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PRACTICAL AND JURISDICTIONAL PROBLEMS
FACING THE INTERNATIONAL CRIMINAL
TRIBUNAL FOR THE FORMER YUGOSLAVIA

STUART BERESFORD

A thesis submitted for the degree of
Masters of Laws
at the University of Otago, Dunedin,
New Zealand.

7 February 1997
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INTRODUCTION

Between 24 May and 30 August 1992 Bosnian Serb forces seized and confined more than 3,000 Bosnian Muslims and Bosnian Croats in the Keraterm Camp, a former ceramics factory located in the Opstina (district) of Prijedor, in Bosnia-Herzegovina. Around 20 July 1992 several hundred detainees were crowded into one of the storage area of the camp, known simply as Room 3. On the evening of 24 July 1992 the guards of the camp, assisted by Bosnian Serb soldiers from the surrounding area, formed a semi-circle around the outside of Room 3 and began firing into the room with machine guns and heavy calibre guns. The firing continued off and on over a period of several hours. After it ended approximately 140 men who were detained in Room 3 were dead.

Exactly three years later two Bosnian Serbs from the town of Prijedor, Dragan Kulundžija and Zoran Zigic, who participated in the massacre, were charged by the International Criminal Tribunal for the former Yugoslavia (the Tribunal) with committing a grave breach of the 1949 Geneva Conventions, a violation of the laws and customs of war and a crime against humanity.¹

On 23 May 1993 the Tribunal was set up in an unprecedented move by the Security Council to prosecute the perpetrators of the worst atrocities to be committed on European soil since the Second World War. Using the powers given to it by Chapter VII of the United Nations Charter, the United Nations Security Council declared that the establishment of the Tribunal would help restore and maintain international peace and security. Would be perpetrators would be deterred from committing atrocities and ethnic tension would be reduced as blame would be laid on individual perpetrators and not on entire ethnic groups.

Within the first few months of its existence, the Judges of the Tribunal formulated and adopted rules of procedure and evidence, rules of detention and guidelines concerning the assignment of counsel for indigent detainees. In addition, the Office of the Prosecutor was rapidly organised so that investigations and trials could commence. By 30 June 1996 the Judges of the Tribunal had confirmed eighteen indictments, in which seventy five persons were accused of violating international humanitarian law: seven of the indictees are presently in the custody of the Tribunal.

Despite these actions, since its inception the Tribunal has been plagued by practical, financial and structural problems. The Tribunal has also encountered various legal constraints, many of which arose because when the Statute of the Tribunal was formulated the Secretary-General of the United Nations decreed that the Tribunal

¹ The Prosecutor v. Sikirica & Others, Case No. IT-95-8-1 (21 July 1995).
should only apply rules of international humanitarian law which were beyond any
doubt part of international customary law.² Such rules, he stated, were embodied in
the 1949 Geneva Conventions, the 1907 Hague Convention, the 1948 Genocide
Convention and the Nuremberg Charter.³ By limiting the Tribunal’s jurisdiction to
these conventions, the Secretary-General inadvertently reduced the Tribunal’s ability
to prosecute all the perpetrators of the atrocities which were committed during the
conflict. For example, since the laws and customs governing non-international armed
conflicts are not as extensive as those governing international armed conflicts,
perpetrators of atrocities committed during phases of the conflict deemed non-
international may only be charged with genocide and crimes against humanity, and
these offensives are more difficult to prove than grave breaches of the 1949 Geneva
Conventions.

The success of the Tribunal has also been limited by the failure of national
governments to execute orders of the Tribunal. The Implementation Force (IFOR),
which was established at the end of 1995 to ensure the provisions of the Dayton
Agreement are complied with, has repeatedly refused to arrest indicted persons unless
it comes across them in the course of its duties. In addition, IFOR has declined to
provide twenty four hour protection to mass grave sites. As a result those who
embarked on a four year orgy of murder, rape and torture throughout the territory of
the former Yugoslavia are still free and evidence that may convict them is slowly
vanishing.

In contrast the Nuremberg and Tokyo Tribunals, which prosecuted the major
German and Japanese war criminals at the end of the Second World War, did not face
such problems. By having physical control over the combatants and because the
alleged war criminals no longer had control over their respective government, they
were able to successfully prosecute the perpetrators of some of the worst atrocities
known to humankind.

This thesis will describe the numerous problems the Tribunal has faced in its
attempt to prosecute those persons who have committed serious violations of
international law in the former Yugoslavia, and will outline how it has attempted to
overcome them. It will also explain why the Tribunal is important to development of
international humanitarian law, irrespective of its success or failure. As Professor
Cherif Bassiouni has stated “law develops out of a dynamic where historical
opportunity provides the occasion for evolving a new sort of legal understanding and

² Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808
³ Id.
development that can then provide a more settled foundation for behaviour in the future.4

Chapter I of this thesis provides an overview of the events that led up to the dissolution of the former Yugoslavia, and describes how the conflict unfolded. Without such an synopsis it is difficult to explain why the ethnic groups of the former Yugoslavia embarked on a conflict that killed over a quarter of a million people, and left two million homeless. Chapter II examines the combatants who took part in the conflict sets out the types of violations that were committed, and where possible identifies those who committed them..

The following chapter describes how the international community responded to the reports of atrocities that flooded out of the former Yugoslavia. It describes how the United Nations Commission on Human Rights sent Tadeuz Mazowiecki, the former Prime Minister of Poland, to the region to investigate the atrocities that were being committed, and summarises his findings. It then sets out how the Security Council firstly set up the Commission of Experts to investigate the alleged atrocities and then established the Tribunal to prosecute the perpetrators. The last part of this chapter explains why the establishment of the Tribunal by a Security Council Resolution was a legitimate measure for the Security Council to take.

In order to understand what is meant by the phrase “international humanitarian law” Chapter IV explores the development of this field of law. The history of war crimes trials, in particular the Nuremberg Trial, is examined, as are various international instruments which codify the principles laid down by these trials. This chapter also outlines how the international community has applied these instruments in various conflicts that that have been fought since 1945. Since certain defences, such as duress and mistake, have relieved individuals from responsibility for committing violations of international humanitarian law, Chapter V describes certain substantive defences which may be available to defendants. In addition, this chapter examines in detail the doctrine of command responsibility and how it has developed over the last century.

The next two chapters analyse the Statute of the Tribunal and the Rules of Procedure and Evidence which the Tribunal adopted on 11 February 1994. Although Chapter VI focuses primarily on the scope of the Tribunal’s jurisdiction, it also surveys the organisation of the Tribunal, the conduct of proceedings, the rights of accused persons and various administration matters. Considering many of the articles contained in the Statute were supplemented by the Judges when they adopted the Rules of Procedure and Evidence, Chapter VII examines these rules and assesses how

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they overcame certain deficiencies in the wording of the Statute. Rules adopted for the admission of evidence, the protection of victims and witnesses and the appointment of defence counsel are also reviewed.

Practical, organisational and financial problems the Tribunal has faced since it was inaugurated in November 1993 are discussed in Chapter VIII. In addition, this chapter reviews the eighteen indictments which have been confirmed by the Judges of the Tribunal and examines the judicial activities of the Tribunal up until 30 June 1996. Given these moderate achievements Chapter IX assesses whether the Tribunal will successfully complete its mandate, and how it will contribute to the development of international humanitarian law. It concludes by determining that in light of numerous atrocities that are currently being committed throughout the world, it is imperative that the development of international humanitarian law continues, and a permanent international court is established.

Please note that because the Tribunal is still in existence and new developments are regularly occurring 30 June 1996 was chosen as the cut-off date for consideration of new material to bring a closure of this thesis.
BACKGROUND TO THE CONFLICT

Sixty-eight year old Miladin Gvozdenovic had lived all his life in Zagoni. For as long as he could remember his village had had a good relationship with the surrounding Muslim villages. From 1990 onwards this relationship changed. The people of the Socialist Federal Republic of Yugoslavia could no longer live together. The inhabitants of Zagoni began to be persecuted by their neighbours, simply because they were Serbs. To protect their village the men of Zagoni began to arm themselves. Their efforts were in vain. On 5 July 1992 Miladin Gvozdenovic watched as Zagoni, whose only strategic importance was that it was a Serbian village inside Muslim territory, was burnt to the ground. Thirteen villagers, including his son and brother, were murdered that day.

Between 1991 and 1995 thousands of other Yugoslavs had experiences similar to Miladin’s. To understand why their country, which marked the bridge between the Orient and the Occident, was destroyed in a bloodbath which cost the lives of over a quarter of a million people, we need to examine the history of the former Yugoslavia. Only then can we understand the antagonism between the Yugoslav people, the roots of their historical claims and the causes of their mutual hatred.

The Migration of the Slavic People

In the late sixth and early seventh century the Slavic people migrated from what is today Ukrainian-Byelorussian territory to the Balkan peninsula. They drove out the eastern Roman population that occupied the area, and very soon after settling there broke up into small tribal units. The Slovene and Croat tribes dominated the north of the Balkan peninsula, while the Serbs dominated the South. Although descended from the same people these tribes soon developed different cultures, as one fell under the influence of the western Roman culture, while the other fell under the influence of the eastern Roman culture.

In the ninth century the Eastern Roman Church converted the Serbian tribes to Orthodoxy. Like the Orthodox Russians, Greeks and Bulgarians they adopted the Glagolitic script, which had been developed by the eastern Roman Slavic apostles.

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1 A village in north-eastern Bosnia-Herzegovina.
3 In 395 AD Emperor Constantine decided to split the Roman Empire. The western half was to be ruled from Rome, while the Eastern half was to be ruled from Constantinople.
Cyril and Methodius. The Cyrillic script, which is today used by the Serbs, developed from Glagolitic.

Around the year 800, after the Franks invaded the north Balkans, the Slovenes and the Croats came under the influence of the western Roman Church. Frankish missionaries converted the Croats and the Slovenes to Catholicism and taught them to use the Latin alphabet, which they use today. While the Slovenes remained under the influence of firstly the Franks and subsequently the Hapsburgs until 1918, the Croats founded their own independent kingdom in 925. This Croatian kingdom covered the present territory of Bosnia-Herzegovina. In 1102 Kolomon, the Hungarian monarch, was crowned king of Croatia, so from then until 1918 Croatia remained under external control.5

In the twelfth century the Serbs also gained national independence, and soon achieved ecclesiastical independence from Byzantium when the Serbian Orthodox church was founded in 1209. Because the centre of this Serbian kingdom was Raska, the present-day Kosovo, modern day Serbs think of Kosovo as being the birth place of the Serbian nation.6 The Serbian empire steadily grew, but on 28 June 1389 the Serbs were defeated by the Ottomans at the battle of Kosovo Polje (the Field of the Blackbirds).7 For the next 500 years Serbian territory was ruled by the Turks.

Five Centuries of Foreign Rule

Under Ottoman rule the Christian population was given few privileges. They were kept out of all high offices and were not permitted to develop an administrative or educated class. Hence many Yugoslav Christians refer to the Ottoman period as 400 years without a history.8 Christians had to pay a special head tax and were required to give some of their new born boys to the Turkish authorities,9 who trained them to be janissaries, elite fighters in the Turkish army.10 The Turks did tolerate the

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7 Vidovdan, the anniversary of the battle of Kosovo, is still the most important day in the Serbian calendar. Serbs commemorate the battle in their poetry and folk songs. Serbs are called upon to avenge the injustice of Kosovo. Through-out history Serbian leaders have used the Kosovo myth to stir up Serb nationalism. See Branka Magas, *Mythology and Genocide*, Against the Current 48 Jan/Feb 1994, at 9.
9 This child levy was imposed by the Ottomans on all Christian lands they conquered. H. T. Norris, *Islam in the Balkans*, London: Hurst and Co. (1993), at xv.
existence of the Serbian Orthodox Church, which provided the Serbs with the spiritual support they desperately needed.\textsuperscript{11}

The Croats and the Slovenes were given more freedom as their Hungarian and Austrian rulers entrusted them with the administration and defence of their territory. Croatia and Slovenia also benefited from the cultural, intellectual and economic development that was occurring in the rest of Europe. The economic and cultural north-south split in the former Yugoslavia was primarily due to the five centuries of separation that the South Slav people went through from the 1400s to the turn of the twentieth century.

Not all Serbs remained under Ottoman rule during this time. Many fled to Croatia to escape Turkish oppression, and settled in Croatia’s southern provinces. Since they lived in the frontier region between the Austrian and Ottoman Empires, they were entrusted with the task of repulsing the numerous Turkish advances. In return the Austrian authorities gave them land and granted them several privileges, such as personal freedom, freedom from taxes, religious freedom, education, and self government. The area in which these Serbs lived coincides almost exactly with Krajina, the former Serbian held areas in Croatia, and the Serbs that lived there were said to be direct descendants of the frontier settlers.\textsuperscript{12}

Thousands of Serbs also fled to Vojvodina, which at this time was controlled by Hungary. The biggest exodus occurred in 1690 when 80,000 Serbs fled there from Kosovo, following the failure of a Serbian rebellion against the Turks. The vacated Kosovo lands were settled by Islamicized Albanians. In 1991 Albanians made up 85 percent of the population in Kosovo.\textsuperscript{13}

During the period of Ottoman rule two new groups of people began to emerge in the Yugoslav territory: the Montenegrins and the Bosnian Muslims. The Montenegrins were Serbs who lived in the mountain areas of Montenegro, an area where the Ottoman Empire never established full authority. In the seventeenth century the Montenegrin tribes united, and with the help of Russia formed a national state. This state was recognised by the Turks in 1799.

\textsuperscript{11}As the head of the Orthodox church resided in Istanbul, the Turkish authorities felt they could control the teachings of the Orthodox Church. As the headquarters of the Roman Catholic Church lay outside the Ottoman Empire, Catholicism was regarded with deep suspicion. Noel Malcolm, \textit{Bosnia: A Short History}, New York: New York University Press (1994), at 55.

\textsuperscript{12}Stiglmayer, \textit{supra} note 4, at 4.

\textsuperscript{13}Hugh Poulton. \textit{The Balkans: Minorities And States In Conflict}, London: Minority Rights Group (1991), at 57.
Bosnian Muslims

Like the Serbs, Croats and Slovenes, the Bosnian Muslims are also descended from the Slavs who settled the Balkan peninsula in the late sixth and early seventh century. From then until the twelfth century the territory of Bosnia-Herzegovina belonged alternately to the Croatian-Catholic-western Roman and the Serbian-Orthodox-eastern Roman spheres of influence.

In 1180 Bosnia attained its independence. Over the next two centuries under such rulers as Ban Kulin it became a formidable opponent in the Balkan Peninsula. During this time the Bogomil religion spread throughout the Bosnian. This religion derived from a medieval sect that was founded as a reaction against the hierarchy and formalism of the Catholic and Orthodox churches.\(^{14}\)

As easily as they had conquered the Serbs, in 1463 the Ottomans conquered the territory of Bosnia-Herzegovina. Although unlike the Serbs the Bosnian people converted to Islam. In a region where Christianity had been constantly changing from the Catholic belief to the Orthodox one, and churches were few in number, it was not surprising that the Bosnians turned to the faith of the conquering people. The Turks had achieved great success and this could only be a sign of God's favour. Bosnians were also attracted by privileges such as the elimination of the Christian head tax and by the fact that converts had a better chance of advancement.\(^{15}\)

National Awakening

In the nineteenth century, when nationalistic voices were raised throughout Europe, the wish for self government spread amongst the South Slavic people. In 1804 and 1815 there were Serbian uprisings against the Turks, the latter proving successful as it gained the support of Russia.\(^{16}\) The Belgrade pashalic, a Turkish administration zone, was liberated and recognised as autonomous by the Ottomans in 1830. This region was, however, just a fraction of the great Serbian Empire that had existed five centuries earlier. Most Serbs were still living under Turkish rule or were living under Austro-Hungarian rule in the North.

In 1844 the Serbian Minister of the Interior, Ilija Garasanin, put forth a plan which proposed unifying all Serbs within one empire. Although this plan was never

\(^{14}\) Malcolm, supra note 11, at 29.

\(^{15}\) See generally Donia and Fine Jr, supra note 8 at 35-44.

\(^{16}\) For a detailed account of why the 1804 uprising failed and the 1815 uprising succeeded, see Jelavich, supra note 5, at 193-204.
implemented, from then on Serbs dreamt of a “state for all Serbs,” and the idea of
Greater Serbia was raised repeatedly by Serbian leaders.17

During this period the Croats also developed national aspirations, rebelling
unsuccessfully against the Hapsburg Monarchy in 1848. Realising that they could not
secede from Austria-Hungary by force, certain Croat leaders began to raise the idea of
a federation of Austria, Hungary and Croatia. More nationalistic politicians voiced the
wish for an independent Croatian state that would stretch from the Alps to Bulgaria.
This extremist ideology has plagued Croatian politics ever since, and was recently
being advocated by the Croatian Party of the Right.18

In 1875 a peasant uprising in Herzegovina against the abuses of Muslim
landlords quickly became a revolt of Christian peasants throughout Bosnia-
Herzegovina. Although the uprising simply began as a social protest against landlord
abuses, some agitators expressed a desire for political union with Serbia. Realising
that this was a perfect opportunity to increase its influence in the Balkans, Russia
came to the aid of the rebelling peasants, and together they drove the Turks out of the
Balkans. The increased Russian influence in the Balkans alarmed Austria-Hungary,
France and England. To avert any possible international crisis, the Great Powers
convened the Congress of Berlin in 1878, where it was decided that Austria would be
permitted to occupy and administer Bosnia-Herzegovina and that Macedonia would
be returned to Turkey.

In 1908, after thirty years of pretending that it was merely occupying it on
behalf of the Great Powers, Austria formally annexed Bosnia-Herzegovina. Russia
protested vigorously, but was deterred from declaring war because the German empire
affirmed its loyalty to its alliance with Austria. From then on the two great European
alliances, Austria-Hungary and Germany on one side and Russia, England and France
on the other, opposed each other with undisguised hostility. The assassination of the
Austrian Crown Prince Franz Ferdinand by the Bosnian Serb Gavrilo Princip in
Sarajevo on 28 June 1914, and Serbia’s subsequent reluctance to allow Austrian
authorities to investigate the assassination inside Serbian borders, sent the two
European alliances to war.

Royal Yugoslavia

Out of the rubble of World War One, in which both the Hapsburg and the
Turkish Empires disintegrated, Yugoslavia was born. When the war began Serbia
hoped to exploit the conflict to further its own expansion, but when Russia was forced

17 Stiglmayer, supra note 4, at 6.
18 Id., at 7.
to pull out of the war because of the February Revolution, Serbia began to support the idea of a Union of the South Slavic areas, raised by Croatian and Slovenian politicians in London in 1915. In July 1917 representatives of Serbia, Croatia, and Slovenia signed the Corfu Declaration in which they agreed to create a constitutional, democratic and parliamentary monarchy under the Serbian Karadjordjevic dynasty. On 1 December 1918 the Serbian prince regent, Aleksander Karadjordjevic, declared that the three Yugoslav peoples were one nation under the name the “Kingdom of the Serbs, Croats, and Slovenes.” Montenegro joined the new state which also included Kosovo and northern Macedonia, areas that Serbia had conquered in the Balkan wars of 1912-13.

Although united in one state, the Serbian leadership had differing ideas to the Croats and the Slovenes as to how the kingdom would be run. The Croats and the Slovenes wanted a federation in which they would have the same power as the Serbs. The Serbs insisted they should have the dominant role. They argued that they had had over a hundred years of recent statehood, they possessed a functioning government, they had the largest percentage of the population, and above all, they were on the winning side in the war whereas Croatia and Slovenia were not.

Not surprisingly Serbian interests prevailed. On 28 June 1921 the constitution of the new state was passed providing for a constitutional monarchy and a centralised state structure based in the Serbian capital of Belgrade. Croatian and Slovenian representatives boycotted the vote and series of unending disputes between Croats and Serbs began. Over the next eight years there were several parliament boycotts and collapsed governments.

To alleviate the economic rift that had developed between the north and the south the Serbian dominated government imposed higher taxes on Croatia and Slovenia. In Kosovo the Serbs clamped down on the Albanian population, as they considered them to have stolen their land, and in Bosnia-Herzegovina there were violent disputes between disenfranchised Muslim landowners and their Christian former peasants.

The Croatian-Serbian opposition came to a head when Stejpan Radic, the leader of the Croat Peasant Party, was assassinated. On 6 January 1929 the king suspended parliament, annulled the constitution and began dictatorial rule. Freedom of the press

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19 D. Dobes. Yugoslavia: New War: Old Hatred, 91 Foreign Pol’y 3, at 11.
20 In October 1912 Montenegro and Serbia declared war on Turkey and with the help of Bulgaria and Greece drove the Turks out of Kosovo and Macedonia. In June and July of the following year the victories allies fought amongst themselves. Serbia was victorious. Malcolm, supra note 11, at 154.
21 Twenty four cabinets ruled the Kingdom of Serbs, Croats, and Slovenes. Stiglmayer, supra note 4, at 8
and freedom of speech were revoked, and all political parties based on ethnical, regional, or religious grounds were forbidden. In order to promote national unity he renamed the Kingdom of Serbs, Croats, and Slovenes, the Kingdom of Yugoslavia.22

Karadjordjevic’s attempt to ease national tensions failed. National extremism flourished in all parts of the country. This extremism culminated in the assassination of Karadjordjevic in Marseilles on 9 October 1934 by members of the Croatian Ustasha Organisation and IMRO, the Internal Macedonian Revolutionary Organisation.23 Despite the assassination of Karadjordjevic, Serb-Croat relations improved over the next five years and Yugoslavia slowly returned to democracy. On 26 August 1939 a Serbian-Croatian treaty was signed which gave Croatia considerable autonomy. However, due to the outbreak of the Second World War one week later, the treaty was never put into effect.

After the defeat of France Hitler began to press the Yugoslav government to join the Tripartite Pact, which Yugoslavia’s neighbours Hungary, Romania and Slovakia, had already joined. After hesitating for several months the Yugoslav government signed the pact on 25 March 1941. Two days later a bloodless military coup occurred in Belgrade. This infuriated Hitler so much he ordered the Wehrmacht to invade Yugoslavia and destroy it “militarily and as a state.” On 6 April the bombing of Belgrade began.

The Second World War

Eleven days after being invaded Yugoslavia unconditionally surrendered, and was partitioned between the Axis powers. Serbia became a German protectorate. Croatia and most of Bosnia-Herzegovina were incorporated into the “Independent State of Croatia.” Since the Croat Peasant Party refused to cooperate with the Germans, Ante Pavelic and his Ustasha Party were placed in power. Under him Croatia was turned into a model fascist state. Jews and Gypsies were sent to the extermination camps of Poland,24 and Serbs were eliminated in their thousands, either by extermination, deportation or forced conversion to Catholicism. Between May and October 1941 it is estimated that the Ustasha killed between 300,000 and 340,000 Serbs.25

22 As Yugo in Serbo-Croat means south, Yugoslavia literally means “Land of the South Slavs”.
23 The murder of Karadjordjevic was committed with the complicity of Italy and Hungary who hoped to profit territorially if Yugoslavia collapsed. Joseph Rothschild, East Central Europe Between The Two Wars, Seattle: University of Washington Press, (1974), at 246.
The genocidal policies of the Ustasha caused thousands of people to enlist in organised resistance movements, the two major movements being the Chetniks and the Partisans. The Chetniks were led by the former Serb officer Draza Mihajlovic who sought to restore the Serbian royal family as rulers of a Greater Serbia in which all Serbians were to be incorporated. Although initially resisting the Germans, the Chetniks were soon ordered by the Yugoslav government-in-exile to delay active resistance until the Allies invaded the Balkans. Mihajlovic was also deterred from resisting the Germans by Berlin’s decree that for every German soldier killed by the resistance, 100 Yugoslavs would die.\(^6\) Instead the Chetniks started to take revenge on the Croat and Muslim populations for the Ustasha massacres. In November 1941 they also started to turn on the Partisans whom Mihajlovic believed would sweep away the old order that he desperately wanted. When, in the summer of 1943, they began to openly collaborate with the Italian forces, the Allies dropped their support for Mihajlovic and his Chetniks, and supported the Partisans instead.

The Yugoslav Partisan movement was lead by the general secretary of the Communist Party of Yugoslavia, Josip Broz Tito. Using the motto "Brotherhood and Unity", and promising to establish a federation of equal republics after the war, Tito was able gain the support of thousands of Yugoslavians and organised the Partisans into an efficient fighting force. Unlike Mihajlovic, Tito encouraged active resistance against the Germans, and during the course of the war large areas of Yugoslavia were liberated. However liberation came at a price. When an area was liberated, Partisan officials ‘sovietised’ it and in doing so executed many ‘bourgeois’.

Aided by the growing number of Allied victories over the Germans and the surrender of Italy in 1943, Tito led the Partisans to victory. To the Ustasha, Chetniks, and other collaborators the Partisan victory amounted to the destruction of the old order. Thousands fled to the West where they hoped the Allies would give them refuge. But because of the Allies’ policy that all Axis supporters were to surrender to troops in their native lands, over 18,000 ‘Axis collaborators’ were sent back to Yugoslavia where they were executed within hours of their arrival on Yugoslav soil.\(^7\) Over the next year Tito’s secret police are reputed to have killed over 250,000 real or imagined political enemies.\(^8\)

\(^6\) Mihajlovic’s fears were well founded as in reprisal for ten Germans being killed and 26 being wounded, seven thousand inhabitants from the city of Kragujevac were executed in October 1941.


\(^7\) Malcolm, *supra* note 11, at 193.

\(^8\) Id.
Socialist Yugoslavia

In the three years that followed the war Tito modelled Yugoslavia on Stalinist Russia. Five year plans were introduced to develop the battered economy, and a Constitution, which was almost an exact match of Stalin’s Soviet Constitution of 1936, was introduced.

The 1946 Constitution established a federation of the six Republics of Slovenia, Croatia, Bosnia-Herzegovina, Serbia, Montenegro and Macedonia under the name the Socialist Federal Republic of Yugoslavia. Although the Constitution affirmed the Communist Party’s right to dominate public institutions, the Republics were given fictional sovereignty, and limited cultural and political autonomy. By splitting pre-war ‘Southern Serbia’ into Macedonia and Montenegro and setting up the autonomous regions of Kosovo and Vojvodina, in recognition of the Albanian and Hungarian minorities that lived there, Tito was able to weaken the domination that Serbia had in pre-war Yugoslavia.

In 1948 Yugoslav socialism was radically altered when Stalin expelled the Socialist Federation of Yugoslavia from the Cominform. Tito now abandoned the policies of control and repression and introduced liberalisation into most state structures. This policy lead to unrestrained competition between the Republics and renewed ethnic rivalry.

Although nationalistic movements were strictly forbidden, Aleksander Rankovic, Tito’s Minister of the Interior, used the Serb dominated secret police to persecute the Croats on the basis that they were all collectively responsible for the Ustasha atrocities committed in 1941. Murder and mistreatment were also widespread in Kosovo, and in the mid 1950s Rankovic had 100,000 Kosovo Albanians deported to Turkey.

In the 1960s the failure of Tito’s economic programmes became evident. To avoid the Socialist Federal Republic of Yugoslavia becoming a third world country, representatives of Slovenia, Croatia and Macedonia urged Belgrade to liberalise the economy and decentralise the government. After Rankovic, the strongest opponent of reform, was ousted by Tito in 1966 some of these demands were meet. Bosnian Muslims were given official recognition, the Macedonian Orthodox Church was

29 Donia and Fine Jr, supra note 8, at 11.
30 Croats and Serbs have long denied the legitimacy of the Muslims as an ethnic or national group. Some Serbs claim that the Muslims are Orthodox Christian Serbs who converted to the Islamic religion. Similarly some Croats claim that Muslims are Roman Catholic Croats who converted to Islam during Ottoman rule. Muslims reject both arguments claiming not only separate religious affiliation but a distinct Slavic national identity as well. Helsinki Watch, War Crimes in Bosnia-Herzegovina, New York: Helsinki Watch (1992), at 22.
allowed to separate from the Serbian Orthodox Church; and Albanians living in Kosovo were given more autonomy.

Only when Croat national movements demanded Croatian independence did Tito try to extinguish the rising nationalistic feelings. In 1974 he introduced a new Yugoslav Constitution which declared the Yugoslav federation a state community of voluntary united nations and their sovereign republics. To prevent the Yugoslav President having too much power the Constitution decreed that the position of federal President would rotate annually between representatives of each of the six republics and the two autonomous states. By passing this Constitution, Tito believed no state could gain a monopoly over the government.

The Death of Yugoslavia

Following Tito's death on 4 May 1980 inter-ethnic tensions became evident once again. In March and April 1981 widespread protests by Albanians in Kosovo turned violent and Yugoslav federal troops were ordered to put down the 'uprising'. Serb newspapers accused Albanians of planning genocide against the Serbian people. Frequent reports of atrocities being committed by extremist Albanians against the Serb population appeared in Serbian newspapers. Although very little of this propaganda was true, Serbian fears of being overwhelmed in Kosovo were skillfully exploited by Slobadon Milosevic and catapulted him to power. By manipulating the symbolism and rhetoric of Serbian nationalism, and by purging independent minded journalists from the press and television and replacing them with his supporters, Milosevic was able to rally millions of followers to his side.

In the summer of 1988 Milosevic's supporters organised mass demonstrations in the capitals of Vojvodina, Kosovo and Montenegro with the result that the governments of these Republics resigned. Not surprisingly, pro-Milosevic officials were appointed in their place. By employing mass demonstrations to intimidate the Republics' leaders, Milosevic had effectively reduced the importance of the Party in resolving inter-republic disputes. By controlling the representatives of Vojvodina, Kosovo and Montenegro in the Yugoslav Federal Presidency, Milosevic obstructed that institution as well.

The main hurdle to Milosevic's nationalistic ideals was the Jugoslavenska Narodna Armija (the Yugoslav National Army which was commonly known as the

31 Poulton, supra note 13, at 29-31.
32 Albanians were said to be raping Serbian women, slaughtering the cattle of Serbian peasants, cutting down their fruit trees and use anti-Serb sentiment to drove out the local population. Stiglmayer, supra note 4, at 14.
33 Donia and Fine Jr, supra note 8, at 204.
JNA), which saw itself as the protector of the Socialist Federal Republic of Yugoslavia and not of one particular national group. By appealing to the pride and dignity of the predominantly Serbian Officer Corps of the JNA, Milosevic was able to essentially transform the army into the fighting arm of Serbian nationalism.\textsuperscript{34} The anti-Serbian policies being conducted in Croatia by the government led by Franjo Tudjman also influenced Serbian officers to turn their allegiance to Milosevic.\textsuperscript{35}

To try and overcome the deadlock that was now occurring within the Yugoslav government, Slovenia and Croatia proposed making Socialist Federal Republic of Yugoslavia a loose confederation of sovereign states, but Milosevic rejected this proposal. He stated that if any of the Republics decided to become independent Serbia would annex any Serb inhabited areas within them, as all Serbs had a right to live together in a single state.

The final straw that lead to the break-up of the Socialist Federal Republic of Yugoslavia came when Milosevic blocked the Croat, Stipe Mesic, from becoming the Yugoslav President. Using the votes that he had effectively stolen from Kosovo, Vojvodina and Montenegro he was able to prevent Mesic gaining the five votes he needed to be confirmed as President. Even though Milosevic was pressured by the European Community to allow Mesic to become President four months later, both the governments of Slovenia and Croatia held referendums in which the people of these Republics decided to leave the Socialist Federal Republic of Yugoslavia.

Fearing that the JNA would intervene to protect the integrity of the Yugoslav State, Croatian and Slovene officials began to secure arms. At the same time Serbian officials in Belgrade began to arm bands of irregular Serbian forces stationed in Croatia and Bosnia-Herzegovina. Even though civil war now seemed inevitable and they did not have the support of the international community,\textsuperscript{36} Slovenia and Croatia declared their independence on 25 June 1991.

\textbf{The Yugoslavian Conflict: The First Phase}

On the basis that Slovenia's declaration of independence was a threat to the territorial integrity of the Socialist Federal Republic of Yugoslavia, on the 27 June

\textsuperscript{34} A. Djilas, \textit{A Profile of Slobodan Milosevic}, 74 Foreign Aff. 81 (1993), at 91.

\textsuperscript{35} Tudjman and his HDZ (Croatian Democratic Union) Party resurrected old national symbols that had once been used by the Ustasha, refused to incorporate the four Serbian S's into the Croatian coat of arms, purged Serbians from the Croatian Police force and in December 1990, demoted the Serbian population living in Croatia from a constituent people to a national minority. Stiglmayer, \textit{supra} note 4, at 15.

\textsuperscript{36} On 21 July 1991 the US Secretary of State, James Baker, announced in Belgrade that the United States would not recognise any state that broke away from Yugoslavia. US Department of State Dispatch Vol. 2, No 26, at 468.
1991 soldiers of the JNA were ordered by Belgrade to secure all strategic points in Slovenia, that is its international borders, airports, and major traffic routes.\(^{37}\) Much to the Yugoslav military’s surprise Slovene forces which had been secretly organised over the previous two years fought back. They were able to rout the JNA’s ill-prepared conscripts, many of whom deserted, and were able to take control of all international border checkpoints.

Fearing that the situation in Slovenia would erupt into full-scale war, the European Community sent representatives to the Socialist Federal Republic of Yugoslavia to help resolve the conflict. Faced with being labelled the aggressor if it escalated the conflict in Slovenia,\(^{38}\) the JNA decided to withdraw its forces. On 18 July 1991 the two sides reached an agreement. All federal army units were to be withdrawn and Slovenia was free to go its own way. Ethnically Slovenia was a relatively homogeneous republic. Nationality issues that confronted Croatia and Bosnia-Herzegovina were not present. In addition, the lack of a sizeable Serb population meant Slovenia was beyond the aspirations of Serb nationalists who advocated uniting all Serbs into a Greater Serbia.

**Croatia’s Fight For Independence**

The former Yugoslavia’s second war was fought on Croatian soil. This conflict began slowly but lasted over six months. Whereas Croatia was ill prepared for war when it declared independence on 25 June 1991 Serbia was not. Beginning in 1990 Serbian officers in the JNA began supplying paramilitary groups in Croatia with large numbers of weapons. In March 1991 Serbs in the Krajina region of Croatia declared their separation from Croatia. Clashes between Serbian irregular forces and Croatian militiamen escalated. After Croatia declared its independence, Serbian paramilitary groups began to launch massive artillery attacks on cities in eastern Croatia. With the world preoccupied with the Russian coup attempt, the JNA, rightly believing no outside power would intervene, went on the offensive in order to secure those areas which were inhabited by Croatian Serbs.

The barbarity of the Serbian forces shook the world. Towns with seemingly no military purpose were destroyed. Ancient monuments, such as the medieval fort at Dubrovnik, were also targeted by Serb artillery. The city of Vukovar was levelled and thousands of Croats who fell into Serbian hands were tortured or murdered. By the start of 1992 Serb forces had seized a quarter of Croatian territory, an estimated

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\(^{38}\) Donia and Fine Jnr, *supra* note 8, at 219.
25,000 people were dead or missing, and over half a million people had fled from their homes.

From the start of the hostilities the international community seemed intent on securing a cease-fire instead of direct military intervention. After nine cease-fire attempts had failed, the Security Council imposed an arms embargo on all the Yugoslav Republics. But because the JNA had been stockpiling weapons since the end of the Second World War the embargo did not affect the Serbian war effort. In response to public pressure to stop the war, the German government insisted the European Community recognise Croatia and Slovenia. However as the United States was not prepared to commit NATO troops to the conflict, the December 1991 recognition of Croatia and Slovenia by the European Community was not backed up by force.

After the majority of Serb inhabited territory was in Serbian hands, the Serbs agreed to a peace settlement proposed by United Nations representative Cyrus Vance. On 2 January 1992 the two sides agreed to cease hostilities. Although the United Nations decreed that it would not recognise changes to the borders of the Yugoslav Republics, the deployment of UN peacekeeping troops around areas seized by Serb forces in March 1992 seemed, for the time being, to legitimise Serbian claims over the land they had conquered.

The Serbanization of Bosnia-Herzegovina

While the war raged in Croatia, tensions rose between the Serb and Muslim populations in Bosnia-Herzegovina. As they had done in Kosovo, Serb newspapers conducted a propaganda campaign against Bosnian Muslims, whom they referred to as Islam fundamentalists, mudjahedins, and extremists. Early in November 1991 the Bosnian Serbs declared their autonomy. Radovan Karadzic, the leader of the Bosnian Serbs, stated that this new Serbian state would encompass 62 percent of the territory of Bosnia-Herzegovina. At this time Serbs only made up 31 percent of the Bosnian population (Muslims represented 44 percent and Croats 17 percent).

Faced with being left in a rump Yugoslavia under Serbian control, the Bosnian government, led by Alija Izetbegovic, decided to seek independence. Following the European Community's guidelines on state recognition, a referendum on independence was held in Bosnia-Herzegovina on 28 February and 1 March 1992. Although Bosnian Serbs boycotted the vote, 99 percent of those who voted favoured independence. Two days later Bosnia-Herzegovina declared its independence.

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With UN peacekeepers acting as de facto protectors of Serbian conquests in Croatia, 80,000 soldiers of the JNA moved into Bosnia-Herzegovina from Croatia. With them came several Serbian paramilitary groups, the most notorious being Vojislav Seselj’s Chetniks, Dragoslav Bokan’s White Eagles and Zeljko ‘Arkan’ Raznatovic’s Tigers. Four months earlier Arkan’s Tigers had assisted the JNA in its destruction of Vukovar.

Although armed conflicts erupted throughout the Republic from the beginning of March, full scale conflict did not commence until the United States and the European Community accorded diplomatic recognition to Bosnia-Herzegovina on 6 April. The following day, as Croatia also recognised Bosnia-Herzegovina, Bosnian Serbs declared the independence of the Serbian Republic of Bosnia-Herzegovina, claiming two thirds of Bosnia-Herzegovina’s territory. Serbian irregular forces from Bosnia-Herzegovina, Serb paramilitary forces and units of the JNA then set out to secure this territory.

During the first two weeks of the fighting Serbian forces captured several major towns bordering Serbia and Eastern Croatia. Foca, Cajnice, Visegrad, Zvornik, Bijelina, Bosanki Brod and Deventa fell in quick succession. Serbian forces also captured the town of Kupres which lay along the strategically important road through western and central Bosnia-Herzegovina. Once these towns were in their hands, Serbian forces set out to secure the roads connecting them, as well as those leading to Sarajevo, Pale (the seat of the Bosnian Serb government) and Banja Luka, which was the major Serb stronghold in western Bosnia-Herzegovina.41

Even though Bosnia-Herzegovina had been recognised by the international community and could therefore assert the right to self-defence under the UN Charter, the United States and Britain decided that in the interests of world order the arms embargo should still apply to Bosnia-Herzegovina. Unprepared for war and lacking the heavy weapons needed to conduct an adequate defence, Muslim forces were quickly driven back to an area covering only 15 to 20 percent of Bosnian territory. Bosnian Croats assisted by soldiers of the Croatian Army did manage to repulse Serb advances. However as few Serbs lived in Croat populated areas of Bosnia-Herzegovina, these areas were not in the battle plans of the Serbian Military Commanders. Using “ethnic cleansing” techniques to purify areas they conquered,42 Serb forces then forced over one million people from their homes.

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42 Ethnic cleansing has been used to refer to the elimination, by the ethnic group exercising control over a given territory, of members of other ethnic groups. Methods used to do this include harassment, discrimination, beatings, torture, rape, summary executions, expulsions, shelling of civilian population centres, relocation of populations by force, confiscation of property and destruction
As the war intensified the international community seemed hesitant to intervene in the conflict. In October 1992 UN peacekeepers were sent to Bosnia-Herzegovina to accompany and protect aid convoys. Since their mandate did not allow them to intervene in any fighting unless shot at, these ‘peacekeepers’ had to look on while the civilian population was massacred around them.

The ban on all flights over Bosnia-Herzegovina, imposed by the Security Council in October 1992, did little to stop the Serbian air force bombing Muslim targets, as planes supplied by NATO were not authorised to shoot down hostile military aircraft until six months later. By this time the Serbian air force had flown 465 sorties over Bosnian territory.

Similarly, economic sanctions imposed by the Security Council against the Federal Republic of Yugoslavia (Serbia and Montenegro) also lacked the military muscle needed to enforce them. Warships sent into the Adriatic by NATO were effectively only a deterrent. They did not have the power to physically stop ships that chose to defy the sanctions. Even when the Security Council approved the use of force to enforce the sanctions, fuel and other commodities made their way into Serbia.

The lack of commitment by the international community to use military force to end the conflict contributed to the failure of the Vance-Owen peace plan. Under this plan Bosnia-Herzegovina was divided into 10 autonomous provinces (3 Muslim, 3 Serb, 3 Croatian, with the capital Sarajevo as a neutral zone). Since the plan gave the Bosnian Croats more territory than they currently occupied the Bosnian Croats did not hesitate to sign the agreement. With some reluctance Izetbegovic signed the agreement on behalf of the Bosnian Muslims in March 1993. Although Karadzic signed the agreement on 2 May 1993, the rest of his political colleagues rejected it.

of homes and places of worship and cultural institutions. For an analysis of the practice see Bell-Fialkalf, supra note 25, at 110.

45 This authorisation was provided by Sec. C. Res. 816, U.N. Doc. S/RES/816 (1993).
46 The Federal Republic of Yugoslavia, which consisted of the Republics of Serbia and Montenegro, considered itself for diplomatic purposes to be the continuation of the Socialist Federal Republic of Yugoslavia.
48 It was estimated that 90 per cent of goods that were supposed to be shipped across Serbia to Macedonia ended up in Serbia. James Bone, UN aims to tighten Yugoslavia noose with new sanctions, The Times, 20 April 1993, at 1.
49 Laura Silber and Allan Little, Yugoslavia: Death of a Nation, 2nd Ed. USA: TV Books (1996), at 276-277.
50 Karadzic stated that his signature would become null and void unless the Bosnian Serb Parliament approved the plan. The Times, May 3 1993, at 1.
By interposing a Croatian province between Belgrade and Banja Luka the plan prevented the creation of a Greater Serbia, and would have forced the Serbs to relinquish one third of the territory they now controlled.

With all sides no longer at the negotiating table the war escalated once again. Believing that the international community was now prepared to recognise territorial conquests, Croatian and Bosnian government forces began to consolidate their positions and started to assume full control of regions assigned to them under the Vance-Owen plan.\(^{51}\) As a result full scale war erupted between Croatian and Bosnian Muslim forces in central and western Bosnia-Herzegovina,\(^ {52}\) and vicious campaigns of ethnic cleansing were conducted by both sides.

Although this fighting was among the war's bloodiest, hostilities ended abruptly in February 1994. Faced with a failing economy, and the threat of UN economic sanctions against Croatia if it continued to provide military assistance to the Bosnian Croats, Tudjman ordered Croatian commanders in Bosnia to stop attacking Muslim positions. A cease-fire was quickly arranged between the two sides, and in March Croatian and Bosnian Muslim commanders agreed to merge their forces into a single army.

With Bosnian and Croatian forces united once again, Serb leaders agreed to participate in peace negotiations once more and as a result a peace plan was formulated by the Five Nation Contact Group, which consisted of the USA, the UK, Germany, France, and the Russian Federation.\(^ {53}\) Although they considered certain aspects of the plan to be unjust,\(^ {54}\) in order to bring peace to Bosnia-Herzegovina the Bosnian government signed the plan on 17 July 1994. As they did with the Vance-Owen plan, the Serbs opted for a continuation of the war.

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\(^{51}\) Donia and Fine Jr, *supra* note 8, at 250-251.


\(^{53}\) The Contact Group’s plan envisaged:

a) that the Muslim-Croat Federation of Bosnia-Herzegovina should be awarded 51% of Bosnia-Herzegovina’s territory,

b) that Bosnian Serb forces would cede to the Federation about one third of the territory which they currently occupied, including strategically crucial land on the Bosnian-Croatian border,

c) that many towns ‘ethnically cleansed’ of their Muslim population by the Serbs would remain under Serb control, including Banja Luka and Prijedor,

d) that the United Nations and the European Union would place under their protection key areas, such as Sarajevo, Srebrenica and Gorazde.

\(^{54}\) See the text of the speech given by Izetbegovic at the 49th session of the General Assembly of the United Nations. 27 September 1994.
The Changing of the Tide

In the spring of 1995 the war reached a turning point, with the international community taking a firmer stance towards the Bosnian Serbs, who had lost the military advantage that they had possessed for the previous three years. On 1 May, following the end of a United Nations arranged cease-fire that had been in operation for six months, the Croatian Army attacked and regained several villages in Western Slavonia that were under the control of the Croatian Serbs.55 In retaliation the army of the Serb Republic of Krajina launched several rocket attacks against Zagreb which resulted in the deaths of several civilians.56 The following month Bosnian Government forces launched several offensives around Sarajevo in order to lift the strangle-hold the Serbs had placed over the city for the previous three years.57 After achieving initial success these offensives soon ground to a halt.

It was then the turn of the Serbs to go on the offensive. Despite being warned by the Security Council not to attack any of the UN safe areas58, the Bosnian Serbs captured Srebrenica and Zepa in July 1995.59 The capture of these safe areas, along with the atrocities that Serbs committed there,60 lead to a change in way the international community responded to the human rights violations that were occurring in Bosnia-Herzegovina. Ultimatums issued to the Serbs were now backed up by force,


Operation Flash, the code name the Croats gave to the recapture of western Slavonia, caused turmoil in the Croatian Serb leadership. The chief of the Croatian Serb Army was fired and in his place Belgrade dispatched General Mile Mrskic who had lead the JNA assault on Vukovar three years earlier. Despite his appointment he was unable to shake up the depleted and demoralised Croatian Serb Army. Silber and Little, supra note 49, at 347.


The fall of Srebrenica has been described as “the darkest moment in the international involvement in Bosnia. The United States and Europe did nothing to stop the murder of perhaps as many as eight thousand Muslim men who were rounded up while trying to escape to Bosnian held territory...Its defeat exposed the complete lack of international commitment to defend (the UN safe-havens), Silber and Little, supra note 49, at 356.

and not mere threats. After a Sarajevo market place was hit by a Serbian mortar on 28 August, resulting in the deaths of 37 people, NATO launched massive air strikes against Bosnian Serb targets. These strikes continued until the Bosnian Serb Army complied with NATO demands to remove all pieces of heavy artillery from within 20 miles from Sarajevo and allow humanitarian aid convoys to reach the remaining UN safe areas.

Even though a hard stance was now being taken against the Bosnian Serbs, the international community seemed to turn a blind eye to military actions taken by the Croat and Muslim forces. While the Bosnian Serb army was preoccupied in the eastern parts of Bosnia-Herzegovina, on 4 August the Croatian Army launched a major offensive to regain areas of Croatia that were still under Serb control. Two days later the Croatian flag flew over Knin, the capital of the Serb Republic of Krajina, and within a week over 150,000 Croatian Serbs were fleeing to the Federal Republic of Yugoslavia, leaving behind the land in which their ancestors had lived for the last three hundred years. With the fall of Krajina only the oil rich areas of Eastern Slavonia remained under Serbian control. However, as these areas were controlled by troops of rump Yugoslavia, the Croatian government reverted to diplomatic efforts in order to unite these areas with the rest of Croatia.

Although condemned for capturing Krajina by force, the international community refused to impose tougher measures against Croatia. Even when it became obvious that Croatian troops were looting and destroying the homes of Croatian Serbs who had fled to the Federal Republic of Yugoslavia, and had murdered several who remained behind, Croatia still received aid from the international community.

Taking advantage of the damage caused by NATO air strikes the Fifth Corps of the Army of Bosnia-Herzegovina, under the command of Atif Dudakovic, broke out

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63 See Martin Fletcher, Washington gives tacit support to Croat attack, The Times, 4 August 1995, at 12.
65 The Croatian Army easily overwhelmed its Croatian Serb counterpart as it was numerically superior, better equipped and, due to the assistance of military advisors from the United States, better organised. Silber and Little, supra note 49, at 349.
of the enclave of Bihac in north-western Bosnia-Herzegovina\textsuperscript{67}, and during a two-week campaign captured, along with troops from the Croatian Army and Bosnian Croat forces, vast areas of western and central Bosnia-Herzegovina that had previously been under Bosnian Serb control.\textsuperscript{68} By the end of September 1995 these forces controlled fifty percent of Bosnia-Herzegovina. Five months earlier they only controlled thirty-five percent. However, just when it seemed that they would rout Bosnian Serb forces stationed in Western Bosnia-Herzegovina and capture the cities of Prijedor and Banja Luka, the Clinton Administration demanded an end to their offensive.\textsuperscript{69}

Facing the prospect that the US Congress would force him to lift the arms embargo against Bosnia-Herzegovina, a move which would embarrass him in the eyes of the American public and damage relations with Britain and France, the US President choose diplomacy over aggression.\textsuperscript{70} In September 1995 President Clinton dispatched Richard Holbrooke, the United States Assistant Secretary of State, on a whirlwind voyage of diplomacy. This culminated in a peace agreement being negotiated over 21 days in November 1995 between Tudjman, Milosevic and Izetbegovic at the Wright-Patterson Air Force Base in Dayton, Ohio\textsuperscript{71}. Under the terms of the Dayton Agreement, the Republic of Bosnia-Herzegovina would continue as a sovereign state within its present internationally recognised borders.\textsuperscript{72} However, the Republic would be composed of two entities: the Federation of Bosnia and Herzegovina which would control fifty-one percent of the territory, and the Serb Republic (Republika Srpska) which would control the remainder.\textsuperscript{73} Sarajevo, which had been besieged for nearly four years would be re-unified within the Muslim-Croat Federation and the eastern Muslim enclave of Gorazade would be linked to the federation by a secure land corridor. Although, in order to preserve the 49:51 split, the Bosnian government agreed to relinquish certain regions which it had captured during the September offensive.\textsuperscript{74} A central government, which was to be composed of representatives of both entities, would have responsibility over foreign policy, foreign trade, immigration and monetary and customs policy. However, each entity was


\textsuperscript{69} Undelivered, supra note 67.

\textsuperscript{70} Id., at 5.

\textsuperscript{71} The full text of the Dayton Agreement on Implementing the Federation of Bosnia and Herzegovina and its accompanying Annexes are reprinted in 35 I.L.M. 75 (1996).


\textsuperscript{73} Id.

\textsuperscript{74} Id.
entitled to maintain its own army, collect its own taxes and operate its own police force and justice system.\textsuperscript{75}

To ensure the implementation of the Agreement 60,000 NATO troops would be deployed throughout Bosnia-Herzegovina. These troops would have unimpeded freedom of movement, authorisation to use military force to prevent violence against civilians and refugees, and permission to arrest indicted war criminals if they encountered them\textsuperscript{76}. Finally, it was agreed that the arms embargo against Bosnia-Herzegovina and the trade sanctions against the Federal Republic of Yugoslavia would be lifted, although the trade sanctions would be reimposed if the Serbian authorities failed to meet their obligations under the peace agreement.\textsuperscript{77}

In separate agreements announced midway through the Dayton talks, Croatia agreed to close down the so-called Republic of ‘Herceg-Bosnia’, the Bosnian Croat mini-state within Bosnia-Herzegovina, and the Federal Republic of Yugoslavia agreed to peacefully restore Eastern Slavonia to Croatia over a two year transitional period. During this period Eastern Slavonia would be demilitarised and Croatian civilians would be allowed to return to their homes.\textsuperscript{78}

\section*{Epilogue}

With the signing of the Dayton Agreement the conflict that erupted in the former Yugoslavia in 1991 came to an end. Over a quarter of a million people were killed and at least two million were made homeless. But the Serbian people are still divided, and the non-Serb populations of Vojvodina and Kosovo are voicing their resentment as thousands of Serb refugees from Croatia and Bosnia-Herzegovina flood into these regions.\textsuperscript{79} Given the Balkan tradition for inter-ethnic aggression and the propensity for the ethnic groups in the region to take revenge on one another for acts committed generations before, it is impossible to predict how long this peace will last.

\textsuperscript{75} Id.
\textsuperscript{76} Id.


\textsuperscript{78} Undelivered, supra note 67, at 6.
\textsuperscript{79} Silber and Little, supra note 49, at 368-369.

Of 180,000 refugees who fled the Serb Republic of Krajina in August 1995, 117,000 sought refuge in Vojvodina. Although the authorities in the area provided food, education and health care to the refugees the refugees have argued that this is not enough. Claiming that they lost their homes and possessions because of a secret agreement signed between Belgrade and Zagreb the refugees have exerted pressure on Serbia to expel the non-Serb and non-orthodox population from the region. Mihal Ramac, \textit{Serbs from all lands in one province}, 37 \textit{War Report} (October 1995) at 18-19.
THE COMBATANTS AND THE CRIMES THEY COMMITTED

The Warring Factions

Under communist rule the JNA was entrusted with the defence of the Socialist Federal Republic of Yugoslavia. Each Republic was also protected by local territorial defence forces and local police units. Consequently the war in the former Yugoslavia was not fought solely between soldiers of regular army units. The territorial defence forces, as well as paramilitary forces, units of policemen and armed civilians all participated in the conflict. On most of these occasions army officers directed the fighting, though on a few occasions the different combatant elements fought independently. As a result it was difficult to establish who had command over particular groups of combatants during certain period of the conflict.1

When the fighting broke out in Slovenia in June 1991, troops of the JNA fought troops of the Slovenian Territorial Defence Force, Slovenian troops who had left the JNA to form the Slovenian Army, and members of the Slovenian police force.

When the fighting spread to Croatia JNA units fought alongside paramilitary units from Serbia (which were mainly made up of expatriate Serbs and Serb mercenaries), local Serb-Croat paramilitary units, Serbian members of the Croatian police force and armed Croatian-Serb civilians. Opposing them were troops of the newly formed Croatian Army which consisted of Croats who had left the JNA, the Croatian National Guard which was Croatia’s territorial defence force, local militia and Croatian paramilitary forces. Units of armed Croatian civilians and police officers also fought, but these units only operated in areas near their homes. Although JNA troops officially withdrew from Croatia in November 1991, they still gave assistance to the Army of the Serb Republic of Krajina which had been created by this time and was made up of Croatian Serbs who had left the JNA.

The fighting in Bosnia-Herzegovina took place between Bosnian Croats, Bosnian Serbs, and Bosnian Government forces which consisted mainly of Bosnian Muslims.

Fighting alongside the Croatian Defence Council, which was made up of Bosnian Croats, were units of the Croatian Army, Croatian paramilitary forces as well as Croat members of the Bosnian police force and armed Bosnian Croat civilians.

Bosnian government forces consisted of the Bosnian Army, which was made up of Muslims who had left the JNA, Bosnia-Herzegovina’s territorial defence force, Muslim paramilitary units, Muslim policemen, armed Muslim civilians, and volunteers from other ethnic groups.²

When the fighting broke out JNA troops were joined by paramilitary units from Serbia, Bosnian Serb paramilitary units, Serbian members of the Bosnian police force and armed Bosnian Serb civilians. In June 1992 Bosnian Serbs in the JNA formed the Bosnian Serb Army after the Federal Republic of Yugoslavia withdrew their forces from Bosnia-Herzegovina.³ However, as they left the Republic, the JNA handed all heavy artillery, tanks and arsenals located in Bosnia-Herzegovina to the newly formed Bosnian Serb Army.

During the early stages of the fighting many combatants, including several units in the regular army, did not wear distinctive uniforms, emblems or insignia of rank. Officers also moved from one unit to another, and in some cases from army to paramilitary units. Matters were further complicated as the chain of command of most army and paramilitary units was not clearly established during the earlier stages of the conflicts in Croatia and Bosnia-Herzegovina.⁴

It was estimated that at least 45 paramilitary units fought during the war.⁵ Three of the most sinister were the Serb paramilitary units, the Tigers, the Chetniks, and the White Eagles. The Tigers were set up in 1991 by the Serbian Minister of the Interior, Mihalj Kertes, and were led by Zeljko ‘Arkan’ Raznajatovic.⁶ While this group was initially financed by the Interior Ministry, it soon became self-financing as it looted truckloads of goods from Croatia and Bosnia-Herzegovina.⁷ The Chetniks, were set

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² Many Bosnian Croats and Bosnian Serbs have been fighting for the Bosnian Government, especially in Sarajevo. They have aligned themselves with the Bosnian Government as they dislike the nationalistic policies of their respective ‘ethnic’ governments. Alexandra Stiglmayer, *Mass Rape: The War Against Women in Bosnia-Herzegovina*, Lincoln: University of Nebraska Press (1994), at i.

³ In addition, when the JNA pulled out of Bosnia-Herzegovina it demobilised an estimated 35,000 men, however these men simply replaced the badges of the JNA on their uniforms with those of the Bosnian Serb Army. See remarks of M. Cherif Bassiouni in Leslie Deak *The United Nations ad hoc Tribunal for the former Yugoslavia 20 Am. Soc. Int’l L. Proc. 20* (1993), at 21.

⁴ Final Report, supra note 1, para. 114.

⁵ Id., para. 121.

⁶ Before the war Arkan was a key figure in Yugoslavia’s criminal fraternity and was reputed to have carried out assassinations for the Yugoslav Secret Service. He is wanted by Interpol for bank robberies and murder. Eve Anne Prentice, *Serb War Criminal to Marry Rock Star*, The Times, 17 February 1995.

⁷ Arkan reportedly had a price list for ‘liberating’ a town, these being approximately 2 million to 3 million German marks, plus all the loot from the police station and bank, plus right of passage for 30 cars, plus everything else his men could carry. Johanna McGeary, *Face to Face With Evil*, TIME, 13 May 1996 [hereinafter “Evil to Evil”] at 22.
up by Vojislav Seselj, who once advocated transferring to Serbia the whole of Bosnia-Herzegovina, Macedonia, Montenegro and most of Croatia, leaving the Croats with “what you can see from the top of the Zagreb Cathedral.” The White Eagles, organised and commanded by Dragosalv Bokan, were responsible, among other things, for demolishing the villages of Vocin and Lovas, near Vukovar, in 1991. During take-over of these towns Croats were made to march through minefields. If they refused they were shot.

While the majority of paramilitary units were trained and supplied by their respective governments and had an identifiable leader, many did not have a clearly defined command structure. In addition, most operated independently and when they were integrated with regular army units they were difficult to control. Local militias, which consisted of armed fighters from particular towns or villages, did not have a clear chain of command either. However these groups only operated in areas near their village or town and were generally lead by local political figures.

Before the conflict the Yugoslav police force was split into national, regional and local units. Thus when the war broke out the Ministry of the Interior, which normally ran the police force, could no longer command the police effectively. Local police units began to operate independently and in most cases had complete autonomy in their respective areas.

Because all the parties that fought during the conflict in the former Yugoslavia used a multitude of combatant forces, there was no effective command and control. Sometimes combatants operated under command structures, although these structures varied between the various units to which the combatants belonged, while on other occasions combatants operated under no structure at all.

Reported Atrocities

All parties to the conflict in the former Yugoslavia were accused of committing various violations of international humanitarian law. This section sets out the types of the violations that were committed, and identifies, where possible, the combatants

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8 Seselji is a Serbian extremist and is currently the leader of the extreme nationalist Serbian Radical Party. Id., at 21
10 Evil to Evil, supra note 7, at 22.
11 It has been alleged that Bokan’s hatred of the Croat people stems from the fact that his family was killed by Croat Ustashi during the Second World War. Id.
12 See Final Report, supra note 1, para. 121.
13 Id., para. 122.
14 The territorial defence forces operated by the Slovene, Croat and Bosnian Governments had a different command structure to the regular army. Id., para. 119.
15 See comments by Cherif Bassiouni, supra note 3.
who perpetrated these violations. Even though the JNA was accused of bombing civil and civilian targets during the brief Slovenian conflict, this section will concentrate on the Croatian conflict of 1991, the conflict in Bosnia-Herzegovina, and the crimes committed during the reclamation of Krajina by Croatian troops in the summer of 1995.

**The Croatian War**

Tales of atrocities began to appear in Serbian and Croatian newspapers not long after the fighting broke out in Croatia. Although these stories were mostly exaggerated and were often misrepresented to exacerbate the fears of both Serbs and Croats, foreign journalists and international organisations confirmed that human rights abuses were being committed. Such abuses included summary executions, indiscriminate and disproportionate use of force against civilian targets, torture and mistreatment of detainees, disappearances and hostage taking, forced displacement and resettlement of civilian populations, and the killing of journalists covering the war.

**Mass Killings**

Representatives of the Helsinki Watch Organisation reported that Serbian rebel forces were responsible for the summary execution of at least 200 civilians and disarmed soldiers in fourteen separate instances during the latter half of 1991. A large proportion of those executed were old men and women who were unable to flee from the advancing Serbian forces. After their villages fell into Serbian hands, paramilitary forces conducted house to house searches and executed many of the Croats they found. In several cases the victims were beaten before being executed.

Adults were not the only people to be killed. In Josevica a 5 year old was shot, along with 19 others, to avenge the deaths of 21 Serbian paramilitary members killed.

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18 Id.

19 Id., Helsinki Watch Letter to Slobodan Milosevic, President of the Republic of Serbia, at 274, and Helsinki Watch Letter to Franjo Tudjman President of the Republic of Croatia, at 310.

20 Id., at 276.

21 Autopsy reports performed on people massacred at the village of Dalj concluded that many victims were shot in the head after being wounded or beaten, Id., at 277.
during a Croatian offensive. In another act of reprisal, Serbian forces killed 48 Croat civilians in the village of Skarbrnje, after Croat partisans destroyed a Yugoslav army tank. While the majority of those killed were shot in the head at close range, soldiers killed three villagers by smashing their heads with a blunt instrument and killed a 59 year old women by driving a tank over her.

Croat civilians were also executed by Serbian forces as Serbs were forced to flee from Croat offensives in December 1991. In the villages of Hum and Vocin, in Western Slavonia, members of the White Eagles paramilitary group massacred 43 Croats so that they would not be liberated. The White Eagles also burnt down the homes of the Croats and raised Vocin's Catholic Church to the ground.

Croat forces were similarly responsible for the summary executions of Serbian soldiers and civilians. In Karlovac, Croat police officers beat and killed two members of the Yugoslav army and 11 army reservists after they had surrendered. Croatian police officers were also responsible for executing 24 Serbs from the municipality of Gospic in October. The following month another massacre took place in Marino Selo when Croatian Guardsmen shot 12 insurgents whom they had arrested. In a letter sent to Franjo Tudjman in December 1991, Helsinki Watch listed over a dozen other incidents in which Serbs were illegally killed, presumably by Croats. Most of these killings occurred in areas near regions held by Serbian forces.

Detention Camps, Arbitrary Arrests and Disappearances

During the conflict in Croatia both sides maintained detention camps in which both soldiers and civilians were held. Serbian forces set up eighteen such camps in Krajina, while Croat forces set up nine. In these camps prisoners were often tortured and beaten by the camp's guards, and in a number of cases these beatings resulted in death. Because Serbian forces had captured eight times as many prisoners than

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22 Id., at 284.
23 Id., at 282.
24 Id., at 284-285.
25 Id., at 312.
26 Id., at 313.
27 Id., at 316. In another incident in Marino Selo three Serb civilian were executed by members of the Croatian military police. Eve-Ann Prentice, Croats Accused of Atrocities in Death Camps, The Times, 11 August 1995 [hereinafter “Croat atrocities”].
28 Helsinki Watch Letter to Franjo Tudjman, President of the Republic of Croatia, Helsinki Watch, supra note 17, at 317-319.
29 See Croat atrocities, supra note 27.
Croat forces, on several occasions Serbian civilians living in Croat-held territory were arrested so that they could be used in prisoner exchanges.30

Those who were exchanged were fortunate, hundreds of others who were arrested by both Croatian and Serbian forces disappeared without trace. It is feared that a large number of these people were executed. For instance, after the city of Vukovar fell to JNA and paramilitary forces in November 1991 over 3,000 people were taken into custody. Only a few were heard of again. Most of those who disappeared were civilian males aged between 16 and 60. It is alleged that around 200 people who disappeared from Vukovar were executed and buried in a mass grave six kilometres south east of the city.31 Based on eye-witness accounts and Croatian necklaces found on two of the bodies recovered from the grave site,32 investigators believe that the site contains the bodies of patients and medical staff of Vukovar hospital who were taken into custody by the Serbs after the fall of the city.33

Indiscriminate Use of Force and Forcible Displacement

Serbian forces were responsible for the indiscriminate shelling of Dubrovnik, Vukovar and Osijek. These and other attacks against Croatian cities were justified according to the Yugoslav military in order to protect the Serbian population living in Croatia and to liberate JNA barracks encircled by Croatian forces.34 Such a justification could not apply to Dubrovnik as only 6.7% of the city’s population was Serbian and the city did not have any JNA barracks.35

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30 Helsinki Watch, supra note 17, at 326.
31 Members of Physicians for Human Rights carried out a preliminary site investigation at the grave site in October 1992. From their investigation they concluded that a mass execution had taken place at the site. A more extensive investigation was not carried out as Serb authorities refused to grant permission for the investigation until November 1993, by which time winter had set in. Before any excavation work could commence in the spring of 1994, the Commission of Experts which was financing the excavation, was disbanded. Estimates of who and how many people were buried in the grave come from eye witness accounts. See generally Physicians for Human Rights: Preliminary report of a Mass Grave near Vukovar, Former Yugoslavia, published in First Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), Annex 1, U.N. Doc S/25274 (10 February 1993).
32 The two necklaces contained Roman Catholic crosses and one bore the inscription BOG I HRVATI (God and Croatians). Id.
33 After Serbian forces occupied the hospital they agreed to evacuate 420 Croatian patients to Croatian held territory. However, as the patients were leaving reservists and JNA officers and soldiers separated the lightly wounded military and civilian males from the other patients. Among them were several male hospital workers. These men were driven to the JNA barracks in Vukovar and then to the village of Ovcara. On the evening of 9 November 1991, from 6 p.m. onwards, 20 prisoners at a time were taken by truck into a heavily wooded ravine. The truck always returned empty 15 minutes later. The skeletons found by members of the Physicians for Human Rights were buried in the wooded ravine. Id.
34 Helsinki Watch, supra note 17, at 294.
35 Id.
Shelling by artillery caused extensive damage to Dubrovnik and Osijek and reduced Vukovar to rubble. Nearly every residential, commercial, cultural and religious structure in Vukovar was either gutted or severely damaged.\textsuperscript{36} Because the city was only defended by a few Croatian soldiers the force used by the Serbs when they took the city was clearly disproportionate to the threat posed by Croatian troops stationed there.

Croatian forces were also responsible for attacking the property of Serbian civilians living in Croatia. They also destroyed countless buildings and property left by Croatian Serb civilians who had fled to Serb held territory. Most of these properties were looted before being destroyed.\textsuperscript{37}

However, the majority of the people displaced in the conflict were non-Serbs, forced from their homes by JNA soldiers and members of Serbian paramilitary units in order to create purely Serbian regions. In many cases Serbian authorities made the non-Serbs sign prepared affidavits in which they relinquished all claims over their homes and property to them before they left. To ensure everyone signed, this was normally done at gunpoint. Displaced Serbs were resettled in areas previously occupied by non-Serbs, in order to consolidate Serbian positions and to prevent the original non-Serbian inhabitants returning.

The Use of Human Shields and Attacks on Journalists and Medical Personnel

Croat civilians were also used as human shields by Serbian forces. Not long after the conflict began insurgents used between 30 to 40 people from the village of Zamlaca as human shields so that they could dislodge Croatian policemen hidden in the nearby village of Struga. The insurgents fired over the heads of their shield at houses containing the policemen. To avoid hitting the 'human shields' none of the policemen returned fire. Nevertheless one 'human shield' was mortally wounded and several others were slightly injured.\textsuperscript{38}

Several journalists were killed by soldiers from both sides during the course of the conflict.\textsuperscript{39} In addition, on a few occasions medical vehicles were stopped by soldiers and their personnel taken hostage. In July 1991 an ambulance carrying three wounded Croatian police officers was initially shot at and then stopped by Serb troops. The three wounded police officers were separated from the medical personnel and were never seen again. Although the three medical personnel were released by the

\textsuperscript{37} Helsinki Watch, supra note 17, at 326-328.
\textsuperscript{38} Id., at 238-244.
\textsuperscript{39} Id., at 300 and 329.
Serbian authorities after being detained for three days, during their detention they were beaten.  

Atrocities committed since the January 1992 cease fire

During the sporadic fighting that occurred between Croat and Croat-Serb forces since the January 1992 cease-fire several instances of human rights violations were reported. In January 1993 Croat-Serb forces destroyed the Peruca Dam to prevent it falling into Croatian hands, even though 20,000 people lived downstream. Fortunately a human catastrophe was averted as members of the UN peacekeeping force managed to lower the dam’s water level before the dam was destroyed.

In September 1993 Croat troops attacked and occupied the Medak pocket, which at the time was in Serbian hands. When the area was later turned over to UN soldiers, it lay in ruins. Hundreds of buildings were burnt down or demolished. Farm animals were killed, and vehicles and farm machinery were destroyed. Since many buildings were destroyed by demolition charges which had to be placed inside the buildings, it was clear that the destruction was not caused during military confrontation, or due to military necessity.

When Croat forces captured the Western Slavonian enclave of Okucani in May 1995, Croatian soldiers were accused of firing on columns of fleeing Serbian refugees. In retaliation for the capture of Okucani, Croatian-Serb forces launched rocket attacks on Zagreb and as a result several civilians were killed. With the fall of Krajina in August 1995 came new instances of abuse and maltreatment. Croatian troops looted and destroyed hundreds of homes left vacant by fleeing Croatian Serbs. They also executed several elderly Croatian Serbs who decided to remain in Krajina. Because the Croatian Government failed to control the violence, UN officials in Croatia concluded that the attacks were part of a systematic campaign to

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40 Id., at 243.
41 Nick Nuttall, Royal Marine Saved 20,000 by Failing Serb Dam Plot, The Times, 16 September 1995, at 1.
42 See Final Report, supra note 1, para. 213.
43 UN judge investigates Croatia atrocities, The Times, 23 May 1995, at 12.
45 After monitoring the actions of the Croatian forces the European Union’s monitoring mission held that out of 18,232 houses in 240 Serbian villages they had monitored, more than 13,600, or 73 percent, had been completely or partly destroyed. Chris Hedges, Arson and Death Plague Serbian Region of Croatia, The New York Times, 1 October 1995, at A6 [hereinafter “Arson and Death”].
46 In one instance Bosnian Army soldiers who had been defending the Bihac enclave killed 5 elderly Krajina Serbs, the majority of whom were physically and mentally handicapped. Stacy Sullivan, Renegade Bosnians slaughter old men, The Times, 10 August 1995, at 8.
drive all remaining Serbs from Krajina and prevent those who wanted to return from coming back.\textsuperscript{47}

\textit{The Bosnia-Herzegovina Conflict}

Mass Killings

Similar types of human rights violations were committed during the fighting in Bosnia-Herzegovina, though on a much wider scale. International organisations confirmed numerous instances where civilians and disarmed combatants were summarily executed.

In May 1992 only a month after the fighting erupted in Bosnia-Herzegovina 83 Muslims, including 11 children, were shot by Serbian ‘Chetniks’ in the village of Zaklopaca.\textsuperscript{48} Since those who survived the massacre fled the village to avoid other attacks, the bodies of the dead remained unburied.\textsuperscript{49} In the Vlasic Plateau 15 disarmed combatants were executed by members of the Serbian military police. Autopsies performed on the bodies concluded that the men died from shots fired to the head or chest. Bruising on the bodies indicated that the Serbs had beaten some of the victims after they had been killed or while they were unconscious.\textsuperscript{50} In July 1992 in the course of a three day blood bath, 20 Chetnik paramilitaries slaughtered 450 Muslims from the city of Visegrad, many of whom were beheaded. The bodies of the victims were thrown into the Drina river.\textsuperscript{51} After Srebrenica fell to Serbian troops under the command of General Ratko Mladic in July 1995, an estimated 6,000 Bosnian men and boys were rounded up, transported to various locations and machine-gunned to death.\textsuperscript{52}

\textsuperscript{47} A\textsuperscript{4}son and Death, supra note 45.
\textsuperscript{48} Muslim and Croats commonly refer to Serbian combatants as Chetniks because they equate their current actions with those committed against Croats and Muslims during the Second World War. Even though the Chetnik label has been adopted by Seselj’s paramilitary organisation, other paramilitary units used it as well. Due to this it is not always clear which Serbian paramilitary unit Croats and Muslims are referring to, when they use the term Chetnik to describe Serbian combatants.
\textsuperscript{49} Helsinki Watch, supra note 17, at 54.
\textsuperscript{50} Id., at 59.
\textsuperscript{52} General Mladic had promised a “bloody feast” after the fall of the town, and is reported to have told prisoners confined on a football field that 1,000 Muslims would die for every Serb killed in the battle for the town. According to survivors of the massacre following Mladic’s threat the prisoners were loaded into lorries and taken about half a mile away where they were machine-gunned in groups of 20 to 25. Spy photographs taken by satellites and U2 spy planes confirmed that at least 600 people were held on the football field, and showed one of the reported burial sites after the earth had been disturbed. James Bone, Bosnia Serbs are Accused of Massacre, The Times, 11 Aug. 1995, at 1. For a detailed report of the massacre see Stephen Engelberg and Tim Weiner, Srebrenica: The days of Slaughter, The New York Times, 29 October 1995, at A1, A14 and A15.
One seventeen year old Bosnian, Nezad Avdic, who survived the Srebrenica killings, described the scenes he witnessed as follows:

“When the truck stopped, we immediately heard shooting outside.... The Chetniks told us to get out, five at a time. I was in the middle of the group, and the men in front didn’t want to get out. They were terrified, they started pulling back. But we had no choice, and when it was my turn to get out with five others, I saw dead bodies everywhere. A Chetnik said, “Come on Balije,” find some space.” We stood in front of the Chetniks with our backs turned to them. They ordered us to lie down, and as I threw myself on the ground, I heard gunfire. I was hit in my right arm and three bullets went through the right side of my torso. I don’t recall whether or not I fell on the ground unconscious. But I remember being frightened, thinking I would soon be dead or another bullet would hit. I thought it would soon be all over. While lying there I heard others screaming and moaning ... During one of the following executions I felt a sharp pain in my foot ... The man next to me was moaning, and one of the Chetniks ordered the others to check and see what bodies were still warm. “Put a bullet through all the heads, even if they’re cold.” Another Chetnik replied, “Fuck their mothers! They’re all dead!” Only one Chetnik came over to the pile and shot the man next to me....”

The other sides involved in the conflict in Bosnia-Herzegovina were not innocent either. In August 1992 Bosnian Muslims ambushed a convoy of Serbs fleeing from the outskirts of Gorazde. After the shooting ended at least 20 Serbs lay dead. The following month Muslims from Kamenica attacked Serbian villages near Milici and murdered more than 60 Serb villagers.

When Bosnian Croats turned on their Muslim allies in 1993, Bosnian Croat and Muslim forces attacked civilians of each other’s ethnic group in the Lasva Valley region of central Bosnia. On 16 April Bosnian Croats murdered almost the entire village of Vitez. They went from house to house and shot any Muslim they found. For

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53 Balije is a derogatory term used for Muslims by Serbs.
54 Avdić and one other Muslim managed to escape from the mass grave he was lying in before it was covered with earth. Over the next few days they made their way to Bosnian territory. Jan Willem Honig and Norbert Both, Srebrenica: Record of a War Crime, London: Penguin Books (1996), at 62-63.
56 The Muslims mutilated many of their victims. Some bodies were burned to a charcoal, others had their fingers on their right hand cut off as this was the hand Orthodox Christians use to bless themselves. Some bodies had their eyes gouged out and some were circumcised as in Yugoslavia only Muslims were traditionally circumcised. Id.
instance, one woman was shot while taking in her laundry.\textsuperscript{57} The next day the nearby village of Almici was also attacked, and 107 of its Muslim inhabitants were killed.\textsuperscript{58} A week later Muslim forces attacked Miletici, a Croatian village just north of Vitez, and executed four Croats.\textsuperscript{59} On the outskirts of Travnik, Muslim military police were responsible for attacking Croatian civilians and driving them from their homes\textsuperscript{60}, and in Ahinici UN officials discovered the bodies of 103 Muslim villages killed by Bosnian Croats. According to European Community officials the Ahinici massacre was organised and well planned.\textsuperscript{61}

In October 1993 Bosnian Serbs living in the village of Stupni-Do were massacred by a Croatian paramilitary group. British peacekeepers who arrived in the village not long after the massacre reported that the killings were perpetrated by the Bobovac brigade.\textsuperscript{62}

Later that year Croat militia forces forced three Muslims they had captured to advance on Muslim positions with anti-tank mines strapped to their bodies. When they neared the Muslim lines the mines were detonated. Only a few remains of the three Muslim prisoners were recovered.\textsuperscript{63}

Detention Camps

After Serbian forces occupied an area they imprisoned many of the non-Serb population of the area in detention camps. These camps ranged in size from small detention centres that temporarily housed a few prisoners to camps that housed upwards of 8,000 people.\textsuperscript{64} The most notorious of the larger camps were Omarska, Manjaca, Keraterm, Trnopolje and Luka-Brcko.\textsuperscript{65} Inmates in these camps were often

\begin{thebibliography}{99}
\bibitem{57} 8th Report, supra note 51, at 537.
\bibitem{59} The four Croats were executed in retaliation for the death of one Muslim fighter who was killed in the attack. They were not executed in revenge for the Vitez attack, 8th Report, supra note 51, at 538.
\bibitem{60} Ic., at 537.
\bibitem{61} Ic. According to a Croat journalist the Ahinici massacre was perpetrated by a group of Croatian irregulars called the ‘Black Night’. These men had formerly belonged to the extreme wing of the HVO, the Bosnian Croats’ defence force. Tom Rhodes, \textit{Envoys decry murderers who touched villages}, The Times, 26 April 1993, at 10.
\bibitem{62} Anthony Loyd, \textit{Massacre by Croat ‘scum’ says Brigadier}, The Times, 28 October 1993, at 1.
\bibitem{63} Anthony Loyd, \textit{Croat militia turn prisoners of war into human bombs}, The Times, 24 November 1993, at 1.
\bibitem{65} \textit{War Crimes in Bosnia-Herzegovina: Volume II}, Helsinki Watch (1993), at 18 [hereinafter “Helsinki Watch II”].
\end{thebibliography}
packed in so tightly they could not even sit, let alone lie down. In many camps prisoners were starved, and were often deprived of toilet and washing facilities. As a result dysentery and lice epidemics broke out.

The camps were frequently operated by local police officials and not military officials, and were normally operated in networks, each one serving a different purpose. Such purposes included mass killing, rape, and holding camps for those about to be exchanged. Prisoners were frequently moved from one camp to another. When being moved prisoners were tightly packed into buses, lorries and other forms of transport and were normally denied food, water and toilet facilities. Guards often shot prisoners at random during the move and also upon reaching the new camp.

Almost all prisoners were interrogated by officials once detained inside these camps. However, the majority of the interrogations were unrelated to military or security matters, and concerned such matters as how much wealth a prisoner had or whether another prisoner had relatives fighting for the Bosnian army. In many cases interrogation was accompanied by brutality, humiliation and torture. Prisoners were also selected at random for beatings. Very few prisoners received medical treatment after such beatings and many died as a result of the injuries they sustained. When there had been a Bosnian Serb military setback or if there had been casualties at the front, beatings escalated. At times prisoners were forced to inflict injuries on each other. In one such incident a guard at the Omarska camp forced a prisoner to drink a litre of oil and then bite the testicles off three fellow prisoners. The injured prisoners subsequently bled to death.

Prisoners were often summarily executed, tortured, raped and sexually assaulted by guards, local police, members of Serbian paramilitary units and other people permitted by the camp authorities to perform such acts. Some of the bloodiest massacres reported in the conflict occurred in the camps. On 24 July 1992 guards at the Keraterm camp sprayed an enclosure containing between 200 to 300 men with machine gun fire. Approximately 140 of the prisoners in the enclosure died. The next

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66 At the Luka-Brcko camp, 650-700 men were housed in a hanger, 20 by 28 meters. Due to the cramped conditions internees had to sleep standing up. 3rd Report, supra note 55, at 830.
67 One witness who spent a week at the Omarska detention camp claimed that only 6 litres of water and one loaf of bread was provided daily for all the 900 men in the camp at the time. The loaf was thrown in the air by the guards and only a lucky few got crumbs, Staff Report, supra note 64, at 25.
68 See Final Report, supra note 1, para 230.
69 Id.
70 On 6 August 1992, 1,300 prisoners from Omarska arrived at Manjaca camp. During the lunch hour 15-20 of these men were murdered. 8th Report, supra note 51, at 539.
71 See Final Report, supra note 1, para 230.
72 Stiglmayer, supra note 2, at 88.
morning 50 of the survivors were taken out of the enclosure and shot.73 At the Omarska detention camp, journalists estimated that guards killed between ten to twenty prisoners per day.74

The biggest killing spree occurred at the Luka-Brcko detention camp between the beginning of May and early June 1992 when it is estimated 3000 men women and children were killed.75 During the slaughter nine-tenths of the camp’s population died.76 While a large number of prisoners were shot, several prisoners had their throats cut. Prisoners were also mutilated before being killed. Some had their ears and noses cut off, others had their eyes gouged out, and at least 60 prisoners had their genitalia cut off. The prisoner’s bodies were dumped in the Sara River until mid-May, after which they were burnt in factories located in the vicinity. Before being disposed of jewellery would be removed from the bodies and gold and silver fillings would be extracted from the mouths.77

Men between the ages of 16 to 60 were normally separated from elderly men, women and children, and were transported to camps where killings and torture were prevalent. Women detainees were also abused. Thousands were raped while in detention. Most of those raped were aged between 16 and 30, but women as young as 7 and as old as 65 were also raped. In same cases women were raped several times a day, for many days, often by more than one person at a time. After being raped many women were either killed or brutalised to the point where they were traumatised. Those women who resisted being raped were normally killed, quite often in front of other prisoners in order to deter other women from resisting being raped.78

Croat and Bosnian government forces also set up detention camps. In the Muslim run Celebici detention camp an elderly Bosnian Serb reported that 15 or 16 ethnic Serbians were so badly beaten they died.79 Another Bosnian Serb reported that

73 Several witnesses have verified that this massacre took place. Fifth Report on War Crimes in the Former Yugoslavia, reprinted in U.S. Department of State Dispatch Vol. 4, No. 6 [hereinafter “5th Report”], at 75, also see 3rd Report, supra note 55, at 826.
74 Id.
76 A female prisoner who was released from the camp claimed that the killings were not committed by the camp’s guards but by ‘Arkan’s men’. Supplementary Report on War Crimes in the Former Yugoslavia, reprinted in U.S. Department of State Dispatch Vol. 3, No. 44, at 803 [hereinafter “Supplementary Report”]. Another prisoner claimed that Serbian policemen also took part in the killings. 3rd Report, supra note 55, at 827.
77 Id.
78 See Final Report, supra note 1, para. 230.
79 3rd report, supra note 55, at 826.
In their report to the Security Council on crimes committed against Serbs the Federal Republic of Yugoslavia stated that at Celebici “each prisoner had his place beside the wall or in the middle, leaving just enough space for a guard to pass between them. The prisoners had to sit both day and night. They were not allowed to rise, move or lie down. During their entire stay in this camp the inmates were not allowed to bathe or wash their faces.” Letter dated 21 December 1994 from the
after being arrested by Croat authorities he was detained in a prison in Moster and was forced to perform hard labour, build bunkers and other defensive structures. He claimed that prisoners who could not work, or stopped working to rest repeatedly, were beaten around the head and kidneys with night-sticks. Although it is clear violations occurred at the camps run by Croat and Muslim authorities, the number of reported violations were limited, and both governments pledged to investigate all violations that were reported.

Several mass grave sites have been identified in areas surrounding the detention camps. Approximately 62 lie in the Serb controlled Prijedor region, in which the Omarska and Kereterm camps were situated. Throughout the territory of the former Yugoslavia 187 mass grave sites have been identified. While a large number contain the bodies of Muslims, some contain the bodies of Croats while others contain the bodies of Serbs. Witnesses claim that the number of bodies in each of these grave sites range from three to five thousand people. In depth investigations have only taken place at a few grave sites because the local authorities have denied investigators access to the sites. It is believed however that at least 99 sites contain the victims of mass killings and at least 13 sites contain 500 bodies or more.

Indiscriminate Shelling, and the Targeting of Cultural Monuments

Before an area was occupied by Serbian forces, Serb paramilitary and army units launched mortar and artillery attacks for prolonged periods on the area, in order to force the non-Serb population to flee or surrender. Those that fled often took shelter in nearby towns or villages that came under attack a few days later. In one case a women was forced to flee from 15 different villages in 40 days. Several villages that fell into Serbian hands were transformed into ghettos where thousands of non-Serbs were held. People confined in such villages were normally held there until they were exchanged for Serbian combatants or civilians held by Croatian and Muslim

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80 3rd Report, supra note 55, at 829.
81 See Final Report, supra note 1, para. 260.
82 At least 65 graves contain Muslim bodies, 32 contain Croat bodies and 19 contain Serbian bodies. Id., para. 257.
83 Id.
84 In September 1995 Bosnian government forces captured Krasulje, a village six miles from the town of Kijuc in north-western Bosnia. There they found a mass grave containing an estimated 100 to 150 bodies. They also found empty bottles of acid, which had been poured over the bodies to dissolve the bones. Stacy Sullivan and Michael Evans, Mass Grave Find Threatens Bosnian Peace, The Times, 25 September 1995, at 13.
85 See Final Report, supra note 1, para. 258.
86 Helsinki Watch, supra note 17, at 72.
forces. Paramilitaries and members of the army patrolled the perimeters of the villages and interrogated many of the internees. In some cases non-civilians were forcibly taken to Bosnia-Herzegovina’s international borders and expelled from the Republic.

Larger towns and cities that could not easily be taken were indiscriminately bombed, shelled or otherwise attacked by Serbian forces, with little, if any, regard for civilian life. Sarajevo was shelled the most. Its city centre, airport and south western suburbs were consistently targeted. Almost all cultural and religious structures as well as public utilities were shelled. As the shelling occurred at different times of the day, without any apparent pattern or specific target, the attacks terrorised the civilian population.

On several occasions non-military targets in Sarajevo were attacked. On 1 June 1993 Serbian mortar crews shelled a soccer game being played in a Muslim residential suburb. Thirteen persons died and 133 were injured. On 5 February 1994 Serbian forces launched a mortar attack on an open air market. 66 people were killed in this attack. Eighteen months later this market was targeted again. This time 37 people died. Other attacks were made against schools, open streets, public parks, cemeteries, hospitals and bread, water and relief lines.

Because artillery shelling intensified prior to and during various peace conferences and other negotiations, it was suggested that there was a political link to the shelling. Conversations recorded by Bosnian government intelligence teams between General Ratko Mladic, commander of the Serbian forces in Bosnia-Herzegovina, and two Serbian colonels confirm that residential areas were deliberately targeted. In the recording Mladic ordered the two colonels to attack residential districts of Sarajevo with heavy artillery. The colonels were also ordered to

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87 Id., at 69.
88 Id., at 71.
89 See Final Report, supra note 1, para. 190.
90 Id., para. 191.
91 Id., para. 201-202.
93 After the market place was attacked President Izetbegovic stated that this was a “black and terrible day. We Bosnians feel condemned to death. Every government which supports the arms embargo against (Bosnia-Herzegovina) is an accomplice to acts of atrocity such as this.” Laura Silber and Allan Little, Yugoslavia: Death of a Nation, 2nd Ed. USA: TV Books (1996), at 309.
96 See Final Report, supra note 1, para 192.
use 155 millimetre howitzer shells, the heaviest shells in the Serbian force’s arsenal, instead of the lighter 82 millimetre or 120 millimetre shells.96

Serbian forces also destroyed cultural and religious monuments throughout Bosnia-Herzegovina, targeting mosques in particular. All 14 mosques around Foca, including one built in 1448, were destroyed. Bosnian officials in Zurich alleged that 90% of the mosques in Serbian-controlled territory were destroyed.97

Croat forces were also guilty of targeting cultural monuments. In western Bosnia-Herzegovina Croatian forces were responsible for destroying several Orthodox Churches, including Mostar’s Orthodox Cathedral and the fifteenth century Byzantine style monastery at Zavala.98 On 9 November 1993 Croat tanks destroyed the white marble bridge at Mostar. The bridge, which was built around 1556, was said to mark the boundary between east and west. Because the bridge served no military purpose, its destruction deepened the despair of the Muslim population who had been besieged in the city for over five months.99

Rape

In August 1992 journalist Roy Gutman reported that 40 young women from the Muslim populated town of Brezov Polje had been brutalised and raped repeatedly. The rape victims were aged between 15 and 30 and were chosen because of their wholesome looks, careful dress and gentle manners.100

In response to the large numbers of reports of Muslim women being raped in Bosnia-Herzegovina the European Community, with the support of the Security Council,101 sent a delegation headed by Dame Ann Warburton to investigate the treatment of women in Bosnia-Herzegovina. Following two visits to former Yugoslavia102 the delegation submitted a report to the Secretary-General.103 The report concluded that the rape of Muslim women was committed on a wide scale and in such a systematic manner that the delegation believed rape was not incidental to the war but served a strategic purpose in itself.104

96 Helsinki Watch, supra note 17, at 108-109.
97 Supplementary Report, supra note 76, at 802.
98 5th Report, supra note 73, at 79.
100 Gutman, supra note 75, at 68-73.
102 These being from 18 to 24 December 1992, and from 19 to 26 January 1993.
104 Stiglmayer, supra note 2, at 83.
Based on this and other reports it is clear that rapes were committed by soldiers from all sides to the conflict, though victims were predominantly Muslim and the alleged perpetrators were predominantly Serbian.\textsuperscript{105} Because of the social stigma attached to being raped, especially amongst the Muslim population, many victims have been reluctant to report that they were raped.\textsuperscript{106} Exactly how many women were raped is therefore unknown, but estimates range from 20,000 to 50,000.\textsuperscript{107}

From those rapes that have been reported the majority occurred in one of five ways. Rapes were firstly committed by individuals of one ethnic group in conjunction with looting and intimidation of a different ethnic group, before widespread fighting began in that area. Rapes were also committed in conjunction with the fighting in an area.\textsuperscript{108}

After an area fell large numbers of women who were placed in detention were raped. Male prisoners were also subjected to sexual assault. Some were forced to rape women and perform sexual acts on guards or each other. Many men were also castrated, circumcised or sexually mutilated.\textsuperscript{109} Women who were not detained, but remained in areas controlled by a different ethnic group, were raped in the hope that they would leave the area in terror and humiliation. Educated women and prominent members of the community were regularly targeted for rape, as were young women and virgins.\textsuperscript{110} To heighten their shame women were often raped in front of spouses or family members, or were raped in public places.\textsuperscript{111}

Finally, women were detained against their will in hotels or similar facilities for the sole purpose of sexually entertaining soldiers. Women in this group were almost inevitably killed after they were no longer of use.\textsuperscript{112}

Muslim victims were often told that they were being raped so that they would have Serbian babies.\textsuperscript{113} If, while in detention, a rape victim was unfortunate enough to

\textsuperscript{105} See Final Report, supra note 1, para. 251.
\textsuperscript{106} Id., para. 234.
\textsuperscript{107} Stiglmayer, supra note 2, at 85.
\textsuperscript{108} After taking the town of Bisevo and shooting most the town's men aged between 14 and 60, Chetnik soldiers raped three young women. One of which was only 14. Id., at 97.
\textsuperscript{109} Id., at 85.
\textsuperscript{110} See Final Report, supra note 1, para. 250.
\textsuperscript{111} Id.
\textsuperscript{112} All rape camps were kept secret by those in charge of them, and were disbanded immediately after being discovered. Evidence establishing the existence of rape camps in Dudoj and Visegrad comes from women fortunate to escape from them. Stiglmayer, supra note 2, at 85-131. Borislav Herak, convicted by a Bosnian court for the rape and murder of Bosnian women, confirmed that a rape camp had been established in a former restaurant in Vogosca. It was in this camp that Herak raped several Muslim girls and later killed some of them. John F. Burns His Bosnia Trail Ending, Serb Asks Death Penalty, The New York Times, 28 March 1993. In another incident a 17 year old Muslim reported being detained by members of the White Eagles along with 60 other women in a forest motel for four months. Soldiers raped them every night. Sixth Report on War Crimes in the Former Yugoslavia, reprinted in U.S. Department of State Dispatch, Vol. 4, No. 15, at 248.
\textsuperscript{113} Stiglmayer supra note 2, at 132.
become pregnant, they were quite often not released until it was too late for them to have an abortion.\footnote{114}

Human Shields and Attacks on Journalists, Humanitarian Aid Convoys and Medical Personnel

In May 1995 the Bosnian Serbs took several hundred UN peacekeepers hostage and used them as human shields to prevent NATO aircraft attacking strategic military targets.\footnote{115} Troops from the various warring factions also harassed, attacked and in some cases killed journalists, medical relief personnel and people engaged in the delivery of humanitarian aid.\footnote{116} On numerous occasions Serbian forces were responsible for attacking relief convoys with sniper and mortar fire and they frequently hijacked and looted the contents of the convoys. On a few occasions they confiscated the vehicles that were carrying aid supplies.\footnote{118}

One tactic employed by the Serbs was to starve the population of besieged towns and villages so that they would surrender. It is therefore believed that the humanitarian aid convoys were deliberately attacked so that they would be prevented from reaching towns and villages that were desperately short of food and supplies.\footnote{119}

The regular shelling of Sarajevo airport causing the suspension of aid flights to the city was an example where this tactic was employed by the Serbs.\footnote{120}

\footnote{114} As the old Yugoslav abortion law still operates throughout the present day Republics, rape victims are permitted to have an abortion so long as it is performed in the first trimester. In Bosnia-Herzegovina certain doctors performed abortions whenever pregnancy could be terminated. However, due to the lack of drugs and hospital beds and the difficulty victims had reaching the hospital many rape victims were unable to terminate their pregnancy. Id., at 135.


\footnote{116} Bosnian Serb forces also took UN peacekeepers hostage and used them as 'human shields' in August 1995 following NATO airstrikes, Michael Evans, \textit{UN human shields seized as war rages}, The Times, 5 August 1995, at 1.

\footnote{117} Helsinki Watch, \textit{supra} note 17, at 112; Adam LeBor and Eve-Ann Prentice, \textit{Sarajevo nurses killed as shells strike hospital}, The Times, 2 December 1993, at 17.

\footnote{118} Id.

\footnote{119} Id.

\footnote{120} Throughout the conflict aircraft carrying food and medical supplies into Sarajevo were regularly shoot at while the aircraft were in the air and on the ground. Several UN peacekeepers charged with unloading humanitarian cargo were wounded during these attacks. Serbian forces also fired on trucks carrying the supplies between the airport and the city. Helsinki Watch II, \textit{supra} note 65, at 277.
The Policy of Ethnic Cleansing

Many of the atrocities committed by Serbian forces were committed as part of the policy of ethnic cleansing. This policy was advocated by the Serbian leadership as a way to make Serb held territory ethnically homogeneous by using force or intimidation to ‘cleanse’ the territory of non-Serbs.\(^ {121}\)

In areas that were to be cleansed Serbian forces firstly attacked the non-Serb areas with artillery and sniper fire in order to force the civilian population to surrender or flee. After the area was taken by Serbian troops, brutal measures were taken to cleanse the area of any non-Serbs that remained. Such measures included summary executions, torture, beatings, rape, detention, confinement in ghetto areas, forcible displacement and deportation, and wanton destruction of homes, cultural institutions and places of worship. By conducting many of these atrocities in public and allowing the witnesses to flee with tales of what they saw, Serbian forces were able to install fear in the civilian population of areas that were yet to be conquered. Consequently many civilians fled before Serbian forces attacked their villages. The use of detention camps also facilitated ethnic cleansing. After an area was captured males were normally taken to detention camps, and in return for their release their wives or female relations had to agree to leave the area. As well the camps provided a place where non-Serbs could be massacred *en masse*.\(^ {122}\)

While the idea of eliminating minority populations to create a more secure ethnically homogeneous state is very old,\(^ {123}\) ethnic cleansing is unique in certain ways. Unlike previous policies which were carried out by soldiers of regular armies, ethnic cleansing was carried out mainly by the irregular paramilitary forces. The practice of widespread rape also made the policy unique. While rape may not have been a deliberate tactic of the Serb leadership when they devised the policy of ethnic

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122 Staff Report, *supra* note 64, at 5.

123 The first recorded forced resettlement of a politically unreliable population dates from the eighth century when Tiglath-Pilser, ruler of Assyria, forced half the population of a conquered land from their homes and replaced them with settlers from another region. Since then ‘cleansing’ has regularly occurred, with the practice escalating during the last two hundred years. The Nazis persecution of the Jews was the most horrific, but the biggest has been the forced resettlement of 12 million Germans from Eastern Europe by the Russians after the end of the Second World War. Cleansing has previously occurred in the Balkans, in 1941, when the Croatian Ustashi government regarded Croatia’s two million Serbs as a threat to national integrity and murdered 300,000 to 340,000 of them. Andrew Bell-Fialkoff, *A Brief History of Ethnic Cleansing*, 74 Foreign Aff. 110 (1993), 111-116.
cleansing, the fear of being raped caused thousands of non-Serb women to flee with their families.\textsuperscript{124}

Since ethnic cleansing predominantly occurred in areas that linked Serb inhabited areas in Bosnia-Herzegovina and Croatia with Serbia proper, it seems likely that this policy was conducted in furtherance of the Greater Serbia dream.\textsuperscript{125} The pattern and manner in which it was carried out also indicates that ethnic cleansing was planned and coordinated.\textsuperscript{126} For example, investigations into the ethnic cleansing of the town of Foca suggest that members of Karadzic’s inner circle planned and coordinated the cleansing that occurred there in April 1992.\textsuperscript{127}

Foca, whose population of 40,000 was 52 percent Muslim and 45 percent Serbian before the war, was one of the first towns to be seized by the Serbs. Three days before it was taken, Velibor Ostojic, the former Minister of Information in the pre-war Bosnian government and Minister of Information in the Karadzic Bosnian Serb government, arrived in Foca. With the help of local Serbian officials he allegedly helped plan and organise the arming of Serbian Democratic Party members and prepared the attack. After local Muslims failed to agree to his demands that they hand over all weapons and concede that Foca was a Serbian territory, Ostojic invited paramilitary troops from nearby towns in Serbia and Montenegro to cleanse Foca.\textsuperscript{128}

Muslims were rounded up and placed in prison camps where it is estimated 1,000 men were executed. It is alleged that a summary military court was set up, over which Ostojic and other Serbian officials presided.\textsuperscript{129} Hundreds of Muslims were bought before this court where they were either condemned to death or were sent to concentration camps. Ostojic is also alleged to have ordered the raping of Muslim women in Foca. As a result several rape camps were set up in the town.\textsuperscript{130}

In the Serb Republic of Krajina, Croatian Serb forces engaged in practices which closely resembled those used to cleanse non-Serb areas in Bosnia-Herzegovina. Similar, although less violent, practices were conducted against non-Serbs in Kosovo, Vojvodina and the region of Sandzak.\textsuperscript{131} Due to these campaigns it was speculated

\textsuperscript{124}Id., at 119-120.
\textsuperscript{125}See Final Report, supra note 1, para. 131-133.
\textsuperscript{126}Id., para 142.
\textsuperscript{127}Gutman, supra note 75, at 157-163.
\textsuperscript{128}A Bosnian Muslim from Foca confirmed that the paramilitaries that took control of the town came from Serbia as they spoke with an Ekovski dialect. Seventh Report on War Crimes in the Former Yugoslavia, reprinted in U.S. Department of State Dispatch Vol. 4, No. 16, at 262.
\textsuperscript{129}Gutman, supra note 75, at 162-163.
\textsuperscript{130}One victim reported that several women detained by the Serbs were separated into four groups and taken to separate houses confiscated from Muslim owners. There they were raped by local Foca Serbs until they were released 27 days later. Id., at 263.
\textsuperscript{131}Sandzak is located partly in Serbia and partly in Montenegro and has a predominantly Muslim population.
that the ethnic cleansing of Bosnia-Herzegovina was only part of a systematic policy to remove all non-Serbs from Serbian controlled areas, or at least significantly reduce their numbers.
THE INTERNATIONAL RESPONSE

The United Nations Commission on Human Rights

Appalled by the reports of widespread violations of human rights that were occurring in the former Yugoslavia, on 13 August 1992 the United Nations Commission on Human Rights convened the first special session in its history to discuss the human rights crisis in the former Yugoslavia. The Commission adopted a resolution on the situation of human rights in the territory of the former Yugoslavia, in which it condemned all violations of human rights within former Yugoslavia, especially the concept and practice of 'ethnic cleansing', and reminded all parties to the conflict of their obligations under humanitarian law. The Commission requested that a Special Rapporteur be appointed to investigate first hand the human rights situation in the former Yugoslavia, to make recommendations for bringing violations to an end, and to gather systematically information on possible human rights violations, including those which may constitute war crimes. Tadeusz Mazowiecki, the former Prime Minister of Poland, was subsequently appointed as the Special Rapporteur. Between August 1992 and July 1995 Mazowiecki conducted several missions to the former Yugoslavia and submitted eighteen reports that detailed the massive violations of international humanitarian law that were committed throughout former Yugoslavia.

After visiting Bosnia-Herzegovina in August 1992, Mazowiecki was stunned by the degree of suffering he witnessed. "Human rights," he said, "do not exist in Bosnia-Herzegovina." From what he witnessed, Mazowiecki concluded that although violations had been committed by all sides to the conflict, the Serbs were most to blame for the savagery. Such violations had reached a point where Bosnian Muslims felt they were threatened with extermination. In his reports to the Commission

3 Id., para. 2
4 Id., para. 9
5 Id., para. 12
6 Id., para. 13
7 Id., para. 14
Mazowiecki confirmed that in territory controlled by the Serbs, massive violations of human rights had occurred. These included killings, torture, beatings, rape, disappearances, destruction of houses and other acts or threats of violence aimed to force individuals from their homes.\(^\text{11}\) Mazowiecki asserted that the practice of ethnic cleansing followed the objectives of Serbian nationalist leaders who wanted to gain control over all territories in Bosnia-Herzegovina inhabited by large numbers of Serbs, in order to incorporate these areas into a ‘Greater Serbia’.\(^\text{12}\) Violations were not simply features of the armed conflict but were the means used to achieve ethnically homogeneous areas.\(^\text{13}\)

Human rights violations were not limited to Bosnia-Herzegovina. In Croatia Mazowiecki observed that people were still being detained and illegally evicted by Croatian authorities. In Kosovo ethnic Albanians were being discriminated against by Serbian officials, and thousands lost their jobs. The Albanian curriculum was replaced by a Serbian one, and several Albanians were imprisoned for allegedly trying to set up an independent Albanian state within Kosovo. In Sandzak and Vojvodina, the non-Serb population was also subject to discrimination.

In Macedonia Mazowiecki found that although certain irregularities had occurred without regard to the rights of national minorities, these problems were being approached within the framework of Macedonia’s constitution. The only Republic where, as far as Mazowiecki was concerned, the human rights situation was satisfactory was Slovenia.

Following the fall of the safe areas of Srebrenica and Zepa in July 1995 Mazowiecki resigned as the Special Rapporteur and was replaced by Elizabeth Rehn, the former Finnish Minister of Defence. In his letter of resignation Mazowiecki was critical of the way in which the international community allowed the two safe areas to fall into Serbian hands, even though the safety of both areas was guaranteed by international agreements.\(^\text{14}\)

### The Security Council

Although reports of summary executions of Muslims were given to UN peacekeepers in May 1992, the Security Council did not try to end the atrocities until

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\(^{12}\) Joyner, supra note 1, at 250.

\(^{13}\) Id.

July 1992 when it adopted the first stage of what has been described as a four-step process of condemnation, publication, investigation, and punishment.\(^\text{15}\)

Under Resolution 764 (1992), which was adopted on 13 July 1992, the Security Council reaffirmed that all parties to the conflict were bound by international humanitarian law and confirmed that those committing or ordering the commission of violations would be held individually responsible.\(^\text{16}\) On 4 August 1992, as more reports of atrocities came out of former Yugoslavia, the Security Council in a statement made by its President condemned the violations of international humanitarian law that had been committed in the former Yugoslavia.\(^\text{17}\) On 12 August 1992 the Security Council formally condemned the violations of international humanitarian law in Resolution 771 (1992), singling out those involved in the practice of ethnic cleansing.

In Resolution 771 (1992) the Security Council also called on states and international organisations to collate substantiated reports of humanitarian law violations and submit them to the Security Council.\(^\text{18}\) By highlighting the atrocities and emphasising individual accountability, it was hoped the atrocities might subside.\(^\text{19}\)

Before any reports were submitted, on 6 October 1992 the Security Council established a Commission of Experts to examine and analyse all violations of humanitarian law,\(^\text{20}\) and requested the Commission to pursue actively its investigations, especially those concerning the practice of ethnic cleansing.\(^\text{21}\)

The five member Commission\(^\text{22}\) commenced its activities in November 1992 and concluded its work on 30 April 1994.\(^\text{23}\) During this period the Commission held \(^\text{15}\) See James O’Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 Am. J. Int’l L. 639 (1993), at 640.
\(^\text{16}\) This Resolution departed from previous Resolutions 752 and 757, which only reminded the parties concerned of their obligations under international humanitarian law.
\(^\text{18}\) Reports were only received by some of the parties to the conflict and by the United States.
\(^\text{22}\) The Commission originally consisted of Professor Cherif Bassiouni (Egypt), Commander William Fendrick (Canada), Judge Keba Mbaye (Senegal), Professor Torkel Opsahl (Norway) and Professor Frits Kalshoven (the Netherlands), who was appointed chairman. However Professor Kalshoven resigned from the Commission for medical reasons in August 1993 and Professor Opsahl, who briefly was the acting chairman, passed away in September 1993. On 19 October 1993, Professor Bassiouni was appointed Chairman and Professor Christine Cleiren (the Netherlands) and Judge Hanne Sophie Greve (Norway) were appointed as new members.
\(^\text{23}\) The Commission considered this date premature as it had anticipated finishing its work on 31 July 1994. As a result it was forced to cease some of its investigations, in particular its investigation into rape and sexual assault, and its investigation into three mass grave sites in the former Yugoslavia.
12 sessions, in which substantive, methodological and organisational problems were discussed, a series of studies and on-site investigations were conducted,\(^\text{24}\) and an extensive database of all reported violations of humanitarian law was compiled.\(^\text{25}\)

After reviewing reports submitted by the Special Rapporteur of the Human Rights Commission, as well as other UN bodies and inter-governmental and non-governmental organisations, the Commission presented two interim reports\(^\text{26}\) and a final report\(^\text{27}\) to the Security Council.

In its final report, issued on 24 May 1994, the Commission concluded that grave breaches of the 1949 Geneva Conventions and other violations of humanitarian law had been committed on a large scale in the territory of the former Yugoslavia. The Commission also stated that ethnic cleansing and rape and sexual assault had been carried out so systematically that they appeared to be the product of state policy. Evidence for this could be inferred from the consistent failure of commanders to prevent the commission of such crimes and to prosecute and punish the perpetrators.\(^\text{28}\)

On 22 February 1993 the Security Council adopted Resolution 808 (1993) in which it decided in principle to establish an international tribunal to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia. When adopting the resolution the Security Council took into account the first interim report of the Commission of Experts in which the Commission observed that a decision to establish an ad hoc tribunal would be consistent with the direction of its work.\(^\text{29}\) The Security Council also took note of reports submitted to it by various states, including France,\(^\text{30}\) and the Conference for

\(^{24}\) Six on-site investigations were conducted by the Commission. These being an investigation into the siege of Sarajevo, two investigations into mass grave sites, a radiological investigation, an investigation into the bombardment of Dubrovnik and an investigation into the ‘Medak Pocket’ incident. Three separate studies were also conducted on the ethnic cleansing of the Prijedor area, the destruction of cultural property and rape. Id., at 798.

\(^{25}\) The database was established at De Pauls University in the United States and included 64,000 pages of documents submitted to the Commission by governments, inter-governmental organisations, non-governmental organisations and other sources, and 300 hours of video tapes, produced by public and private television networks and private sources. Id., at 795.


\(^{28}\) Id., para 2.


Security and Co-operation in Europe (CSCE), which had sent three investigative missions to the former Yugoslavia. The CSCE recommended that due to the urgency of adjudicating cases concerning war crimes it was necessary to establish an ad hoc tribunal instead of waiting for the draft statute for an International Criminal Court to be drafted by the International Law Commission. The French study stated that such a tribunal could be established by a resolution of the Security Council acting under Chapter VII of the UN Charter.

On 3 May 1993, pursuant to Resolution 808 (1993), the Secretary-General submitted to the Security Council a detailed report covering the working of the Tribunal and the legal basis for its establishment. Annexed to it was a draft of the Tribunal’s Statute.

In his report the Secretary-General stated that the Tribunal should be established under Chapter VII of the UN Charter as a subsidiary organ of the Security Council. It should perform its functions independently of political considerations and should not be subject to the authority or control of the Security Council with regard to the performance of its judicial functions. Its life span should be linked to the restoration and maintenance of international peace and security in the territory of the former Yugoslavia. The seat of the Tribunal should be at the Hague.

The Secretary-General proposed that the Tribunal should consist of three organs: (1) the Chambers, comprising two Trial Chambers and an Appeals Chamber, (2) the Prosecutor, (3) and a Registry which should serve both the Chambers and the Prosecutor. The Chambers should be composed of a total of 11 Judges, no two of whom would come from the same State. Three Judges should serve in each of the Trial Chambers and five should serve in the Appeals Chamber. Judges should be elected for a four year term by the General Assembly from a list of nominees put forward by Member States and short-listed by the Security Council. When doing this the Security Council should ensure that the principal legal systems of the world were represented.

32 Id., para. 17(a).
33 French Report, supra note 30, para. 34-37.
35 The drafting of the statute involved significant consultations with governments, non-governmental organisations and individual experts. The Under Secretary-General and Legal Council of the United Nations, Carl-August Fleischhauer, and the Deputy Legal Counsel of the United Nations, Ralph Zacklin, supervised the drafting.
The Establishment of the Tribunal

On 25 May 1993 in Resolution 827 (1993) the Security Council approved the Secretary-General’s report and established a tribunal “for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace...” The Security Council also adopted the Statute of the Tribunal prepared by the Secretary-General without change and declared that all states must cooperate fully with the Tribunal and take any measures necessary under their domestic law to implement its Statute.36

The establishment of the Tribunal expressed the Security Council’s determination to put an end to the violations of international law that were being committed in former Yugoslavia and to bring the perpetrators of the violations to justice. Following the recommendations of the Secretary-General the Tribunal was established under the authority conferred on the Security Council by the UN Charter. Article 24(1) of the UN Charter provides:

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.

Furthermore, Article 25 requires all member states to accept and carry out the decisions of the Security Council.

Chapter VII of the UN Charter enables the Security Council, after determining the existence of any threat to the peace, breach of the peace or act of aggression, to make recommendations, or take measures to maintain or restore international peace and security.37 Article 41 of the UN Charter entitles the Security Council to decide “what measures, not involving the use of armed force, are to be employed to give effect to its decisions” and enables the Security Council to “call upon the members of the United Nations to apply such measures.” While this article lists certain measures

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36 The Security Council did not want to open the door for amendments and revisions for they feared that this would delay the adoption of the Statute. Consequently some important clarifications and refinements of the Statute were not made. M. Cherif Bassiouni, Former Yugoslavia: Investigating Violations of International Humanitarian Law and establishing an International Criminal Tribunal, 25 Security Dialogue 409 (1994), at 415.
that the Security Council may take, this list is not exhaustive. The measures specified only illustrate the types of measures the Security Council may take. So long as a measure will restore or maintain international peace and security and does not involve the use of armed force it is permissible under Article 41. After determining in the preamble to Resolution 808 (1993) that the continuing violations of international humanitarian law occurring within the territory of the former Yugoslavia constituted a threat to international peace and security the Security Council was entitled to take measures under Chapter VII of the UN Charter to stop the violations.

The establishment of a tribunal to prosecute violations of international humanitarian law committed in the former Yugoslavia was a legitimate measure for the Security Council to take. The possibility of prosecution would discourage would-be-perpetrators from committing atrocities. In addition, prosecuting those responsible for committing the atrocities would defuse ethnic tensions as blame would not be assigned to an entire nation, but will rest on individual perpetrators.

Criticisms regarding the establishment of the Tribunal and the adoption of its Statute by means of a Security Council resolution have been made. The strongest protests came from the Federal Republic of Yugoslavia, which claimed that "under the Charter of the United Nations, the Security Council has no mandate to set up a tribunal or to adopt its statute." It argued that Chapter VII of the UN Charter did not contain provisions necessary to establish an ad hoc tribunal, and furthermore no independent organ could be established as a subsidiary organ of the Security Council under Article 29.

As already shown the Security Council has the mandate to set up the Tribunal under Chapter VII of the UN Charter. The Federal Republic of Yugoslavia’s first criticism was therefore without basis. Its second criticism, regarding inappropriately establishing the tribunal as a subsidiary organ of the Security Council, is also unfounded. While the Security Council is not a judicial organ and is not provided

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with judicial powers, the establishment of the Tribunal by the Security Council does not signify that the Security Council delegated to the Tribunal some of its own powers. Nor does it mean that the Security Council was adopting for itself part of a judicial function which does not belong to it. The Security Council merely resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security.  

Two other approaches for setting up the Tribunal were proposed, these being international treaty or resolution of the General Assembly. Normally a tribunal of this nature would have been established by an international treaty. All previous international tribunals set up to try war criminals were established by a treaty. Id., at 385. An appropriate international body would draft and adopt the treaty and would then open it for signature and ratification. For instance, the Nuremberg Tribunal which prosecuted the Nazi war leaders was established by the London Agreement and such a procedure is currently being followed by the International Law Commission in its attempts to set up a Permanent International Criminal Court. As many commentators believe that the establishment of a tribunal by way of a treaty would affect state sovereignty, it is necessary that states participate in the negotiation and conclusion of the treaty, and more importantly have the opportunity to decide whether they wish to become parties to the treaty.

However, adopting the treaty approach to set up a tribunal to prosecute violations committed in the former Yugoslavia had serious disadvantages. Considerable time would have been required to establish the draft of the treaty, and then to achieve the required number of ratifications necessary for the treaty to come into force. Such a delay would occur no matter how narrowly the group of participating states was defined.

Even then there would be no guarantee that ratifications would be received from states which should be parties to the treaty. Since a treaty only binds parties that sign it, if a state such as Serbia, whose agreement is vital, refused to sign the treaty the Tribunal would be rendered meaningless. Without the participation of all interested

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44 It is worth noting that even though the General Assembly did not have military and police functions, it nevertheless established the United Nations Emergency Force in the Middle East. Appeal’s Decision, supra note 38, para. 38.
45 All previous international tribunals set up to try war criminals were established by a treaty. Id., at 385.
46 Secretary-General’s Report, supra note 34, para. 19.
47 French Report, supra note 30, para 27.
50 Kolodkin, supra note 42, at 387.
states, there would be difficulties obtaining alleged perpetrators and possible witnesses.\textsuperscript{51} If the Tribunal lacked the means to exercise its jurisdiction there would be no point creating it. Because of the need to act quickly and the importance of assuring that the Tribunal covered all relevant states, the Tribunal was not set up by way of a treaty.

Establishing the Tribunal by resolution of the General Assembly was also dismissed as a possibility. Article 22 of the UN Charter allows the General Assembly to “establish such subsidiary organs as it deems necessary for the performance of its functions.” Since one of the purposes of the United Nations is to encourage “respect for human rights and for fundamental freedoms for all,” the creation of an international tribunal to prosecute those who commit violations of international humanitarian law would accomplish this purpose.\textsuperscript{52} Unfortunately the UN Charter does not confer on the General Assembly the competence necessary to create the Tribunal itself. While reviewing possible ways of establishing a permanent international criminal court, the Committee on International Jurisdiction concluded that under the UN Charter a permanent international criminal court could only be established as a subsidiary organ of the General Assembly, “but a subsidiary body could not have a competence falling outside the competence of its principal, and it (is) questionable whether the General Assembly (is) competent to administer justice.”\textsuperscript{53} This finding would equally apply if the General Assembly adopted a resolution establishing the Tribunal.

The Organisation of the Islamic Conference felt that the General Assembly should be involved in the establishment of the Tribunal, but in a limited role. It proposed that while the Security Council should adopt a resolution establishing the Tribunal in accordance with Chapter VII, the General Assembly should be allowed to approve the provisions of the Tribunal’s Statute.\textsuperscript{54} This proposal was also unsound as the Charter does not allow the General Assembly to adopt mandatory decisions. The General Assembly is only empowered to make recommendations to its members.\textsuperscript{55} To ensure that states cooperate with the Tribunal, and orders and decisions made by the Tribunal are binding on all states, any decision made to set up a Tribunal to prosecute those who violate international humanitarian law must be mandatory.

\textsuperscript{51} Id. See also Secretary-General’s Report, supra note 34.
\textsuperscript{52} U. N. Charter, supra note 37, art. 1.
\textsuperscript{54} Letter dated 31 March 1993 from the Permanent Representatives of Egypt, Iran, Malaysia, Pakistan, Saudi Arabia, Senegal, and Turkey, on behalf of the Organisation of the Islamic Conference, Addressed to the Secretary-General, U.N. Doc. S/25512. para. 2. See Kolodkin, Id., at 388-389.
\textsuperscript{55} U. N. Charter, supra note 37, art. 10.
THE DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW

According to paragraph 1 of Resolution 808 (1993) the Tribunal shall prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.¹

International humanitarian law guarantees the protection of persons who are not, or who no longer take part in, military action.² These laws safeguard military personnel hors de combat, and protect different categories of persons not taking part in the hostilities, in particular the civilian population. Civilian objects are also protected. Furthermore, humanitarian law determines the rights and duties of belligerents in the conduct of military operations and limits the choice of means for causing injury and suffering to the enemy.³

The term “humanitarian law” itself, is a recent concept. The four 1949 Geneva Conventions refer only to humanitarian activities and humanitarian organisations. Although commentators in the early 1950s started using the term humanitarian law, the International Committee of the Red Cross (ICRC) in 1956 still referred to these laws as “rules in international law, deriving in particular from the instruments of Geneva and the Hague.”⁴ In 1965 the term appeared in Resolution XXVIII of the XXIInd International Red Cross Conference in Vienna.⁵ In Resolution XXIII on “Human Rights in Armed Conflicts”, adopted by the International Conference on Human Rights in Teheran on 12 May 1968, the term was specified to cover the regulations set down in the Hague Conventions of 1899 and 1907, the Geneva Protocol of 1925 and the Geneva Conventions of 1949.⁶ These instruments incorporate many customary laws that have their origins in age-old patterns of behaviour in combat.⁷ In 1970 the term was formally adopted by the General Assembly in Resolution 2677/XXV.⁸

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³ Id
⁵ Id
⁶ Id
⁷ Gasser, supra note 2, at 15.
This chapter analyses the development of international humanitarian law. It also sets out the history of war crimes trials, examines various instruments which have codified international humanitarian law and assesses how the international community has applied these instruments to prosecute persons who violate international humanitarian law.

The Development of the Laws and Customs of War

Although Cicero once said "in times of war law is silent"\(^9\), many ancient societies tried to regulate armed conflict in order to limit its brutality. In the Art of War, Sun Tzu wrote that in war armies should attack enemy armies. Cities should not be attacked unless there is no alternative.\(^10\) In India the Law of Manu prohibited the killing of unarmed, sleeping or wounded enemy soldiers and prohibited the use of certain weapons, such as poisoned weapons.\(^11\) While these were gallant attempts to limit the brutality of war only a few states introduced such laws. Beliefs similar to the Roman principle *adversus hostem aeterna auctoritas esto* (everything is lawful against the enemy) prevailed in most ancient societies.\(^12\)

As Christianity spread throughout Europe, attempts were made to humanise war. In 511 AD the Council of Orleans introduced the right of asylum,\(^13\) and in 989 A.D. the trace of God, pronounced at the Council of Charroux, decreed that sacred places were to be protected from destruction, and that priests, women and pilgrims were not to be slaughtered.\(^14\) Later councils decreed that no fighting was to take place during certain periods of the year, such as Easter and Christmas,\(^15\) and prohibited the use of the crossbow and certain other types of weaponry.\(^16\)

Towards the end of the middle ages many belligerents began to employ full-time armies, consisting mainly of mercenaries. The prospects of gaining quick riches by looting, extortion, booty and ransom drove many into battle.\(^17\) Once again the brutality of war escalated, most notably during the Thirty Year War (1618-1648).\(^18\) The conduct of belligerents during this time prompted many jurists and theologians to

\(^{11}\) Id.
\(^{13}\) Id.
\(^{14}\) Id.
\(^{15}\) The Council of Elne, pronounced in 1027, protected these holy periods. Id.
\(^{16}\) In 1139 the Second Lateran Council condemned the use of the crossbow and the arc. Green, *supra* note 10, at 21.
\(^{17}\) Encyclopaedia of Public International Law, vol. 3, *supra* note 4, at 182.
write on the concept of war. Based on the principle that there are general laws binding on all men regardless of nationality, in 1625 Hugo Grotius wrote Du Jure Belli Ac Pacis (The Laws of War and Peace). In his work Grotius concluded that war should be governed by a strict set of rules. These rules should be followed at all times no matter how unjustly an enemy belligerent acted. Violence should also be limited to that necessary to secure the military goal. A century later Jean-Jacques Rousseau reiterated Grotius’s ideas and stressed that belligerents should distinguish combatants from non-combatants and attacks should be limited to armed combatants.

Unfortunately as the majority of European States at the time were concerned with the conquest and enslavement of large parts of Africa, Asia and the Americas, the theories of writers such as Grotius and Rousseau had little influence. It was not until the 19th century, in response to the changing nature of warfare, the massive advances in technology and the increased rivalry between the major powers of Europe and North America, that states made concerted efforts to codify the conduct of war.

The first modern codification of the laws of war occurred when Francis Lieber drafted comprehensive rules on land warfare for the Union Army during the American Civil War (1861-1865). Although intended by Lieber to be a purely internal code, the ‘Lieber Code’ became the basis for subsequent international attempts to codify the rules of war.

The St Petersburg Declaration, which outlawed the use of small exploding projectiles in combat, was the first major convention to introduce rules reducing the calamities of war. Although not ratified by states, codes drafted at the 1874 Brussels Conference, and by the Institut de Droit International in 1880, provided the basis for

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19 af Jochnick & Normand, supra note 9, at 62.
20 "Since the aim of warfare is to subdue a hostile state, a combatant has the right to kill the defenders of the state while they are armed; but as soon as they lay down their arms and surrender, they cease to be either enemies or instruments of the enemy; they simply become men once more and no one has any longer the right to take their lives.” Jean Paul Rousseau, quoted in Edward Kwakwa, The International Law of Armed Conflict: Personal and Material Fields of Operation, Doordrecht; Boston: Kluwer Academic Pub. (1992), at 10.
21 af Jochnick & Normand, supra note 9, at 62.
22 Id.
24 The rules embodied in the Lieber Code appeared in similar manuals and codes issued by Prussia 1870; the Netherlands, 1871; France, 1877; Russia, 1877 and 1904; Serbia, 1878; Argentina, 1881; Great Britain, 1833 and 1904; and Spain, 1893. Green, supra note 10, at 27.
25 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, signed at St Petersburg, 29 November 1868, reprinted in Schindler and Toman, supra note 23, at 101.
26 The Brussels Declaration confirmed the principles underlying the St Petersburg Declaration by drawing up rules regulating the conduct of land warfare. The most significant being the prohibition on bombardment of unfortified towns. This and the other rules were seen as to humanitarian by the great powers who all refused to ratify the agreement. af Jochnick & Normand, supra note 9, at 67.
the laws of war which were drafted and ratified at the Hague Peace Conferences in 1899 and 1907. The conventions ratified at the Hague Conferences confirmed that the means of warfare were not unlimited. Those not taking part in the hostilities were not to be made targets of attack. Combatants taken prisoner were given certain rights, including the right not to be punished for their legitimate acts of warfare.

The Red Cross and the Geneva Conventions

At the same time that attempts were being made to codify the conduct of war, attempts were being made to reduce the suffering caused by war. In 1859 during the Battle of Solferino a young Swiss national, Henri Dunant, tried as best he could to take care of some of the forty thousand soldiers that were wounded. Distressed by the suffering he witnessed, in 1862 Dunant published the booklet, *A Memory of Solferino*, in which he proposed that arrangements be made between states to care for the wounded and sick of armies in the field. He also proposed that voluntary organisations be set up in each country to care for those wounded in battle, regardless of nationality. Dunant's first proposal led to the signing of the Geneva Convention, while his second was the basis for the founding of the Red Cross. In 1864 sixteen states met in Geneva and drafted the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. This convention provided protection for the sick and wounded, medical and religious personnel and all other persons caring for the wounded, and for hospitals and ambulances. This convention was revised in 1906.

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27 The Institut de Droit, an unofficial body of highly respected leading scholars, produced the Manual of the Laws of War on Land at its Oxford Conference in 1880. Although the Manual contained a comprehensive list of laws governing war, it was never intended to be the basis of an international treaty. Id.
29 Convention (IV) Respecting the Laws and Customs of War on Land, signed at the Hague, 18 October 1907, reprinted Schindler and Toman, Id., at 63.
30 Under Article 25 of the Fourth Hague Convention the attack and bombardment by whatever means of towns, villages, dwellings or buildings which are undefended, is prohibited. Id.
31 Article 4, Fourth Hague Convention, Id.
33 Reprinted in Schindler and Toman, supra note 23, at 279.
34 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 6 July 1906, reprinted in Schindler and Toman, Id., at 301.
Customary Law and the Punishment of War Criminals

Although neither the Hague nor the Geneva Conventions stated that individuals who breached the laws of war would be punished, customary law had for a long time granted belligerents the right to punish captured members of enemy belligerents who had breached the laws and customs of war.\(^{35}\)

In 1474 Peter von Hagenbach was condemned to death for allowing those under his command to murder, rape and loot, in order to subjugate the citizens of Breisach in the Upper Rhine.\(^{36}\) Following the American Civil War, several confederate soldiers who had served as guards in confederate prison camps were tried by Federal courts for mistreating prisoners.\(^{37}\) During the Boer War, a British court sentenced a Boer officer to death for deliberately misusing a white flag.\(^{38}\)

Violators of the laws and customs of war could also be prosecuted by their own military courts since belligerents had the right to court martial members of their armed forces who violated the national military code.\(^{39}\) However because of nationalistic, patriotic or propagandistic considerations such trials were rare.\(^{40}\) One case that was tried occurred during the Boer War when three Australian officers were court martialled for shooting Boer prisoners and murdering Boer civilians. All three were convicted and two were sentenced to death.\(^{41}\)

The First World War - The Scandal of the Leipzig Trials

During the First World War the German Army and Navy were frequently accused of violating the laws of war. Several German prisoners were tried by French military courts for breaching such laws.\(^{42}\) The German authorities also alleged that war crimes were being committed by their enemies and established an organisation to investigate such claims. Although most of the allegations were unsubstantiated the


\(^{36}\) Id., at 18-19.


\(^{38}\) Id., at 16.


\(^{40}\) Id.

\(^{41}\) Levie, *supra* note 37, at 16.

\(^{42}\) Id., at 19.
German authorities did try the captain of a British steamship for attempting to ram a German submarine. Because merchant ships and their personnel were prohibited from committing acts of hostility against the enemy, the captain was convicted of violating the laws of war.\(^{43}\)

After hostilities ceased the Allied powers established a commission to determine where the responsibility for the war lay, the extent to which the Central Powers had violated the laws and customs of war, the degree to which individuals should be responsible for such breaches, and the rules and procedure under which a war crimes tribunal could operate.\(^{44}\) From their findings the commission concluded that responsibility for the war lay primarily with Germany and Austria-Hungary and secondly with Turkey and Bulgaria, that the Central Powers had fought the war by barbaric and illegitimate means, and that all those who committed war crimes could be prosecuted, regardless of rank.\(^{45}\)

By finding that all individuals, regardless of rank, could be prosecuted for war crimes they committed the commission denied head of states from claiming that they could not be responsible for breaching the laws and customs of war on the ground of sovereign immunity. The United States objected to this finding, as it felt that subjecting Heads of State in this way was unprecedented in national and international law, and would be contrary to the concept of national sovereignty. Notwithstanding the dissent of the United States, Article 227 the Treaty of Versailles charged the German Kaiser, Wilhelm II, with the "supreme offence against international morality and the sanctity of treaties."\(^{46}\)

Because the Kaiser had been granted asylum in the Netherlands after he abdicated from the German government, Article 227 also asked the government of the Netherlands to surrender the Kaiser so that he could be put on trial. Despite massive diplomatic pressure the government of the Netherlands refused. It felt that the concept of national sovereignty allowed a Head of State to decide to go to war. Consequently, the Versailles Treaty was charging the Kaiser with what was essentially a political offence. As such the Netherlands were entitled to refuse the request for extradition.\(^{47}\)

\(^{43}\) The accused, Captain Fryatt, was convicted under the Eighth Hague Convention 1907 and Art. 12(2) of the 1913 Oxford Manual of Naval Warfare of the Institute of International Law. For an analysis of the trial see Id., at 20-21.


\(^{45}\) Id.


Articles 228 to 230 gave the Allies the right to try persons accused of having violated the laws and customs of war. Article 228 required the German government to recognise "the right of the Allied and Associated powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war." Article 229 enabled Allied nations to try Germans accused of war crimes in their own national military courts, unless more than one Allied nation was involved, in which case the alleged offenders would be tried in front of a tribunal comprised of individuals from the Allied nations concerned. Article 230 required the Germans to surrender all information requested by the Allies for the prosecution of those accused and any information relating to the identification of additional war criminals.

Before the Treaty came into effect the Germans indicated that compliance with these provisions was an impossibility and suggested that they could try the persons themselves. Nevertheless the allies presented a list to the German government containing the names of 896 people accused of committing war crimes. These included von Hindenburg, Ludendorf, von Tirpitz and von Moltke. But by now the Allies were no longer united in their commitment to try accused war criminals. So when the German government insisted again that the extradition of those named was a physical and moral impossibility, the Allies accepted the German proposal to have cases tried before the Supreme Court of Leipzig.

The subsequent trials were a farce. Of the 896 Germans who were accused of having committed war crimes, all but 13 were either acquitted or had the case against them dismissed, and those who were convicted were given inadequate sentences. The last case to be tried typified the inadequate nature of the trials. John Boldt and Ludwig Dithmir were charged with firing on the crew and passengers of the British hospital ship, the Llandovery Castle, after the U-boat they were serving on torpedoed her. Of the 258 persons who were on board the vessel only 24 survived. Boldt and Dithmir were found guilty and were each sentenced to four years in prison. However with official approval and massive public support both men succeeded in escaping.

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48 Levy, supra note 37, at 28.
49 Id. The list was divided into two classes. One contained the names of those allegedly responsible for formatting and implementing war policies, while the other contained the names of those charged with cruelty to prisoners-of-war and those charged with submarine atrocities.
50 President Wilson was reserved about the trials as he felt they would embitter post-war relations, making it more difficult to establish the new order for which he thought the war had been fought. J. F. Willis, Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War, Connecticut: Greenwood Press, (1982), at 47-48.
51 Levy, supra note 37, at 29.
52 Id.
from prison and making their way to Sweden within a few months of being convicted. The German government made no effort to secure their return.53

Although similar provisions to Articles 228 to 230 were included in the treaty with Austria-Hungary and the Allies did request that those accused be handed over, no trials were held. Provisions for war crime trials were also included in the cease-fire agreement between the Allies and Turkey, but the Treaty of Lausanne which replaced this agreement exempted individuals from criminal responsibility.54

Attempts to Outlaw War

By 1923 the Allies had lost their desire to prosecute German war criminals. Instead the efforts of the international community turned to outlawing war. In 1928 the International Treaty for the Renunciation of War as an Instrument of National Policy, otherwise known as the Pact of Paris or the Kellogg-Briand Pact, was signed.55

The following year the 1906 Geneva Convention on the Amelioration of the Condition of the Wounded and Sick in Armies in the Field was redrafted.56 As the experiences of the First World War had shown that the articles contained in the Hague Convention relating to the treatment of prisoners of war were insufficient, a separate Geneva Convention dealing with the treatment of prisoners of war was also drafted in 1929.57

At the XVth International Red Cross Conference held in 1934 in Tokyo a draft proposal for a convention on the protection of civilians during war was circulated amongst delegates for their appraisal. States were invited by the Swiss Council to attend a conference to be held in Geneva in 1940 to discuss the implementation of this convention. But, because of the outbreak of the Second World War, this conference was never held. Although the ICRC proposed that all belligerents follow the guidelines laid down in the proposed convention on the treatment of civilians, this proposal was unsuccessful. The civilian population was therefore left with practically no protection under international law during the course of the war.58 Combatants were given protection as the majority of states fighting in the Second World War were

53 Id., at 34.
54 Id., at 36.
55 Kellogg-Briand Pact, 27 August 1928, 46 Stat. 2343, 94 L. N. T. S. 57. As asserted in Article 1 of this instrument, "(t)he High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another."
56 Reprinted in Schindler and Toman, supra note 23, at 325.
58 Encyclopaedia of Public International Law, vol. 3, supra note 4, at 184.
signatories to the two Geneva Conventions and the Hague Conventions. However, the prisoner of war convention of 1929 did not apply to the Soviet Union or Japan, as neither state was a party to it.59

The Second World War and the Nuremberg Tribunal

Not long after the outbreak of the Second World War, it became clear that the German Army was committing atrocities on a wide scale. Such actions were condemned by the Allied leaders who declared that retribution for these crimes would become one of the major purposes of the war.60

On 20 October 1943 the United Nations War Crimes Commission was established to “identify war crimes suspects and collect and organise evidence of and about war crimes.”61 Although it collected thousands of pages of documents, the commission had little influence in the trials of Nazi war criminals that were conducted by the Major Allied Powers after the war ended. The Nuremberg Tribunal, established to prosecute the major Nazi war criminals, used its own investigation unit to secure the evidence it needed to commence prosecutions.62 So did the four Allied Powers who occupied Germany after the war ended.63 The commission’s work did benefit trials conducted by countries occupied by the Axis forces. Once sufficient evidence of an atrocity had been obtained the commission passed the evidence over to the country in which the atrocity took place, with the recommendation that the persons who carried out the atrocity be prosecuted. The commission also performed valuable legal research on the concept of war crimes, and provided advice to several governments on how to set up and conduct prosecutions.64

In November 1943 the Allied leaders signed the Declaration of Moscow, whereby they gave notice to all Germans who committed war crimes that they would be held accountable for their actions. The declaration also stated that war criminals would be returned to the country “in which their abominable deeds were done, with the exception of major war criminals whose offence had no specific geographic

59 As the Soviet Union was not a party to the Convention, the German authorities refused to afford Soviet prisoners the protection accorded to prisoners under the convention. Green, supra note 10, at 38.
60 The St James Declaration, of 3 January 1942, declared that the Allies “place among their principal war aims the punishment, through the channel of organised justice, of those guilty of and responsible for these crimes, whether they have ordered them, perpetrated them or in any way participated in them.” Burnett, supra note 39, at 85.
62 Cherif Bassiouni, supra note 47, at 788.
63 Although the French and British authorities did make use of some of the information obtained by the commission. Id.
64 Id., at 787.
location.” These war criminals would be punished by a joint decision of the Allied governments. On 8 August 1945 representatives of Great Britain, France, the United States and the Soviet Union signed the London Agreement, which established the Nuremberg Tribunal. The Charter of the Nuremberg Tribunal, containing its rules and procedure, was annexed to the agreement.

The Nuremberg Tribunal was composed of four judges, one from each of the four major Allied powers. Lord Justice, Sir Geoffrey Lawrence, the British judge, was elected as the president of the Tribunal. The remaining three judges were Francis Bibble, the United States Attorney General, Professor Donnedieu de Vabres of the University of Paris, and General J. T. Nikitchenko, Vice President of the Soviet Supreme Court. Since Nikitchenko had assisted in the drafting of the Charter, it was disturbing that he was appointed to sit as a judge, because almost every day the Nuremberg Tribunal was called upon to rule on matters relating to the construction of the charter.

Article 6 of the Nuremberg Charter provided the Nuremberg Tribunal with the jurisdiction to try three types of crimes for which there would be individual responsibility, namely:

a) Crimes Against The Peace: Namely, planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan, or conspiracy for the accomplishment of any of the foregoing;

b) War Crimes: Namely, violations of the laws or customs of war. Such violations shall include, but shall not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, town or villages, or devastation not justified by military necessity;

c) Crimes Against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before or during the war, or persecutions on political, racial or

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65 By using the word punished the Allies left open the possibility of summarily executing war criminals, a option advocated by many allied politicians. Wexler, supra note 61.
67 Levie, supra note 37, at 63.
religious grounds in execution of or in connection with any crime within
the jurisdiction of the Tribunal, whether or not in violation of the
domestic law of the country where perpetrated.

While individual responsibility for war crimes was already established by
customary and conventional law, it was not clear at the time that the Nuremberg
Charter was drafted whether individual responsibility existed for crimes against the
peace or crimes against humanity.\footnote{Sunga, supra note 35, at 32-48.} If it did not then these crimes were \textit{ex post facto}
and the maxim \textit{nullum crimen sine lege} had been broken.\footnote{Under this rule individuals should not be penalised for actions not criminal at the time they
were committed.}

The Nuremberg Tribunal ruled that individuals were liable for committing
cries against the peace on the basis of the Nuremberg Charter, which they
characterised as "decisive and binding upon the Tribunal," and also on the basis of
existing international law. However, given that the Nuremberg Tribunal did not
define what this ‘existing law’ was their decision was questionable.\footnote{Encyclopaedia of Public International Law: Use of Force, War and Neutrality, Peace Treaties,
vol. 4 N-Z, Amsterdam: North Holland Publishing Co. (1981) at 52.} The Kellogg-
Briand Pact made no reference to individual responsibility when it outlawed war, and
other treaties and conventions, such as the Hague Conventions and the Treaty of
Versailles, were also silent on the issue.\footnote{Sunga, supra note 35, at 38.} While it is true that the planning, preparing
and the carrying out of a war of aggression is done by individuals, existing law at the
time only placed liability on the state. Arguments that the offence of crimes against
the peace was an \textit{ex post facto} law were therefore well founded.\footnote{Id.}

To a lesser extent it was argued that individual responsibility for the offence of
cries against humanity was also \textit{ex post facto} law. No one before Nuremberg had
been charged or convicted of such an offence. While it might be true that crimes
against humanity were first defined in the Nuremberg Charter, the notion of such a
crime existed long before the Second World War began.\footnote{Id., at 41-44.} The de Martens preamble
to the Hague Convention referred to the “principles of the laws of humanity,”\footnote{The de Martens clause provided for the continued relevance of customary law when treaty law
was not available. Green, supra note 10, at 32.} and in 1915 the term was used in a letter addressed to the Turkish government by the Allied
governments condemning the Turkish massacre of the Armenian people.\footnote{Sunga, supra note 35, at 42.} The
Commission set up by the Allies after the end of the First World War to investigate

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violations of the laws and customs of war committed by the Central Powers also
recognised that crimes against humanity were distinguishable from war crimes.\textsuperscript{76}

Crimes against humanity were included separately in the Nuremberg Charter so
that crimes committed by the Germans against other Germans or against the
populations of other Axis countries, before and after the war, were within the
jurisdiction of the Nuremberg Tribunal. Such crimes were not covered under the
definition of war crimes.\textsuperscript{77} The Nuremberg Tribunal, however, limited the scope of
crimes against humanity by requiring that such crimes had to be committed in
execution of, or in connection with, a crime within its jurisdiction. This restriction did
not greatly affect inhumane acts committed after the war commenced as there was a
presumption that such acts were committed in connection with the waging of
aggressive war. However, inhumane acts committed before the war were only judged
by the Nuremberg Tribunal if it was shown that they were committed in execution of,
or in connection with, the aggressive war waged by the Nazis.\textsuperscript{78}

Under Articles 9 and 10 the Nuremberg Charter provided that certain groups or
organisations could be declared criminal. Consequently members of those groups or
organisations could be subsequently convicted on the basis of individual liability for
the collective criminality of the organisation or group.\textsuperscript{79}

The Nuremberg trial was conducted by prosecution teams from each of the four
major Allied powers. After initially disagreeing on who were going to be indicted, the
prosecution indicted 24 individual defendants as well as 7 organisational defendants
on 29 August 1945. 22 individuals were eventually tried, and of these, 19 were
convicted. Four of the organisational defendants were also found guilty.\textsuperscript{80}

In its judgment the Nuremberg Tribunal stated that the rights of humanity
prevailed over municipal law. Thus individuals had international duties that went
beyond national obligations.\textsuperscript{81} Following Article 7 of the Nuremberg Charter, the
Nuremberg Tribunal held that individuals could not obtain immunity while acting in
the pursuance of the authority of the state, if the state was violating international
law.\textsuperscript{82} The Nuremberg Tribunal also reiterated Article 8 by stating that obedience to

\textsuperscript{76} Id.
\textsuperscript{77} Encyclopaedia of Public International Law vol. 4, \textit{supra} note 70, at 53.
\textsuperscript{79} This provision was included as a quick way to convict the hundreds and thousands of
Schutzstaffel who had run the concentration camps and committed other atrocities. See remarks by
Telford Taylor, \textit{Forty Years After the Nuremberg and Tokyo Tribunals: The Impact of the War Crimes
\textsuperscript{80} For a detailed description of the trials see T. Taylor, \textit{The Anatomy of the Nuremberg Trials},
\textsuperscript{81} Encyclopaedia of Public International Law vol. 4, \textit{supra} note 70, at 53.
\textsuperscript{82} Id.
superior orders did not free individuals from responsibility, but did say that if an individual had no moral choice in carrying out the illegal order then he was entitled to the defence of duress. 83

Control Council Law No. 10

After the trial of the major Nazi war criminals ended, the Nuremberg Tribunal was dissolved and the task of prosecuting the thousands of other individuals who were alleged to have committed war crimes was passed to each of the four occupying powers. Because each occupying power had its own system of law, Control Council Law No. 10 was enacted by the Allied Control Council of Germany to establish a common basis for conducting the trials. 84 Article II of Law No. 10 incorporated the offences covered by the Nuremberg Charter with only a few alterations. Paragraph 1(a) of this article expanded the doctrine of crimes against the peace to include initiating invasions of other countries and wars of aggression. Paragraph 1(c) relating to crimes against humanity did not include the provision that offences had to be committed before or during war and did not include the limiting phrase “in execution of or in connection with any crime within the jurisdiction of the Tribunal.” Acts committed against Germans before the outbreak of the war were thus considered to be crimes against humanity regardless of whether they were committed in relation to a crime against the peace. 85

Between 1945 and 1949 the four occupying powers conducted many trials in Germany of Nazi war criminals. Other European nations, as well as Australia, Canada and China, conducted trials of suspected Nazi war criminals, in either their regular courts or in special war crimes tribunals. Trials were also conducted by the courts of the Federal Republic of Germany, and by a number of Germany’s former allies. As the Soviet Union and many Eastern European countries included collaboration as a war crime, it is unclear exactly how many Nazi war crime trials were held, and how many people were tried. 86 Reports from the German Minister of Justice, published in 1965, indicate that 5025 Germans were tried in Germany by French, English and American courts, 5426 by German courts 87 and about 70,000 by courts outside Germany. 88

83 Sunga, supra note 35, at 58.
84 Levie, supra note 37, at 71.
85 Id., at 72.
86 Id., at 137.
87 Id., at 138.
88 This figure was revised to 6,100 the following year. Id., at 138.
89 Id.
The Tokyo Trial

While the Nuremberg Tribunal was created by international negotiation and agreement, the Tokyo Tribunal set up to prosecute Japanese war criminals was not. It was created by a charter attached to a proclamation by General Douglas MacArthur, the Supreme Commander of the Allied Powers in the Far East. The Tokyo Tribunal was in many respects similar to the Nuremberg Tribunal, although there were differences in its composition and the way in which the prosecution was structured. The members of the Tokyo Tribunal included representatives from all the Allied countries that signed the Japanese surrender, and not just from the four major Allied powers. Two representatives from countries that sat on the Far Eastern Commission were also included. The President of the Tokyo Tribunal was appointed by General MacArthur and not by the Tribunal itself. As for the prosecution teams, unlike Nuremberg where all the prosecution teams were of equal standing, the United States representative on the prosecution team was declared the chief prosecutor. Another difference between the Tokyo Charter and the Nuremberg Charter was that while the decision of the Nuremberg Tribunal was final, the Tokyo Charter allowed the Supreme Commander of the Allied Powers for the Far East to reduce or alter, but not increase, the sentence of those found guilty.

The Tokyo Charter called for the just and prompt trial and punishment of the major war criminals in the Far East, and allowed the Tokyo Tribunal to have jurisdiction over the offences of crimes against the peace, conventional war crimes and crimes against humanity. Under the terms of its Charter only individuals whose charges included crimes against the peace were to be tried by the Tokyo Tribunal. The individual’s official position or the fact that they were acting under the orders of a superior would not free them from responsibility for their acts.

Twenty eight Japanese politicians, diplomats and soldiers were arraigned by the Tokyo Tribunal on 3-4 May 1946. Two died and a third had his indictment severed due to his ill health before the Tokyo Tribunal passed judgment on 4 November 1948. All 25 were found guilty and seven were sentenced to death.

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90 The Charter itself was drawn up primarily by Chief Prosecutor Joseph B. Keenan. The Allies of the United States were consulted only after the charter had been issued. Id.
91 Levie, supra note 37, at 141.
92 The Tribunal contained 11 justices; one justice from Australia, Canada, China, France, Great Britain, India, the Netherlands, New Zealand, the Philippines, the Soviet Union and the United States.
93 Although Article 17 of the Tokyo Charter granted General MacArthur the power to review the Tribunal’s judgment and sentence, he choose not to alter the Tribunal’s decision. Minear, supra note 89, at 33.
94 Id., at 21.
Like its Nuremberg counterpart the Tokyo Tribunal attracted controversy. It was criticised with regard to the selection of the Judges chosen to preside over it, the selection of the accused, and the rules of evidence under which it operated. The selection of the justices was criticised as all eleven judges were from nations that had suffered from Japanese military activity. None of the Judges were appointed from either a neutral state or Japan itself. Although defence attorneys argued that this denied the accused a fair and impartial trial, none of the Judges conceded that a trial by the victors of the vanquished was by definition unfair.95

A further objection to the selection of the Judges was that three of them had prior involvement in the issues before the court,96 one was not a Judge in his native state97, and another could not speak either of the two official languages of the court.98 Considering that all five of these Judges supported the majority judgment and most of the death sentences, the criticisms raised against their impartiality had some merit.

Since the Tokyo Charter stated that it had the power to try and punish those who committed war crimes in the Far East, the Tokyo Tribunal was also criticised for only indicting Japanese individuals, even though individuals from other participants in the Far East conflict also violated the provisions of its Charter.99 Both the Soviet Union’s declaration of war on Japan in violation of peace agreements between the two countries, and the nuclear bombing of two Japanese cities by the United States, were seen by several commentators as being acts which were theoretically prohibited by the provisions of the Tokyo Charter.100

Furthermore several people felt that Emperor Hirohito should have been named as an accused because he was a symbol of Japanese aggression in the Far East.101 However, for political reasons he was not indicted. Had he been indicted it was feared that there would be grave and perhaps irreversible administrative problems for the

95 Id., at 79.
96 The Philippines Justice, Delfin Jaranilla, had been a survivor of the Bataan death march and had spent the duration of the war in a Japanese prison camp. The American justice, Major General Myron H. Cramer, had submitted a legal brief to President Roosevelt on the responsibility for the attack on Pearl Harbour, and the Australian justice, President Webb, had been the Australian war crimes commissioner during the war. In this role President Webb had investigated Japanese atrocities on New Guinea. Id., at 81.
97 Mei Ju-ao, the Chinese justice, was a politician in China and not a judge. Id.
98 This was Major General I. M. Zaryanov, the Soviet justice. Id.
99 Id., at 94.
100 By the standard of the Kellogg-Briand Pact, the Soviet Union was guilty of committing a crime against the peace for its declaration of war on Japan, on 8 August 1945. Similarly the United States could be accused of committing a crime against humanity as it had committed an “inhumane act against a civilian population.” See Id., at 95-102.
101 Sir Justice William Webb, President of the Tribunal, in a separate decision to the majority, criticised the fact that the Allies had failed to indict the Emperor. Judge Bernard of France, in his minority decision, criticised the fact that the failure to indict the emperor was detrimental to the other accused. Id., at 116
occupation of Japan, which would have meant a larger occupation force and a longer period of occupation.102

Finally, as the rules of evidence were applied more strictly against the defence, the Tokyo trial was criticised for depriving the defence from raising evidence important to its case.103

While criticisms as to the unfairness of its proceedings may be justified, the Tokyo Tribunal did contribute to the expansion of international humanitarian law. By recognising that the Pacific war was a war of aggression, the judgment of the Tokyo Tribunal enforced the notion that crimes against the peace were international crimes. The judgment reiterated that political and military leaders could be responsible for the commission of war crimes so long as they knew about them, could have prevented them and had command responsibility.104 Since many of the accused were convicted for having deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance and prevent breaches of the laws of war, the judgment also extended the scope of individual responsibility for war crimes.105

Other Trials Conducted In The Far East

In addition to the twenty-eight defendants prosecuted at Tokyo another 4,200 Japanese were convicted in around 2,000 other trials conducted by American, Australian, British, Chinese, Dutch and French military tribunals for committing crimes of aggression, conventional war crimes and crimes against humanity. Over 700 were condemned to death.106

While the majority of these verdicts were just, the conviction of General Tomoyuki Yamashita was controversial.107 General Yamashita, the commander of the Japanese armed forces in the Philippines during the last year of the war, was charged with failing to prevent troops under his command from committing war crimes. Although it was clear that these atrocities were committed, Yamashita denied having

102 Id., at 112.
103 In his dissenting judgment Justice Pal, from India, listed evidence rejected by the Tribunal that he believed would have supported the case for the defence. Such evidence included evidence relating to the state of affairs in China prior to the time when the Japanese forces; evidence showing that the Japanese forces restored peace and tranquillity to China; evidence relating to the A-bomb decision; and evidence regarding reservations made by many states to the signing of the Pact of Paris. Id., at 120.
104 Encyclopaedia of Public International Law vol. 4, supra note 70, at 214.
105 Id.
106 Levie, supra note 37, at 182.
107 See re Yamashita, 13 Annual Digest and Reports of Public International Law Cases, 255 (1946).
any knowledge of the atrocities. The Prosecutor argued however, that as the atrocities were so barbaric and were committed on such a wide scale, Yamashita must have known about them. The military Judges who presided over the case concurred with the views of the Prosecutor, and just over a month after the trial began, Yamashita was found guilty and was sentenced to death.

As the trial began only three weeks after Yamashita surrendered there was concern that Yamashita was denied reasonable opportunity to prepare a defence. The trial was also criticised on the grounds that the judges admitted evidence that would have been inadmissible under common law. Such evidence included instances of hearsay, as well as the footage of an American propaganda film.

While many commentators feel that the Yamashita standard of command responsibility was too harsh, the trial has been praised for providing army commanders with the incentive to command their men effectively. Those who chose not to ensure that their men followed the law of war did so at their own peril.

Despite the many criticisms levelled against the Nuremberg Tribunal, the Tokyo Tribunal and the numerous trials conducted after the end of the Second World War, relating to the unprecedented nature of the proceedings, the possible lack of judicial impartiality and the \textit{ex post facto} application of crimes against the peace, these trials established individual responsibility for war crimes, crimes against the peace and crimes against humanity. Furthermore, the principle that a state, supreme within its own sphere, sovereign and equal to other states in international law, can shield its officials from international sanctions by virtue of state privilege and immunity was rejected. Finally, obedience to superior orders was held to be no longer acceptable as an absolute defence in international law and commanders were made responsible for ensuring that those under their command did not commit violations of international humanitarian law.

\textsuperscript{108} Christopher Crowe points out that during the trials numerous witnesses and several captured documents that were introduced did contradict Yamashita’s claims of ignorance. Christopher Crowe, \textit{Command Responsibility in the former Yugoslavia: The Chances for Successful Prosecutions}, 29 U. Rich. L. Rev. 191 (1994), at 208.

However Ann-Marie Prevost points out that the soldiers who committed the offences were not under Yamashita’s command but were in fact under the command of General Toyoda, Ann-Marie Prevost, \textit{Race and war Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita}, 14 Hum. Rts Q. 333 (1992).


\textsuperscript{111} Id., at 161.
The United Nations

Since it came into existence the United Nations has made significant advances in the field of international humanitarian law. The use of force was banned in Article 2(4) of the UN Charter and in 1946 the General Assembly adopted Resolution 95(I) affirming the principles of international law recognised by the Charter of the Nuremberg Tribunal. In a later resolution the General Assembly called on the International Law Commission to draw up a statement of the principles of international law recognised by the Nuremberg Charter and the judgment of the Nuremberg Tribunal. The report containing the text of the principles was adopted by the General Assembly in December 1950.

Principle I affirmed that all persons who committed a crime under international law were individually responsible and were subject to punishment. Principle II affirmed the proposition that even though national law did not condemn an act which constituted a crime under international law persons who committed such acts were still liable under international law. Principle III confirmed that Heads of State or responsible government officials could not plead their status as relieving them from international responsibility. Principle IV denied the defence of superior orders provided a moral choice was available to the accused. Principle V stated that persons accused of war crimes had the right to a fair trial. Principle VI confirmed the criminality of the acts defined in Article 6 of the Nuremberg Charter, namely crimes against the peace, war crimes and crimes against humanity. Complicity in such acts was reaffirmed as a crime under international law by Principle VII.

The Nuremberg principles have had a marked influence on the development of modern international law. Besides being incorporated into the domestic legal systems of several members of the international community these principles have influenced the drafting of the UN Charter and have been incorporated into many codes and

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112 Green supra note 10, at 40
116 This wording differed from Article 8 of the London Charter, which stated that compliance with an order did not absolve persons from responsibility, "but may be considered in mitigation of punishment if the tribunal determines that justice so requires." See Green, supra note 10, at 40.
117 By stating this the International Law Commission confirmed the view that individuals charged with war crimes should not be dealt with summarily. Bland, supra note 115, at 244.
conventions drafted by the UN and its subsidiary bodies. Such conventions have included the 1948 Genocide Convention, the 1949 Geneva Conventions and their 1977 Additional Protocols I and II, and the 1984 Convention Against Torture.\textsuperscript{118}

\textbf{The 1948 Genocide Convention}

Although history is full of instances in which minority groups were deliberately and systematically destroyed, the term ‘genocide’ was not introduced until 1944. Raphael Lemkin, a Polish lawyer who escaped the German occupation of his homeland, coined the term in response to Winston Churchill’s description of Nazi atrocities in Poland as “crimes without a name.”\textsuperscript{119} Distinct from other wartime atrocities, genocide signified the coordinated plan of different actions aimed at destroying essential foundations of life of national groups with the aim of annihilating the groups themselves.\textsuperscript{120}

In response to the atrocities committed during the Second World War, and recognising that the only restraints on states committing genocide could come from the international community, the General Assembly unanimously adopted Resolution 96(I) on 11 December 1946\textsuperscript{121} which established genocide as a crime under international law, and invited member states to enact legislation for the prevention and punishment of this crime.

Two years later the General Assembly approved the draft of the Convention on the Prevention and Punishment of the Crime of Genocide.\textsuperscript{122} This convention, which came into force on the 12 January 1951, declared genocide an international crime, defined the meaning of genocide, designated what constituted punishable acts and established what persons were liable for committing the crime of genocide.

The convention confirmed that genocide, whether committed in times of war or in times of peace, is a crime under international law, and is a crime which all signatories promised to prevent and punish.\textsuperscript{123} In Article II of the convention genocide is defined as a variety of acts:

\textsuperscript{118} Id.
\textsuperscript{123} Id., art. I.
....committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

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

Such acts as conspiracy, incitement, attempt and complicity to commit genocide are also punishable under the convention.124 Article IV decrees that all individuals who commit genocide are liable, whether they are constitutionally responsible rulers, public officials or private individuals. The remaining articles of the convention place obligations on signatory states to legislate against genocide under their domestic law125, to prosecute offenders and to assist with the extradition of alleged offenders to the state where the offence took place.126 The convention also allows signatory states to take disputes relating to the interpretation of the convention and the responsibility of states under the convention, to the International Court of Justice (ICJ).127

Unfortunately, because of the vagueness in the way genocide is defined in the convention and the inherent weaknesses in the convention’s enforcement mechanisms, the Genocide Convention has not been as effective as its drafters would have hoped.

To come within the definition of genocide the victims must be an identifiable national, ethnical, racial or religious group; there must be intent to destroy the group in whole or in part; and the perpetrator must commit an identifiable act in conjunction with the intent to destroy the identified group. These requirements highlight several weaknesses contained in the convention. Firstly only national, ethnical, social and religious groups are covered by the convention. Soviet bloc countries opposed having political groups included in the definition of genocide, hence these groups were omitted.128 Consequently, the mass killings of communists in Indonesia during the 1960s and the slaughter of thousands of political opponents of the Khmer Rouge in Cambodia have gone unpunished.129

124 Id., art. III.
125 Id., art. V.
126 Id., art. VII.
127 Id., art. IX.
129 For an analysis of these killings and how the law prohibiting genocide applies to them see Kuper, Id.
Another weakness concerns the degree of intent that perpetrators of genocide are required to have. Genocidal acts are outlawed if the perpetrator’s direct intent is to commit prohibited acts against individuals because those individuals are members of the specified group, and for no other reason.\textsuperscript{130} Since destruction of a group without intent to destroy the group is not genocide, the mass killing of the Aché Indians in Paraguay was deemed not to be genocide as they were killed as an unfortunate result of Paraguay’s deforestation policy.\textsuperscript{131}

Confusion has also arisen over the meaning of the phrase ‘in whole or in part’. It is unclear exactly how many members of a group have to be killed before their destruction comes within the scope of the convention.\textsuperscript{132} Furthermore, when a group is partially destroyed it is unclear whether the perpetrator must have intended to destroy the whole group or whether it is enough that the perpetrator intended to destroy a part of the group.\textsuperscript{133}

Although genocide is viewed by many to be a crime with universal jurisdiction, the convention only grants jurisdiction to the state where the acts took place or to a tribunal whose jurisdiction is accepted by all parties to the acts of genocide.\textsuperscript{134} Since no such international court exists at the moment, the lack of universal jurisdiction is a

\footnotesize{While the majority of Cambodia’s political groups were legally prohibited, sociologically dissolved and when necessary physically liquidated, the Khmer Rouge also eliminated the Buddhist monkhood and Cambodia’s ethnic minorities, for instance the ‘Cham’. Despite the elimination of these groups the General Assembly never condemned the ‘genocide’ of these groups. David Hawk, The Cambodian Genocide, in Genocide: A Critical Bibliographic Review, Israel W. Charney Ed. London: Mansell Pub. (1988), at 137-140.

However, in 1994 the U.S. enacted the Cambodian Genocide Justice Act which declared that it is the policy of the U.S. Government to support efforts to bring members of the Khmer Rouge to justice for crimes committed during their rule in Cambodia. As part of the implementation of the Statute, the U.S. Department of State commissioned two international law scholars to prepare a study on legal issues relating to the Statute’s implementation, with particular emphasis on recent developments in the area of international criminal law.

These scholars found that the Khmer Rouge committed genocidal acts against religious and ethnic groups including the Cham, Vietnamese and Chinese ethnic groups and the Buddhist monkhood, but concluded the argument that acts against Khmer national groups constituted genocide remained problematic. Jason S. Abrams and Steven R. Ratnet, The Attempt To Bring The Perpetrators Of The Cambodian Genocide To Trial, in Contemporary Genocide: Causes, Cases, Consequences, Albert J. Jongman (Ed.) the Netherlands: PLOOM, Leiden (1996) at 77-78.

During the drafting of the convention the Soviet delegate argued that the phrase ‘intent to destroy’ should be deleted to avoid pleas of innocence due to absence of intent. The phrase was retained as intent was perceived as an essential element in the definition of genocide. L. J. Le Blanc, The Intent to Destroy Groups in the Genocide Convention: The Proposed US Understanding, 78 Am. J. Int'l L. 369 (1984), at 371.


For a discussion on the scope of the phrase “intent to destroy, in whole or in part”, see L. J. Le Blanc, supra note 130.

See comments made by Dean Rusk, former US Deputy Under Secretary of State, reprinted in Le Blanc, id, at 373.

Genocide Convention, supra note 122, art. VI.}
serious flaw. Given that most acts of genocide are state sponsored it is unlikely that states will punish themselves for acts of genocide they have committed. 135

Extradition of alleged perpetrators is also not mandatory. If there is no extradition treaty between the state that holds the alleged perpetrator and the state in which the acts of genocide took place, the 'holding' state may refuse any request for extradition. 136 Because no enforcement mechanisms are contained in the Genocide Convention, the only way states can compel other states to cease committing genocide is to take that state to the ICJ. 137 As such a referral is viewed by many states as being an imposition on their right of state sovereignty many states have refused to sign the convention. 138

Despite these flaws, especially the lack of enforcement mechanisms, the Genocide Convention has contributed to the prohibition of genocide being recognised as a custom under international law. 139 As the majority of states now recognise a legal obligation not to engage in the practice, many minority groups have been protected from annihilation. 140

Grave Breaches of the Geneva Conventions

From the level and degree of atrocities that were committed in the Second World War it was clear that the laws of war needed to be revised. Between April and August 1949 a diplomatic conference was held in Geneva, 141 during which the 1929 Geneva Conventions on the treatment of the wounded and sick in the armed forces in the field, and the treatment of prisoners of war, were redrafted. 142 Two separate conventions, one dealing with the wounded, sick and shipwrecked members of the armed forces of the sea, and the other dealing with civilian persons in time of war,

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136 Under Article VI contracting parties pledge to grant extradition in accordance with their laws and treaties in force. Genocide Convention, *supra* note 122.
138 Zeiler, *supra* note 120, at 599.
140 Zeiler, *supra* note 120, at 602.
141 Representatives from sixty four states attended the conference. As at 31 August 1992 173 states had signed the four Geneva Conventions. Fox and Meyer, *supra* note 2, at 234.
were also adopted. The latter convention marked the realisation that civilians were not immune from the horrors of war, especially in areas occupied by enemy forces.

Each of the signatories to these conventions agreed to apply the conventions during any armed conflict, whether war was declared or not, and even if one party to the conflict did not recognise the existence of a state of war. The conventions also apply if a state's territory is partially or totally occupied, even if the occupation has met with no resistance. In addition, the signatories agreed to be bound by the conventions even if the belligerent they were fighting was not a party to the conventions.

Along with defining rules relating to the treatment of each of the four types of persons protected under the conventions, each convention lists a series of violations of basic human rights norms known as 'grave breaches', which can be punished by any state on the basis of universal jurisdiction. Because those acts that make up grave breaches are considered by the international community to be heinous war crimes, parties to the Geneva Conventions agreed to enact legislation necessary to prosecute persons committing or ordering to be committed any grave breach of the Conventions, to search for alleged perpetrators and to bring such persons, regardless of their nationality to justice, either before their own courts or by handing them to other signatories to face trial.

In all four Geneva Conventions acts which constitute grave breaches include wilful killings, torture or inhumane treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. In the case of the convention dealing with prisoners of war, it is also a grave breach to compel a prisoner of war to serve in the forces of the hostile power, or to deprive the prisoner of the right to a fair and regular trial. In the case of the convention dealing with the rights of civilians in the hands of a hostile power, it is also a grave breach to unlawfully deport or transfer or unlawfully confine enemy civilians, to compel enemy civilians to serve in the forces.

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144 Article 2, common to all four Geneva Conventions.
145 Id.
146 This clause rejects the all participation clause found in the Hague Conventions, Green supra note 10, at 41.
147 Geneva Convention I, art. 49; Geneva Convention II, art. 50; Geneva Convention III, art. 129; Geneva Convention IV, art. 148.
148 Geneva Convention I, art. 50; Geneva Convention II, art. 51; Geneva Convention III, art. 130; Geneva Convention IV, art. 147.
149 Geneva Convention III, art. 130.
of the hostile power, to deprive them the right of a fair and regular trial, and to use civilians as hostages.\textsuperscript{150}

Although the four Geneva Conventions are primarily concerned with preventing violations in international conflicts, protection is also provided to those affected by non-international conflicts by Article 3, common to all four Geneva Conventions. Under this article parties involved in a non-international conflict agree to be bound, as a minimum, to the following conditions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed \textit{hors de combat} by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.

(2) The wounded, sick and shipwrecked shall be collected and cared for.

Common Article 3 adds that the application of these provisions shall not affect the legal status of the parties. Therefore just because this article of the Geneva Conventions is applied does not mean the nature of the conflict changes from non-international to international. Similarly, the state is not required to treat captured members of the rebellious force as prisoners of war, and may, if it chooses place them on trial for treason.\textsuperscript{151}

While this article provides important minimum guarantees in non-international armed conflicts, it is far from the legal regime set out in the grave breaches provisions of the four Geneva Conventions. Although it ensures that those participating in such conflicts apply rules of humanity which are recognised as essential by civilised

\textsuperscript{150} Geneva Convention IV, art. 147.  
\textsuperscript{151} Green, \textit{supra} note 10, at 42.
nations, and sets certain mandatory guarantees, Common Article 3 does not provide adequate protection to combatants and does not require mandatory supervision by a neutral protecting power or non-governmental organisation.\textsuperscript{152} Impartial humanitarian bodies, such as the ICRC, may offer their services but those participating in non-international armed conflicts are under no obligation to accept such offers.\textsuperscript{153} Owing to the differences in the protection offered by the Geneva Conventions to international and non-international armed conflicts, it is important that conflicts are viewed objectively and accurately, so that the applicable law governing the conflict can be ascertained.\textsuperscript{154}

The 1977 Additional Protocols

The armed conflicts in Korea, Vietnam and elsewhere demonstrated that the four Geneva Convention needed to be adapted to the conditions of contemporary hostilities.\textsuperscript{155} Technological advancements in weaponry meant that warfare was no longer limited to military targets, consequently the civilian population was now even more at risk. Increasing use of guerrilla activity also raised the question of whether guerrilla fighters should be afforded prisoner of war status. Furthermore, Common Article 3 had proved inadequate in the protection of the civilian population in non-international armed conflicts.\textsuperscript{156}

In 1974 the Swiss government invited state representatives to attend a conference in Geneva to consider draft proposals prepared by the ICRC. In order to ensure broad participation, the Swiss government also invited certain national liberation movements to participate fully in all discussions, although only states were entitled to vote.\textsuperscript{157} The Geneva Diplomatic Conference on the Reaffirmation and Development of the International Humanitarian Law Applicable in Armed Conflict ended in 1977 after two protocols additional to the 1949 Geneva Conventions were adopted.\textsuperscript{158} Protocol I updated and developed rules protecting victims and participants

\textsuperscript{152} Kwakwa, \textit{supra} note 20, at 30.
\textsuperscript{154} Kwakwa, \textit{supra} note 20, at 30.
\textsuperscript{157} Id.
\textsuperscript{158} The two Protocols were formally adopted on 8 June 1977 and were opened for signature on 12 December 1977. As of 31 August 1992 115 states had signed Protocol I, while 105 had signed Protocol II. Fox and Meyer, \textit{supra} note 2, at 234.
in international armed conflicts,\textsuperscript{159} while Protocol II extended this protection to individuals involved in non-international conflicts.\textsuperscript{160}

Protocol I extended the protection given to civilians and non-military objects\textsuperscript{161} and outlawed action likely to have long term deleterious effects on civilians, such as the prohibition of enforced starvation of the civilian population.\textsuperscript{162} The rights and privileges of medical personnel were extended and medical aircraft were provided with protection at all times, even when flying over hostile territory.\textsuperscript{163} The Protocol defined when individuals were to be considered mercenaries and whether such persons are entitled to prisoner of war status.\textsuperscript{164} The grave breaches provisions of the 1949 Geneva Conventions were also widened,\textsuperscript{165} and protection was extended to individuals performing civil defence tasks.\textsuperscript{166} Finally, to ensure that military commanders understood the consequences of their actions in times of armed conflict, the Protocol required that legal advice be available to them on the application of the 1949 Geneva Conventions and Protocol I.\textsuperscript{167}

By expanding the scope of conflicts covered by international humanitarian law to include “armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination,”\textsuperscript{168} Protocol I made controversial innovations to the laws governing international armed conflict.\textsuperscript{169} This expansion was criticised for giving protection to terrorist organisations and legitimising their activities in the name of humanitarian law.\textsuperscript{170} Nonetheless, considering that the main form of terrorist activity (acts and

\textsuperscript{159} Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, 12 December 1977, reprinted in 16 I.L.M. 1391 (1977) [hereinafter “Protocol I”].

\textsuperscript{160} Protocol Additional to the Geneva Convention of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, 12 December 1977, reprinted 16 I.L.M. 1442 (1977) [hereinafter “Protocol II”].

\textsuperscript{161} Although they may be military objects, Article 56 of Protocol I prohibits any attack upon dams, dykes and nuclear generating stations if the result would be to release dangerous forces and consequent severe losses among the civilian population. Green, supra note 10, at 149.

\textsuperscript{162} Protocol I, supra note 159, art. 54(2)

\textsuperscript{163} Id., arts. 24 to 27.

\textsuperscript{164} Id., art 47. Nevertheless, captured mercenaries are still entitled to the fundamental guarantees, applicable to all persons, which are set out in Article 75.

\textsuperscript{165} Id., art 75.


\textsuperscript{167} Protocol I, supra note 159, art. 82.

\textsuperscript{168} Id., art 1(4)

\textsuperscript{169} Roberts and Guelff, supra note 155, at 388.

threats of violence whose primary purpose is to spread terror among civilian populations) was outlawed by Article 51(2) of Protocol I, such fears were unjustified.\textsuperscript{171}

Protocol II enlarged the fundamental guarantees provided by Common Article 3 to those affected by non-international conflicts by including the prohibition of collective punishments, acts of terrorism, slavery, pillage and rape.\textsuperscript{172} The Protocol reiterated that people are to be treated humanely,\textsuperscript{173} prohibited the starvation and forced movement of the civilian population,\textsuperscript{174} and provided safeguards for "persons whose liberty had been restricted."\textsuperscript{175} Finally the Protocol expanded the protection and care offered to the wounded, sick and shipwrecked,\textsuperscript{176} and provided for the protection of medical and religious personnel,\textsuperscript{177} and for the first time children.\textsuperscript{178}

Despite extending the protection offered by Common Article 3 to those participating in non-international conflicts, only dissident armed forces that satisfied the requirements set out in Article 1(1) regarding territory and command, fall within the scope of the Protocol. The dissident armed force must be able to exercise such control over a part of the national territory as to enable them to carry out sustained and concerted military operations. In addition, the force or group must be under responsible command that can maintain discipline and ensure compliance with the Protocol. Thus substantial restrictions are placed on the type of groups protected by the Protocol. Forces operating from bases outside the national territory are excluded, as are forces which are constantly on the move.\textsuperscript{179} Like Protocol I, terrorist organisations will not be protected by Protocol II if, as will usually be the case, they do not satisfy the territorial requirements of the Protocol.\textsuperscript{180} Similarly internal disturbances and tensions, such as riots, isolated and other sporadic acts of violence, are also excluded from the protection offered by Protocol II.

Although Protocol II extended the protection offered to civilians under international humanitarian law because many governments denied the application of Common Article 3,\textsuperscript{181} it is unclear exactly what effect Protocol II will have.\textsuperscript{182}

\textsuperscript{172} Protocol II, \textit{supra} note 160, art. 4(2).
\textsuperscript{173} Id., art. 4(1).
\textsuperscript{174} Id., arts. 14 and 17.
\textsuperscript{175} Id., art. 5.
\textsuperscript{176} Id., art. 7.
\textsuperscript{177} Id., art. 9.
\textsuperscript{178} Id., art. 4(3).
\textsuperscript{179} Simpson, \textit{supra} note 171, at 165.
\textsuperscript{180} Id.
\textsuperscript{181} See reservations made by Argentina and Portugal when they signed the Additional Protocol. Roberts and Gueiff, \textit{supra} note 155, at 331 - 337.
Despite this uncertainty it is still better to have the Protocol than not have it. As Telford Taylor said after examining the disappointing effects of humanitarian law in the Vietnam war, "if we did not have humanitarian law, hospitals would be bombed all of the time, instead of only some of the time." 183

The 1984 Torture Convention

On 10 December 1984 the General Assembly adopted the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatments and Punishments. 184 Although torture had been outlawed in war by the 'grave breaches' provisions of the 1949 Geneva Conventions, and the 1977 Additional Protocols, this convention outlawed torture in times of peace as well. Article 1 of the Convention defines torture as:

....any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. 185

To come within the definition of torture the act that causes the pain and suffering must be intentional; mere negligence will not suffice. 186 However the act need not cause pain or suffering immediately. Isolated acts, and acts of omission, such as intentional deprivation of food or water, may also be considered torture. 187 Although the convention lists a number of purposes for which severe pain or suffering is intentionally inflicted, this list is not exhaustive. Other purposes of a similar type

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182 Id.
183 Quoted in David P. Forsythe, The International Committee of the Red Cross, in Fox and Meyer, supra note 2, at 92.
185 Id., art 1(1).
187 Id.
may also be prohibited.\textsuperscript{188} Finally, as the purpose of the Torture Convention is to prohibit torture committed by or under the responsibility of public officials for purposes connected with their public functions, the convention only covers acts of torture committed or instigated by public officials. Acts of torture committed by private individuals are not covered.\textsuperscript{189}

Article 2 requires signatories to enact legislation prohibiting the use of torture at all times. Exceptional circumstances such as during a state of war or when war is threatening will not legitimise acts of torture.\textsuperscript{190} Likewise orders from either a superior or a public authority will not legitimise acts of torture.\textsuperscript{191}

\textbf{The Application of International Humanitarian Law Since 1945}

\textit{“Failures”}

\textit{Korea and Vietnam}

Despite the advances made by the international community in the area of humanitarian law, numerous violations of international humanitarian law have occurred during several armed conflicts that have been fought since 1945, and the perpetrators of these atrocities have generally gone unpunished.

During the Korean War, North Korea and China were accused of violating the Geneva Conventions by torturing and executing prisoners of war.\textsuperscript{192} After the hostilities had ended, the General Assembly adopted Resolution 804(VII),\textsuperscript{193} which condemned the violations of humanitarian law which were committed during the war. However, no war crimes trials were held as all prisoners had already been exchanged.\textsuperscript{194}

Right from the outset of the Vietnam War it became clear that the laws and customs of war were not likely to be followed by the communist forces. Prisoners of

\textsuperscript{188} However, only those purposes connected with the interests or the policies of the state and its organs will be recognised. Id.
\textsuperscript{189} The assumption being that acts which the state does not condone or to which the state does not acquiesce would be prosecuted in due course by the domestic courts of that state. Id.
\textsuperscript{190} The Torture Convention, supra note 184, art. 2(2).
\textsuperscript{191} Id., art 2(3).
\textsuperscript{192} In 1953 it was announced that 11,622 members of the United Nations forces had been tortured and murdered by North Korean and Chinese Communist forces. 6,113 of whom were American. Levi, supra note 37, at 201.
\textsuperscript{193} Id.
\textsuperscript{194} Id., at 200.
war were mistreated and civilians were often summarily executed. Forces fighting the communists were also guilty of committing war crimes. The most infamous incident being the destruction of the South Vietnamese hamlet of My Lai by a company of United States soldiers under the command of Captain Ernest Medina. Under the direct supervision of several officers, American troops killed over 200 unarmed South Vietnamese civilians. The civilians were either shot in small groups or fired upon as they fled. The soldiers also destroyed most of the buildings in the hamlet, and killed the majority of the domestic animals they found. In addition, several soldiers committed acts of rape and sexual molestation.

While the massacre was initially covered up by the army, accounts of the massacre soon reached President Nixon and several members of Congress. A military inquiry followed, and as a result of its findings four officers and nine enlisted men were charged for their involvement in the massacre, while fourteen other officers were charged for their involvement in the cover up. Only First Lieutenant William Calley was convicted. The rest of the accused either had the charges against them dismissed or were found not guilty.

Calley was found guilty of killing twenty two non-combatants, and assault with attempt to murder a two year old child. He was dismissed from the army and sentenced to life in prison. Although his sentence was reduced firstly to twenty years and then to ten, it was overturned by a Federal Judge in 1975. This meant that in punishment for the crimes he committed, Calley only spent six months in prison and three years under house arrest.

Captain Medina, although outside the village when the massacre took place, was charged as a principal to murder on the grounds that after he became aware of the killings he declined to exercise his command responsibility by not taking necessary and reasonable steps to stop the atrocities. The case against Medina rested almost

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195 Blatant violations of numerous provisions of the laws of war, including murder, torture and intimidation, were the modus operandi for the Viet Cong and the North Vietnamese Army. It is estimated that North Vietnam sponsored the killing of over one and a quarter million of its own people between 1945 and 1987. Major J. F. Addicott and Major W. A. Hudson Jr, *The Twenty-Fifth Anniversary of My Lai: A Time To Inoculate The Lessons*. 139 Mil. L. Rev. 153 (1993), at 155.
196 Id., at 157 to 158.
197 The Peers Commission was appointed by United States Secretary of the Army and the Chief of Staff to investigate the original Army investigation into what happened at My Lai on 16 March 1968. This investigation became known as the Peers Report. Id., at 156.
200 Addicott and Hudson Jr, supra note 195, at 160.
201 The decision of the Federal Court Judge was overturned on appeal, but Calley was not returned to prison as he was paroled by the Secretary of the Army in 1975. Id., at 161.
entirely on whether he had knowledge that the crimes were being committed. In their judgment the military judges held that commanders were responsible if they had actual knowledge that troops under their command were either committing, or about to commit, war crimes and they wrongfully failed to prevent such crimes. Because actual knowledge was required, presence without knowledge was not enough. That is, the commander-subordinate relationship by itself was not enough to give rise to an inference of knowledge. Medina was acquitted as he did not have actual knowledge that the atrocities were being committed.

This ruling lessened the responsibility placed on commanders by the *Yamashita* test. In that case Yamashita was convicted on the basis that as the crimes committed by his troops were so flagrant, he must have known they were being committed. While the standard of command responsibility applied in the *Yamashita Case* was criticised as being too high, the standard applied to Medina was criticised as being too lenient. The actual knowledge test has been described as an “invitation to the commander to see and hear no evil.”

Vietnam was labelled a dirty war as war crimes were committed by both sides. Although, there were two major differences between the two sides. On the communist side it was a dirty war as a matter of official policy, while on the South Vietnamese/United States side it was a dirty war as a matter of individual action and despite official policy to the contrary. Secondly, while it is unknown whether members of the communist forces were tried for committing violations of the laws and customs of war, the United States military command did investigate reports of atrocities. Excluding the My Lai massacre, 241 cases of war crimes committed by United States personnel were investigated. Although, most were deemed to be unsubstantiated and only 36 cases were tried, of these, 20 cases involving 31 servicemen resulted in convictions.

*The 1971 Indian Invasion of East Pakistan and the 1990 Gulf War*

Between 25 March and 16 December 1971 the Pakistani Army and local collaborators committed what has been described as “the ugliest genocide in history” in an attempt to stop the Bengali population of East Pakistan succeeding from

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203 Id., at 15.
204 Colonel Eckhardt provides a useful summary of why Captain Medina did not have actual knowledge, Id., at 34.
205 See comments by Cap. Branstetter, supra note 110, at 161.
206 Eckhardt, supra note 202, at 20.
207 Levi, supra note 37, at 208.
Pakistan. Estimates of the numbers of people killed range from 1.5 million to 3 million. In December 1971 Indian forces supporting the rebellious Bengali population attacked the Pakistani forces capturing approximately 92,000 Pakistani soldiers. The Indian authorities agreed to release all the prisoners they captured expect 195, whom they intended to charge with genocide and crimes against humanity. Pakistan then commenced proceedings in the ICJ, arguing that as both countries were parties to the Genocide Convention, under Article 6 Pakistan had exclusive jurisdiction over the accused. Before the ICJ could rule on the dispute, the case was dropped as all the accused soldiers were handed back to Pakistan following its recognition of Bangladesh.

Since Pakistan did not exercise its alleged exclusive jurisdiction to try the soldiers for genocide following the soldiers repatriation, it was clear that Pakistan only took the case to the ICJ in order to secure the return of the soldiers, and not out of a humanitarian desire to try those accused of genocide. This case highlighted the difficulty that the world community has in prosecuting individuals accused of committing violations of humanitarian law if the state in which those individuals reside decides not to prosecute them. This problem arose again following the defeat of Iraq in the Gulf War of 1990-91.

During their invasion and subsequent occupation of Kuwait in 1990, the Iraqi forces committed numerous violations of the laws and customs of war. The Security Council condemned these violations, and warned Iraq of the consequences if violations continued. In Resolution 674 (1990) the Security Council invited UN member states to gather information about violations of the Geneva Conventions committed in Kuwait.

After Kuwait was liberated, hundreds of pages of information relating to the atrocities committed by Iraqi forces were gathered by investigation teams from the coalition forces. Considering thousands of Iraqi soldiers were in the custody of coalition forces, it was hoped that those who committed war crimes would be tried for

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209 Id.
211 Id.
their acts. No such trials took place. Instead all captured Iraqis were repatriated in return for the small number of coalition prisoners held by the Iraqis. Because the United Nations had it within its power to set up a war crimes tribunal, and had many of the Iraqi military leaders responsible for the commission of war crimes within its custody, its failure to set up such a tribunal was considered a major setback to international accountability.

"Successes"

Despite the failure of the international community to prosecute individuals who committed war crimes during these conflicts, the principles laid down at Nuremberg and subsequently codified by the international community have not been lost.

The trial of Adolf Eichmann

In 1960 Adolf Eichmann, the head of the office responsible for the supervision of the extermination of the Jews, was abducted by Israeli agents and flown to Israel to face trial for war crimes. In April 1961 his trial began in Tel Aviv. Eichmann was subsequently found guilty and sentenced to death.

Eichmann was charged with war crimes, crimes against humanity and genocide, under the Nazi and Nazi Collaborators Law which had been enacted by the Israeli parliament in 1950. The war crimes and crimes against humanity provisions contained in this act are identical to the respective provisions in the Nuremberg Charter.

During the trial the defence made several challenges relating to Israel's right to try Eichmann. Since Jewish judges were trying the case the impartiality of the court was challenged. However, as with similar arguments raised during the Nuremberg and Tokyo trials, this objection was rejected.

The defence also challenged the jurisdiction of an Israeli court to try Eichmann on the basis that he was a non-Israeli, charged with offences that occurred outside

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216 A. D'Amato, Peace vs. Accountability in Bosnia, 88 Am. J. Int'l L. 500 (1994), at 501. Given the fact that the United Nations coalition's war objectives were limited, and there was an obvious tension between negotiating a cease-fire with Saddam Hussein and demanding his arrest and trial as a war criminal, this result was not surprising. Nevertheless a "historic opportunity was missed to breathe new life into the critically important concept of individual criminal responsibility for the laws of war violations." Meron, supra note 39, at 124.
218 Id., at 17.
Israel, that did not exist under Israeli law when committed and whose victims were not Israelis. By reconfirming that war crimes, crimes against humanity and genocide were universal offences over which all states had jurisdiction, the court also overcame these objections.\textsuperscript{219}

The defence finally argued that under the provisions of the Genocide Convention, unless the accused is being tried by an international tribunal, only the state in whose territory the genocidal acts were committed could try the accused. In other words, Israel had no right to try Eichmann for genocide because the genocidal acts Eichmann was alleged to have committed were not committed in Israel. The court however declared that because no international court existed and the territorial state was frequently the sponsor of genocide, the Genocide Convention could not limit jurisdiction to the state in which the acts took place. If it did the Genocide Convention would be a nullity.\textsuperscript{220}

Although Israel was criticised for the way in which its agents abducted Eichmann from South America,\textsuperscript{221} the trial was important to the development of international humanitarian law. It confirmed that war crimes and crimes against humanity were universal crimes and that those who committed them were individually responsible for their actions. In addition, the trial concluded that the territorial competence of states to try persons accused of genocide was not limited by the wording of the Genocide Convention. Genocide is a universal crime and therefore all states have the right to prosecute those who commit it.

\textit{The International Criminal Tribunal for Rwanda}

On 6 April 1994 a plane carrying the Presidents of Rwanda and Burundi was shot down.\textsuperscript{222} This event precipitated a "pre-planned execution of severe human rights violations, including systematic, widespread and flagrant breaches of international humanitarian law, large-scale crimes against humanity and

\footnotesize{\textsuperscript{219} Id., at 15. \\
\textsuperscript{220} The court held that "although Article 6 expressly assigned jurisdiction either to the state on whose territory the crime was committed or to an international tribunal, it did not exclude universal jurisdiction. The convention had two aspects: the confirmation of certain principles as established rules of customary international law; and the determination of conventional obligations between the parties for the future. Article 6 established a compulsory minimum, which did not affect the existing jurisdiction of States under customary international law." Id., at 11. \\
\textsuperscript{222} Sam Kiley, \textit{Tribal violence flares in Rwandan capital}, The Times, 8 April 1994, at 12.}
It is estimated that 500,000 people were killed during the massacre.\(^{224}\)

Although numerous massacres had been committed in Rwanda since it gained independence from Belgium in 1959, the 1994 massacre was the worst.\(^{225}\) In the three and a half months between the death of the Rwandan President and the inauguration of the Tutsi-dominated Rwandan Patriotic Front on 14 July 1994, Hutu militia massacred unarmed and innocent Tutsi civilians in "a planned and methodical way with the intention to wipe out the entire Tutsi minority."\(^{226}\)

On 1 July 1994 the Security Council adopted Resolution 935 (1994) which reminded persons involved in the Rwandan conflict that "all persons who commit or authorise the commission of serious violations of international law are individually responsible for the violations and should be brought to justice." In addition, the resolution requested the Secretary-General to establish an impartial Commission of Experts to examine and analyse "evidence of grave violations of international humanitarian law committed in the territory of Rwanda, including the evidence of possible acts of genocide."\(^{227}\)

The Commission of Experts submitted an interim report to the Secretary-General on 4 October 1994,\(^{228}\) followed by a final report on 29 November 1994.\(^{229}\) In its interim report the Commission concluded that the conflict in Rwanda was, for the purposes of international humanitarian law, an armed conflict, and was of a non-international character. Common Article 3 of the Geneva Conventions and Additional Protocol II therefore applied to the conflict. The legal norms prohibiting crimes against humanity and genocide were applicable as well.\(^{230}\)

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\(^{226}\) Id. At the time of the massacre the Hutu population made up 84 per cent of the Rwandan population, while the Tutsi made up 14 per cent.

\(^{227}\) On 26 July 1994 the Secretary-General appointed Mr. Atsu-Koffi (Togo), Ms. Hady Dieng (Guinea) and Mr. Salifou Fomba (Mali) to serve on the Commission.

\(^{228}\) Preliminary Report, supra note 223.


\(^{230}\) Sunga, supra note 224, at 122.
On the basis of evidence they received, the Commission concluded that individuals on both sides of the conflict in Rwanda had perpetrated serious breaches of international humanitarian law, in particular the obligations set out in Common Article 3 and Additional Protocol II, and had committed crimes against humanity. Furthermore, the Commission concluded that certain Hutu elements had carried out acts of genocide against the Tutsi minority in Rwanda. On the basis of these findings the Commission recommended that the individuals responsible for these crimes should be brought to justice before an independent and impartial tribunal.

On the 8 November 1994, having determined that the “genocide and other systematic, widespread and flagrant violations of international humanitarian law” committed in Rwanda “constitute a threat to international peace and security,” the Security Council adopted Resolution 955 (1994) whereby it established a Tribunal to prosecute persons responsible for committing genocide and other serious violations of international humanitarian law in Rwanda. The Statute of the Rwanda Tribunal was annexed to the Resolution. The Statute provides the Tribunal with jurisdiction over persons who violated Common Article 3 of the Geneva Conventions and Additional Protocol II during the Rwandan conflict, as well as persons who committed acts of genocide and crimes against humanity in Rwanda and Rwandan citizens who committed such acts in the territory of neighbouring states, between 1 January 1994 and 31 December 1994.

In its report the Commission of Experts recommended that the jurisdiction of the International Tribunal for the former Yugoslavia be expanded to include the crimes committed in Rwanda. While the Security Council did not follow this recommendation, it did not create a completely separate Tribunal either. While the Rwandan Tribunal has separate Trial Chambers from the Yugoslav Tribunal, it shares the same Appeals Chamber, the same Prosecutor and the same rules of procedure and evidence.

In April 1995, in accordance with the procedure laid down in the Statute of the Rwanda Tribunal, the Security Council submitted to the General Assembly a list of
twelve nominations for the bench of the Rwanda Tribunal. Six were duly elected as Judges in May 1995. From then on the work of the Tribunal has steadily increased. In December 1995 the Tribunal indicted eight former Rwandan officials in connection with mass killings that occurred in the western provinces of the country. Several more senior officials were indicted during the first half of 1996, including Colonel Theoneste Bagosora who is alleged to be the mastermind behind the genocide. Colonel Bagosora is currently detained in the Cameroon and is expected to be transferred shortly to the seat of the Rwanda Tribunal in Arusha, Tanzania.

Finally on 30 May 1996, two years after allegedly playing leading roles in the genocide, Georges Rutanganda and Jean Paul Akayesu were arraigned by the Rwanda Tribunal. Rutanganda, the former vice president of the Interahamwe (those who fight together) militia that carried out most of the killings, was charged with distributing guns and other weapons to militia members following the death of President Habyarimana, and ordering the men under his control to murder several Tutsi civilians. Akayesu, a former mayor was charged with ordering and participating in the slaughter of at least 2,000 Tutsis who lived in his province. Both pleaded not guilty to charges of crimes against humanity and genocide.

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236 The six elected Judges are Navanethem Pillay (South Africa), Laity Kama (Senegal), T. H. Khan (Bangladesh), Yakoh A. Ostrovsky (Russian Federation), William H. Sekule (Tanzania) and Lennart Aspegren (Sweden). David Turns, War Crimes Without War? - The Applicability of International Humanitarian Law to Atrocities in Non-International Conflicts, 7 RADIC 804 (1995), at 823.


239 The transfer of Colonel Bagosora to Arusha has been complicated by the fact that Belgium has issued an international warrant for his arrest as he is alleged to have ordered the murder of 12 Belgium peacekeepers who were killed in the first days of the Genocide. In addition, the government of Rwanda wants to try Colonel Bogosora and other indictees "in Rwandan court before Rwandan people according to Rwandan law." Id.


241 Id.
DEFENCES TO WAR CRIMES

The trials conducted after the Second World War not only established certain international offences for which individuals were responsible but also acknowledged that certain defences, such as duress and mistake, could relieve individuals from responsibility.1 Defences traditionally available to states which 'legitimise' unlawful behaviour, such as military necessity and reprisal, could also exempt individuals from responsibility.2 Even though these defences may prevent the prosecution of some of the worst perpetrators of atrocities, they should be included in the field of international humanitarian law. Just as compulsion, self-defence or mistake may excuse a murder under national law, such defences should be available in international law.3

The first section of this chapter discusses certain defences which may be available to defendants. For the purposes of this section only substantive defences are discussed: procedural grounds for excluding liability, such as lack of jurisdiction or non bis in idem, are not discussed. The second section of this chapter discusses the doctrine of command responsibility. Given that this doctrine denies military commanders from arguing that they are not liable for the actions of their subordinates because they had no personal knowledge of the illegal acts, it is appropriate to re-examine this doctrine in relation to possible defences to liability.

Defences

Heads of State

Traditionally acts performed by either the Head of State or a government official acting in their official capacity were regarded as acts of the state. Only the state was considered responsible for any wrongdoing, and other states could not hold either the Head of State or the government official personally responsible.4

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1 Lyal S. Sunga, Individual Responsibility in International Law for Serious Human Rights Violations, the Netherlands: Martinus Nijhoff (1992), at 54.
2 Id.
4 Chief Justice Marshall stated in the case of the Schooner Exchange v. Mcfaddon (1812) 1 Cranch 116 that "the head of State is responsible only to the law of his own country and he cannot be subjected to trial and punishment by a tribunal to whose jurisdiction he was not subject when the alleged offences were committed." Quoted in L. C. Green, Superior Orders and Command Responsibility, 27 Can. Y. B. Int’l L. 167 (1989), at 192.
However, despite protests from Japan and the United States, after the First World War the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties recommended that charges be brought against the Heads of State from the Central Powers. Article 227 of the Treaty of Versailles called for the trial of the Kaiser for the supreme offence against international morality and the sanctity of treaties. Because of the extensive participation of officials from the various Axis governments in the atrocities committed by their forces during the Second World War, by the time the Nuremberg Charter was drafted objections to the trials of either Heads of States or government officials had ceased. Article 7 of the Nuremberg Charter stated:

The official position of the defendants, whether as Heads of State or responsible officials in Government departments, shall not be considered as freeing them from responsibility or mitigating punishment.

During the subsequent Nuremberg trial of the Major Nazi war criminals the defendants included Karl Doenitz, Hitler’s successor as Head of the German State. In regard to the question of whether an individual was exempted from liability due to their governmental position, the Nuremberg Tribunal held:

“The principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.....the very essence of the Charter is that individuals have international duties which transcend the national

5 The American representative objected to the ‘unprecedented proposal’ to put the heads of state on trial, as this would be to subject them to a “degree of responsibility hitherto unknown to municipal or international law, for which no precedents were to be found in the modern practice of nations.” Id., at 192


7 Glueck summarised the problem the allies faced. He argued that “the application of a universal principle of non-applicability of a State’s agents could render the entire body of criminal law a dead letter. For any group of criminally minded persons comprising the temporary Government that has seized power in a State could readily arrange to declare all of its violations of the law of nations - either in initiating an illegal war or in conducting it contrary to the laws and customs of recognisably legitimate warfare - to be “acts of State”. Thus all its treaty obligations and international law generally could be rendered nugatory; and thus the least law-abiding member of the Family of Nations could always have a weapon with which to emasculate the very law of nations itself. The result would be that the most lawless and unscrupulous leaders and agents of a State could never be brought to account.” Sheldon Glueck, The Nuremberg Trial and Aggressive War, New York: Knolf (1946), at 56-57.
obligation of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorising action moves outside its competence under international law."\textsuperscript{8}

When the Nuremberg Principles were set out by the International Law Commission, Principle III held Heads of State and public officials responsible for their crimes. This principle has subsequently been embedded in international humanitarian law. For instance, Article IV of the Genocide Convention specifies that all persons who violate the convention face punishment, “whether they are constitutionally responsible rulers, public officials or private individuals”. The provisions of the 1968 Convention on the Non-Applicability of Statutory Limitations also apply to ‘Representatives of State Authority’.

**Superior Orders**

It has long been demanded by military command structures that soldiers obey the orders of those above them. Those who disobeyed their superiors were normally subjected to severe punishment.\textsuperscript{9} In his *Digest* Justinian specified that “any person who, in war, commits any act forbidden by his commander, or fails to obey his orders, shall suffer death even if his mission be successfully accomplished.”\textsuperscript{10} In the Articles of War declared by Richard II in 1385, inferiors were expected to obey their commanders. If they disobeyed they would loose their horse and armour.\textsuperscript{11} A similar order was promulgated by James I in 1688 when he announced that “if any inferior officer or soldier shall refuse to obey his superior officer....he shall be cashiered, or suffer such punishment as a Court Martial shall think fit.”\textsuperscript{12} Provisions demanding the obedience of inferiors to the orders of superiors also appeared in military instructions issued by Robert, Earl of Leicester, when he commanded the Dutch and English forces in 1586, and in the

\textsuperscript{8} 1 *Trial of the Major War Criminals before the International Military Tribunal* 223 (1948), quoted in Levie, *supra* note 6, at 465-466.

\textsuperscript{9} Military life is characterised by a very high degree of authoritarianism. In most countries there are separate national laws, judicial and enforcement procedures that apply to members of the military, as opposed to civilians. Soldiers who refuse to follow orders face a very high likelihood of having to bear the brunt of military discipline, notwithstanding that performance of the orders would involve the commission of a war crime. Sunga, *supra* note 1, at 57.


\textsuperscript{11} Id.

\textsuperscript{12} Id.
Letters of the Articles on Military Discipline which were devised by Prince Maurice of Orange, and which stayed in force until 1799.13

As attempts were made to limit the brutality of war a principle developed within military systems that inferiors were only to obey the lawful orders of commanders. The earliest recognition of this principle occurred during the trial of Peter von Hagenbach in 1474. Tried by what was essentially an international tribunal, von Hagenbach was accused of having “trampled underfoot the laws of God and man,” by permitting his men to maltreat the citizens of Breisach.14 Arguing that his actions were in compliance with the orders of his master, the Duke of Burgundy, von Hagenbach maintained that, “he had no right to question the orders that he was charged to carry out, and it was his duty to obey.”15 Even though at this time it was customary for knights to obey their masters completely, von Hagenbach’s defence was held to be contrary to the laws of God, and he was stripped of his knighthood and sentenced to death.

Two centuries later similar rulings were made by English magistrates in the trials of those who participated in the execution of Charles I. In the case of Cooke, the Chief Justice of Ireland who presented the indictment and demanded judgment against the king, the magistrates rejected his defence that “they were not my words, but the words that commanded me,” and convicted him of treason.16 Since Cooke was learned in law he should have known that what his parliamentarian masters were commanding him to do was illegal.17

A similar verdict was applied in the case of Axtell,18 who commanded the guards attending the king’s execution. Although just a common soldier and unlearned in the law, the magistrates rejected Axtell’s defence of superior orders on the basis that even a common soldier must have known that it was an act of treason to participate in the execution of one’s king.19

When the laws of war were first codified by Francis Leiber in 1863, no mention was made about the extent to which soldiers had to obey their superiors. However, following the end of the American Civil War the defence of superior

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13 Id.
15 Green, supra note 10, at 323.
16 (1660) 5 State Trials 107. See Green, Id.
18 (1661) Kelying 13; 84 Er 1055, at 1060.
19 Brownlee, supra note 17, at 402.
orders was rejected in the trial of Captain Henry Wirz, the commander of the Confederate Prisoner of War camp at Andersonville, Georgia.\textsuperscript{20}

In the case of \textit{R v Smith}, conducted during the Boer War, Justice Solomon stated:

"...it is monstrous to suppose that a soldier would be protected when the order is grossly illegal...(But) if the orders are not so manifestly illegal that he must or ought to have known they were unlawful, the private soldier will be protected by the orders of his superior."\textsuperscript{21}

Despite the comments made by Justice Solomon, in his Treatise on International Law published in 1906,\textsuperscript{22} Oppenheim said:

"If members of the armed forces commit violations by order of their Government, they are not war criminals, and cannot be punished by the enemy."\textsuperscript{23}

Oppenheim went on to say:

"In case members of forces commit violations, ordered by their commanders, the members may not be punished for the commanders are alone responsible and the latter members may therefore be punished as war criminals on their capture by the enemy."\textsuperscript{24}

These statements have been regarded as the ‘backbone and cornerstone’ of the doctrine of respondeat superior.\textsuperscript{25} Under this doctrine obedience to superior orders is an absolute defence. It does not eliminate criminal responsibility, it

\textsuperscript{20}Yoram Dinstein, \textit{The Defence of ‘Obedience’ to Superior Orders in International Law}, the Netherlands: A. W. Sijthoff, Leyden (1965), at 160.

\textsuperscript{21}Smith, a British soldier, obeyed an officer’s order to shoot a civilian who refused to comply with a command to fetch a bridle. \textit{Regina v. Smith}, 17 S. C. 561 (C. of G. H. 1900) at 567-8.


\textsuperscript{23}s 253, Id., at 264.

\textsuperscript{24}Id.

merely shifts the responsibility upward to the person who issued the illegal orders.

Similar statements supporting this doctrine appeared in subsequent editions of Oppenheim’s book, even though the defence of superior orders was rejected again, this time by the Supreme Court of Leipzig in the *Llandovery Castle Case*. Finding Boldt and Dithmir guilty of firing upon the survivors of a British hospital ship sunk by their submarine, the German court said:

“It is true that that according to s47 of the [German] Military Penal Code, if the execution of an order in the ordinary course of duty involves such a violation of the law as is punishable, the superior officer issuing such an order is alone responsible. According to paragraph 2, however, the subordinate obeying such an order is liable to punishment, if it was known to him that the order of the superior involved the infringement of civil or military law....(It) was perfectly clear to the accused that killing defenceless people in the life-boats, could be nothing else but a breach of the law.”

During the course of the Second World War several discussions occurred between jurists from the Allied powers about the problem of superior orders. Fearing that several Nazi war criminals would escape liability by placing the responsibility for their acts on the Führer, who could not be held accountable as he had committed suicide in May 1945, the doctrine of respondeat superior was rejected. Instead the Allies adopted Article 8 of the Charter of the Nuremberg Tribunal, which stipulated:

The fact that defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

Although the Nuremberg Tribunal supported this rule it felt the absolute liability approach was to harsh. Instead it stated:

“The provisions of this article are in conformity with the law of all nations.

That a soldier was ordered to kill or torture in violation of the international

26 Judgment in the case Lieutenant Dithmir and Boldt (the Hospital Ship “Llandovery Castle”) (S. Ct. Liepzig, 16 July 1921) H.M.S.O. Cmd 450 (1921), See Green, supra note 10, at 324.
28 See Green, supra note 10, at 341.
law of war has never been recognised as a defence to such acts of brutality though as the Charter here provides, the order may be urged in mitigation of punishment. The true test, which is founded in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible."

It is clear from the explicit language used by the Tribunal in the first part of this statement that they did not wish to lessen the approach taken by Article 8 of the Nuremberg Charter. Defendants could not argue that they should be freed from responsibility merely because they carried out the act constituting an offence pursuant to a superior order. However, if defendants who acted in pursuance to a superior order succeeded in establishing a defence based on lack of moral choice, the fact that a superior order was involved should not preclude the defendant from being acquitted.

The Nuremberg Tribunal’s approach to the problem of superior orders was approved in subsequent trials conducted by the Allies under Control Council Law No. 10 and the Charter of the Tokyo Tribunal. When the International Law Commission drafted the Principles of International Law Recognised by the Charter of the Nuremberg Tribunal and the Judgment of the Nuremberg Tribunal, they included the principle that, “the fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.”

Both the Nuremberg judgment and the Nuremberg principles were endorsed by the Israeli Supreme Court during the trial of Adolf Eichmann when dismissing Eichmann’s plea that he was ordered to carry out the crimes he committed. The Supreme Court reiterated that:

“The mere plea of obedience to the order of the superior - as distinct from the plea that he could not avoid committing the crime because he had no ‘moral choice’ to pursue any other course - will not avail the accused.”

Therefore the modern view of the defence of superior orders is that it is not a defence per se, but just a circumstance that may be taken into account when deciding whether a defence based on lack of moral choice is applicable. Such

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29 Trial of the Major War Criminals before the International Military Tribunal 406 (1948).
30 Principle IV, reprinted in Schindler & Toman, supra note 27, at 923.
defences include duress or mistake. Nevertheless, in cases where a moral choice was available superior orders may still serve as a plea in mitigation.

In the *High Command Case*, one of several cases conducted by the Americans under Control Council Law No. 10, the tribunal addressed the question of whether field commanders are responsible for orders they receive from their superiors and simply pass on to their subordinates. The court held that:

"Military commanders in the field with far-reaching military responsibilities, cannot be charged under International Law with participation in issuing orders which are not obviously criminal or which they are not shown to have known to be criminal under International Law. Such a commander cannot be expected to draw fine distinctions and conclusions as to legality in connection with orders issued by his superiors. He has the right to presume, in the absence of specific knowledge to the contrary, that the legality of such orders has been properly determined before their issuance. He cannot be held criminally responsible for a mere error in judgment as to disputable legal questions.

It is therefore considered that to find a field commander criminally responsible for the transmittal of such an order, he must have passed the order to the chain of command and the order must be one that is criminal upon its face, or one which he is shown have known was criminal."  

*Duress*

In criminal legal systems culpability depends on proof that the defendant committed the act (the *actus reus*) with the intention to commit the act (the *mens rea*). However, *mens rea* is negated where there is duress, and duress was the sole reason why the defendant committed the act. For example in the *Krupp Case*, the tribunal decided that the defence of duress would not absolve the defendants

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33 See Dinstein, *supra* note 20, at 153.
34 *The High Command Case*, 15 Int’l L. Rep. 376 (1948) [hereinafter “High Command Case”], at 385. It is unlikely that the fourteen senior military officers who were tired during this case would not have realised that orders such as those issued by Hitler relating to the killings of captured commandos and commissars, the Commando and Commissar Orders, were criminal on their face. Levie, *supra* note 6, at 429.
35 Sunga, *supra* note 1, at 58.
from the acts they committed as the defendants had no intention or will contrary to those who supposedly exerted the compulsion.\textsuperscript{36}

With regard to the extent of duress necessary to negate mens rea the tribunal in the \textit{Einsatzgruppen Case} stated:

"If one claims duress in the execution of an illegal order it must be shown that the harm caused by obeying the illegal order is not disproportionately greater than the harm which would result from not obeying the illegal order." \textsuperscript{37}

A similar position was taken by the Israeli Supreme Court in the \textit{Eichmann Case}. The court felt that two factors had to be shown in order to prove duress. Firstly there had to be imminent danger to the accused's life, and secondly the accused carried out the criminal act out of a desire to save his own life and because he saw no other possibility of doing so.\textsuperscript{38}

\textit{Mistake}

Ignorance of the law is normally no excuse for committing an offence. Although, given the nature of military systems in which subordinates are expected to obey the orders of those above them and the complexity and uncertainty of international law, several military tribunals have allowed the defence of mistake of law. On the basis that soldiers cannot be expected to know what rules of international law might apply to a particular set of circumstances, a defendant has a defence if the act he was asked to perform was not so manifestly illegal that he did not know or could not have known that the order was illegal.\textsuperscript{39}

During the court-martial of Lieutenant Calley for his part in the massacre of the Vietnamese village of My Lai, the judge advocate ruled:

\begin{footnotes}
\item[36] 15 Int'l L. Rep. 620 (1948). The \textit{Krupp Case} concerned the trial of German industrialists who had helped equip the German war machine with arms and machinery. See Levie, \textit{supra} note 6, at 91-94.

\item[37] 15 Int'l L. Rep. 656 (1948) [hereinafter “\textit{Einsatzgruppen Case}”], at 666. This case concerned the operations of the Extermination Units that accompanied the German Army during the invasion of the Soviet Union. Since these units were credited with having murdered about one million people, this trial was described as “the biggest murder trial in history.” Levie, Id., at 89.

\item[38] Eichmann Case, \textit{supra} note 31, at 318.

\item[39] For example, the tribunal in the \textit{High Command Case} concluded that a military commander has “the right to presume, in the absence of specific knowledge to the contrary, that the legality of such orders has been properly determined before their issuance. He cannot be held criminally responsible for a mere error in judgment as to disputable legal questions.” Bakker, \textit{supra} note 25, at 67.
\end{footnotes}
"If .... Lieutenant Calley received an order directing him to kill unresisting Vietnamese within his control or within the control of his troops, that order would be an illegal order. The question does not rest there, however. A determination that an order is illegal does not, of itself, assign criminal responsibility to the person following the order for the act done in compliance with it .... The acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability unless the superior's order is one which a man of ordinary sense and understanding would, under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful.\textsuperscript{40}

Since this defence concerns an objective analysis of the accused's state of mind, in order to prove \textit{mens rea} the prosecution need only prove that the orders were manifestly illegal. Once this is shown there is effectively a irrefutable presumption that the defendant was aware of the illegality of the order.\textsuperscript{41}

\textbf{Reprisals}

According to the \textit{Naulilaa Case} a reprisal is "an act of self-help by an injured state responding, after an unsatisfied demand, to an act contrary to international law committed by the offending State."\textsuperscript{42} Reprisals may be carried out in order to effect reparation from the offending state for the offence or to compel the offending state to discontinue the unlawful practice. In order to achieve this reprisals are not limited merely to the destruction of property. The killing of hostages may also be a legitimate reprisal if such killings were proportionate to the offence committed by the offending state.\textsuperscript{43} As the state which carries out a reprisal incurs no responsibility, the persons who actually carried out the act are therefore not individually responsible.\textsuperscript{44}

\textsuperscript{40} \textit{U.S. v. Calley}, 48 C.M.R. 19 (1971), at 80-81, quoted in Green, \textit{supra} note 10, at 328.
\textsuperscript{41} Id.
\textsuperscript{42} \textit{The Naulilaa Case (Port. v Ger.)} 2 R. Int'l Arb. Awards 1012 (1928).
\textsuperscript{44} Sunga, \textit{supra} note I, at 61.
Nevertheless under the modern restrictions on the use of force set out in the UN Charter and various instruments of international humanitarian law, acts of reprisal are not lawful. According to the UN Charter members of the United Nations are obliged to refrain from the threat or use of force, unless they do so in self-defence. Reprisals are not the same as acts of self-defence, for acts of self-defence are limited to immediate responses to an attack, whereas reprisals may be carried out at a later date to the unlawful act by the other party.\textsuperscript{45}

Other declarations of the United Nations also outlaw acts of reprisals. The 1970 Declaration on Friendly Relations declares that "States have a duty to refrain from acts of reprisal involving the use of force." In addition, General Assembly Resolution 2675(XXV) declared that reprisals against civilians in times of armed conflict were prohibited, and Article 5(1) of the 1974 General Assembly Resolution on the Defence of Aggression declared that "no consideration of whatever nature, whether political, economic, military or otherwise may serve as a justification for aggression."\textsuperscript{46}

The 1949 Geneva Conventions and the 1977 Additional Protocols also prohibit various types of reprisals. Reprisals against the wounded, sick, personnel, buildings or equipment are prohibited in Geneva Conventions I and II, while reprisals against prisoners of war, civilians, civilian objects, cultural objects and places of worship, the natural environment and objects that are either indispensable to the survival of the civilian population or pose a danger to them are prohibited by Additional Protocol I.\textsuperscript{47}

To overcome the prohibitions against reprisals, certain states have tried to justify the use of reprisals by arguing that such aggressive acts fall within the scope of self-defence. For instance, in 1986 the United States bombed several targets in Libya in response to a bomb explosion in a Berlin discotheque which killed one US soldier and wounded 200 civilians. Since the Libyan government was implicated in the Berlin bomb attack, the US government justified its response by claiming that this act was not a reprisal but was in fact an act of self-defence.\textsuperscript{48} Nevertheless, this justification must be viewed in light of international consensus. Given the aforementioned conventions and the fact that such acts have

\textsuperscript{46} See Sunga, \textit{supra} note 1, at 61.
\textsuperscript{48} Furthermore, President Reagan stated that the mission was justified under Article 51 of the UN Charter as it was a pre-emptive attack against terrorism. President Reagan said that "this pre-emptive action...will not only diminish Colonel Kadhafi's capacity to export terror, it will provide him with reasons and incentives to change his criminal behaviour." McCoubrey and White, \textit{supra} note 45, at 115.
been strongly condemned by the Security Council it is unlikely that reprisals may be pleaded as a valid defence to a war crime.49

Military Necessity

International customary law has recognised that in certain situations the destruction of cities, towns or villages may be justified on the basis of military necessity. For instance, Article 53 of the Fourth Geneva Convention states that:

Any destruction by the Occupation Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organisations is prohibited, except where such destruction is rendered absolutely necessary by military operations.

Neither the Geneva Conventions nor the 1977 Additional Protocols defined the extent to which military necessity allows belligerents to commit such acts. Fortunately this question was answered by comments made during war crimes trials conducted after the Second World War. In the Hostage Case the tribunal stated that:

“Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money. In general, it sanctions measures by an occupant necessary to protect the safety of his forces and to facilitate the success of his operations.”50

Nevertheless, action taken on the basis of military necessity must not be specifically prohibited by the law of war. In the High Command Case the tribunal held that if the notion of military necessity allowed a belligerent to do anything that contributed to the war effort “it would eliminate all humanity and decency and all law from the conduct of war.” It felt that such a contention was “contrary to the accepted usages of civilised nations.”51 Consequently military necessity

49 Sunga, supra note 1, at 62.
50 The Hostage Case supra note 43, at 646.
51 The High Command Case, supra note 34, at 397.
would not justify the brutal treatment of prisoners-of-war or extensive destruction of the countryside.\textsuperscript{52}

The modern view of the doctrine of military necessity holds that military necessity can only be invoked when there is an express provision to that effect. Even then military commanders must distinguish between the civilian population and combatants, and between civilian objects and military objectives, and must direct their operations only against military objectives.\textsuperscript{53}

\textit{Tu Quoque}

Proponents of the doctrine of \textit{tu quoque} argue that individuals who commit atrocities should be exempted from liability if their adversaries behaved in a similar manner.\textsuperscript{54} While the doctrine of \textit{tu quoque} is recognised as a principle of equity, such a doctrine is not a defence under criminal law. Just because an individual has committed an offence and has not been prosecuted for it, does not mean another individual who has committed the same offence should be exempt from criminal liability.\textsuperscript{55} In the \textit{High Command Case} the tribunal concluded that:

\begin{quote}
"Under general principles of law, an accused does not exculpate himself from a crime by showing that another committed a similar crime, either before or after the alleged commission of the crime by the accused."\textsuperscript{56}
\end{quote}

From this and the decisions of other tribunals that adjudicated over the trials of Nazi war criminals it is clear that the doctrine of \textit{tu quoque} does not free individuals from liability.\textsuperscript{57} However, because of a ruling made by the Nuremberg Tribunal it may be possible for defendants to argue this doctrine in mitigation of sentence. During the trial Admiral Karl Doenitz was accused of and found guilty of waging unrestricted submarine warfare. However, the Tribunal imposed no

\textsuperscript{52} In the \textit{High Command Case} the scorched earth policy conducted by the Germans was condemned as being unjustified by any legitimate necessity. McCoubrey and White, \textit{supra} note 45, at 343.


\textsuperscript{54} See comments by Eser, \textit{supra} note 3, at 218.

\textsuperscript{55} Levi, \textit{supra} note 6, at 521.

\textsuperscript{56} Id., at 523.

\textsuperscript{57} The doctrine was also argued and rejected in the \textit{Ministries Case}, the \textit{Flick Case}, the \textit{Einsatzgruppen Case} and the \textit{Hostage Case}. Id., at 522-525.
penalty on him for this offence because the United States Navy engaged in a similar practice in the Pacific.\(^{58}\)

\textit{The 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity}

The legal systems of many countries place limitations on the period in which law enforcement agencies may prosecute criminal offenders.\(^{59}\) Such limitation periods encourage law enforcement agencies to seek prosecutions within a reasonable time while evidence is still available. Furthermore, such periods prevent unreasonable financial and psychological burdens being placed on offenders.\(^{60}\)

While such limitation periods may serve the national interest, it is in the public interest that persons who commit serious crimes do not escape prosecution and punishment merely because it took a while for law enforcement officials to compile enough evidence against them. This is especially so in the prosecution of war criminals. The public interest in prosecuting them clearly outweighs “the right of the individual to be spared the psychological uncertainty of being susceptible to prosecution... for acts committed... half a life time ago.”\(^{61}\)

On 11 November 1970 the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity entered into force.\(^{62}\) Article I of this convention declares that no statutory limitations shall apply to war crimes and crimes against humanity. Under Article IV signatories declare that they will “undertake to adopt, in accordance with their respective constitutionally processes, any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and

\(^{58}\) Id., at 525.

Similarly, in the \textit{High Command Case} the court rejected the \textit{tu quoque} argument in relation to the use by German forces of prisoners of war as illegal labour in forward combat areas by stating “the fact that similar use was made of German prisoners by the enemy is only a factor in mitigation and not a defence.” Major William H. Parks, \textit{Command Responsibility for War Crimes}, 62 Mil. L. Rev. 1 (1973), at 58.

\(^{59}\) It should be noted that the statutory limitation in criminal law is not a universal concept. In many common law countries the principle of setting a time limit for the prosecution of crime is generally not recognised. Robert Miller, \textit{The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity}, 65 Am. J. Int'l L. 476 (1971), at 476n

\(^{60}\) Sunga, supra note 1, at 63

\(^{61}\) Id.

\(^{62}\) Reprinted in Schindler and Toman, supra note 27, at 837. The convention was adopted by U.N.G.A. Res. 2391 (XXIII) (26 November 1968). Unfortunately the convention has not been widely supported. As of September 1986 only twenty eight countries had ratified this convention. Sunga, Id.
punishment of (war crimes and crimes against humanity),” and will abolish statutory limitations already in existence.

Command Responsibility

It has long been held in both municipal and international law that a superior is responsible for all criminal acts he or she orders others to perform. An identical rule exists in almost all national military legislations. Military commanders are personally liable if they order a subordinate to perform a criminal act. While this rule has been widely accepted, the degree to which military commanders are responsible for acts they did not personally order has been the subject of constant debate.

In its report published after the end of the First World War the Commission of Responsibility felt that charges should be laid inter alia:

“.... against all authorities, civil or military, belonging to enemy countries, however high their positions may have been, without distinction of rank, including the Heads of State, who ordered, or, with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing, violations of the laws or customs of war.”

This view accorded with the writings of Grotius, who had written in De Jure Belli Ac Pacis that “a community or its rulers may be held responsible for the crime of a subject if they knew of it and do not prevent it when they could and should prevent it.”

During the Second World War the Allies made a number of proclamations in which they announced their intention to try and punish those guilty of or responsible for war crimes, including those who ordered them. Although, in the trials that followed the war, there was strong disagreement as to the extent to which commanders were responsible for the actions of their subordinates.

The first and most controversial trial to deal with this issue was the trial of General Tomoyuki Yamashita. While Yamashita was in command of the Japanese forces on the Philippines, troops under his command committed widespread war crimes including, murder, plunder, devastation, rape, shooting

63 Oppenheim confirms that the superior issuing an order to commit a criminal act shall be held liable for that act. Green, supra note 4, at 188.
64 See Levie supra note 6, at 422.
65 Id., at 421.
guerrillas without trial, and failing to make provision for prisoners of war. Yamashita was accused of failing to “discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes.” With regard to the responsibility of military commanders the court considered that:

“....assignment to command military troops is accompanied by broad authority and heavy responsibility. This has been true in all armies throughout recorded history. It is absurd, however, to consider a commander a murderer or a rapist because one of his soldiers commits a murder or a rape. Nevertheless, where murder and rape and vicious revengeful actions are widespread offences and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless act of his troops depending upon their nature and the circumstances surrounding them.”

Rejecting Yamashita’s claim that he was unaware of the crimes committed by his men, the court concluded that the prosecution had succeeded in demonstrating that the crimes were “so extensive and widespread, both as to time and area, that they must either have been wilfully permitted by (Yamashita) or secretly ordered by (him).”

Yamashita appealed to the US Supreme Court by way of habeas corpus on a number of grounds, but his appeal was dismissed. Nevertheless, in a dissenting judgment Justice Murphy pointed out that when these crimes were committed there was little left of Yamashita’s command as the repeated land and air assaults made by the allies had pulverised the Japanese forces. In his opinion, “to use the very inefficiency and disorganisation created by the victorious forces as the primary basis for condemning offices of the defeated army bears no resemblance to justice or to military reality.”

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68 Id.
69 The Supreme Court held that as the Commission that prosecuted Yamashita had been lawfully constituted and Yamashita had been properly charged with a violation of the laws of war, Yamashita’s trial and conviction were lawful. Prevost, supra note 64, at 324.
70 Green, supra note 4, at 195.
71 Id.
The doctrine of command responsibility was also discussed in the *High Command Case* and the *Hostage Case* where senior members of the German Army were charged with failing to prevent their subordinates from committing illegal acts.

In the *High Command Case* the tribunal decided that Field Marshall von Leeb had not violated his responsibilities as a military commander because in order to be responsible for the illegal actions of his subordinates a commander “....must have known of these offences and acquiesce or participate or criminally neglect to interfere in their commission and that the offences committed must be patently criminal.”

In the *Hostage Case* the tribunal rejected Field Marshal List’s contention that he was unaware of the atrocities committed by his subordinates because reports of the atrocities had reached his headquarters. It held that:

“....if (a commander) fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defence....want of knowledge of reports made to him is no defence. Reports to commanding generals are made for their special benefits.”

Although the tribunal embraced a “should have known” standard, this standard was not concerned with the extent of atrocities as in the *Yamashita Case* but the fact that reports of the atrocities had reached Field Marshal List’s headquarters.

The doctrine of command responsibility was raised again during the trial of Captain Ernst Medina for his part in the massacre of civilians at My Lai during the Vietnam War. Even though Medina was in the vicinity of the village and was in radio contact with his troops at the time of the massacre neither the “should have known” standard of was applied in the *Hostage Case* nor the “must have known” standard have the *Yamashita Case* were applied. Instead the court followed the ruling of the *High Command Case* and instructed the jury that in

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72 Crowe, *supra* note 67, at 215
73 *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 (1949)*, vol. 11, at 1271.
74 *Prevost, supra* note 66, at 329.
order to find Medina responsible for the actions of his subordinates, it would have to find that he had actual knowledge of the atrocities.\textsuperscript{75}

During the conference that lead to the adoption of Additional Protocol I delegates addressed the issue of command responsibility. The \textit{Yamashita} precedent of absolute liability was rejected, as was the requirement of actual knowledge. Article 86(2) of Additional Protocol I states that:

The fact that a breach of the (Geneva) Conventions or this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

In addition, Article 87 of Additional Protocol I places a direct duty on commanders to "prevent and, where necessary, to suppress and report to competent authorities" any breaches of the 1949 Conventions or Additional Protocol I.\textsuperscript{76} Commanders are required to "ensure that members of the armed forces under their command are aware of their obligations under these instruments."\textsuperscript{77} To ensure that the appropriate instructions are given, legal advisers must be available to the commanders.\textsuperscript{78} Finally "any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the 1949 Conventions or Additional Protocol I, is to initiate such steps as are necessary to prevent such violations, and, where appropriate, to initiate disciplinary or penal action against such violators."\textsuperscript{79}

\textsuperscript{75} General Telford Taylor, former American Chief Prosecutor at Nuremberg stated that “if you were to apply to (General Westmoreland and other US generals) the same standards that were applied to General Yamashita, there would be a strong possibility that they would come to the same end as he did.” Neil Sheehan, \textit{Taylor Says by Yamashita Ruling Westmoreland May Be Guilty}, The New York Times, 9 January 1971, at 3.
\textsuperscript{76} Additional Protocol I, \textit{supra} note 53, art. 87(1).
\textsuperscript{77} Id., art. 87(2).
\textsuperscript{78} Id., art. 82.
\textsuperscript{79} Id., art. 87(3).
The Statute of the Tribunal governs the Tribunal, and defines the boundaries within which it can operate. The Statute was drafted using provisions found in existing international instruments, along with suggestions made by states, organisations and individuals on how the Tribunal could be run.

Because the Statute was drafted by the Secretary-General in 60 days and was adopted by the Security Council three weeks later, there was insufficient time to discuss all the consequences of the Statute’s thirty-two articles. It soon became clear that because of the wording of the Statute, the Tribunal would face several difficulties carrying out its mandate. While many of these difficulties were overcome when the Tribunal adopted its Rules of Procedure and Evidence, some of the articles may limit the Tribunal’s ability to prosecute persons who committed serious violations of international humanitarian law in the former Yugoslavia.

The Legal Competence of the Tribunal

The legal competence of the Tribunal derives from the mandate set out in paragraph 1 of Resolution 808 (1993), and is reiterated in Article 1 of the Statute. This article gives the Tribunal:

...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.

Along with limiting the Tribunal’s geographical and temporal jurisdiction, Article 1 limits the range of offences over which the Tribunal has jurisdiction. To prevent problems arising from the principal *nullum crimen sine lege*, only rules of

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international humanitarian law that are part of customary law are included within the Tribunal’s jurisdiction.⁴

Although the former Yugoslavia was a signatory to several instruments which codified international humanitarian law,⁵ and the nationals of the Yugoslav Republics are bound by such instruments, either by formal declaration of the new state, or by general rules of state succession,⁶ the Secretary-General decided that international customary law and not national law, should be the source of the Tribunal’s jurisdiction.⁷ This approach followed suggestions made to the Secretary-General by

⁴ This will prevent the problem of adherence of some but not all states to specific conventions from arising. Id., para. 34.
⁷ According to Article 34 of the 1978 Vienna Convention on the Succession of States in Respect of Treaties [hereinafter “the Vienna Convention”], where a part or parts of a state separate to form one or more states, any treaty in force at the date of succession in respect of the entire territory of the predecessor state continues in force for each of the successor states so formed, whether or not the predecessor state continues to exist. However, if the parties concerned declare that a treaty will not apply to the successive states or if it is clear that the application of a treaty in respect of the successor state would be incompatible with the object and purpose of the treaty or would radically change the conditions of its operation, then such treaties will not apply to successor states. Malcolm Shaw, International Law, Cambridge: Grotius Pub. (1986), at 445.
⁸ As far as the predecessor state is concerned, Article 35 of the Vienna Convention provides that after the succession the remaining territory is still bound by a treaty, unless the parties to the treaty agree otherwise, or the treaty only applied to the territory which has separated from the predecessor state or it appears from the treaty that the application of the treaty in respect of the successor state would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation. Id., at 446.
⁹ Consequently the Republics of Slovenia, Croatia and Bosnia-Herzegovina, as well as the Federal Republic of Yugoslavia, are bound by the instruments of international humanitarian law which were signed by the former Socialist Federal Republic of Yugoslavia. All of these instruments applied to the entire territory of the former Socialist Federal Republic of Yugoslavia, and none of the newly independent states have stated that they will not honour the treaties. In fact all states involved in the conflict have declared that they will apply the provisions of the four Geneva Conventions and the two Additional Protocols, and have agreed that persons who violate international humanitarian law are personally responsible for their actions. See Mark Bland, An Analysis of the United Nations International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia: Parallels, Problems, Prospects, 2 Global Legal Studies Journal 233 (1994), at 251.

The parties involved in the conflict made one reservation when agreeing to honour the Geneva Conventions and Additional Protocols. They stated that they would not apply those provisions relating to grave breaches. However such an exclusion is to no avail as the Geneva Conventions concern customary law and in many respects even peremptory norms that cannot be excluded by agreements. Id.

⁷ Such law provided a sufficient basis for the Tribunal’s subject-matter jurisdiction, and as a consequence there was no need to apply the domestic law of the Yugoslav Republics. Secretary-General’s Report, supra note 3, para. 36.
the Committee of French Jurists. The Committee considered that “an international judicial body cannot render a judgment on the basis of domestic law, even though that law may recapitulate the rules of general international law.”

Not everyone supported this view. In the proposal prepared by the CSCE rapporteurs on the creation of the Tribunal it was pointed out that the Penal Code of the former Yugoslavia provided for individual responsibility for war crimes, crimes against humanity and genocide, and following its break-up the Yugoslav Republics largely incorporated this Code into their national laws. Since the necessary legislation needed to prosecute those responsible for committing violations of international humanitarian law was already in place, the CSCE rapporteurs felt that the Tribunal should apply the national legislation of the Yugoslav Republics.

Other states also raised the idea of using the national laws of the Yugoslav Republics, but only as a subsidiary or secondary source of law. Russia and Italy both suggested that the Tribunal should apply penalties pursuant to the criminal law in force at the time of commission in the state in which the crime took place.

Applicable Law

According to the Secretary-General, the conventional international humanitarian law which had beyond doubt become part of international customary law was the law applicable in armed conflict as embodied in the 1949 Geneva Conventions, the Fourth Hague Convention, the Genocide Convention and the Nuremberg Charter. While these instruments are undeniably part of customary international law, the Secretary-General did not refer to other instruments which codified certain aspects of international humanitarian law, such as the 1977 Additional Protocols to the Geneva Conventions, and the Torture Convention.

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8 French Report, supra note 5, at 18.
10 Id.
14 Secretary-General’s Report, supra note 3, para 35.
15 The French Jurists felt that as the 1949 Geneva Conventions were old, the Statute of the Yugoslav Tribunal should take into account subsequent developments in international humanitarian law, as reflected, inter alia, in the two Protocols of 1977. French Report, supra note 5, at 20.
Concerning the omission of Additional Protocol I, Theodor Meron suggests that as it contains certain provisions that have not yet been accepted as customary law, the Secretary-General may have felt it was better not to refer to the Protocol at all, rather than listing only those provisions of the Protocol that had acquired customary status.\textsuperscript{16}

\textit{Characterisation of the conflict as international or non-international}

The Fourth Hague Convention and the grave breaches provisions of the 1949 Geneva Conventions only apply to international armed conflicts. Such conflicts include conflicts between an established government and a state intervening on behalf of the opposition, conflicts between states intervening on behalf of the opposing sides in a civil war, and belligerent occupations.\textsuperscript{17} Other types of conflict, for example wars of national liberation, are said to be non-international. These types of conflict are governed by the provisions found in Common Article 3 of the 1949 Geneva Conventions, Additional Protocol II, and certain customary rules of international humanitarian law which govern internal armed conflict.\textsuperscript{18} Because Common Article 3 and Additional Protocol II are limited in their application when compared to the grave breaches provisions of the 1949 Geneva Conventions and the Fourth Hague Convention\textsuperscript{19}, it is therefore important to identify what, if any, phases of the Yugoslav conflict were non-international.

After reviewing the various conflicts that have occurred in the former Yugoslavia, the Commission of Experts concluded that:

"...the character and complexity of the conflicts concerned, combined with the web of agreements on humanitarian issues the parties have concluded among themselves, justify an approach whereby it applies the law applicable in

\textsuperscript{17} Common Article 2 of the Geneva Conventions.
\textsuperscript{18} Customary rules have developed to govern internal strife. These rules cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities. The Prosecutor v Tadic, Case No. IT-94-1-AR72, \textit{Appeal on Jurisdiction} (2 October 1995), [hereinafter Appeal’s Decision] para. 127. For a more detailed description of the customary rules of international humanitarian law governing internal armed conflicts, see paras. 96-127.
international armed conflicts to the entirety of the armed conflicts in the territory of the former Yugoslavia."\(^{20}\)

This conclusion may seem correct when assessing the conflict generally. Three states have fought in the conflict, primarily in the territory of two of them, and a number of proxy groups have participated on behalf of each party to the conflict.\(^{21}\) However, the conflict that has occurred in the former Yugoslavia since 1991 has not been continuous. By examining the course of the conflict, it is clear that there were separate phases of the conflict, these being (1) the Slovenian conflict of 1991, (2) the Croatian conflict of 1991, (3) the Croatian conflict following the February 1992 cease-fire, (4) and the conflict that occurred in Bosnia-Herzegovina between 1992 and 1995. After investigating each phase separately, and examining the various groups which have participated in them, it is possible to argue that certain phases of the conflict were non-international. This conclusion is supported by the fact that the Security Council has never explicitly determined that the armed conflicts in the former Yugoslavia were either all international armed conflicts or were all one international armed conflict.\(^{22}\) In addition, in his report the Secretary-General explained that 1 January 1991 was chosen as the date from which the Tribunal had jurisdiction as it was "a neutral date which was not tied to any specific event and (was) clearly intended to convey the notion that no judgment as to the international or internal character of the conflict (was) being exercised."\(^{23}\) Furthermore, the Appeals Chamber of the Tribunal has decreed that the conflicts in the former Yugoslavia had both internal and international aspects. Their view being based on various statements of the international community, most notably the participants in the conflict, the Security Council and the ICRC.\(^{24}\)

As stated above, the Fourth Hague Convention and the Geneva Conventions, except for Common Article 3, apply only to conflicts between states. It is impossible


\(^{21}\) See Christopher Greenwood, The Prosecution of War Crimes in the Former Yugoslavia, 26 Bracton L. J. 13 (1994), at 18. Meron has also suggested that the entire conflict should be considered international and therefore subject to the rules of international armed conflict. "The relevant factors in the transition of the conflict from internal to international were the recognition of Slovenia, Croatia and Bosnia-Herzegovina; the admission of these states to the United Nations; and the agreements concluded between the parties to the conflicts ...which provide for the application of the Geneva Conventions, in whole or in part." Meron, supra note 16, at 81.

\(^{22}\) Appeal's Decision, supra note 18, para. 74.

\(^{23}\) Secretary-General's Report supra note 3, para 62.

\(^{24}\) The Appeals Chamber stated that the members of the Security Council had both aspects of the conflict in mind when they adopted the Statute of the Tribunal. Consequently, they intended to empower the Tribunal to adjudicate violations of international humanitarian law that occurred in either context. Appeal's Decision, supra note 18, paras. 71-78.
to argue that the hostilities that occurred in the republics of Slovenia, Croatia and Bosnia-Herzegovina before they achieved statehood were governed by the rules applicable in international armed conflicts. Only after these Republics had established themselves as states could the fighting between troops of the Republics and troops from the JNA be said to be international in character. While Bosnia-Herzegovina satisfied the criteria of statehood by the time it declared independence in April 1992, difficulties exist in determining the dates on which the Republics of Slovenia and Croatia achieved statehood.

Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States declares that states should possess the following qualifications:

(a) a permanent population; (b) a defined territory; (c) a government, and (d) the capacity to enter into relations with other states. 25

Although Croatia and Slovenia had a permanent population, a defined territory and the necessary government apparatus to govern effectively when they declared their independence on 25 June 1991, neither of them satisfied the final requirement of the Montevideo Convention. 26 To have the capacity to enter into relations with other states, an entity cannot be subject to the sovereignty of another state. Even though Slovenia and Croatia declared their independence on 25 June 1991, they had not severed all links with the Socialist Federal Republic of Yugoslavia at this time. This is shown by the responses made by both the Yugoslav government and the international community to the declarations of independence. The Yugoslav government ordered units of the JNA to secure the international borders of Slovenia, and to take control of important military and government installations within the two Republics. As far as the Yugoslav government was concerned, Slovenia and Croatia were still part of the Socialist Federal Republic of Yugoslavia. The international community also held this view, as evidenced by their refusal to recognise the declarations made by the two Republics.

In 1993 the Geneva Peace Conference set up the Badinter Commission to determine the dates on which the various Republics succeeded from the former Yugoslavia. The Commission considered that neither Croatia nor Slovenia had achieved the criteria of statehood when they declared their independence on 25 June

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25 See Shaw, supra note 6, at 127.
26 The importance of this criteria is reiterated in Article 2 of the 1978 and 1983 Vienna Conventions on the Succession of States, which declares that “the date of the succession of states means the date upon which the successor state replaced the predecessor state in the responsibility for the international relations of the territory to which the succession of states relates.”

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1991. Nevertheless, the Commission concluded that by October 1991 the two Republics had severed all links with the organs of the Socialist Federal Republic of Yugoslavia. Since Croatia and Slovenia had suspended their declaration of independence for three months on 7 July 1991, the Commission declared that Croatia and Slovenia became states on 8 October 1991, this being the date the suspension ceased to have effect. Consequently, the entire Slovenian conflict and the initial stages of the Croatian conflict were internal, and, as a result, were only governed by the provisions contained in Common Article 3 and Additional Protocol II, as well as customary rules of international humanitarian law which govern internal armed conflict.

The fact that the international community did not recognise the two Republics until the end of 1991 would not affect the Badinter Arbitration Commission’s determination as to the date on which Croatia became a state. Even though recognition provides a strong indication that the relevant criteria of statehood have been fulfilled, recognition has not always been considered a prerequisite for statehood. It is merely an acceptance by states of an already existing situation. A new state will acquire capacity in international law not by virtue of the consent of others but by virtue of a particular factual situation. Once Croatia satisfied the requirements of statehood set out in the Montevideo Conventions, then the Croatian conflict became governed by the rules of international armed conflict, regardless of the fact that the international community did not recognise Croatia until the end of 1991.

At the end of November 1991 the JNA withdrew its forces from Croatia. From then on the conflict in Croatia was fought primarily between the Croatian Army and forces from the so-called Serb Republic of Krajina, and consequently should be viewed as an internal conflict. Such a classification still holds true for this phase of the conflict even though troops of the Bosnian Serb Army occasionally attacked positions controlled by the Croatian Government.

In the *Nicaragua Case* the ICJ stated that it is possible to apply the rules of international armed conflict to situations where the forces of different states have been fighting against each other, without affecting the classification of a conflict as non-international. In its decision, the ICJ contrasted the conflict between the contras and

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28 Id.
30 Id.
31 *Military and Paramilitary Activities (Nicaragua v. United States)* 1986 I.C.J. 4, 114. [hereinafter "Nicaragua Case"].
the Sandinista government with that between the United States and Nicaragua. The first, as an non-international conflict, was governed by Common Article 3 only, whereas the second, as an international conflict fell under the rules of international conflicts.

On the basis of the *Nicaragua Case* fighting between Croatian government forces and Bosnian Serbs was governed by the rules contained in the Geneva and Hague Conventions, whereas fighting between Croatian government forces and troops from the Serb Republic of Krajina was only governed by the rules of non-international conflicts. One consequence of following this approach is that civilians caught in the middle of the fighting that occurred when the Croatian army retook the rebel Croatian Serb areas of Western Slavonia in May 1995, and Krajina in August 1995, were only protected by the provisions contained in Common Article 3, Additional Protocol II, and rules of customary law which govern internal armed conflict.

The difficulties associated with deciding when Croatia became a state do not apply to the fighting in Bosnia-Herzegovina as Croatia satisfied the requirements of the Montevideo Convention when it declared independence on 6 March 1991. While minor armed incidents occurred between rival ethnic groups before this date, full blown hostilities did not break out until after Bosnia-Herzegovina declared independence. For the next few months troops loyal to the Bosnian government fought troops from the JNA, Serbian paramilitary forces and local Bosnian Serb militias. Since the Serbian government had a substantial influence over the Bosnian territory that was in the hands of the Serbs this phase of the conflict was international.

On 19 May 1992, in an attempt to distance themselves from the Bosnian conflict, Serbia and Montenegro withdrew their forces from the conflict in Bosnia-Herzegovina. Bosnian Serbs who had formally been in the JNA established the Bosnian Serb Army in its place. From all appearances this army was commanded by Bosnian Serbs who had formally been officers in the JNA, and became self-reliant by requisitioning arms and ammunition belonging to the JNA which were situated in Bosnia-Herzegovina. Its orders now came from the Bosnian Serb government that had been established in Pale, and instead of trying to prevent Bosnia-Herzegovina from seceding from the Socialist Federal Republic of Yugoslavia, the Bosnian Serb Army now set out to establish an independent Bosnian Serb state.

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32 The Badinter Arbitration Commission were of the view that since this date the constitutional authorities of Bosnia-Herzegovina acted like a sovereign state in order to maintain its territorial integrity and their full and exclusive powers. Greenwood, *supra* note 21, at 1588.
While it may appear that the fighting which took place in Bosnia-Herzegovina after the Federal Republic of Yugoslavia withdrew its forces was internal, there are several factors which support a different finding. Despite public statements to the contrary, Serbian and Montenegren officers were not encouraged to return to the Federal Republic of Yugoslavia following the withdraw of the JNA. Instead they continued to run the units they previously commanded in the JNA before it divided. More direct evidence of the support the Federal Republic of Yugoslavia gave to the Bosnian Serb Army comes from the fact that the JNA continued to pay the salaries of several senior officers of the Bosnian Serb Army, and the Bosnian Serb Army received direct logistical support at all levels from the JNA. Accordingly, even after the JNA divided there was still significant involvement in the Bosnian conflict by forces from the Federal Republic of Yugoslavia.

While the authorities of the Federal Republic of Yugoslavia acted in a clandestine manner in the way in which they supported the Bosnian Serbs, the Croatian authorities openly supported the Bosnian Croat Army. Franjo Tudjman acted as the de facto spokesperson for the so-called Bosnian Croat Republic of Herzog-Bosnia. He represented them at various international peace conferences, most notably Dayton, and when the Bosnian Croat Army turned on the Bosnian Muslims, the international community threatened to impose sanctions on Croatia unless Tudjman ordered the Bosnian Croatian forces to stop their attacks. The most obvious form of assistance was the fact that on several occasions units from the Croatian Army fought in Bosnia-Herzegovina alongside Bosnian Croat forces. On such occasions both sets of forces received their orders from Zagreb. Based on these factors strong arguments can be made for applying the laws of international armed conflict to the entire Bosnian conflict.

**Competence ratione materiae**

*Article 2 - Grave Breaches*

Articles 2 to 5 of the Statute give the Tribunal jurisdiction to prosecute persons responsible for committing serious violations of international humanitarian law.

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34 Id.
35 Military correspondence between the Bosnian Serbs and Belgrade also indicated that the army General Staff in the Serbian capital secretly organised the Serbian military campaign in Bosnia-Herzegovina. Ed Vulliamy, *Serbian lies world chose to believe*, The Guardian, 29 February 1996, at 6.
Article 2, entitled “Grave Breaches of the Geneva Conventions of 1949,” provides the Tribunal with:

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

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

This article provides the core of the customary law applicable in international armed conflicts. While the terms of this provision are broad, inhumane acts can only be prosecuted under this article if they were committed during an international armed conflict, the defendant was connected to a party involved in the conflict, and the victim was a protected person under one of the four 1949 Geneva Conventions.

Even though this provision is almost identical to the grave breaches provisions of the four Geneva Conventions, one notable improvement has been made. In paragraph (b) biological experiments have been specifically mentioned as a form of inhumane treatment. By specifically including this offence within the Statute, the Secretary-General has expanded the scope of conventional humanitarian law.

Unfortunately errors and inconsistencies in the way in which Article 2 was drafted may reduce the effectiveness of this article. Criticisms have been made regarding the use of the term “unlawful” in paragraphs (d) and (g) of Article 2.

36 Secretary-General’s Report, supra note 3, para 37.
37 The last requirement may prove difficult to apply in some cases, for example where both the defendant and the victim were of the same nationality, and control of an area was being disputed between rival ethnic groups from within the same republic, because according to Article 2 of Geneva Convention IV a protected person must be of a different nationality to the occupying power. Greenwood, supra note 21, at 19. See also Appeal’s Decision, supra note 22, para. 81.
While the language of these paragraphs is precisely the same as that used in the equivalent provisions of the Geneva Conventions, the Statute did not define the term ‘unlawful’. When the Geneva Conventions were signed, it was agreed that signatories would give their own meaning to this and other general terms found in the Conventions through their municipal criminal law. It was not intended that such phases would be given an international meaning. Since the term “unlawful” does not have an international meaning challenges as to the meaning of the word may arise.39

Paragraph (g) is also inconsistent as the word “unlawful” was used before the words “deportation” and “confinement” but not before the phase “transfers of protected persons.” This means all transfers of protected persons, whether lawful or unlawful, are criminally punishable. Given that the Geneva Conventions recognise certain situations in which the transfer of protected persons is allowed, applying paragraph (g) in this way will lead to challenges based on the principle of *nullum crimen sine lege*.40

*Article 3 - Violations of the Laws and Customs of War*

Article 3 gives the Tribunal jurisdiction over other “Violations of the Laws or Customs of War”, which the article describes as including “but not limited to”:

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

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39 Rubin comments that as he know no “handing over” of persons alleged to have committed a “grave breach”, no diplomatic correspondence or practice puts meaning to the term “unlawfully”. Id.
40 Id.
These provisions originate from Articles 23 to 28 of the Fourth Hague Convention, and many of the provisions have been reiterated in subsequent conventions, such as the 1925 Geneva Protocol for the Prohibition of Gases.41

The use of the words “shall include but not limited to,” raises the possibility that the Tribunal will be able to prosecute violations of the laws and customs of war which were not specifically mentioned in the Statute. When Resolution 827 (1993) was being debated in the Security Council representatives from several countries commented that the scope of Article 3 was not limited to violations of the Fourth Hague Convention, but also covered violations of international humanitarian law other than the grave breaches of the Geneva Conventions contained in Article 2 of the Statute. For instance, the British delegate stated:

“It would be our view that the reference to the laws or customs of war in Article 3 is broad enough to include applicable international conventions.”42

Consequently it can be argued that Article 3 is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5. In particular (i) violations of the Hague Laws of International Armed Conflict, (ii) infringements of provisions of the Geneva Conventions other than those classified as “grave breaches” by the Conventions, (iii) and violations of Common Article 3 and other customary rules of internal conflicts.43

However, because the scope of Article 3 is potentially broad, legal problems may arise from the principle nullum crimen sine lege.44 Defendants charged with acts

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While analogy inter legem is not forbidden in criminal law and cannot be entirely avoided, it is nevertheless undesirable because it softens the principle of lex certa, whereby no conduct constitutes
that are not specifically mentioned under Article 3 may argue that the alleged offence has not been sufficiently established as a war crime. This problem was recognised by the American Bar Association (ABA) which felt that when the Statute was drafted Article 3 should have listed violations referred to in the Hague Conventions which were not already specified.\textsuperscript{45} A similar approach could be taken with regard to including Common Article 3, and those provisions of the 1977 Additional Protocols that codify customary international humanitarian law.

\textit{Article 4 - Genocide}

Under Article 4 of the Statute the Tribunal is given the power to prosecute persons committing the crime of genocide.\textsuperscript{46} Paragraph 2 of this article defines genocide as:

\textit{...any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:}

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

Paragraph 3 stipulates that the Tribunal may prosecute persons who commit acts of genocide, along with the related acts of conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide.

These two paragraphs are identical to Articles 2 and 3 of the 1948 Genocide Convention which are limited in their range and scope. Such limitations will have a


\textsuperscript{46} In 1992 Bosnia-Herzegovina asked the ICJ for a finding that Serbian forces committed genocide against its people [see Application of the Convention on the Protection and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia (Serbia and Montenegro)), 1993 \textit{ICJ} 3 (3 April 1993) reprinted in 32 \textit{I.L.M.} 888 (1993)] Although the ICJ ordered both parties not to engage in acts of genocide, it failed to address whether any acts of genocide had already taken place. Lisa L. Schmandt, Peace With Justice: Is It Possible For The Former Yugoslavia? 30 \textit{Tex. Int'l L. J.} 335 [1995] at 349.
great impact on the acts to which Article 4 of the Statute applies. Although acts which may be prosecuted by the Tribunal under this provision extend beyond killing, such acts will only constitute genocide if the victim or victims were members of a national, ethnic, racial or religious group, the defendant intended to destroy that group, either in whole or in part, and the defendant committed the act in furtherance of this intent. Direct intent is required. If members of the group are destroyed for any other reason, then this will not be an act of genocide. Article 4 is further limited by the fact that the extermination of social or political groups is not included within the definition of genocide.

One advantage with prosecuting under Article 4 is that the Genocide Convention prohibits genocidal acts whenever and wherever they are committed. The Tribunal will therefore be able to prosecute acts of genocide committed in former Yugoslavia after 1 January 1991 but before the date that hostilities broke out, and will also be able to prosecute crimes committed outside the areas in which armed conflict is taking place if such crimes fall within the definition of genocide. For instance, if the acts committed by the Serbs against the Albanian population in Kosovo fall within the definition of genocide then the Tribunal may prosecute those persons who carried out the acts, as well as those who ordered the acts to be committed.

Article 5 - Crimes Against Humanity

Finally, Article 5 grants the Tribunal the right to prosecute crimes against humanity, which the Statute defines as:

...the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

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

Although the Secretary-General stated in his report that this article was based on Article 6(c) of the Nuremberg Charter, this definition is in fact taken from Control
Council Law No. 10, as its provisions were wider than Article 6(c) of the Nuremberg Charter.\textsuperscript{47} The definition is also similar to Common Article 3 of the Geneva Conventions. By including crimes against humanity within the Statute the Tribunal will be able to prosecute crimes committed against the civilian population during phases of the conflict which are deemed internal. Furthermore, the victims of crimes against humanity need not come from a different party to the conflict from that of the perpetrator. This would cover certain instances in which Serb civilians were allegedly murdered by Serb soldiers for protecting Muslim families.

Unfortunately the elements that have to be satisfied in order to prosecute an offender under Article 5 are more restrictive than those needed to prosecute under Articles 2 and 3. It is not enough that the victim was a civilian. Crimes against humanity must be committed against a “civilian population”. Isolated attacks on individuals will not satisfy the requirements of Article 5.\textsuperscript{48}

Several trials conducted after the Second World War under Control Council Law No. 10 held that in order to show the crime was committed against a civilian population, the crime must be organised and approved by the government controlling the area in which the offence took place.\textsuperscript{49} Only under those situations did the Allies have the right to prosecute an offender for committing a crime against humanity. The judges hearing those cases made this ruling on the basis that if the appropriate government was not implicated in the crimes, then they would punish the offender themselves.\textsuperscript{50}

If such a restriction was applied by the Tribunal, then obtaining a conviction for crimes against humanity would be difficult, as many of the crimes committed in former Yugoslavia have occurred in areas with questionable government structures.\textsuperscript{51} The Tribunal would be required to investigate the conduct of military and political authorities in such areas to see if their actions, or inactions, could lead to an assumption that the crimes were committed with the approval of the relevant government.\textsuperscript{52} This would place an extra burden on the staff of the Prosecutor’s office. For instance, to show that a guard at the Omarska camp committed a crime against humanity the Prosecutor would have to show that the military and political leaders in charge of the area in which the camp was situated failed to stop the crimes

\textsuperscript{47} Control Council Law No. 10 expanded the scope of crimes against humanity by including acts of rape and torture within its definition. Greenwood, \textit{supra} note 21, at 20.


\textsuperscript{49} Id.

\textsuperscript{50} Id.

\textsuperscript{51} “In a number of cases, the alleged facts seem to be attributable to groups operating in a disorganised and undisciplined manner under very limited command and control,” First Interim Report, \textit{supra} note 20, at 11

\textsuperscript{52} O’Brien, \textit{supra} note 48, at 649.
committed in the camp and failed to punish those who committed such acts. Such evidence would show the Bosnian Serb government's approval of the acts that took place there.

Fortunately these investigations will not be necessary as, in his report, the Secretary-General did not expressly require that crimes against humanity be organised and approved by the government of those that committed the acts. In his opinion, it would be enough that the "inhumane act" was committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.53

With regard to this last statement, it is worth noting that the Secretary-General has included acts committed against a civilian population on political grounds, even though such a category was not included within the definition of genocide.

Another matter that will create problems for the Tribunal in the application of Article 5 concerns the circumstances in which an atrocity will be considered a crime against humanity. When the Nuremberg and Tokyo Charters were drafted the scope of crimes against humanity was restricted, as both charters required that crimes against humanity be committed "in execution of or in connection with another crime in the charter of the tribunal." Although this requirement was eliminated in Control Council Law No. 10,54 a few tribunals that operated under this law applied the restrictive meaning of crimes against humanity contained in the Nuremberg and Tokyo Charters.55

Fortunately the Statute has removed the restrictive requirement contained in the Nuremberg and Tokyo Charters, although, in order to fall within the jurisdiction of the Tribunal, crimes against humanity must be committed in "armed conflict".56 As the Statute does not define this term, it is unclear how this phase should be interpreted. The use of the word "in" raises the possibility that a substantive, rather than just a temporal, connection between the crime and the armed conflict is required. Such a requirement was not advanced by states participating in the debate on Resolution 827 (1993). They felt that it was sufficient for the purposes of Article 5 that the crime was committed 'during' armed conflict.57 If this interpretation is

53 Secretary-Generals Report, supra note 3, para 47.
54 The nexus between crimes against humanity and either crimes against peace or war crimes was also eliminated by the Genocide Convention and the Apartheid Convention, both of which prohibit particular types of crimes of humanity regardless of any connection to armed conflict. Appeal's Decision, supra note 18, at 140.
55 O'Brien supra note 48, at 649.
56 Maintenance of even such a reduced nexus to war, however, is disappointing. It may have been triggered by the drafters' concern that some members of the Security Council would be opposed to the criminalisation of peacetime human rights abuses. Meron, supra note 16, at 87.
57 Id
followed, then certain crimes committed against civilian populations in areas of the former Yugoslavia in which the armed conflict was not taking place, such as Kosovo or Vojvodina, will fall within the Tribunal’s jurisdiction.

Even if the Tribunal adopts this interpretation it will still face the dilemma of how to include crimes committed before the armed conflict broke out in June 1991 within the definition of crimes against humanity. Given that the Tribunal was given jurisdiction over crimes committed in former Yugoslavia since 1 January 1991, it seems unlikely that the Secretary-General intended to limit the Tribunal’s jurisdiction over crimes committed before the outbreak of hostilities to acts of genocide, especially as many organisations felt that the nexus between crimes against humanity and armed conflict is unnecessary. Both the International Law Commission and the ICRC have declared that unlike war crimes, crimes against humanity can be committed independently of armed conflict. As the Tribunal is bound by the terms of the Statute, one commentator suggests that the Tribunal could overcome this dilemma by classifying crimes committed before the outbreak of hostilities as isolated acts of armed conflict.

Like Article 3, the inclusion of the words “other inhumane acts” in Article 5(i) indicates that the list of crimes prohibited by Article 5 is not exhaustive. To prevent the Tribunal from being criticised for violating the principle of *nullum crimen sine lege*, the ABA felt that Article 5 should have stated precisely which acts constituted crimes against humanity. It suggested that crimes contained in Common Article 3 of the Geneva Conventions that were not already included in Article 5 should have been included within the Statute. It also suggested that Article 5(g) should have been expanded to cover forced prostitution, forced pregnancy and other widespread sexual abuses reputedly committed in the former Yugoslavia.

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60 However, there is no indication in any statements or resolutions made by the Security Council that it intended to establish a Tribunal to prosecute persons who committed crimes against humanity before the outbreak of any hostilities. Virginia Morris and Michael Scharf, *An Insiders Guide to the International Criminal Tribunal for the former Yugoslavia*, New York: Transnational Publishers (1995), at 83.
61 O’Brien suggests that by determining that local armed conflicts existed before June 1991, the Tribunal would be able to prosecute crimes committed before the outbreak of hostilities under Article 5. O’Brien, *supra* note 48, at 650.
62 Puis, *supra* note 45, at 143.
63 Id.
The overlap between the crimes listed under the Statute

Like the Nuremberg and Tokyo Charters, there is considerable overlap between the crimes prohibited under the Statute. Even though rape is only expressly prohibited by Article 5 of the Statute, it will be possible for the Tribunal to prosecute rape under each of the four criminal articles. Similarly the Tribunal will be able to prosecute those persons who were responsible for ordering or carrying out the policy of ethnic cleansing under all four crimes within the its jurisdiction.

Rape

While Article 2 of the Statute does not expressly include rape as a grave breach, since the provisions listed in this article are broad, rape will constitute a grave breach of the Geneva Conventions under paragraphs (b) and (c) of this article. As rape fits within the definition of torture contained in the 1984 Torture Convention, persons who commit rape may be prosecuted under paragraph (b) of Article 2 of the Statute. Rape may also be prosecuted under this paragraph on the basis that it inflicts inhumane treatment on a person. In addition, because rape causes great suffering or serious injury to the body and health of the victim, the Tribunal will be able to prosecute those who commit rape under Article 2(c) of the Statute.64

Article 3 of the Statute allows the Tribunal to prosecute persons who violate the laws and customs of war. Since acts of rape which are committed in warfare are definitely crimes under international customary law this article provides a further foundation for the prosecution of rape. The prohibition of rape in the modern laws of armed conflict originated from the Military Code written by Francis Lieber in 1863.65 The 1899 and 1907 Hague Conventions, while not specifically mentioning women, required that “family honour and rights....must be protected.” Rape was prosecuted as a war crime at the Tokyo Trials, and was listed as a crime against humanity in Control Council Law No. 10.66 Rape has also been outlawed by the Fourth Geneva Convention and Additional Protocol I. Article 27 of the Fourth Geneva Convention and Articles 75(2)(b) and 76(1) of Additional Protocol I also prohibit enforced


66 See Meron, supra note 64.
prostitution and any form of indecent assault committed during international armed conflicts. Furthermore, Additional Protocol I prohibits inhuman and degrading practices which outrage personal dignity, a category in which rape could be prosecuted, and also prohibits the use of rape and other forms of sexual assault as a form of reprisal against civilians.

Because of the broad nature of the phrase “includes, but not limited to,” the Tribunal also has jurisdiction over the customary laws of internal armed conflicts. The Tribunal will therefore be able to prosecute persons who committed rapes during phases of the conflict that are declared to be internal under common Article 3 of the Geneva Conventions\(^67\) and Article 4 of Additional Protocol II\(^68\).

It will be easier for the Tribunal to prosecute persons who committed rape under Articles 2 and 3 of the Statute than prosecuting them for committing a crime against humanity. In order to come within the scope of Article 5 the prosecution must prove that the rape was committed as part of a widespread or systematic attack upon the civilian population. Although this burden will be difficult to establish in individual cases of rape.\(^69\)

Finally when rape is used as a way to eliminate a minority group, then persons who commit rape may be prosecuted under Article 4 of the Statute for committing an act of genocide. For example, this article would apply when women of a particular minority group were forcibly impregnated in order to dilute the bloodline of that minority group.\(^70\) Unfortunately, given the degree of intent needed to prove genocide, it is unlikely that a prosecution under this article would be based upon allegations of rape in isolation from evidence of other crimes.\(^71\)

Ethnic Cleansing

Persons who ordered or carried out ethnic cleansing within the former Yugoslavia may also be prosecuted under all four of the categories within the Tribunal’s jurisdiction. Those who killed, tortured, raped or deported persons protected under the 1949 Geneva Conventions may be prosecuted under Article 2, while those who wantonly destroyed civilian areas, attacked undefended towns, destroyed or damaged cultural objects or plundered the property of civilians, may be prosecuted under Article 3. Given the extent of the crimes and the systematic manner

\(^{67}\) The Tribunal may prosecute those who commit rape under Art 3(1)(c): “outrages upon human dignity, in particular humiliating and degrading treatment.”

\(^{68}\) The Statute, supra note 1, art 4(2)(e) prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.”

\(^{69}\) Greenwood, supra note 21, at 20.

\(^{70}\) Lakatos, supra note 64, at 918.

\(^{71}\) Greenwood, supra note 21, at 20.
in which they were carried out, most if not all instances of ethnic cleansing will fall within the definition of crimes of humanity.

Finally, since the practice of ethnic cleansing has resulted in the virtual eradication of the civilian population of Muslims from much of the territory of Bosnia-Herzegovina, it may be possible to prove the requisite intent required for genocide by establishing that ethnic cleansing was conducted as a matter of official policy. In the absence of direct evidence of such a policy, it may also be possible to infer the necessary specific intent from the number of victims belonging to a specific group and other indications of demographic changes affecting this group which could only be explained in terms of a systematic plan or policy directed against members of the group as such. The Commission of Experts observed:

“There is sufficient evidence to conclude that the practices of ethnic cleansing were not coincidental, sporadic or carried out by disorganised groups or bands of civilians who could not be controlled by the Bosnian-Serb leadership. Indeed, the patterns of conduct, the manner in which these acts were carried out, the length of time over which they took place and the areas in which they occurred combine to reveal a purpose, systematically and some planning and coordination from higher authorities.”

Competence Ratione Personae and Individual Criminal Responsibility

Paragraph 1 of Resolution 808 (1993) declared that the 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. Because of previous resolutions passed by the Security Council, the Secretary-General decided that the term “persons responsible for serious violations of international humanitarian law,” would only apply to natural persons.

In his report the Secretary-General did consider whether a juridical person, such as an association or an organisation, could be considered criminal, so that its members

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72 In his confirmation hearing US Secretary of State Warren Christopher commented that the Serb campaign of ethnic cleansing was resulting in “near genocidal or perhaps really genocidal conditions.” Similarly in mid-November 1993 a written submission to the US Senate House Subcommittee on Foreign Relations stated that “the Department of State does believe that certain acts committed as apart of the systematic Bosnian Serb campaign of ethnic cleansing in Bosnia constitute acts of genocide.” Richard Johnson, Some Call It Genocide But Not Those Who Can Make A Difference, Washington Post, 13 February 1994 at C7, quoted in Schmandt, supra note 46, at 349.


74 The Statute, supra note 1, art. 6 states that “the International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute”. 

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for that reason alone could be subject to the jurisdiction of the Tribunal. Even though
a provision to this effect was included in the Nuremberg Charter, the Secretary-
General decided not to include juridical persons within the jurisdiction of the
Tribunal.\(^75\)

Despite the fact that Article 6 of the Statute limits the Tribunal’s jurisdiction to
‘natural persons’, within these constraints the Tribunal has broad competence ratione
personae.\(^76\) In paragraph 1 of Article 7 the Statute states that all persons who
“planned, instigated, ordered, committed or otherwise aided and abetted in the
planning, preparation or execution of a crime” within the Tribunal’s jurisdiction are
personally responsible for the crime. This provision extends Article 4, which gives the
Tribunal jurisdiction over conspiracy, incitement, attempt and complicity in relation
to the crime of genocide. It will also enable the Tribunal to prosecute persons who
have provided material and financial support to those who have committed violations.\(^77\)

Fulfilling the commitment to prosecute “all persons” who participated in
planning, preparation or execution of a crime, the Statute prevents Heads of State, or
government officials, from arguing that they are relieved of individual responsibility
because of their official positions.\(^78\) As well as making military commanders liable
for unlawful orders they issue to their subordinates, the Statute extends their criminal
responsibility to situations where the commander “knew or had reason to know” that
their subordinates were about to commit unlawful acts, or had done so, and they failed
to take necessary and responsible measures to prevent such acts, or to punish those
who committed them.\(^79\) Article 7 also specifies that “the fact that an accused person
acted pursuant to an order of a Government or of a superior shall not relieve him of
criminal responsibility, but may be considered in mitigation of punishment, if the
International Tribunal determines that justice so requires.”\(^80\)

Questions relating to the scope of command responsibility and the applicability
of superior orders will provide an interesting challenge to the Tribunal. Because of the
chaotic nature of the fighting that occurred in the former Yugoslavia, it may not be
possible to implicate persons other than those who carried out the atrocities. The
Tribunal will therefore have to prosecute several political and military leaders under

\(^75\) The French report felt that membership in a de jure or de facto
group whose primary or subordinate goal is to commit crimes coming within the jurisdiction of the Tribunal should be a
separate defence. French Report, supra note 5, at 25.

\(^76\) Peter Burns, An International Criminal Tribunal: The Difficult Union of Principle and Politics,

\(^77\) O’Brien, supra note 48, at 651.

\(^78\) The Statute, supra note 1, art. 7(2).

\(^79\) Id., art. 7(3).

\(^80\) Id., art. 7(4).
the doctrine of command responsibility, which requires commanders to repress, or punish, those under their command who commit war crimes. The Statute provides that commanders are responsible if they did not repress or punish criminal acts committed by their subordinates which they “knew or had reason to know” were being, or had been committed.

The scope of a commander’s responsibility is defined by the words “knew or had reason to know”. Commanders are liable if they had received reports about the crimes, and had not investigated or even read them. Indeed, because of the words “had reason to know” it may be possible to hold commanders responsible simply by establishing that a vast number of atrocities were committed by their subordinates.81 As this approach has been rejected by the majority of trials that have dealt with the doctrine of command responsibility Article 7(3) should not be applied to this extent.82 This degree of responsibility places a heavy burden on commanders, as it does not take account of the circumstances the commander was in. If the commander’s lines of communication were severed by the enemy, it would be unfair to hold him liable for crimes he had received no information about. In accordance with the precedent set by the Hostage Case and the definition of command responsibility set out by Article 86 of Additional Protocol I, the Tribunal should only hold commanders responsible if they knew or had information which should have enabled them to conclude, in the circumstances at the time, that their subordinates were committing or were going to commit a war crime.

A great deal of the atrocities that were committed in the former Yugoslavia were perpetrated by small paramilitary groups acting independently of the regular army. Nevertheless, it may be possible to hold certain high officials responsible for not preventing or repressing these crimes. In the Hostage Case the court held that persons who had occupational or executive responsibility over an area were responsible for repressing and punishing violations, even if committed by forces not under their operational or administrative control.83 Also, if it can be shown that the crimes committed by different paramilitary groups were committed in an identical way, then it may be possible to infer that the crimes were coordinated, and that the officials who controlled the area either participated in the coordination of the crimes or consented to them.84

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82 Id., at 224
84 O’Brien, Id.
Paragraph 4 of Article 7 of the Statute is identical to Article 8 of the Nuremberg Charter. Under this article, the fact that a crime was committed pursuant to an order of a superior was not considered when determining criminal culpability, and was not to play a part in the context of another defence. Defendants who claimed that they committed the crime “pursuant to orders and under the threat of death for disobedience” would not be freed from liability. Once the act was proved to be criminal, the defendant was to held to be responsible. Claims of compulsion or mistake of law were only to be considered in mitigation of punishment.

The doctrine of absolute liability imposed by Article 8 of the Nuremberg Charter was criticised because it did not give a defendant the opportunity to prove he lacked a culpable state of mind. For instance, at the time the charter was adopted the US Uniform Code of Military Justice allowed the defence of superior orders in situations where the order was not so manifestly illegal that the subordinate did not know or could not have known that the order was illegal.85

The Nuremberg Tribunal also felt that Article 8 was too harsh. In its ruling the Tribunal decided that a defendant who acted pursuant to superior orders would be freed from responsibility if no moral choice was available to him. The Commission of Experts set up to investigate violations of international humanitarian law in the former Yugoslavia supported a similar definition of superior orders. It recommended that “the fact that a person acted pursuant to order of his government or of a superior does relieve him from responsibility under international law, provided a moral choice was available to him.”86

To give effect to customary law, the Tribunal should not prevent a defendant raising a defence based on lack of moral choice merely because the defendant acted in pursuance to a superior order. A defendant should be exempted from criminal responsibility if he shows that the order was not manifestly unlawful or that he carried out the order under conditions of duress, as in such cases no moral choice was available to the perpetrator.

It is interesting to note that although other defences to war crimes, such as military necessity, reprisals and mistake of fact, were applied in several trials that were conducted after the Second World War, the Secretary-General choose not to include them in the Statute. However, the Secretary-General’s report did recognise that the Tribunal would have to decide on a case-by-case basis whether a defence, such as minimum age or mental incapacity, would relieve a person accused of committing violations of international humanitarian law from responsibility for their

85 See comments by Steven J. Lepper, reprinted in Coonan, supra note 6, at 248
86 The French Jurist proposed that the fact that an individual charged with a crime before the Tribunal obeyed an order of a superior would not relieve him of responsibility if, in the circumstances at the time, it was possible for him not to comply with that order. French Report supra note 5, at 25.
actions. When determining whether such defences are admissible the Tribunal must “draw upon the general principles of law recognised by all nations.”

Competence Ratione Loci and Ratione Temporis

The exact details of the territorial and temporal limits to the Tribunal’s competence, that were established in Article 1, are set out in Article 8. The territorial jurisdiction of the Tribunal is limited to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters.

In Resolution 808 (1993) the jurisdiction of the Tribunal was limited to violations committed “since 1991”. As the Secretary-General understood this phase to mean anytime on or after 1 January 1991, the temporal jurisdiction of the Tribunal begins on 1 January 1991. This date was chosen because it was “a neutral date which (was) not tied to any specific event.”

The temporal jurisdiction of the Tribunal is only defined in terms of its starting point because when the Statute was drafted there was no indication when the violations of international humanitarian law that were being committed in the former Yugoslavia would cease. With the signing of the Dayton Agreement the Security Council may decide to limit the Tribunal’s temporal jurisdiction. However, as it demonstrated following the Gulf War, the Security Council is prepared to continue taking appropriate measures to restore and maintain peace and security, in accordance with Chapter VII of the Charter, long after the fighting has ceased.

Concurrent Jurisdiction

Since it was not the intention of the Security Council to preclude or prevent national courts prosecuting persons who committed serious violations of international humanitarian law in the former Yugoslavia, Article 9 of the Statute provides that the...
Tribunal’s jurisdiction is concurrent to national courts. In fact, the Secretary-General stressed that national courts should be encouraged to prosecute such persons. Such prosecutions would lighten the workload of the Tribunal. However, Article 9 also states that the Tribunal shall have primacy over national courts, and “at any stage” of the national courts proceedings, “the International Tribunal may formally request national courts to defer to the competence of the International Tribunal.”

While Article 9 allows the Tribunal to request a national court to defer to its competence, because such a request is not a ‘request for assistance’ which a state is required to comply with pursuant to Article 29 of the Statute, a state may refuse to defer a case to the Tribunal’s competence on the grounds that such a deferral would prevent the state’s right to conduct its own proceedings. This right is preserved by paragraph 1 of Article 9.

Article 10 of the Statute concerns the principle of non-bis-in-idem, which prevents persons being tried twice for the same crime. Although paragraph 1 of Article 10 prevents national courts trying persons for crimes they had previously been tried for by the Tribunal, paragraph 2 allows the Tribunal to try persons for crimes for which they had already been tried for by a national court if:

(a) the act for which he or she was tried was characterised as an ordinary crime, or;
(b) the national court's proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

When the Tribunal tries persons who have previously been tried by a national court, the Tribunal will take into account the extent to which any penalty imposed by

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95 While other forms of jurisdiction such as exclusive, preferential or appellate jurisdiction were dismissed as possibilities for the Tribunal’s jurisdiction with regard to national courts, concurrent jurisdiction has certain drawbacks. Firstly, offenders would receive different punishments depending on where the trial is held, Leslie Deak, *The United Nations Ad Hoc Tribunal for the Former Yugoslavia* 20 Am. Soc. Int'l L. Proc. (1993), at 28; and concurrent jurisdiction might complicate the use of defendants in one court as witnesses in another, as well as raise the problems of double jeopardy. Paul Szasz, *The Proposed War Crimes Tribunal for Ex-Yugoslavia*, 25 N.Y.U.J. Int'l & Pol. 405 (1993) at 426.

96 Id.


98 Statute, supra note 1, art. 9(2).

99 O’Brien, supra note 48, at 655; see also Rubin, supra note 38, at 14.

100 During the debate on Resolution 827 (1993), several states suggested that the term national proceedings included not only the trial and sentencing proceedings but also clemency, parole and other proceedings that determine a defendant’s punishment. O’Brien, Id.
a national court has already been served. This provision is important for if the Tribunal was not allowed to prosecute persons who had been previously prosecuted in ‘sham national trials’, then the trials of Yugoslavian war criminals would suffer the same fate as trials conducted after the First World War, where short sentences, reduced by escape or clemency, undermined efforts to establish individual responsibility for war crimes.

The Organisation of the Tribunal

Since the Tribunal was established to prosecute persons responsible for committing serious violations of international humanitarian law in territory of the former Yugoslavia, the Tribunal comprises a judicial organ, comprising two trial chambers and an appeals chamber, a prosecutorial organ and a registry. In his commentary on the Statute the Secretary-General stated that the responsibilities of these organs were as follows:

“It would be the function of the prosecutorial organ to investigate cases, prepare indictments and prosecute persons responsible for committing....violations (of the Statute). The judicial organ would hear the cases presented to its Trial Chambers, and consider appeals from the Trial Chambers in its Appeals Chamber. A secretariat or Registry would be required to service both the prosecutorial and judicial organs.”

Article 12 states that the judicial organ of the Tribunal shall be composed of 11 Judges, no two of whom may be nationals of the same state. Three Judges shall serve in each of the two trial chambers and five shall serve in the appeals chamber.

Article 13 declares that Judges must be “persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices.” Furthermore, with

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101 Statute, supra note 1, art. 10(3)
102 O’Brien, supra note 48, at 655. It is worth noting that although the rule allowing retrial by the Tribunal is theoretically sound, it will be much more difficult to follow in practice. Information the Tribunal needs in order to decide that a retrial is necessary will be difficult to obtain, especially if the country in question does not cooperate with the Tribunal. This situation will become even more complicated when the tribunal is seeking evidence required to prove that the national trial was a “sham”. See Puls, supra note 45, at 149.
103 The Statute, supra note 1, art. 11.
104 Secretary-General’s Report, supra note 3, para. 69.
105 Impartiality with respect to the Yugoslav situation is essential to ensure both the integrity of the Tribunal and the right to trial by a fair and impartial judicial body. Morris and Scharf, supra note 59, at 143.
regard to the overall composition of the Chambers, "due account shall be taken of the experience of the Judges in criminal law, international law, including international humanitarian law and human rights law."106

The manner in which Judges are to be elected is also set out in Article 13. The Secretary-General shall invite member states of the United Nations and non-member states with permanent observer missions at UN headquarters to nominate up to two Judges who possess the required qualifications. Nominations received by the Secretary-General shall be forwarded to the Security Council who shall establish a list of not less than twenty-two and not more than thirty-three candidates.107 From this list the General Assembly shall elect the eleven Judges who will serve on the Tribunal. Each Judge will be elected for a team of four years, after which they are eligible for re-election. If a vacancy arises in the Chambers prior to the completion of the four year term, the Secretary-General, after consulting with the President of the Security Council and the General Assembly, shall appoint a suitably qualified person to fill the vacancy for the remainder of the term.108

It has been suggested that the static composition of the Chambers and the lack of alternate Judges may pose serious problems for the Tribunal's operation. If a Judge has to excuse himself or herself, then the chamber in which he or she sits will no longer be available to the defendant. Similarly if a Judge dies or is otherwise unavailable, until their position is filled by the Secretary-General, his or her Chamber will be forced to stop work.109

Concerns have also been raised about the electoral process and the terms Judges are appointed for. Since the Statute does not set out the grounds on which the General Assembly may select Judges, undue political interference may affect the election process.110 Additionally, because the terms for which the Judges are elected for are not staggered, the entire bench will be subject to turnover at the same

106 The Statute, supra note 1, art. 9(1).
107 When preparing this list the Security Council must ensure that the principal legal systems of the world are represented. This will give the Tribunal a multinational and multicultural composition. Such a composition was not processed by the Nuremberg Tribunal, as it only included representatives from France, the Soviet Union, the United States, and the United Kingdom. Christopher C. Joyner, Enforcing Human Rights Standards in the Former Yugoslavia: The Case for an International War Crimes Tribunal, 22 Denv. J. Int'l L. & Pol. 235 (1994), at 267.
108 The Statute supra note 1, art. 9(3). This procedure is easier than the somewhat complicated and time-consuming procedures that are required for the initial election of the Judges at the beginning of each term. Morris and Scharf, supra note 58, at 146.
109 Puls, supra note 45, at 145.
110 Id., at 146.
time. During this period it is possible that the entire bench will be more concerned with re-election, than with the cases they are prosecuting.\textsuperscript{111}

Article 14 concerns the election of the President of the Tribunal and the assignment of Judges to the various Chambers. The following article gives the Judges the competence to adopt the rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses, and other appropriate matters.\textsuperscript{112}

The selection and the responsibilities of the Prosecutor are set out in Article 16. The Prosecutor must be of “high moral character and must possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases,” and shall be appointed by the Security Council on nomination by the Secretary-General.\textsuperscript{113} Once elected the Prosecutor is “responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law in the territory of the former Yugoslavia since 1 January, 1991.”\textsuperscript{114} To ensure the impartiality of the Tribunal is not questioned the Prosecutor must be independent from other parts of the Tribunal, and must not seek or receive instructions from any government or from any other source.\textsuperscript{115}

The administrative and support services offered to the Chambers and the Prosecutor’s office by the Registry are set out in Article 17. These services include public information and external relations, preparation of minutes of meetings, conference-service facilities, printing and publication of all documents, all administrative work, budgetary and personnel matters, and serving as the channel of communications to and from the Tribunal.

Since both the Chambers and the Prosecutor’s office share the services of the Registry, there may be possible conflicts of interest. It would be possible for the Prosecutor’s office to influence the Chambers by manipulating the workload of the Registry, or to gain access, either deliberately or accidentally, to confidential documents. To avoid such situations arising, the ABA recommended that the Registry should separate personnel who work for the Prosecutor’s office from those

\textsuperscript{111} To avoid these problems occurring the ABA suggested that Judges should be elected for the entire period that the Tribunal is in place, subject to removal for impropriety only by a unanimous decision of the remaining Judges. Id.

\textsuperscript{112} The Statute, \textit{supra} note 1, art. 15.

\textsuperscript{113} Id., art. 16(4).

\textsuperscript{114} Id., art. 16(1).

\textsuperscript{115} Along with governments, private individuals, and governmental and non-governmental organisations, the Prosecutor must not seek or receive instructions from the Tribunal and the Security Council. If he did, his work would not accord with the fundamental principles of fairness. Daniel D. Ntanda Nsereko, \textit{Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia}, 5 Crim. L. F. 507 (1993), at 517,
who work for the Chambers. Administrative or support services in the Registry that did not have access to confidential information would not need to be separated.

Investigation and Pre-Trial Proceedings

Articles 18 and 19 set out the investigation and pre-trial procedures the Tribunal must follow. The Prosecutor shall initiate investigations, *ex officio*, or on the basis of information obtained from any other source, particularly from governments, UN organs, and inter-governmental and non-governmental organisations. During such investigations the Prosecutor has the authority to question suspects, victims and witnesses, collect evidence and conduct on-site investigations. While carrying out investigations the Prosecutor may seek the assistance of any state authority which may assist the investigation.

Once the Prosecutor determines that a prima facie case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime, or crimes, with which the accused is charged. This indictment will then be transmitted to a Judge of a Trial Chamber, who shall review the indictment and if satisfied that the Prosecutor has established a prima facie case, the Judge shall confirm the indictment. If the Judge is not satisfied the indictment will be dismissed. After the indictment is confirmed the Judge “may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.”

This pre-trial procedure closely follows the adversarial legal system, as opposed to the inquisitorial legal system, since the investigation of offences and the preparation of indictments are performed by the Prosecutor. Even though a Judge of

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116 Puls, *supra* note 45, 144-145.
118 Even though this list is not exhaustive, the Statute is unclear on whether the Prosecutor may initiate proceedings on the basis of reports or complaints from victims, their relatives, or their friends. If the Prosecutor does act on such information the Prosecutor must take into account the possibility that such persons may be acting out of “partisan motives.” Similarly the Prosecutor must be watchful when assessing information supplied by non-governmental organisations from within the territories of the former Yugoslavia. Nsereko, *supra* note 115, at 520-521.
119 A prima facie case is established if there is “such evidence that, if it be uncontradicted at the trial, a reasonable minded jury may convict upon it.” *Ex parte Bidwell*, (1937) 1 K.B. 305, 314 (1936).
120 The Statute, *supra* note 1, art. 18(4).
121 Id., art. 19.
the Trial Chamber has to confirm an indictment, the Statute does not permit the judge to investigate the offence independently.\(^\text{122}\)

Since the Prosecutor is to act independently of any government or organisation, the Prosecutor cannot take political considerations into account when laying indictments.\(^\text{123}\) Once a prima facie case has been established the Prosecutor must prepare an indictment, even if the person is the head of one of the belligerent forces or is a major influence in peace negotiations.\(^\text{124}\) This provision supports the view that amnesties from prosecution organised between the leaders of the belligerent forces will not prevent the Tribunal laying charges against them.\(^\text{125}\)

The detailed records kept by the Nazis meant that the courts which prosecuted Nazi war criminals had no difficulty linking those who committed the crimes with those who ordered them. This is not the case in the former Yugoslavia. Most of the evidence that has been collected comes either from on-site investigations, or from the testimony of victims and witnesses. Since it is unlikely that such evidence will link high officials to the crimes which have been committed it has been suggested that the Prosecutor should be given the ability to grant immunity to certain defendants in return for information relating to offences committed by others.\(^\text{126}\)

Given the international character of the Tribunal it would be unwise to allow the Prosecutor such discretion. Despite the fact that granting immunity to ‘lower-level criminals’ has been effective in the fight against organised crime in the United States, immunity is not allowed in many countries. Allowing immunity would greatly Americanise the Tribunal, and this result must be avoided in order to help ensure general acceptance of the Tribunal by the international community.\(^\text{127}\)

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\(^\text{122}\) Szasz, supra note 94, at 423-424.

\(^\text{123}\) When asked whether those in senior positions would be indicted, the Prosecutor of the Tribunal, Richard Goldstone, asserted that politics would not be taken into account in the decision to prosecute. Schmandt, supra note 46, at 358.

\(^\text{124}\) Rubin criticises the fact that even before the offence is proven the Prosecutor has the authority and the responsibility to ‘decapitate’ peace negotiation teams. Rubin supra note 38, at 9. Another commentator has stated “it may not be possible to bring about a peace settlement in the former Yugoslavia if the Tribunal is going forward with active prosecutions of the state leaders of the belligerent parties.” Ruth Wedgwood, War Crimes in the Former Yugoslavia: Comments on the International War Crimes Tribunal, 34 Va. J. Int’l L. 267 (1994), at 274.

\(^\text{125}\) Nsereko disagrees “...where there is sufficient evidence to warrant prosecution, the Prosecutor should have no discretion but to prosecute....it would be an outrage to the international public were the Prosecutor to decline to go forward with a case for reasons other than insufficiency of evidence.” Nsereko, supra note 115, at 518-519.

\(^\text{126}\) Since the world community, through the Security Council, has decided that these offences should be prosecuted in a war crimes tribunal, only the world community can grant amnesty or respite from prosecution. See comments by Paul C. Szasz, reprinted in Deak, supra note 94, at 31-32. See also Anthony D’Amato, Peace vs. Accountability in Bosnia, 88 Am. J. Int’l L. 500 (1994), at 500.

\(^\text{127}\) See comments by the ABA reprinted in Puls, supra note 45, at 151.

139
Trial and Post-Trial Proceedings

The rules relating to the commencement and conduct of trial proceedings are set out in Article 20. Once taken into custody persons accused of committing offences must be immediately informed of the charges against them. After they are transferred to the Tribunal the Trial Chamber shall read the indictment to them, ensure that their rights are respected, confirm they understand the indictment, instruct them to enter a plea, and set a date for their trial. During the trial of the accused, the Trial Chambers must ensure that the trial is “fair and expeditious and the proceedings are conducted in accordance with the rules of procedure and evidence.” The Trial Chambers must also ensure that the rights of the accused are fully respected, and appropriate protection is provided to victims and witnesses.

Article 21 sets out the rights of the accused. The accused is entitled to a fair and public hearing, subject to rules relating to the protection of victims and witnesses, is presumed to be innocent until proven guilty, and is entitled to the following minimum guarantees:

(a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
(c) to be tried without undue delay;
(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.
(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;
(g) not to be compelled to testify against himself or to confess guilt.

Despite the fact that Article 21 incorporates many internationally recognised standards regarding the rights of an accused, in particular the standards set out in

Statute, supra note 1, art. 20(1).
Article 14 of the International Covenant on Civil and Political Rights,\textsuperscript{129} no reference is made regarding pre-trial release or \textit{habeas corpus}.\textsuperscript{130}

While defendants should have been given the right to contest the lawfulness of their arrest or detention, it would have been unwise to release defendants before trial. There is a strong possibility that if Serbian defendants are released before their trial they will attempt to flee to either Serbia or Republika Srpska as both territories have repeatedly refused to recognise the jurisdiction of the Tribunal. Because of the lack of adequate safeguards to ensure that defendants will return to the Tribunal to face trial, it was appropriate therefore that the right of pre-trial release was not included in the Statute.\textsuperscript{131}

By requiring that defendants must be tried in their presence,\textsuperscript{132} the Statute rejected the idea of \textit{in absentia} trials, which was recommended by the French to ensure that defendants did not escape conviction simply because they refused to appear.\textsuperscript{133} After receiving reports from several states the Secretary-General decided that trials \textit{in absentia} should not be allowed because there was a "widespread perception" that such trials would be inconsistent with Article 14 of the International Covenant on Civil and Political Rights.\textsuperscript{134}

Many of the crimes that have been committed in the former Yugoslavia were committed by irregular soldiers and bands of armed civilians. It is possible that some of the crimes committed may have been carried out by juveniles. Although many domestic legal systems prosecute and punish juvenile offenders separately from...
adults, the Statute does not distinguish between them. The Statute should have addressed this issue, especially as Article 14 of the International Covenant on Civil and Political Rights declares that when prosecuting juvenile defendants a court must take into account their age and the desirability of promoting their rehabilitation.

Several people who will be required to give evidence in front of the Tribunal will be the victims of rape, sex offences and torture. Because the defence has the right to examine witnesses, such examinations may psychologically destroy witnesses who may be already traumatised. Article 22 addresses this problem by requiring that the Tribunal adopt rules protecting victims and witnesses, within its Rules of Procedure and Evidence.

Articles 23 and 24 give the Tribunal the power to pronounce judgment and impose sentences and penalties on persons convicted of serious violations of international humanitarian law. Judgements must be by a majority of the Judges in the Trial Chamber, and must be delivered in public. A reasoned opinion made in writing, to which separate or dissenting opinions may be appended, must accompany the judgment.

Upon conviction, the Tribunal may sentence the accused to a period of imprisonment and may order any property and proceeds which have been acquired by criminal conduct, including by means of duress, to be confiscated and returned to their rightful owners. The Tribunal is not authorised to sentence the accused to death.

135 See Dolenc, supra note 42, at 459. For example, in the United Kingdom a court must take into account the welfare of the child when imposing sentences on persons under the age of 18. Except in certain cases, when imposing sentences the court cannot impose custodial sentences on persons 14 years or under, and may only imprison persons under 18 for a period of up to twelve months. See Caroline Ball, Youth Offenders and the Youth Court, Crim. L. Rev. 277 (1992), at 277.

136 Although the Statute did not distinguish between juvenile and adult offenders, the Secretary-General's Report did recognise that a person could be relieved of individual criminal responsibility if they committed the act as a juvenile. However, the Report did not indicate at which age an offender would be considered an adult for the purposes of being prosecuted under the Article 7 of the Statue. Secretary-Generals Report, supra note 2, para 58.

137 Stestack has stated that "although justice will be best served by affording the defendant full confrontational rights, the war crimes in the former Yugoslavia may involve a unique situation calling for the Tribunal to devise novel protective measures for witnesses and victims and to modify the rights of the defendant accordingly." Stestack, supra note 117, at 158.

138 To ensure the decision is fair, the "reasoned opinion" should include findings of ultimate and supporting fact for each element of any charge against the accused and sufficient legal reasoning to support each of the judges' conclusions. Shestack, Id., at 157.

139 By only allowing property to be confiscated if it can be returned to its rightful owners, Article 24 fails to address the question of forfeiture if the property and/or proceeds cannot be returned to the person it was stolen from. Dolenc, supra note 44, at 459.

131 Secretary-Generals Report, supra note 3, para. 112.
Appellate and Review Proceedings

Under Article 25 convicted persons or the Prosecutor may appeal decisions made by the Trial Chambers on the grounds that there has been either an error on a question of law invalidating the decision, or an error of fact which has occasioned a miscarriage of justice. After hearing such appeals, the Appeals Chamber may confirm, reverse or revise the Trial Chamber’s decisions. The Statute, however, does not allow the Appeals Chamber to send proceedings back to a Trial Chamber so that questions of fact may be decided. This position follows the inquisitorial legal system, in which appellate courts may determine questions of fact for themselves; in adversarial legal systems, appellate courts usually remit such questions to the trial court.\textsuperscript{140}

The next article in the Statute permits both the accused and the Prosecutor to apply to either the Trial Chamber or the Appeals Chamber to review its decision if a new fact comes to light which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber, and that fact could have been a decisive factor in reaching the decision.\textsuperscript{141}

Enforcement of Sentences

Given the nature of the crimes committed during the conflict and the international character of the Tribunal, it was decided that persons convicted by the Tribunal should serve their sentence outside the territory of the former Yugoslavia to ensure that it will be enforced.\textsuperscript{142} Pursuant to Article 27 persons convicted shall serve their term of imprisonment in a state designated by the Tribunal, from a list prepared by the Registry of states who have indicated their willingness to accept convicted persons.

Under Article 28 eligibility for pardon or commutation of sentence is to be determined by the laws of the state in which the defendant is imprisoned. If eligible for release the state concerned shall notify the Tribunal, and the President of the Tribunal, in consultation with the other Judges, shall decide to pardon or commute the sentence of the defendant “on the basis of justice and the general principles of law.”

The ABA pointed out that the way in which this article is worded could lead to unequal enforcement of sentences. The length of time required before consideration

\textsuperscript{140} O’Brien, \textit{supra} note 48, at 656.
\textsuperscript{141} Statute, \textit{supra} note 1, art. 26.
\textsuperscript{142} Secretary-Generals Report \textit{supra} note 3, para. 121.
by a parole board may be two years in one country and ten in another.\textsuperscript{143} Another problem which may eventuate is that the Tribunal may no longer be in existence when the prisoner becomes eligible for release.\textsuperscript{144} Because of these possibilities, the ABA suggested that the Tribunal should adopt guidelines that states should use to ensure prisoners are treated similarly, and should adopt procedures for the treatment of prisoners after the Tribunal has dissolved.\textsuperscript{145}

**General Provisions**

When the Allied powers set up the Nuremberg and Tokyo Tribunals they exercised full authority and control over the territory of Germany and Japan respectively. Consequently they did not need the cooperation of the national authorities of these two states in order to carry out investigations, collect evidence and apprehend suspects. The Tribunal is not as fortunate. When establishing the Tribunal the Security Council was aware that it lacked any direct authority over the territories of the former Yugoslavia and as a consequence could not carry out investigations, subpoena witnesses or serve arrest warrants without the cooperation of the national authorities of states.

To ensure that the Tribunal can fulfil the tasks the Security Council gave it, Article 29 requires states to comply with requests for assistance from the Tribunal in the identification and location of persons, the taking of testimony, the production of evidence and the service of documents. States must also comply with orders issued by the Trial Chambers regarding the arrest or detention of persons, the surrender or transfer of the accused to the Tribunal and any other order necessary for the conduct of the trial. In addition, Resolution 827 (1993) requires states to take necessary measures, including the adoption of domestic legislation, to implement the orders of the Tribunal. Because the Tribunal was established pursuant to a Chapter VII resolution these obligations are binding on all states, including the Republics of the former Yugoslavia.

One major problem the Tribunal will face is that under Article 29 only states have to cooperate with the orders issued by the Tribunal. Since the Bosnian Serb Republic has not been recognised as a sovereign and independent state, the Bosnian Serbs will not be under any obligation to carry out the orders of the Tribunal.\textsuperscript{146}

\textsuperscript{143} Puis, \textit{supra} note 45, at 150.
\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} Rubin, \textit{supra} note 38, at 10.

This problem was overcome when the Judges adopted the Rules of Procedure and Evidence. A State is defined in Rule 2 of the Rules of Procedure and Evidence as "a State Member or non-Member
Nevertheless Bosnian Serbs who are accused of committing war crimes will become “prisoners in their own country” for if they set foot in another state, that state will be obliged to arrest and extradite them.  

*Cooperation and Judicial Assistance*

Article 30 grants to the Judges, the Prosecutor and the Registry, the privileges and immunities, exemptions and facilities accorded to diplomatic envoys under international law, and grants to the staff of the Prosecutor and the Registry the privileges and immunities accorded to officials of the United Nations under the Convention on the Privileges and Immunities of the United Nations. In addition Article 30 declares that “other persons, including the accused, who are required at the seat of the Tribunal, shall be accorded such treatment as is necessary for the proper functioning of the Tribunal.”

The last four provisions of the Statute set out various administrative matters. The Tribunal shall be situated in the Hague, it shall be financed by the United Nations, and its working languages shall be English and French. Finally, Article 34 requires the President of the Tribunal to submit an annual report on the Tribunal’s activities to the Security Council and the General Assembly.

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148 Statute supra note 1, art. 31. In his commentary on the Statute the Secretary-General suggested that the Tribunal may also be seated in Geneva. However, as the United Nations European Headquarters which is located in Geneva was associated with the political negotiations to end the Yugoslav conflict, several persons felt that it was undesirable to conduct judicial proceedings to determine individual criminal responsibility for the atrocities committed in the conflict in close proximity to political negotiations to settle the conflict. Secretary-General Report, supra note 3, para. 131.

149 Statute, supra note 1, art 32.

150 Id., art 33. This is consistent with the official languages of the ICJ and the working languages of the United Nations. Morris and Scharf, supra note 59, at 237.
THE RULES OF PROCEDURE AND EVIDENCE

The Judges of the Tribunal adopted the Rules of Procedure and Evidence under which the Tribunal would operate on 11 February 1994. These rules came into force on 14 March 1994. In accordance with Article 15 of the Statute the Rules govern “the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence and the protection of victims and witnesses.” In addition, the Rules augment provisions contained in the Statute relating to the issuing of orders and warrants by the Trial Chambers, the appointment of counsel and the necessary structure for the functioning and organisation of the Tribunal.

When formulating these rules the Judges took into consideration the rules of procedure and evidence prevalent throughout the major legal systems of the world. The rules under which the Nuremberg and Tokyo Tribunals operated were not followed as they were of little precedential value to the Tribunal. Even though the Judges tried to capture “the international character of the Tribunal”, the rules they choose to follow reflect the common law adversarial system more than the civil law inquisitorial system.

The Rules of Procedure and Evidence are arranged in logical sequence because when they formulated the Rules the Judges tried to reflect the actual steps in the proceedings. The Judges also tried to write the Rules using plain and understandable language. The Rules are divided into nine parts. Part One, entitled “General

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4 As the Nuremberg Charter directed the Tribunal to “adopt and apply to the greatest extent expeditious and non-technical procedure”, the rules the Nuremberg Tribunal operated from scarcely covered three and a half pages and contained only eleven brief articles. All procedural problems were resolved by individual decisions of the Tribunal. Daniel D. Ntanda Nsereko, Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia, 5 Crim. L. F. 507 (1994), at 508.
5 At Tokyo there were only nine rules of procedure which formed part of the Statute of the Tribunal. Again all other matters were left to the case by case ruling of the Tribunal. Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia Since 1991, UN Doc. A/49/342 (29 August 1994), para. 54 [hereinafter “1994 Annual Report”].
6 Such an approach followed the Statute’s preference for a modified adversarial model. Nsereko Id.
Provisions," provides that the working languages of the Tribunal will be English and French although an accused has the right to use his or her own language. A Chamber may exercise its functions at a place other than the Hague if the President of the Tribunal authorises it in the interests of justice. Acts committed by any party to the proceedings which do not comply with the Rules will only be declared invalid if the act was inconsistent with the fundamental principles of fairness and occasioned a miscarriage of justice. Rule 6 allows the Tribunal to amend the Rules provided such amendments are unanimously approved by the Judges.

Primacy of the Tribunal

Article 9 of the Statute provides that the Tribunal and national courts have concurrent jurisdiction over persons who commit crimes within the jurisdiction of the Tribunal. Nevertheless, because it has primacy over national courts the Tribunal may formally request national courts to defer to the competence of the Tribunal. Part Two of the Rules sets out the procedure for making such deferrals.

When it appears to the Prosecutor that crimes within the Tribunal's jurisdiction have been or are still subject to investigation or court proceedings in any state, the Prosecutor may request the state concerned to supply him with all information concerning such investigations or proceedings. States are obliged to comply with such a request under Article 29 of the Statute. After receiving this information the Prosecutor may propose to the Trial Chamber designated by the President that a formal request be made that such courts defer to the competence of the Tribunal, if:

(i) the national court characterises the act under investigation as an ordinary crime;
(ii) a lack of impartiality or independence exists, or the investigations or proceedings are designed to shield the accused from international criminal responsibility, or the case is not diligently prosecuted; or
(iii) the proceeding concerns matters closely related to significant factual or legal questions that may have implications for investigations or prosecutions before the Tribunal.

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7 I.T.R. Proc. & Evid., supra note 1, R. 3(D). Under Rule 3(C) witnesses who do not have sufficient knowledge of either of the working languages may also use their own language.
8 Id., R. 4.
9 Id., R. 5.
10 Id., R. 6(B). Such an amendment would enter into force immediately, but will not operate to prejudice the rights of the accused in any pending case. R. 6(C).
11 Id., R. 8.
12 Id., R. 9.
If the Trial Chamber is convinced that one of the grounds for deferral has been established, the Trial Chamber may issue a formal request to the state concerned that its national court defer to the competence of the Tribunal.\footnote{Id., R. 10(A).} To ensure the fairness of the subsequent proceedings, the person whose case is deferred to the Tribunal’s competence cannot be tried by the Trial Chamber which requested the deferral.\footnote{Id., R. 10(C).}

If within 60 days after a request for deferral has been made the national state fails to file a response that satisfies the Trial Chamber that it has taken or is taking adequate steps to comply with the order, the Trial Chamber may request the President of the Tribunal to report the matter to the Security Council.\footnote{Id., R. 11.}

The principle of *non bis in idem* is reiterated in Article 10(1) of the Statute which forbids national courts from trying persons for “acts constituting serious violations of international humanitarian law” for which those persons have already been tried by the Tribunal. If a national court violates the *non bis in idem* principle Rule 13 requires a Trial Chamber to “issue a reasoned order requesting that court permanently to discontinue its proceedings. If that court fails to do so, the President (of the Tribunal) may report the matter to the Security Council.” Since the Statute allows the Tribunal to prosecute persons who have been previously prosecuted by a national court,\footnote{The Statute, *supra* note 2, art. 10(2).} Rule 12 declares that “determinations of courts of any state are not binding on the Tribunal.”

**Organisation of the Tribunal**

Part Three sets out rules relating to the various organs of the Tribunal. Rules 14 to 17 apply to the Judges of the Tribunal. Before taking up their duties each Judge must declare that he or she will perform their duties and exercise their powers honourably, faithfully, impartially and conscientiously.\footnote{I.T.R. Proc. & Evid. *supra* note 1, R. 14. The declaration must be signed by the Judge and witnessed by the Secretary-General of the United Nations or his representative.} While all Judges are deemed to be equal in the exercise of their judicial functions, there may be other situations where it is necessary to distinguish among the Judges. In such cases the President and the Vice-President shall have precedence, followed by the Presiding Judges of the Trial Chambers. The superiority of the remaining Judges shall be determined according to the date on which a Judge was elected to the Tribunal, and, for Judges appointed on the same day, the actual age of the Judges.\footnote{Id., R. 17.}
To ensure fairness, Judges are forbidden to preside over trials or appeals in which they have a personal interest or an association which might affect their impartiality.\(^{19}\) Similarly the Judge of the Trial Chamber who reviews an indictment against an accused cannot sit as a member of the Trial Chamber for the trial of that accused,\(^ {20}\) and no member of the Appeals Chamber can sit on any appeal in a case in which he or she sat as a member of the Trial Chamber.\(^ {21}\)

Under Rule 16 Judges are allowed to resign from the Tribunal. Resignations must be communicated in writing to the President of the Tribunal who in turn must transmit the resignation to the Secretary-General of the United Nations.

Rules 18 to 22 provide for the election and functions of the President and Vice-President of the Tribunal. Both the President and Vice-President must be elected by a majority of the Tribunal’s Judges,\(^ {22}\) and are elected for a two year term, at the end of which they may be re-elected for one more term.\(^ {23}\) While the President must preside over the Appeals Chamber,\(^ {24}\) the Vice President may sit as a member of either the Trial Chamber of the Appeals Chamber.\(^ {25}\)

The President is required to preside over all plenary meetings of the Tribunal, coordinate the work of the Chambers, supervise the activities of the Registry and to carry out any other function given to the President by the Statute and the Rules.\(^ {26}\) The Vice-President is to carry out these functions if the President is absent or is otherwise unable to carry out these functions.\(^ {27}\)

Rule 23 provides for the establishment of a Bureau, which is to consist of the President, Vice-President and the presiding Judges of the two Trial Chambers. The Bureau was assigned the task of considering all major questions relating to the functioning of the Tribunal,\(^ {28}\) and will assist in the determination and implementation of administrative rules and regulations issued by the Tribunal.\(^ {29}\) Other matters provided for in the Statute and the Rules, such as the election of the President and

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\(^{19}\) Id., R. 15(A).

\(^{20}\) Id., R. 15(C).

\(^{21}\) Id., R. 15(D).

\(^{22}\) Id., RR. 18(C), 20(C).

\(^{23}\) Id., RR. 18(A), 20(A).

\(^{24}\) The Statute, supra note 2, art. 14.


\(^{26}\) Id., R. 19.

\(^{27}\) Id., R. 21.

\(^{28}\) For instance, the Bureau has responsibility for determining an application for the disqualification of a Judge pursuant to Rule 15, 1994 Annual Report, supra note 4, para 69.

\(^{29}\) Id.
Vice-President and the adoption and amendment of rules, shall be decided during plenary meeting of the Tribunal.\footnote{I.T.R. Proc. & Evid. supra note 1, R. 24. Under Rule 26 at least seven Judges must attend such meetings, and decisions must be taken by the majority of those present. In the event of a tie, the President shall have a casting vote.}

According to Rule 27 Judges must rotate on a regular basis between the Trial Chambers and the Appeals Chamber. Judges may also be temporarily assigned to another Chamber by the President.\footnote{Id., R. 27(C).} Each month one Judge from each of the Trial Chambers will be assigned to review indictments prepared by the Prosecutor.\footnote{Id., R. 28.}

Rules governing the appointment of the Registrar, the Deputy Registrar and the Registry Staff are set out in Rules 30 and 31. Before taking up their positions all staff members of the Registry, along with the Registrar and Deputy Registrar, must declare that they will perform their duties in all loyalty, discretion and good conscience and they will faithfully observe all the provisions of the Statute and the Rules of the Tribunal.\footnote{Id., R. 32.} The Registrar will assist the Chambers, the plenary meetings of the Tribunal, the Judges and the Prosecutor in the performance of their functions. The Registrar is also responsible for the administration and servicing of the Tribunal and shall serve as its channel of communication.\footnote{Id., R. 33.} The Registrar shall also keep a Record Book which shall list all the particulars of each case brought before the Tribunal.\footnote{Id., R. 36.}

Rule 34 requires that the Registrar must establish a Victims and Witnesses Unit. In accordance with Article 22 of the Statute this unit is charged with recommending protective measures for victims and witnesses and with providing counselling and support for victims and witnesses, especially in cases of rape and sexual assault.\footnote{Even though not specifically mentioned in Rule 34, the Victims and Witnesses Unit should provide legal as well as psychological counselling. Legal counselling would ensure that the witness or victim understand the implications of giving evidence, and would ensure that any evidence given by the witness or victim was voluntary. Alex C. Lakatos, Evaluating the Rules of Procedure and Evidence for the International Tribunal in the Former Yugoslavia: Balancing Witnesses' Needs Against Defendants' Rights, 46 Hastings L. J. 909, (1995), at 938-939.} It has been suggested, however, that when making recommendations the unit should try to avoid affecting the rights guaranteed to the defendant under Article 21 of the Statute.\footnote{Id., at 927.}

Rule 37 declares that the Prosecutor shall perform all the functions provided by the Statute in accordance with the Rules and such regulations framed by him. If the
Prosecutor is absent or is unable to carry out his functions, the Deputy Prosecutor will take over his functions.\textsuperscript{38}

\textbf{Investigations and Rights of Suspects}

Part Four of the Rules concerns investigations and the rights of suspects. Rule 39 elaborates on the powers given to the Prosecutor in Article 18 of the Statute. It declares that in the conduct of investigations, the Prosecutor may:

- \textit{(i)} summon and question suspects, victims and witnesses and record their statements, collect evidence and conduct on-site investigations;
- \textit{(ii)} undertake such other matters as may appear necessary for completing the investigation and the preparation and conduct of the prosecution at the trial, including the taking of special measures to provide for the safety of potential witnesses and informants;
- \textit{(iii)} seek, to that end, the assistance of any State authority concerned, as well as of any relevant international body including the International Criminal Police Organisation, and;
- \textit{(iv)} request such orders as may be necessary from a Trial Chamber or a Judge.

Many of the crimes committed during the Yugoslav conflict were committed in areas now under Bosnian Serb control. Since investigators from the Prosecutor’s office have repeatedly been refused permission to conduct on-site investigations in such areas,\textsuperscript{39} it is important that the Prosecutor has the authority to summon and question victims and witnesses. Without their testimony the Prosecutor will have difficulty identifying the crimes that have been committed and difficulty establishing the identity of the perpetrators.

While the Statute and the Rules provide suspects with adequate protection when being questioned, neither instrument says anything about the rights of witnesses and victims.\textsuperscript{40} For instance it is unclear whether witnesses may refuse to answer a summons to appear before the Prosecutor, and if they do appear it is unclear whether they are allowed to remain silent when being questioned. Although in common law jurisdictions it is an offence to refuse to answer a summons, any evidence a witness

\textsuperscript{38} The Deputy Prosecutor is appointed by the Secretary-General of the United Nations on the basis of recommendations from the Prosecutor. I.T.R. Proc. & Evid. supra note 1, R. 38.


\textsuperscript{40} See Nsereko, supra note 4, at 521-522.
gives must be voluntary. Investigators cannot compel witnesses of crimes to talk about what they saw.\textsuperscript{41} On that basis a witness must comply with a summons to appear for questioning, but the Prosecutor cannot force the witness to answer questions.

In October 1995 the Judges of the Tribunal adopted Rule 90 \textit{bis}.\textsuperscript{42} Pursuant to this rule persons who have been detained by the authorities of a state may be temporarily transferred to the detention unit of the Tribunal if:

\begin{enumerate}
\item the presence of the detained witness is not required for any criminal proceedings in progress in the territory of the requested State during the period the witness is required by the Tribunal;
\item transfer of the witness does not extend the period of his detention as foreseen by the requested State.
\end{enumerate}

To ensure investigations conducted by the Prosecutor are not thwarted by suspects escaping to jurisdictions hostile to the Tribunal, or by evidence being destroyed or removed, either accidentally or deliberately, Rule 40 allows the Prosecutor to request states to arrest suspects temporarily and seize physical evidence. The Prosecutor is also allowed to request states to take all necessary measures to prevent the escape of a suspect or an accused, injury to or intimidation of a victim or witness, or the destruction of evidence.\textsuperscript{43} Since these types of requests fall within the definition of Article 29 of the Statute, states are under an obligation to carry out such requests without undue delay.

Given that pieces of physical evidence obtained by the Prosecutor during the course of his investigations will be required during trial proceedings, Rule 41 places the responsibility for the retention, storage and security of information and physical evidence on the Prosecutor.

The procedure for provisional arrest which is set out in Rule 40 may infringe on the rights offered to a suspect by the municipal law of the state a request is made to. As there are no express limitations on this power and no provision is made for judicial review, it is possible for the Prosecutor to request states to arrest a suspect arbitrarily.\textsuperscript{44} Given the fact that under Article 29 of the Statute states are obliged to carry out such a request, any human rights protections prohibiting arbitrary arrest in

\textsuperscript{41} Id., at 522.
\textsuperscript{43} Nsereko, \textit{supra} note 4, R. 40(iii).
place in that state will be overridden. It has therefore been suggested that requests for
the provisional arrest of a suspect should be reviewed by a Judge, and only granted if
there is reasonable or probable cause to believe that the suspect has committed a crime
within the jurisdiction of the Tribunal and might flee or commit further crimes.45

Rules 42 to 46 concern the rights given to suspects when they are questioned by
the Prosecutor. Prior to being questioned suspects must be informed in a language
they speak and understand that they are entitled to be assisted by the counsel of their
choice, or if they do not have sufficient means to pay for representation, that they can
have legal assistance assigned to them.46 Suspects must also be informed that they
have the right to have the free assistance of an interpreter if they do not understand or
speak the language to be used for questioning, that they have the right to remain silent,47
and must be cautioned by the Prosecutor that any statement they make “shall
be recorded and may be used in evidence.”48 When the Prosecutor questions suspects
such questioning must be conducted in the presence of defence counsel, unless a
suspect has voluntarily waived the right to counsel.49

It is vital that suspects are given the right to counsel during pre-trial questioning.
This will ensure that the suspect’s right to remain silent is not nullified by improper
questioning techniques, that the suspect is not coerced by the Prosecutor, that
statements made by the suspect are recorded accurately, and that when such
statements amount to confessions they are made freely and voluntarily.50

Unfortunately while the Rules give suspects the right to counsel, they are silent on
whether a similar right is available to persons before they become suspects. According
to Rule 2, a suspect is “a person concerning whom the Prosecutor possesses
information which tends to show that he may have committed a crime over which the
Tribunal has jurisdiction.” Because a large part of the evidence gathered by
investigators will be testimonial, a suspect may be interviewed by a either a police
officer or another investigative officer before the Prosecutor possesses enough
information about him that shows he may have committed a crime. To ensure that a
person’s rights are respected during such interviews, especially with regard to self-
incrimination, a person should be entitled to the right to counsel as soon as ‘the

45 Id.
46 I.T.R. Proc. & Evid., supra note 1, R. 42(A)(i). The procedure for the assignment of counsel to
indigent suspects or accused is set out in Rule 45.
47 Id., R. 42 (A)(ii-iii).
48 Id., R. 42 (A)(iii).
49 Id., R. 42 (B). Under Rule 44 in order to qualify as a defence counsel the counsel must satisfy the
Registrar that he has been admitted as a lawyer, or is a University Professor of Law.
50 Nsereko, supra note 4, at 525-526.
interviewing officer' believes the person has committed a crime within the jurisdiction of the Tribunal. 51

Rule 43 augments the protection offered to a suspect during questioning by requiring that questioning must be audio-recorded or video-taped. A suspect must be informed in a language he or she speaks and understands that the questioning is being recorded. 52 In the event of a break in the questioning, the fact and the time of the break must be recorded before the recording ends. 53 The time the questioning resumed must also be recorded. At the conclusion of the questioning the suspect must be given the opportunity to clarify anything he or she said and add anything she or he may wish. 54 The recording of the questioning must be transcribed, and a copy of the recording along with a copy of the transcript must be supplied to the suspect. Finally, the original recording must be sealed in the presence of the suspect, under the signature of the Prosecutor and the suspect. 55 While this procedure may be costly, it will guard against possible tampering of the recording and will ensure that the questioning of a suspect is not performed in a coercive manner. 56 The recording will also enable the Tribunal to assess the demeanour of a suspect. 57

Unfortunately the Rules do not give any guidelines on how suspects can be questioned. It is imperative that any questioning is carried out in a fair and legitimate manner. The suspect must never be forced to talk, and when he does talk he must be allowed to speak in his own words, without any prompting from other people. The person questioning the suspect may ask questions in order to clarify something the suspect has said, but must not cross-examine the suspect. Finally a suspect should be allowed to make written statements if he or she desires. After making a written statement a suspect should not be questioned further unless certain points in his or her statement need to be clarified. 58

Pre-Trial Procedures

Part Five, encompassing Rules 47 to 73, sets forth the procedure for indictments, orders and warrants, the production of evidence, depositions and preliminary motions.

53 Id., R. 43(ii).
54 Id., R. 43(iii).
55 Id., R. 43(iv).
56 Nsereko, supra note 4, at 526.
57 Id.
58 Id.
When the Prosecutor is satisfied that sufficient evidence exists to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal, the Prosecutor must prepare an indictment. The indictment must state "the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged." An indictment may join two or more persons charged with committing the same or different crimes in the course of the same transaction, and may charge an accused person with two or more crimes so long as those crimes form part of a series of crimes that constitute one transaction.

The Prosecutor must forward the indictment to the Registrar, who in turn will forward it to a Judge of the Trial Chamber for review. On the date fixed for the review of the indictment the Prosecutor may present additional material in support of any of the counts in the indictment. The Judge may confirm or dismiss each count or may adjourn the review to another date. The dismissal of a count, however, will not preclude the Prosecutor from subsequently bringing a new indictment based on the acts underlying that indictment if supported by additional evidence.

At any time before it is confirmed an indictment may be amended or withdrawn without leave. After it is confirmed an indictment may only be amended or withdrawn with the leave of the Judge who confirmed it, or if at trial, with the leave of the Trial Chamber.

Once the indictment is confirmed it must be made public. However, in certain cases where it is likely that the accused will go into hiding on hearing the indictment, the Judge may order that the indictment cannot be disclosed to the public until it is served on the accused. After confirming the indictment the Judge may issue a warrant for the arrest of the accused. The warrant must be accompanied by a copy of the indictment and a statement of the rights of the accused. The Registrar will then forward the warrant, and an order for the surrender of the accused to the Tribunal, to

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60 Id., R. 47(B).
61 Id., R. 48.
62 Id., R. 49.
63 Id., R. 47(A).
64 Id., R. 47(C).
65 Id., R. 47(D).
66 Id., R. 47(E).
67 Id., RR. 50-51.
68 Id., R. 52.
69 Id., R. 53(A).
70 Id., R. 54.
71 The rights of the accused include those rights set out in Article 21 of the Statute and in Rules 42 and 43 of the Rules of Procedure and Evidence, together with the right of the accused to remain silent and to be cautioned that any statement he makes shall be recorded and may be used in evidence. Id., R. 55(A).
the national authorities of the state in which the accused resides or was last known to be. Once a Judge confirms an indictment and issues an arrest warrant and an order for the surrender of the accused, the state concerned is under a binding obligation to arrest the accused and transfer him or her to the seat of the Tribunal. Under Rule 58 the obligation to transfer an accused to the Tribunal prevails over any national laws or extradition treaties that might obstruct the transfer.

States that are unable to execute an arrest warrant must inform the Registrar that they are unable to do so and explain why. If, after a reasonable period, a state fails to inform the Registrar of the actions it has taken with regard to the warrant, the President of the Tribunal may inform the Security Council of that state's inaction.

To assist the apprehension of an accused, the Prosecutor may request the national authorities of any state, or states, in whose territory the accused is believed to be, to publish the indictment in newspapers that are widely circulated in these territories. Such a notice will firstly enrol the media and the general public in the effort to locate and arrest the accused, and secondly will give the accused notice and an opportunity to voluntarily come forward and defend the charges.

If, after all reasonable steps have been taken to arrest the accused, the accused does not present himself or is not surrendered to the Tribunal the Prosecutor may ask the Judge who confirmed the indictment initially to allow him to submit the indictment to the Trial Chamber. The indictment must be presented in open court, together with all the evidence that was placed before the confirming Judge. The Prosecutor may also call and examine any witness whose statement was submitted to the confirming Judge, and may introduce additional evidence. If the Trial Chamber determines that there are reasonable grounds for believing that the accused committed all or any of the crimes he or she is charged with, the Trial Chamber must make a public statement to that effect and must issue an international arrest warrant which will be transmitted to all states. Furthermore, if the Prosecutor satisfies the Trial Chamber that the "failure to

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72 Id., R. 55(B).
73 Although states are under an obligation to transfer accused persons to the seat of the Tribunal as soon as possible, the transfer will be dependent on the time needed to arrange security and transportation, unobstructed travel through third states to the Hague and the detention in the Tribunal's facilities upon arrival in the Hague. Virginia Morris and Michael P. Scharf, An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia, New York: Transnational Publishers (1995), at 213.
74 This rule will be particularly relevant with regard to accused Serbs who are living in the territory of the Federal Republic of Yugoslavia as its constitution prohibits the extradition of nationals. Id., at 294.
76 Id., R. 59(B).
77 Id., R. 60.
78 Id., R. 61.
79 Public statements of this kind may encourage states to comply with their international obligations to search for and prosecute or extradite persons responsible for committing war crimes. James O'Brien,
effect personal service was due in whole or in part to a failure or refusal of a state to cooperate with the Tribunal,” the President of the Tribunal must inform the Security Council accordingly.  

This procedure cannot be considered a trial *in absentia* for it does not culminate in a verdict nor does it deprive the accused of the right to contest the charges brought against them in person at a later date. Such a procedure is important as it will provide the victims of the crimes committed in the former Yugoslavia “with the opportunity to be heard in a public hearing and to become a part of history.”

Rule 62 requires the Tribunal to formally charge the defendant as soon as possible after he is transferred to the seat of the Tribunal. During the arraignment the Trial Chamber must read the indictment to the accused, and must ensure that the accused’s right to counsel is respected, that the accused understands the indictment, and that the accused enters a plea. If the accused pleads guilty, before entering the plea the Trial Chamber should ensure that it was freely and voluntarily given, and the accused understood and agreed with all the elements that made up the offence with which he has been charged. If the accused disagrees with any of the elements of the offence the Trial Chamber must enter a plea of not guilty. When an accused pleads not guilty the Trial Chamber must instruct the Registrar to set a date for trial.

Even though prosecutors are not normally allowed to question an accused after the accused has been arraigned, Rule 63 allows the Prosecutor to do so. Although such questioning can only be carried out if defence counsel is present, and in addition the questioning must be taped in accordance with Rule 43 and the accused must be cautioned. This rule would seem to give the prosecution an unfair advantage as the defence does not have a similar right to question prosecution witnesses.

After being transferred to the seat of the Tribunal, the accused must be detained in facilities provided by the host country, or by another country. Once detained, the accused can only be released in exceptional circumstances, and if the trial chamber is satisfied the accused will appear for trial and will not pose a danger to any victim, witness or other person. To ensure the accused will appear for trial the Trial

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Chamber may impose any conditions it deems appropriate, including the lodging of a bail bond.\footnote{Id., R. 65(C). Other restrictions might include restrictions on the accused’s movements, confiscation of the accused’s travel documents, and a requirement that the accused periodically reports to designated authorities. Nsereko supra note 4, at 532.}

In order that the accused is able to prepare an adequate defence, Rule 66 requires the Prosecutor to make available to the accused copies of the supporting material that accompanied the indictment when it was confirmed, along with “all prior statements obtained by the Prosecutor from the accused or from prosecution witnesses.” The Prosecutor must also permit the defence to inspect any books, documents, photographs and tangible objects in his custody or control, unless the disclosure may prejudice further or ongoing investigations, or for any reasons may be contrary to the public interest or affect the security interests of any state.\footnote{I.T.R. Proc & Evid., supra note 1, R. 66. Rule 70 provides that the Prosecutor cannot disclose information provided to him on a confidential basis which has been used solely for the purpose of generating new evidence without the consent of the person or entity who provided the information.} When the accused asks to inspect any book, document, photograph or tangible object in the Prosecutor’s custody or control, the Prosecutor has a reciprocal right to inspect any books, documents, photographs or tangible objects in the custody or control of the defence.\footnote{Id., R. 67(C).} This requirement is surprising considering that in common law countries only the Prosecutor is required to disclose evidence prior to trial.\footnote{This procedure will result in an even combat and reduces the possibility of surprise at trial. Nsereko, supra note 4, at 536.}

Pursuant to Rule 67 the defence must notify the Prosecutor if it intends to argue the defence of alibi or any special defence, such as diminished responsibility or lack of mental responsibility, and must supply the names and addresses of witnesses they intend to call to support these defences. In return, the Prosecutor must notify the defence of any witnesses it will call to prove the accused’s guilt or to rebut any defences the accused raises. Pursuant to Rule 69 the Prosecutor may, in exceptional circumstances, apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until they are under the Tribunal’s protection.

Rule 68 requires the Prosecutor to disclose to the defence any evidence that tends in any way to exculpate the accused or may affect the credibility of prosecution evidence. Unlike Rule 67(C) concerning the disclosure of books, documents, photographs or tangible objects in the possession of the defence, the defence is not under a reciprocal obligation to disclose incriminating evidence in its possession to the prosecution.
Rule 71 allows either party to the proceedings to request that a deposition be taken for use at trial. If the Trial Chamber decides that in the interests of justice a deposition should be taken, the party who requested the deposition must inform the other party, as that party has the right to be present when the deposition is taken and is allowed to cross-examine the person making the deposition. Such a procedure will enable testimony to be taken from witnesses who are unable or unwilling to testify in open court, and will enable the Tribunal to hear evidence from witnesses who have subsequently disappeared.

After the accused is arraigned both the prosecution and the defence may move before a Trial Chamber for appropriate relief or ruling. Such preliminary motions may be written or oral and must be disposed of by the Trial Chamber in limine, and without interlocutory appeal except when a motion is dismissed on the basis of lack of jurisdiction.

Proceedings Before Trial Chambers

Part Six of the Rules regulates the proceedings before the Trial Chambers. This part is divided into four sections. Section one sets out certain administrative and procedural matters which will facilitate the proceedings. Rule 74 allows the Trial Chamber, if it considers it desirable for the proper determination of the case, to invite or grant leave to a State, organisation or person to appear before it and make submissions on any issue the Chamber specifies. The possibility of such third-party participation will allow the human rights organisations which have been monitoring the conflict in the former Yugoslavia to participate in the Tribunal’s proceedings, and will address the concerns of certain states who wanted to grant the victims of the atrocities the right to plead and be represented by counsel in the proceedings.

Rule 75 allows a Judge or a Trial Chamber to order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused. A Chamber may hold an in camera proceeding to determine whether to order (i) measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of

90 Deposition evidence may be given by means of a video conference, I.T.R. Proc. & Evid., supra note 1, R. 71(D).
91 1994 Annual Report, supra note 4, para. 79.
92 I.T.R. Proc. & Evid., supra note 1, R. 72(A). The preliminary motions the accused may file are set out in Rule 73.
93 Id., R. 72(A)-(B).
94 Morris and Scharf, supra note 73, at 270.
persons related to or associated with a witness or a victim,\textsuperscript{95} (ii) closed sessions, or (iii) appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.

Rule 76 requires interpreters and translators to swear that they will perform their duties faithfully, independently, impartially and with full respect for the duty of confidentiality. Under Rule 77 a witness who refuses or fails "contumaciously" to answer a relevant question, or a person who interferes with or intimidates witnesses, may be held in contempt of the Tribunal, and may be fined up to US $10,000 or imprisoned for a term not exceeding six months.

While all proceedings before a Trial Chamber, other than deliberations, shall be public,\textsuperscript{96} the Chamber can order the press and public to be excluded from all or part of the proceedings.\textsuperscript{97} Similarly, in the interests of justice and to maintain the dignity of the proceedings the Trial Chamber has the power to exclude individuals from the courtroom\textsuperscript{98}, or order the removal of the accused if he or she continually disrupts the proceedings. In such a case the proceedings will continue in his or her absence.\textsuperscript{99} In order to inform the outside world of any developments during the trial, the Trial Chamber has the discretion to permit "photography, video-recording or audio-recording of the trial."\textsuperscript{100}

Section two of Part Six sets out the procedure the Trial Chamber will follow when hearing cases. Before evidence is presented each party may make an opening statement, although the defence may elect to make its opening statement at the conclusion of the prosecution’s evidence.\textsuperscript{101} The prosecution will present its evidence first, followed by the defence. The prosecution will then have the opportunity to present evidence in rebuttal, after which the defence may present evidence in rejoinder. Should the need arise the Trial Chamber may then introduce evidence on its own behalf.\textsuperscript{102} Each party to the proceedings has the right to cross-examine any

\textsuperscript{95} Such measures may include deleting names and identifying information from the Chamber’s public record; non-disclosure to the public of any records identifying the victim; giving testimony through image- or voice-altering devices or closed circuit television; and assignment of a pseudonym. Id., R. 75(i)(a-d).

\textsuperscript{96} Id., R. 78.

\textsuperscript{97} Id., R. 79. The Trial Chamber can close the session for reasons of public order or morality, safety, security or non-disclosure of the identity of a victim or witness, or the protection of the interests of justice.

\textsuperscript{98} Id., R. 80(A).

\textsuperscript{99} Id., R. 80(B).

\textsuperscript{100} Id., R. 81(O).

\textsuperscript{101} Id., R. 84.

\textsuperscript{102} Id., R. 85(A).
witness called by either the other side or a Judge, although the Judges are instructed to prevent questions that are intended to intimidate and harass.

After all the evidence has been presented the prosecution and the defence may give their closing arguments, following which the Trial Chamber will retire in private to decide the case. Each count against the accused will be decided separately, and the accused will be found guilty if the majority of the Judges in the Trial Chamber are satisfied beyond reasonable doubt that the accused committed the crime in question. Judgment will then be publicly pronounced, along with any orders for the restitution of property unlawfully taken by the accused. Pursuant to Article 24 of the Statute, a written reasoned opinion, to which separate or dissenting judgements may be amended, must accompany the decision.

It is interesting to note that the Rules do not allow the Trial Chamber to acquit the accused at the conclusion of the prosecution’s case if the prosecution fails to establish a prima facie case. This common law custom is based on the principle that the prosecution bears the evidentiary burden of proof. It must satisfy the Judge that the evidence it presents is capable of demonstrating beyond reasonable doubt that the accused committed the crime. The prosecution cannot rely on the cross-examination of defence witnesses to establish any part of its case. Under civil law systems, however, the prosecution does not need to establish a prima facie case before the accused is called upon to answer it.

A more disturbing aspect of this section of the Rules concerns the fact that under Rule 85(B) a Judge has the right to put questions to a witness himself. While Judges should have the ability to ask witnesses questions in order to resolve ambiguities and to clarify certain points, they should not intrude into the arena of trial combat. This

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103 Id., R. 85(B). Following cross-examination the party that called the witness has the opportunity to re-examine the witness on matters raised during cross-examination.
104 Id., R. 75(C). It would also be possible for judges to hold counsel who persist in asking intimidating questions in contempt under Rule 77(C) and sentence them accordingly.

Lakatos suggests that in order to reduce the amount of harassing and intimidating questions the Trial Chamber could insist that counsel submit a list of questions they proposed to ask a witness. The Judges would thus have a greater opportunity to screen out inappropriate questions. See Lakatos, supra note 36, at 936-937.
105 I.T.R. Proc & Evid., supra note 1, R. 86.
106 Id., R. 87(A).
107 Id., R. 88(A)-(B).
108 Id., R. 88(C).
109 Nsereko, supra note 4, at 537.
110 Id.
111 Nsereko suggests that a Judge should refrain from (i) asking questions which create the impression that he is not conducting the trial in an open-minded or impartial manner, (ii) questioning witnesses in such a way or so such an extent that it may preclude him from detachedly or objectively appreciating and adjudicating upon the issues being fought out before him, (iii) questioning a witness in a way that may intimidate or disconcert him or unduly influence the quality or nature of his replies and thus affect his demeanour or impair his credibility. Id., at 538-539.
should be left to the parties themselves, as a “Judge who observes the demeanour of the witness while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a Judge who himself conducts the examination.”

There are two main purposes why courts adopt rules of evidence. Firstly evidential rules help maximise the discovery of the truth. By identifying what evidence is reliable, a court will be able to determine the true nature of the events it is considering. The second purpose of evidential rules is to ensure that certain values fundamental to the integrity of the justice system are not violated. As a consequence limits are placed on certain methods which may be used to establish the truth. To ensure that the integrity of the Tribunal is not dishonoured in the pursuit of the truth section 3 of Part Six sets out certain evidential rules the Tribunal must follow.

While Rule 89(A) declares that these rules of evidence “shall govern the proceedings before the Chambers” and that “the Chambers shall not be bound by national rules of evidence,” only a few substantive rules are included in this section. In situations where a Trial Chamber comes across evidentiary issues which are not covered by the Rules, the Chamber must “apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.”

Rule 89(C) allows the Trial Chamber to “admit any relevant evidence which it deems to have probative value,” though if its probative value is substantially outweighed by the need to ensure a fair trial, the evidence must be excluded. The Rules, however, do not state in what situations relevant and probative evidence will be excluded. Hearsay evidence should be excluded as such evidence may be inaccurate,

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114 Id.
115 “It would be a gargantuan task to draw up a comprehensive code covering all evidentiary issues.” The Tribunal has therefore only referred to confessions, similar acts, judicial notice, evidence in sex-related cases, and lawyer-client privilege. Nsereko, supra note 4, at 540-541.
116 I.T.R. Proc. & Evid., supra note 1, R 89(B). The “spirit of the Statute” is best represented by Article 20(1) of the Statute, which requires that trials be “fair and expeditious” and pay “full respect for the rights of the accused and due regard for the protection of victims and witnesses.” Nsereko, Id., at 541.
117 Evidence is said to be relevant if it tends to establish the state of some fact in issue. David Walker, The Oxford Companion To Law 1st Ed., Oxford: Oxford University Press (1982), at 1055. Evidence is said to have probative value if it has persuasive value or tends to prove or disprove the fact or matter in issue. Nsereko, Id.
118 I.T.R. Proc. & Evid., supra note 1, R 89(D).
perceived incorrectly, distorted through repetition, or simply made up.\textsuperscript{119} Other types of evidence that should also be excluded include opinion evidence other than that given by experts on matters within their expertise,\textsuperscript{120} evidence relating to the character of the accused and evidence relating to the conduct of the accused on other occasions.

Written or oral confessions that breach Rule 63 should also be excluded for reasons of fairness.\textsuperscript{121} If the accused was not cautioned before making the confession or if defence counsel was not present when the confession was made the court should consider the confession inadmissible.\textsuperscript{122} Equally, confessions that are not freely and voluntarily made by the accused should be excluded.\textsuperscript{123} Although under common law systems the burden of proving that a confession was voluntarily made is placed on the party seeking to tender it as evidence, Rule 92 declares that confessions made by the accused during questioning by the Prosecutor are presumed to have been free and voluntary. Rule 92, however, allows the accused to challenge the fact that a confession was voluntarily made. Given the difficulties the accused will face in establishing that he or she was forced to make a confession, once it has been shown on a balance of probabilities that the confession was involuntary, the confession should be deemed inadmissible.\textsuperscript{124}

Under Rule 95 evidence will also be excluded if it was obtained by methods which cast substantial doubt on its reliability, or if its admission is antithetical to and would seriously damage the integrity of the proceedings. This rule would prohibit evidence obtained by torture,\textsuperscript{125} and may exclude evidence obtained after prolonged interrogations or through psychological pressure, as well as evidence obtained by financial or other forms of inducement, or through illegal searches. Whether the Tribunal excludes evidence obtained in these situations will ultimately depend on the circumstances of each particular case. It is implicit in the wording of the rule that the Trial Chamber may include relevant evidence if it decides that the way in which it was obtained would not seriously affect the integrity of the proceedings. Challenges to the

\begin{itemize}
\item \textsuperscript{119} The rule against hearsay prohibits witnesses repeating out-of-court statements made by others in order to establish the truth of those statements. Waight and Williams, \textit{Evidence: Commentary and Materials 3rd Ed}, Sydney: Law Books Co. (1990), at 643.
\item \textsuperscript{120} Evidence of opinion on matters not calling for expertise is generally excluded because it does not help the court. At best it is superfluous, and it could be a cause of confusion. Sir Rupert Cross, \textit{Cross on Evidence 7th Ed}. London: Butterworths (1990), at 491.
\item \textsuperscript{121} Nsereko, \textit{supra} note 4, at 542.
\item \textsuperscript{122} Id.
\item \textsuperscript{123} Id.
\item \textsuperscript{124} In common law systems the prosecution has to prove beyond a reasonable doubt that the confession was voluntary. Id.
\end{itemize}
commencing investigations based on such testimony, witnesses may still prefer to commit perjury than incriminate themselves.

Article 5 of the Statute provides the Tribunal with jurisdiction over crimes against humanity, these being acts such as wilful killing, torture and rape committed as part of a widespread or systematic attack against the civilian population on ethnic, national, political, racial or religious grounds. In order to establish that certain acts were committed as part of a widespread systematic practice and were not simply isolated events the Tribunal will need to examine not only the behaviour of individual defendants, but also the behaviour of military and paramilitary units generally. Consequently, Rule 93 allows the Trial Chamber to hear “evidence of a consistent pattern of conduct.” Evidence of a pattern of conduct will also be relevant when establishing whether one of the requirements of genocide, namely “the intent to destroy, in whole or in part, a group,” is present. That is, whenever the intent of the perpetrator is not obvious the Trial Chamber may examine the consistent behaviour of military or paramilitary groups to ascertain whether intent can be inferred from their “pattern of conduct.”135 Given the highly prejudicial nature of such evidence it had been suggested that the Trial Chambers should only admit such evidence in exceptional circumstances, and only when the probative value of the evidence outweighs its prejudicial effect on the accused.136

Victims of sexual assault who testify before a court are often treated in a harsh and damning way. Their credibility and honesty are attacked, and in cases where the accused argues the sexual conduct was consensual a victim’s prior sexual behaviour is often introduced in evidence. Yet victims of sexual assault are as likely to misinform the court as the victim of any other offence. In fact “the stress, trauma and public humiliation so often experienced by the victims of sexual offences in court, and the intimidation to which they are subjected out of court deter many from testifying at all and certainly militate against the bringing of false evidence.”137 Rule 96 addresses this problem and attempts to reduce the amount of harassment a victim of a sexual assault will face when giving evidence before the Tribunal.

In certain jurisdictions it is the practice of the court to warn the jury, or the Judge to warn himself, of the danger of convicting the accused upon the uncorroborated

135 1994 Annual Report, supra note 4, para 77.
137 Celia Wells, Corroboration of Evidence in Criminal Trials, 140 New L. J. 1031 (1990), at 1032.
evidence of the victim of a sexual offence. Because this practice has been criticised, for example, for being an insult to women, Rule 96(i) states that corroboration evidence in cases of sexual assault is not required. However, it has been pointed out that the due process function that corroboration serves must be met by other procedural protections, in particular cross-examination, and allowing the accused to confront the victim under the pretext of cross-examination may severely traumatisate the victim.

To minimise this risk the defence’s right to cross-examine victims of sexual assaults is limited by what is essentially a rape shield rule. The defence cannot introduce evidence relating to the prior sexual conduct of the accused, and may only argue that the victim consented to the sexual act if the consent was given freely and voluntarily. Furthermore, before evidence of the victim’s consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible.

In common law jurisdictions confidential communications between a client and lawyer do not need to be given in evidence by the client, and without the client’s consent may not be given in evidence by the lawyer in judicial proceedings, if the communication was made in order to enable the client to obtain legal advice, or was made for the purpose of pending or contemplated litigation. Such communications are considered privileged in order to encourage a client to confide fully and candidly with his lawyer. While Rule 97 incorporates this privilege within the Rules, problems may arise because of the way in which this rule was drafted. Rule 97 states that all communications between a client and lawyer are privileged and consequently are not subject to disclosure. Yet the client-lawyer privilege normally only applies to communications made for the purpose of obtaining or dispensing legal services.

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138 Cross, supra note 120, at 238. The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which is sufficient and satisfactory and credible. DPP v Hester (1973) AC 296, 315.

139 The cautionary rule has also been criticised for being misogynistic, as perpetuating subordination and as treating the victim of a sexual attack as an accomplice to the crime. Nsereko, supra note 4, at 547-548.

140 C.P.M. Cleiren and M.E.M. Tijssen, Rape and Other Forms of Sexual Assault in the Armed Conflict in the Former Yugoslavia: Legal, Procedural, and Evidentiary Issues, 5 Crim. L. F. 471 (1994), at 505-506.

141 Lakatos, supra note 36, at 933.

142 Id., R. 96(iv).

143 Rule 96(ii) states that consent is not a defence if the victim “has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or reasonably believed that if the victim did not submit, another might be subjected, threatened or put in fear.” Id.

144 Id., R. 96(iii).

145 Cross, supra note 120, at 428.

146 McNicol, Law of Privilege, 1st Ed. at 46.
Casual conversations made for other reasons are not considered privileged.\textsuperscript{147} Communications made in order to facilitate the perpetration of a crime are also not considered privileged, since the public interest in having the communication disclosed outweighs the right of the accused to keep the communication confidential.\textsuperscript{148}

Another disparity between the way in which Rule 97 was drafted and the way in which the client-lawyer privilege normally operates concerns communications between a client and a third person. Under this rule a third party, to whom the client discloses a client-lawyer communication, may give evidence of that disclosure. Normally communications made by a client to a third party for the purpose of pending or contemplated litigation are said to be privileged.\textsuperscript{149} Allowing third parties to disclose communications made in such situations would infringe on the right of an accused to prepare an adequate defence. It is submitted that under Rule 97 communications between a client and lawyer are only privileged if they are made for the purpose of obtaining legal services, and communications made between a client, or their lawyer, and a third party in contemplation of litigation do not need to be disclosed.

While the Rules only specifically mention client-lawyer privilege, there are other situations in which a witness may validly refuse to answer a question or supply information which would be relevant to the determination of an issue. These include certain communications between spouses, priests and penitents, and doctors and patients.\textsuperscript{150} Because the Tribunal must take account of the general principles of law when faced with evidentiary issues not covered by the Rules, the Tribunal should allow a witness to refuse to divulge information disclosed to them in these situations.

The last section in Part Six on “sentencing procedures” provides that the Trial Chamber may sentence a convicted person to term of imprisonment up to and including the remainder of his life,\textsuperscript{151} taking into account the gravity of the offence and the individual circumstances of the convicted person, as well as (i) any aggravating circumstances, (ii) any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction, (iii) the general practice regarding prison sentences in the former Yugoslavia and, (iv) the extent to which any penalty imposed by a court of any state on the convicted person for the same act has already been served.\textsuperscript{152} The Trial Chamber must also give

\textsuperscript{147} Nsereko, \textit{supra} note 4, at 546.
\textsuperscript{148} Cross, \textit{supra} note 120, at 440-441.
\textsuperscript{149} Id., at 431-434.
\textsuperscript{150} Although, the situations in which doctors and clergymen may refuse to answer questions are limited. Id., at 447-449.
\textsuperscript{151} I.T.R. Proc. & Evid. \textit{supra} note 1, R. 101(A).
\textsuperscript{152} Id., R. 101(B).
credit to the convicted person for the period, if any, he was detained in custody pending surrender to the Tribunal or pending trial or appeal.\textsuperscript{153} In accordance with Article 27 of the Statute the place of imprisonment will be served in a state designated by the Tribunal from a list of states which have indicated their willingness to accept convicted persons.\textsuperscript{154}

After an accused is convicted, the Prosecutor may convene a special hearing to determine the matter of the restitution of any property unlawfully acquired or the proceeds thereof. To ensure such property or proceeds are kept secure until this hearing occurs the Trial Chamber may “order such provisional measures for the preservation and protection of the property or proceeds as it considers appropriate.”\textsuperscript{155} Under Rule 105(B) the Trial Chamber is not prevented from ordering the restitution of property or its proceeds that may be in the possession of third parties who were not connected with the crimes committed by the accused. However, as third parties may have been unaware that the property or its proceeds were initially acquired in an unlawful manner, the Rules give third parties the opportunity to justify their claim to the property or its proceeds.\textsuperscript{156}

Rule 106 allows a victim or persons claiming through him to bring an action in a national court or other competent body to obtain compensation pursuant to relevant national legislation. For the purposes of such claims the Tribunal’s judgment as to the criminal responsibility of a convicted person is considered final and binding on national courts.

**Appeals, Reviews and Pardon or Commutation of Sentence**

Part Seven of the Rules allows for and sets out procedures for appeals. These include rules relating to the notice of appeal,\textsuperscript{157} briefs of argument,\textsuperscript{158} the inclusion of additional evidence not available at trial,\textsuperscript{159} the judgment of the appeal,\textsuperscript{160} and the status of the accused following the appeal.\textsuperscript{161} Part Eight allows the defence and the

\textsuperscript{153} Id., R. 101(E).
\textsuperscript{154} Id., R. 103(A).
\textsuperscript{155} Id., R. 105(A).
\textsuperscript{156} Id., R. 105(C).
\textsuperscript{157} Id., R. 108. A party seeking to appeal a judgment or sentence has 30 days to lodge the appeal unless the appeal concerns lack of jurisdiction, perjury or contempt, in which case the party only has 15 days to lodge the appeal.
\textsuperscript{158} Id., RR. 111-113.
\textsuperscript{159} Id., R. 115. Such evidence will only be introduced if its introduction would be in the interests of justice.
\textsuperscript{160} Id., R. 117.
\textsuperscript{161} Id., R. 118.
Prosecutor to request that a judgment be reviewed. Such a review may only occur if a new fact has been discovered which was not known to the moving party at the time of the proceedings before a Trial Chamber or the Appeals Chamber, and could not have been discovered through the exercise of due diligence. If a majority of the Judges of the Chamber that pronounced the judgment agree that the new fact, if proved, could have been a decisive factor in reaching the decision, the Chamber shall review the judgment and after hearing from each party shall pronounce a further judgment. Under Rule 121 each party may appeal the decision of the judgment on review.

The ninth and final part of the Rules allows a state in which a convicted person is imprisoned to notify the Tribunal when the convicted person is eligible for pardon or commutation of sentence. The Tribunal shall then decide whether pardon or commutation is appropriate after taking into account the gravity of the offence the prisoner was convicted of, the treatment of similarly-situated prisoners, the prisoner’s demonstration of rehabilitation, along with any substantial cooperation the prisoner has given the Prosecutor.

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162 Id., R. 119. While the defence may make a motion for the judgment to be reviewed at any time, the Prosecutor may only request that the judgment be reviewed within one year of the final judgment being pronounced.
163 Id.
164 Id., R. 120.
165 Id., R. 121.
166 Id., R. 123.
167 Id., RR. 124-125.
THE OPERATIONS OF THE TRIBUNAL

The Initial Activities of the Tribunal

Following the adoption of Resolution 827 (1993) the Secretary-General sent letters to member states of the United Nations and non-member states who maintained permanent observer missions at the United Nations headquarters inviting them, in accordance with Article 13 of the Statute, to nominate up to two candidates to serve as Judges on the Tribunal. Each candidate had to be of high moral character, impartiality, and integrity, and had to possess the qualifications required to be appointed as a Judge in their home country.

All nominations that were received by the Secretary-General within 60 days were passed to the Security Council, who short listed the nominations to 23 people. When doing this the Security Council ensured that all the principal legal systems of the world were represented. In accordance with Article 13(d) of the Statute, the list was presented to the General Assembly who elected eleven Judges to serve on the Tribunal on 17 September 1993. All the Judges were elected for a four year term on a full time basis.

On 21 October 1993 the Security Council appointed Ramon Escovar-Salom, the Attorney General of Venezuela, as Prosecutor of the Tribunal. A month later the first plenary session of the Tribunal convened, and on 17 November the Tribunal was inaugurated at the Peace Palace in the Hague. During the next two weeks the Tribunal elected Antonio Cassese as its President and Elizabeth Odio-Benito as its

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2 The eleven Judges elected under General Assembly decision A/DEC/47/328 were G. M. Abi-Saab (Egypt), A. Cassese (Italy), J. Deschenes (Canada), A. G. Karibi-Whyte (Nigeria), G. Le Foyer de Costil (France), H. Li (China), G. K. McDonald (USA), E. Odio-Benito (Costa Rica), R. Sidhwa (Pakistan), Sir N. Stephen (Australia), and L. C. Vohrah (Malaysia). Morten Bergsmo, The Establishment of the International Tribunal on War Crimes, 14 Hum. Rts. L. J. 371 (1993), at 373.
Vice-President, determined the membership of Chambers, and began considering the rules of procedure and evidence that the Tribunal would follow.

At the second plenary session of the Tribunal, held between 17 January and 11 February 1994, the Tribunal prepared and approved its Rules of Procedure and Evidence. These rules covered all aspects of the functioning of the Tribunal, and reiterated the obligation of states to co-operate with the Tribunal and to take all necessary measures to comply with its requests. During this session Escovar-Salom announced that he would not take up office as Prosecutor.

The rules governing the detention of persons awaiting trial or appeal before the Tribunal, or otherwise detained on the authority of the Tribunal, were adopted during the Tribunal’s third plenary session, held from 25 April to 5 May 1994. Such a regime had to be devised given that for the first time in history accused persons were to be held in a special detention unit governed not by national rules of detention but by “a unique system of international standards created specifically by the international body before which they will be tried.”

When drafting the Rules of Detention the Tribunal took into account guidelines set out in various international instruments concerning the treatment of prisoners, including the 1977 UN Standard Minimum Rules for the Treatment of Prisoners. The rules deal with the management of the detention unit, the rights of detainees and the removal and transport of detainees.

Three basic principles underlie the Rules of Detention. Firstly, all persons awaiting trial have the right to be presumed innocent until found guilty. Secondly, detainees must be humanely treated at all times, and their physical, moral and spiritual needs must be met. Finally no discrimination based on race, colour, gender, language,
ethnic origin, religion or other ground will be practised or tolerated in the Detention Unit.\textsuperscript{10}

Since suspects or accused persons who are unable to pay for counsel were entitled to free legal assistance from the Tribunal, Professor Theo van Boven, the Acting Registrar prepared a Directive on the Assignment of Defence Counsel,\textsuperscript{11} which was submitted to the Tribunal during its fourth session, held in July 1994. This Directive sets out the procedure for the assignment of defence counsel, the calculation and payment of fees and disbursements, and the establishment of an advisory panel which will be consulted by the Registrar or the President on questions concerning the assignment of counsel.\textsuperscript{12}

Financial Problems

Before he withdrew as Prosecutor, Escovar-Salom recommended that Graham Blewitt, the Director of the Nazi War Crimes Unit in Australia, be appointed Acting Deputy Prosecutor, to which the Secretary-General agreed. A five month stalemate in appointing a successor to Escovar-Salom followed as members of the Security Council disagreed over the appointment of various candidates.\textsuperscript{13} An agreement was reached on 8 July 1994 when the Security Council unanimously appointed South African Judge Richard Goldstone as Prosecutor.\textsuperscript{14}

When Goldstone took office on 15 August 1994 he found a Tribunal that was seriously underfunded. While the Security Council established the Tribunal, the Fifth Committee of the General Assembly through the Advisory Committee on

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\textsuperscript{10} The Detention Unit is located near the seat of the Tribunal in the Netherlands, within a government prison, but under the exclusive control and supervision of the United Nations. Id.


\textsuperscript{12} Bergamo, supra note 9, at 408.

\textsuperscript{13} This delay was described in the First Annual Report of the Tribunal as a “major blow to the Tribunal.” Madeline Albright, the United States Ambassador to the United Nations, stated more forcibly that “the victims of atrocities in the former Yugoslavia have not been well-served by the resulting delay....Never again should the pursuit of justice by this body be so stymied.” Id., at 405.

\textsuperscript{14} Goldstone was a Judge on the Appellate Division of the South African Court and was head of the South African Commission Concerning the Prevention of Public Violence and Intimidation. He had also conducted a series of investigations into violence in the black townships of South Africa. Id.

At the start of 1996 Justice Goldstone announced he would leave the Tribunal as he wanted to return to South Africa. On 29 February 1996 the Security Council, by Resolution 1047 (1996), appointed Justice Louise Arbour of Canada as the new Prosecutor of the Tribunal. Justice Arbour will take up her post when Justice Goldstone leaves the Tribunal on 1 October 1996. 1996 Annual Report, supra note 2, para. 86.
Administrative and Budgetary Questions (ACABQ) decides on its financing. In Resolution 47/235 of 21 October 1993 the General Assembly asked the Secretary-General to produce an estimate for the cost of running the Tribunal. Even though the Secretary-General estimated that the Tribunal required U.S. $32,200,000 for the biennium 1994-1995, in December 1993 the General Assembly only authorised the allocation of U.S. $5,600,000 for the first six months of the Tribunal’s operation.

This limited financing had a substantial and detrimental effect on the Tribunal. Not knowing whether its finances would be extended at the end of the six month period the Tribunal could not enter into any long-term commitments beyond June 1994. For instance, the Tribunal could not enter into a long term lease for its premises; nor could the Tribunal recruit experienced staff other than on short-term contracts or purchase and install the technical equipment necessary to start investigations. In February 1994 the President of the Tribunal wrote to the General Assembly stating that in order for the Tribunal to accomplish its task it must be financed appropriately.

A further allocation by the General Assembly of US$5.4 million in April 1994 relieved the Tribunal of some of the problems it faced. In addition, the General Assembly gave the Secretary-General specific authority to enter into a long-term contract for the premises and to recruit personnel on a long-term basis. In July 1994 a four-year lease for the premises of the Tribunal was signed, and soon afterwards workers began to convert some of the office space of the premises into a court-room.

During the first half of 1995 the Tribunal faced further fiscal problems as a dispute arose within the Fifth Committee of the General Assembly over whether the Tribunal should be funded out of the general United Nations budget or out of the peacekeeping budget. The five permanent members of the Security Council argued that because the ICJ was funded out of the general United Nations budget the Tribunal should be as well. The Group of 77, led by India, Mexico and Brazil, argued, however, that because the Security Council set up the Tribunal under the ‘peacekeeping’ provisions of the UN Charter, the Tribunal should be paid out of the

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15 Article 32 of the Statute of the Tribunal which is set out as an annex to the Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704.
16 This amount was based on recommendations from the ACABQ. 1994 Annual report, supra note 7, para. 34.
17 Id., para. 35.
18 This was especially burdensome as the Tribunal needed to alter the premises to the specific needs of the Tribunal, most specifically it needed to construct a courtroom. Id.
19 Id.
20 Id., para. 36.
21 Id.
peacekeeping budget. Since the United Nations could not formally approve the Tribunal’s budget until the General Assembly agreed on which account it should be paid from, the consequences of this dispute were potentially serious.23

In monetary terms the differences that member states would be forced to pay was insignificant. For the general United Nations budget member states contribute at a ‘regular rate’ proportionate to their national wealth. Since peacekeeping is controlled by the Security Council, the permanent members of the Council contribute slightly more than other states towards peacekeeping. Consequently, if the Tribunal was funded from the peacekeeping budget the permanent members of the Security Council would pay more. If the Tribunal was funded out of the general budget then other countries would pay more. Since the total budget for the Tribunal for 1995 was $28.4 million this meant that the amount in dispute for the United States was $1.7 million. For France and the United Kingdom the difference was about $500,000 and $400,000 respectively. For many countries the difference was only $2,500.

For many countries this dispute was a matter of pride. Article 32 of the Statute states that the costs of the Tribunal would be paid from the general United Nations budget. To certain countries that were resentful of the Security Council establishing a new organ of the United Nations on its own, this simply was too much. They felt the Security Council was trying to appropriate certain powers of the General Assembly relating to the United Nations budget.

In early July a number of human rights groups and other non-governmental organisations urged the opposing factions to compromise. On 14 July 1995 the permanent members of the Security Council reached an agreement with the G-77 non-aligned countries agreeing that one half of the costs of the Tribunal would come out of the peacekeeping funds while the other half would come out of the general budget.24

Confirmation of Indictments and Judicial Activities

Following his appointment the Deputy Prosecutor set out to organise the office of the Prosecutor. As he initially had only a handful of staff-members to work with, the Deputy Prosecutor firstly formulated a staffing plan and began to recruit qualified and experienced staff to work in the Prosecutor’s office.25 The structures and operational procedures and systems for investigations and subsequent prosecutions

23 Id.
were then set up. A wide range of information relevant to the Tribunal’s jurisdiction was also assembled, a large part coming from the Commission of Experts who, in May 1994, turned over to the Prosecutor’s Office most of the information it obtained during its investigations.

As a result of the Deputy Prosecutor’s efforts the first investigations were ready to commence when the Prosecutor finally arrived. On 1 November 1994 the Prosecutor submitted the first indictment for confirmation. The indictment, which was confirmed by Judge Odio-Benito on 4 November 1994, charged Dragon Nikolic with committing grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war, and crimes against humanity. According to the indictment, between June and September 1992 Nikolic, a Bosnian Serb, was the commander of the Susica detention camp, which was located near the town of Vlasenica in northeastern Bosnia-Herzegovina. While in command of the camp Nikolic directly participated in the wilful killing, torture and inhumane treatment of many of the camp’s detainees. Since his exact whereabouts were unknown an arrest warrant, a copy of the indictment and a statement of his rights were delivered to the government of Bosnia-Herzegovina and the Bosnian Serb government.

In the indictment against Nikolic there were twenty four counts, almost all of which were framed in the alternative. It has been suggested that the Prosecutor decided to use alternative counts as the nature of the conflict in which the acts were committed had still to be decided. If the conflict was international then Nikolic could be found guilty of a grave breach of the 1949 Geneva Conventions. On the other hand if the conflict was internal then Nikolic could only be found guilty of crimes against humanity or violations of Common Article 3.

In October 1995, pursuant to Rule 61, Trial Chamber I held a public hearing in which the Prosecutor presented all the evidence supporting the indictment against Nikolic. After a five day hearing the Judges determined that there were reasonable grounds for believing that Nikolic committed the offences with which he was charged, and ordered that an international arrest warrant against Nikolic be issued and transmitted to all states. In addition, Trial Chamber I publicly stated that the reason

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26 Id.
27 Id.
30 Id.
31 See The Prosecutor v. Nikolic, Case No. IT-95-3-R61, Review of Indictment Pursuant To Rule 61 (20 October 1995) at 23.
why the indictment had not been served was due to the failure or refusal of the Bosnian Serb administration in Pale to cooperate with the Prosecutor.\(^{32}\)

During its investigations the Commission of Experts conducted a very thorough examination of events that occurred in the Opstina (district) of Prijedor in northwestern Bosnia-Herzegovina during the summer of 1992. They revealed that during this period widespread and systematic breaches of humanitarian law were committed in this area\(^{33}\). In the first public hearing of the Tribunal held on 8 November 1994 the Tribunal formally requested that the German Government defer to the competence of the Tribunal the criminal proceedings currently being conducted in its national courts against Dusko Tadic, a Bosnian Serb who was alleged to have been a guard at the Omarska detention camp, which was located in the Prijedor Opstina.\(^{34}\)

On 13 February 1995 Tadic was indicted by the Tribunal on 132 counts of war crimes.\(^{35}\) It was alleged that Tadic and Goran Borovnica, who was charged in the same indictment, took part in the persecution of the Muslim population of the Prijedor Opstina and the deportation of civilians to camps located in that area. Tadic was also charged with offences relating to the collection and mistreatment of civilians inside and outside the Omarska detention camp and various offences committed at the Keraterm and Tmopolje detention camps.

In another indictment confirmed on 13 February 1995 nineteen Bosnian Serbs, who were either commanders, guards or regular visitors to the Omarska detention camp, were charged with committing war crimes, grave breaches and crimes against humanity.\(^{36}\) Zeljko Meakic, the commander of the camp, was also charged with three counts of genocide for killing, injuring and severely maltreating inmates "with the intention of destroying the Bosnian Muslim and Bosnian Croat people as national, ethnic and religious groups."

Because Tadic was the only person in custody, arrest warrants were issued for the 20 other accused. On 31 March 1994 the German government enacted legislation

\(^{32}\) On 30 October 1995, pursuant to Rule 61(E) of the Rules of Procedure and Evidence, the President of the Tribunal notified the Security Council that the Bosnian Serb administration in Pale had either failed or refused to execute the arrest warrants against Nikolic. 1996 Annual Report, supra note 2, para. 51.

\(^{33}\) 1995 Annual Report, supra note 24, at 52.

\(^{34}\) This request was in accordance with Rule 9(iii) of the Rules of Procedure and Evidence. The Trial Chamber agreed that the Tadic investigation was important to the prosecution of persons responsible for committing violations in Prijedor the region of Bosnia-Herzegovina and the alleged acts committed by Tadic would provide a clearer picture of the plan to prosecute the civilian population of the region. They also agreed that the investigation involved potential co-offenders and accomplices who may not be amenable to German jurisdiction and involved many witnesses interviewed by the Prosecutor’s office who resided outside Germany. Vierucci, supra note 29, at 136-137.

\(^{35}\) The Prosecutor v. Tadic, Case No. IT-94-1-1 (13 February 1995).

\(^{36}\) The Prosecutor v. Meakic, Case No. IT-95-4-I (13 February 1995).
on cooperation with the Tribunal, and on 24 April 1994 Tadic was transferred to the Hague.\(^\text{37}\) Two days later Tadic appeared before Trial Chamber II and pleaded not guilty to all the charges contained in the indictment.\(^\text{38}\)

During the next few months several preliminary motions were filed in the Tadic Case by both the Prosecutor and the Defence pursuant to Rule 72 of the Rules of Procedure and Evidence. On 10 August 1995 Trial Chamber II issued two rulings in the case. The first ruling related to the Prosecutor's request for a number of measures for the protection of victims and witnesses.\(^\text{39}\) Among these the Prosecutor requested that certain victims and witnesses be heard in camera; that certain victims and witnesses be assigned pseudonyms, that their true names be expunged from the public record and stated only in sealed records which were not to be disclosed to the public or the media, that their testimony be given by closed-circuit television with image and voice distortion, and finally, that the identities of several victims and witnesses be withheld from the accused and his counsel. Trial Chamber II granted all these requests.\(^\text{40}\)

While Tadic's defence counsel did not object to most of these requests they did object to the ruling allowing the Prosecutor to withhold the identities of certain victims and witnesses from the accused and his counsel. They claimed that this ruling denied the accused a fair trial and the right to examine witnesses against him which are required by Article 21 of the Statute. Judge Stephen, one of the members of the Trial Chamber, agreed with their objection.\(^\text{41}\)

In the second ruling the Trial Chamber dismissed Tadic's challenge to the jurisdiction of the Tribunal.\(^\text{42}\) The defence subsequently appealed. During the Appeals hearing the defence based their motion on three grounds: the establishment of the Tribunal was unlawful, the primacy the Tribunal had over component domestic courts was unjustified, and the Tribunal lacked subject matter jurisdiction under Articles 2, 3 and 5 of the Statute. On 2 October 1995 the Appeals Chamber upheld the decision of Trial Chamber II.\(^\text{43}\) The Appeals Chamber dismissed the plea that the Tribunal was not lawfully established, dismissed the challenge to primacy and decreed that the


\(^\text{38}\) Id. At the initial appearance Tadic was represented by Professor Michail Wladimiroff and Mr. Milan Vujin, the former having been assigned to represent Tadic pursuant to Rule 45 of the Rules of Procedure and Evidence.


\(^\text{40}\) Since this ruling is procedural, therefore, pursuant to Rule 72(B), it is not subject to interlocutory appeal. See Monroe Leigh, \textit{The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused}, 90 Am. J. Int'l L. 235 (1996) at 235.

\(^\text{41}\) Id., at 236.

\(^\text{42}\) The Prosecutor v. Tadic, Case No. IT-94-1-T, \textit{Decision on Jurisdiction} (10 August 1995).

\(^\text{43}\) The Prosecutor v. Tadic, Case No. IT-94-I-AR72, \textit{Appeal on Jurisdiction} (2 October 1995) [hereinafter “Appeal’s Decision”].
Tribunal had subject-matter jurisdiction in respect of each of the three articles in the Statute.\textsuperscript{44}

Since this was the first time that an international appeals body had ruled on the current status of international humanitarian law, the Appeals Chamber took the opportunity to consider at length the application of international humanitarian law to the situation in the former Yugoslavia to the extent that it was necessary for the determination of issues of jurisdiction.\textsuperscript{45} The Chamber found that:

"...an armed conflict exists wherever there is a resort to armed force between States or protracted violence between governmental authorities and organised armed groups or between groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there."\textsuperscript{46}

Applying this concept of armed conflict to the situation in the former Yugoslavia the Appeals Chamber found that an armed conflict existed at all relevant times. Concerning the characterisation of the conflict, the Appeals Chamber concluded that the conflicts that were fought in the former Yugoslavia between 1991 and 1995 had both internal and international aspects, "that the members of the Security Council clearly had both aspects of the conflict in mind when they adopted the Statute," and "that they intended to empower the Tribunal to adjudicate violations of international humanitarian law that occurred in either context."\textsuperscript{47} In that respect the Appeals Chamber held that for the Tribunal to have jurisdiction under Article 2 of the Statute the alleged offences must have been committed within the context of an international armed conflict, though its jurisdiction under both Article 3 and 5 applied to both international and non-international conflicts.\textsuperscript{48}

Towards the end of April the Prosecutor announced that his office was investigating Bosnian Serb leader Radovan Karadzic, commanding General Ratko

\textsuperscript{44} See George H. Aldrich, \textit{Jurisdiction of the International Criminal Tribunal for the former Yugoslavia}, 90 Am. J. Int'l L. 64 (1996), at 64.
\textsuperscript{45} 1996 Annual Report, \textit{supra} note 2, para. 33.
\textsuperscript{46} Appeal's Decision, \textit{supra} note 43, para. 70.
\textsuperscript{47} Id., para. 77.
\textsuperscript{48} Id., para. 72-78.

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Mladic and former secret police chief Mico Stanisic for war crimes committed in Bosnia-Herzegovina.\(^{49}\) The Prosecutor alleged that they were responsible for genocide, numerous acts of murder, rape and torture, and the forced removal of thousands of civilians from large parts of Bosnia-Herzegovina. While Bosnian Prime Minister, Harris Silajdzic, applauded this announcement, the Bosnian Serb Ministry of Information brushed it claiming that the charges lacked proof and were the work of “countries historically hostile toward the Serbs.”\(^{50}\)

Since Bosnia-Herzegovina was conducting its own investigation into the activities of these three men, the Prosecutor applied to a Trial Chamber for the issue of a formal request to the Republic that it defer its investigation to the competence of the Tribunal. On 16 May 1995 this application was granted and the Trial Chamber made the request for deferral.\(^{51}\)

On 25 July 1995 Karadzic and Mladic were indicted by the Tribunal on counts of genocide, crimes against humanity, war crimes and grave breaches of the 1949 Geneva Conventions.\(^{52}\) The indictment alleged that the two Bosnian Serb leaders were responsible either directly or on the basis of command responsibility for (i) the internment of thousands of Bosnian Muslims and Croats in detention facilities where the internees were subject to torture, murder, sexual assault, robbery and other acts, (ii) the shelling and sniping campaigns conducted against civilian populations, (iii) the deportation of Bosnian Muslim and Croat civilians from areas occupied by the Bosnian Serbs, (iv) the destruction of Muslim and Roman Catholic sacred sites, and (v) the taking of United Nations hostages for use as “human shields.”\(^{53}\)

Four more indictments were also confirmed during the latter half of July 1995. The first of three indictments confirmed by Judge Vohrah on 21 July 1995 followed further investigations into atrocities committed in the Prijedor Opstina during 1992. This indictment related to crimes committed by Bosnian Serbs at the Keraterm detention camp.\(^{54}\) Dusko Sikirica, the commander of the camp, was accused of genocide and, along with 12 other subordinates or persons subject to his authority, with committing crimes against humanity, war crimes and grave breaches. The crimes these men were accused of included the wilful killings, torture and sexual assault of several hundred detainees of the Keraterm detention camp.

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\(^{50}\) Karadzic has always denied responsibility for crimes against Muslim civilians. He has said that any crimes committed, were committed by uncontrollable Serbian paramilitary forces and were no worse than atrocities committed by Muslims against Serbs.  
\(^{52}\) The Prosecutor v. Karadzic and Mladic, Case No. IT-95-5-I (25 July 1995).  
\(^{53}\) 1995 Annual Report, *supra* note 24, para. 62-63. The investigation into other members of the Bosnian Serb leadership, including Stanisic is still proceeding.  
\(^{54}\) The Prosecutor v. Sikirica and Others, Case No. IT-95-8-I (21 July 1995).
In the second indictment six persons were accused of having committed grave breaches, war crimes and crimes against humanity while co-ordinating and waging a campaign of terror against the non-Serb civilian population in Bosanski Samac, a municipality located in the Posavina corridor in northern Bosnia-Herzegovina.\(^{55}\)

The third indictment related to atrocities committed by Goran Jelistic and Ranko Cesic at the Luka detention camp of Brcko, in north-eastern Bosnia-Herzegovina during the summer of 1992.\(^{56}\) Jelistic, who was charged with committing genocide, crimes against humanity, war crimes and grave breaches, is alleged to have been one of the commanders responsible for running the camp and was specifically accused of 16 murders and numerous beatings.\(^{57}\) Cesic, who was charged with committing crimes against humanity, war crimes and grave breaches, is alleged to have committed 13 murders and one sexual assault.\(^{58}\)

On 25 July 1995 Judge Jorda confirmed an indictment in which Milan Martic, the President of the self-proclaimed Serb Republic of Krajina, was accused of having committed violations of the laws or customs of war.\(^{59}\) Martic was accused of ordering the cluster-bomb rocket attacks against the civilians of Zagreb in early May 1995, in which five civilians were killed and several others were injured.\(^{60}\)

On 29 August 1995 Ivica Rajic was indicted for having committed grave breaches and war crimes.\(^{61}\) It was alleged that Rajic, who was the first non-Serb to be indicted by the Tribunal, was the commander of a unit of the Croatian Defence Council (HVO) which operated in Central Bosnia. On 23 October 1993 soldiers of the HVO under Rajic’s command attacked the village of Stupni Do which was inhabited at the time by approximately 250 people, most of whom were Muslim. As a result of the attack 16 civilians were killed, the village was almost totally destroyed and the inhabitants who survived were forced to flee.

An indictment against three Serbian officers of the JNA was confirmed by Judge Riad on 7 November 1995. Mile Mrkic, Miroslav Radic and Veselin Slijivancanin were accused of being responsible either directly or because of superior authority for “the mass killing at Ovcara, near Vukovar, of approximately 260 captive non-Serbs, who had been removed from Vukovar Hospital on 20 November 1991.”\(^{62}\) It was alleged that two days after Vukovar was captured by Serbian forces, soldiers of the JNA’s Belgrade-based Guards Brigade and Serbian paramilitary troops under the

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\(^{55}\) The Prosecutor v. Miljkovic and Others, Case No. IT-95-9-I (21 July 1995).
\(^{56}\) The Prosecutor v. Jelistic and Cesic, Case No. IT-95-10-I (21 July 1995).
\(^{58}\) Id.
\(^{59}\) The Prosecutor v. Martic, Case No. IT-95-11-I (25 July 1995).
\(^{60}\) 1995 Annual Report, \textit{supra} note 24, para. 72.
\(^{61}\) The Prosecutor v. Rajic, Case No. IT-95-12-I (29 August 1995).
\(^{62}\) The Prosecutor v. Mrksic and Others, Case No. IT-95-13-I (7 November 1995).
command or supervision of Mrkic, Radic and Sljivancanin removed 261 non-Serbian men from Vukovar Hospital. After transporting these men to a farm building in Vraca they preceded to beat them for several hours. Afterwards the men were driven in groups of ten to twenty to a ravine two kilometres from the farm building, where they were shot. After the killings a bulldozer buried the bodies in a mass grave.

Early in 1995 the Prosecutor’s office became formally aware that a court in Bosnia-Herzegovina was conducting an investigation into atrocities that were committed against the population of the Lasva river valley by Bosnian Croats during 1993. Since his office were also conducting a similar investigation, on 21 April 1995 the Prosecutor filed an application to the Trial Chamber asking that it request the Republic to defer its investigation to the competence of the Tribunal. This request was granted and as a consequence of the Prosecutor’s investigation on 13 November 1995 an indictment was confirmed against six Bosnian Croats who were allegedly responsible for “the prosecution on political, racial and religious grounds of the Bosnian Muslim population” of the Lasva Valley area in Central Bosnia between May 1992 and May 1993. The crimes with which they were charged were carried out on “such a large scale and widespread basis and implemented in such a systematic fashion” that they “effectively destroyed or removed almost the entire Muslim population in the Lasva Valley.”

On 16 November 1995 the Tribunal issued a new indictment against Karadzic and Mladic accusing them of committing genocide and war crimes against the residents of the United Nations designated safe area of Srebrenica in July 1995. At the start of July Srebrenica was attacked by Bosnian Serb forces. According to the indictment when it became clear that the enclave would fall, the Bosnian Muslim population in the enclave either sought refuge near the UN compound in Potocari or fled in a large column towards Tuzla.

On 12 and 13 July 1995 many of those whom had sought refuge near the UN compound were summarily executed. The remaining Muslim population of Srebrenica was then removed from the area by bus. Before letting the Muslims board the buses the Bosnian Serb soldiers separated the men from the women and children. Throughout the night of 11 July 1995 Bosnian Serb forces attacked the column of refugees that were fleeing Srebrenica. Thousands of the refugees surrendered or were
subsequently captured in the days following the attack. Hundreds of those who were captured were either summarily executed at the site of their capture, or were transported to two locations near the village of Karakaj.

On 14 July 1995 thousands of Muslim men who had either been separated from the other refugees in Potocari or had surrendered or had been captured while fleeing the enclave were summarily executed in two large fields near Karakaj. The indictment alleges that at all times during this massacre the Bosnian Serb forces were under the command and control of Karadzic and Mladic.

During the first six months of 1996 the judicial activity of the Tribunal increased. On 12 February 1996 the head of logistics in the Bosnian Serb Army, General Djorde Djukic and his assistant Colonel Alexa Krsmanovic, who were arrested in Sarajevo the previous month, were transferred to the Hague as witnesses pursuant to Rule 90 bis. While Colonel Krsmanovic was subsequently transferred back to Sarajevo, General Djukic was indicted by the Tribunal on 28 February 1996. The indictment, which charged the General with committing a crimes against humanity and a violation of the laws and customs of war, was based on his role in aiding the Bosnian Serb Army in operations which included the shelling of civilian targets during the Bosnian Serb siege of Sarajevo between May 1992 and December 1995. Unfortunately before judicial proceedings could properly commence General Djukic was provisionally released by the Tribunal because of his medical condition. General Djukic, who was suffering from pancreatic cancer, returned to Belgrade where he died in May 1996.

On 21 March 1996 the Tribunal indicted three Bosnian Muslims and a Bosnian Croat for allegedly committing crimes against Bosnian Serbs who were detained in the Celebic camp during the summer of 1992. The indictment stated that the detainees were subjected to serious violations of international humanitarian law including murder, torture (including rape of female detainees), beatings, and inhumane treatment. Within days of the confirmation of the indictment two of the

66 1996 Annual Report, supra note 2, para. 25.
67 Colonel Krsmanovic was transferred back to Sarajevo when it became clear to the Prosecutor that he was not prepared to act as a witness and assist the Prosecutor in his on-going investigations. Five days after returning to Bosnia-Herzegovina the Bosnian courts announced that they had found new evidence that proved beyond doubt that Colonel Krsmanovic participated in war crimes. Despite this statement Colonel Krsmanovic was soon freed from the central prison in Sarajevo and transported to Pale. It is believed that he was exchanged for Ibran Mustafic, a Bosnian MP and member of Izetbegovic's Party of Democratic Action (SDA). Zoran Pirolic, Bosnian's Bitter Over Slim Results, The Tribunal (June/July 1996) at 7, a supplement to 42 War Report (June 1996).
68 The Prosecutor v Djukic, Case No. IT-96-20-I (29 February 1996).
69 1996 Annual Report, supra note 2, para. 45.
70 The Prosecutor v Delalic & Others, Case No. IT-96-21-I (21 March 1996).
indictees were arrested in Western Europe.\textsuperscript{71} The other two indictees were arrested by the authorities of Bosnia-Herzegovina in May 1996. All four were subsequently transferred to the Hague and are currently awaiting trial.\textsuperscript{72}

In March 1996 two Bosnian Serb soldiers were transferred to the Hague pursuant to Rule 90 \textit{bis} as it was believed that they could assist the Prosecutor in his investigation of the Srebenica massacre.\textsuperscript{73} Drazen Erdemovic was subsequently indicted by the Tribunal for participating in the summary execution of hundreds of unarmed Bosnian Muslims at the Pilica collective farm on or about 16 July 1996.\textsuperscript{74} According to the indictment busloads of Muslim men, who had surrendered to Bosnian Serb forces after the fall of Srebenica, were transferred to the collective farm on or about 16 July 1996. Once there they were taken in groups of ten to a nearby field by members of Erdemovic’s unit. There they were lined up in rows and summarily executed. On 31 May 1996 Erdemovic pleaded guilty to committing a crime against humanity.\textsuperscript{75} He will be sentenced in October 1996.\textsuperscript{76}

On 27 June 1996 the Tribunal indicted a group of eight Serbs for the organised mass rape of Muslim women in the south-eastern Bosnian town of Foca from April 1992 to February 1993.\textsuperscript{77} The confirmation of this indictment marked the first time that sexual assault had been treated separately as a war crime. According to the indictment “several women were held in houses and apartments, which were run in the manner of brothels, by groups of mainly (Serb) paramilitary units,” and in such places they were subjected to almost constant rape and sexual assaults, torture and other abuses. As a result of the sexual assaults “the physical and psychological health of many female detainees seriously deteriorated and many contemplated suicide.”

On the same day the Tribunal also released two other indictments which charged nine Bosnian Croats with atrocities committed during attacks on Muslim villages in the Lasva Valley region of Central Bosnia in 1993.\textsuperscript{78} Although these indictments were confirmed by Judge McDonald in November 1995, they were not publicly announced

\textsuperscript{71} Alan Cowell, \textit{Tribunal Files First Charges With Serbs As War Victims}, The New York Times (23 March 1996), at 1.
\textsuperscript{72} 1996 Annual Report, \textit{supra} note 2, para. 47.
\textsuperscript{73} Id., para. 25.
\textsuperscript{74} The Prosecutor v Erdemovic, Case No. IT-96-22-I (29 May 1996).
\textsuperscript{75} When pleading guilty Erdemovic stated “...your honour, I had to do this. If I had refused I would have been killed together with the victims... when I refused they told me “if you’re sorry for them, line up with them and we will kill you to.”” \textit{Croat soldier tells Tribunal of massacre at Srebrenica}, International Herald Tribune, 1 June 1996, at 1.
\textsuperscript{76} 1996 Annual Report, \textit{supra} note 2, para. 49.
\textsuperscript{77} The Prosecutor v Gagovic & Others, Case No. IT-96-23-I (27 June 1996).
\textsuperscript{78} The Prosecutor v Marinic, Case No. IT-95-15-I (10 November 1995) and the Prosecutor v Kupreskic & Others, Case No. IT-95-16-I (10 November 1995).
at the time as the Prosecution wanted time to protect the safety of victims and witnesses.\textsuperscript{79}

In addition to confirming indictments, the Judges of both Trial Chambers were busy reviewing indictments pursuant to Rule 61 of the Rules of Procedure and Evidence. The first of these proceedings concerned Milan Martic who was accused of ordering rocket attacks on Zagreb in May 1995.\textsuperscript{80} On 27 February 1996 Trial Chamber I examined all the evidence against Martic. Based on this evidence the Trial Chamber was satisfied that reasonable grounds existed for believing that, on 2 and 3 May 1995, the civilian population of Zagreb was attacked with Orkan rockets on orders from Martic.\textsuperscript{81} The attacks killed and wounded many civilians and caused significant damage. The Trial Chamber found that because of their limited accuracy and striking force, the use of the Orkan rockets indicated that Martic did not intend to hit military targets but instead wanted to terrorise the population of Zagreb. The attacks were therefore contrary to laws and customs of war which fall within the scope of Article 3 of the Statute.\textsuperscript{82}

Between 20 March and 28 March 1996 Trial Chamber I also conducted a Rule 61 hearing against three officers of the JNA for their part in the alleged November 1991 massacre of 261 non-Serbs who were patients of the Vukovar Hospital. After hearing the testimony of several witnesses and examining numerous documents the Trial Chamber found that there were sufficient grounds for believing that the three officers committed the offences for which they were accused, and issued an international arrest warrant for each of them.\textsuperscript{83}

The following month Trial Chamber II held a public hearing under Rule 61 in the case of Ivica Rajic who was accused of ordering the attack on the Muslim village of Stupni Do on 23 October 1993. After presenting written and oral evidence in support of the indictment, the Prosecutor filed an application to adjourn the decision on the Rule 61 proceedings against Rajic as he wanted to file additional evidence to support the submission regarding the existence of an international armed conflict.\textsuperscript{84} While this request was granted, as of 30 June 1996 this evidence was still to be presented.

On 16 June 1996 the Tribunal announced that evidence would be heard against Radovan Karadzic and Ratko Mladic who had been indicted twice by the Tribunal. On 28 June 1996 Trial Chamber I began hearing evidence against the two Bosnian Serb

\textsuperscript{79} 1996 Annual Report, supra note 2, para. 14.
\textsuperscript{80} Id., paras. 53-55.
\textsuperscript{81} Id., para 55.
\textsuperscript{82} Id.
\textsuperscript{83} Id., para. 57.
\textsuperscript{84} Id., para. 60.
leaders,\textsuperscript{85} and it is expected that the Trial Chamber will confirm the indictments and issue international arrest warrants for Karadzic and Mladic.

Finally on 7 May 1996 Trial Chamber II, comprising Judges McDonald, Vohrah and Stephen, began hearing evidence against Dusko Tadic.\textsuperscript{86} In his opening address Grant Niemann, who appeared for the Prosecutor, stated:

\begin{quote}
"...the opening of the first case before the Tribunal is an historic occasion but it is also a solemn one. The duty of any criminal court is onerous, but the duty imposed on this Tribunal is a heavy burden indeed. This Tribunal has been created not only to administer justice in respect of the accused that stands before you, but there is an expectation that in so doing you will contribute to a lasting peace in the country that was once Yugoslavia.

The human tragedy that has occurred in the former Yugoslavia since 1991 is of major proportions. When dealing with violations of international humanitarian law, we are not only looking to the actions of individuals, but to the involvements of the authorities of the state as well.

Through this trial (the Prosecution) will embark upon an examination of events of unspeakable horror. What man has done to man in the cause of nationalism, or ethnic hegemony in the former Yugoslavia, strains the most agile of human reasoning." \textsuperscript{87}
\end{quote}

\textsuperscript{85} Id., para. 61.
\textsuperscript{86} The start of the trial was delayed as the defence needed to complete its investigations and discovery in the region of the former Yugoslavia. Id., para. 38.
\textsuperscript{87} The Prosecutor v Tadic, Case No. IT-94-I-T, \textit{Opening statement by Grant Niemann and Michail Wladimiroff} (7 May 1996) at 7-8.
Despite facing jurisdictional restrictions imposed by the Statute and encountering financial and practical difficulties, the indictments the Prosecutor has prepared and the modest judicial results his office has achieved suggests that the Tribunal may succeed in the task given to it by the Security Council and prosecute those persons responsible for committing serious violations of international humanitarian law in the former Yugoslavia. This final chapter will assess whether the Tribunal will successfully complete its mandate, and how it will contribute to the development of international humanitarian law.

Firstly the chapter will assess whether the Tribunal will overcome criticisms which tarnished the Nuremberg Tribunal, and whether it will satisfy international standards of due process that were established by the two post-Second World War Tribunals and were augmented by various international covenants and treaties that were subsequently codified. This chapter will then examine whether the international community, in particular the Republics of the former Yugoslavia and states contributing personnel to IFOR, will carry out orders and decisions issued by the Tribunal as they are required to under Article 29 of the Statute. Given the fact that the Tribunal lacks any police or other enforcement agency of its own which can execute warrants of arrest issued by the Tribunal, without such cooperation the Tribunal will not successfully complete its mandate. Finally, this chapter will explore the question of whether the establishment of the Tribunal will lead to the establishment of other ad hoc tribunals or whether it will contribute to the creation of a permanent international criminal court.

**Improving upon the Nuremberg Precedent**

In his report to the President of the United States following the Nuremberg Trial, Justice Robert Jackson, the head of the United States Prosecution team, stated:
"...many mistakes have been made and many inadequacies must be confessed. I am consoled by the fact that in proceedings of this novelty, errors and missteps may also be instructive to the future."  

Given its significance in the development of international humanitarian law, it is likely that the success or failure of the Tribunal will be measured against the Nuremberg Tribunal. The Tribunal must therefore ensure that it complies with the due process standards recognised by the Nuremberg Tribunal and must address any shortcomings it had.

Even though the Nuremberg Tribunal established the principle that individuals are criminally liable for committing crimes against humanity, the Nuremberg Tribunal and its Tokyo counterpart were heavily criticised for applying so-called victors' justice. Both were composed exclusively of prosecutors and judges of the victorious countries and even though several violations of humanitarian law were committed by members of the allied forces the defendants only came from the defeated states.

Unlike its predecessors the Tribunal for the former Yugoslavia was not created by either the victors of the conflict or the parties involved in the fighting. Instead the Tribunal was established by the community of nations acting through the Secretary Council pursuant to Chapter VII of the UN Charter. Its Statute provides for the prosecution of all persons who have committed offences in the former Yugoslavia since 1 January 1991, regardless of nationality; the Chambers of the Tribunal is composed of eleven judges representing the major legal systems of the world; the Prosecutor is not to “seek or receive instructions from any Government or from any other source,” and the purpose of the Tribunal is not only to punish the perpetrators but also to restore peace. As the President of the Tribunal said “for the first time, the community of States is rendering a justice which is not that of the victors...a justice animated not by a spirit of revenge but by the determination to bring the criminals to book and prevent further crimes.”

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2 Parties from all sides to the conflict, be they Serb, Croat or Muslim may be prosecuted and punished by the Tribunal. While it is recognised that Serbian forces committed the majority of the atrocities, by recognising that all sides have committed atrocities the Tribunal would show that it was a dispenser of real justice. See Lisa L. Schmandt, Peace with Justice: Is it possible for the former Yugoslavia? 30 Tex. Int'l. L. J. 335 (1995), at 351.

3 This requirement eliminates another criticism of Nuremberg, where the prosecutors often received instructions directly from their governments. Morris and Scharf, supra note 1 at 332.

4 Statement of Antonio Cassese, President of the Tribunal, U.N. Doc. IT/23, 21 January 1994. This statement reiterates comments made by US Supreme Court Justice Murphy in his dissenting opinion in the Yamashita Case. Justice Murphy stated “(if) we are ever to develop an orderly
Another criticism of the Nuremberg Tribunal was that it applied *ex post facto* laws when it held individuals responsible for crimes against peace. To avoid a similar criticism being made against the Tribunal the Secretary-General decided that it would only have jurisdiction over rules of international humanitarian law which were beyond any doubt part of customary international law. Such rules, he stated, were embodied in the 1949 Geneva Conventions, the 1948 Genocide Convention, the Hague Convention of 1907 and the Nuremberg Charter.

The Nuremberg Tribunal was also criticised for prosecuting Martin Bormann even though he had not been seen since early May 1945. In light of Article 14 of the International Covenant on Civil and Political Rights, which provides that the accused shall be entitled to be tried in his presence, the Secretary-General decided that the Tribunal should not conduct trials *in absentia*. The prohibition on *in absentia* trials creates a formidable obstacle to successfully prosecuting many defendants, especially as Bosnian Serb leaders have refused to hand over anyone indicted by the Tribunal. However, many commentators believe that such trials are unnecessary. Part Five of the Rules of Procedure and Evidence, which allows the Trial Chambers to consider indictments or reports of the Prosecutor and to ‘condemn’ the accused if apprehension is not possible, achieves the objectives of trials *in absentia*, while avoiding their inherent disadvantages.

The Statute of the Tribunal not only satisfies the international standards of due process which were established by both the Nuremberg and Tokyo Tribunals but also reflects the significant developments in human rights standards that have occurred in the last fifty years. Article 21 of the Statute, which is essentially a reproduction of Article 14 of the International Covenant on Civil and Political Rights, contains several provisions designed to ensure a fair trial. In particular, it states that the accused (1) is entitled to a fair and public hearing on the charges brought against him; (2) is to be presumed innocent; (3) has the right to choose counsel and to communicate with him; (4) has the right to be informed in detail and in a language he understands of the charges brought against him; (5) has the right to be tried without undue delay; (6) has

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1. The necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness.” In *Re Yamashita* 327 US 1 29-30 (1946) (Murphy J. dissenting)
3. Id., para. 35.
5. Id., see also Morris and Scharf, *supra* note 1, at 333.
the right to be present at his own trial; (7) has the right to examine witnesses against
him and to obtain the attendance of witnesses on his behalf; (8) has the right to the
free assistance of an interpreter if necessary; and (9) does not have to testify against
himself or to confess guilt. Furthermore, by virtue of Article 24, the Tribunal may not
sentence a convicted person to death. It may only impose a prison sentence which will
be served in the prisons of countries offering penal facilities. The Statute also prevents
national courts subsequently prosecuting individuals for acts for which he or she has
already been tried by the Tribunal\(^9\) and limits the power of the Tribunal to retry
persons already prosecuted for the same offence before a national court.\(^10\) Finally the
Statute provides for an Appeals Chamber to hear appeals from persons convicted by
the Tribunal.\(^11\)

In addition, the Rules of Procedure and Evidence which the Tribunal adopted
are a marked improvement over the meagre set of rules followed by the Tribunal’s
predecessors. These rules, which are arranged in a logical sequence, cover all the
different stages of the proceedings. In addition, they set out the rights of both suspects
and accused persons.

While the Statute and the Rules of Procedure and Evidence comply with
international standards of fair trial and due process, two recent actions of the Tribunal
raise doubts as to the extent to which accused persons will receive a fair trial. At an
international conference on the Dayton Agreement held in June 1996 the President of
the Tribunal, Antonio Cassese, urged the international community to postpone the
elections in Bosnia-Herzegovina until Radovan Karadzic and Ratko Mladic were
arrested as alleged war criminals. He further demanded that Serbia and the Serbian
Republic of Bosnia-Herzegovina be expelled from the Olympic Games in Atlanta
unless they helped arrest these two indictees.\(^12\)

Considering that one day he may have to preside over an appeal lodged by
either of the two Bosnian Serb leaders, President Cassese’s prosecutorial zeal must be
questioned.\(^13\) To ensure that the Tribunal is a success all the Judges of the Tribunal

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\(^9\) The Statute of the Tribunal is set out as an annex to the Report of the Secretary-General
Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, art. 10(1).
\(^10\) Id., art. 10(2).
\(^11\) Id., art. 25(1).
\(^12\) See Judge Antonio Cassese The Dayton Accord and the International Criminal Tribunal for
the former Yugoslavia, speech given at the Florence Mid-term Conference on the Implementation
of the Dayton Accord (13 June 1996). Copy in the possession of the author.[hereinafter “Speech by Judge
Cassese”]
\(^13\) In 1995 President Cassese also called for a programme of indictments to meet the expectations
of the Security Council and of the world community at large. Geoffrey Robertson QC, War Crimes
Deserve a Fair Trial, The Times, 26 June 1996 [hereinafter “Fair Trial”].

Not surprisingly Richard Goldstone, the Prosecutor of the Tribunal has come out in defence of
President Cassese. At the Potsdam Einstein Forum Conference in May 1996 he stated “Judges are
entitled to make public calls for justice, and the Judges of the Tribunal have an obligation to express
publicly their concern when political actions appear to undermine the credibility and effectiveness of
must remain impartial. Nuremberg was considered a success as many of the charges laid against the defendants were unproved and three of the defendants were acquitted. In contrast to President Cassese, the presiding judge at Nuremberg, Lord Justice Geoffrey Lawrence, remained publicly and resolutely impartial throughout the course of the Trial.14

A further concern relates to the ruling by Trial Chamber II in the Tadic Case in which it authorised the Prosecutor to withhold from the accused and his counsel the identity of a number of witnesses who were to give evidence.15 This ruling gives rise to the possibility that an accused may be sentenced to life imprisonment on the testimony of witnesses whose identity he does not know. Consequently it has been criticised for misconstruing the Statute, misunderstanding judicial precedents and misdescribing the function of the judiciary in a criminal trial, this being to balance the fundamental rights of the defendant against prosecution convenience.16

Despite these imperfections, other decisions of the Tribunal indicate that the rights of accused persons are being upheld. In April 1996 Trial Chamber I provisionally released General Djorde Djukic as he was seriously ill with pancreatic cancer. In June 1996 the same Trial Chamber released Goran Lajic after it became clear to Tribunal investigators that he was not the same Goran Lajic who was named in the indictment.17 Since the motion to release Goran Lajic came from the Office of the Prosecutor his release shows that despite the abovementioned actions, the Tribunal intends to comply with international standards of fair trial and due process. However, whether the Tribunal will be effective in rendering justice is another question.

The Prospects for the Effective Functioning of the Tribunal

With the signing of the Dayton Agreement it became clear that there would be no victors to the conflict. After four years of war the Serbian forces had failed to unite their people into a ‘Greater Serbia’. Despite this the Serbian leaders who lead their people to war remained in power. Since Germany, Japan and their Axis Allies were totally occupied by the Allied forces after the Second World War neither the Tokyo nor the Nuremberg Tribunals were faced with the question of how to prosecute war criminals who maintained significant political or military control within a state.

the Tribunal.” Mirko Klarin, Crisis Time In The Hague, 4 The Tribunal (June/July 1996) at 1, a supplement to 42 War Report (June 1996).
14 Fair Trial, Id.
15 The Prosecutor v Tadic, Case No. IT-94-1-T, Decision on the Protection of Victims and Witnesses (10 August 1996).
16 Fair Trial, supra note 13.
17 The Prosecutor v. Goran Lagic, Case No. IT-95-8-T, Order For The Withdrawal Of The Charges Against The Person Named Goran Lagic And For His Release (17 June 1996)
History has shown that except in the case of total defeat or occupation prosecutions of enemy personnel accused of war crimes are rare. For instance, following the First World War a defeated but not completely occupied Germany successfully resisted demands by the victorious powers to hand over about 900 persons accused of committing war crimes. More recently, the international community has been unsuccessful in its attempts to hold Sadaam Hussein and his military council accountable for the atrocities committed against the population of Kuwait and the Kurdish minority living in the north of Iraq.

In order to prosecute those responsible for committing serious violations of international humanitarian law in the former Yugoslavia, the Tribunal will have to rely on the cooperation of the governments of the international community, and specifically the governments of the Republics of the former Yugoslavia and the governments of those states who contribute personnel to IFOR. If these people are not brought to trial, the deterrent value of the Tribunal will be ruined. In addition, there would be no reconciliation between the different ethnic groups of the former Yugoslavia. Instead of blaming individuals for ordering or carrying out the atrocities, the entire population will be blamed. The notion of collective guilt will ultimately lead to more atrocities being committed, as the survivors of one ethnic group take revenge on the survivors of another. This was the thinking behind the Allies' push to inform the German population about the Nuremberg Trials in the months following Germany's surrender.

At Dayton the governments of Bosnia-Herzegovina, Croatia and the Federal Republic of Yugoslavia agreed to cooperate fully with the investigation and prosecution of war crimes. In his report to the Security Council at the conclusion of the Dayton Agreement the Secretary-General declared:

"...I must reiterate that peace cannot be durable unless it is accompanied by justice. Following one of the most bitter wars in Europe since 1945 with unspeakable atrocities against civilians reaching the level of crimes against humanity, those indicted by the International Tribunal for the former Yugoslavia..."
must be brought to trial. Peace with justice is an overriding goal of the international community, and it is the legal and moral duty of all signatories to the Peace Agreement to assist in its attainment.\textsuperscript{22}

More forceful words were spoken by the United States Ambassador to the Security Council, Madeleine Albright, at the time of the adoption of Resolution 1022 (1995). She stated:

"After the siege of Sarajevo, the market place shelling, the years of “ethnic cleansing” and the unforgivable savagery at Srebrenica, the world has had enough of the Bosnian Serb arrogance and brutality. Their compliance (the Dayton Agreement) must be demanded by the Government in Belgrade; it must be demanded by (the Security) Council; and it must be demanded by every civilised person on Earth."\textsuperscript{23}

Although the governments of the Yugoslav Republics were initially reluctant to cooperate with the Tribunal, during the latter months of 1995 and the first six months of 1996 the cooperation of these governments has increased. Tribunal investigators are now permitted to operate fully within Croatia, Bosnia-Herzegovina and the Federal Republic of Yugoslavia collecting evidence, questioning witnesses and exhuming mass grave sites. Nevertheless the governments of Croatia and the Federal Republic of Yugoslavia as well as the Bosnian Serb and Bosnian Croat authorities have all failed to execute arrest warrants of persons living within the territories under their control.

The government of Bosnia-Herzegovina has (i) enacted legislation which permits its authorities to cooperate with the Tribunal\textsuperscript{24}, (ii) permitted Tribunal investigators to function within its territory, (iii) assisted the Tribunal in the discovery and exhumation of mass grave sites, and (iv) deferred prosecutions at the request of the Tribunal.\textsuperscript{25} While Bosnia-Herzegovina was criticised for failing to provide the Tribunal with information concerning Muslim suspects, on 2 May 1996 the authorities

of Bosnia-Herzegovina arrested two Bosnian Muslims indicted by the Tribunal for crimes allegedly committed against Bosnian Serbs at the Celebici prison camp. On 13 June they were transferred to the Hague. Unfortunately as the state-controlled media in Bosnia-Herzegovina did not report the arrests and the independent newspaper Oslobodjenje only reported the arrests indirectly, it is not clear whether the authorities of the Bosnia-Herzegovina are fully supportive of the Tribunal.

Croatia has also permitted investigators from the Tribunal to operate within its territory since 1994, and in April 1996 enacted legislation authorising closer cooperation with the Tribunal. In addition, in April 1996 a Croatian General, Tihomir Blaskic, was persuaded by Croatian officials to surrender himself to the Tribunal, and on 8 June 1996 authorities in the Croatian port of Split arrested a Bosnian Croat charged with committing grave breaches of the 1949 Geneva Convention and war crimes. Nevertheless, Croatian authorities have failed to exercise their acknowledged authority and influence over the Croat population of Bosnia-Herzegovina in order to apprehend other Bosnian Croat indictees. Furthermore, Croatia has not vigorously prosecuted those persons who committed war crimes when the Croatian Army retook Krajina in August 1995, nor has it assisted the Tribunal with the investigation of these atrocities.

The attitude of the Federal Republic of Yugoslavia and the Bosnian Serb entity in Bosnia-Herzegovina is more deplorable. Although the Bosnian Serb authorities have agreed to assist the Prosecutor of the Tribunal in his investigations, in reality they have ignored the Tribunal’s most simple requests. Radovan Karadzic and General Ratko Mladic, both of whom have been indicted by the Tribunal, remain firmly in power over Bosnian Serb territory despite the provisions in the Dayton Agreement which require indicted war criminals to relinquish power. This has resulted in the Bosnian Serb authorities refusing to arrest and surrender indicted persons who live in the Bosnian Serb Republic.

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26 Id.
27 Zoran Pirovic, Bosnians bitter over slim results, 4 The Tribunal (June/July 1996) at 7, a supplement to 42 War Report (June 1996).
29 Id. It is alleged that General Blaskic is responsible, on the basis of command responsibility, for a number of atrocities committed against the Bosnian Muslim population of the Lasva Valley between May 1992 and May 1993.
30 Id.
31 This is illustrated by the fact that Dario Kordic, leader of the so-called Bosnian Croat Republic of Hercog-Bosnia, was seen sitting in the row behind Franjo Tudjman at an opera concert despite the fact that he had been indicted by the Tribunal for committing war crimes and crimes against humanity. Samantha Power, Croatia, too, flouts Dayton Pact, International Herald Tribune, 24 July 1996.
Although the Federal Republic of Yugoslavia has formally allowed the Tribunal to open an office on its territory and has surrendered two witnesses to the Tribunal\(^{33}\), the authorities of the Federal Republic of Yugoslavia have not executed a single arrest warrant issued by the Tribunal. Although draft legislation implementing the Tribunal's Statute has been prepared, the Federal Republic of Yugoslavia has not enacted it. In any case the draft legislation is in contradiction to the Statute of the Tribunal as it gives the national authorities discretion to refuse the transfer of accused persons to the Hague.\(^{34}\) Following the Rule 61 hearing on the indictment against three officers of the JNA who were charged with the murder of 261 civilians and unarmed men following the capture of the city of Vukovar in November 1991, the President of the Tribunal, Judge Antonio Cassese, wrote to the Security Council on 24 April 1996 informing it of the failure of the failure of the Federal Republic of Yugoslavia to arrest the three officers.\(^{35}\) On 8 May 1996 the President of the Security Council issued a statement on behalf of the Security Council which declared:

"The Security Council deplores the failure to date of the Federal Republic of Yugoslavia to execute the arrest warrants issued by the Tribunal against the three individuals....and calls for the execution of those arrest warrants without delay."\(^{36}\)

On 21 May 1996 the disregard that the Federal Republic of Yugoslavia has shown towards the Tribunal was further demonstrated when General Ratko Mladic and Colonel Viselin Sljivancanin, who was indicted for his part in the Vukovar massacre, attended the public funeral of General Djorde Djukic. Neither Mladic nor Sljivancanin were arrested.\(^{37}\) On 22 May 1996 the President of the Tribunal again wrote to the Security Council, stating:

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\(^{33}\) Id., para. 169.

\(^{34}\) Justice Richard Goldstone, *The Responsibility To Act*, 4 The Tribunal (June/July 1996) at 8, a supplement to 42 War Report (June 1996).


\(^{36}\) Presidential statements are adopted by consensus by the 15 members of the Security Council but are not binding. Therefore they carry less diplomatic importance than resolutions.

\(^{37}\) When US officials protested to Slobodan Milosevic they were told by the Serbian President "funerals are very important to Serbs." Chris Hedges, *US and Allies fail in efforts to oust top Bosnian Serbs*, The New York Times, 24 May 1996, at A1.
“(The fact that General Mladic had) not been arrested by the authorities of the Federal Republic of Yugoslavia is further evidence of the blatant failure of that State to comply with its clear and overriding legal obligation to execute orders of this Tribunal”. 38

On 28 May 1996, in response to this letter, the President of the Security Council stated that the Security Council deeply deplored the continued failure of the government of the Federal Republic of Yugoslavia to cooperate with the Tribunal, that this failure cannot be justified, and that compliance with the requests of the Tribunal constitutes an essential aspect of implementing the peace agreement.

In the middle of June 1996 during an international conference in Florence, Italy, which was held to assess the extent of compliance with the Dayton Agreement, the President of the Tribunal reiterated his demands that the authorities of the former Yugoslav Republics arrest indicted persons. Stating that it was “imperative to take prompt and drastic action” to ensure “that real peace returns to the former Yugoslavia once and for all,” he again called on the international community to assist in the capture of indictees either by obliging IFOR to arrest suspects, or by imposing sanctions on uncooperative Republics in order to compel them to detain suspects and transfer them to the Hague. 39

As the President of the Tribunal himself conceded, sanctions may prove counter-productive in that they may expose rifts between the Western powers and Russia and they may jeopardise Milosevic’s cooperation with the West. 40 In addition, sanctions could cause the postponement of the elections in Bosnia-Herzegovina which are scheduled to take place in September 1996. Nevertheless, the international community should call on IFOR commanders and those states contributing personnel to it to comply with the 1949 Geneva Conventions, Resolution 827 (1993) and the Dayton Agreement and arrest those persons who have committed serious violations of international humanitarian law.

To ensure that peace returns to Bosnia-Herzegovina IFOR has 60,000 persons stationed within the Republic. In addition, IFOR has extensive intelligence-gathering capabilities, including the monitoring of radio communications and access to satellite and aerial reconnaissance data. Under the terms of the Dayton Agreement “IFOR has complete and unimpedied freedom of movement by ground, air and water through-out

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39 Speech by Judge Cassese, supra note 12.

Bosnia-Herzegovina.” IFOR operates almost at will throughout the Republic and has the authority to do almost whatever it wants in order to implement the peace agreement. However, despite these powers IFOR has consistently refused to search for and arrest persons accused of committing serious violations of international humanitarian law. 41 For instance, an American commander in Bosnia-Herzegovina has stated “I will not see my soldiers put at risk unnecessarily, and we are put at risk if we arrest some of these characters, even under the best of conditions.” 42 Similarly when the head of the United States Joint Chiefs of Staff, General Shalikashvili, was asked whether IFOR would arrest war criminals he replied “Absolutely not, I’m against it.” 43

Although the 1949 Geneva Conventions are strictly binding only on states, it is now accepted that peace-keeping forces are bound by the provisions set out in these conventions. Both the International Conference for the Protection of War Victims and the ICRC have stated that peace-keeping forces must comply with international humanitarian law. 44 Furthermore, since 1992 the United Nations has regularly included, in the agreements it has signed with the states into which it has dispatched peace-keeping forces, provisions which state that its peace-keeping operations shall be conducted with full respect to the principles and spirit of the 1949 Geneva Conventions and the 1977 Additional Protocols. 45

States contributing personnel to IFOR are also bound to search for and arrest persons indicted by the Tribunal under Resolution 827 (1993) as it obliges states to cooperate fully with the Tribunal and to take any measures necessary to implement the resolution. On 15 December 1995 the Security Council adopted Resolution 1031 (1995) which reaffirmed that all states must cooperate fully with the Tribunal in accordance with Resolution 827 (1993).

41 It is widely believed that American commanders are frightened by the example of Mogadishu in 1993, when American soldiers were killed in a vain attempt to capture General Mohammed Farah Aidid, the Somalian warlord. Let The Tribunal, supra note 20.
44 On 10 November 1961 the ICRC drew the attention of the Secretary-General to the need to ensure the application of the Geneva Conventions by forces placed at the disposal of the United Nations.
45 Umesh Palwankaar, a member of the ICRC’s legal division has stated “since the UN...is not a party to the Conventions, the ICRC considers that each State remains individually responsible for the application of these treaties whenever it provides a continent for a [peace-keeping force]. In consequence, the State should do what is necessary, especially by issuing appropriate instructions to the troops before they are posted abroad.” Umesh Palwankaar, Applicability of international humanitarian law to United Nations peace-keeping forces, International Review of the Red Cross No. 294 (May 1994).
46 The United Nations has negotiated such agreements with Angola, Croatia, Haiti, Macedonia and Rwanda.
Since the primary purpose of Resolution 1031 (1995) was to ensure that the parties to the Dayton Agreement comply with the provisions of the agreement, one may conclude that the Security Council believed that the Dayton Agreement gave IFOR the power to detain and transfer persons indicted by the Tribunal.\textsuperscript{46} According to Article IV(2) of the Military Annex to the Dayton Agreement, "the parties understand and agree that the IFOR shall have the right to monitor and help ensure compliance by all parties to this Annex."\textsuperscript{47} In order to ensure compliance with these obligations, IFOR has the right to use force if necessary. Furthermore IFOR has agreed to arrest indicted war criminals "when coming into contact with them in carrying out its duties as defined by the Military Annex of the Peace Agreement."\textsuperscript{48} By giving this mandate a wider interpretation, it is possible to argue that IFOR has the authority to search for, arrest and transfer to the Hague all persons who have been indicted by the Tribunal.\textsuperscript{49}

Furthermore, the Military Annex to the Dayton Agreement requires IFOR to cooperate with international personnel who are stationed in Bosnia-Herzegovina. Such cooperation includes assisting the investigators of the Tribunal in the location, guarding and exhumation of mass graves. Several media reports have alleged that mass grave sites have been emptied of corpses or otherwise tampered with. It is imperative that access to such sites is restricted, because otherwise evidence will be tainted and the efforts of the Tribunal’s investigators will be hampered. With the help of IFOR, Tribunal investigators have been able to locate and gain access to mass grave sites. Once located IFOR personnel have assisted in the guarding of the sites while they are exhumed and, most importantly, have cleared the areas of mines and ‘booby traps’.\textsuperscript{50} In addition, IFOR has provided aerial surveillance of mass grave sites.\textsuperscript{51} Yet, IFOR has so far refused to exhume mass grave sites themselves or to investigate suspected atrocity sites. IFOR has also refused to provide twenty-four hour security for all grave sites or even a substantial number of grave sites.\textsuperscript{52}

\textsuperscript{46} See statements of the Ambassadors of the United Kingdom and the United States which were made when Resolution 1031 (1995) was adopted. Provisional Verbatim Record of the 3607th Meeting of the Security Council, U.N. Doc. S/PV. 3607 at 8 and 20 respectively.

\textsuperscript{47} Goldstone, supra note 34.

\textsuperscript{48} Id.

\textsuperscript{49} Id.

\textsuperscript{50} 1996 Annual Report, supra note 25, para. 79.

\textsuperscript{51} Emma Daly, Serbs cover up traces of the killing fields, The Independent, 3 April 1996, at 10.

\textsuperscript{52} Emma Daly, It is a crime too great to hide, but do we have the stomach to bring the killers to trial. The Independent, 3 April 1996.
The Permanent International Criminal Court

As of 1 July 1996 the Tribunal had seven persons in custody. Of these only General Tihomir Blaskic is alleged to have "planned, instigated or ordered" atrocities. The rest are merely small fry, who were, at best, second or third in the line of responsibility. Because of the reluctance of both IFOR and the authorities of the various Yugoslav Republics to arrest indictees and transfer them to the Hague, it seems unlikely that the Tribunal will be able to arrest the military and political leaders who were responsible for the atrocities. Nevertheless, since serious violations of international humanitarian law have been committed in numerous conflicts throughout the world, such as Liberia, Cambodia, Iraq and Somalia, several commentators have expressed the view that the Yugoslav Tribunal, and its Rwanda counterpart, should "serve as a model for other conflicts and a warning to those who believe that they can avoid punishment for despicable acts."

In order to prosecute the perpetrators of such atrocities the Security Council could establish additional ad hoc tribunals similar to the Yugoslav and Rwanda Tribunals. However, this approach to the enforcement of international humanitarian law has been criticised for being inherently politicised and selective. Moreover, as shown by the fact that both the Yugoslav and Rwanda Tribunal's were set up months after the respective conflict began, the ad hoc approach does not provide the international community with an existing mechanism that can promptly investigate and prosecute violations of international humanitarian law. Both problems would be overcome if a permanent international criminal court was established.

For the last fifty years numerous jurists and politicians have tried to establish an international criminal court and codify international offences. Shortly after the United Nations was founded, the International Law Commission (ILC) was instructed to prepare a draft code of offences against the peace and security of mankind. In 1954 the ILC tabled a draft code to the General Assembly, however, as this code did not define aggression the General Assembly decided that the draft code could not be

53 In fact Justice Goldstone has stated "it is highly unsatisfactory that people at the level of Dusan Tadic should fact trial and that those who facilitated such conduct should escape justice and remain unaccountable." Quoted in John Swain, Serb War Criminals Flaunt Their Freedom, The Sunday Times, 23 June 1996.
54 Warren Zimmerman, Director of the State Department Bureau of Refugee Programs, quoted in Morris and Scharf, supra note 1, at 343.
55 Id. at 483.
56 Id.
considered until the crime of aggression was defined.\textsuperscript{59} Although in 1974 the General Assembly finally adopted the definition of aggression,\textsuperscript{60} it did not see fit to reconsider the question of the draft code until 1978 when it asked the ILC to proceed with the formation of the code. In 1982 the ILC appointed Doudou Thiam, a former Minister from Senegal, as Special Rapporteur for the draft code. From 1982 to 1991 the ILC received nine reports from the Special Rapporteur. From these reports the ILC provisionally adopted several articles of the draft code.\textsuperscript{61}

Shortly after it was instructed to prepare a draft code of offences against the peace and security of mankind the ILC was also assigned the task of formulating a draft statute for the establishment of an international criminal court.\textsuperscript{62} In 1951 the ILC submitted a draft statute to the General Assembly, although as many states were still unwilling to surrender any portion of their national sovereignty to an international court, this draft was rejected.\textsuperscript{63} Two years later the ILC submitted a revised draft, however, the General Assembly decided not to consider it until the draft code had been adopted.\textsuperscript{64}

In 1988 in an attempt to combat international drug trafficking, the government of Trinidad and Tobago asked the General Assembly to request the ILC to resume its work on the international criminal court. Although the United Nations was dealing with the issue of war crimes that were being committed in the conflict in the former Yugoslavia in another way, the atrocities that were being committed there forced the international community to speed up the establishment of the international criminal court.\textsuperscript{65} On 25 November 1992 the General Assembly adopted Resolution 47/33 in which it requested the ILC to make the formulation of a draft statute of the international criminal court a matter of urgency. During the summer of 1993 the ILC

\textsuperscript{59} Id., at 257.


\textsuperscript{61} These articles include Article 19 (Genocide), article 20 (Apartheid), Article 21 (Systematic and mass violations of human rights), Article 22 (Exceptionally serious war crimes), Article 23 (Recruitment, use, financing and training of mercenaries), Article 24 (International terrorism), Article 25 (Illicit traffic in narcotic drugs), and Article 26 (Wilful and severe damage to the environment). Id., at 260.

\textsuperscript{62} Bassiouni \textit{supra} note 58, at 250.

\textsuperscript{63} Id., at 256.

\textsuperscript{64} Id., at 257.

\textsuperscript{65} Marquardt, \textit{supra} note 59, at 92.
prepared a draft statute for an international criminal court, which established the composition of the court, the standards for election and dismissal of judges, a list of crimes defined by treaties over which the court has jurisdiction, and other rules governing jurisdictional issues.

In 1994 after reviewing the draft statute the General Assembly decided to establish an ad hoc committee to further revise the draft statute and to consider arrangements for the convening of an international conference of plenipotentiaries. The General Assembly's Ad Hoc Committee on the Establishment of an International Criminal Court subsequently met for two two-week sessions in 1995 to review and assess the issues involved in the creation of the court. Following these discussions, on 11 December 1995 the General Assembly decided to establish a Preparatory Committee to draft a statute for a permanent international criminal court. The Preparatory Committee is to complete its work in two sessions in 1996 and is to report to the General Assembly at its fifty-first session beginning in September 1996. At this session the General Assembly is to decide on the time and duration of an international conference of plenipotentiaries to finalise and adopt a convention on the establishment of an international criminal court. Italy has offered to be the host for such a diplomatic conference, and a large number of states have urged that the conference should take place no later than 1997.

Despite the prospect that an international criminal court may be established within the next few years, sceptics and opponents of the international criminal court have raised many questions regarding its formation. Their concerns mainly centre around the types of crimes the court would have jurisdiction over and how the court would decide which cases to prosecute. If the international criminal court was given the mandate to prosecute international drug traffickers it is feared that the international court, like many national courts, would be prone to corruption. Secondly, if the crime of aggression was included within its jurisdiction certain countries, such as the United States, Israel, Russia and China whose cooperation is vital to the success of the international criminal court, may choose to add reservations when signing the treaty which establishes the international criminal court, or may even refuse to sign the treaty altogether.

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67 Id., art. 5.
68 Id., arts. 6, 7, 11.
69 Id., art. 22.
70 Id., arts. 23, 24, 25, 26.
71 L. M. Nelson, Permanent 'Nuremberg Tribunal' gets nearer half a century later, U.N. Observer vol. 18, No. 7 (July 1996) [hereinafter "Half a century later"].
72 War Crimes Court, supra note 57.
73 Id.
The other problem which is regularly highlighted is the way in which individual cases will be selected. If the statute of the international criminal court allows any party to bring a complaint and obliges the prosecutor of the international criminal court to open an investigation, the workload of the court could be manipulated. As one commentator has said, "legitimate complaints must be sorted out from political gestures and grandstanding." One possible solution would be for the Security Council to refer cases to the international criminal court. Again the workload of the court would be open to political interference as the permanent members of the Security Council could use their veto to ensure that neither they nor their allies are prosecuted by the court.

Given the effect it would have on state sovereignty it will be more difficult to gain the international support required to establish the international criminal court than was required to establish the ad hoc Tribunals for Yugoslavia and Rwanda, and for the international court to be successful all states must be obliged to execute its orders and carry out its decisions. However, with the continuing atrocities that are being committed in the African Republics of Burundi, Liberia, Somalia and Zaire it is imperative that the international community continues the recent developments that have occurred in the field of international humanitarian law and establishes the international court. Otherwise violations of international humanitarian law will go unpunished "wherever a majority or a politically or militarily dominant force can impose its will on a minority.... The prosecution of those guilty of unspeakable acts against their fellow men and women must go forward or the cycle of hate will continue unabated."

As one commentator has stated "the establishment of a permanent (international) criminal court.... would be a great step forward to the maintenance of international law. By putting an end to the culture of impunity and the climate of international indifference, such a court could also herald an end to the almost absolute power and arbitrariness with which criminal regimes act against their own population."
CONCLUSION

In 1863 Francis Lieber drafted several regulations governing the way soldiers from the Union Army were to act during the American Civil War. Although attempts had previously been made to reduce the calamities of war, the ‘Lieber code’ was the first codification of the rules of warfare. Over the next one hundred and thirty years international humanitarian law steadily developed. Rules were introduced which limited the means of warfare and the way in which it was carried out. Persons not taking part in hostilities, especially civilians, were afforded protection, and military personnel who were taken prisoner were given certain rights. The Nuremberg and Tokyo trials confirmed that persons who violated these rules were individually responsible and would be held accountable for their deeds. National laws would no-longer condone acts which constituted crimes under international law and Heads of State were no-longer immune from international responsibility.

Despite these advances, international humanitarian law has been violated on numerous occasions during the last fifty years. Conflicts such as those fought in Korea, Vietnam, East Pakistan, Kuwait and Rwanda were as violent and barbaric as the conflicts that preceded them.

The war in the former Yugoslavia was no exception. All sides to the conflict are alleged to have committed various violations of international humanitarian law, although to varying degrees. After the fighting broke out in Croatia in 1991 numerous atrocities were committed. Such atrocities included summary executions, indiscriminate and disproportionate use of force against civilian targets, torture and mistreatment of detainees, disappearances and hostage taking, forced displacement and resettlement of civilian populations and the beating and killing of journalists and medical personnel. Shelling by the artillery of the JNA also caused extensive damage to the Croatian cities of Dubrovnik and Osijek and reduced Vukovar to rubble.

When the war spilled into Bosnia-Herzegovina similar types of violations were committed although on a much wider scale. After seizing approximately sixty per cent of the Republic, Serbian forces set out to ethnically cleanse those who were not of Serb dissent. Ethnic cleansing followed a standard pattern. After roadblocks were erected around a town, the local Serb population would be advised to leave. Once they had gone heavy artillery and mortars would fire at the Muslim and Croatian populations that remained. Those who did not flee would then come face to face with their greatest enemy: the paramilitaries.

Once a town was sufficiently softened up the paramilitaries would enter the town to complete the ethnic cleansing process. By indiscriminately killing, torturing, beating and threatening the non-Serb population the paramilitaries would terrorise the
remaining non-Serb population to such an extent that they would be afraid to remain in the town.

Since the Yugoslav military was steeped in the Titoist tradition of territorial defence and people’s war, every man was a potential fighter. Men of military age who survived the initial onslaught and the brutality that accompanied it were tracked down and interned in detention facilities, such as those located at Omarska, Manjaca, Keraterm, Trnopolje and Luka-Brcko. Here the inmates were subjected to a harsh regime of malnutrition, beating and torture, which in many cases culminated in execution. Women were not spared from the violence. Tens of thousands of women were raped during the conflict. Some were raped as part of the policy of ethnic cleansing while others were simply kept in ‘rape camps’ to satisfy the needs of the combatants. Because of the stigma attached to being raped, especially amongst the Muslim population, the exact number of women who were raped will never be known.

In July 1992 the Security Council, responding to growing international condemnation of the atrocities, adopted Resolution 764 (1992) in which it reminded the parties to the conflict of their responsibilities under international humanitarian law and confirmed that those who committed or ordered atrocities would be held accountable. One month later the Security Council formally condemned the violations of international humanitarian law that were being committed, especially those associated with ethnic cleansing.

As reports of violations continued, in October 1992 the Security Council established a Commission of Experts to examine and analyse all violations of international humanitarian law that were alleged to have been committed in the former Yugoslavia. During the next eighteen months the Commission conducted a series of studies and on-site investigations and produced two interim reports and a final report. From their findings the Commission concluded that grave breaches of the 1949 Geneva Conventions and other violations of international humanitarian law had been committed on a large scale in the former Yugoslavia. In addition, they concluded that ethnic cleansing and rape and sexual assault had been carried out so systematically that they appeared to be a product of state policy. Finally, the Commission observed that the establishment of an ad hoc Tribunal to prosecute those who committed the violations would be consistent with the direction of its work.

Following this suggestion, on 22 February 1993 the Security Council adopted Resolution 808 (1993) in which it decided in principle to establish an international tribunal to prosecute persons responsible for serious violations of international law committed in the former Yugoslavia since 1991. Pursuant to this resolution the Secretary-General prepared a report on the workings of the Tribunal and the legal
On 3 May 1993 this report was submitted to the Security Council. Attached to it was a draft of the Statute of the Tribunal.

In his report the Secretary-General stated that the Tribunal should be established under Chapter VII of the UN Charter as a subsidiary organ of the Security Council. Consequently, its life span should be linked to the restoration and maintenance of international peace and security in the territory of the former Yugoslavia. Although a tribunal of the nature would normally be established by an international treaty, such an approach was rejected as it would be to time consuming and there was no guarantee that all international states would sign the treaty. However, to protect its impartiality the Secretary-General stressed that the Tribunal should perform its functions independently of political considerations and should not be subject to the authority or control of the Security Council with regard to the performance of its judicial functions.

The Secretary-General proposed that the Tribunal should consist of three organs, (1) a judicial organ, (2) a prosecutorial organ, headed by the Prosecutor, and (3) a secretariat or Registry, which should provide general administrative and support services to both the Chambers and the Prosecutor. The judicial organ should be composed of two three-member Trial Chambers and one five-member Appeals Chamber. The Judges should be elected for a four year term by the General Assembly from a list of nominees put forward by the member states and short-listed by the Security Council. When doing this the Security Council should ensure that the principal legal systems of the world were represented. No two Judges should come from the same country.

In his report the Secretary-General emphasised that the Tribunal should apply rules of law that were clearly established at the time the alleged offences were committed. Accordingly, he proposed that the Tribunal should be given the power to prosecute persons who committed grave breaches of the 1949 Geneva Conventions, violations of the laws and customs of war, genocide and crimes against humanity. All persons who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of these offences should be held responsible for their crimes. In addition, following principles recognised by the Nuremberg and Tokyo Tribunals persons should not be relieved of their individual responsibility by virtue of their official position and military commanders should be responsible, not only for unlawful acts they ordered, but also for acts committed by their subordinates which they knew or had reason to know were being or had been committed and they failed to prevent such acts or punish those who committed them. Furthermore, the fact that a person acted pursuant to an order of a government or of a superior should not relieve him or her of criminal responsibility.
On 25 May 1993 the Security Council adopted Resolution 827 (1993) in which it approved the Secretary-General’s report and adopted the Tribunal’s Statute without change. It also declared that all states must cooperate with the Tribunal and take any measures necessary under their domestic law to implement its Statute. By establishing the Tribunal in this way, the Security Council expressed its determination to end the violations that were being committed in the former Yugoslavia and to bring the perpetrators of the violations to justice.

This determination was embraced by the Tribunal following its inauguration on 17 November 1993. During the next six months, the Judges of the Tribunal prepared and adopted rules under which the Tribunal would operate, rules governing the detention of persons awaiting trial or appeal or otherwise detained on the authority of the Tribunal, and a directive governing the procedures for assigning defence counsel to accused persons who were unable to pay for their own defence. The adoption of the Tribunal’s Rules of Procedure and Evidence was a monumental task, especially as the rules under which the Nuremberg and Tokyo Tribunals operated were of little precedential value. The Rules of Procedure and Evidence cover all aspects of the pre-trial phase of proceedings, trials and appeals, the admission of evidence and the protection of victims and witnesses.

While the Security Council argued over whom should be appointed as the Prosecutor, the Deputy Prosecutor set out to organise the Office of the Prosecutor so that it could commence investigations and prosecutions as soon as the Prosecutor was confirmed. On 1 November 1994 Richard Goldstone, the newly appointed Prosecutor, submitted the first indictment for confirmation, and on 8 November 1994 the first public hearing of the Tribunal was held. As of 30 June 1996 eighteen indictments have been submitted for confirmation and seventy-five persons have been indicted. Unfortunately, only seven are in the custody of the Tribunal.

Since it lacks direct authority over the territory of the former Yugoslavia in which the atrocities were committed and most if not all the victims, witnesses, and perpetrators are residing, the Tribunal must rely on the cooperation of states in order to carry out investigations, subpoena witnesses and serve arrest warrants. At the Dayton Peace Conference the governments of Bosnia-Herzegovina, Croatia and the Federal Republic of Yugoslavia agreed to cooperate with the investigation and prosecution of war crimes. While the government of Bosnia-Herzegovina has lived up to this promise and has transferred two indictees to the Hague, the governments of Croatia and the Federal Republic of Yugoslavia as well as the Bosnian Serb and Bosnian Croat authorities have all failed in varying degrees to cooperate with the Tribunal, and most importantly have failed to arrest indicted persons living within the territories under their control.
Although it faces many financial, practical and structural problems, if the Tribunal does not prosecute those responsible for the violations of international humanitarian law committed in the former Yugoslavia since 1991, it will not be able to deter would-be-perpetrators from committing further atrocities. Instead of assigning blame on individual perpetrators, in the eyes of the victims responsibility for atrocities will rest with the different ethnic groups. Thus, given the propensity for ethnic groups within the Balkans to take revenge on one another for acts committed years before the circle of violence will continue.
AFTERWORD

Although 30 June 1996 was chosen as the cut-off date for the consideration of new material, three major developments have occurred which should be mentioned in the final pages of this thesis.

On 11 July 1996 Trial Chamber I unanimously reconfirmed the two indictments against Radovan Karadzic and Ratko Mladic and issued international warrants for their arrest. Not only were the two accused found responsible on the basis of command responsibility for violations of international law committed in the territory of Bosnia-Herzegovina by Bosnian Serb forces, the Trial Chamber also found them personally responsible for genocide and other crimes with which they were charged. The Trial Chamber stated that:

"...the evidence and testimony tendered all concur in demonstrating that Radovan Karadzic and Ratko Mladic were not only informed of the crimes allegedly committed under their authority, but also and, in particular, that they exercised their power in order to plan, instigate, order or otherwise aid and abet in the planning, preparation or execution of the said crimes."  

In its decision the Trial Chamber invited the Prosecutor to consider laying additional charges of genocide against that Karadzic and Mladic, and by determining that they were responsible on the basis of governmental or military-command responsibility, the Trial Chamber also invited the Prosecutor to investigate decision-making responsibility at the same, or higher, echelons.

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2 The Trial Chamber found that "Radovan Karadzic's central role in the political and military preparation of the take-over by the Serbs of Bosnia and Herzegovina is clearly apparent. All of the evidence and testimony tendered by the Prosecutor shows that since July 1990, Radovan Karadzic has been the unchallenged leader of the Bosnian Serbs. His actions and statements demonstrate not only that he was abreast of his subordinate's doings, but also, notably, that he endorsed their behaviour, that he participated from the first moment on in the planning of the policy of 'ethnic cleansing' in Bosnia and Herzegovina and that he himself was in a position to order the Bosnian Serbs' operations which led to the commission of prohibited acts." Id. para. 74.
3 As Chief of Staff of the Bosnian Serb Army, "Ratko Mladic has full control over his generals and .... was often personally involved in the operational decisions of the various corps, going so far as to change commanders' orders and to take tactical decisions in their stead. His power also extended to the political level." The Trial Chamber concluded that "his knowledge of the obligations under international humanitarian law and generally speaking of the prohibited acts committed, as well as the absence of any disciplinary measure to punish the serious violations perpetrated by his subordinates, have been sufficiently proven at this stage of the proceedings." Id., paras. 78 - 79.
4 Id., para. 83.
5 Id., para. 85.
On 13 September 1996 Trial Chamber II unanimously confirmed all counts of the indictment against Ivica Rajic and issued an international warrant for his arrest. The Trial Chamber found that Croatian troops had taken a direct part in the Bosnian conflict and that, in addition, Croatia was a sponsor of the Bosnian Croat troops. Consequently, it confirmed the existence of an international armed conflict between Bosnia-Herzegovina and Croatia at the time the alleged offences were committed. Furthermore, the Trial Chamber found that "the civilian residents of the village of Stupni Do were, for the purposes of grave breaches of Geneva Convention IV, protected persons vis-a-vis the Bosnian Croats because the latter were controlled by Croatia."

Based on the evidence produced by the Prosecutor and the testimony heard, the Trial Chamber was satisfied that:

"...the Prosecutor (had) presented reasonable grounds for believing that, on 23 October 1993, the civilian village of Stupni Do was attacked by HVO forces who were acting with Ivica’s Rajic’s aid and assistance or on his orders. The attack appeared(d) to have been aimed at the civilian population of the village, many of whom were killed during it. The village, which had no military significance, was devastated and the civilian property in it was destroyed."

Finally, on 29 November 1996 Trial Chamber I sentenced Drazen Erdemovic to ten years imprisonment for his part in the massacre of 1,200 Muslims following the fall of the United Nations safe area of Srebrenica in July 1995. Although the Tribunal held that crimes against humanity were inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, and thus were crimes demanding the most severe penalties, the Trial Chamber ruled that...
mitigating circumstances must be taken into account when imposing sentence. Consequently, when considering the sentence the Trial Chamber took into account Erdemovic’s age at the time of the offence, his low military rank, the fact that he surrendered voluntarily to the Tribunal, confessed, pleaded guilty, showed sincere and genuine remorse and was willing to supply evidence with probative value against other individuals.

During the sentencing hearing Erdemovic claimed that when he was ordered to execute the Muslims he immediately refusal. However, he carried out the order as he was threatened with instant death and was told “if you don’t wish to do it, stand in the line with the rest of them and give others your rifle so that they can shoot you.” Nevertheless, as the defence had not produced any testimony, evaluation or any other elements to corroborate what Erdemovic said the Trial Chamber decided that they could not accept the plea of extreme necessity. Similarly the Trial Chamber did not take into account the accused’s mental condition at the time of the commission of the offence as no testimony or evaluation had been presented which established that at the moment of the events Erdemovic was “no longer conscious of his acts” and did not have “any freedom of will.” The defence is appealing this decision.

13 Id., para. 46.
14 Having noted that “mitigation of penalty based on obedience to superior orders alone is expressly enshrined in the Statute in Article 7(4)”, the Trial Chamber accepted from the analysis of the jurisprudence of post-Second World War international and national military tribunals that they “have considered orders from superiors as valid grounds for a reduction of penalty” and “have tended to show more leniency in cases where the accused arguing the defence of superior orders held a low rank in the military or civilian hierarchy.” Id., para. 53.
15 Id., para. 80.
16 Id., para. 91.
17 Id., para. 88.
NEWSPAPERS

The war in the former Yugoslavia and the workings of the Tribunal have been well covered in several British and American daily newspapers, most notably The Times, The New York Times and the International Herald Tribune.

Apart from daily newspapers, a number of weekly and monthly periodicals have provided good detailed coverage of the events that have occurred and are presently occurring in the former Yugoslavia. The Institute for War & Peace Reporting from London publishes a monthly periodical called War Report, provides detailed analysis of events that are currently unfolding in the former Yugoslavia. Six times a year this institute publishes the Tribune, a supplement to the War Report. Several articles relating to war crimes prosecutions, both international and national, have been published in this supplement.

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