 6, 7, 11.
241. Id., art. 22.
court with general jurisdiction;\textsuperscript{243} 2) States may prefer not to hand over drug traffickers and terrorists to an international court, choosing instead to use multilateral extradition treaties;\textsuperscript{244} and 3) States may fear that any such international court will be a highly politicized body and, thus, court composition, procedures, and punishment will be inherently unfair.\textsuperscript{245} It is imperative that the United Nations approve a final Draft Code of Crimes and that it attempt to reduce its Member States’ resistance to the creation of a permanent international criminal court; otherwise, chances that such a court will ever exist are slim to none.

V. CONCLUSION

By early spring of 1994, some two years after full-scale war had begun in the former Yugoslavia, negotiating a peaceful resolution to the conflict had become a top priority. The February 5 murder by mortar shell of sixty-six civilians in a crowded Sarajevo open-air market\textsuperscript{246} outraged the world community and prompted U.N. Secretary-General Boutros-Ghali to ask NATO for authorization to order punitive air strikes against Serbian gun positions around Sarajevo.\textsuperscript{247} On February 9, NATO declared that Bosnian Serb forces had to withdraw or hand over their heavy guns within twelve miles of Sarajevo by February 20 or risk aerial attack by NATO jets.\textsuperscript{248} By the deadline the Serbs had complied.\textsuperscript{249} The operation was so successful that American, Russian, and European diplomats resolved to intensify their efforts to achieve a negotiated end to the war.\textsuperscript{250} The first concrete result of this new initiative was the signing in Washington on March 1 of an agreement

\textsuperscript{243} SUNGA, supra note 56, at 119.

\textsuperscript{244} Ferencz, supra note 227, at 387.

\textsuperscript{245} Id. at 388.

\textsuperscript{246} At least 66 were killed and 200 others wounded in the worst massacre in Sarajevo since the siege of the city began in April of 1992. John Kifner, 66 Die as Shell Wrecks Sarajevo Market, N.Y. TIMES, Feb. 6, 1994, at A1.


\textsuperscript{248} Nato’s Risky Step, N.Y. TIMES, Feb. 10, 1994, at A22.


\textsuperscript{250} Craig R. Whitney, Conflict in the Balkans: Diplomats See a New Chance to End Bosnia War, N.Y. TIMES, Feb. 23, 1994, at A8.
between Bosnian Muslim and Croat leaders that envisioned the creation of a loose confederation of each side’s respective territory.251

Nevertheless, while the peace process accelerated, the U.N. International Tribunal seemed to stand still. By mid-February 1994, the court still had no chief prosecutor, no investigators of its own, and no final budget to pay for its operations. Further, the eleven judges had just started to work on rules of procedure and were months away from conducting any trials.252

In the meantime, the Tribunal’s mandate had been undermined in a variety of ways. In 1993, Bosnian Muslim leader Fikret Abdić signed an accord with Serbia that provided that each side in the conflict would prosecute its own war criminals and that each side would regard the conflict as an internal matter, which would preclude the application of international law.253 Further, several countries have conducted or plan to conduct war crimes trials of their own, seeing no need to send the suspects to The Hague for incarceration until the U.N. International Tribunal begins to hear cases.254 Finally, in a move that may have revealed the U.N.’s weakening resolve to pursue the prosecution of war criminals, Secretary-General Boutros-Ghali indicated in mid-February 1994 that he expected the U.N. Commission of Experts charged with investigating war crimes in the former

253. However, the U.N. Tribunal could still use the substance of the Genocide and Geneva Conventions to prosecute suspected war criminals—international law overrides national law in this case. Sadruddin Aga Khan, War Crimes in Bosnia: International Community’s Sole Pledge for Justice Gutted, OTTAWA CITIZEN, Feb. 17, 1994, at A11.
254. In March of 1993, a Bosnian military court condemned two Serb militiamen to death by firing squad for war crimes against Muslims. One defendant, Borislav Herak, confessed to thirty-five murders and sixteen rapes. Sentenced to Die, MACLEAN’S, Apr. 12, 1993, at 19. Two Charged in War Crimes Trial, CHI. DAILY L. BULL., Mar. 12, 1993, at 1. In mid-February 1994, Germany’s federal prosecutor’s office became the first body outside the former Yugoslavia to arrest a Serb suspected of committing atrocities. Dusan Tadić was charged with assisting in genocide at the Omarska detention camp, where up to fifteen prisoners died each day from shootings, beatings, and illness. Christie, supra note 196. In a related matter, a Bosnian Muslim who had fled to Denmark was charged in mid-February 1994 with the murder of Croats in a detention camp near the city of Mostar. He was recognized when he was admitted to a refugee center near Copenhagen full of former inmates from the camp. The Danes saw no reason to turn him over to the U.N. International Tribunal. Danes Accuse Bosnian Moslem Refugee of War Crimes, Reuters World Service, Feb. 18, 1994, available in LEXIS, News Library, WIRES File.
Yugoslavia to finish its work by April. Should this happen, the legal authority for much of the current evidence-gathering would be in doubt.\textsuperscript{255}

Creating the U.N. International Tribunal was a laudable move. However, today's \textit{realpolitik} most likely will prevent the Tribunal from being a truly effective organ of justice. Pressure to negotiate an agreeable settlement to the bloody two-year-old war, coupled with demands for immunity from suspected war criminals-peace negotiators, will probably undermine any possibility of trying those responsible for serious human rights abuses.

Nonetheless, the Tribunal should not be disbanded before it issues detailed indictments. The atrocities in the former Yugoslavia deserve the world's attention not only because of their appalling nature, but also because they present an opportunity to vindicate international humanitarian law and the established customs and laws of war. Egomaniacal bullies should not be permitted to further their petty territorial ambitions by targeting for extermination innocent civilians who happen to stand in their way, regardless of where they are in the world.

The United Nations International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia is an admittedly imperfect, ad hoc solution to a regrettable wartime phenomenon that more properly deserves attention from a permanent international criminal court. Yet, the U.N. International Tribunal should not be abandoned; if anything, its mere existence represents the world's attempt to acknowledge the inviolability of certain fundamental human rights by punishing those who choose to abuse them.

\textsuperscript{255} For example, the authority to complete the exhumation of the Croat mass grave near Vukovar, one of the most damning pieces of evidence available, would be in doubt. Khan, \textit{supra} note 253, at A11.
VI. ADDENDUM

In April 1994 the five-member United Nations Commission of Experts headed by De Paul University law professor M. Cherif Bassiouni concluded its evidence-gathering activities on the Yugoslav atrocities. The resulting 3,300-page final report (submitted on May 2 to United Nations Secretary-General Boutros-Ghali) detailed specific cases of serious violations including mass executions, rapes, ethnic cleansing, torture, and acts of wanton destruction. By early June the United Nations had released a fifty-seven page version of the Commission's report that specifically accused the Bosnian Serbs of crimes against humanity, particularly in northwest Herzegovina. The Commission of Experts meanwhile had submitted 65,000 pages of documents, 300 hours of videotape, and a computerized database to the Tribunal in The Hague.

On July 8, after a frustrating and demoralizing yearlong search, the United Nations Security Council unanimously approved the appointment of a high-profile South African Supreme Court judge as chief prosecutor for the Tribunal. The judge, Richard J. Goldstone, assumed office on August 15, 1994, and immediately had to cope with a process that has been ineffective at best. The proposed budget for 1994-1995 is $32.5 million, of which only $11 million has been appropriated to date. Almost all of the budget ($32 million) consists of salaries for the judges and lawyers (the eleven judges earn $145,000 and essentially have been inactive since January 1994). More telling is the proposed budget for the prosecutor's


261. Marquand, supra note 259, at FO3 (Forum).
office: $8.7 million, of which only $550,000 has been slated for investigations.\(^{262}\)

Yet, the situation is not entirely bleak. Germany, Denmark, and Austria each holds a suspect who eventually will be turned over to the Tribunal in The Hague,\(^{263}\) twenty-four prison cells attached to the Tribunal's headquarters are ready to receive those indicted,\(^{264}\) Germany has launched war crimes investigations against fifty-one Serbs currently residing within its borders and has indicated its intention to enact a law allowing direct extradition of war criminals to the Tribunal,\(^{265}\) Bosnia and Croatia have pledged to hand over suspects and to open branches of the Tribunal in their respective capitals,\(^{266}\) and INTERPOL has recently resolved to cooperate with the Tribunal (war crimes suspects who are not extradited by their mother countries will be subject to an international indictment backed by INTERPOL).\(^{267}\)

On November 7, 1994, the United Nations International Tribunal handed down its first indictment and ordered the arrest of Dragan Nikolić, the Bosnian Serb commander of a detention camp near the eastern Bosnian town of Vlasenica. Nikolić is charged with overseeing the murder of perhaps 3,000 Bosnian Muslims.\(^{268}\) One day later, a three-judge panel approved

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\(^{262}\) Id.

\(^{263}\) Landrey, supra note 260, at 1A (National). See supra note 254 for text regarding the former Bosnian Muslim camp guard detained in Copenhagen on accusations of war crimes; the Danish Court of Appeal was scheduled to hear his case on November 7, 1994. *Ouverture du procès d’un Serbe accusé de génocide en ex-Yougoslavie*, Agence France Presse, Oct. 20, 1994, available in LEXIS, World Library, PRESSE File. On October 20, 1994, the much-publicized trial of a Serb accused of genocide began before an Austrian appellate court in Salzburg. The case is unique because it represents the first trial in a foreign country of a Yugoslav war criminal. *Erster Prozess wegen Kriegsverbrechen in Bosnien*, Süddeutsche Zeitung, at 7, available in LEXIS, World Library, ZEITNG File. The U.N. International Tribunal was informed of the trial but did not demand extradition of the accused, viewing the case as "less significant" than others. *Ouverture du procès d’un Serbe accusé de génocide en ex-Yougoslavie*, supra note 263. Unfortunately, the first day of the proceedings was marred by hearsay evidence, translation errors, and contradictory statements and affidavits. The presiding judges adjourned the trial until December 5 to allow a search for more witnesses. *World in Brief: 48 Die as Bridge in Seoul Collapses*, ATLANTA J. & CONST., Oct. 21, 1994, at A8, available in LEXIS, News Library, CURNWS File.

\(^{264}\) Id.


a formal request to the German government to extradite Dusan Tadić, a Bosnian Serb arrested in Germany in February 1994 and charged with ordering the torture and killing of Muslims during a campaign of ethnic cleansing in northern Bosnia in 1992. This indictment, while little more than a public formality designed to convince the world community that the Tribunal is functioning as intended, is nonetheless important symbolically and psychologically for the Tribunal’s small staff of sixty, for those individuals and organizations around the world who so relentlessly gathered incriminating evidence, for the survivors of the atrocities in the former Yugoslavia, and for those war criminals who now face the possibility of having to account for their deeds at the first trial, currently scheduled to take place in March 1995.


271. Id.