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**THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA:
AN ANALYSIS OF THE LEGAL BASIS FOR ITS OPERATION**

Ausma Zehanat KHAN

**Thesis submitted to
the School of Graduate Studies and Research
in partial fulfilment of the requirements
for the LL.M. degree in Law**

University of Ottawa

 Ausma Zehanat Khan

April 30, 1996



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ABSTRACT

The premise of this thesis is that the creation of the International Criminal Tribunal for the Former Yugoslavia is a unique initiative aimed at reasserting the perspective of the international community on what type of conduct is considered acceptable and legal in international and internal warfare. The work of the ICTFY validates international humanitarian law by attempting to provide some form of enforcement of the Convention on the Punishment and Prevention of the Crime of Genocide, the Geneva Conventions, the Hague Conventions of 1907, the principles established at Nuremberg and its own statute, which relies on these treaties and principles.

Although its framework and structure have been instituted in a carefully premeditated and properly legal manner, the ICTFY cannot accurately be regarded as a mechanism aimed at ending the conflict on the ground, nor has it served any deterrent function. The foremost question that must be asked by anyone studying the tribunal is what is it meant to achieve? In my analysis, I focus on three primary issues: 1) what is the legal basis for the operation of the ICTFY? This involves looking both at the law that empowers the tribunal, as well as the laws that the tribunal will rely on in interpreting and prosecuting genocide, war crimes and crimes against humanity. 2) Should the ICTFY be regarded as a mechanism aimed at ending the conflict on the ground, and is this, in fact, a role that tribunals, domestic or international, are supposed to play; and 3) if so, is the ICTFY a successful resolution mechanism. The third question will be answered in the negative. Some of the policy reasons resulting in this interpretation will be explored further on, while the first two questions which will occupy the larger part of the discussion.

Chapter One examines the legacy of the Nuremberg War Crimes Trials, the significance of the United Nations Charter and the law to be applied by the tribunal. Chapter Two scrutinizes modern applications of existing international law, focusing specifically on The Hague Conventions, the Nuremberg Principles, the Genocide Convention, and the 1949 Geneva Conventions. Chapter Three involves a closer examination of the statute itself and addresses the substantive and procedural problems to be found in interpreting the statute of the ICTFY.

The second premise of this thesis is that although it may have been intended to be so, the ICTFY is not a successful conflict resolution mechanism, nor does it possess any deterrent value, in terms of hindering or decreasing the war crimes that took place in Bosnia. Chapter Four deals with this premise in detail, by examining the issue of the credibility of the tribunal in the eyes of the international community, and specifically in the eyes of the parties to the conflict. It also incorporates an analysis of the relevant portions of the text of the Dayton Accords. The premise is further developed by examining other relevant obstacles that face the tribunal today, including the problem of funding and the aggravated nature of the war before the Dayton agreement.

Finally, the thesis will be summarized by demonstrating conclusively that the constitution and empowerment of the ICTFY does reassert the perspective of the international community on acceptable conduct in warfare; that the work of the ICTFY validates international humanitarian law, and that it is an unfortunate but predictable fact that it is not the function of the ICTFY to regulate or end the conflict on the ground, nor did it do so.

*Dedicated to my father, Dr. Zehanat Ali Khan,
whose example of integrity and honour
has been my lifelong inspiration*

*and to my mother, Mrs. Nasima Khan,
whose selfless love and continuous sacrifice
has made it possible for me to achieve my every dream*

*Everything I have and everything I am,
I will always owe to both of you.*

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Preface

In order to situate the work of the International Criminal Tribunal for the former Yugoslavia, hereinafter the ICTFY, in its proper context, it is necessary to first understand a few of the basic details underpinning the war in the former nation's present republics. One can then understand why such a momentous step as creating a war crimes tribunal was undertaken for the first time since the Nuremberg Trials following the Second World War.

The war begins its modern history on April 6, 1992, when Radovan Karadzic, the Bosnian Serb leader, left Sarajevo and began the Serbian bombardment of the city, which continued for nearly four years. However, before the Republic of Bosnia-Herzegovina came under attack, equally severe assaults had already taken place in Croatia in 1991, when cities like Dubrovnik and Vukovar were bombarded and taken.

The United Nations stepped in as the international organization with the right and indeed the obligation to assist in promoting international peace, security and co-operation, and yet an objective analysis of the UN's role in the former Yugoslavia, must necessarily conclude that international measures aimed at containing or disciplining the war have failed. The United Nations neither acted alone nor refused action on its own irresolute terms. Its partner in determining

Bosnia policy, and thereby Bosnia's fate in particular, is the European Union or Community, which seized the opportunity to solve the 'European' problem in its own backyard. But whether one looks to NATO, the EU, or the UN, the result is the same. Ordinary interventionist measures proved unsuccessful. Between the period of 1992 and 1995, there was no abatement of civilian casualties or other atrocities. Despite the formalized protection granted to various enclaves in Bosnia through Security Council Resolutions, two of the UN-declared safe havens were overrun. Military realities meant that the Dayton agreement was to yield territory that had been seized by force, although otherwise protected by international law. It is these contradictory realities, as much as the specific type of war fought in the former Yugoslavia, that brought about the creation of the International Criminal Tribunal for the Former Yugoslavia.

When it is considered that war is a common enough occurrence in human history, the fact of its occurrence is not sufficient to presuppose the necessity for this type of tribunal to exist. What prompted this unique and creative initiative was not the actual fact of the war, but the conduct of the parties to the conflict. If the good faith of the members of the international community who took responsibility for mediating and controlling the war is presumed, the argument can be made that the international community took an unprecedented step because

they were dealing with an unprecedented war. Since 1992, it has been a matter of regular course for news agencies, human rights organizations¹, special United Nations' envoys² and others to report the atrocities that are tantamount to genocide in the former Yugoslavia.³

Perhaps it is the extent and nature of the carnage coupled with the reality of the UN's inability to change the tactics being used on the ground, through other measures, which provided the impetus for the establishment of an ad hoc tribunal to deal with war crimes. The attempts of world leaders such as President Clinton, to equate the Balkan war with the conduct of the Nazi regime, may also have gone some way to highlighting a Nuremberg Trials comparison.

An automatic presumption of good faith, either on the part of the international community, or on the part of any of the parties to the conflict, is dangerous. Objective analysis stands to discredit such a presumption, by looking

¹See.e.g., Amnesty International. "A Wound to the Soul" (January 1993) AI Index: Eur 63/03/93. US Helsinki Watch "War Crimes in Bosnia-Herzegovina, Volumes I & II" (August 1992 and April 18, 1993); see also Helsinki Watch, Yugoslavia "Human Rights Abuses in Kosovo 1990-1992" (1992).

²See U.N. Doc S/24516 (A/47/418) which includes the report on the situation of human rights in the territory of the former Yugoslavia prepared by Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights.

³Pearl, Elizabeth. "Punishing Balkan War Criminals: Could the End of Yugoslavia Provide an End to Victors' Justice?" (1993) 30 *American Criminal Law Review*, at 1375.

first at the nature of the war taking place presently in Bosnia and Herzegovina, but previously in other Yugoslav republics as well, and then secondly at the nature of the international response to the war. An analysis undertaken in this context presents the conclusion that while individual lawmakers and staff of the ICTFY intend to carry out the function of their offices with integrity and without delay, international policymakers looked at the ICTFY as an expedient method of deflecting international pressure to discover and implement more rapid and possibly more authentic solutions to the war in Bosnia, such as those demonstrated by the UN's decisive role in the Gulf War.⁴

In 1945, Yugoslavia was liberated by Tito and the Soviet Army and became socialist, this formation being the second Yugoslavia. When Tito died in 1980, reviving nationalist sentiments and aspirations made it far more difficult to hold the country together. In the ten-year period that followed, the country was ruled by a collective presidency, made up of one representative from each of its eight

⁴This is not meant to imply that the UN response to the conflict in Bosnia should be identical to the approach taken in the Gulf War. I am pointing to the clear disparity between the decisive 'Coalition Action' that was mustered to deal with an impending oil crisis during the Gulf War, as opposed to the vacillation that has characterized the American position, particularly, when it comes to taking a leadership role in Bosnia. For an analysis of the inconsistency of the American position, see, Rieff, David, *Slaughterhouse: Bosnia and the Failure of the West* (New York: Simon & Schuster, 1995), at 26-28.

regions.⁵

Although Alija Izetbegovic, a Muslim, was elected President of Bosnia in 1990, it would be incorrect to label either the party or its agenda as nationalist along Muslim lines in policy or intention. The Party for Democratic Action (the SDA) was multinational in both character and structure, although the largest party in Parliament and drawn from the largest community in Bosnia, the Muslims.⁶ Yet it clearly recognized that its survival was linked to the ethos of pluralism and multinationalism, in contrast to the nationalist agendas of both Serbia/Montenegro and Croatia.⁷ With the coming to power of Slobodan Milosevic in 1986 in Serbia, the Bosnian Serbs were to make significant strides for the "Greater Serbia" project that was to fuel the entire war.

The first direct involvement of the United Nations in the conflict came with the enactment of Security Council Resolution 713, which imposed the arms embargo on Yugoslavia.⁸ Another decisive moment followed when Bosnia and

⁵*Sarajevo: A Portrait of the Siege* (New York: Epicenter Communications, 1994), at 9.

⁶Lifschultz L. & R. Ali "In Plain View" in Lawrence Lifschultz & Rabia Ali (eds.) *Why Bosnia?* (Stony Creek: Pamphleteer's Press, 1993) at xxv. See also, Glenny, Misha "What is to be Done?" *New York Review of Books* (27 May 1993).

⁷*Ibid.* See also, Kemal Kurspahic "Letter from Sarajevo: Is There a Future?" in Lawrence Lifschultz & Rabia Ali (eds.) *Why Bosnia?* (Stony Creek: Pamphleteer's Press, 1993), at 13-14.

⁸U.N. Doc. S/RES/713 (25 September 1991).

Herzegovina tried for international recognition of their state in December of 1991.⁹ At that same time, the SDA government asked the United Nations to provide troops in Bosnia, to prevent the conflict in Serbia and Croatia from spilling over into its territory.¹⁰ The request was refused at that time, and one of the outcomes of the refusal was the unchecked continuation of atrocities and war crimes inside Bosnia's territory.

Between September of 1991 and January of 1994, a series of over fifty Security Council Resolutions were passed, aimed at regulating the conflict according to the laws of humanitarian war, among other things.¹¹ Without adequate backing by commensurate action from NATO, such resolutions were to carry little weight. The United Nations had tried peacekeeping initiatives, it had consistently attempted a mediation process, it worked in conjunction with NATO at producing airstrike ultimatums, and yet nothing it did was sufficient to end the nationalist campaign of 'ethnic cleansing' that defined the war in the former Yugoslavia.

⁹*Supra*, note 7, at xxvii.

¹⁰*Supra*, note 6 at 11.

¹¹*Supra*, note 7 at xxx.

'Ethnic cleansing' has been defined as a practice 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.¹²

The campaign taking place in Bosnia and Herzegovina has commonly come to be recognized as a campaign of 'ethnic cleansing', and many players in the international arena have stated that what is taking place in Bosnia is akin to the actions perpetrated by the Nazi regime in World War Two. This has prompted the cry "never again", from leaders such as Bill Clinton, President of the United States.

It has also prompted a ruling from the International Court of Justice, pursuant to a request for a ruling on the matter of genocide by the Government of Bosnia and Herzegovina.¹³ In a two-part decision, the International Court of

¹²Meron, Theodor. "The Case for War Crimes Trials in Yugoslavia" (Summer 1993) *Foreign Affairs*, at 132.

¹³See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide. Provisional Measures. Order of 8 April 1993*, I.C.J. Reports 1993, p.3, where the Bosnian government presses the ICJ for a ruling on whether Yugoslavia (Serbia and Montenegro) had violated the Genocide Convention. The Application referred to several provisions of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, as well as to the Charter of the United Nations, which BiH alleged were violated by Yugoslavia. It also referred in this respect to the four Geneva Conventions of 1949 and their

Justice ruled that there is sufficient basis to fear that genocide is being committed against the Bosnian people, and also called upon Serbia and Montenegro to cease and desist from actions promoting the genocide.¹⁴ The first part of the ruling was unanimous, the second was based on a 13 to 1 vote, with only the Russian judge dissenting.¹⁵

Taking eleven months to come to this conclusion was a significant delay for a people that were finally recognized as facing genocide. This is particularly noteworthy when one considers that the Security Council was soliciting information about war crimes, cognizant that they were taking place, as early as May of 1992, with further substantiation provided by the Bosnian government and international monitoring agencies at many points along the way.¹⁶ Even if this delay in using the word 'genocide' can be overlooked, the inconsistency of never

Additional Protocol I of 1977, to the Hague Regulations on the Land Warfare of 1907, and to the Universal Declaration of Human Rights.

¹⁴*Ibid.* The Court considered two instruments: a Declaration whereby (the present) Yugoslavia, on 27 April 1992, proclaimed its intention to honour the international treaties of the former Yugoslavia, and a "Notice of Succession" to the Genocide Convention deposited by Bosnia-Herzegovina on 29 December 1992. The Court found that the treaties applied, and found that it was satisfied, taking into account the obligation imposed by Article I of the Genocide Convention, that the indication of measures was required for the protection of such rights.

¹⁵*Id.*

¹⁶See e.g., U.N. Doc S/24525 (8 September 1992), U.N.Doc.S/24677 (19 October 1992), U.N.Doc.S/24797 (12 November 1992), U.N.Doc.S/24405 (10 August 1992).

using the term in mediation processes or in the Security Council Resolutions¹⁷ that followed the April 1993 ruling of the International Court of Justice cannot be.

It is in this context of avoidance and ineffectuality that the ICTFY was constituted and empowered. More than two years have passed since its statute was drafted and accepted. In that time, there have been repeated assaults on the safe havens and surrounding areas by the Bosnian Serb forces. The siege of Sarajevo is considered to be the longest in modern history, and before the Dayton peace talks, the UN stood poised between complete withdrawal and a final authorization of massive airstrikes, but what is most striking in the turn of contemporary events is that the tribunal has seen fit to charge Radovan Karadzic, and Ratko Mladic, his foremost general with genocide, war crimes and crimes against humanity.¹⁸ The tribunal's indictments could not alter the situation on the ground, but they do alter slightly, the context in which the debate about the ICTFY must take place. The questions posed throughout this paper are not questions that can operate in a political vacuum; the conduct of war in Bosnia has

¹⁷See e.g., U.N. Doc. S/RES/819 (16 April 1993) which refers to the shelling of Srebrenica and the bombardment of a civilian population, but does not use the word 'genocide' to describe the activities on the ground.

¹⁸"Genocide Charges Laid" Toronto Star (26 July 1995).

continuing consequences for the fate and effectiveness of the tribunal. Thus, my analysis of the legal basis for the operation of the International Criminal Tribunal for the Former Yugoslavia, will be rooted in this unique history and with these particular considerations in mind.

Introduction

The premise of this thesis is that the creation of the International Criminal Tribunal for the Former Yugoslavia is a unique initiative aimed at reasserting the perspective of the international community on what type of conduct is considered acceptable and legal in international and internal warfare. The work of the ICTFY validates international humanitarian law by attempting to provide some form of enforcement of the Convention on the Punishment and Prevention of the Crime of Genocide¹⁹, the Geneva Conventions²⁰, the Hague Conventions of 1907²¹, the principles established at Nuremberg and its own statute, which relies on these treaties and principles.

Although its framework and structure have been instituted in a carefully

¹⁹Convention on the Punishment and Prevention of the Crime of Genocide, Article 1, December 9, 1948, T.S. 1949 No. 27, entered into force Dec. 2, 1952.

²⁰Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, T.I.A.S. No.3364, 75 U.N.T.S. 135, entered into force Oct. 21, 1950; Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, Article 3, 6 U.S.T. 3516, T.I.A.S. No. 3364, 75 U.N.T.S. 287 (Fourth Geneva Convention), entered into force Oct. 21, 1950.

²¹Convention Respecting the Laws and Customs of War on Land (Hague Convention No. IV), 36 Stat. 2277, T.S. 539, entered into force Jan. 26, 1910.

premeditated and properly legal manner, the ICTFY cannot accurately be regarded as a mechanism aimed at ending the conflict on the ground, nor has it served any deterrent function. The foremost question that must be asked by anyone studying the tribunal is what is it meant to achieve? In my analysis, I focus on three primary issues: 1) what is the legal basis for the operation of the ICTFY? This involves looking both at the law that empowers the tribunal, as well as the laws that the tribunal will rely on in interpreting and prosecuting genocide, war crimes and crimes against humanity. 2) Should the ICTFY be regarded as a mechanism aimed at ending the conflict on the ground, and is this, in fact, a role that tribunals, domestic or international, are supposed to play; and 3) if so, is the ICTFY a successful resolution mechanism. It should come as no surprise that the third question will be answered in the negative. Some of the policy reasons resulting in this interpretation will be explored further on. However, it is the first two questions which will occupy the larger part of the discussion.

The first premise of this thesis is that the creation of the ICTFY reasserts the international community's perspective on acceptable conduct in war, and further that it validates international humanitarian law by doing so. This premise will be developed and explored in Chapter One, which examines the legacy of the Nuremberg War Crimes Trials, the significance of the United Nations Charter and

the law to be applied by the tribunal. Chapter Two scrutinizes modern applications of existing international law, focusing specifically on The Hague Conventions of 1907, the Nuremberg Principles, the Genocide Convention of 1948, and the 1949 Geneva Conventions. The statute of the ICTFY incorporates all of these standards into its task of defining what acts are to be characterized as war crimes, crimes against humanity and genocide.

Chapter Three involves a closer examination of the statute itself and addresses the substantive and procedural problems to be found in interpreting the statute of the ICTFY. These obstacles reinforce the difficulty inherent in attempting to derive an appreciation of international consensus through the work of the tribunal. Can the work of the tribunal be considered representative of international agreement on what constitutes valid grounds for apprehending and punishing war criminals? Can different interpretations of jurisdictional issues be resolved to the satisfaction of the international community? The practical implications of the work of the tribunal, and its impact on redefining international law, is considered at length in this chapter.

The second premise of this thesis is that although it may have been intended to be so, the ICTFY is not a successful conflict resolution mechanism, nor does it possess any deterrent value, in terms of hindering or decreasing the war crimes

that took place in Bosnia. Chapter Four deals with this premise in detail, by examining the issue of the credibility of the tribunal in the eyes of the international community, and specifically in the eyes of the parties to the conflict. The premise is further developed by examining other relevant obstacles that face the tribunal today, including the problem of funding and the aggravated nature of the war before the Dayton agreement.

Finally, the thesis will be summarized by demonstrating conclusively that the constitution and empowerment of the ICTFY does reassert the perspective of the international community on acceptable conduct in warfare; that the work of the ICTFY validates international humanitarian law, and that it is an unfortunate but predictable fact that it is not the function of the ICTFY to regulate or end the conflict on the ground, nor did it do so.

CHAPTER ONE: THE LONG ROAD TO THE ICTFY

1.0 Introduction

"There are no permanently established means of enforcing the Nuremberg principles, and they are often flouted, but as a moral and legal statement, clothed with judicial precedent and United Nations recognition, the Nuremberg principles are an international legal force to be reckoned with."²²

No action taken under the aegis of the international community's umbrella can be said to be without prior authority, and although one might call the creation of the ICTFY an unprecedented step in dealing with modern warfare, it is rooted in the significant acts of recent history. If the United Nations can be said to speak for the international community, and it is generally accepted that this is the case, it is also the organization which is given the responsibility to determine what steps are appropriate in attempting to mediate conflicts between states. Yet its other actions in the Balkans prove that it might have been lost, in terms of its moral grounding, had it not had the Nuremberg precedent to look to. Nuremberg itself, arose out of a series of unique circumstances, but by the time the Nuremberg Principles came to be espoused, it was clear that a historical trail was being followed.

²²"An Interview with Telford Taylor" (Summer/Fall 1994) 18 *The Fletcher Forum of World Affairs* No. 2. at 1.

1.1 The Legacy of Nuremberg

The International Military Tribunal set up after the Second World War arraigned German war criminals in the city of Nuremberg. Political and military leaders had been charged with war crimes, and the Nuremberg trials stood for the proposition that "all individuals, regardless of military rank or governmental position, are answerable to international law for their conduct in initiating and waging war".²³ This is not the primary starting point to be considered, although it is the most relevant in terms of its impact on the ICTFY.

Clearly, the ICTFY owes its greatest foundational debt to the Nuremberg Charter²⁴, yet the Charter by itself is neither a true precedent in international law nor does it represent very strong authority for the principle of individual responsibility for war crimes²⁵, in strictly legal terms. It was the adoption and endorsement of the principles of both the Charter and Judgment of the International Military Tribunal at Nuremberg, by the United Nations General

²³Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis. Aug.8, 1945, 58 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 280, [hereinafter Nuremberg Charter]. *Infra*, note 48, ILC Report on the Formulation of Nurnberg Principles.

²⁴*Supra*. note 23.

²⁵Sunga, Lyal S. *Individual Responsibility in International Law for Serious Human Rights Violations* (Boston: Norwell, 1992), at 56.

Assembly that is considered authoritative²⁶. The distinction is that the International Military Tribunal established after World War Two was not a permanent court and no other international court with permanent criminal jurisdiction has been created since Nuremberg,²⁷ which indicates that the Charter alone could not have been considered completely authoritative. Legitimacy was added by the UN's General Assembly Resolution²⁸.

It is interesting to note, however, that in regard to permanent *legal* impact, the war crimes trials suggested and half-heartedly conducted before the *First* World War left no mark other than to lay the groundwork for Nuremberg. Therefore, the work accomplished prior to the Second World War, must be given some precedential weight, albeit minor.

Following World War I, a Commission was established to investigate the responsibility of those who violated the laws and customs of war essentially as embodied in the 1907 Hague Convention,²⁹ in addition to crimes considered by the

²⁶G.A.Res. 95(I), U.N. GAOR. 55th plen. mtg., at 188, U.N.Doc. A/64/Add.1 (1946).

²⁷Bland, Mark A. "An Analysis of the United Nations International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia: Parallels. Problems. Prospects" (Fall 1994) 2 *Indiana Journal of Global Legal Studies* No 1., at 246.

²⁸*Supra*, note 26.

Commission to be against the "laws of humanity".³⁰ This commonly accepted phrase came to be known as the Martens Clause.³¹ The entire purpose of the Commission was to present evidence of war crimes to an international tribunal which was responsible for prosecuting German war criminals.³²

These investigations led eventually to the Leipzig Trials of 1921, which set an important historical precedent despite being deemed a failure.³³ It was the first time that it was recognized and acknowledged that those who tortured others as a duty to their country could be put on trial, as might did not prove right.³⁴ Few

²⁹*Supra*. note 21.

³⁰*Supra*. note 21. Preamble.

³¹*Ibid*. See also, Kupferberg, Matthew I. "Balkan War Crimes Forum Selection" (Summer 1994) 27 *Boston College International and Comparative Law Review* No. 2, at 383, where he states that the Martens Clause represented an expanded definition of war crimes, and that the Preamble of the Hague Convention recognized that the definition of war crimes is not limited to the articles of the Hague Convention. Instead, the concept of war crimes is dynamic and subject to change where circumstances may require [Hague Conventions 101-02].

³²Bassiouni, M. Cherif " The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)" (October 1994) 88 *American Journal of International Law* No. 4, at 785. Professor Bassiouni points out that the difference between the 1919 Commission and the Commission of Experts established to prosecute war crimes in the territory of the former Yugoslavia (*Infra* Note 50) is that the former was established at the same time as the drafting of the Treaty of Versailles, which provided for an international tribunal, whereas the 1992 Commission was established six months before the ICTFY. See U.N.Doc. S/RES/827 (25 May 1993).

³³*Supra*, note 32, at 786.

³⁴*Supra*, note 32, at 787, quoting Mullins, Claude, *The Leipzig Trials* 23-24 (1921).

prosecutions resulted from the work of the 1919 Commission³⁵, due to changing political will, leading to difficulties in establishing Nuremberg, as "compromised justice always haunts succeeding generations."³⁶

Yet in theory at least, the Treaty of Versailles that followed the First World War, did provide for three significant things: 1) the German government's recognition of the Allied powers' right to try persons responsible for violating the laws of war before military tribunals³⁷, (2) the right of the Allies to establish national war crimes tribunals³⁸, and (3) the separate trial of Kaiser Wilhelm II for

³⁵An interesting argument is laid out in most works that consider the Leipzig Trials: war crimes trials were first suggested by the Allied powers in order to provoke immediate deterrence of battlefield atrocities. Yet at any point when the outcome of the First World War seemed in question, the cries for retaliatory punishment of war criminals became muted. This was due to the fact that holding such trials and meting out punishment would only be feasible and acceptable if the Allies were to demonstrate a clear and crushing victory. Sought on this basis, it was no wonder that the Germans thought such trials would be inherently hypocritical, predicated as they were on victors' justice. At no point did the Allies consider punishment of their own soldiers or leaders required or justifiable. For a closer look at this argument see Willis, James F. *Prologue to Nuremberg*. (Connecticut: Greenwood Press, 1982), Preface and Taylor, Telford *Anatomy of the Nuremberg Trials* (New York: Random House, 1992), Chapter 1.

³⁶*Supra*, note 32, at 787. Bassiouni goes on to note that although both the 1919 Commission and the United Nations War Crimes Commission established in 1943 produced a great deal of evidence and information, international and national prosecutions did not result in connection with the work of these bodies. He attributes this to a change of political will of the powers that established these commissions, due to the nature of changing political circumstances.

³⁷Treaty of Peace between the Allied and Associated Powers and Germany, June 28, 1919, 11 Martens (ser. 3) 323, 2 Bevens 43, Article 228.

³⁸*Supra*, note 37, Article 229.

offences against international morality and the sanctity of treaties³⁹. The Leipzig Trials carry little historical weight, in that rather than pursuing prosecutions, the Allied powers sought concessions on other fronts, yet they definitely set out a line of thinking that was picked up both by Nuremberg and in present times, by the ICTFY.

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.⁴⁰ This agreement consisted of the Agreement itself as well as of the Charter of the International Military Tribunal.⁴¹ One significant element was that the Agreement supported the establishment of an international military tribunal the purpose of which would be to try war criminals whose offenses had no specific geographic location.⁴² This will be relevant to an understanding of the ICTFY's jurisdiction both over war crimes and war criminals.

³⁹Supra, note 37, Article 227. The Kaiser was the figurehead of the German war effort and as such earned retaliatory wrath in proportion to his position. He sought refuge in the Netherlands and the Allied powers did not attempt to extradite him to stand trial.

⁴⁰Supra, note 23.

⁴¹Ibid.

⁴²Harris, Whitney R. "A Call for an International War Crimes Court: Learning from Nuremberg" (1992) 23 *University of Toledo Law Review*, at 242-243.

While much about Nuremberg is important in understanding the ICTFY, perhaps the most important element can be found in Article VI of the Nuremberg Charter. This Article set up three categories of crimes for which accused Nazis could be tried: Crimes Against Peace, War Crimes and Crimes Against Humanity.⁴³ The Statute for the International Criminal Tribunal for the former Yugoslavia incorporates the language of war crimes and crimes against humanity⁴⁴ with expanded definitions, but differs from the Nuremberg Charter in other crucial regards.⁴⁵

The ICTFY is also indebted to the Nuremberg Charter for certain foundational principles including the recognition that individual responsibility for

⁴³*Supra*, note 23, Article VI, which defines Crimes Against Peace as planning, initiating and waging wars of aggression, or in violation of treaties, or the conspiracy to do so. War Crimes are defined as violations of the laws and customs of war with emphasis on ill-treatment of prisoners of war and civilians in occupied countries. Crimes Against Humanity are held to be the murder of civilians based on religious, political or racial grounds.

⁴⁴*Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*. U.N.Doc. S/25704 (3 May 1993). For a fuller citation of the report, see Note 75. The statute of the tribunal was adopted in U.N.Doc. S/RES/827 (25 May 1993), Articles 3 and 5.

⁴⁵There are several factors that diminish the authority of the Nuremberg precedent, including 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 defeated the defendants. These factors impaired credibility and resulted in a perception of "victors' justice" being imposed. The IMT also tried defendants in absentia, which is another crucial difference from the modus operandi of the ICTFY. For a detailed analysis of these differences, see Bland, Mark A., *supra*, note 27, at 246-247.

crimes against humanity constituted a valid norm of international law.⁴⁶ 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 Nuremberg⁴⁷, the first of these stating 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.⁴⁸ The fundamental rule underlying Principle I is that "international law may impose duties on individuals directly without the interposition of internal law."⁴⁹ The Commission of Experts established pursuant to Security Council Resolution 780⁵⁰ relied extensively on these UN-endorsed principles in preparing and presenting a report to the Secretary-General of the United Nations on the nature and instances of war crimes taking place in the territory of the former Yugoslavia. The extent of this reliance will be examined further on.

⁴⁶*Supra.* note 27, at 384.

⁴⁷*Supra.* note 26.

⁴⁸ILC Report on the Formulation of Nurnberg Principles, [1950] 2 *Yearbook of the International Law Commission*, U.N. Doc. A/CN.4/22/1950.

⁴⁹*Ibid.*

⁵⁰U.N.Doc. S/RES/780 (6 October 1992).

1.2 The Security Council Updates Nuremberg

Although the example was present in the history of international law, the ICTFY was not actually constituted until well into the second year of the war in Bosnia. One might ask why the delay? Or more tellingly, one could ask what the impetus was for the Security Council resolution calling for the establishment of a war crimes tribunal in this day and age.

It was not a step the United Nations took lightly, or as I will argue further on, even in good faith. It took the decision of the International Court of Justice on April 8, 1993⁵¹ to bring the subject to light. And that decision was made pursuant to a request for a ruling on the question of genocide by the government of Bosnia-Herzegovina. Prior to this moment, the international community had not demonstrated any initiative with specific regard to a tribunal, although it had been involved in collecting information on war crimes from relatively early on.

With its decision on April 8, 1993, the International Court of Justice made it clear that the aggression in Bosnia amounted to genocide, and further that Serbia

⁵¹*Supra*, note 13.

and its surrogates were to cease such acts at once.⁵² Members of the Security Council reacted strongly to the assault on the city of Srebrenica in early April, 1993.⁵³ The ICJ's decision acted as a spur, but perhaps less so than the assault on Srebrenica's civilian population for Security Council resolutions that named the city a safe haven,⁵⁴ and which once again condemned all violations of international humanitarian law, including in particular, the practice of 'ethnic cleansing' and the massive, organized and systematic detention and rape of women. The Council proceeded to the next step by affirming that those responsible for such acts would be held individually responsible,⁵⁵ a direct, if unacknowledged, follow-up on the Nuremberg principles.

Although it is clear that the Security Council was proceeding in the direction that would lead to the establishment of the ICTFY, the language of many

⁵²*Supra.* note 13.

⁵³See e.g., U.N.Doc. S/PV.3200 (18 April 1993), where Morocco's representative to the Security Council states that "this is a case of genocide, which our Council has been saying for almost two years now." See also, Muhammad Sacirbey's (the Bosnian Ambassador to the UN) statement to the Security Council in U.N.Doc.S/PV.3201 (19 April 1993), at 6 and 7, where he states that "the Security Council took note of the ICJ's opinion and the international community expects the Council to shoulder its responsibilities under the Charter for the maintenance of international law."

⁵⁴*Supra.*, note 17.

⁵⁵U.N. Doc. S/RES/820 (17 April 1993).

of the resolutions remained ambiguous at best. Invited to speak at Security Council deliberations on April 19, 1993, the Bosnian Ambassador to the United Nations, Muhammad Sacirbey, denounced this ambiguity. In his address, several key points were made:

"Genocide and aggression are two powerful words in any language or tone. They underlie powerful legal considerations. There is an obligation on the part of the community of nations to take concrete steps to halt immediately the actions those words represent. Obviously, that is the reason why certain members of the Council avoid the use of these two words. It is tragically comical how resolutions and statements are drafted that describe the acts so faithfully and meticulously omit the damning words. These two words are the reality of Bosnia and Herzegovina, no matter what attempts are made to exclude them from any resolution or statement pertaining to Bosnia and Herzegovina.⁵⁶

The Ambassador's statement should be viewed in light of the regime international law has set up for dealing with situations such as the conflict taking place in Bosnia. The Convention on the Prevention and Punishment of the Crime of Genocide⁵⁷, one of the few treaties to gain substantial worldwide acceptance, articulates some of the standards which the ICTFY will look to in prosecuting war

⁵⁶U.N.Doc.S/PV.3201 (19 April 1993). at 7.

⁵⁷*Supra*, note 19.

criminals. Genocide is a powerful word in international language because it is seen as the violation of law that is considered inherent (*jus cogens*), or customary.

International law is considered customary when it is comprised of two elements: 1) a consistent and general international practice among states, and 2) when the practice is accepted as law by the international community.⁵⁸ Over one hundred states have ratified the Convention, whose first four articles prescribe the substantive principles that now constitute the crime of genocide by declaring genocide a "crime under international law"⁵⁹. Prohibitions on torture and genocide are now considered to be norms of international law, which rarely spark debate about applicability. The real question when using the term genocide is how to establish that genocide has actually been committed, and then how to make that definition workable for the ICTFY.

Did the international community react to the threat of genocide? The chain of events leading to the actual creation of the ICTFY should be examined. The ICJ decision was the point at which inaction could no longer be explained away,

⁵⁸Kindred, Hugh M. et al. *International Law: Chiefly as Interpreted and Applied in Canada* (Emond Montgomery, 1993, Fifth Ed.), at 174.

⁵⁹Webb, John "Genocide Treaty and Ethnic Cleansing: Substantive and Procedural Hurdles in the Application of the Genocide Convention to Alleged Crimes in the Former Yugoslavia" (1993) 23 *Georgia Journal of International and Comparative Law* No. 2, at 388. Webb refers

but there was a somewhat promising pattern developing in the trend of several earlier Security Council resolutions adopted in reaction to reports of war crimes and crimes against humanity in the territory of the former Yugoslavia.⁶⁰ In early 1992, resolution 771 called for preliminary investigations.⁶¹ Beyond that, in resolution 780⁶², the Security Council requested that the Secretary-General establish an impartial Commission of Experts to analyze the information requested by resolution 771. Based on the report of this Commission, the Secretary-General then proceeded to recommend that the Security Council create the ICTFY.⁶³ It is logical to conclude that the Security Council of the United Nations looked both at the historical record on prosecuting war crimes (the question of *defining* the crimes will be left aside at this point), and at the trend it was itself developing

specifically to Article I of the Convention in this instance.

⁶⁰See e.g., U.N.Doc. S/RES/764 (13 July 1992) reaffirming that all parties to the conflict are bound to comply with their obligations under international humanitarian law and in particular with the Geneva Conventions of 12 August 1949.

⁶¹U.N.Doc. S/RES/771 (13 August 1992), in which the Security Council calls for "States and international humanitarian organizations to collate substantiated information relating to the violations of humanitarian law, including grave breaches of the Geneva Conventions, being committed in the territory of the former Yugoslavia, and to make this information, [inter alia], available to the Council."

⁶²*Supra*, note 50. The Commission was also to pursue its own investigations and efforts.

⁶³U.N.Doc. S/24657 (14 October 1992). On October 26, 1992, the Secretary-General announced the appointment of the Chairman and members of the Commission of Experts.

through the passing of resolutions essentially concerned with this point.

Further to this, in February of 1993, the Secretary-General submitted an interim report of the Commission of Experts to the President of the Security Council, which concluded that grave breaches of international humanitarian law were taking place, and that should the Security Council or any other competent organ of the United Nations decide to establish an ad hoc international tribunal, such a decision would be consistent with the direction of its work.⁶⁴

Security Council resolution 808 establishes the tribunal to prosecute those responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991,⁶⁵ and asks for the Secretary-General to provide a report on this same issue. Pursuant to the report provided, resolution 827 specifically explains and reaffirms how the tribunal is to be established, and approves the tribunal's statute.⁶⁶

The hand of Nuremberg is visible in the direction that the ICTFY has taken, its impact being substantive rather than procedural. Nuremberg set the precedent for individual responsibility for committing acts that constitute a crime under

⁶⁴U.N.Doc. S/25274 (9 February 1993).

⁶⁵U.N.Doc. S/RES/808 (22 February 1993).

international law, a principle to be found in the statute of the ICTFY as well.⁶⁷ In addition, the Leipzig and Nuremberg precedents stand for the proposition that a military or government leader is not exempt from such responsibility, at least in theory, and the statute of the ICTFY reinforces this point.⁶⁸ Thirdly, the statute of the ICTFY very much relies upon Nuremberg interpretations of international law to codify the acts that constitute violation of the laws of war; Article 3 specifically deals with the violation of the laws or customs of war, Article 2 addresses grave breaches of the Geneva Conventions, while Article 5 defines crimes against humanity.⁶⁹ Yet the question remains: what is the actual basis for empowering such a tribunal, and what physical realities moved the Security Council forward in time to this point? The United Nations looks as much to its Charter as to its history in establishing the basis for the creation of such a court.

⁶⁷U.N. Doc. S/RES/827 (25 May 1993)[hereinafter cited as Statute].

⁶⁸Statute: Article 7, paragraph 1 of the statute states "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be held individually responsible for the crime."

⁶⁹Statute: Article 7, paragraph 2 states "The official position of any accused person whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment." This paragraph was doubtlessly contemplating the future role of Radovan Karadzic and other leaders responsible for war crimes, before the tribunal.

⁶⁹Statute, Articles 2, 3 and 5.

1.3 The Significance of the UN Charter

Article 41 of the UN Charter provides that "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the members of the United Nations to apply such measures."⁷⁰ Article 42 states: "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."⁷¹ If the language of Article 41 is not considered explicit enough to justify establishing a tribunal, the argument is that if force is allowed as a "measure" under Article 42, the creation of an ad hoc international criminal court should also be permitted.⁷²

Indeed it is arguable that there are clear examples in international relations where creating and empowering such a court may be a better attempt at resolution and the normalization of international relations than a show of force. Whether

⁷⁰U.N. Charter, Article 42, June 26, 1945, 59 Stat. 1031, T.S. 993, entered into force Oct. 24, 1945.

⁷¹*Ibid.* Article 42.

⁷²Blakesley, Christopher L. "Obstacles to the Creation of a Permanent War Crimes Tribunal" (Summer/Fall 1994) 18 *The Fletcher Forum of World Affairs* No. 2, at 85-85.

Bosnia represents such an example remains to be seen, but the more likely argument is that the use of one could enhance the effectiveness of the other. Nonetheless, it is Chapter VII of the Charter that provides the basis for the Security Council to act in creating an international war crimes tribunal.

This is not to say that a Chapter VII authorization is not problematic. There are scholars who argue that if Article 42 "extends to creating an international tribunal, it extends to making that tribunal effective"⁷³, but the issue of credibility must not be overlooked. In order for a practice or measure to be accepted by the international community, it must have some foundation in law. Remember that one of the problems faced by the International Military Tribunal at Nuremberg was the issue of credibility in light of the fact that the tribunal prosecuted war criminals based on laws that were applied *ex post facto*⁷⁴. One of the arguments against going forward with the Nuremberg trials was that the trials would

⁷³Wedgwood, Ruth. "War Crimes in the former Yugoslavia: Comments on the International War Crimes Tribunal" (Winter 1994) 34 *Virginia Journal of International Law* No. 2, at 270. It should not be surprising to note that the subject of a permanent international criminal court, which would obviate the need for ad hoc tribunals of the nature of the ICTFY, has long been considered by international lawyers. See, e.g., Alfaro Ricardo, U.N. Doc. A/CN.4/Ser.A/1950/Add.1, at 15, where the Special Rapporteur to the United Nations states "During [the last thirty years] the public opinion of the world, official and unofficial entities representing the world's legal and political thought, have strongly advocated the creation of an international criminal jurisdiction."

⁷⁴*Supra*, note 27.

represent prosecution based on a set of laws and principles, created and approved, after the acts had already taken place.⁷⁵ The definition of both war crimes and war criminals was being defined retroactively and would apply retroactively, thus earning the derisive name 'victor's justice'.⁷⁶

The question is by relying on a Security Council resolution as the basis for establishing the tribunal, and saying that such reliance was consistent with Articles 41 and 42 of the UN Charter, did the United Nations damage the credibility of its court from the inception? In its Task Force report on the ICTFY, the American Bar Association notes that the Secretary-General saw advantages in using a Security Council resolution because it would be expeditious and immediately effective.⁷⁷ In the view of the Secretary-General, the recognized international process of drafting a treaty and submitting it for ratification posed problems not only because it was time-consuming, but because there was a danger that some nations would not ratify the Convention.⁷⁸

⁷⁵*Ibid.*

⁷⁶*Ibid.*

⁷⁷Monroe Leigh et al., Report on the International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia (1993), commenting on the Report of the Secretary-General, pursuant to Security Council resolution 808, *infra*, note 78.

⁷⁸Secretary-General's Report on Aspects of Establishing an International Tribunal for the

A suggested General Assembly resolution was seen as being inconsistent with the urgency required.⁷⁹ Furthermore, the Secretary-General concluded that "the international tribunal established under Chapter VII would be legally justified based on the object and purpose of the decision as well as past Security Council practice".⁸⁰ Some weight was added to this argument by relying on Articles 24 and 39 of the UN Charter. Since the tribunal's goal was to prosecute those who violated the agreed upon international norms, it would be contributing to restoring and maintaining international peace and security, thereby satisfying the requirements to be found in Articles 24 and 39.⁸¹

Special attention ought to be paid to Article 39. The Secretary-General relies on it heavily to justify the creation of the ICTFY in accordance with it, when

Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, U.N. SCOR, U.N. Doc. S/25704 (1993), paragraph 20.

⁷⁹*Ibid.*, paragraph 21.

⁸⁰*Supra*, note 77, at 9.

⁸¹*Supra*, note 70. Article 24 states: "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf. Article 39 states: "The Security Council shall determine the existence of any threat to the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

he states:

"In this particular case, the Security Council would be establishing, as an enforcement measure under Chapter VII, a subsidiary organ within the terms of Article 39 of the Charter, but one of a judicial nature. This organ would, of course, have to perform its functions independently of political considerations; it would not be subject to the authority or control of the Security Council with regard to the performance of its judicial functions. As an enforcement measure under Chapter VII, however, the life span of the tribunal would be linked to the restoration and maintenance of international peace and security in the territory of the former Yugoslavia, and Security Council decisions related thereto."⁸²

The Secretary-General appears to be conscious of the significance of the decision to use the powers of the Security Council to circumvent the normal route of signature and ratification. The language of the report is careful to express both the powers and the limitations of the interim court. And yet the question of the tribunal's *legitimacy* is not at issue, or should not be, as far as the Secretary-General's report is concerned. Simply put, the fact that the tribunal has been empowered by extraordinary means does not mean that it has no basis in existing international law.

⁸²*Supra*, note 78, at paragraph 28. It is also interesting that the Secretary-General insists that the Security Council would not be attempting to legislate the law, but instead that the tribunal would be applying existing international humanitarian law (paragraph 29), thereby lending credence to the argument that universal principles of international law meant to be applied to situations such as the war in Bosnia already exist, and do not need to be re-created. The statement of the Secretary-General must be taken as validating the norms of international humanitarian law already in existence, while implicitly acknowledging the Nuremberg debt.

One question that is raised by the Secretary-General's desire not to delay proceedings by leaving the issue of ratification up for grabs, is that this suggests a lack of international consensus, or international political will to see the tribunal realized. The Task Force's endorsement of the Secretary-General's report seems almost too hasty in that it neglects to answer the question of whether consensus exists. If states do not agree on the definition of an international "measure" under Article 42 of the UN Charter, is the circumvention of the General Assembly, and the reliance purely on the political will of the Security Council, a truly legitimate course of action? Although Chapter VII confers broad interpretative powers on the Security Council, the Council is not without legal restrictions on its power.⁸³ The flipside is that it is necessary for the Council to protect its institutional legitimacy by acting in ways which most states deem appropriate.⁸⁴ If some states would not have ratified a treaty proposing the establishment of an ad hoc international tribunal, one could question whether the Security Council was acting

⁸³Harper. Keith "Does the United Nations Security Council Have the Competence to Act as Court and Legislature?" (Fall 1994) 27 *New York University Journal of International Law and Politics* No. 1, at 105.

⁸⁴*Ibid.* Chapter III of the Statute of the International Court of Justice provides procedural rules that ensure the due process guarantees to a greater extent than in many domestic courts, Statute of the International Court of Justice, 59 Stat. 1031, entered into force Oct. 24, 1945, Articles 39-64. However, the Security Council does not yet have a comprehensive set of procedural rules, which suggests that its power is somewhat arbitrary in nature.

appropriately or arbitrarily.⁸⁵

Others would argue that the establishment of the tribunal, pursuant to either Article 41 or 42, would be consistent with upholding the collective security system, an obligation outlined in Article I of the Charter. Roslyn Higgins has this to say about the the collective security system and the UN Charter:

"It was not the intention of the Charter that collective security should only be available to an attacked state if others felt that they had a direct interest in assisting; if it could be guaranteed that assistance would entail no harm to their soldiers; and if the political and military outcome was clear from the outset. The integrity of the Charter's collective security system was not intended to be dependent upon a states's perception of where their national interest lay. Becoming a member of the United Nations necessarily entails, at that moment, the decision that the national interest will lie in ensuring an efficacious collective security system."⁸⁶

A link can be established between an ad hoc tribunal and collective security. In constituting the tribunal, the Security Council was mobilizing its collective political will -- to what end? It was reacting to the situation in Bosnia, a war that

⁸⁵The argument for arbitrariness is weakened when one considers that the model of the statute and composition of the ICTFY was relied on in creating the International Tribunal for Rwanda. The statutes of the two tribunals bear many similar provisions, both prosecute genocide and crimes against humanity, and both are explicitly stated to have been created under Chapter VII of the Charter of the United Nations. See U.N. Doc. S/RES/955 (8 November 1994) which sets out the provisional statute for the International Tribunal for Rwanda.

⁸⁶Higgins, Roslyn. "The New United Nations and the former Yugoslavia" (July 1993) 69 *International Affairs* No. 3, at 471.

poses a threat to international security, although there are those who argue that it affects only the regions which share borders with Bosnia.⁸⁷ The creation of the tribunal does not equal a solution for the war in Bosnia, but it indicates a step towards ensuring effective collective security, by suggesting that the conduct of the aggressor forces in the war in Bosnia is unacceptable to the international community.

More importantly, it is a creative solution indicative of the need to be flexible as the war in the Balkans has worsened over time. There are two comments that need to be made: first, collective security has been threatened by the war in the Balkans. The collective security system is weakened when no response or an inadequate response is made to international aggression. If any organization is considered, before aggression is demonstrated, it is the United Nations. Thus, the silence of the UN on an issue that threatens regional stability and possibly global stability, is a general indicator that if the UN applies a

⁸⁷ This is a short-sighted proposition. "What Bosnia is about is changing borders. If the West acquiesces to a new map achieved by force in Yugoslavia, why shouldn't 4.5 million Russians in northern Kazakhstan change that border by violence and join Russia? What we in the West are saying is 'We don't care.' That's a dangerous answer in a part of the world where political borders don't correspond to ethnic borders. The day after the Serbs take Sarajevo, any Russian leader who stands up and says we have to create a 'Greater Russia' will be listened to." Statement by Paul A. Goble, Senior Associate at the Carnegie Endowment for International Peace, 17 May 1993.

consistent standard, aggression will be tolerated. It cannot be argued that the UN was silent in Bosnia, merely ineffectual. The end result, however, is the same. For the UN to fail to respond adequately to aggression against a member-state, indicates that if this is possible in one instance, it is also possible in others. Protection is not guaranteed, despite the commitment of the member-States to the UN Charter.

In the case of Bosnia, the UN identified a threat to the collective security system, and therefore, saw its responsibility under the appropriate articles of its Charter. It used the collective security rationale to justify the creation of an ad hoc tribunal under Chapter VII of the UN Charter, indicating that the creation of such a tribunal is at least as appropriate a response to the war as the use of force or the threat of the use of force. Recall that Articles 41 and 42 of the UN Charter, allow for the Security Council to undertake variety of measures in response to threats to the international peace and security.⁸⁸ If empowering the tribunal is seen as a response to a threat against international security, then it follows that it will continue to be a consideration in instances of potential future aggression.

Therefore, while creating and empowering the tribunal might be an unusual

⁸⁸*Supra*, note 70, Articles 41 and 42.

initiative, it is not without basis in international law. It has historical roots in the establishment of three separate commissions that were constituted for the purpose of collecting evidence on war crimes⁸⁹, and more importantly one can look to the example of Nuremberg. The Charter of the United Nations also provides room for asserting that the establishment of the ICTFY is a legitimate, international measure when international peace and security are threatened, although reservations about an arbitrary Security Council should be borne in mind. The Security Council should not automatically be given blanket authority to devise unique responses to other instances of international aggression, as this would ultimately lead to the circumvention of the regular methods of ascertaining and obtaining international consensus. Considering that the work of the Security Council is as much political as it is legal, this could result in a monopoly of power by a select few. As Roslyn Higgins contends, this is not the definition of collective security.⁹⁰

In the case of Bosnia, given that other measures have proved ineffective at

⁸⁹Recall the 1919 Commission, the 1943 United Nations War Crimes Commission, established during World War II by a diplomatic conference held at the Foreign Office in London, and the more recent Commission of Experts, established pursuant to Resolution 780.

⁹⁰*Supra*, note 86.

controlling or containing the war in Bosnia, the decision to circumvent the treaty process in favour of a Security Council authorization is appropriate, particularly when weighed against the reality of genocide.

1.4 The Law to be Applied by the Tribunal

Having established the laws and legal measures the ICTFY is based on, it then becomes imperative to study which laws or norms of international consensus will guide and direct the implementation of its provisions.

Article 1(A) of the Statute deals with the ICTFY's competence to rule, as pertaining to subject-matter jurisdiction, or competence *rationae materiae*.⁹¹

Paragraph 33 stipulates that the tribunal shall prosecute persons responsible for serious violations of international humanitarian law. It clarifies that this body of law exists in the form of both conventional law and customary international law.⁹²

Paragraph 34 explicitly states that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law

⁹¹*Supra*, note 66.

⁹²*Supra*, note 78. Paragraph 33 also states that while there is international customary law which is not laid down in conventions, some of the major conventional humanitarian law has become part of customary international law.

so that the problem of adherence of some but not all States to specific conventions does not arise.⁹³ Paragraph 35 of the Report of the Secretary-General on the statute of the ICTFY is the most important for my purposes here, because it enumerates the Conventions and Treaties that the tribunal will rely on to define war crimes and war criminals. It also states that customary international law is relevant and applicable, and reads as follows:

The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; the Genocide Convention; and the Charter of the International Military Tribunal of 8 August 1945.⁹⁴

It should also be noted that all States involved in the conflict have agreed to be bound by the obligations of the former Yugoslavia under the four Geneva Conventions⁹⁵ and have accepted the "Statement of Principles" declared by the London Conference on Yugoslavia on August 26, 1992, "concerning compliance

⁹³*Ibid.*

⁹⁴*Id.*

⁹⁵*Supra*, note 13, at 129.

with international humanitarian law and personal responsibility for violations of the conventions."⁹⁶

Thus far, accepting which laws are to govern the conflict in the territory of the former Yugoslavia has not been a contentious issue for the parties involved in the war. The substantive issue that *has* provoked debate among the parties to the conflict is whether any violations of these standards can be said to have taken place, despite evidence to conclude that they have.⁹⁷ This is not a claim that has been taken seriously by the international community, as the bulk of the evidence, including evidence collected by the tribunal itself, indicates that the contrary is

⁹⁶Trnka, Kasim "Degradation of Bosnian Peace Negotiations" in Lawrence Lifschultz and Rabia Ali (eds.) *Why Bosnia?* (Stony Creek: Pamphleteer's Press, 1993), at 203. Seven principles were established at the London Conference: 1) A cessation of all hostilities in the Republic of Bosnia-Herzegovina; 2) an end to outside involvement in the conflict either in terms of human or material support; 3) the gathering of all heavy weaponry under international supervision; 4) the demilitarization of large cities with oversight by international observers; 5) the establishment of refugee centers; 6) the expansion of humanitarian aid to all areas of Bosnia-Herzegovina; and 7) the establishment of UN peacekeeping forces in order to maintain the ceasefire, the supervision of military movements, and the establishment of other confidence-building measures.

⁹⁷ For example, see "Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Yugoslavia [Serbia and Montenegro]*), request for the indication of provisional measures, (1993) *I.C.J. Reports* 3, wherein the rump Yugoslavia contends that it is not responsible for committing war crimes, and rather that it is the Government of BiH that is running concentration camps, *see* p. 185. While war crimes have been committed by all three parties to the conflict, it is important to recognize the relative degrees of proportion and aggression. It is the responsibility and the intention of the tribunal to prosecute any individual that evidence indicates is responsible for committing war crimes, regardless of which party he or she represents.

true.

The next chapter will focus on the laws that the Secretary-General describes in his report as beyond doubt having been accepted as customary international law⁹⁸, as these are the laws which have been incorporated into the Statute of the ICTFY and which govern the definition of war crimes and the steps to be undertaken to bring the perpetrators of such crimes to justice.

⁹⁸*Supra*, note 89.

CHAPTER TWO: MODERN APPLICATIONS OF EXISTING INTERNATIONAL LAW

2.0 Introduction

It is important to reiterate at this point that although the Security Council of the United Nations undertook responsibility for creating and empowering the International Criminal Tribunal for the Former Yugoslavia, it did not want to assign itself the task of creating or legislating the international humanitarian law that the tribunal was to interpret and implement.⁹⁹

In his report, the Secretary-General had made it clear that the relevant body of law already existed, and that what was needed was to incorporate such law into the language of the ICTFY's statute. In doing so, the Security Council, and therefore, the international community, are both reasserting their perspective on what type of conduct is considered acceptable and legal in modern warfare. Existing humanitarian law is implicitly validated by the international community, through its mouthpiece the Security Council, by attempting to enforce such law through the work of the tribunal.

⁹⁹*Supra.* note 78, paragraph 29.

2.1 The Hague Conventions of 1907

The Hague Conventions were first referred to in conjunction with the work of an international commission in 1919, while the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles) was being conducted.¹⁰⁰ The most important of the Hague Conventions, also for the purposes of the ICTFY is the fourth Convention which codifies the principles of war on land and sets out a basic international normative core for the later Nuremberg trials.¹⁰¹ It is interesting to note that while the former Yugoslavia was not a party to The Hague Convention IV of 1907, it did ratify a second convention that was to become a forerunner of the later Hague Convention IV, containing several of the same provisions.¹⁰² Furthermore, the Nuremberg IMT explicitly recognized that the 1907 pact was declaratory of customary international law and therefore, was binding on all nations, regardless of whether they were signatories to the Convention or not.¹⁰³

The greatest contribution made at the Hague Conferences was the

¹⁰⁰*Supra.* note 37.

¹⁰¹*Supra.*, note 27, at 252.

¹⁰²*Ibid.*

¹⁰³*Id.*

elaboration of definite principles through which the conduct of war would be humanized.¹⁰⁴ The 1864 and 1907 Hague Conventions on the Laws and Customs of War on Land contained specific provisions which prohibited the bombardment of undefended towns, and the mistreatment of prisoners of war.¹⁰⁵ Hague doctrines were not considered inflexible—permissible military necessity and reprisal provided too great an exception to the laws of war.¹⁰⁶ Furthermore, enforcement constituted a grave problem. Belligerent states were to be held accountable for the actions of their armies, but the punishment of individual soldiers was left in their hands.¹⁰⁷

The ICTFY has made good use of the provisions of the Hague

¹⁰⁴Wills, James F. *Prologue to Nuremberg* (Connecticut: Greenwood Press, 1982) at 5.

¹⁰⁵*Supra*, note 21. Other examples of prohibited acts include the use of poison and other weapons causing superfluous injuries, the declaration of no quarter, the destruction of enemy property and attacks on soldiers who had laid down their arms. The prohibition against assaulting undefended towns is interesting, because it fails to address the question of what law governs when the situation consists of an aggressor force attacking a civilian town, that the civilians nonetheless make a concerted effort to defend. Are the aggressors then allowed greater latitude? This question is particularly relevant to the situation in Bosnia when one considers the Bosnian attempt to defend the safe haven, Zepa.

¹⁰⁶*Ibid.*

¹⁰⁷*Ibid.* This is significant in that the ICTFY has departed from this route. It faces similar enforcement problems, but does not yield jurisdiction to the states that are parties to the conflict, recognizing that if it were to do so, accountability and prosecution could not be guaranteed.

Conventions, while acknowledging the shortcomings. Article 1 of the tribunal's statute deals with the question of the tribunal's competence. It states:

"The International Tribunal shall have the power to prosecute persons responsible for serious violations of *international humanitarian law* committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute." (emphasis added)¹⁰⁸

But it is the commentary preceding Article 3 which is most on point. In paragraph 41, the Secretary-General concludes that the 1907 Hague Convention (IV) and its Regulations is part of the body of international customary law¹⁰⁹, and that by 1939 all 'civilized nations' had accepted the Regulations as being "declaratory of the laws and customs of war"¹¹⁰. The violations of law or customs of war referred to in Article 3 are offences when committed in international conflict, but not when committed in internal armed conflicts.¹¹¹

The Secretary-General goes on to acknowledge the overlap between the

¹⁰⁸Statute, Article 1

¹⁰⁹*Supra*, note 78, paragraph 41

¹¹⁰*Supra*, note 78, paragraph 42

¹¹¹Bassiouni, M. Cherif & Manikas, Peter *The Law of the International Criminal Tribunal for the Former Yugoslavia* (New York: Transnational, 1996), at 509. Professor Bassiouni notes that if the tribunal finds the conflict to be international for purposes of the Geneva Conventions, it would necessarily find it to be 'international in character' for purposes of the Hague Conventions (also at 510).

Hague Convention, the 1949 Geneva Conventions and the Nuremberg Charter, but singles out the specific practical application of the Hague Convention where it states that "resort to certain methods of waging war is prohibited under the rules of land warfare".¹¹²

In practical terms, this has resulted in Article 3 of the statute of the ICTFY which deals with the violation of the laws or customs of war. Specific acts are prohibited under this article including a) employment of poisonous weapons, b) wanton destruction of cities, etc., not justified by military necessity, and c) the attack of undefended towns.¹¹³

The comparisons are evident and obvious. Yet it is not clear that the tribunal has managed to completely evade the enforcement and definition problems that faced the drafters of the Hague Convention. For example, where the Hague Convention permitted exceptions to the laws of war when it came to military necessity and reprisals, the ICTFY has addressed this problem under two separate headings, but has not resolved it.

Article 3(b) prohibits the wanton destruction of cities, towns or villages, or devastation *not justified by military necessity*. And yet the ICTFY will not permit

¹¹²*Supra*, note 78, paragraph 43.

¹¹³Statute, Article 3.

the attack on undefended towns by any means, according to Article 3(c). The language of the two paragraphs can be construed as contradictory, as one grants an absolute right, while the other qualifies it. The phrase 'justified as military necessity' must be closely examined. An argument could be made that although Srebrenica in 1995 was undefended, it was a military necessity to destroy it. The counter-argument is that the difference between destruction for the purpose of occupation, and wanton destruction is significant enough not to be dismissed as a legal technicality. The former might excuse or exempt certain types of military conduct from being governed by Article 3, the latter would not.

It is my position that Article 3(c) should govern wherever a conflict arises. It is par for the course for cities to experience bombardment and shelling in Bosnia preparatory to being overrun. The aim of occupation does not mitigate the intent to attack an undefended area and therefore, should not be excused through technical arguments, particularly where the occupation itself cannot be defended at international law. Whether the destruction is wanton or not, whether the larger aim is to occupy a city or destroy it, if either of the actions can be found to contravene acceptable standards for conducting warfare, "military necessity" should not serve as an escape clause. Until it is more closely defined, it provides

an avenue for abuse of the accepted standards.¹¹⁴

Therefore, although the Hague Convention has a role to play in giving effect to the practical work of the tribunal, such a role should not be considered sacrosanct and unquestionable. While validating the norms of international humanitarian law, the tribunal should still be aware of the inherent flaws.

¹¹⁴*Supra*, note 11, at 510. Bassiouni draws attention to the use of the phrase "such violations shall include but not be limited to", in Article 3. This language was intended to fill in gaps in the Statute, as the drafters were concerned about possible omissions. Bassiouni cautions that "open-ended language [should] not extend beyond narrow analogies to...[the] text of Article 3."

2.2 The Application of the Nuremberg Principles

One of the most significant outcomes of the Second World War was the establishment of a set of principles of international law which were to be applied to judge the conduct of individuals during war. Codified as the Nuremberg Principles in General Assembly Resolution 95(I),¹¹⁵ they were utilized in the prosecution of Axis war criminals, and prevented a denial of responsibility by government officials and military superiors.¹¹⁶ The direction that the ICTFY has taken with regard to holding individuals accountable for their acts, and with regard to asserting its jurisdiction, suggests that a great foundational debt is owed both to the Principles and the Nuremberg Charter.

To summarize briefly, the most relevant of the Nuremberg Principles to the language of the Tribunal's statute are: 1) Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.¹¹⁷ 2) Even if internal law punishes the same act, an individual who

¹¹⁵*Supra*, note 26.

¹¹⁶*Supra*, note 104, at 238.

¹¹⁷*Report of the International Law Commission*, U.N. G.A.O.R. V, Supp. 12 (A/ 1316) 11-14 (1950). Principle 1.

commits an act that is a crime under international law is still responsible under international law.¹¹⁸ 3) Government office does not preclude responsibility,¹¹⁹ and (4) if a moral choice was available, the defence of superior orders will not excuse illegal conduct.¹²⁰ Principle VI provides headings and definitions of war crimes, crimes against peace and crimes against humanity.¹²¹

The Nuremberg Charter defines war crimes as 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.¹²² The statute of the ICTFY uses the formal language of the Geneva Conventions to define acts that are considered to be war crimes. In Articles 1 and 2 of the statute, war crimes become synonymous with grave breaches of the Geneva Conventions.¹²³ There is overlap between all three.

¹¹⁸*Supra*, note 108, Principle 2.

¹¹⁹*Ibid*, Principle 3.

¹²⁰*Id*, Principle 4.

¹²¹*Id*, Principle VI.

¹²²Nuremberg Charter, Article 6(b).

¹²³Statute, Articles 1 and 2. Paragraph 38 of the Secretary-General's report stipulates that "Each Convention contains a provision listing the particularly serious violations that qualify as 'grave breaches' or war crimes."

Using the Nuremberg definition, war crimes in the former Yugoslavia would consist of atrocities committed in concentration camps, destruction of cities like Sarajevo and general human rights violations.¹²⁴ Interestingly enough, the statute of the ICTFY defines "grave breaches" as including wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly, compelling a prisoner of war or a civilian to serve in the forces of a hostile power, and wilfully depriving a prisoner of war or a civilian of the rights of a fair and regular trial, among other things.¹²⁵

It is the details of language that are dissimilar, whereas the prohibited acts remain the same under both the Nuremberg definition and the language of the Conventions.

Further similarities are found when looking at the acts defined by IMT as crimes against humanity and studying the list provided in Article 5 of the statute of the ICTFY.¹²⁶

¹²⁴*Supra*, note 27, at 253.

¹²⁵Statute, Article 2(a)-(g).

¹²⁶It should be noted, however, that Article 5 of the Statute explicitly includes rape as a crime

Although the statute does not define a specific category of crimes against peace which usually concern high-ranking members of the military, Mark Bland points out that this category could have been used to apply to both the Serbian and Croatian leaders who started the war.¹²⁷ If Bosnian government officials and Bosnian soldiers come to be prosecuted for war crimes, this category would also apply to the leaders of the Bosnian government. Since it does not articulate the concept of 'crimes against peace' in precisely the same language as the IMT Charter, the ICTFY will most likely use the concept of individual criminal responsibility embodied in Articles 6 and 7 of its statute¹²⁸ to prosecute high-ranking officials, military leaders and possibly even heads of state.

Article 7, particularly, states that a "person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present statute, shall be

against humanity, which was not an act listed in the Nuremberg Charter.

¹²⁷*Supra*, note 27, at 253.

¹²⁸Statute, Article 6. Professor Bassiouni finds it problematic that Articles 1 and 6 of the Statute limit the tribunal's personal jurisdiction to individuals, excluding 'criminal organizations' and states from prosecution. *Supra*, note 111, at 303. The question it raises is whether the Article 7 provisions on superior orders and commanding officers being held individually responsible will suffice to cover this gap.

individually responsible for the crime.¹²⁹

The Hague Convention laid the roots for the concept of individual responsibility, which was then fleshed out in the Nuremberg Charter. Article 7 of the statute of the ICTFY sets out the permutations of the notion of individual responsibility in four paragraphs.¹³⁰ The first two have been explored earlier, but it is necessary to include a brief mention of the fact that the ICTFY did not consider the wording of Nuremberg Principles 1,3, and 4 sufficient to cover all grounds of prohibited acts in this category.

In paragraph 3 of Article 7, it is clearly enunciated that the fact that an offence was committed by a subordinate does not relieve the superior of criminal responsibility if "he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof".¹³¹ This is significant for several reasons: first, consider the expansion *beyond* the Nuremberg terms. A new onus is being placed upon any defendants who attempt to mount a defence. While the doctrine of 'no defence of superior orders' has

¹²⁹Statute, Article 7(1).

¹³⁰Statute, Article 7.

¹³¹*Id.* Article 7(3).

played a role of greater or lesser proportion in international law up to this point, rarely has the standard of proof been articulated so precisely.¹³² Knowledge of the criminal acts of a subordinate is merely one part of the condemning implication; the second is the requirement of taking necessary and reasonable measures to *prevent* such acts. Failure to do so is equivalent to announcing culpability.

It is my position that this indicates real, substantive progress has been made in interpreting the norms of international humanitarian law. While the accused's right to a full and fair defence must never be prejudiced, equivalent care is being given to the rights of the victims.

Unlike the Second World War, this is not a war where the perpetrators of war crimes have left behind a clear and convincing paper trail to connect them to their crimes. Consequently, justice may be significantly delayed as convincing evidence is sought. A broad interpretation of the Nuremberg principle on individual responsibility, particularly where some of the onus of proof is shifted to the defence, may go some distance towards redressing this imbalance. Rather than

¹³²However, Professor Bassiouni points out that Article 7 does not fully develop the doctrine of command responsibility because it does not include the applicable legal standard for determining command responsibility. *Supra*, note 111, at 344. The test that should have been articulated is whether a common-law or civil standard should apply. Is the test of knowledge to be objective or subjective? Bassiouni argues that the lack of clarity is a setback, whereas my position is that it allows the tribunal greater flexibility in interpretation, while potentially posing a danger in terms of consistency and therefore, credibility.

the victim having to prove, for example, that a particular army commander knew that the soldiers in his regiment were executing a policy of systematic rape, the accused would have to show that he did not know, and that he had taken *necessary and reasonable* measures both to prevent and punish such acts.

The problem that will face the tribunal in this regard is one of definition. What meaning is to be given to these terms? How will 'necessary and reasonable' be defined to give effect to this provision? Will it vary according to the nature and extent of the crime? Or will a standardized definition prevail? The tribunal has not addressed these questions yet, and as indictments proceed to trial they will rapidly occupy a large part of the discussion. An effective strategy lies between these two extremes: there must be enough of a core meaning given to the terms to permit consistency, and yet the definition should remain flexible enough to encompass a wide variety of crimes.

Finally, although this proposition has been discussed earlier, it is relevant to reiterate that the official position of any accused person, whether as Head of State or government or as a responsible government official, will not relieve an accused person of criminal responsibility, nor shall it mitigate punishment.¹³³ While this

¹³³Statute, Article 7(2).

concept is based on a Nuremberg principle, it does away with the need for Nuremberg-type articulations of categories of crimes to be defined¹³⁴. Still, the links are quite definite and it will be interesting to see if the ICTFY can steer clear of the obstacles that fazed the Nuremberg Tribunal. Like the IMT, it must deal with the issues of credibility and legitimacy (the latter having been discussed in Section 1.3), and yet the issues are not identical in each case.

¹³⁴Recall that in Principle VI, Nuremberg sets out three definite categories of crimes, and assigns responsibility for war crimes in specific terms, in each category.

2.3 The Genocide Convention of 1948

Genocide is conceptually linked to crimes against humanity but has been accorded special attention only since the extermination of six million Jews during the Nazi regime.¹³⁵ 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 international humanitarian law that entails the national and international responsibility of individual persons and States.¹³⁶ The Genocide Convention came into force on January 12, 1951 and Yugoslavia was one of the original signatories.¹³⁷

The Genocide Convention established the basic premise that has guided the development of a system of international criminal law.¹³⁸ Article I states that regardless of whether genocide is committed in a time of war or of peace, it is a

¹³⁵Harf, Barbara, *Genocide and Human Rights: International Legal and Political Issues* (Denver: University of Denver, 1984), at 11-12.

¹³⁶See G.A.Res.96(1), U.N.Doc. A/231 (1946).

¹³⁷*Supra*, note 59, at 387, n.53.

¹³⁸Jackson, Robert "Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London 1945", at 11-12, reprinted in Lippman, Matthew "Nuremberg: Forty-Five Years Later", (1991) 7 *Connecticut Journal of International Law* No. 1, at 48.

crime under international law, that ratifying parties must both prevent and punish.¹³⁹

Article 4 of the Statute of the ICTFY deals with the power of the tribunal to prosecute genocide and uses the same definition expressed in the Convention.¹⁴⁰ Article 4(2) defines genocide as any one of a range of enumerated acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group.¹⁴¹ The difficulty arises when one considers the practical impact of the use of the word 'intent'. Is it manipulable? Is it conceivable to argue that while heinous acts have been committed in the territory of the former Yugoslavia, the intent has not been to eradicate any particular group?¹⁴²

The facts indicate otherwise. Mark Bland suggests that the practice of ethnic cleansing by paramilitary forces against discrete ethnic populations, *when not motivated by political or territorial gain* but rather by an intent to eradicate the civilian population of a group victim, qualifies as the sanctionable crime of

¹³⁹Genocide Convention, Article 1.

¹⁴⁰Statute, Article 4.

¹⁴¹*Ibid.*

¹⁴²*Supra*, note 111, at 527. Bassiouni points out that while a policy of genocide is not specified as an element of the offence in Article 4, it is unlikely that the tribunal would find the requisite intent in the absence of such a policy.

genocide (emphasis added).¹⁴¹ This is an artificial distinction. Often the two motivations are closely linked, the desire for territorial gain is accompanied by the desire to eradicate a specific population.¹⁴² How does one tell the difference if the effect is the same?

It is more likely that whatever motivation can be ascertained, if the net result is, in effect, to commit the crime of genocide, the tribunal will act on those circumstances. One is left then with the question of whether importing a specific intent requirement into the definition of the crime is an empty gesture, unless there is some meaningful way to make distinctions. For example, if the extermination of a particular group was the result but not the aim of a particular drive for territorial conquest, would that nonetheless qualify as the crime of genocide?¹⁴³

The statute makes five offences punishable by law: a) genocide, b)

¹⁴¹*Supra*, note 27, at 256.

¹⁴²In direct contradiction to all those who market the war in Bosnia as a 'civil war' and who speak of the atrocities in the language of parity, it has been amply demonstrated that there is no parity between the three sides, even prior to the Croatian-Bosnian alliance. The overwhelming majority of war crimes have been committed in a deliberate, systematic and premeditated manner by Serbian and Bosnian Serb forces. War crimes on the part of the Croats or the Bosnian Muslims have been in retaliation for these atrocities, and while inexcusable are nowhere near the scale of the actions of the aggressor forces, nor have they been part of a wide-ranging strategy (see *infra*, note 290).

¹⁴³*Idem*, note 73, at 271. The author argues that a further problem is collecting evidence to prove intent as "soldiers in an internecine war rarely record the reason they are killing."

conspiracy to commit genocide, c) direct and public incitement to commit genocide, d) attempt to commit genocide and e) complicity in genocide. There is an interesting overlap between Article 4, the genocide provision, and Article 5, the provision dealing with crimes against humanity. Article 5(b) gives the tribunal the authority to prosecute persons responsible for extermination, which is held to be a different crime than genocide.¹⁴⁶ One might argue that the difference between genocide and extermination is a superficial one, as it is essentially the same act that is punishable. The differences lie in the intent requirement. If one studies the elements of the offence, extermination, it is clear that the offence is identical to the offence of genocide, except that when proving extermination one must prove that the offence was part of a widespread or systematic attack against a civilian population on national, political, ethnic, racial, or religious grounds, *not* intent to destroy the group.¹⁴⁷ Yet are these formulations so precise and distinct? Are there in fact two separate offences? How different is it to say that in the case of

¹⁴⁶Statute, Article 5(b). The section reads: "The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (b) extermination.

¹⁴⁷Lawyers Committee for Human Rights. "International Tribunal on War Crimes in the former Yugoslavia: Establishment, Proceedings to Date, and Jurisdiction" (Brussels: Center for Anti-War Action-Belgrade, March 3-4 1994). Article 5(h) of the tribunal's statute refers to persecutions on political, racial and religious grounds.

genocide, the perpetrator intends to destroy the group, whereas in the example of extermination the perpetrator systematically attacks a civilian population on certain discrete grounds.¹¹¹ The end result is the same, a particular group is destroyed, and the nature of that group is determined on criteria that is not so strikingly dissimilar

This is not meant to minimize the significance of proving intent¹¹², rather, it questions whether those that perpetrate the act of exterminating a specific population can be said not to hold the requisite intent, when their actions are aimed at 'cleansing' a particular territory, or some other objective. That the ultimate objective may not be genocide or extermination, does not eliminate the fact that there must have been an intent to cause the resulting extermination as a means of procuring the objective.

A second interesting point can be raised when studying Articles 4(3)(b) and (e). These are the provisions which deal with the conspiracy to commit genocide and complicity in genocide. The statute does not explicitly define the elements of these offences, unless one takes Article 4(2)(a)-(e) to be representative of the

¹¹¹*Supra*, note 111, at 527. Bassiouni identifies the problem more explicitly, distinguishing between 'general' and 'specific intent'. The specific intent that separates genocide from war crimes and crimes against humanity is that the actor either 'specifically sought to produce a particular result, or knew that his conduct was part of an overall plan, designed to eliminate in whole or in part a certain group of people.'

elements of the offence. I argue that paragraph 2 does not provide a clear definition; paragraph 2 serves to illustrate and define what acts can be characterized as genocide, but does not speak to either complicity or conspiracy. These provisions are notable for two reasons: they are left open-ended enough to support the contention that other states may be called to account for complicity or conspiracy to commit genocide, and secondly, they are not suggestive in any way of the evidentiary burden that would have to be satisfied in order to prove that the offences had been committed.

It is not as unrealistic as it may seem to suggest that states other than Serbia/Montenegro and the Bosnian Serbs associated with it are involved in a conspiracy to commit genocide or are complicit in genocide. Dealing with the issue of conspiracy, first, it would obviously be much harder to prove that states or organizations, for example the United Nations, had conspired with the intent to perpetrate genocide on a specific population. What evidence could be adduced to that end? Unless something very explosive was revealed such as direct contact between the British Prime Minister and Radovan Karadzic, discussing where next to implement the policy of 'ethnic cleansing' in Bosnia, it is extremely unlikely that the charge would stick. Complicity might be easier to demonstrate. One could look at the record and practice of the members of the Security Council, the

same Security Council that established the tribunal, and argue that measures such as vehemently opposing lifting the arms embargo,¹⁴⁹ or insisting on negotiations with those that have come to be indicted as war criminals¹⁵⁰, or that the questionable behaviour of UN troops on the ground¹⁵¹, let alone the insistent impartiality of the UNPROFOR (United Nations Protection Force)¹⁵² all amount to complicity in genocide.

¹⁴⁹See, e.g. Lifschultz L. and Rabia Ali (eds.) "In Plain View" *Why Bosnia?* (Stony Creek: Pamphleteer's Press, 1993), at xlv. The record of Britain and France has been consistent on this point, with both nations vetoing the suggestion that the arms embargo imposed on the then extant Yugoslavia (U.N.Doc. S/RES/713 (25 September 1991) should be lifted. The United States has been willing to see the embargo lifted, and indeed there was a push in Congress to that end, however, the President of the United States refused to lift the embargo unilaterally. All three states argue that doing so would escalate the violence in the former Yugoslavia and prolong the war.

¹⁵⁰"Genocide Charges Laid" *Toronto Star* (26 July 1995). On July 25, 1995 the ICTFY issued five indictments charging a total of 24 Bosnian and Croatian Serbs with crimes ranging from genocide to breaches of the Geneva Conventions. Arrest warrants have been issued, including warrants for the arrest of Radovan Karadzic and Ratko Mladic.

¹⁵¹Allegations of misconduct by UN troops are wide-ranging. From being accused of black-market profiteering on humanitarian aid supplies, including selling gasoline to journalists, to frequenting Serbian 'brothels' where Muslim women are said to be held captive, the UN image in Bosnia has been severely tarnished. One example is the assassination of the Bosnian Vice-President, Dr. Hakija Turaljic, in January of 1993. He was travelling to Sarajevo in a French armoured personnel carrier when the vehicle was stopped at a Serb checkpoint. Instead of calling for help from the UNPROFO airport garrison, the French commander sent away British Warrior fighting vehicles that happened on the scene and offered assistance. The French troops opened the APC for inspection by the Serbs, at which point a Serb fighter shot and killed Dr. Turaljic. For details and commentary on this incident, see Rieff David, *Slaughterhouse* (New York: Simon & Schuster, 1995), at 151.

¹⁵²For other references to UN misconduct in Bosnia, see *ibid*, at 121-122, 148, 150-152, 165-169, 194, and 206-207.

Any state whose record was particularly blemished and who carried major responsibility for the outcome of events based on how it voted in the Security Council and the pressure it exerted in terms of corridor diplomacy could find itself susceptible to a charge of complicity in genocide. There is nothing in the tribunal's statute to prohibit this.

The argument can be developed further by looking at the terms of the Genocide Convention itself. Article I of the Convention explicitly states that the contracting parties are under an obligation to both *prevent* and *punish* the crime of genocide.¹⁵³ Article V lays on the contracting parties the responsibility to enact domestic legislation to give effect to the provisions of the Convention, and to set up effective penalties for persons guilty of genocide.¹⁵⁴ If states have undertaken no steps in the case of Bosnia to either prevent or punish the crime of genocide as required by the Convention, it could be argued that if they did not conspire to commit genocide, their very silence and inaction at least makes them complicit.

Naturally, there are problems with this argument. First, the entire definition of the crime of genocide, and the subsequent crimes thereunder, turns on a highly

¹⁵³Genocide Convention, Article I.

¹⁵⁴Genocide Convention, Article V.

specific intent requirement written into the Convention in Article II¹⁵⁵ and copied verbatim into the statute of the ICTFY. Denial of intent is an automatic defence and the difficulty of establishing intent is an inherent problem. For example, the British government could and would argue that its position on the arms embargo was intended to prevent violence from escalating in the region, and was not intended to result in the genocide of a particular group. No matter how clearly a connection was drawn between the two acts, it would be nearly impossible to demonstrate the requisite intent. Under what conditions could intent be imputed to demonstrate if not that genocide had been committed, then at least that there was complicity in genocide? In his influential work, *The Prevention of Genocide*, Leo Kuper argues that intent is established if the foreseeable consequences of an act are, or seem likely to be, the destruction of a group.¹⁵⁶

Carrying my example to its conclusion, there is the possibility then, that if it could be proven that the foreseeable consequences of imposing an arms embargo on Bosnia would be the genocide of a particular group, intent would have been

¹⁵⁵Article II of the Genocide Convention reads: "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". The five grounds are then enumerated.

¹⁵⁶Kuper, Leo *The Prevention of Genocide* (New Haven: Yale UP, 1985), at 12. Kuper frankly admits, however, that such a definition of imputed intent is problematic and controversial, and concedes that it would be the role of the court to determine intent according to

established and indeed other states could be called to account. Particularly if it could also be shown that the same states had not undertaken the requisite measures¹⁵⁷ to prevent and punish the crime of genocide. If signatories to conventions are to be legally bound by the treaties they have signed, some method must be devised of testing adherence and compliance. It is problematic, but I think that it is an argument worth making in order to test the limits of the Convention, and to see how much weight it carries as a norm of international humanitarian law. Otherwise, the international community cannot be said to have proceeded beyond the point of recognition of international norms. There must be a two-step process which incorporates both ratification and compliance. If charging states that have ratified the Genocide Convention, for example, with complicity in genocide if they have done nothing to fulfill their obligations, is considered a subversion of the intended legal process, some other method must be devised by which we can measure the efficacy of our international provisions.

the circumstances of a particular case.

¹⁵⁷ Again this is difficult because there is no standard definition of what these requisite measures would entail. Genocide is a crime that grants universal jurisdiction, but does this mean that states have a responsibility to punish those who commit genocide and are within their reach? If so, how should they be punished? Would the death sentence suffice in the United States, compared to life imprisonment in England? The Convention deals in generalities not specifics and thus is ambiguous at best.

As a final point, it is important to note that insofar as the genocide provision is concerned, the statute is not specific about the nature of the evidence that could be adduced to illustrate that the act has occurred. Generally, as regards admissibility of evidence, the tribunal's position is that all relevant evidence may be admitted unless its probative value is substantially outweighed by the need to ensure a fair and expeditious trial.¹⁵⁸ The tribunal is also authorized to obtain new evidence *proprio motu*, to ensure that there is full satisfaction with the evidence on which final decisions are based.¹⁵⁹ These principles apply to all the offences which are enumerated in the statute of the tribunal. I point it out here to show that political considerations do not automatically disqualify evidence from being adduced or heard, which will be relevant to the discussion on the tribunal's role as a conflict resolution mechanism.

In theory, the international community is ready to recognize the importance and applicability of the Genocide Convention to the war in Bosnia. It is accepted

¹⁵⁸*Supra*, note 147, Addendum, paragraph 1.

¹⁵⁹U.N.Doc. IT/29 (11 February 1994), Statement by the President of the Security Council. Made at a Briefing to Members of Diplomatic Missions, at 3. One of the reasons for permitting new evidence to be heard is to minimize the possibility of charges being dismissed on technical grounds for lack of evidence.

as customary international law¹⁶⁰, and has been made a separate article in the statute of the tribunal, which validates and legitimizes its place in international humanitarian law. It remains to be seen what practical weight will be given to steps such as indicting Bosnian Serb leader Radovan Karadzic on charges of genocide and crimes against humanity. If he is compelled to stand trial before the International Criminal Tribunal for the former Yugoslavia, it will lend credence to the view that the Genocide Convention, along with other norms of international law, is intended to be enforceable and binding.

¹⁶⁰*Supra*, note 94.

2.4 The 1949 Geneva Conventions & the 1977 Additional Protocols

The Fourth Geneva Convention¹⁶¹ and the 1977 Additional Protocols¹⁶² are concrete examples of the international community's desire to ease the unnecessary suffering caused by war. The Conventions established a system of grave breaches which envisaged prosecution and punishment of individuals who commit serious human rights violations.¹⁶³ They are interesting in that while they do contain specific elements of criminal offenses, they nonetheless delineate clearer categories of prohibited acts than were provided in the Nuremberg Charter. As discussed in Section 2.2, the links between the Nuremberg Principles and those acts considered to be grave breaches of the Geneva Convention are clear, and together they have influenced the articulation of the definition of war crimes in the tribunal's statute.

I purport to do two things in this section: 1) outline the Common Articles of

¹⁶¹Geneva 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.

¹⁶²Protocol 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 12 Dec. 1977, U.N.Doc.A/32/11 Annex II.

¹⁶³Kupferberg, Matthew I. "Balkan War Crimes Forum Selection" (Summer 1994) 27 *Boston College International and Comparative Law Review* No.2, at 387.

the Geneva Conventions insofar as they apply to the work of the tribunal, and 2) indicate some of the difficulties facing the tribunal in interpreting this law, by studying the elements of the offences detailed in the statute.

"The Geneva Conventions constitute rules of international humanitarian law and provide the core of the customary law applicable in international armed conflicts. These Conventions regulate the conduct of war from the humanitarian perspective by protecting certain categories of persons: namely, wounded and sick members of armed forces in the field; wounded, sick and shipwrecked members of armed forces at sea; prisoners of war, and civilians in time of war."¹⁶⁴

They are extremely relevant, and indeed necessary, to the work of the tribunal as it considers the consequences of the war in Bosnia. The Common Articles are those which are common to all four of the Geneva Conventions, and which possess a general character.¹⁶⁵ These include Articles 1 through 9, but my discussion will focus on the first three.

Article 1 provides that "the contracting parties undertake to respect and to insure respect for the present Convention in all circumstances".¹⁶⁶ This creates a

¹⁶⁴*Supra*, note 78, paragraph 37.

¹⁶⁵Yingling & Ginnane "The Geneva Conventions of 1949" (1953) 46 *American Journal of International Law*, at 393.

¹⁶⁶Geneva Conventions, Article 1.

unilateral legal obligation which is not dependent on observance by all parties; it applies regardless.¹⁶⁷ The added words 'to insure respect' create a duty upon states to not only instruct the various departments of the state to obey the Conventions, but to insure that they have done so.¹⁶⁸ This is an important part of international humanitarian law; for states to claim ignorance of violations of the Conventions is unacceptable -- Article 1 takes away claims to lack of knowledge, or more significantly, lack of necessity to comply with the Conventions merely because the other parties to a particular conflict are not obeying them.

Article 2, which is slightly less relevant, states the Conventions apply whether or not war has been explicitly declared,¹⁶⁹ again taking away technical claims of lack of knowledge, as well as maintaining that the reality of a state of war is what matters, not the express acknowledgement of it. Thus, for example, for Serbia to declare that it is not at war in Bosnia, while the war effort is supplemented by regular and irregular units equipped and staffed by the Yugoslav National Army, does not preclude the applicability of the Conventions in this

¹⁶⁷Gulbrandsen, Perry "Humanitarian Law of Armed Conflicts" in M. Cherif Bassiouni & Ved Nanda (eds.) *A Treatise on International Criminal Law: Volume 1 Crimes and Punishment* (Springfield: Charles C Thomas, 1973), at 371.

¹⁶⁸*Ibid.*

¹⁶⁹Geneva Conventions, Article 2.

instance. Whether or not Serbia exerts control over the forces in Bosnia, the conduct of warfare is to be regulated by the Conventions. Breaches are equivalent to the commission of war crimes and these come within the jurisdiction of the ICTFY.

The argument that has been consistently made is that the war in Bosnia is a conflict between three ethnic communities confined within the same border, thereby constituting a civil war.¹⁷⁰ The implication is that civil wars need not be held to the same standard of accountability. Article 3 of the Geneva Conventions does away with such an assumption by setting out the minimum standard of conduct acceptable in conflicts not of an international character, i.e. civil wars.¹⁷¹ If, based on objective standards, the Bosnian war is found to be a civil war, exemption from being governed by the Geneva Conventions will still not be a viable argument. A certain minimum standard of conduct is acceptable in warfare, and cannot be compromised whether the war is internal or international in

¹⁷⁰This assertion has been reiterated by international media and political figures. Yet there has been direct collaboration and instigation from Serbian paramilitary forces since the beginning of the war, as well as direct intervention by Croatia in 1993. See, e.g., *supra*, note 144, at xix. See, specifically, Fogelquist, Alan F. *The Breakup of Yugoslavia, International Policy and the War in Bosnia-Herzegovina* (Whitmore Lake, MI: AEIOU Publishing, 1993), at 28; "In Bosnian City, UN Finds Terror with Misery" (AP), *The New York Times*, 27 August 1993, and "US Memo Reveals Dispute on Bosnia: Christopher's View that all Share Guilt for Atrocities is Attacked by Official", *The New York Times*, 25 June 1993.

¹⁷¹Geneva Conventions, Article 3.

character.

The statute of the ICTFY makes no explicit reference to or distinction between an international or internal conflict with regards to Bosnia. The position of the statute is that the Geneva Conventions apply, and that grave breaches of the Conventions are tantamount to committing war crimes. The statute is very much concerned with accountability and with the difficulty of proving accountability. Article 2 states that the tribunal "shall have the power to prosecute persons committing or *ordering* to be committed grave breaches of the Geneva Conventions."¹⁷² No one involved in committing such breaches is to be considered exempt, regardless of position or rank. The standard of accountability is appropriately high, and is consistent throughout the provisions of the statute.

This, however, does not mean that the tribunal is not faced with grave issues when interpreting these norms of international humanitarian law. It is interpretation which gives weight and meaning to the Geneva Conventions, leaving the tribunal with the difficult task of giving practical effect to the terms of the Conventions. The Security Council did not wish to "legislate" international law, but the ICTFY is left with the task of interpreting it.

¹⁷²Statute, Article 2.

The statute, for example, defines wilful killing, torture and unlawful deportation¹⁷³ as grave breaches of the Conventions. The elements of the offences are not specified, and yet one can conclude from the close link between the Conventions and the statute that the elements specified in the Conventions hold true for the tribunal as well. Specifically, the tribunal defines the elements of the offence of wilful killing as being a) that a person protected by the Conventions is dead; b) that the death resulted from the act or omission of the accused; c) that the killing was unlawful, and; 4) that, at the time of the killing, the accused had the intent to kill or inflict great bodily harm upon a person.¹⁷⁴

Careful attention should be paid to the second element: death resulting from an act or *omission* of the accused will qualify as a war crime. A consistent standard of protection for the rights of the victims is being upheld. Just as lack of knowledge does not equal a valid defence, the omission of acts that would protect lives is not a ground that excuses culpability. For example, if death of a civilian results from an officer not commanding his soldiers to desist from attacking or harming civilians, the fact that the officer did not issue the order to kill will not

¹⁷³Statute, Article 2(a),(b) and (g).

¹⁷⁴Lawyers Committee for Human Rights, Appendix A. Based on a memorandum prepared by the Office of the Chairman, the Joint Chiefs of Staff, dated 25 June 1993.

necessarily be upheld as a valid defence. Knowledge, power and opportunity are all aggravating factors that will not be lightly dismissed. This demonstrates an important trend in the work of the tribunal: the law that the ICTFY is to apply to the conflict in Bosnia is so portentous, and the conduct of warfare on the ground is so egregious, as to merit the most painstaking and scrupulous analysis possible. The ICTFY is striving to give the law full effect, and more importantly full *practical* effect.

The elements of the offence of torture, while not set out in Article 2 of the statute, have been fleshed out by reference to the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment¹⁷⁵. They include: (1) that the accused intentionally inflicted severe physical or mental pain or suffering on a person; 2) that the torture was intentionally inflicted for the purpose of obtaining a confession, as punishment for an act the person was suspected of committing, or to intimidate or coerce him or her, or for any reason based on discrimination of any kind; 3) that the torture is inflicted by or at the instigation of or with the consent or acquiescence of a public official; and 4) that the pain or

¹⁷⁵Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, G.A. res. 39/46 U.N. GAOR Supp. (No. 51) at 197, U.N.Doc. A/39/51 (1984), *entered into force* June 26, 1987. There is no explicit reference to this Convention in the statute of the ICTFY, rather it can be found in Appendix A of the report of the Lawyers Committee on Human Rights. See footnote 147.

suffering was not a result of lawful sanctions.¹⁷⁶

The crime of torture is an exceedingly significant one for the tribunal to consider. The war in Bosnia has heralded reports of torture in rape and concentration camps, realities that have not been mentioned since the Second World War.¹⁷⁷

Defined as internment centres established outside of the ordinary detention system, where persons are confined for military or political security, and for punishment and exploitation,¹⁷⁸ concentration camps first acquired international significance following the Second World War.¹⁷⁹ In Nazi Germany, the camps served several functions: they confined members of political opposition, as well as persecuted minority groups, and they provided a labour force that could be exploited.¹⁸⁰ The extreme variation on the concentration camp, was the extermination camp, the primary function of which was the mass murder of

¹⁷⁶*Supra*, note 147, Appendix A, at 2.

¹⁷⁷For an examination of the Serb-run concentration and rape camps in Bosnia, see, Gutman. Roy. *A Witness to Genocide: The 1993 Pulitzer Prize-winning Dispatches on the "Ethnic Cleansing" of Bosnia* (New York: Macmillan Publishing, 1993).

¹⁷⁸"Concentration Camps" in *Encyclopedia Britannica: Volume 6* (Chicago: William Benton, 1994), at 252.

¹⁷⁹*Supra*, note 178, at 253.

¹⁸⁰*Ibid.*

specific populations, particularly the Jews.¹⁸¹

Distinctions are often made between labour camps, which are also called concentration camps, rape camps and detention camps, but these are as much terms of journalistic expression, as they are definitions of specific realities.¹⁸²

Reports have been made to the Commission of Experts, and to international human rights monitoring agencies about the situation inside the camps in Bosnia.¹⁸³ Regardless of the label given to a particular camp, the activities occurring within its borders are generally similar. Most of the acts fall within Articles 2 - 5 of the statute of the tribunal, meaning that they will be punishable at law.

If the work of the tribunal is to be taken seriously, it is not only the punishment of genocide which must prevail, but also a message must be sent out that torture is an act that will not be tolerated by the international community. The

¹⁸¹ *Id.*

¹⁸² *Supra*, note 177, at x - xv.

¹⁸³ *Supra* notes 1, 2 and 32. Note also that journalists who have been responsible for breaking new stories on concentration camps identify labour camps as the same camps where extensive torture has taken place, although no camp has been specifically designated as an extermination camp. See, e.g. note 178. Another relatively new phenomenon is that of 'rape camps' where women are detained in large groups, both for the purpose of providing labour, as well as for providing sexual services. See, e.g. note 172. See, *infra*, note 227. The crime of detaining, torturing, and sexually assaulting persons in concentration camps and elsewhere will be prosecuted by the ICTFY, under Articles I - X of its Statute.

war in Bosnia is not the first situation where torture has been used as a means of facilitating the war aim, nor will it be the last, but international covenants that are signed and ratified will continue to have little impact until the international community begins to enforce them. The work of the tribunal is a concrete step in that direction.

The tribunal has before it evidence that in the summer of 1992, the Bosnian Serbs held more than 3,000 Muslims and Croats at the Keraterm camp.¹⁸⁴ The detainees were killed, sexually assaulted, tortured, beaten and subjected to other forms of cruel and inhuman treatment, a pattern that is common throughout Bosnia.¹⁸⁵ One camp commander in the city of Brcko called himself the 'Serb Adolf'.¹⁸⁶ These are carefully culled examples from a mass of similar data and the tribunal is faced with the task of enforcing the norms that constitute accepted international humanitarian law. Genocide and torture are relatively easy to prohibit by statute or convention, as there are few states or groups who would argue that the punishment of these crimes by an international body is an

¹⁸⁴Tribunal Watch, "Indictments Issued July 25, 1995". Human Rights Center at the School of Law, State University of New York, dated 29 July 1995.

¹⁸⁵*Ibid.*

¹⁸⁶*Id.*

infringement on state sovereignty.

The tribunal has been delegated the task of giving effect to international humanitarian law by the international community. If its work is successful, i.e., if it not only indicts the torturers and perpetrators of genocide but also prosecutes and convicts them, it both validates and legitimizes the very norms that the international community is said to uphold. This point cannot be overstated -- the international covenants begin to have meaning, the international community agrees to be regulated by them, and aberrant conduct becomes easier to detect and punish, and ultimately, easier to deter.

One final offence that merits comment is the offence of unlawful deportation. Again, this is relevant to the conflict in Bosnia, particularly as the war has resulted in massive displacement of people from all three republics (Croatia, Serbia, and Bosnia-Herzegovina). Article 2(g) of the statute of the ICTFY prohibits the unlawful deportation or transfer or unlawful confinement of a civilian.¹⁸⁷ This is a scenario that has been witnessed repeatedly, often as a strategic initiative following peace negotiations. One side or another will besiege an area or town, including the safe havens, once the town is taken the women and

¹⁸⁷Statute, Article 2(g).

children are evacuated, while the men of fighting age and younger are detained to be held for questioning about war crimes.

The ICTFY may be faced with a problem when it comes to defining the term 'unlawful deportation'. On the face of it, it suggests the forced transfer of a population from their homes. However, the argument could be made that the civilian populations willingly leave, consciously making a decision after considering the military realities on the ground. Therefore, the citizens of Zepa or Srebrenica were not deported, they chose to leave following the bombardment and occupation of their towns. The attacking forces merely provided a safe exit out. The statute does not define clearly enough what acts qualify as unlawful deportation -- this example indicates forced transfer. The option here seems to be a choice between fleeing or dying, and it seems safe to assume that the tribunal would find a way to make this forced transfer qualify as a breach of the Geneva Conventions.

There are other situations where drawing the same conclusion is not as straightforward a matter. A classic example is the siege of Sarajevo. The city was under siege and yet was never overrun. Do those citizens who left out of fear of shelling and sniper fire, or who could no longer carry out the business of normal life under these conditions, qualify as deportees? Or have they made a careful,

well-considered choice? Is there an element of force to their departure? Is an element of force to be imputed as an intent requirement into the prohibition against unlawful deportation? If so, why is it not explicitly stated?

It is possible to make the argument that the difference between being forced out militarily and besieged through shelling and starvation is not so great. It is possible to argue that both Sarajevans who flee in fear for their lives and Zepans who are given no choice but to leave are deportees, but it is not known yet whether the tribunal will consider them to be so.

Admittedly, it will involve reading into the statute of the tribunal, an act the judges of the ICTFY may not be willing to perform if it jeopardizes the tribunal's credibility. The challenge in this instance is to balance the need for justice for the victims with the equally serious necessity for consistent and reliable international norms.

It is important that the standard of justice to be applied be uniform and consistent. Victims of the war from Sarajevo to Dubrovnik to Banja Luka will likely hold the same grievances and have the same need for appropriate redress and compensation.

2.5 Conclusion

By incorporating into its statute a definition of war crimes that mirrors the provisions of the Geneva Conventions, the ICTFY is accomplishing two contemporaneous objectives. It both helps to define the norms of international humanitarian law, by drawing on the Nuremberg Charter and Principles, and the Hague, Geneva and Genocide Conventions; and it further validates the principles articulated in these statutes by relying on them. The ICTFY cannot operate in a legal vacuum, any more than the political nuances which influence its direction can be ignored. It must either create law or utilize law that is in existence. It has declined to do the former. As it undertakes the task of prosecuting war criminals for the first time since the Second World War, the laws that it applies in the furtherance of this task will acquire a new significance in the eyes of the international community. These are not laws that have seriously been called into question since the process of regulating warfare began with the Hague Conventions, but rarely has their applicability been so urgently demonstrated. Furthermore, it could be argued that although there have been no permanent objections to these laws, per se, since their drafting, they have had little effect upon the conduct of war. Even in the case of the former Yugoslavia, a deterrent

function is not being served. Therefore, it is not enough for states to have signed and ratified the relevant conventions. The Geneva, Genocide and Hague Conventions, along with the principles established at Nuremberg, must be given weight, both by implicit and express acceptance, but more importantly through enforcement. It is to be hoped that the ICTFY will be given the tools to meet these requirements. Otherwise, few gains will be made in interpreting and applying international humanitarian law.

CHAPTER THREE: INTERPRETING THE STATUTE OF THE ICTFY - SUBSTANTIVE PROBLEMS AND JURISDICTIONAL ISSUES

3.0 Introduction

The competence of the International Criminal Tribunal for the former Yugoslavia derives from the mandate set out in paragraph 1 of resolution 808 (1993), which states:

"Recalling paragraph 10 of its resolution 764 (1992) of 13 July 1992, in which it reaffirmed that all parties are bound to comply with the obligations under international humanitarian law, in particular the Geneva Conventions of 12 August 1949, and that persons who commit or order the commission of grave breaches of the Conventions are individually responsible in respect of such breaches,

1. *Decides* that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991".¹⁸⁸

Article 1 of the statute of the ICTFY is entitled "Competence of the International Tribunal" and repeats paragraph 1 of resolution 808. There are four fundamental elements of the tribunal's competence to consider: 1) *ratione materiae*

¹⁸⁸U.N.Doc. S/RES/808 (22 February 1993).

(subject-matter jurisdiction), 2) *ratione personae* (personal jurisdiction), 3) *ratione loci* (territorial jurisdiction) and, 4) *ratione temporis* (temporal jurisdiction).⁸⁹

There is also the question of the concurrent jurisdiction of the tribunal and national courts.⁹⁰

The previous chapter dealt at length with the question of subject-matter jurisdiction; here I will add on, only that the tribunal is competent to preside over war crimes, crimes against humanity and genocide that has occurred in the territory of the former Yugoslavia, and that these acts have been specifically set out and detailed in Articles 2 through 5 of the tribunal's statute.

3.1 Personal Jurisdiction

The next question that warrants detailed consideration is that of personal jurisdiction. As defined in Article 6 of the tribunal's statute, the tribunal is to have jurisdiction over natural persons pursuant to the provisions of the present statute.⁹¹

One major problem that this raises is distinguishing between natural persons and juridical persons for the purposes of the tribunal's statute. The jurisdiction of

⁸⁹*Supra*, note 78, paragraph 31.

⁹⁰*Ibid*

⁹¹Statute, Article 6

the tribunal naturally excludes juridical persons as set out in Article 6.¹⁹² The term 'juridical persons' is taken to refer to associations or organizations, and cannot be discarded too hastily. The concept of personal jurisdiction is tied into individual criminal responsibility, as the exclusion of juridical persons from the tribunal's jurisdiction seems to imply. People are to be held individually responsible for the crimes they commit. The question of the guilt of an association or organization remains.

This is by no means a superficial question; the culpability of the Serbian government, the Bosnian Serb paramilitary units, the Croatian government in some instances, and the Yugoslav National Army (JNA) should not be lightly dismissed. These are organizations which have articulated a genocidal agenda.¹⁹³ Or drawing the links more closely, it was the Serbian government and the Bosnian Serb leadership that had the agenda, and the JNA and the paramilitary units that carried

¹⁹¹Statute, Article 6.

¹⁹²*Supra*, note 78, paragraph 50.

¹⁹³Fogelquist, *supra* note 170, at 28. Mass rape was also a deliberate Serb government policy, see, e.g. Gutman, Roy "Foreword" in Alexandra Stiglmayer (ed.) *Mass Rape: The War Against Women in Bosnia-Herzegovina* (Lincoln, NB: University of Nebraska, 1994), at xii. See, also, Stiglmayer, Alexandra "The War in the former Yugoslavia" in *ibid*, at 19.

it out as policy.¹⁹⁴

Should the organizations, as much as the individuals, be held responsible? The practical response should be no. It is individuals who commit crimes and it is individuals who are capable of sustaining punishment for those crimes. (It could be argued that the JNA, for example, could be penalized in other ways, perhaps by paying fines or compensation. In this case its absolute responsibility would have to be established.¹⁹⁵) However, there are also individual members of organizations who did not participate in illegal policy and did not commit or allow to be committed war crimes, crimes against humanity, or genocide and they should not be held responsible for the guilt of the organization.

The Secretary-General argues in his report, that the concept of juridical person should not be retained by the tribunal, as the criminal acts outlined in the statute are carried out by individuals or natural persons, and that these persons would be subject to the tribunal's jurisdiction, based on their individual criminal responsibility, and therefore, that their membership in groups is irrelevant.¹⁹⁶ The

¹⁹⁴*Supra*, Stiglmeier, note 170.

¹⁹⁵Recall, however, that Professor Bassiouni argued that the terms of Article 6 of the Statute did not allow for such a provision or means of recourse.

¹⁹⁶*Supra*, note 78, paragraph 51.

point is to try the person who is guilty of the crime, but I submit there is additional merit to be had by labelling an organization as guilty of committing war crimes, or having a policy to commit war crimes. The stigma attached to such an organization would not soon be forgotten and would deter future similar conduct. Furthermore, if the organization was sentenced to make restitution, it might cripple the ability of that organization to engage in similar conduct until well into the future. By that time, an educational process might have set in with positive results.

I have avoided the question of imprisonment because it seems problematic. Article 24 of the statute sets out the penalties that the tribunal will impose, and they are limited to imprisonment¹⁹⁷, although the Trial Chambers are permitted to order the return of property and proceeds acquired through criminal conduct.¹⁹⁸ There is no other explicit reference to compensation, which leaves open the question of whether the World War Two-Bosnia comparison can be stretched any further. Germany, as a state, had to make significant war reparations to the victims of the Second World War, often directly to the state of Israel. Should the

¹⁹⁷Statute, Article 24(1).

¹⁹⁸*Ibid*, Article 24(3).

governments of the parties to the conflict in this case be forced to make reparation? Presently, the tribunal has no jurisdiction to make this a reality. Its only jurisdiction is over natural persons, and the only significant penalty it can impose is one of imprisonment. States and organizations cannot be imprisoned, therefore, it seems only logical for the tribunal to try only natural persons. There is no reason to believe that this exclusion from consideration of juridical persons would mean that government or military officials would be exempt from the punishment the tribunal will mete out. The concepts of personal jurisdiction and individual responsibility are closely linked. In paragraph 54 of his report to the Security Council, the Secretary-General states that "all persons who participate in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia contribute to the commission of the violation and are, therefore, individually responsible."¹⁹⁹

The tribunal also does not permit the defence of superior orders, although it may be considered a mitigating factor in connection with other defences such as coercion or lack of moral choice.²⁰⁰

¹⁹⁹*Supra*, note 78, paragraph 54.

²⁰⁰Statute, Article 7(3),(4).

The influence of the Nuremberg Principles is evident in these classifications, as is the desire of the tribunal to see justice served without doing harm, and without prejudicing the rights of the accused.²⁰¹ Based on the indictments of Bosnian Serb leader, Radovan Karadzic and General Ratko Mladic, it is a reasonable assumption that the formulation of the tribunal's jurisdiction over persons as articulated in the statute will not prohibit the net of justice from being cast over all those who are guilty of committing war crimes, regardless of their position. This was a responsible initiative for the tribunal to take, and a logical conclusion to the process begun at Nuremberg.

However, it is naive to assume that the problems end there. It is one thing for the tribunal to assert jurisdiction over natural persons, but compelling the attendance of the accused before the tribunal is much more difficult. Voluntary presentation of the accused before the international criminal tribunal is extremely unlikely.

It has been suggested that one alternative for gaining custody over Serbian offenders, for example, would be a decisive Bosnian victory on the ground.

²⁰¹ The rights of the accused are elaborated in Article 21 of the Statute and are comprehensive. Undoubtedly, the most important protection the statute affords an accused is the right not to be tried in absentia, [Article 21(d)], which is a departure from the Nuremberg precedent but one designed to allay fears about the tribunal's credibility.

coupled with the willing surrender of the offenders.²⁰² The military reality presently, does not indicate that a clear-cut victory for any of the parties is forthcoming. This is further qualified by the principles agreed to at the Dayton peace conference. It should also be recalled that where airstrike ultimatums and economic sanctions had little effect on deterring aggressive conduct, it is unlikely that the fact that the tribunal has jurisdiction will result in the voluntary surrender of any person guilty of war crimes to the authority of the tribunal. It is unlikely, too, that those capable of perpetrating genocide are also capable of submitting to the censure and approbation of the world community, particularly as it is manifested through the tribunal's indictments.

The situation is different now than it was at Nuremberg. The IMT selected only a few choice names from the top leadership of the Nazi regime; lesser criminals were left to be tried in the countries where their crimes had been committed.²⁰³ The UN tribunal's task is to try all defendants, not just political and military leaders.²⁰⁴ In either case, whether procuring a few defendants, or an entire army, the tribunal's task is considerably harder. One potential solution to this

²⁰²*Supra*, note 59, at 406.

²⁰³*Supra*, note 27, at 263.

problem is to exert pressure on the states that harbour alleged war criminals. Refusal to turn them over to the jurisdiction of the tribunal would result in international sanctions being levied against that state.²⁰⁵ This raises three further problems: first, there is absolutely no provision in the statute of the ICTFY that would justify imposing sanctions, typically considered a harsh international measure, in that it affects not only governments with unacceptable policies, but also peoples who may have no choice but to uphold those policies. Yet, imposing sanctions is a valid measure under Article 41 of the UN Charter. In attempting to do so, the tribunal would be navigating the difficult waters of trying to fulfill a legal mandate while constrained by political considerations.²⁰⁶ This would complicate the work of the tribunal greatly, and would earn it the hostility of any state that so found itself singled out.

²⁰⁴ *Ibid.*

²⁰⁵ *Id.*, at 264.

²⁰⁶ When considering levying economic sanctions against a state, economic factors are as significant as political ones. If the sanctionable state is a major trading partner with a member-state of the UN that has considerable influence, or one of its allies, it becomes much more difficult to use sanctions as a tool for punishing human rights violations. These factors could influence the ability of the tribunal to act in the best interests of justice.

In fact, sanctions have already been imposed on the state of Serbia²⁰⁷ in an effort to end its complicity in genocide, but they did not accomplish the desired effect. Simply put, the tribunal lacks an enforcement mechanism. Its success in trying alleged war criminals depends entirely on the goodwill of the parties involved, and it is unlikely that war criminals will demonstrate goodwill in this sense, when it comes to determining their own fate.

Secondly, it is a real possibility that amnesty may be demanded by war criminals in exchange for peace, thereby trivializing the tribunal's object and purpose,²⁰⁸ in which case, personal jurisdiction would cease to be a basis for concern.

Thirdly, the difficulty of enforcing the tribunal's jurisdiction is exacerbated by provisions within the tribunal's own statute. Article 21(4)(d) provides that the accused has the right to be tried in his presence, and to defend himself in person.²⁰⁹ In other words, there will be no trials in absentia, a procedure designed to boost

²⁰⁷See U.N.Doc. S/RES/757 (30 May 1992).

²⁰⁸*Supra*, note 27, at 264. The Human Rights Center at the School of Law, State University of New York - Buffalo has set up an organization called Tribunal Watch, which insists on no amnesty for war criminals as part of a peace agreement. This is a political issue which has not been addressed in the statute of the tribunal.

the credibility of the tribunal by ensuring that all defendants have the opportunity to make a full and fair defence. In practical terms, this translates into the tribunal having a difficult task ahead of it with regard to asserting its jurisdiction over natural persons. The fact that it is given the authority to try, based on the provisions of its statute, indicates that the international community accepts and recognizes the validity of these bases of jurisdiction, despite the fact that the difficult issue of providing enforcement mechanisms has not been addressed.

²⁰⁹Statute, Article 21(4)(d).

3.2 Territorial and Temporal Jurisdiction

The territorial and temporal jurisdiction of the tribunal are set out succinctly in Article 8 of the statute, which states that the territorial jurisdiction of the tribunal extends to the territory of the former Yugoslavia (i.e, its pre-dissolution borders), including land surface, airspace and territorial waters²¹⁰, while temporal jurisdiction extends to the period beginning on January 1, 1991.²¹¹

The Secretary-General chose this date as a neutral date, not linked to any specific event.²¹² If one regards the date of the war's inception as being the day the Serbs began the bombardment of Sarajevo, in early April 1992, which is commonly accepted, it is interesting that the Secretary-General set the date for temporal jurisdiction to begin, over a full year earlier. Of course, this choice recognizes that 'ethnic cleansing' had already taken place in Croatia in the fall of 1991, when the Serb assault resulted in the capture of one-quarter of Croatia's

²¹⁰Statute, Article 8.

²¹¹*Ibid.*

²¹²Joyner, Christopher C. "Enforcing Human Rights Standards in the Former Yugoslavia: The Case for an International War Crimes Tribunal" (Spring 1994) 22 *Denver Journal of International Law and Policy* No.2/3, at 264.

territory.²¹³ Other commentators have suggested that the beginning date for the violations should have been set as June 1, 1991, which was when the republics of Croatia and Slovenia formally declared their independence from Yugoslavia.²¹⁴

The issue of temporal jurisdiction does not pose a problem for the tribunal; the Secretary-General has set the date far enough back to encompass the war in Croatia, possibly the situation of 'martial law' in Kosovo²¹⁵, and certainly all the violence in Bosnia itself.²¹⁶ One interesting point is raised by allowing the tribunal to have jurisdiction over crimes that may have been committed as far back as January 1991. Recall that in the genocide provision of the statute, in Article 4, conspiracy to commit genocide has been defined as a crime,²¹⁷ along with the direct and public incitement to commit genocide.

It has long been acknowledged that the program to 'cleanse' Bosnia, the Krajina territory of Croatia, and the region of Kosovo of non-Serbs had been in

²¹³*Supra*, note 149.

²¹⁴See, Sudetic, Chuck "2 Yugoslav States Vote Independence to Press Demands" New York Times, 26 June 1991.

²¹⁵See, Maliqui, Shkelzen "The Albanians of Kosovo: Self-Determination through Non-Violence" in Lawrence Lifschultz & Rabia Ali (eds.) *Why Bosnia?* (Stony Creek: Pamphleteer's Press, 1993), at 331.

²¹⁶*Supra*, note 111, at 305. Bassiouni argues that the January 1, 1991 date "can be read to support the proposition that the conflict was continuous, although developing in fits and bursts".

place prior to April of 1992, when the siege of Sarajevo began.²¹⁸ It is possible that the development and refinement of this program, prior to its actual implementation when the war began, would qualify as acts that constituted a conspiracy to commit genocide.²¹⁹ There is evidence of direct and public incitement of hatred of Bosnia's Muslim and Croat populations by the Serb authorities, but whether this would translate into incitement to commit genocide is unclear.²²⁰ Television has long been a weapon in convincing the Serb people that

²¹⁷Statute, Article 4(3)(b) and (c).

²¹⁸*Supra*, note 149. at xxiii and xxiv.

²¹⁹These acts would include the nationalist rhetoric espoused by the Serbs prior to the dissolution of Yugoslavia. It might include the historic nationalist memorandum written and circulated by the famous Serb historian Dobrica Cosic. It would certainly include the secret collaborations of Serbian leader Slobodan Milosevic and Croatian President Franjo Tudjman, when they met in March of 1991 to discuss how Bosnia was to be divided up between their two republics (*supra*, note 144, at xxv). Providing that the limitation period is satisfied, it might also include the building of an arms pipeline between Serbia and Bosnia to fuel the war effort in the newly emergent nation. Equally importantly, the demand by the JNA that all Bosnian Muslims who had served in the army turn over their weapons to the JNA as a sign of goodwill prior to independence could also be seen as another step in the conspiracy to commit genocide, particularly if it could be shown that this demand was made explicitly for the purpose of leaving a civilian population defenceless before the onslaught that was to ensue. (For a thorough discussion of all these acts, see, *supra*, note 149). Should the tribunal choose to take all these acts into account and lay charges of conspiracy to commit genocide, the Secretary-General acted appropriately in selecting January 1, 1991 as the commencement date for the tribunal's temporal jurisdiction.

²²⁰See, Stiglmayer, Alexandra "The War in the former Yugoslavia" in Stiglmayer, A. (ed) *Mass Rape: The War Against Women in Bosnia-Herzegovina* (Lincoln, NB: University of Nebraska, 1994), at 20, where she writes: "In the past seven years since Belgrade television has been controlled by Slobodan Milosevic, it has built up a distorted image of reality, a highly complex web of lies in which everything has its own logic. Many Serbs are convinced by it that

they are the victims of Croats and Muslims, whose goal is to see the Serb nation destroyed. The rationale fed to the population through state-controlled television is 'destroy them before they destroy us'.²²¹ It would be a difficult but necessary task for the tribunal to establish the connection between state-run propagandist media and the actual commission of the crime of genocide. Linking the tribunal's temporal jurisdiction to its subject-matter jurisdiction, vis-a-vis Article 4(3)(b) and (c), provides it with the unique and creative opportunity to do so. The separate acts that have characterized the Yugoslav war should be deconstructed into the reality of war crimes that they are. The tribunal must use all the bases of its jurisdiction to bring this about.

Article 8 poses no difficulty in terms of territorial jurisdiction either. Thus far the war has been confined to the borders of the former Yugoslavia. As long as the tribunal has the jurisdictional competence to rule on all matters within this territory, which it does, justice will not be circumvented.

they are defending themselves against the Muslim and Croatian 'danger' and must for that reason put aside sentiment and friendly feelings." See, also, Lovric, Jelena "Things Fall Apart" in Lifschultz & Ali (eds) *Why Bosnia?* (Stony Creek: Pamphleteer's Press, 1993), at 283, and Denitch, Bogdan "The Last Days of Yugoslavia" in *ibid*, at 288 and 290.

²²¹*Supra*, note 220, *re* Stigmayer, footnote 71. "This information comes from the Serbian journalist Petar Lukovic, deputy editor-in-chief of the independent Belgrade weekly *Vreme*. According to him, Belgrade television is 'Milosevic's main weapon. Without television, there would be no Milosevic, and if television falls, he falls too' (interview on September 3, 1992, in Belgrade)".

3.3 Concurrent Jurisdiction or the Principle of Non-Bis-in-Idem

This brings us to the jurisdictional basis which potentially poses the most problems for the tribunal, in terms of obstacles it may face in trying to assert its authority. Articles 9 and 10 of the statute of the tribunal seek to recognize an important principle of international law, which grants *universal* jurisdiction over certain types of crimes. Universal jurisdiction under customary law allows any state to take jurisdiction over genocidal acts, regardless of the offender's nationality and place of commission.²²² Universal jurisdiction for the crime of genocide was widely accepted after Nuremberg, although no state has chosen to exercise it unless some other basis of jurisdiction also exists.²²³

"Traditionally, the jurisdiction of a State extends to the limits of its sovereignty and may not encroach upon the sovereignty of other states."²²⁴ The concept of universal jurisdiction is one that permits every state to exercise

²²²*Supra*, note 59, at 395. See, also, *supra*, note 2120, at 238; *supra*, note 73, at 275; *supra*, note 163, at 398. See, also, Meron, Theodor. "War Crimes in Yugoslavia and the Development of International Law" (January 1994) 88 *American Journal of International Law* No. 1, at 77-78.

²²³*Supra*, note 59, at 395.

²²⁴*Supra*, note 25, at 100.

jurisdiction over certain types of offences, which are considered to be universal concerns.²²⁵ Genocide is a prime example of such an offence, and is a matter of concern for states, as well as for the tribunal. Israel relied on the concept of universal jurisdiction when trying Adolf Eichmann.²²⁶

The tribunal recognizes the concept of universal jurisdiction in its statute by drawing attention to it in two separate articles. In his report to the Security Council, the Secretary-General states that it was not the intention of the Council to prevent national courts from exercising their jurisdiction with regards to such acts²²⁷, and that national courts should be encouraged to exercise their jurisdiction.²²⁸ Nonetheless, the tribunal would not have much work before it, if it were to turn over its responsibilities to the domestic courts of particular states. Therefore, although the principle of concurrent jurisdiction is recognized by the tribunal, it is subject to the primacy of the ICTFY. Specifically, at "any stage of

²²⁵*Supra*, note 163, at 388.

²²⁶See *Israel v. Eichmann*, 35 International Law Reports 277 (Supreme Court of Israel, 1962).

²²⁷Indeed, the government of Bosnia had gone ahead with its own indictments and prosecutions of war criminals in its national courts. One such defendant was Borislav Herak, who was extensively interviewed by John Burns of The New York Times in November of 1992, about crimes he had committed. See, Vulliamy, Ed. *Seasons in Hell* (London: Simon & Schuster, 1994), at 192. See, also, Stiglmayer, Alexandra "Rapes in Bosnia-Herzegovina" in Alexandra Stiglmayer (ed.) *Mass Rape: The War Against Women in Bosnia-Herzegovina* (Lincoln, NB: University of Nebraska, 1994), at 147, for a conversation held with Herak.

the procedure, the International Tribunal may formally request the national courts to defer to the competence of the International Tribunal."²²⁹ The details of how this is to be accomplished are set out in the tribunal's rules of procedure.

Why was it necessary for the ICTFY to explicitly assert its primacy? I argue that there are a number of reasons for the precise language in which Article 9 has been articulated. First, there is the concern over impartiality. If a state that is a party to the war is trying accused war criminals in its own courts, there are serious questions raised about the safety of the accused while being detained for trial. It is at this stage when it is likeliest that detainees will be interrogated about their participation in war crimes, and confessions will be forthcoming.²³⁰ Justice served by an aggressor nation is unlikely to be in good faith; even in the case of the government of a state that is the victim of aggressive war, the temptation to retaliate in the treatment of prisoners, and those detained on charges of war crimes can override concerns for a fair and impartial trial. Article 9(1) does not deny nation states the right to exercise jurisdiction, or administer justice according to

²²⁸*Supra*, note 78, paragraph 64.

²²⁹*Supra*, note 78, paragraph 65.

²³⁰Consider the case of the recently overrun safe haven, Zepa, where women and children were deported, but men between the ages of eighteen and sixty were detained for questioning about their involvement in war crimes by Serb forces.

their own laws, but Article 9(2) indicates that a greater purpose may be served by having a neutral party (in this case, the tribunal) act as arbiter. Not only will justice be done, it will be *seen* to be done.²³¹

The implicit neutrality of the tribunal is one factor, another is that the tribunal will have greater assistance and co-operation from many states in providing information about war crimes and in terms of its authority to collect such information. This may prove to be a consideration that lacks substance, depending on how successful the tribunal actually is in obtaining co-operation from states. The Secretary-General, in his report to the Security Council, points out that the establishment of the tribunal on the basis of a Chapter VII decision creates a binding obligation on all states to take the necessary steps required to make the decision effective.²³² Co-operation is to entail compliance with any request for assistance or order issued by a Trial Chamber of the tribunal, including a) the identification and location of persons, b) the taking of testimony and the production of evidence; c) the service of documents; d) the arrest or detention of

²³¹*Supra.* note 111, at 315. Bassiouni points out, however, that by allowing for concurrent jurisdiction the Security Council did not mean to discourage prosecutions on a national level. In fact, such prosecutions were to be encouraged, but given the lack of prosecutorial action at a national level, it is evident why the establishment of the ICTFY became necessary. Bassiouni concludes that "concurrent jurisdiction is the inevitable result of the circumstances under which the tribunal was established and of the manner in which its jurisdiction was defined."

persons; and e) the surrender or the transfer of the accused to the tribunal.²³³

An example available at this time is a successful one: upon request by the tribunal to turn Dusan Tladic over to its custody, the government of Germany immediately complied.²³⁴ However, one should be cautious about assuming that compliance will be forthcoming from the state of Serbia, or from the self-styled Bosnian Serb nationalist redeemers. The guards of concentration camps and their superiors have not been forthcoming in terms of allowing humanitarian access to the sites, nor in terms of co-operating with fact-finding missions.²³⁵ Other states, however, have seen their responsibility and have conducted their own investigations into war crimes, including Austria, Germany and Sweden.²³⁶ The United States State Department has also presented "several hundred pages of reports and summaries of testimony of victims and witnesses".²³⁷

²³³*Supra*, note 78, paragraph 125.

²³³Statute, Article 29 (a)-(e).

²³⁴*Supra*, note 150.

²³⁵See, e.g., Gutman, Roy. *A Witness to Genocide* (New York: Macmillan Publishing, 1993), and Bassiouni, M. Cherif "The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)" (October 1994) 88 *American Journal of International Law* No. 4, at 796.

²³⁶Bassiouni, *supra*, note 235, at 799.

²³⁷*Ibid.*

This is a consideration that can only be adequately judged after the fact.

The tribunal has the authority to solicit assistance and states are bound to comply, individual states do not possess the same authority and therefore, it may be more difficult for them to process alleged war criminals through their national courts.

A final consideration on this issue is the question of parity or uniformity.

There is a strong need to see that justice is applied to all defendants appropriately and consistently. Adhering to the standards of the tribunal as set out in its statute will meet this requirement. Trials before different national courts with different standards of punishment will result in justice not being delivered on an even-handed basis. Different states may have different standards for the admissibility of evidence and the circumstances under which evidence can be obtained. Some states may impose a death penalty for war crimes, others may impose lifetime prison terms. In order to equalize the treatment of all accused in this war, the best course is to leave prosecution in the hands of the international tribunal.

One other point can be made: doing so will further validate the norms of international humanitarian law that the tribunal is being asked to interpret and apply. It will also go some distance to reasserting the perspective of the international community on the relevance and necessity of seeing international humanitarian standards observed.

This is a fitting place to consider Article 10 of the statute which deals with the principle *non-bis-in-idem*. According to this principle, a person shall not be tried twice for the same crime.²³⁸ The general rule that is to prevail is that if an individual is tried before the tribunal, he or she cannot then be tried before a national court. The reverse, however, is not true in all cases, and addresses in part the dilemma posed by having national courts with different rules of procedure try defendants.

An individual will be subject to subsequent trial by the tribunal if: a) the act for which he or she was tried was characterized as an ordinary crime by the national court, or b) the national court proceedings were not impartial or independent, were designed to shield the individual from international criminal responsibility, or the case was not diligently prosecuted.²³⁹ In considering these provisions, the Secretary-General states that subsequent trial will be possible if the national court and the tribunal do not characterize the act that is an offence in the same way.²⁴⁰ In other words, if the act is characterized as an ordinary crime that does not take into account the violation of international humanitarian law, and is

²³⁸*Supra*, note 78, paragraph 66.

²³⁹Statute, Article 10(2)(a) and (b).

²⁴⁰*Supra*, note 78, paragraph 66(a).

punishable on that basis only, the tribunal reserves the right to try the defendant again.

This can only be to stress the importance of the customary international law that is to be applied, to see that it is not trivialized and that real justice is not preempted. The act must be characterized as a violation of the laws and customs of war, as a grave breach of the Geneva Conventions, as a crime against humanity, or as genocide. If the language employed by national courts is not consistent with these formulations, it is insufficient for the purposes of the tribunal. However, the tribunal will also try not to prejudice the rights of the accused, in that it will take into account any penalty imposed by a national court which has already been served.²⁴¹

Is this problematic? It could be argued that these reservations to the principle of *non-bis-in-idem*, and the very language of Article 9 and 10 are significant intrusions into the domain of state sovereignty and provide a crippling effect on the concept of universal jurisdiction. I have addressed some of the factors involved in this argument, but my conclusion is in light of the goals that the International Criminal Tribunal for the former Yugoslavia is trying to achieve,

²⁴¹Statute, Article 10(3).

the intrusions, if any, are justifiable. The point of the exercise is not to adhere to the letter of the law at the expense of providing real justice to the victims, and the statute of the tribunal reflects the fact that the competing considerations have been weighed with great care. It is only through the actual implementation of the statute's provisions that a detailed analysis of the merits versus the drawbacks will be possible. The tribunal has been given a mandate to fulfill, a mandate that is expressive of the concerns and the perspective of the international community, and it is working towards that end. How successful it will be in its work remains to be seen.

3.4 Mass Rape: The Example of Sexual Assault in Bosnia

The question of rape and sexual abuse during war has always been a problematic one facing policymakers, and yet when one considers that sexual abuse is prohibited under the fourth Geneva Convention with a clarity that is rare in international law, it is puzzling why this should be so.²⁴² Article 27 of the Convention states that "women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."²⁴³

The reason that rape poses is a problem is that although it is covered by the Fourth Geneva Convention, and defined as a crime against humanity in Article 5 of the ICTFY's Statute²⁴⁴, beyond a certain point in time, it is argued that incidents of rape no longer qualify as crimes against humanity as they are simply that -- incidents, no longer part of a larger, overriding policy. Evidence collected up to a specific period indicates that mass rape was a clear policy directive of the warmakers.²⁴⁵ Yet what about circumstances where incidents of rape are high, but

²⁴²Wilbers, M.T.A. "Sexual Abuse in Times of Armed Conflict" (Autumn 1994) 7 *Leiden Journal of International Law* No. 2, at 49.

²⁴³Fourth Geneva Convention, Article 27.

²⁴⁴Statute, Article 5(g).

no systematic or widespread pattern can be proved to exist? Will it still be possible to prosecute on the basis that rape is a crime against humanity? Is it sufficient for the act to have occurred during wartime?

There is no clear answer to this question yet, but the statute of the tribunal makes it clear that rape is a crime against humanity when it is part of a larger, systematic, widespread assault²⁴⁶, and not otherwise. Adrien Katherine Wing defines this as a problem in that the "mandate for the Tribunal does not recognize rape and forced prostitution as forms of persecution based on gender alone".²⁴⁷ She argues that rape should be considered a crime against humanity regardless of whether it is part of an 'ethnic cleansing' strategy or instead a reward for the troops.²⁴⁸ The other point that can be raised is that once acknowledged as a strategy of war, encouraged and indeed forced on participating troops, are the authors of the strategy absolved from responsibility once rape and other forms of

²⁴⁵Bassiouni, *supra*, note 235, at 798. See, also, Joyner, *supra*, note 212, at 251. This article documents in part the findings of the Dame Warburton Mission to Yugoslavia, sent to investigate the treatment of Muslim women in December 1992-January 1993. The mission concluded that "the rape of Muslim women has been perpetrated on a wide scale and in such a systematic, premeditated manner as to be considered part of an intentional war strategy."

²⁴⁶Statute, Article 5.

²⁴⁷Wing, Adrien Katherine & Sylke Merchan "Rape, Ethnicity and Culture: Spirit Injury from Bosnia to Black America" (Fall 1993) 25 *Columbia Human Rights Law Review* No. 1, at 43.

²⁴⁸*Ibid.*

sexual assault occur as routine incidents, rather than as a widespread pattern?²⁴⁹

Can two men be held accountable for the same act of rape? It very much depends on the definition of the crime; if the tribunal considers an incident of a rape that has occurred during the war to be part of a widespread, deliberate assault, it will qualify as a crime against humanity and it will be prosecuted. When the act of rape comes under the jurisdiction of the ICTFY, it will look at individual criminal responsibility in two senses: the person who committed the crime will be individually responsible for it²⁵⁰, and the person who planned, instigated or ordered the crime, or who otherwise aided and abetted in planning, preparing or execution shall also be held individually responsible for it.²⁵¹ Furthermore, a superior officer is responsible for not punishing or preventing a subordinate from carrying out the act if he knew or had reason to know the act was being committed.²⁵² The implications of this provision are arresting: if established as part of an overriding policy, a single act of rape could bring before the tribunal the

²⁴⁹For accounts that Serb soldiers were ordered to rape Bosnian women, see, e.g. Gutman, *supra*, note 177, at 68 and 72. See, also, Stiglmeier, *supra*, note 220, throughout; MacKinnon, Catherine A. "Rape, Genocide and Women's Human Rights" in *ibid*, at 187. Survivors recount stories of systematic rape, rape camps, forced brothels, repeated gang rape and intentional impregnation.

²⁵⁰Statute, Article 7(1).

²⁵¹*Ibid*.

individual rapist, his immediate commander, his army commander and possibly even his political leader.²⁵³

But unless the act of rape qualifies as a crime against humanity, it is not punishable by the tribunal. It is my contention that international humanitarian law does not go far enough in this regard. It is not enough to informally recognize that sexual atrocities are part of the ongoing reality of the war in Bosnia. The link between the war strategy implemented by the aggressor and the incidents of rape on the ground is strong and clear. At any time, rape should be seen as the violation of a human right²⁵⁴, but in the context of the Bosnian war it should be seen as a war crime, a crime against humanity. There are no circumstances in this war in which rape can be considered merely 'incidental' and left to the national

²⁵²*Ibid.* Article 7(3).

²⁵³If this connection is made, international humanitarian law is being well-served. It would demonstrate that no exceptions are to be made for anyone who violates the laws and customs of war, and reinforces the type of conduct that is considered acceptable in war. Rape and sexual assault are intolerable offences at any time, but in the course of war they acquire a new, dehumanizing and threatening character. Catherine MacKinnon goes further when she states that "In the West, sexual atrocities have been discussed largely as rape *or* genocide, not as what they are, which is rape *as* genocide, rape directed toward women because they are Muslim or Croatian." MacKinnon, *supra*, note 220, at 187-188.

²⁵⁴Catherine MacKinnon points out the incongruity of never recognizing rape as a human rights violation in the domestic or 'peacetime' context of women's lives, and the implicit acceptance of rape as a routine occurrence of war when she writes "In the records of human rights violations [rapes are] overlooked entirely, because the victims are women and what was done to them smells of sex." MacKinnon, *supra*, note 220, at 184.

courts to prosecute. Doing so means that the protection of women and children (recall that girls as young as five years old have been raped in the war) is a value accorded little weight by the international community, which contradicts standards the international community purports to uphold, such as the Geneva Conventions.

The tribunal has the jurisdiction to prosecute this crime and should be creative about exercising it. The significance of rape as a war strategy in the drive to cleanse Bosnia and Croatia of non-Serb peoples cannot be overemphasized. If it is overlooked, it transmits the signal that similar conduct is entirely permissible where other conflicts arise.

3.5 Conclusion

It is evident that the tribunal faces several obstacles in interpreting its own statute for the purpose of doing the work it has been entrusted with. While the international community appears to have agreed on the bases of jurisdiction that the tribunal will operate under, it is less clear what principles of international law should govern when dealing with issues such as universal jurisdiction over war crimes, securing the compliance of states with the work of the tribunal (particularly the aggressor states in the war), and ensuring that the tribunal can assert its jurisdiction over natural persons accused of committing war crimes, crimes against humanity and genocide.

If the tribunal's work is seen as representative of the international community's perspective on the importance, even the sanctity, of certain norms of international humanitarian law, it is disturbing that it possesses the jurisdiction to do its work, but the inability to enforce its mandate. The lack of any enforcement mechanism in the statute of the tribunal is so central to its ability to complete its task that it renders concerns over the uniformity of treatment of defendants, potential amnesty for war criminals, and the lack of penalties other than imprisonment, trivial by comparison. Those are concerns that cannot be addressed until the tribunal is able to go ahead with its work.

Until the mandate of the ICTFY is given teeth by the international community, it will be a long time before it can interpret or redefine the international law that the community is seeking to uphold, which is, essentially, its task. The longer the delay in accomplishing this task, the less validity these standards of international humanitarian law will seem to have. Thus, although the work of the tribunal reasserts the perspective of the international community on what type of conduct is considered acceptable and legal in international and internal warfare, by allowing for broad bases of jurisdiction, and although international humanitarian law is validated by *attempted* enforcement, until *actual* enforcement is able to take place, the tribunal's work will have limited application.

CHAPTER FOUR: THE ISSUE OF CREDIBILITY

4.0 Introduction

The issue of credibility is a pivotal one in determining the effectiveness and legitimacy of the ICTFY. The structure and mandate of the tribunal have been instituted in a carefully premeditated and properly legal manner, nonetheless, the tribunal faces challenges to its credibility. It is within this context that the question of the purpose of the creation and empowerment of the tribunal is posed. Was the tribunal ever seen as or intended to be a mechanism by which the war in the republics of the former Yugoslavia could be stopped? Is this a function that courts, domestic or international, have performed in the past? If it was constituted to that end, has it been successful? The answer is no -- the tribunal has not served the function of deterring the type of warfare being conducted, nor did its work serve to end the war.

Certain contradictions are posed by the Yugoslav war. On one side, there is the creation of an international tribunal meant to prosecute those individuals guilty of committing war crimes. At the same time, circumstances have forced peace negotiations with some of these same parties.

There is also a duality that exists in the creation of the tribunal. It is possible to recognize that the work of the tribunal will be a serious effort, while at the same time acknowledging that the political considerations which have led to its creation were not necessarily enacted in good faith: it was politically expedient to create the tribunal, and this same expediency may continue to have influence following the Dayton agreement. It is this duality that primarily affects the credibility of the international tribunal.

Impaired credibility means that the tribunal could not serve to deter the type of war being conducted. It also means that despite the jurisdiction granted to the tribunal in its statute,²⁵⁵ there was no reason for any of the parties to the conflict to respect its jurisdiction. Naturally, all sides would wish for the accused on the opposing side to be prosecuted. They would not, however, surrender members of their own military or party. Particularly if they were aware that the tribunal lacked a discrete enforcement mechanism.

One must consider that in the past, the creation of courts and tribunals has never been aimed at resolving a conflict situation on the ground.²⁵⁶ The

²⁵⁵Statute, Articles 1 - 10.

²⁵⁶*Supra*, note 83, at 108.

purpose of a court is to adjudicate remaining matters, after resolution has already taken place. Nowhere in the tribunal's statute is it specified that the international tribunal is to serve this function. But if this were indeed a task of the ICTFY, it would not be articulated in a legal formulation. Rather, the tribunal would be serving as a political tool, just as the announcement of its creation silenced criticism that the UN had failed in Bosnia, and had ceased to act in good faith. However, if in empowering the tribunal, the UN was also not acting in good faith, it could not have been a policy intention to deter the course of a war that included genocide. Thus in legal terms, there is no basis for the supposition that the tribunal's role was to end the war or to otherwise act as a conflict resolution mechanism. The political context surrounding the creation of the tribunal suggests that the tribunal could not have served as a political tool to this end either.

4.1 The Lack of Good Faith in the Establishment of the Tribunal: Peace Negotiations and Prosecution

One of the predictions on the fate of the tribunal came from Telford Taylor, the US Chief Prosecutor for the Nuremberg Trials, who wondered if the

ICTFY would come to pass.²⁵⁷ He believed that in a situation where the people involved in war crimes and the evidence of such crimes are largely inaccessible, to set up the tribunal before the hostilities conclude is largely premature.²⁵⁸ Furthermore, Taylor believed that a cessation of hostilities or an end to genocide would not be possible until the aggressor forces had secured a general amnesty provision.²⁵⁹

Securing such a provision would do away with the need for a war crimes tribunal, but Taylor's comments are indicative of a general lack of faith in the ability of the ICTFY to be effective in the face of the obstacles that confront it. The Dayton agreement has added a new twist to these sentiments. A general amnesty provision is not on the table, contrary to Taylor's prediction. However, the fact that Slobodan Milosevic is one of the signatories to the peace accord, on behalf of the Serbian people, indicates that despite the evidence the ICTFY may be able to adduce, it will not be possible to prosecute the Serbian leader. The same holds true for the Bosnian and Croatian presidents, however, the example is more compelling

²⁵⁷ *Supra*, note 22, at 2.

²⁵⁸ *Ibid.*

²⁵⁹ *Id.*

in the case of Milosevic, as evidence has already been presented in the form of U.S. State Department reports, and other intelligence.²⁶⁰

One must also consider whether the Dayton agreement represents a breakthrough, any more so than the Vance-Owen plan of its day, or the Owen-Stoltenberg negotiations.²⁶¹ The allocation of territory has been agreed upon by all three parties to the conflict, and it has been agreed that acts which constitute war crimes, crimes against humanity and genocide will cease; yet, already the Bosnian Croats have begun to defy the terms of the agreement. As they evacuate the towns they are to turn over to Serb control, Sipovo in Bosnia-Herzegovina being one such example, they are setting the towns ablaze, causing massive destruction and looting homes.²⁶² The Serbs have promised to retaliate with the destruction of Sarajevo.²⁶³

The Dayton agreement has had serious implications for the tribunal as well, but it has not facilitated the work of the ICTFY as it endeavours to

²⁶⁰ *Infra*, notes 289, 290, and 316.

²⁶¹ *Supra*, note 149, at xxxii.

²⁶² Pomfret, John. "Bosnian Croats defy peace pact" Toronto Star (10 December 1995).

²⁶³ *Supra*, note 262, at A1. There are other numerous examples of violations of the Dayton agreement. In the town of Jajce, Croat forces have refused to allow Muslim refugees return to their homes. In northern Bosnia, Serb forces expelled sixty families from their homes, despite the agreement to cease forced expulsions. UN convoys continue to be blocked on the route to Gorazde, despite the commitment to allow free access to humanitarian convoys.

indict war criminals and procure the defendants before the Hague. In direct violation of the Dayton agreement, Croats in Mostar released a Croat militiaman indicted by the tribunal.²⁶⁴ Under the terms of the Dayton agreement, all three sides agreed to co-operate with the tribunal. Judge Richard Goldstone, the Chief Prosecutor at the Hague, reports that Serbian-led Yugoslavia continues to rebuff his work, and has refused to supply evidence even against a Bosnian Muslim arrested in Holland.²⁶⁵

Those who continue to assert that all three sides are equally guilty in the Bosnian war must bear in mind the following evidence: whereas the government of Bosnia-Herzegovina, in the wake of Dayton, has enacted the requisite legislation, has deferred prosecution of war criminals at the tribunal's request, and has transferred suspects to the jurisdiction of the tribunal, Bosnian Serb authorities, Bosnian Croat authorities, the Federal Republic of Yugoslavia and the government of Croatia have not transferred indicted suspects to the jurisdiction of the tribunal.²⁶⁶ Despite promising to do so, Yugoslavia has not permitted the tribunal to open an office or allow

²⁶⁴ *Supra*, note 262.

²⁶⁵ *Ibid.* The arrested man will be the first Muslim to be tried for executing numerous Bosnian Serbs, and his case is extremely important to the tribunal's credibility.

²⁶⁶ Amnesty International. "Bosnia-Herzegovina: The Duty to Search for War Criminals/An Open Letter from Amnesty International to IFOR Commanders and Contributing Governments" (March 1996) AI Index: Eur 63/08/96.

investigators to operate freely within its territory²⁶⁷, although Croatia has called for such investigation.

The lack of co-operation with the work of the tribunal will continue as long as its credibility continues to be impaired by two main factors: the necessity of conducting peace negotiations with those widely acknowledged to have had a hand in genocidal policy; and the inability of the tribunal to function on the scale that it should, given its lack of funding.

The UN's role in mediating the Bosnian conflict is worth mentioning, although the analysis will be limited. Mediation began well before the International Criminal Tribunal for the former Yugoslavia was established, but was based on the faulty premise that all three sides came into the negotiations with equal grievances and with equal status.

In tandem with its interventionist measures, the UN attempted to promote a political settlement of the conflict by pressuring all three sides to come to the negotiating table and work out a realistic plan. These negotiations underwent three stages: the first being the stage that established the principles of the London Conference.²⁶⁸ The second was the

267 *Ibid.*

268 *Supra*, note 96.

now defunct Vance-Owen plan which proposed carving Bosnia up into ten ethnically homogeneous regions²⁶⁹, and the third was the map redrawn by Croatia and Serbia after their territorial gains which envisioned a loose confederation of three provinces within Bosnia-Herzegovina (the Owen-Stoltenberg negotiations)²⁷⁰. All three plans were accepted by the Bosnian government and rejected by Serbia's representatives. Negotiations continued despite ongoing violations of the safe havens resolution, or as some would argue, in order to resolve such violations.²⁷¹

Under Chapter VIII of the UN Charter²⁷², the UN is authorized to develop strategies for peace in co-ordination with regional authorities. The European Community offered to host and direct the peace negotiations, a plan readily approved by the Security Council. The London Conference which was finalized on August 26 and 27, 1992 was organized by the Secretary-General and British Prime Minister John Major, who was acting on behalf of the EC.²⁷³

269 *Supra*, note 149, at xxxii.

270 *Supra*, note 149, at xxxix.

271 U.N.Doc.S/RES/819 (16 April 1993).

272 UN Charter, Chapter VIII.

273 *Supra*, note 96.

The next round of talks, scheduled for September in Geneva was intended to resolve the question of the implementation of the London Conference principles. The most significant event to take place during the Geneva Conference was the demotion of Bosnia's government, and thereby, the sovereign, independent state, to the status of a warring faction.²⁷⁴ The nation was to find itself relegated to the same status as the other forces within Bosnia that were not independently recognized at international law. Instead of a legitimate government, Bosnia now became the Muslim party to the conflict. This was despite the Security Council's endorsement of the agreement reached in London.²⁷⁵

The Bosnian government was aware of this shift in its status. In a letter dated September 8, 1992, the acting President Ejup Ganic emphasized that while the Bosnian delegation had been participating in peace talks in Geneva, Serb forces attacked the Bosnian towns of Banja Luka, Magiaj, Bosanski Brod, Teslic, Jajce, and Brcko.²⁷⁶ This was a pattern that was to be repeated throughout the various stages of the peace negotiations.

274 *Supra*, note 96, at 204.

275 U.N.Doc.S/PV.3097 (17 July 1992), at 6.

276 U.N.Doc.S/24601 (29 September 1992), at 2.

In November of the same year, the Bosnian government sent an urgent letter to the Security Council detailing how each of the London Principles continued to be violated, while implementation mechanisms remained absent.²⁷⁷ Although the overriding principle of the London Conference was the abolition of ethnic cleansing policies, five hundred and fifty thousand Bosnians were forced from their homes between the time the London Conference ended and the Presidency's letter was sent.²⁷⁸ Despite repeated requests from Bosnia's government, the London Principles were abandoned in the face of changing realities on the ground. The role that UN inaction played in contributing to the military realities was seldom considered when the parties were asked to sign the newest version of a devised partition plan.

On October 27, 1992, Cyrus Vance and Lord David Owen unveiled their plan to divide Bosnia into ten semiautonomous multiethnic regions, which would leave Sarajevo an "open city" not under the control of any one ethnic group.²⁷⁹ With increasing diplomatic pressure mounted against them, the Bosnian government signed the plan that ceded territory won by

²⁷⁷ U.N.Doc.S/24761 (5 November 1992).

²⁷⁸ *Ibid.*

²⁷⁹ *Supra*, note 6, at 12.

force, and which ignored the principles articulated at the London Conference, stating that such an exchange would never be permitted. The 25th of March, 1993, was a cornerstone in the Vance-Owen peace process.²⁸⁰ On this date, both Bosnia's government and Bosnian Croatian elements signed the plan. In the debate that took place regarding the Security Council resolution for strengthening sanctions, France noted that the Serbs had taken advantage of the delay in putting the resolution into effect by taking control of the safe haven Srebrenica, while at the same time rejecting the peace plan.²⁸¹ Apparently, one of the purposes of the new sanctions resolution had been to encourage the Bosnian Serbs to sign.²⁸²

280 Recall that the recommendation to establish an international tribunal to try war crimes was passed in February of 1993, and that Security Council resolutions calling for the collation of information regarding war crimes had been passed as early as the fall of 1992. The peace negotiators were not unaware of the other steps being taken to address and possibly redress the worsening conflict.

281 U.N.Doc.S/PV.3200 (18 April 1993), at 8.

282 Sanctions against Serbia represent another aspect of the UN's failed Bosnia policy. The sanctioning states of the Security Council could not have given careful enough thought to the question of whether they wanted to single Serbia/ Montenegro out as an international pariah, thereby causing it to cease its destructive policies, or whether they wanted to bring about the total economic ruin of the rump Yugoslavia, as a means of deterrence. See, Kuyper, Pieter Jan. *The Implementation of International Sanctions* (The Hague: Sijthoff & Noordhoff International Publishers, 1978), at 10. Sanctions were first imposed on Serbia with resolution 757, *supra*, note 207, and six months later were reinforced with a second resolution which specifically targeted the supply of oil, shipments arriving via the Danube, and transfer of funds. See, U.N.Doc.S/RES/787 (16 November 1992). But like the other work of the Security Council, there was no enforcement of these resolutions and no enforcement mechanism proposed. Addressing the Security Council in November of 1992, Cyrus Vance warned that it was common

These methods failed, as the Bosnian Serbs voted in a referendum held on May 15, 1993 to reject the plan which ceded them less than the 70% of Bosnian territory that they had already captured through war. Recall that the resolution reaffirming the establishment of the war crimes tribunal was passed in the same month.

The negotiators knew that the Serbs had a record of intransigence when it came to discussing peace, that the talks were often nothing more than a facade designed to obfuscate their manoeuvrings on the ground, yet they neither ceased the negotiation process, which was one alternative, nor did they recommend any steps to ensure that the Vance-Owen plan would in fact be accepted.

Responding to this danger in April of 1993, Turkey's representative to the Security Council stressed that the Council should adopt a resolution which would sanction aerial attacks on the supply lines of Bosnian Serb paramilitary units; undertake measures designed to place heavy weapons

knowledge that transit documents were being misused and that embargoed oil was getting through in larger and larger quantities. See, U.N.Doc.S/PV.3134 (13 November 1992), at 16. Lord Owen confirmed the problems regarding poor enforcement with his statement that there are "gaping holes in the current oil embargo" along all of Serbia/Montenegro's borders." *Ibid*, at 27.

under UN control; and if this did not work to lift the arms embargo vis-a-vis Bosnia-Herzegovina.²⁸³

In the same debate, Indonesia condemned the Vance-Owen plan for its obvious shortcomings, stating that it offered the Bosnians the agony of the dismemberment of their country.²⁸⁴ Indonesia was clear-sighted in addressing the problems that hindered Serbian acceptance of the plan, although given its own human rights record, it is unsurprising that its words did not carry much weight:

"The fragmentation of the country will not reflect geographical, historical, demographic or economic realities. It rewards "ethnic cleansing" by assigning to Serbs areas that they seized after driving out the other communities. Hence it is unfair to Bosnian Muslims and unduly rewards Bosnian Serbs. It lacks a mechanism that would compel Serbs to comply, and it represents an enforced compromise between aggressors and their victims. The contemptuous rejection of the plan by the Serbs is clearly a blatant attempt to divide Bosnia along ethnic lines and thereby create States-within-a-State, taking them closer to their proclaimed goal of an independent Bosnian Serbian State that will join up with the former Yugoslavia to form a greater Serbia."²⁸⁵

283 U.N.Doc.S/PV.3201 (19 April 1993), at 16.

284 *Supra*, note 56, at 41.

285 *Ibid.*

The rejection of the plan which contradicted earlier principles indicated that negotiations were not taking place in good faith. Although the parties to the conflict were told to accept military reality, and that the plan was the "only game in town", it was never admitted that the military reality had been contributed to by UN policy.²⁸⁶

In August of 1993, Diego Arria delivered a critique of the plan to the Council, and suggested that Lord Owen's resignation from the process could have influenced and generated a much-needed change in the international community's position.²⁸⁷ Arria stated that:

"From Lord Carrington's negotiations to the Vance-Owen Peace Plan, Bosnia and Herzegovina's tragedy has accelerated downhill into ethnic partition -- a kind of apartheid modality -- no longer a peace plan, but simply a deal. We have the impression that there is an interest in terminating the matter at any price."²⁸⁸

The Owen-Stoltenberg negotiations that represented round three, and the deliberations that led to the Dayton agreement, took place in essentially the same context. Negotiations continued on the same footing, while the international community was aware that the Serbian

286 *Supra*, note 149, at xxxviii.

287 U.N.Doc.S/PV.3269 (24 August 1993), at 37.

288 *Ibid.*

representatives with whom it was negotiating had already been named as war criminals in United States State Department reports.²⁸⁹ In addition, information had subsequently been collected on this point, by the tribunal and the Commission of Experts.²⁹⁰

This is relevant to the credibility of the tribunal in two ways: as long as there was this dual approach to resolving the Balkan crisis, the existence of the tribunal could not serve as a deterrent to genocidal conduct. Despite the fact that the tribunal was and is intending to prosecute, its lack of enforcement mechanisms, coupled with contemporaneous peace negotiations meant that the tribunal did not pose a serious threat to the architects of the Balkan war strategy. As long as Balkan leaders involved in war crimes were present at the negotiating table, it would not be possible to prosecute them. If there was no threat that they would be prosecuted, and as

289 *Infra.* note 316. Lawrence Eagleburger, the US Secretary of State under the Bush administration, named Milosevic, Karadzic and Mladic as potential criminals along with two Serb paramilitary leaders, Vojislav Seselj and Zeljko Raznjatovic. Eagleburger compared the "ethnic horror" in Yugoslavia to Nazi genocide. See, Kempster, Norman "Eagleburger Seeks Balkan Atrocity Trials" L.A. Times (17 December 1992).

290 See, also, Cohen, Roger. "CIA Says Most Ethnic Cleansing Done By Serbs" The New York Times (9 March 1995), where the details of a classified report detailing the extent of war crimes carried out by Serbs and leading Serb politicians is discussed. The report was highly classified because the news came at a time when the United States and

other UN measures aimed at curtailing genocide had failed, there was no incentive to change the war strategy or desist in ethnic cleansing.

Even after Dayton, indicted suspects Radovan Karadzic and Ratko Mladic continue to move about freely within Bosnia, in full view of the Implementation Force (IFOR).²⁹¹ As they continue to retain power and flout IFOR's authority, NATO's credibility wanes. "NATO is ... exposed for lacking the political will to contest the Bosnian Serbs,"²⁹² and thereby assist the tribunal, which undermines both the substance of the Dayton Accords and the credibility of the tribunal.

4.2 The Full Impact of the Dayton Accords and the Presence of IFOR

Any review of the credibility of the ICTFY in light of peace negotiations conducted with suspected and indicted war criminals must include at least a surface analysis of the text of the Dayton Accords. It is altogether possible that the Proximity Peace Talks, as they are named, may

its European allies embraced the Serbian President, Slobodan Milosevic, as a potential peacemaker.

291 Hedges, Chris. "Bosnia and Iraq: The West Repeats Itself" *The New York Times* (3 March 1996).

292 *Ibid.* Mahir Hadziahmetovic, head of Bosnia's mission to the Organization for Security and Co-operation in Europe emphasizes this point when he says: "Karadzic wanders about freely while official papers are handed to IFOR troops authorizing his arrest. The refusal by IFOR to implement the rule of law in Bosnia, including the international law that calls for the arrest of war criminals, is destroying its credibility."

alter the context in which questions about the tribunal's credibility may be posed.

If Dayton is to be seen as not impeding or negatively affecting the credibility of the tribunal, the ultimate goal that must be satisfied is its efficacious and consistent implementation. The Accords consist of a General Framework Agreement, reinforced by eleven separate annexes.²⁹³ While each annex is independently necessary to the survival of peace in the region, the tribunal's work is most closely connected to Annexes 1-A, 6 and 7. Annex 1-A refers to the Military Aspects of the Peace Settlement (i.e. IFOR's role), Annex 6 deals with Human Rights, while Annex 7 refers to Refugees and Displaced Persons.²⁹⁴

The Human Rights provisions are the most noteworthy, particularly the four paragraphs of Chapter III, Article XIII. It is this article which refers implicitly, although not explicitly, to the investigative and prosecutorial functions of the tribunal. Paragraph I recognizes that the

293 *Proximity Peace Talks*. Wright-Patterson Air Force Base, Dayton, Ohio. (November 1 - 21, 1995).

294 *Ibid*, Annex 1-A, 6 and 7.

Parties to the Conflict shall promote and encourage the activities of non-governmental and international organizations for the protection and promotion of human rights.²⁹⁵ If this is not explicit enough, paragraph 2 invites the UNCHR and other agencies to monitor the human rights situation in Bosnia, and stipulates that the parties to the conflict will provide such agencies full and effective facilitation, assistance and access.²⁹⁶

Paragraph 3 is the hindrance clause: the Parties must not impede the work of monitoring agencies, but paragraph 4 is the focal point, the clause that makes explicit reference to the tribunal.²⁹⁷ The language of paragraph 4 is unambiguous: all competent authorities in Bosnia and Herzegovina are to co-operate with and provide unrestricted access to the organizations established in this Agreement (i.e. IFOR), to human rights agencies, and to the International Tribunal for the former Yugoslavia.²⁹⁸

This is a critical clause in the Accords because it explicitly equips the tribunal with authority and jurisdiction, while less explicitly linking the work of human rights agencies and IFOR to the work of the

295 *Ibid.* Annex 6, Chapter III, paragraph 1.

296 *Ibid.* paragraph 2.

297 *Ibid.* paragraphs 3 and 4.

298 *Ibid.* paragraph 4.

tribunal.

A surface analysis would appear to pose few problems: what other point could there be to the work of human rights agencies and the UNCHR, if not to provide material for the tribunal to rely upon? These agencies could even be seen as proactive arms of the tribunal, securing the evidence and testimony upon which to base indictments. No other reason for the existence of this clause has been suggested to date.

It is the role and function of the Implementation Force that raises the thornier questions. It is not an agent of the tribunal. Established under Article I of Annex 1-A, IFOR is to be composed of ground, air and maritime units from NATO and non-NATO nations, deployed to Bosnia and Herzegovina to help ensure compliance with the provisions of the Dayton Accords.²⁹⁹

Substantive analysis poses two questions, both of which have yet to be addressed satisfactorily: (1) What is meant by the phrase "to co-operate with and provide unrestricted access" in Annex 6, Article XIII, paragraph 4; and, (2) How are the words "to help ensure compliance" in Annex 1-A, Article 1(1)(a) to be interpreted when examining IFOR's mandate?

²⁹⁹ *Ibid.*, Annex 1-A, Article 1(1)(a).

Commentators interpret these terms broadly, reading into them IFOR's obligation to assist in searching for and detaining suspected war criminals.³⁰⁰ However, the most authoritative source on this point is the Amnesty International Report on the Duty to Search for War Criminals. The Secretary-General of Amnesty, Pierre Sane, holds that the failure to search for suspected war criminals and to implement law enforcement is inconsistent with the Dayton Accords, is a breach of the Geneva Conventions, and opposes Security Council Resolution 827.³⁰¹

The Amnesty report concludes that under the terms of Dayton, IFOR is obliged to take such measures as required to ensure compliance with Annex 1-A of the Agreement, including with investigators of the tribunal.³⁰² There is no specific clause in the Accords which defines 'ensuring compliance' or 'co-operating fully' as assisting the tribunal by searching for and detaining war criminals. However, Amnesty is able to read in this requirement by carefully and consistently referencing other sources. Amnesty's conclusion is that all state parties to the Geneva

300 See, e.g. the comments of law professor Diane F. Orentlicher as quoted in Shenon, Philip's "GI's Shun Hunt for War Crimes Suspects" *The New York Times*, (2 March 1996).

301 *Supra*, note 266.

302 Dayton, Annex 1-A, Article 2(4).

Conventions have a duty to search for persons alleged to have committed grave breaches of the Conventions, and de facto, this includes suspected war criminals in Bosnia.³⁰³

While IFOR may be seen as an independent entity with the authority to act independently, Amnesty argues that the relevant provisions of the Geneva Conventions make it impossible for state parties to the Conventions to be absolved of any responsibility in this regard.³⁰⁴ IFOR is acting on behalf of state parties not in opposition to them.

Security Council Resolution 1031 provides further authority for the view that the Dayton Accords gave IFOR the authority to detain and transfer persons indicted by the tribunal.³⁰⁵

Lieutenant-Colonel Mark Rayner, speaking on behalf of IFOR, takes the opposite view. The position consistently advocated by IFOR, and reminiscent of UNPROFOR's impartiality, is that IFOR troops have the

303 First Geneva Convention, Article 49. Second Geneva Convention, Article 50. Third Geneva Convention, Article 129. Fourth Geneva Convention, Article 146.

304 Convention I, Article 51. Convention II, Article 52. Convention III, Article 131. Convention IV, Article 148.

305 U.N.Doc. S/RES/1031 (15 December 1995).

authority, but not the obligation to detain war criminals.³⁰⁶ Rayner states that "no matter how much people might want us to arrest war criminals, we have a much bigger mission in Bosnia."³⁰⁷ Purportedly, this mission is to separate long-warring forces and keep the peace.³⁰⁸ However, as aptly noted in a New York Times article, "the relationship between removing Bosnian Serbs and other war criminals from positions of power and long-term peace seems not to be clear to the Pentagon."³⁰⁹

IFOR's actions bring to light another contradiction. Their hands-off approach to protecting material evidence such as mass grave sites is based on the premise that any intervention displayed by their forces will be perceived as bias in favour of a particular party, and will thereby undermine the peace process. At the same time, IFOR is emphatic about the importance of its role in providing security, guides and movement to civilians as part of a population 'relocation', albeit in civilian guise with

306 Transcript of Press Briefing Held on 25 February 1996 by IFOR Spokesman Lt.-Colonel Mark Rayner. UKA at the Sarajevo Coalition Press Information Centre.

307 *Ibid.*

308 *Id.*

309 Shenon, Philip. "GIs Shun Hunt for War Crimes Suspects" The New York Times. (2 March 1996).

demilitarized vehicles.³¹⁰ This is a move that is seen by many as assisting in ethnic cleansing.

The contradictions were apparent enough to result in new guidelines being issued by the United States government on detaining war criminals and protecting mass graves.³¹¹ NATO also prepared a Memorandum of Understanding to govern its relationship with the tribunal, which was rejected by Russia.³¹²

With this much authorization, it is unclear why IFOR makes no attempt to search for and detain at least Radovan Karadzic and Ratko Mladic, whose home bases Pale and Han Pijesak are within easy reach of the force. The problem has its military dimensions, but the impairment of IFOR's credibility has direct consequences for the tribunal.

Thus, while it may never have the role of the international tribunal, in a legal sense, to deter the conduct of warfare in Bosnia, the tribunal was also prevented from exerting any influence in a political context. To do so, its credibility would have to be unimpaired, and this was not possible as

310 *Ibid.*, IFOR Press briefing.

311 Reuters "New Rules on IFOR Detaining War Criminals", (6 March 1996).

312 *Ibid.*

long as peace negotiations were taking place,³¹³ and IFOR was unwilling to implement the outcome of those negotiations. Yet one cannot say either that there is no utility to a mediation process. For the most part, the Dayton agreement has resulted in the cessation of hostilities. What it has also done is cede territory won by force. As Professor Bassiouni points out, "there *is* an obvious incongruence between pursuing a political settlement option and a justice option."³¹⁴ And as President Clinton himself has said:

"We have an obligation to carry forward the lessons of Nuremberg. Those accused of war crimes, crimes against humanity, and genocide must be brought to justice. There must be peace for justice to prevail, but there must be justice when peace prevails."³¹⁵

In December of 1992, the United States listed the individuals it believes should be tried as war criminals, a list including the names of leaders such as Radovan Karadzic and Slobodan Milosevic.³¹⁶ A delicate balance must be struck when pursuing both settlement and justice, and the work of the tribunal takes place in this context.

313 It should be noted, however, that one of the consequences of the indictment of Radovan Karadzic is that although he was present for the previous negotiations, he did not attend the Dayton conference.

314 Bass, Gary J. "Courting Disaster: The U.N. Goes Soft on Bosnia. Again." *New Republic* No. 6, at 13.

315 President Clinton speaking at the Dodd Center in October 1995, as quoted in Shenon, Philip "GIs Shun Hunt for War Crimes Suspects". *The New York Times* (2 March 1996).

316 Sciolino, Elaine "US Names Figures it Wants Charged with War Crimes" *New York Times* (17 December 1992).

The creation of the ICTFY was one more step in a series of steps taken by the UN to alleviate the pressure of public opinion that was critical of the UN's failure in Bosnia. As such it cannot be said to have been constituted entirely in good faith. Its credibility, in terms of enforcing its objectives, continues to be impaired by the terms of the Dayton agreement, and the violation of those terms in the agreement which favour the tribunal's work. This is a significant factor contributing to the tribunal's inability to deter violations of international humanitarian law, or to enforce the international community's perspective that such violations will not be tolerated and must end.

4.3 Funding the Tribunal: Another Factor Impairing Credibility

The question of funding poses another threat to the credibility of the tribunal. If the member-states of the United Nations are reluctant to meet their responsibilities in this regard, the ICTFY becomes in effect, a paper tiger. In the face of indictments that have been issued, it appears to be active. Yet the entire process from 1993 to 1995 has been hamstrung by the insufficient funding provided to conduct investigations, to compile

documentation, and to procure the maximum number of indictments possible, based on the information before the tribunal at this point.

It was in December of 1994, that the two UN committees, the Advisory Committee on Administrative and Budgetary Questions (ACABQ) and the Fifth Committee of the General Assembly met to determine how much funding should be allocated to the ICTFY. The initial budget for the Tribunal broke down as follows: \$32.6 million was to be granted for the year 1994-1995. Of this money, \$22.6 million was for judges, administration and overhead.³¹⁷ The rest was divided up in salaries for prosecution and defence, with only \$562 000 being allocated for investigations.³¹⁸ At the December meeting of the ACABQ, this budget was slashed by twenty per cent, consistent with the trend in UN economizing.

Thomas Warrick, senior counsel to the Chairman of the UN Commission of Experts on the Former Yugoslavia, makes the following case for the necessity of increased funding: as there is no paper-trail in the Bosnian war, the war crimes cases will be witness-driven. Prosecuting a

³¹⁷ Warrick, Thomas S. "War Crimes: Don't Let Them Get Away With It" *Washington Post* (20 December 1994).

³¹⁸ *Ibid.*

camp commander for crimes against humanity may take the court the testimony of fifty witnesses; proving that a systematic policy of mass rape exists will require corroboration by hundreds of witnesses now spread over Europe, and so on.³¹⁹

One must also ask how this unwillingness to fund the tribunal appears to those who will likely be indicted by it. Potential defendants will look at the quibbling of the member-states of the UN as a signal that it is not serious in its intention to prosecute. The alternative viewpoint is that the tribunal may be serious in its intention to prosecute, but that economic realities will prevent it from doing so. In either case, the tribunal cannot function as political tool to deter unacceptable conduct in the Bosnian war, nor can it stand as a hallmark for the future, until it receives adequate funding.

Therefore, there are two significant bases on which the credibility of the tribunal is undermined. If it is to set a standard for future tribunals, or possibly a permanent international criminal court, these problems will have to be addressed.

319 *Id.*

Conclusion

Despite the argument presented in Chapter Four, regarding the obstacles facing the International Criminal Tribunal for the Former Yugoslavia, particularly its damaged credibility in light of ongoing peace negotiations, the constitution and empowerment of the tribunal, for whatever reason, represents a step forward in the conduct of international relations. It is an initiative that is unique in this day and age and one that has prompted the international community to act in a similar manner concerning the genocide in Rwanda.

Although the establishment of the tribunal may owe as much to the pressure of critical international opinion as to the sincere intention to see it realized for the benefit of humanity, it nonetheless serves to illustrate the importance of respecting international humanitarian law. The tribunal stands for two propositions: it takes note of the fact that genocide and other war crimes have occurred in the territory of the former Yugoslavia, and it gives voice to the standards of international humanitarian law that must be applied to situations where genocide, war crimes and crimes against humanity have occurred. It does so by incorporating into its statute the language and standards of the Genocide Convention, the Geneva

Conventions, the Hague Conventions and the influential Nuremberg Principles. These instruments permit the tribunal to assert jurisdiction over a broad range of offences, although the ability to do so is problematic in several instances.

The question of subject-matter jurisdiction has been clarified by the above-mentioned instruments, yet at the same time the issue of characterizing the elements of various offences pursuant to international humanitarian law is still a problem the ICTFY must wrestle with. Personal and concurrent jurisdiction are also problematic bases of jurisdiction, particularly when it comes to the governing difficulty of enforcing the tribunal's authority with respect to any of these categories. Permission is not necessarily ability, and the statute of the tribunal lacks enforcement mechanisms.

Nevertheless, the tribunal has proceeded with its work and has issued forty-six indictments to date, including the indictments of Bosnian Serb political and military leaders. This is a promising step; it indicates that the ICTFY has taken its role seriously and will attempt to exercise its jurisdiction, regardless of the political considerations which have constrained its activities to date. By attempting to carry out its mandate, as prescribed by the Security Council of the United Nations, the tribunal reasserts the perspective of the international

community on what type of conduct is considered acceptable and legal in international and internal warfare. The work of the ICTFY validates international humanitarian law by attempting to provide some form of enforcement of the Convention on the Punishment and Prevention of the Crime of Genocide, the Geneva Conventions, the Hague Conventions of 1907, the principles established at Nuremberg and its own statute, which relies on these treaties and principles.

Any analysis of the tribunal on these grounds must necessarily be ambivalent: the very fact of its creation is an indication of the legitimacy of the norms and values the international community seeks to uphold, and thereby provides a ground for stating that the establishment and work of the tribunal validate international humanitarian law. If the tribunal is successful in enforcing this law, as it is to be hoped, the ambivalence will be resolved.

Secondly, it is not possible to conclude that the tribunal was intended to act as a mechanism for resolving the Bosnian conflict, nor has it served any deterrent function. The situation on the ground is far too complex to be resolved by this single act of the international community, particularly in light of the failure of more relevant and pressing methods. The tribunal validates international humanitarian law, but through no fault of its own, it does so in a hollow context.

Until its requirements for funding are met, and until the contemporaneous peace negotiations with alleged war criminals cease, in the eyes of the aggressor forces, it will continue to lack credibility and thereby will be unable to act as a deterrent to their present genocidal course. Yet it is promising that the rest of the world, and indeed the victims of the war, accept that international humanitarian law is to govern in these circumstances. When the aggressor forces in the world are made to recognize the necessity of obeying the laws of humanitarian war, the tribunal will indeed have made an impact.

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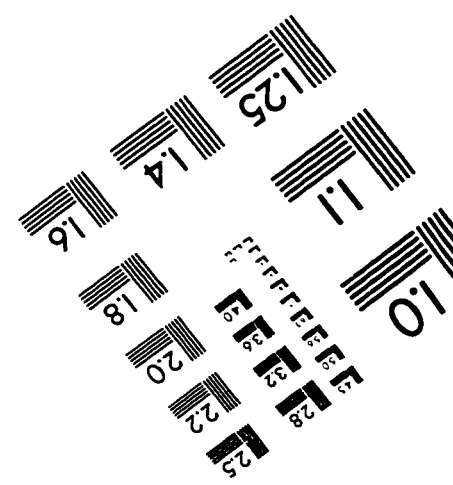
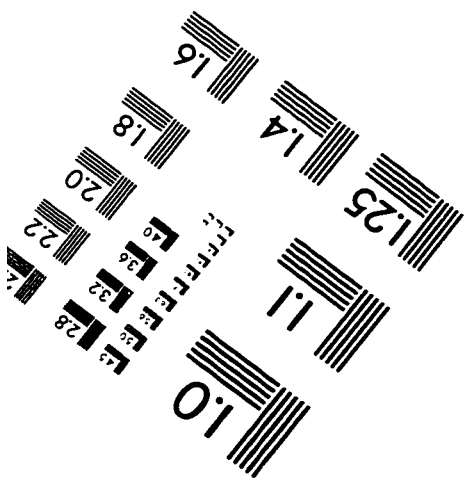
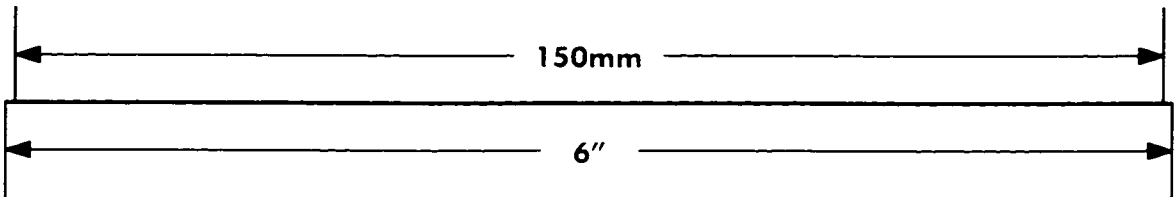
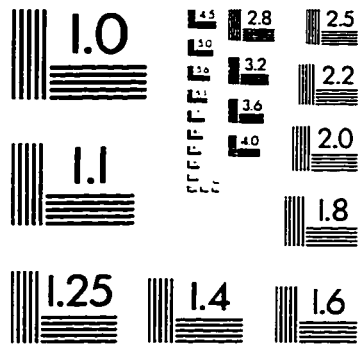
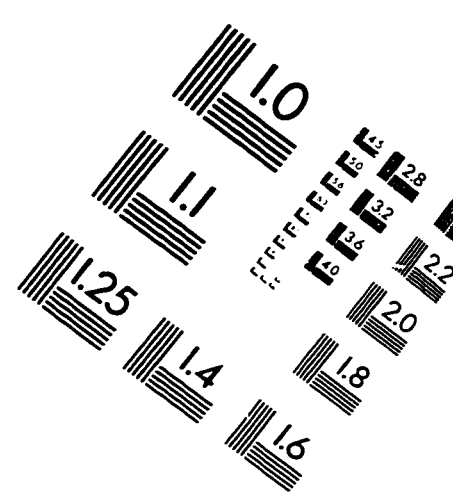
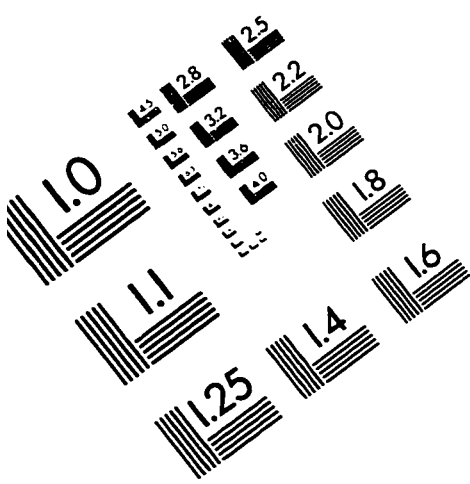
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