'NO JUSTICE, NO PEACE?': A POLITICAL AND LEGAL ANALYSIS OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

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The United Nations Security Council explicitly linked justice and peace when it established the International Criminal Tribunal for the former Yugoslavia (ICTFY). However, the validity of this correlation is not immediately obvious. This study analyses arguments that peace and justice are connected, both in theory and in the specific context of the ICTFY.

Following an introductory section, Part II discusses the background of the ICTFY. Part III outlines the theoretical links between peace and the creation of an international criminal tribunal, and discusses whether the creation of such a tribunal could be legitimate. Part IV analyses whether the ICTFY itself was established legally and whether it has in fact contributed to peace. This paper concludes that with greater international support the ICTFY could aid in the maintenance of peace but without such support it will fail.

Le Conseil de sécurité des Nations Unies a explicitement lié la justice à la paix quand il a constitué le Tribunal pénal international pour l'ex-Yougoslavie (TPIY). Cependant, la validité de cette corrélation n'est pas immédiatement évidente. La présente étude analyse les arguments selon lesquels il y a un lien entre la paix et la justice, aussi bien en théorie que dans le contexte particulier du TPIY.

Après une première partie introductive, la deuxième partie fait l'historique du TPIY. La troisième partie expose les liens théoriques entre la paix et la création d'un tribunal pénal international et discute de la question de savoir si la création d'un tel tribunal peut être légitime. La quatrième partie examine si le TPIY a été légalement constitué et s'il a réellement contribué à la paix. L'article conclut que si le TPIY bénéficiait d'un plus grand appui de la communauté internationale, il pourrait contribuer au maintien de la paix, mais que sans cet appui, il échouera.

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I. INTRODUCTION

In direct recognition and support of the principle of "no justice, no peace," the United Nations Security Council (UNSC) established the International Criminal Tribunal for the Former Yugoslavia (ICTFY)[1] on 25 May 1993, pursuant to Resolution 827 (1993).[2] The UNSC created this Tribunal to address gross violations of international humanitarian law (IHL)[3] committed during the then-ongoing conflicts in the Former Yugoslavia. This action was premised on Chapter VII of the *Charter of the United Nations*,[4] following a determination by the UNSC that the creation of the Tribunal would aid in the restoration and maintenance of international peace and security.[5] However, in theory and in practice the validity of such a determination requires much more than a UNSC resolution, as a strong correlation between justice and international peace is not immediately obvious.

This study analyses a number of questions relating to the argument that a connection can and does exist between peace and justice, both in theory and in the specific context of the ICTFY. Part II sets out the background facts which led to the establishment of the ICTFY, and outlines the specific policy rationales advanced by international actors for this unique undertaking. The issues of concern in Part III are whether there is a necessary link between the creation of a criminal tribunal to address wartime IHL violations and the restoration and maintenance of peace, both in war-torn societies[6] and internationally, and whether the creation of such a tribunal could be a

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[1] This is the official abbreviated title of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 [hereinafter the Tribunal or ICTFY]. See U.N. Press Releases No. IT/13 (30 November 1993) and No. IT/30 (11 February 1994); V. Morris & M.P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis*, vol. 1 (Irvington-on-Hudson, NY: Transnational, 1996) at xvii.

[2] Security Council Resolution 827, U.N. SCOR, U.N. Doc. S/RES/827 (25 May 1993).

[3] These legal principles govern individual and state conduct during times of armed conflict and are designed to provide a measure of protection to both combatants and non-combatants. IHL differs from international human rights law; in general, the former is applicable only in periods of conflict, while the latter applies only during times of peace. See M.C. Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Irvington-on-Hudson, NY: Transnational, 1996) at 487. For a more detailed legal analysis of the specific content of IHL see "Applicable Substantive Law," below.

[4] 26 June 1945, Can. T.S. 1945 No. 7, 59 Stat. 1031, 145 U.K.F.S. 805 [hereinafter *UN Charter*].

[5] This nexus between the creation of the ICTFY under Chapter VII of the *UN Charter, ibid.*, and the maintenance of international peace and security is premised on the terms of Articles 39 and 41. However, the UNSC is endowed with wide discretionary power to make such a link. For a detailed discussion of the legality of the creation of the ICTFY under international law see "Legality of the Creation of the ICTFY," below.

[6] Internal conflicts often pose a threat to international peace and security, either through direct conflict "spillover," or through indirect means such as increased refugee flows or regional destabilisation. Illustrated by an increasing willingness to intervene in primarily domestic matters, recent United Nations (UN) practice indicates a growing organizational acceptance of this fact. The UN has been involved in numerous separate missions to resolve domestic conflict since the end of the Cold War, and such involvement is likely to continue. See *e.g.* D. Carment, "The

legitimate measure under international law. Following a discussion of the practical international support provided to this unprecedented undertaking, Part IV analyses whether the ICTFY itself was implemented legally and whether the imposition of justice in this manner has, in fact, served to aid in the restoration of peace. For the purposes of this study, "justice" refers only to legal (criminal) justice, which is concerned primarily with holding individual actors accountable before a court of law for their actions. Outside of their relationship to law, issues of morality and natural justice are beyond the scope of this definition.

The concept of "peace" requires a more complex interpretation. For the purposes of this paper, peace refers to the cessation of overt military hostilities, widespread violence and IHL violations, and the prevention of their re-emergence at a later date through the peaceful consolidation of post-conflict societies. As such, peace has both immediate and long-term aspects, where "immediate" is used to refer to the period of time prior to, and including, a formal settlement of the specific conflict in question, and "long-term" refers to any time after such a settlement is achieved. The relationship between these two concepts of peace and justice will be outlined separately in the interest of clarity.

In support of the UNSC determination in Resolution 827 (1993), this paper will show that it is clear that a theoretical nexus can and does exist between justice and peace. Strong theoretical arguments support the finding that criminal tribunals, in principle, contribute to the furtherance of national and international peace, especially in a long-term perspective. Reasons underlying this conclusion include aspects of specific and general deterrence, the creation of an historical record of atrocities, the individualizing of guilt for such atrocities and the corresponding decollectivizing of such guilt, the provision of closure for victims and the consolidation, development and furtherance of respect of legal norms both on domestic and international levels. Under international law the creation of such a criminal tribunal would be defensible.

International policy justifications for the creation of the ICTFY reflect these arguments. However, although legally justified, the support for the ICTFY enunciated by the international community has in practice not yet been fully implemented. As a result of lacklustre international support it appears that the current relationship of the Tribunal to the achievement of internal and international peace is tenuous and possibly detrimental.

II. THE CREATION OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

A. *Background Facts of the Yugoslavian Conflicts*

Fundamental to an understanding of the political rationale and legal implications

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Ethnic Dimension in World Politics: Theory, Policy and Early Warning" (1994) 15(4) Third World Q. 551 at 551-52; I. L. Claude Jr., "Peace and Security: Prospective Roles for the Two United Nations" (1996) 2 Global Governance 289 at 289-90; W. J. Durch, "Introduction" *The Evolution of UN Peacekeeping: Case Studies and Comparative Analysis*, W.J. Durch, ed., (New York: St. Martins, 1993) 10; F. L. Kirgis Jr., "The Security Council's First Fifty Years" (1995) 89(3) Am. J. Int'l. L. 506 at 511-18.

of the establishment of the ICTFY is a knowledge of the nature of the conflict(s) which led to this unprecedented international action. However, the task of unravelling these events in all of their complexities is a daunting one.[7] The following outline provides but a brief overview of the most legally and politically relevant occurrences.[8]

Although conflict has been a frequent occurrence in the history of the Balkans, the immediate roots of the recent conflicts in the Former Yugoslavia may be traced to the rise of religious and ethnic nationalism that was unleashed by the death of long-time Communist leader Josef Broz Tito in 1980 and exploited in subsequent years by opportunistic Yugoslavian politicians. Suppressed under Tito's strong centralized leadership, the ethnic and political divisions between and within the eight constituent units of Yugoslavia[9] reemerged following his death and fuelled growing political divisions within the country.

Attempts by Slobodan Milosevic, the leader of Serbia, to centralize Yugoslavia under Serbian political control were countered with proposals favouring significant political decentralization advocated by Franjo Tudjman and Milan Kucan, the leaders of Croatia and Slovenia. Failure to compromise on the internal political structure of Yugoslavia led to increasingly strident and virulent strains of nationalism, often based on past ethnic divisions.[10]

Unable to reach a compromise and fearing Serbian political domination, Croatians and Slovenians expressed overwhelming support for secession in popular referenda. On 25 June 1991, based on this majority support, these two republics declared their independence from Yugoslavia. However, no guarantees of security were given by either republic to the substantial Serbian minorities within their borders. These actions seemingly dashed Serb nationalist hopes for a Serbian-dominated Yugoslavia. In

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[7] For example, in the official records of the UNSC alone there are three thousand five hundred pages documenting the factual and legal circumstances of conflict in the Former Yugoslavia. These records are contained in the *Annexes* of the *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, UN SCOR, U.N. Doc. S/1994/674 (27 May 1994) [hereinafter *Final Report of the Commission of Experts*]. An additional sixty-five thousand pages of documentation were prepared by the International Human Rights Law Institute at DePaul University in Chicago (Bassiouni, *supra* note 3 at xix).

[8] The information provided in this section is drawn from two principal background sources: Bassiouni, *ibid.* and Morris & Scharf, *supra* note 1. Included as Appendix I of Bassiouni's treatise are the *Annex Summaries and Conclusions* of the *Final Report of the Commission of Experts, ibid.* M. Cherif Bassiouni served as the Chairman of the Commissions of Experts for the majority of this entity's operative existence (for a more detailed discussion of the Commission of Experts see "The Tribunal's Impact on Peace," below). Virginia Morris is a member of the United Nations Office of Legal Affairs, while Michael Scharf was Attorney-Advisor for United Nations Affairs at the United States State Department from 1989 to 1993.

[9] Prior to its dissolution the Socialist Federal Republic of Yugoslavia (SFRY) consisted of six republics (Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia) and two autonomous provinces within the territory of the Republic of Serbia (Kosovo and Vojvodina). The (rump) SFRY was reconstituted as the Federal Republic of Yugoslavia (FRY) on 27 April 1992. In the interest of clarity, the term Yugoslavia is used throughout to denote the official state, SFRY or FRY, in existence at the time to which this paper refers in each individual case.

[10] However, it should be noted that, as Donald Horowitz argues, "history can be a weapon, and tradition can fuel ethnic conflict, but a current conflict cannot generally be explained by simply calling it a revived form of an earlier conflict." Bassiouni, *supra* note 3 at 25.

addition, for Serbs in these two republics and within Serbia, these actions also raised the spectre of potential abuses founded upon the historical legacy of the World War II massacre of hundreds of thousands of Serbs by the Ustasha government of the Independent State of Croatia.

Led by Milosevic, the Serbian government immediately responded to these declarations of independence by utilizing the Serb-dominated Yugoslav National Army (JNA) against the two breakaway republics. Brokered by the European Community (EC)[11] a cease-fire was quickly reached in Slovenia on 7 July 1991 after the JNA failed to win an immediate victory. However, fighting continued for months in Croatia. Here the JNA and Croatian-based Serbian paramilitary groups[12] pursued a strategy of linking isolated pockets of Serbs through the expulsion — or in some cases extermination — of the intervening Croat population.[13] Deliberate military attacks on civilians and cultural monuments also occurred, especially in the cities of Dubrovnik and Vukovar. During this conflict thousands of civilians were killed and hundreds of thousands were rendered homeless or refugees through actions undertaken by all parties to the conflict. A settlement to the fighting in Croatia was finally reached on 3 January 1992. This agreement allowed for the February creation and subsequent deployment of the United Nations Protection Force (UNPROFOR) [14] to monitor the disarmament of paramilitary groups and the withdrawal of the JNA from Croatian territory. Widespread official international recognition of Croatia and Slovenia occurred in early 1992.

This dangerous secessionist scenario would be replayed in Bosnia-Herzegovina (Bosnia). In late February and early March 1992 the Muslim and Croatian populations of this multi-ethnic republic voted to secede from the now increasingly Serb-dominated rump Yugoslavia. The majority of the substantial Serbian minority within Bosnia refrained from participation in these popular referenda and expressed vocal opposition to secession.[15] This opposition quickly grew more violent, with Serbia and the JNA providing increasing support and arms for paramilitary Bosnian Serb organizations.

Bosnian independence was nonetheless officially recognized by the EC on 6 April 1992 and by the United States (US) the following day. Led by Radovan Karadzic,

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[11] This entity became the European Union (EU) on 1 January 1993.

[12] With covert Serbian support some of these paramilitary organizations had been in operation in Croatia since as early as August 1990.

[13] Similar policies gained international notoriety during the later conflict in Bosnia under the euphemistic name "ethnic cleansing". The definition of this term adopted in the *Final Report of the Commission of Experts* states:

> "ethnic cleansing" is a purposeful policy designed by one ethnic or religious group to remove by violent or terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas.

Final Report of the Commission of Experts, supra note 7 at ¶ 130. Bassiouni observes that Serb forces relied upon these policies as a result of their weakness and lack of organization. Paradoxically, he argues that a strong military force could have expelled large populations without resorting to significant bloodshed and the use of terror tactics: Bassiouni, *supra* note 3 at 50.

[14] This international entity was established by the UNSC through Security Council Resolution 743, UN SCOR, U.N. Doc. S/RES/743 (21 February 1992).

[15] Concentrated in numerous pockets, often along or near the western border of Serbia, this ethnic group constituted over 30% of the entire population of Bosnia.

Bosnian Serbs declared their own independence from Bosnia, also on 7 April 1992. The newly adopted *Constitution* of the Serbian Republic of Bosnia and Herzegovina (*Republika Srpska* [Srpska])[16] supported the reunification of Srpska with the Serbian-dominated rump Yugoslavia.

In support of this policy, overt JNA involvement in Bosnia increased dramatically.[17] Wide-scale fighting erupted throughout Bosnia, with JNA and Bosnian-Serb forces quickly seizing two-thirds of the territory of the newly recognized state. These forces were opposed by Bosnian Muslims and Bosnian Croats. Towards the achievement of Croatian and Bosnian-Croatian ends, regular Croatian troops were also involved in the conflict in Bosnia, at times supporting the Bosnian Muslims and at times in opposition to both Serbs and Muslims. Involvement of regular army units from Croatia and Serbia was not continuous.[18] However, with or without regular army involvement, during the ensuing years over eighty different paramilitary organizations continued to represent all sides to the conflict.

The fighting in these conflicts, especially in Bosnia, resulted in atrocities perpetrated on civilians on a scale not witnessed in Europe since the end of World War II. These abuses have been extensively documented by the international community. Reports detailing the extensive internment of civilians in hundreds of concentration camps throughout Bosnia focussed world attention on these atrocities. Further investigation has established the widespread use of rape as a weapon of war, with reported victims including tens of thousands of women and young girls. The destruction of entire towns and thousands of cultural monuments has also been documented, as has the deliberate prevention of deliveries of international humanitarian aid to civilians. The region also witnessed the frequent violation of internationally recognized civilian "safe areas," including the widely publicized massacre of thousands of civilians in Srebrenica after the collapse of UN protection in the region. Perhaps most heinous of all, the pursuit of policies of "ethnic cleansing" led to extensive and unimaginable acts of religiously and ethnically motivated genocide involving the murder of tens of thousands of civilians. In short, the conflicts in the Former Yugoslavia were brutal. Although reports indicate that most abuses occurred at the hands of ethnic Serbs, this international documentation also shows clearly that *all* parties to the conflicts participated in the commission of atrocities.

Numerous international efforts to end the war proved futile, as did most international efforts to prevent attacks on civilians. After more than four years of unspeakable brutality, the conflicts in the Former Yugoslavia officially came to an end only through the adoption of a US-brokered negotiated settlement to the Bosnian

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[16] The Srpska *Constitution* was officially adopted on 27 March 1992.

[17] Reports indicate that as early as mid-August 1991 the JNA pursued a policy supporting the annexation of Bosnian-Serb held territories to the rump Yugoslavia. Significant JNA involvement in unrest in Bosnia, and its support of Bosnian-Serbs under Karadzic, began as early as 1990.

[18] For example, the JNA officially withdrew from Bosnia in May 1992 in an unsuccessful effort to avoid the application of international sanctions to Serbia for its continuing involvement in the Bosnian conflict. However, high numbers of JNA soldiers were decommissioned, allowing their involvement with Bosnian-Serb paramilitary organizations. In addition, the majority of JNA military equipment was left to the use of Bosnian-Serb forces. Later direct JNA involvement in incidents in Bosnia has also been documented.

conflict at Wright-Patterson Air Force Base in Dayton, Ohio on 21 November 1995.[19] The *Dayton Accords* formally recognized the internal boundaries of Srpska within a multi-ethnic and independent Bosnia.

B. *International Policy Support for the ICTFY*

International policy-makers involved in the creation of the ICTFY acknowledged and acted upon a theoretical link between peace and justice in response to the reports concerning massive IHL violations in the Former Yugoslavia. This theoretical link was used by the UNSC as the official justification for the Tribunal's creation, and the stated policy reasons for the formation of the ICTFY support the creation of this international criminal tribunal to address wartime violations of IHL as a means to consolidate peace.

The UNSC created the ICTFY through its unanimous adoption of Resolution 827(1993) which signalled its acceptance, without change, of the proposed *Statute of the International Tribunal*[20] [hereinafter *ICTFY Statute*] previously submitted by the Secretary-General of the United Nations (UNSG).[21] This Resolution made explicit the link between the creation of the Tribunal and the consolidation of peace with a clear statement of the UNSC conviction:

> that in the particular circumstances of the former Yugoslavia the establishment as an ad hoc measure by the Council [UNSC] of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the restoration and maintenance of peace.[22]

In fact, as suggested by Resolution 827 (1993), premised on Article 29 of the *UN Charter*, the Tribunal was created as a subsidiary organ of the UNSC. The UNSC is the United Nations (UN) organ empowered with the primary responsibility of maintaining international peace and security under Article 24(1). The underlying goal of the ICTFY, therefore, is not the prosecution of individuals accused of IHL violations within the Former Yugoslavia *per se*. Rather the ultimate function of the Tribunal must be to undertake such prosecutions in order to further international peace and security.

The creation of the ICTFY by the UNSC through Resolution 827 (1993) marked the final step of a process of increasingly vehement UNSC resolutions warning alleged IHL violators in the Former Yugoslavia to refrain from these actions or face serious

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[19] The peace agreement is contained in the *General Framework Agreement for Peace in Bosnia and Herzegovina* [hereinafter *General Framework Agreement*] and its 12 *Annexes* (1-A, 1-B, and 2 through 11) 14 December 1995, (Oct.-Nov.) Int'l Peacekeeping 140-67 (1995) [hereinafter, collectively, the *Dayton Accords*]. This settlement was subsequently signed in Paris, France, on 14 December 1995.

[20] *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN SCOR, 48th Year, Supp. No. 2, U.N. Doc. S/25704 (3 May 1993) [hereinafter *Report of the Secretary-General*], reprinted in Morris & Scharf, *supra* note 1, vol. 2 at 3.

[21] The drafting of the *ICTFY Statute* and the ultimate creation of the ICTFY through Resolution 827 (1993), *supra* note 2, followed a UNSC decision in Resolution 808 that "an international tribunal shall be established" for the Former Yugoslavia. Security Council Resolution 808 (1993), 22 February 1993, U.N. SCOR, U.N. Doc. S/Res/808 (1993) at para. 1.

[22] Resolution 827, *ibid.*, Preamble.

individual consequences.[23] This incremental process began in late 1991 with general UNSC condemnation of IHL abuses in the Former Yugoslavia. By mid-1992, the UNSC required all UN Member States to report such violations with the passage of Resolution 771 (1992). Shortly thereafter, Resolution 780 (1992) created an impartial Commission of Experts to investigate these abuses in a more comprehensive manner.

Although the first formal calls for the creation of an international criminal tribunal to prosecute IHL violations in the Former Yugoslavia were heard as early as 1992, they did not issue from the UNSC. Among other organizations, calls for such a tribunal at this time were forwarded by groups such as Human Rights Watch, the Conference on Security and Cooperation in Europe, and organized groups of French and Italian jurists that made specific legal and procedural recommendations for the creation of an international criminal tribunal.[24] It was only in late February 1993 that UNSC Resolution 808 (1993) called for the creation of an international tribunal to prosecute individuals accused of gross IHL violations. The ICTFY was subsequently officially established in late May 1993 pursuant to Resolution 827 (1993).

Over the period of time up to and including the adoption of UNSC Resolution 827 (1993) it became clear that most of the policy-makers who would ultimately create the ICTFY accepted, implicitly or explicitly, the linkage between peace and justice. Representatives of some UNSC Member States, including the US and Pakistan, and many UN General Assembly (UNGA) Member States, including Canada, the Netherlands, New Zealand and Norway, were vocal in their support of the creation of an international criminal tribunal. While obviously not in general agreement over such action, some other UNSC representatives, notably those from China and Brazil, at least did not engage in open opposition.[25]

In general, the benefits of international over national prosecution efforts appear to have been assumed by the members of the UNSC in light of the on-going conflict in the Former Yugoslavia. Virtually no mention of this subject was made by international policy-makers in justification of the creation of the ICTFY. However, policy statements advanced by those individuals responsible for the creation of the ICTFY supported the establishment of such a criminal tribunal for the prosecution of individuals responsible for IHL violations as a means to achieve and consolidate peace in the Former

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[23] See *e.g.* Security Council Resolution 764 (1992), U.N. Doc. S/Res/764 (13 July 1992); Security Council Resolution 771 (1992), U.N. Doc. S/Res/771 (13 August 1992); Security Council Resolution 780 (1992), U.N. Doc. S/Res/780 (6 October 1992); Security Council Resolution 787 (1992), U.N. Doc. S/Res/787 (16 November 1992); and Security Council Resolution 808 (1993).

[24] Bassiouni, *supra* note 3 at 36-37; P. Burns, "An International Criminal Tribunal: The Difficult Union of Principle and Politics" (1996) 5(2-3) Crim. L. F. 341 at 355-56; L. L. Schmandt, "Peace With Justice: Is It Possible for the Former Yugoslavia?" (1995) 30 Texas Int'l. L. J. 335 at 343.

[25] P. Akhavan, "The Yugoslav Tribunal at a Crossroads: The Dayton Peace Agreement and Beyond" (1996) 18 Hum. Rts. Q. 259 at 263 [hereinafter "Yugoslav Tribunal"]; D. P. Forsythe, "Politics and the International Tribunal for the Former Yugoslavia" (1994) 5(2-3) Crim. L. F. 401 at 411.

Yugoslavia.[26]

1. *Immediate Effects as Policy Justifications*

Significant attention was paid by international policy-makers to the immediate implications of the pursuit of justice for the Former Yugoslavia. Clear public statements indicate that members of the UNSC, in theory, viewed justice as a non-negotiable aspect of peace negotiations. In fact, the UNSC representative from the US, Madeleine Albright, explicitly rejected the use of justice as a "bargaining chip". One of the primary proponents of the ICTFY, Albright stated bluntly that "the Clinton Administration will not recognize ... any deal or effort to grant immunity to those accused of war crimes."[27] This conforms with the position of the UNSG that the ICTFY will "perform its functions independently of political consideration."[28]

By 1994 the official American position stated firmly that "the United States will never allow amnesty ... even as the price for a Balkan peace settlement."[29] US President Bill Clinton would later clarify the rationale behind this policy in a public statement:

> Some people are concerned that pursuing peace in Bosnia and prosecuting war criminals are incompatible goals. But I believe they are wrong. There must be peace for justice to prevail, but there must be justice when peace prevails.[30]

Most UNSC members agreed. The representative of the Russian Federation even argued that the establishment of such a tribunal would serve to *accelerate* the peace negotiation process.[31]

International policy-makers also viewed specific deterrence[32] as a possible result of the implementation of a war crimes tribunal for the Former Yugoslavia.[33] As observed by then-UN Legal Counsel and Under-Secretary-General for Legal Affairs,

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[26] See *e.g.* the statement from the Hungarian UNSC member following the adoption of resolution 827 (1993), concluding that without criminal prosecution of IHL violators, "it is impossible to envisage a lasting settlement of the conflict in the former Yugoslavia." *Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting, Held at Headquarters, New York, on Tuesday, 25 May 1993, at 9 p.m.*, UN SCOR, 47th Year, 3217th Mtg., UN Doc. S/PV.3217 (1993)[provisional], reprinted in Morris & Scharf, *supra* note 1, vol. 2 at 192 [hereinafter *Record of the Three Thousand Two Hundred and Seventeenth Meeting*].

[27] Schmandt, *supra* note 24 at 358 fn. 207.

[28] *Report of the Secretary-General*, *supra* note 20 at para. 28.

[29] M. P. Scharf, "Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?" (1996) 31(1) Texas Int'l. L. J. 1 at 11-12 [hereinafter "Swapping Amnesty"].

[30] P. H. Baker, "Conflict Resolution Versus Democratic Governance: Divergent Paths to Peace?" in C. Crocker and F.O. Hampson, eds., *Managing Global Chaos: Sources of and Responses to International Conflict* (Washington, DC: United States Institute of Peace, 1996) 563 at 566.

[31] "Yugoslav Tribunal," *supra* note 25 at 263-64.

[32] Specific deterrence refers to the immediate and future restraint of current IHL violators, while general deterrence refers to the limitation of immediate and future IHL violations by any other individual or group.

[33] Burns, *supra* note 24 at 358-59, 374; T. Meron, "Answering for War Crimes: Lessons from the Balkans" (1997) 76(1) Foreign Aff. 2 at 3 [hereinafter "Answering"].

Carl-August Fleischhauer, the main goal of the Tribunal was:

> to bring the rule of law to bear upon the perpetrators of the atrocities in the territory of the former Yugoslavia and, hopefully, to bring an end to this long nightmare of human suffering and tragedy.[34]

The UNSC also argued within resolution 827 (1993) itself that the Tribunal would "contribute to ensuring that such [IHL] violations are halted and effectively redressed."[35]

Through the adoption of resolution 827 (1993) the UNSC also formally embraced the link between the formation of the ICTFY and international peace and security. In general, the views expressed within the UNSC related more to "righteous indignation" than to the "maintenance of international peace and security."[36] However, the UNSC representative from the Russian Federation did remark that the formation of the ICTFY by the UNSC under Chapter VII of the *UN Charter* would "serve as a serious warning to those guilty of mass crimes and flagrant violations of human rights in other parts of the world."[37]

2. Long-Term Effects as Policy Justifications

(a) *Long-Term Internal Effects*

The UNSC often stressed the positive long-term effects for Yugoslavia of linking justice and peace as a justification for the creation of the ICTFY. In relation to its foreseen long-term internal impact, UNSC arguments in favour of the creation of a criminal tribunal included deterrence, the creation of an historical record, the individualization and decollectivization of guilt, the provision of closure for victims, and the furtherance of respect for legal and democratic norms within the Former Yugoslavia.[38]

The UNSC recognized that the formation of a tribunal could serve to reduce future IHL violations within the Former Yugoslavia. In fact, the UNSC viewed deterrence as

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[34] Burns, *ibid.* at 374 fn. 137.

[35] Preamble, Resolution 827(1993), *supra* note 21.

[36] "Yugoslav Tribunal," *supra* note 25 at 262.

[37] *Ibid.* at 264. Observers may wonder about the sincerity of this statement. However, given the almost concurrent involvement of the Russian Federation in a brutal conflict in Chechnya which involved widespread IHL violations, coupled with the relatively recent involvements of other UNSC Member States in conflicts which did not result in individual criminal tribunals, issues of potential hypocrisy concerning the creation of the ICTFY are extremely important.

The potential of UNSC hypocrisy also raises concerns regarding the possibility of the effective future application of IHL norms to conflicts involving UNSC Member States. This issue has been of major concern to non-UNSC proponents of a permanent International Criminal Court (ICC). See *e.g.* F. Benedetti, "Summer PrepCom Discusses Role of the Security Council, Powers of the Prosecutor" (1997) 6 (Nov.) The International Criminal Court Monitor: The Newsletter of the NGO Coalition for an International Criminal Court 1.

[38] "Yugoslav Tribunal," *supra* note 25 at 263-64, 281; M.K. Albright, "Enforcing International Law" American Society of International Law: Proceedings of the 89th Annual Meeting: Structures of World Order: April 5-8, 1995, New York, NY, 574 at 579.

a significant and important consequence of pursuing justice in this manner.[39]

Further, the creation of an historical record of abuses and the corresponding punishment in an international criminal forum of individuals responsible for these violations was also foreseen by the UNSC to be a major factor in the future strengthening of long-term internal post-conflict peace. Albright argued strongly that:

> Truth is the cornerstone of the rule of law, and it will point towards individuals, not peoples, as perpetrators of war crimes. And it is only the truth that can cleanse the ethnic and religious hatreds and begin the healing process.[40]

Albright would also remark later that:

> Establishing the truth about what happened in Croatia, [and] Bosnia ... is essential not only to justice, but to peace ... True reconciliation will not be possible in those societies until the perception of collective guilt is expunged and personal responsibility is assigned.[41]

Although not directly responsible for the adoption of the *ICTFY Statute*, the UN representative from the Czech Republic additionally asserted that the provision of closure for victims, and thus the potential prevention of revenge attempts and renewed violence, would be an important future benefit of the establishment of the Tribunal. The Czech representative recognized that such international action was:

> necessary not only for justice to be done, but also to prevent the emergence in Bosnia and Herzegovina of a culture of impunity ... which leaves victims and their children with a feeling that if any justice is to be done they will have to seek it themselves, thus sowing the wind which will possibly yield another whirlwind of war.[42]

Underlying this argument, as well as those addressed by Albright, is the furtherance of respect for legal norms and the rule of law in the Former Yugoslavia through the creation of this international criminal tribunal.

Policy-makers made little direct mention of the potential benefits of international prosecution as compared with the national pursuit of criminal justice. It appears, however, that the UNSC accepted the benefits of international justice without question. This is illustrated by the fact that the *ICTFY Statute* provides for the primacy of the ICTFY over national courts, if necessary,[43] and also allows for the retrial of an accused previously acquitted at the national level if these internal proceedings "were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted."[44] These likely would not be policy concerns if the UNSC had decided that the benefits of national prosecution in all cases outweighed the possible negative ramifications of such action.

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39 "Yugoslav Tribunal," *ibid.* at 263.
40 *Ibid.* at 264.
41 Albright, *supra* note 38.
42 "Yugoslav Tribunal," *supra* note 25 at 281.
43 *ICTFY Statute, supra* note 20, Article 9(2).
44 *Ibid.* Article 10(2)(b).

(b) *Long-Term International Effects*

In discussions of potential long-term international ramifications of the pursuit of justice for the Former Yugoslavia, UNSC policy-makers most often raised arguments relating specifically to the furtherance of international legal norms. For example, the Venezuelan representative to the UNSC argued that the:

> evolution of international society reveals the need to create a corrective and punitive forum, particularly in the case of crimes affecting the very essence of the civilized conscience.[45]

Albright echoed and affirmed this viewpoint, arguing that "[t]he tribunal must succeed, for the sake of the victims and for the credibility of international law in this new era".[46]

III. POLITICAL AND LEGAL THEORY OF INTERNATIONAL CRIMINAL TRIBUNALS

A. *Political Theory*

The UNSC justified the creation of the ICTFY with explicit reference to the foreseen positive effect of the Tribunal on the consolidation of peace. In support of this assertion, many legal scholars and political scientists do argue that the creation of a criminal tribunal will serve to consolidate peace. However, this conclusion is not immediately obvious and is by no means universal. This chapter will outline the arguments advanced by theorists concerning the correlation between justice and peace.[47] It will address immediate and long-term academic arguments for and against the creation of an international criminal tribunal. Also analyzed are theoretical arguments establishing the benefits of international versus national prosecution.

Historical examples of the international prosecution of individuals for IHL violations are rare, although there is a growing consensus that sweeping post-conflict amnesties are impermissible, at least for individuals accused of gross IHL violations.[48] However, such amnesties, whether *de jure* or *de facto*, are a widespread phenomenon and have recently occurred following internal conflicts in Cambodia, El Salvador, and

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[45] "Yugoslav Tribunal," *supra* note 25 at 263.

[46] Schmandt, *supra* note 24 at 355.

[47] Although most writings on this subject are related to the formation of the ICTFY, or were written after its creation, the authors in question here were generally not in a position to directly develop or influence policy. As such, these arguments are analyzed separately from the specific justifications for the creation of the ICTFY advanced by international political actors.

[48] N.J. Kritz, "The Rule of Law in the Postconflict Phase: Building a Stable Peace" in C. Crocker and F.O. Hampson, eds., *Managing Global Chaos: Sources of and Responses to International Conflict* (Washington, DC: United States Institute of Peace, 1996) 587 at 595.

Guatemala.[49] In fact, most civil wars result in amnesties.[50] This has historically also been true for international conflict, with the exception of post-World War II International Military Tribunals at Nuremberg (IMT) and Tokyo (IMTFE[51]), themselves not without serious limitations as precedents.[52] As the perceived cost of maintaining post-conflict peace following World War I, criminal trials under the auspices of the Allied forces were abandoned in the case of Germany or were not implemented in the case of Turkey.[53] More recently, criminal trials were not pursued in regard to alleged IHL violations during the Persian Gulf War.[54]

National trials of individuals alleged to have committed wartime abuses are not unknown.[55] However, the ICTFY represents the first attempt by the international community to create an international judicial institution empowered to hold individuals representing all sides in an armed conflict responsible for their wartime actions before the same court and under the same laws.

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[49] P. B. Hayner, "Fifteen Truth Commissions – 1974 to 1994: A Comparative Study" (1994) 16 Hum. Rts. Q. 597 at 604; "Swapping Amnesty" *supra* note 29 at 36-37.

[50] R. Wedgwood, "War Crimes in the Former Yugoslavia: Comments on the International War Crimes Tribunal" (1994) 34 Va. J. Int'l. L. 267 at 275.

[51] International Military Tribunal for the Far East.

[52] Neither the IMT nor the IMTFE made any pretense of holding Allied forces accountable for alleged IHL violations during the World War II. A number of substantial legal concerns also exist, especially in relation to the IMTFE. For example, in his dissenting judgment the French IMTFE Judge argued that "so many principles of justice were violated during the trial that the Court's judgment certainly would be nullified on legal grounds in most civilized countries." See Morris & Scharf, *supra* note 1, vol. 1 at 8 fn. 42.

[53] K.A. Hochkammer, "The Yugoslav War Crimes Tribunal: The Compatibility of Peace, Politics and International Law" (1995) 28 Vand. J. Transnat'l. L. 119 at 131; Scharf, *supra* note 29 at 10. This Allied perception was ill-founded. As "Long-term Effects of Criminal Tribunals," below, will illustrate, the abandonment of criminal trials may well have a detrimental effect on the long-term consolidation of internal and international post-conflict peace.

[54] Coupled with a perceived risk to their prisoners-of-war, it appears that the victorious UN Coalition states did not press the option of post-war criminal trials for fear of their own nationals being publicly held to account for alleged war crimes. D.A. Martin, "Reluctance to Prosecute War Crimes: Of Causes and Cures" (1994) 34 Va. J. Int'l. L. 255 at 259.

[55] Examples include *United States* v. *Calley*, 46 C.M.R. 1131 (A.C.M.R.), *aff'd*, 22 C.M.A. 534, 48 C.M.R. 19 (1973), petition for writ of habeas granted *sub nom. Calley* v. *Calloway*, 382 F.Supp. 650 (M.D. Ga. 1974), rev'd, 519 F. 2d 184 (5th Cir. 1975), cert. denied, 425 U.S. 911 (1976) [hereinafter *Calley*], re: crimes committed during American involvement in Vietnam ; and *Pius Nwaoga* v. *The State*, 52 I.L.M. 494 (1972), re: crimes committed during Nigerian involvement in Biafra.

However, these and most other national cases relating to alleged wartime criminal activity relied not directly on IHL but rather on national criminal or military law. C. Greenwood, "International Humanitarian Law and the Tadic Case" (1996) 7 Eur. J. Int'l. L. 265 at 278; G.R. Watson, "The Humanitarian Law of the Yugoslavia War Crimes Tribunal: Jurisdiction in *Prosecutor* v. *Tadic*" (1996) 36 Va. J. Int'l L. 687 at 716 fn. 194.

1. Immediate Effects of Criminal Tribunals

Two theoretical arguments are most often raised regarding the immediate effects of the pursuit of justice on the accomplishment and consolidation of peace. These arguments generally relate to immediate deterrence, both specific and general, and to the potential impact of concurrently threatening or enacting justice policies on negotiations to end the conflict in question.

Although deterrence is difficult to measure, a strong argument may be put forward that wartime justice, or threats of post-conflict punishment, have not historically yielded measurable reductions in IHL violations. However, this situation has often resulted from a lack of credible, sustained and resolute action to enforce punishment for IHL violations.[56] As a result, a number of theorists believe that deterrence could be effective if coupled with the existence of a high probability of actual enforcement of threats of prosecution.[57] Conversely, theorists also recognize that the withdrawal of threats of prosecution, once initiated, may have an adverse impact on peace by increasing the combatants' impunity.[58]

Although deterrence is viewed by some theorists as an important immediate consideration, the potential impact on peace negotiations of implementing or threatening justice policies dominates this theoretical discussion. In fact, the impact of justice policies on peace negotiations is a highly contentious subject, leading some theorists to argue strongly that justice policies are detrimental to peace and therefore should be avoided.[59] Other scholars argue as vehemently that regardless of their immediate impact, justice policies are absolutely essential to the long-term consolidation of peace.[60]

This debate revolves around competing claims advanced by groups classified by P.H. Baker as "conflict managers" and "democratisers". Although both share the common goal of peace, they propose markedly different strategies to achieve this end. The paramount goal of conflict managers is a workable, negotiated resolution of the immediate conflict. All other factors, including justice, are viewed as important only if they do not inhibit the negotiation process and prolong the conflict. In comparison, democratisers view justice as an intrinsic and non-negotiable aspect of any negotiated settlement; in the interest of consolidating long-term peace and preventing a renewal of future conflict by strengthening respect for international law, especially that law relating

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[56] Schmandt, *supra* note 24 at 352-53.

[57] See *e.g.* Hochkammer, *supra* note 53 at 124; Schmandt, *ibid.* at 336; C. Thornberry, "Saving the War Crimes Tribunal" (1996) 104 (Fall) Foreign Pol'y. 72 at 81. However, there also are strong arguments that the benefit of immediate specific deterrence could be outweighed by the impact of justice policies on achieving a negotiated solution to the conflict. See *e.g.* Schmandt *ibid.* This concern will be addressed in more detail below.

[58] T. Meron, "The Case for War Crimes Trials in Yugoslavia" (1993) 72(3) Foreign Aff. 122 at 133 [hereinafter "The Case"].

[59] See *e.g.* Burns, *supra* note 24; Forsythe, *supra* note 25; T. D. Mak, "The Case against an International War Crimes Tribunal for the Former Yugoslavia" (1995) 2(4) Int'l. Peacekeeping 536; Wedgwood, *supra* note 50.

[60] See *e.g.* Baker, *supra* note 30 at 569; Kritz, *supra* note 48 at 595; "Swapping Amnesty," *supra* note 29 at 13; Schmandt, *supra* note 24 at 368. The long-term benefits of justice policies on peace, as presented by these theorists, are discussed in greater detail in "Long-term Effects of Criminal Tribunals," below.

to the protection of human rights.[61] As Baker acknowledges, these viewpoints are rarely voiced in pure form.[62] However, these competing philosophies serve to colour the debate regarding the validity of a link between justice and peace and, furthermore, they provide an outline of the inherent theoretical difficulties of threatening or pursuing justice *and* negotiating a peaceful resolution to armed conflict.

Morris Abrams, a former US Ambassador to the UN Commission on Human Rights, summarized succinctly the dilemma presented by these two positions in a 1993 comment on the Former Yugoslavia:

> It is a very tough call whether to point the finger or try to negotiate with people. As a lawyer, of course, I would like to prosecute everybody who is guilty of these heinous things [violations of IHL]. As a diplomat or as a politician or as a statesman, I also would like to stop the slaughter, bring it to a halt. You have two things that are in real conflict here ... I don't know the proper mix.[63]

Recent, post-Cold War conflict resolution has favoured negotiation over 'finger-pointing,' conflict managing over democratizing.[64] Evidence from previous conflicts, such as the civil war in El Salvador, supports the viewpoint that justice must be tempered by "realities of negotiation" at least in a short-term analysis.[65]

What then are the theoretical implications of the pursuit of justice on peace negotiations? In the post-Cold War era, Baker observes that:

> peace is no longer acceptable on any terms; it is intimately linked with the notion of justice. Conflict resolution is not measured simply by the absence of bloodshed; it is assessed by the moral quality of the outcome. And while pragmatism and flexibility continue to be admired, they are not seen as virtues in their own right, but as skills whose value is determined by the ends to which they are applied.[66]

In contrast, many authors, clearly favouring more direct conflict management, argue that criminal justice should not be pursued at all in such situations. They argue that justice should be used as a "bargaining chip" the abandonment of which could serve to facilitate acceptance of a negotiated settlement by the parties to the conflict.[67] These authors argue that, as a bargaining chip, justice could serve as an incentive to end the conflict by allowing parties to make concessions in return for amnesty. It may also serve to further agreement through a form of specific deterrence by adding to the potential cost of continued fighting; persisting conflict coupled with military defeat

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[61] Baker, *supra* note 30 at 563-71.

[62] *Ibid.* at 568.

[63] "Swapping Amnesty," *supra* note 29 at 3.

[64] Baker, *supra* note 30 at 569.

[65] F.O. Hampson, "Why Orphaned Peace Settlements Are More Prone to Failure" in C. Crocker and F.O. Hampson, eds., *Managing Global Chaos: Sources of and Responses to International Conflict* (Washington, DC: United States Institute of Peace, 1996) 533 at 546. However, Hampson also observes that peace and justice may well be interrelated goals in the long-term.

[66] Baker, *supra* note 30 at 566.

[67] See *e.g.* Burns, *supra* note 24 at 375; Forsythe, *supra* note 25 at 415; Mak, *supra* note 59 at 536, 555; Wedgwood, *supra* note 50 at 274.

could result in prosecution, while immediate agreement would result in amnesty.[68]

However, either case, uncompromising justice, or the rejection of the use of justice as a bargaining chip, could lead to the continuation of the conflict if the belligerents feel that military victory is the only way to avoid prosecution.[69] Furthermore, some authors contend that the use of justice as a bargaining chip would render IHL norms meaningless and could therefore serve to create an atmosphere of impunity on national and international levels.[70]

While the threat or enactment of justice policies may have a direct deterrent effect on the commission of IHL violations, the pursuit of such policies could prove detrimental to the immediate achievement of a negotiated conflict settlement.[71] As illustrated above, the overall immediate impact of the pursuit of justice policies on the consolidation of peace is at best unclear and at worst harmful. However, this viewpoint must be tempered with an analysis of the likely beneficial long-term ramifications of the implementation of such justice policies.

2. Long-term Effects of Criminal Tribunals

For clarity, the following theoretical analysis is divided between the long-term internal effects of justice on peace in the specific post-conflict region and the long-term effects of justice on international peace in general. This examination will show that although it is theoretically more expedient, forsaking justice in return for immediate peace may have profound negative consequences on the peaceful development of post-conflict society.[72] Without a *just* long-term settlement, the immediate end to a conflict may well be bought with the lives of future generations.

(a) *Long-Term Internal Effects*

In general, the theoretical long-term implications of justice on the consolidation of peace are viewed as less contentious than the immediate ramifications. Most, though certainly not all scholars who address the issue, agree that justice and peace are, and

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[68] Hochkammer, *supra* note 53 at 147-48. D'Amato argues that concessions for amnesty may also require surrender of conquered territory, increasing the costs of war and creating a possible deterrent effect on the initiation of war if such a future settlement is foreseen by potential combatants. Hochkammer, *ibid.* at 124 fn. 27.

[69] Mak, *supra* note 59 at 555-56.

[70] See *e.g.* P. Akhavan, "Enforcement of the Genocide Convention: A Challenge to Civilization" (1995) 8 Harv. Hum. Rts. J. 229 at 251 [hereinafter "Enforcement"]; Hochkammer, *supra* note 53 at 122.

[71] See *e.g.* Burns, *supra* note 24; Forsythe, *supra* note 25; Mak, *supra* note 59; Wedgwood, *supra* note 50.

[72] These consequences would result from the failure to reap the benefits of justice policies. Proposed long-term benefits of the pursuit of justice policies include deterrence, the creation of an historical record, the individualizing and decollectivizing of guilt, the provision of closure for victims and the furtherance of respect for legal and democratic norms. These specific benefits are discussed in more detail below.

should be, intrinsically linked in post-conflict reconstruction.[73]

It is clear that for a negotiated peace settlement to have any real meaning it requires a corresponding long-term internal development and solidification of peace. Renewed conflict is obviously counterproductive.

As over 90 percent of all conflicts are now internal civil wars rather than international confrontations; a workable process of internal accommodation and reconciliation is, now more than ever, absolutely crucial.[74] Justice may play an important role in such a consolidation process.[75]

Theorists view a wide variety of factors as relevant regarding the possible internal impact of justice on peace in a long-term perspective. Discussion over these issues centres on concerns relating to future general deterrence, the creation of an historical record of atrocities committed in the preceding conflict, the individualization of guilt for these atrocities and the corresponding decollectivizing of this guilt, the provision of closure for victims and the furtherance and solidification of respect for legal and democratic norms.

The general deterrence argument relates to previous threats of prosecution and/or actual prosecutions preventing renewed IHL abuses. Prosecution of leaders responsible for such violations could significantly increase this deterrent effect both by removing these leaders from power and delegitimizing their actions and the policies which led to IHL violations.

Although deterrence is difficult to measure, the potential negative effects of inaction appear clear. For example, human rights reports from Chile and El Salvador indicate that abuses actually increased following *de facto* post-conflict amnesties in these nations.[76] In fact, the 1990 Report of the UN Working Group on Enforced or Involuntary Disappearances concludes that:

> Perhaps the single most important factor contributing to the phenomenon of disappearances may be that of impunity. The Working Group's experience over the past ten years has confirmed the age-old adage that impunity breeds contempt for the law. Perpetrators of human rights violations, whether civilian or military, will become all the more brazen when they are not held to account before a court of law.[77]

As a result, theorists foresee the future deterrence of the commission of war crimes and other IHL violations as a result of the application of post-war justice.[78]

The creation of an historical record of past abuses is also viewed as an important step in consolidating peace. Such a record provides official acknowledgement of the

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[73] See *e.g.* Baker, *supra* note 30 at 569; Kritz, *supra* note 48 at 595; "Swapping Amnesty," *supra* note 29 at 13; Schmandt, *supra* note 24 at 368; M. Schrag, "The Yugoslav War Crimes Tribunal: An Interim Assessment" (1997) 7(1) Transnat'l. L. & Contemp. Probs. 15 at 19. *Contra*, see *e.g.* Forsythe, *supra* note 25 at 422; Mak, *supra* note 59 at 536, 552-53.

[74] Kritz, *ibid.* at 587.

[75] The appropriateness of national versus international judicial arenas for the implementation of justice policies is discussed below.

[76] "Swapping Amnesty," *supra* note 29 at 12.

[77] Para. 344. Reprinted in *ibid.* at 12 fn 80.

[78] See *e.g.* Hochkammer, *supra* note 54 at 124; Scharf, *ibid.* at 12-13. These authors further argue that a corresponding deterrence of renewed conflict may also result. *Ibid.*

suffering of victims.[79] As importantly, such a record could serve to prevent (widespread) historical revisionism.[80] In fact, US Supreme Court Justice Robert Jackson, Chief IMT Prosecutor, viewed the documentation of World War II Nazi atrocities as one of that Tribunal's most important legacies. As Jackson stated, this task was accomplished:

> with such authenticity and in such detail that there can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders can arise among informed people.[81]

It remains difficult to contradict this conclusion.

However, a substantial record of abuses may also be collected by a Truth Commission that is not empowered to prosecute individuals, rather than through formal criminal trials. Generally, such a body would focus on establishing an overall picture of past abuses during a specific period of time, with a pre-determined time limit for the submission of a final report, and would have the legal authority to collect the information necessary to reach its conclusions.[82] However, the broad societal focus of a Truth Commission is less likely to individualize guilt for IHL violations than are individual criminal trials.[83]

The process of the individualization of guilt, which began with the creation of an historical record of criminal activity, could be advanced extensively by the criminal prosecution of accused individuals.[84] Justice could serve to remove perceptions of collective responsibility for the actions of leaders. Furthermore, it could counter wartime indoctrination and misinformation campaigns.[85] This individualization may thus prevent the growth and solidification of collective guilt and break the cycle of

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[79] Schmandt, *supra* note 24 at 353-54.

[80] Kritz, *supra* note 48 at 598-99; "Swapping Amnesty," *supra* note 29 at 13 fn. 84.

[81] Scharf, *ibid.* at 13.

[82] Hayner, *supra* note 49 at 604. Hayner argues that a Truth Commission is not comparable with the prosecution of individual war criminals. She argues that criminal trials may create a record of abuses by individuals, but will not be able to create an overall historical record. *Ibid.*

Although beyond the scope of this study, a comparison of war crimes tribunals versus truth commissions would provide fertile ground for future research. For example, a Truth Commission would likely provide its "defendants" with less legal due process protections than a criminal tribunal. This could endanger the impartiality and accuracy of the historical record and possibly also undermine the later evolution and popular acceptance of an effective legal process. See *e.g.* "Swapping Amnesty," *supra* note 29 at 13 fn. 84.

[83] Hayner, *ibid.* at 604-05.

[84] Bassiouni argues strongly for the individualization of guilt and responsibility for crimes committed recently in the Former Yugoslavia. He maintains that:

> The crimes committed cannot be written off to some peculiarity of the region or its peoples. These crimes were committed by individuals, and for the most part, they were part of policies and practices that political and military leaders developed or allowed to develop. That is why the offenders must be prosecuted individually and their leaders sought out for their command responsibility.

Bassiouni, *supra* note 3 at 62-63.

[85] "Enforcement," *supra* note 70 at 245.

group hatred which is so often a factor in internal wars.[86] The creation of an historical record coupled with criminal justice proceedings may restore the dignity of victims, provide closure, and prevent private revenge attempts.[87]

Even in the absence of the actual trial of wartime leaders, the threat of prosecution or the issuance of unenforced criminal indictments may serve a small role in consolidating peace. Such a process could be effective through the stigmatization and marginalization of accused leaders.[88] In turn, this could lead to a corresponding loss of power and influence, including a lack of international power and relevance, all of which might at least marginally decrease the leaders' ability to undermine the peace process through political action or to mobilize their constituencies for a resumption of conflict.[89]

Some theorists, however, warn of potential negative consequences of wide-ranging post-conflict justice policies. It is possible that most, if not all, actors in specific theatres of conflict, especially internal civil wars, will have been responsible to some degree for IHL violations.[90] Widespread prosecution could force some segments of society, especially the military, to close ranks and/or revolt, and thus actually serve in some respects to collectivize opposition through fear of prosecution.[91] This leads some academics to conclude that the pursuit of such wide-ranging justice strategies should be abandoned if it actually threatens the stability of the long-term consolidation of peace.[92] One suggestion to reduce this possibility is to concentrate prosecution efforts on the leaders responsible for policies leading to IHL violations and those individuals accused of the most heinous abuses.[93]

The practical necessity for the individualization of guilt is not immediately obvious. In fact, a strong theoretical and moral argument may be made that individuals in society do bear collective responsibility for the actions of their leaders and for their own acquiescence in any criminal activities conducted on behalf of their state. For

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[86] Kritz, *supra* note 48 at 587. In specific regard to the Former Yugoslavia, Bassiouni argues that the failure to create an historical record or to prosecute offenders following World War II atrocities by the Ustasha regime in the wartime Independent State of Croatia, a fascist puppet state, played a significant role in the outbreak of the recent Balkan conflict. As a result, he maintains that:

> great crimes ... cannot be buried with the dead and papered over by peace agreements. Peace, as the history of that region reveals, can never take hold without truth and justice.

Bassiouni, *supra* note 3 at 12 fn. 65. In fact, atrocities committed during the Second World War and left unaddressed were often cited by combatants during the recent conflicts in the Former Yugoslavia as justification for their attacks on civilians. Schrag, *supra* note 73 at 19.

[87] "Swapping Amnesty," *supra* note 29 at 14. There is also a moral component to this argument. It is far different for a state to waive prosecution for crimes committed directly against itself, such as treason, than it is for the state to grant amnesty for crimes directed against living persons, such as rape, *ibid.* at 13. For a further discussion of potential benefits of decollectivizing guilt in the Former Yugoslavia see also Schrag, *ibid.*

[88] "Enforcement," *supra* note 70 at 244.

[89] "Yugoslav Tribunal," *supra* note 25 at 272-73.

[90] Forsythe, *supra* note 25 at 415.

[91] "Swapping Amnesty," *supra* note 29 at 8-9.

[92] See *e.g.* Hochkammer, *supra* note 53 at 168; Kritz, *supra* note 48 at 595.

[93] Kritz, *ibid.*

example, historian D.J. Goldhagen presents a compelling and highly acclaimed argument supporting the collective responsibility of ordinary Germans for the Nazi atrocities of World War II. He makes a strong case that the actual implementation of genocidal policies in the Third Reich was based — in theory and in practice — on existing collective antisemitism in German society.[94] Similar arguments can also be made that recent widespread abuses in the Former Yugoslavia could not have occurred without some level of complicity or willful blindness from significant segments of the Yugoslavian population.[95]

Individual criminal guilt is far different from political responsibility and notions of moral guilt. Even if warranted, the individual criminal punishment of an entire society is not a realistic policy option. For example, although widespread trials were held in Germany following the end of the Second World War, this process did not involve the trial of every individual accused of war crimes. The leaders of Nazi Germany in Allied custody at the time were tried internationally before the IMT, and thousands of other significant but lesser Nazi criminals were later tried before courts constituted individually by the major Allied controlling powers.[96] However, resource and willpower limitations prevented the continuation of trials while most alleged criminals remained untried, even though the Allied Powers remained in complete physical control of the defeated Nazi Germany.[97] Although a greater number of Germans were subjected to a widespread quasi-criminal process of "denazification," this process too was found unworkable as a result of resource and willpower limitations.[98]

A judicial application of the principle of collective guilt is unworkable in practice.

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[94] D.J. Goldhagen, *Hitler's Willing Executioners: Ordinary Germans and the Holocaust* (New York: Knopf, 1996).

[95] *E.g.* The Commission of Experts documented the existence of 677 separate detention camps within Bosnia, in which "[p]risoners were commonly subjected to the most inhumane treatment imaginable." *Annex Summaries and Conclusions*, reprinted in Bassiouni, *supra* note 3, Appendix I at 129-30. Much as Goldhagen argued in relation to the widespread atrocities of World War II, *ibid.*, it is difficult to imagine that this situation could have developed or continued without either implicit or explicit societal support throughout much of the Former Yugoslavia.

[96] Individual Allied Powers conducted or authorized trials in their zones of occupation under *Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, 20 December 1945, discussed in R. K. Woetzel, *The Nuremberg Trials in International Law: with a Postlude on the Eichmann Case* (New York: Frederick A. Praeger, 1962) at 218-26.

[97] Criminal trials were conducted for many years following the defeat of Nazi Germany. However, although Allied estimates placed the number of suspected German war criminals around two hundred and fifty thousand, most of these individuals were never tried in a criminal court. D. Botting, *In the Ruins of the Reich* (London: George Allen & Unwin, 1985) at 202-07.

[98] The Allied Powers subjected millions of German civilians to "denazification" procedures following World War II. These procedures could lead to summary dismissal from employment and other serious penalties. Of the approximately 13 million Germans questioned by US officials, over 3 million were deemed suitable for "denazification". Neither the Americans nor the post-war German government could accomplish the formal examination and judgment of this large a segment of German society. Although the Americans were the most zealous proponents of "denazification," the other Allied occupation powers faced similar insurmountable practical difficulties. Botting, *ibid.* at 197-202; K. P. Tauber, *Beyond Eagle and Swastika: German Nationalism Since 1945*, vol. I (Middletown, Conn.: Wesleyan UP, 1967) at 30-37.

Furthermore, any meaningful long-term post-conflict reconstruction requires the establishment of peaceful relations between former combatants and civilians from all sides to the conflict, a process for which the collective demonization of entire populations will be generally unhelpful.[99]

Failure to implement post-conflict justice *at all* could itself have significant negative effects on the consolidation of democracy and the furtherance of long-term internal peace. Such failure could breed cynicism for the rule of law and therefore undermine a key aspect of a functioning democracy.[100]

In contrast, prosecution could further serve to emphasize the discontinuity of a new government from the old abusive regime and thus strengthen its democratic legitimacy, if such a transition had indeed occurred.[101] This is important, as peace settlements with a democratic basis are more likely to succeed in the long-term than those without such a foundation.[102]

Although theoretical arguments clearly favour the pursuit of justice in the consolidation of long-term internal post-conflict peace, the potential benefits of specific arenas (*i.e.* national or international courts) for this pursuit require further analysis. Justice at a national level, through internal legal structures, may significantly strengthen the consolidation of internal democracy. While providing justice for victims, such a process may also aid in the reconstruction of a functioning and legitimate national criminal justice system and lead to the internalization of legal norms of peaceful coexistence in a manner which could not be mirrored by international justice policies.[103]

Historically, however, the prosecution of individuals accused of IHL abuses by

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[99] For example, Tauber argues that the pursuit of post-World War Two "denazification" created serious long-term social problems in Germany. He argues that:

> by blurring the line between formal guilt and moral guilt, the procedure permitted a serious devaluation of the latter category. It also created — and this is of greater importance for the development of nationalism — deep resentment among the formally guilty, who, upon finding themselves publicly thrown together with the substantively guilty, began to make common cause with them. The working of the law, because of its excessive sweep, created something like a fraternal lodge of the disinherited, the denazified.

Tauber, *ibid* at 30.

[100] "Swapping Amnesty," *supra* note 29 at 12-13. A strong argument may be made that democracies are generally more peaceful in their international relations than are other types of regimes, especially in their interactions with other democratic societies. See *e.g.* R.J. Rummel, "Democracies ARE Less Warlike Than Other Regimes" (1995) 1(4) Eur. J. Int'l. Rel. 457. However, this argument is not accepted by all scholars. See *e.g.* T. Risse-Kappen, "Democratic Peace — Warlike Democracies? A Social Constructivist Interpretation of the Liberal Argument" (1995) 1(4) Eur. J. Int'l. Rel. 491. It is clear, however, that the process of democratization is unstable and prone to outbreaks of conflict. See *e.g.* E. D. Mansfield & J. Snyder, "Democratization and the Danger of War" (1995) 20(1) Int'l. Security 5.

[101] "Swapping Amnesty," supra note 29 at 14.

[102] Baker, *supra* note 30 at 569; Hampson, *supra* note 65 at 546. Hampson also argues, however, that justice must be tempered by immediate concerns regarding the negotiation of a sustainable internal post-conflict political structure. *Ibid.*

[103] Kritz, *supra* note 48 at 594-95, 601-02.

their own states has been problematic and relatively rare.[104] National trials may be especially unreasonable in regard to gross IHL violations such as genocide, the very type of crime for which punishment is most important for the peaceful consolidation of post-conflict societies. As Akhavan notes, it is virtually inconceivable for genocide to be committed without the complicity of the state itself.[105] The delegate from the Phillippines recognized the potential problems of this during the drafting of the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*,[106] with the argument that genocide is:

> a collective crime of such proportions that is could rarely be committed except with the participation or the tolerance of the State; it would be paradoxical to leave to that same State the duty of punishing the guilty.[107]

Furthermore, even if a functioning national justice system was in place, and prosecutions did occur, it might be "unwise and unreasonable" to expect parties directly involved in the previous conflict to strive for impartial justice given the likely temptation towards revenge and retribution.[108]

A strong case can be made for a link between justice and long-term internal peace based on deterrence, the creation of an historical record, individualizing and decollectivizing guilt, providing closure for victims and strengthening the norms of democracy through the rule of law. While long-term peace dividends may result from national level trials, these are likely to be outweighed by the potential difficulties of conducting such trials effectively and in an impartial manner.

(b) *Long-Term International Effects*

In contrast, the benefits of justice policies on the consolidation of long-term *international* peace may be increased dramatically if such post-conflict justice is pursued in an international forum. In a remark addressed to perceived and actual victor's justice at the IMTFE following World War II, US Supreme Court Justice Murphy argued in favour of impartial international action. Murphy observed that:

> If we are ever to develop an orderly international community based upon a recognition of human dignity, it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness.[109]

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[104] Mak, *supra* note 59 at 539-40. This is exemplified by the problematic US criminal trials of American soldiers during the Vietnam War. Following the massacre of over three hundred Vietnamese civilians by American soldiers, only one soldier was convicted and he was released after serving a minor sentence. See *Calley, supra* note 55. For an excellent account of the problems and hypocrisy associated with this process see M. Bilton & K. Sim, *Four Hours In My Lai* (Toronto: Penguin, 1992).

[105] "Enforcement," *supra* note 70 at 232.

[106] 9 December 1948, 78 U.N.T.S. 277 [hereinafter *Genocide Convention*].

[107] "Enforcement," *supra* note 70 at 232.

[108] Hampson, *supra* note 65 at 547.

[109] *In re Yamashita*, 327 U.S. 1 (1946) at 29-30 (Murphy J., dissenting) reprinted in Schmandt, *supra* note 24 at 351.

International action may also further the global strengthening of IHL norms, facilitate similar future action, and provide increased international legitimacy to the UNSC, all of which may lessen the potential for future conflict.[110]

In fact, such action may provide a strong philosophical and practical basis for the future creation of the permanent international criminal court (ICC).[111] A permanent court could eliminate many theoretical concerns regarding the potential negative ramifications of the pursuit of justice on the achievement of an immediate negotiated peace settlement. If the ICC is implemented effectively, through the impartial prosecution of all individuals responsible for serious IHL violations in all conflicts, it could serve to eliminate justice from the bargaining process altogether. Additionally, such a court could ensure impartiality and consistency in the prosecution of IHL violations from all conflicts.[112]

Some theorists foresee long-term problems arising from the institution of any international criminal tribunal, viewing a move to enforce IHL through international criminal institutions as premature.[113] For example, Mak argues that the "costs and difficulties" associated with such action may undermine future efforts at international justice, especially if such justice is attempted prior to the end of hostilities, without a military occupation of the territory in question, without a strong willingness to prosecute and without significant international apprehension capabilities.[114]

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[110] Hochkammer, *supra* note 53 at 167-68; Schmandt, *ibid.*

[111] This concept is currently under active consideration by the international community. The UNGA-sponsored Preparatory Committee on the Establishment of an International Criminal Court concluded its work in early April 1998, and an international meeting of plenipotentiaries in Rome, Italy, in June and July1998 negotiated the establishment of an ICC. This concept is supported in principle by scores of individual nations including Canada, Germany, Japan and the UK. See *e.g.* Burns, *supra* note 24 at 349-50; M Thieroff, "Setting a Date for the ICC Conference," 2 (Oct.) The International Criminal Court Monitor: The Newsletter of the NGO Coalition for an International Criminal Court 3 (1996); B. McDougall, "Needed: a permanent judicial attack on war crimes" *The [Toronto] Globe and Mail,* (10 April 1998), A15.

Although supported in principle by 120 of the 148 states participating in the Rome conference, the Statute of the International Criminal Court, U.N. Doc. A/Conf.183/9, 17 July 1998, has not yet entered into force. Sixty states must ratify or otherwise formally adopt the terms of this treaty to enable its entry into force.

International negotiations for the establishment of an ICC built on a text developed by the International Law Commission (ILC). See *Draft Statute for an International Criminal Court.* "Report of the International Law Commission on the work of its forty-sixth session" in *Yearbook of the International Law Commission 1994*, vol. II, Part 2 at 26 (New York, 1997) (UN Doc. A/CN.4/SER.A/1994/Add.1 (Part II)) [hereinafter *ILC Draft Statute*].

[112] For a discussion of the legal process relating to the formation of an ICC see *e.g.* K. Ambos, "Establishing an International Criminal Court and an International Criminal Code: Observations from an International Criminal Law Viewpoint" (1996) 7 Eur. J. Int. L. 519; L. Yee, "Finding the Right Balance" 5 (Aug. 1997) The International Criminal Court Monitor: The Newsletter of the NGO Coalition for an International Criminal Court 5, 14. While impartiality could also result from prosecution in the national courts of neutral third party states, long-term legal consistency would be much more difficult to achieve from jurisdiction to jurisdiction as compared with a single international criminal forum.

[113] See *e.g.* Forsythe, *supra* note 25 at 422; Kritz, *supra* note 48 at 601.

[114] Mak, *supra* note 59 at 552-53. Mak contends that these four conditions were necessary components of the success of the post-World War II IMT. *Ibid.*

In order to be an effective deterrent, international action in regard to one conflict must be followed by similar action relating to other conflicts.[115] This would also avoid charges of selective international prosecution.[116] If Mak is correct, the ability to undertake such future action may be undermined by premature efforts at international prosecution.[117] In contrast, in the case of a conflict where there is a high incidence and scale of atrocities and little chance of national reunification and/or reconciliation, and where wartime leaders remain in power, it would appear that international justice is necessary for there to be any justice at all.[118]

Arguments against international prosecution appear more technical than philosophical, relating more to resources and political will than to absolute theoretical bars to international prosecution. If the necessary means and desire could be consolidated, most such objections could be answered. Much more difficult, in contrast, is answering objections to national prosecution.

Whether national or international in character, justice may serve an important role in consolidating long-term international peace and preventing massive IHL abuses. Failure to prosecute, or the granting of amnesties, may have profound negative consequences. As an example, the international failure following the First World War to prosecute Turkish nationals for wartime atrocities visited on Armenians was later viewed by Adolf Hitler as grounds for impunity in his implementation of the "Final Solution". Hitler once cynically observed, "Who remembers the Armenians?"[119] Furthermore, evidence suggests that the recent failure to prosecute Khmer Rouge leaders in Cambodia led some leaders in the Former Yugoslavia to undertake with impunity their own genocidal policies.[120] As these examples illustrate, failure to act may have significant negative implications for future international peace, especially when confronted with incontrovertible evidence of gross IHL violations. Given the apparent necessity of action, international efforts appear to be the only theoretically defensible alternative.

B. *Legal Theory*

Political theory supports a strong correlation between the pursuit of justice in an international forum and the consolidation of peace in times of armed conflict, especially in a long-term perspective. While theoretically justified, it does not necessarily follow that the establishment of such an international criminal tribunal would be justified under international law. If so, it would still be necessary to determine what law is applicable would be under what circumstances it would apply.

These questions form the foundation of the following legal analysis. In the current absence of an established permanent ICC with a defined treaty-based legal jurisdiction,

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[115] T. Meron, "War Crimes in Yugoslavia and the Development of International Law" (1994) 88 Am. J. Int'l. L. 78 at 78 fn. 2. [hereinafter "War Crimes"].

[116] For example, this could include charges of "eurocentrism," "The Case," *supra* note 58 at 135.

[117] Mak, *supra* note 59 at 536.

[118] "Answering," *supra* note 33 at 3.

[119] Kritz, *supra* note 48 at 597.

[120] *Ibid.*

the answers to these questions will have profound consequences on the ability of the international community to respond to and address IHL abuses in any meaningful manner. The following legal theory also provides a foundation from which to later view and critique the special establishment of the ICTFY.

1. The Legality of the Establishment of an International Criminal Tribunal

The current practical absence of an ICC necessitates the creation of an *ad hoc* institution if international justice is to be achieved in cases of alleged IHL violations.[121] As a matter of international law, the essential elements of any criminal proceedings are the right of an individual defendant to trial "by a competent, independent and impartial tribunal established by law."[122] Two primary legal options exist for the creation of such a tribunal. Under international law, such a court could be established directly through a multinational or international treaty or, in the alternative, it could be instituted under pre-existing UN authority.[123]

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[121] The *ad hoc* nature of any such judicial institution would not necessarily be a bar to its legitimacy. Morris & Scharf, *supra* note 1, vol. 1 at 38-40. However, it should be noted that the UN Human Rights Committee, responsible for monitoring compliance with the *ICCPR*, maintains that:

> The provisions of Article 14 [of the *ICCPR*] apply to all courts and tribunals ... whether ordinary or specialized. ... While the Covenant [*ICCPR*] does not prohibit such [specialized] categories of courts [including *ad hoc* tribunals], nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14.

Reprinted *ibid.* at 38 fn. 137.

Furthermore, the establishment of a permanent court enjoys clear political advantages over the creation of an *ad hoc* tribunal. As noted by Mr. Arangio-Ruiz during a 1993 UN debate concerning the drafting of a statute for a future permanent ICC:

> The members of a court set up in response to a particular situation might be influenced by that situation and by, as it were, an obligation of result. Furthermore, quite apart from the very serious risk of a lack of objectivity and impartiality, *ad hoc* or special criminal courts were essentially instruments used by despotic regimes. It would set a bad example if the international community were to resort to such means and would not augur well for respect for human rights and the rule of law at the national level.

Reprinted *ibid.* at 38 fn. 136.

[122] *International Covenant on Civil and Political Rights*, 19 December 1966, Can. T.S. 1976 No. 47, 999 U.N.T.S. 171, 6 I.L.M. 368., art. 14(1) [hereinafter *ICCPR*]. See Morris & Scharf, *supra* note 1, vol. 1 at 39.

[123] See *e.g.* the ILC commentary on these methods of creating an international criminal court, discussed in relation to the *ILC Draft Statute*, *Yearbook of the International Law Commission 1994*, vol. II, Part 2 (New York, 1997) (UN Doc. A/CN.4/SER.A/1994/Add.1 (Part II)) [hereinafter *ILC Yearbook*].

(a) *Establishment by Treaty*

The method of using a treaty to establish an international criminal tribunal to address IHL violations is clearly legal. Following World War II, the IMT recognized the legality of such an undertaking. In a finding which supported the legality of its own establishment through a multinational treaty the IMT held that its founding nations "ha[d] done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law."[124] This position is also recognized in other international legal documents such as the *Genocide Convention*.[125]

The most significant legal limitation placed on an international criminal tribunal created through the treaty method is that the exercise of its jurisdiction is generally confined to signatory states.[126] In the absence of the evolution of a new tenet of customary international law, states may neither individually nor collectively exercise legal jurisdiction over individuals in non-party states in cases where an international agreement did not exist providing for their transfer or for such a limitation of national sovereignty. For the establishment by treaty of a criminal tribunal to prosecute IHL violations it would be necessary to ensure the agreement of affected national parties.[127] The International Law Commission has recognized that this method of establishing an international criminal tribunal would generally require widespread initial state acceptance.[128]

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[124] *Nazi Conspiracy and Aggression, Opinion and Judgment*, Office of United States Chief of Counsel for Prosecution of Axis Criminality, reprinted in Morris & Scharf, *supra* note 1 at 38.

[125] *Ibid.* at 37.

[126] Article 34 of the *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter *Vienna Convention on Treaties*] provides that "[a] treaty does not create either obligations or rights for a third state without its consent." A third party state would nonetheless be bound by any treaty provisions considered legally to be reflective of international custom, through the operation of Article 38.

[127] See *e.g. Report of the Secretary-General, supra* note 20 at paras. 18-22. Nazi Germany was not a signatory to the *Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis*, 8 August 1945, 82 U.N.T.S. 279, 59 Stat. 1544, E.A.S. No. 472 [hereinafter *London Agreement*]. However, Nazi Germany had ceded its sovereign legislative power to the Allied Powers through its unconditional surrender. Although not without criticism, a strong argument may be advanced that the victorious Allied Powers could therefore adopt the *London Agreement* on behalf of the international community, through the legitimate exercise of these delegated powers. Woetzel, *supra* note 96 at 76-90.

Concerns relating to the establishment of a judicial institution by treaty would obviously be magnified in cases of failed states, where levels of governmental legitimacy and authority are unclear. Although this subject is beyond the scope of this paper, for a general discussion of failed states see *e.g.* M. Ayoob, "State Making, State Breaking and State Failure" in C. Crocker and F.O. Hampson, eds., *Managing Global Chaos: Sources of and Responses to International Conflict* (Washington, DC: United States Institute of Peace, 1996).

[128] *ILC Yearbook, supra* note 123.

(b) *Establishment by the United Nations*

In the absence of an agreement by individual states, the only organ of the UN likely endowed with the legal authority to create an international criminal tribunal to address IHL violations by individuals is the UNSC. Although an international criminal tribunal could be established through treaty by the individual states comprising the UNGA, this body could not itself establish a judicial institution with universal binding legal jurisdiction in the absence of such a treaty. Decisions of the UNGA are confined to recommendations rather than obligations, apart from specific procedural matters such as the appointment of non-permanent members to the UNSC and general UN budgetary concerns. In respect to establishing an international criminal tribunal, therefore, UNGA decisions alone would likely not be legally binding in the absence of a treaty to that effect adopted by all affected states.[129]

Furthermore, the judicial organ of the UN, the International Court of Justice (ICJ), is itself not empowered to hear individual criminal cases. Article 34(1) of the *Statute of the International Court of Justice*[130] provides that, "[o]nly States may be parties in cases before the Court." Individuals do not have legal standing before the ICJ nor are they the proper subject of its jurisdiction. The ICJ may create specialized Chambers for "particular categories of cases" or "a particular case."[131] However, in the absence of an international treaty supporting such action, for example an amendment to the *ICJ Statute*, the ICJ may not extend its jurisdiction through the creation of a subsidiary Chamber to address IHL violations through the imposition of criminal sanctions on individuals.

The *UN Charter* appears, however, to provide legal authority for the establishment of an international criminal tribunal by the UNSC in the absence of an international treaty. The UNSC must nonetheless operate under significant legal constraints in conducting such an endeavour. Article 29 of the *UN Charter* permits the UNSC to establish "such subsidiary organs as it deems necessary for the performance of its functions." Although this wording clearly permits a wide scope of action, equally clear is that any subsidiary organ created by the UNSC must of necessity be designed to fulfill an existing UNSC function. The UNSC cannot legally extend the authority vested in it by the *UN Charter* simply through the creation of a subsidiary organ under Article 29. However, international legal authority supports the creation of a subsidiary judicial body pursuant to Article 29.[132]

The UNSC is the UN organ delegated "primary responsibility for the maintenance

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[129] See *e.g. UN Charter*, Chapter IV, Articles 10, 11, 13, 14, 17 and 18. The ILC recognized that the ambiguous legal nature of UNGA resolutions on the creation of a criminal court could best be surmounted by the adoption of a UNGA resolution recommending the adoption of an implementing treaty by individual states. The ILC also argued that an international criminal court could be established through the amendment of the *UN Charter* with near-universal state support. *ILC Yearbook, ibid.*

[130] 26 June 1945, T.S. No. 933, 59 Stat. 1055, 3 Bevans 1179 [hereinafter *ICJ Statute*].

[131] *Ibid.*, Article 26(1) and (2).

[132] *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, [1954] I.C.J. Rep. 47. This ICJ decision supported the creation of a subsidiary judicial body by the UNGA pursuant to Article 22 of the *UN Charter*, the UNGA equivalent of Article 29. See Morris & Scharf, *supra* note 1, vol. 1 at 47-48.

of international peace and security" under Article 24(1) of the *UN Charter*. Towards the achievement of this end the UNSC is permitted a wide scope of actions.[133] Even if undertaken without the agreement of the affected state parties, UNSC action may be legally binding if conducted under certain provisions of the *UN Charter*. For example, Article 39 of Chapter VII of the *UN Charter* provides that:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Pursuant to this provision, Article 41 allows for "measures not involving the use of armed force," while any actions involving the use of armed force are authorized under the terms of Article 42. If the UNSC deems it necessary, its decisions in these matters are legally binding on all UN Member States.[134]

Therefore, in the absence of an international treaty establishing a criminal tribunal to prosecute IHL violations, the UNSC could be legally authorized to create such an entity if it were established for the purpose of restoring or maintaining international peace and security under Chapter VII (Articles 39 and 41) of the *UN Charter*. As Article 39 stipulates, the determination that a threat exists to international peace and security is within the discretion of the UNSC.[135] Any determination by the UNSC that a connection exists between measures it authorizes pursuant to Chapter VII and the restoration of international peace and security appears in law difficult to challenge at present following the relatively ambiguous ICJ rulings in *Lockerbie*.[136]

However, Article 41 does not explicitly authorize or prohibit the creation of an international criminal tribunal as such a measure. It only provides that those measures designed to contribute to the maintenance of international peace and security:

> not involving the use of armed force *may* include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means

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[133] See *e.g. UN Charter*, Chapters VI and VII.

[134] *UN Charter*, Articles 25 and 48.

[135] An explicit invocation of Article 39 appears in general UNSC practice to be a necessary precondition for the invocation of Chapter VII enforcement measures under the *UN Charter*. Kirgis, *supra* note 6 at 512. However, this may not apply to cases involving the use of Chapter VII authority that cannot be classified as enforcement measures against a particular state. See *e.g. Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, [1962] I.C.J. Rep. 151. See Kirgis, *ibid.*

[136] *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. UK; Libya v. US)*, Provisional Measures, [1992] I.C.J. Rep. 3 [hereinafter *Lockerbie*, Provisional Measures], and *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, (Libya v. UK; Libya v. US)*, Preliminary Objections, General List No. 88, 27 February 1998 [hereinafter *Lockerbie*, Preliminary Objections]. For differing interpretations of the *Lockerbie*, Provisional Measures decision see *e.g.* J.E. Alvarez, "Nuremberg Revisited: The Tadic Case" (1996) 7 Eur. J. Int'l. L. at 253, 258-59; V. Gowlland-Debbas, "The Relationship between the International Court of Justice and the Security Council in the Light of the *Lockerbie* Case" (1994) 88(4) Am. J. Int'l. L. 643 at 660-61.

of communication, and the severance of diplomatic relations.[137]

Based on the ambiguous nature of this provision, valid arguments may be advanced both for and against the legality of the creation of an international criminal tribunal by the UNSC as an enforcement measure under Chapter VII of the *UN Charter*. While the creation of such a tribunal could certainly be classified as a measure not involving the use of force, the specific examples provided in Article 41 do not appear to contemplate judicial action.[138]

A further concern is the legality of action by the UNSC itself, rather than UNSC-authorized action undertaken individually by UN Member States. However, as shown above, the direct creation of a judicial body by a UN organ is a legitimate act under Article 29 of the *UN Charter*. Another substantial legal limitation on the creation of an international criminal tribunal in this manner is the absence of UNSC legislative authority. If the UNSC is authorized to create such a tribunal, under international law it is nevertheless not endowed with the authority to extend the tribunal's judicial scope beyond pre-existing IHL and other customary international law.[139]

2. Applicable Substantive Law

Regardless of the method of its creation, what substantive law would be applicable in an international criminal tribunal established for the purpose of prosecuting individuals accused of IHL violations during periods of armed conflict?[140] Two distinct analytical steps are required to answer this question. The first involves an analysis of the substantive international law generally applicable in situations of armed conflict. Upon this finding, a further legal analysis is necessary to determine which violations of IHL give rise to individual criminal responsibility as illegality does not automatically imply individual criminality.

(a) *International Humanitarian Law*

The determination of the specific substantive international law applicable in periods of armed conflict is a complex task. The evolution of this legal regime resulted

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[137] Emphasis added.

[138] For a discussion of this ambiguity see *e.g.* Alvarez, *supra* note 136 at 253, 258-59. For example, this raises concerns over whether such a tribunal would in fact be "established by law" as mandated by *ICCPR*, Article 14(1). See also Morris & Scharf, *supra* note 1, vol. 1 at 42-43.

[139] The UNSC is not empowered to create *ex post facto* substantive law. See *e.g.* Bassiouni, *supra* note 3 at 251-53. See also *ILC Yearbook*, *supra* note 123.

[140] A court created by the UNSC would likely only have jurisdiction over pre-existing international law, while a tribunal established by treaty could in theory be endowed with greater judicial scope through the enunciation of newly applicable law in its founding treaty. However, this section will only analyse the minimum standard of substantive law applicable in all cases involving the creation of an international criminal tribunal, regardless of the method of the court's creation, rather than attempting to address the potential provisions of any future multinational treaty.

primarily from the undertaking of legal responsibilities by and between states.[141] These interstate obligations were principally intended to minimize abuses by the national armed forces of one state in regard to actions directed towards combatants and non-combatants of an enemy state.[142] As such, a substantial dichotomy evolved in IHL between the law applicable in international conflicts and the law applicable in internal, civil conflicts. Traditionally, IHL primarily addressed only violations occurring during international conflicts, while conduct during internal hostilities was generally governed by national law. IHL is gradually developing to minimize the legal differences between the two regimes but the exact state of this convergence remains unclear.[143] There is a growing recognition that this distinction requires revision in light of rising international concern over internal atrocities and conflicts. However, this has not yet translated into a complete practical and legal removal of the internal/international distinction in IHL applicability to individual and state conduct during hostilities.[144]

An extensive conventional regime exists outlining laws applicable in cases of interstate conflicts. The primary sources of codified IHL include: the *Geneva Conventions* of 12 August 1949[145] and their *Additional Protocols*;[146] the *Hague*

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[141] While modern IHL developed in the Western world, its historical basis may be found in numerous cultures across the globe. In fact, military codes of conduct, including prohibitions regarding attacks on civilians and other non-combatants, existed in Asian and Middle Eastern nations prior to the inclusion of such principles in Western military philosophy. This understanding is important as it provides significant support to the argument that modern IHL does not simply codify and attempt to impose Western values on non-Western nations. Bassiouni, *supra* note 3 at 482-83. For a concise and interesting account of the nature of international humanitarian law, both in general and in the context of the ICTFY, see also W.J. Fenrick, "International Humanitarian Law and Criminal Trials" (1997) 7(1) Transnat'l. L. & Contemp. Probs. 23 at 25-30.

[142] See *e.g. Bassiouni, ibid.* at 486-87; S. E. Nahlik, *A Brief Outline of International Humanitarian Law: Extract from the International Review of the Red Cross, July-August 1984* (Geneva: International Committee of the Red Cross, 1993) at 8-9,16-18.

[143] For example, the ICJ found recently that a minimum IHL standard applies in all conflicts, whether internal or international in character in *Military and Paramilitary Activities in and against Nicaragua* [(*Nicaragua* v. *US*), [1986] I.C.J. Rep. 14 at 144 [hereinafter *Military and Paramilitary Activities*]]. This issue is discussed in more detail below.

[144] See *e.g. Bassiouni, supra* note 3 at 479.

[145] The *Geneva Conventions* include: the *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 U.N.T.S. 31 [hereinafter *Geneva Convention I*]; the *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 U.N.T.S. 85 [hereinafter *Geneva Convention II*]; the *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S. 135 [hereinafter *Geneva Convention III*]; and, the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287 [hereinafter *Geneva Convention IV*], reprinted in *The Geneva Conventions of August 12, 1949* (Geneva: International Committee of the Red Cross, 1992) [hereinafter, collectively, the *Geneva Conventions*].

[146] The *Additional Protocols* are: the *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, 15 August 1977, UN Doc. A/32/144 [hereinafter *Additional Protocol I*]; and, the *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, 15 August 1977, UN Doc. A/32/144 [hereinafter *Additional*

Convention (IV) of 18 October 1907;[147] the *Charter of the International Military Tribunal at Nuremberg* of 8 August 1945;[148] and the *Genocide Convention*. These legal instruments are now widely accepted as the normative basis for the regulation of individual and state conduct during periods of international armed conflict.[149]

The *Geneva Conventions* describe a complex regime of law applicable in cases of international armed conflict and have been ratified by virtually every state in existence.[150] While widely accepted, their *Additional Protocols*, which delineate more extensive legal regimes governing both international and internal conflicts, do not yet enjoy this near-universal acceptance.[151] However, these treaty provisions are bolstered by an emerging regime of customary international law.[152]

In contrast to the *Geneva* and *Hague Conventions*, there is now no necessary nexus between the commission of genocide or crimes against humanity and the existence of any armed conflict at all. For example, the *Genocide Convention* stipulates that genocide is to be considered an international criminal offence "whether committed in time of peace or in time of war."[153] Although crimes against humanity were linked originally to armed conflict at the IMT, this requirement is no longer legally valid.[154] This *jus cogens*, or customary international law, is clearly applicable in the context of either an internal or an international armed conflict.[155]

The internal/international distinction is most obvious in the nature of the applicability of the *Geneva Conventions*. The majority of their provisions apply explicitly to international armed conflicts only. Common Article 2 — a provision common to all four documents — states that the *Geneva Conventions*:

Protocol II], reprinted in *Protocols Additional to the Geneva Conventions of 12 August 1949* (Geneva: International Committee of the Red Cross, 1993) [hereinafter, collectively, *Additional Protocols*].

[147] *Convention Respecting the Laws and Customs of War on Land*, 18 October 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter *Hague Convention (IV)*].

[148] Annexed to the *London Agreement*, *supra* note 127, reprinted in Morris & Scharf, *supra* note 1, vol. 2 at 675-85 [hereinafter *Charter of the IMT*].

[149] See, *e.g.*, *Report of the Secretary-General*, *supra* note 20 at para. 35.

[150] 185 states have now ratified the *Geneva Conventions*. M.-C. Roberge, "Briefing on the International Criminal Court," (Address to the Canadian Network for an International Criminal Court and the Canadian Red Cross, Ottawa, 6 April 1998) [unpublished].

[151] The *Additional Protocols* have been ratified by 158 and 142 states, respectively. *Ibid.*

[152] Custom plays a significant role in the evolution and solidification of international law in general. In the absence of a global legislature, consistent and widespread state practice is viewed as an indication of the international acceptance of legal norms. As Bassiouni observes, the modern normative development of IHL has "never been part of a consistent or cohesive international policy." Bassiouni, *supra* note 3 at 481. While custom clearly plays a significant role in the evolution of international law, the implication of this for the universal applicability of the *Additional Protocols* as customary international law remains unclear.

[153] Article I. See, *e.g.*, *Bassiouni*, *ibid.* at 521-38.

[154] In fact, some of the post-World War Two tribunals conducted by individual Allied Powers immediately following the IMT held that armed conflict was not a necessary prerequisite for successful prosecutions for crimes against humanity. See *e.g. Fenrick*, *supra* note 141 at 41-42.

[155] *Bassiouni*, *supra* note 3 at 481-82. The current legal status of crimes against humanity is also discussed below in "Legality of the ICTFY Statute".

> shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties [signatory states], even if the state of war is not recognized by one of them.

This clearly prevents the full application of the *Geneva Conventions* to internal conflicts, as in these cases only one High Contracting Party may be involved.

However, common Article 3 of the *Geneva Conventions* outlines "minimum" standards applicable "[i]n the case of armed conflict not of an international character." This provides for the "humane" treatment of persons not actively involved in hostilities, with specific limitations on gross violations such as murder, torture, hostage taking, and summary execution.

The ICJ has held that these provisions "constitute a minimum yardstick" for conduct in all internal and international armed conflict, whether or not the actors in the conflict in question have ratified the *Geneva Conventions*.[156] In fact, the provisions of the *Geneva Conventions* which do apply to any given conflict, whether internal or international, may not be limited even through a specific agreement to that effect by the actual Parties to the conflict.[157]

The primary international penal provisions of the *Geneva Conventions* are their common "grave breach" provisions.[158] These generally prohibit actions such as:

> wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.[159]

States are prohibited from absolving themselves or other states from liability for grave breaches.[160]

Within the *Geneva Conventions* themselves the vast majority of the specific restrictions on actions during armed conflict, including the grave breach provisions, is limited to cases of international conflict. Similar limitations also hold true for the majority of the provisions of the *Hague Convention (IV)*.[161] These provisions are not generally considered to reflect customary international law to the extent of becoming

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[156] *Military and Paramilitary Activities, supra* note 143 at 144. See T. Meron, "International Criminalization of Internal Atrocities," (1995) 89 Am. J. Int'l. L. 554 at 560 [hereinafter "International Criminalization"].

[157] This non-derogation clause is found in common Article 6/6/6/7 of the *Geneva Conventions*.

[158] The grave breach provisions are found in common Article 49/50/129/146, respectively, of the four *Geneva Conventions*. This is followed in Articles 50, 51, 130 and 147, respectively, with delineations of grave breaches specific to the individual *Geneva Convention*.

[159] *Geneva Convention I*, Article 50.

[160] *Ibid.* at Article 51. This may be read to limit the ability of a High Contracting Party to grant full amnesties to IHL violators, especially those connected to the state. See *e.g. Schmandt, supra* note 24 at 358 fn. 207.

[161] *Greenwood, supra* note 55 at 278. See also "War Crimes," *supra* note 115 at 80.

applicable in any conflict, whether international or internal in character.[162]

(b) *Criminality of IHL Violations*

IHL applies in either international or internal armed conflicts, albeit to markedly different degrees, as outlined above. However, the individual criminality of specific violations of IHL does not necessarily follow from this conclusion.

Grave breaches of the internationally applicable provisions of the *Geneva Conventions* have always incurred individual responsibility. High Contracting Parties are obligated "to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches" outlined in the *Geneva Conventions*.[163] Genocide and crimes against humanity may also incur individual criminal responsibility.[164] However, the individual criminalization of breaches of common Article 3 of the *Geneva Conventions*, applicable to internal conflicts, is unclear.[165]

Although these offenses may incur individual criminal responsibility, does a legal duty therefore exist to prosecute those individuals alleged to have committed these crimes? An affirmative answer may be given in the case of grave breaches of the internationally applicable provisions of the *Geneva Conventions*, or in the event of genocide. In each case, an absolute legal obligation for either the prosecution or the extradition to a state that will prosecute exists.[166] However, the legal duty to prosecute does not extend to crimes against humanity.[167]

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[162] See *e.g. Bassiouni, supra* note 3 at 489-521. Bassiouni provides his own analysis of the state of customary international law relating to the grave breach provisions of the *Geneva Conventions*, as well as outlining the arguments presented by the UNSG and other international actors.

[163] See common Article 49/50/129/146.

[164] See *e.g.* "International Criminalization," *supra* note 156 at 558; "Swapping Amnesty," *supra* note 29 at 20-39.

[165] See *e.g. Greenwood, supra* note 55 at 275-76.

[166] "Swapping Amnesty," *supra* note 29 at 20. Common Article 49/50/129/146 of the *Geneva Conventions* provides in part that:

> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches [of the *Geneva Conventions*], and shall bring such persons, regardless of their nationality, before its own courts. It may also, ... hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

Similarly, Article I of the *Genocide Convention* states that "[t]he Contracting Parties confirm that genocide, ... is a crime under international law which they undertake to prevent and to punish."

[167] "Swapping Amnesty," *supra* note 29 at 34-39. In the absence of explicit treaty provisions requiring signatory states to prosecute individuals accused of specific IHL violations, state practice does not support the existence of a customary international legal duty to try individuals accused of crimes against humanity. *Ibid.*

Even in the absence of a duty to prosecute, national trial of individuals accused of crimes against humanity are not unknown. For example, France has recently conducted three such trials relating to abuses committed during the Second World War. J. Nundy, "Papon tells jury to arrive at firm verdict: Accused war criminal insists he took no active part in deportations of Jews," *The*

IV. EVALUATING THE ICTFY

In theory, the creation of an international criminal tribunal could be legal, and such an undertaking could have a significant positive impact on the consolidation of post-conflict internal and international peace. However, these conclusions may not necessarily apply to the specific creation of the ICTFY. The following section examines this Tribunal's success in achieving its theoretical goals and the legality of its establishment by the UNSC.

A. *The Tribunal's Impact on Peace*

Has the Tribunal actually been effective in fulfilling the expectations of the world community as expressed by the UNSG and UNSC? Prior to answering this question, a detailed understanding of the level of international support provided to the ICTFY is essential. Practical support for the Tribunal from UNSC member states has been considerably less than reflective of this body's public policy pronouncements. This situation points to the possible conclusion that the creation of the Tribunal was a "fig leaf" to hide the international community's unwillingness to actually prevent massive IHL violations in the Former Yugoslavia, rather than a genuine international effort to bring war criminals to justice.[168] This analysis will show that if current realities remain true, refuting the perception of the ICTFY as little more than an international "fig leaf" will remain difficult, if not impossible, regardless of the original publicized intentions of the UNSC.[169]

Concerns regarding the actual enforcement of IHL in the Former Yugoslavia, through the arrest of individuals indicted by the Tribunal, pose a serious threat to the effectiveness of the ICTFY, as the Tribunal is not authorized to conduct trials *in absentia.*[170] These concerns also provide strong grounds for characterizing the Tribunal as little more than an international "fig leaf".

[Toronto] Globe and Mail (2 April 1998) A19. Two of these trials resulted in the imposition of life sentences, while the third concluded with a ten-year prison sentence. J. Nundy, "French jury gives Papon 10-year sentence: Ex-Vichy official gets relatively light penalty for crimes against humanity during war" *The [Toronto] Globe and Mail* (3 April 1998) A13.

[168] See *e.g.* "Yugoslav Tribunal," *supra* note 25; *Forsythe, supra* note 25 at 403; "The Case," *supra* note 58 at 122-23; and, J. Podgers, "The World Cries for Justice (1996) 82 A. B. A. J. 52 at 53.

[169] The detrimental impact of the lack of international support for the ICTFY on the consolidation of peace is discussed in "The Tribunals Impact on Peace," below.

[170] Under Article 21(4)(d) of the *ICTFY Statute* the Tribunal appears prohibited from conducting a trial of an accused *in absentia.* Article 21(4) states:

> In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
>
> ...
>
> (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing.

In explanatory statements the UNSG noted the consistency of this provision with *ICCPR* Article 14. *Report of the Secretary-General, supra* note 20 at para. 106.

One commentator bluntly observed that:

> This is it. If we can't accomplish this in Europe, we never will ... This has everything to do with whether we'll ever see international law applied to war crimes. Either we go back to the de facto law of the jungle or we press ahead to the next stage of enforcing the writ of international law.[171]

However, Goldstone acknowledged that the current lack of such international enforcement may yet prove to be a "mortal wound" to the Tribunal.[172]

Lack of international enforcement is not a moot point. To date, almost eighty individuals have been indicted by the ICTFY. Only twenty-four are now in custody, or awaiting or undergoing trial.[173] Most high-ranking political and military leaders indicted by the ICTFY, such as Bosnian Serbs Radovan Karadzic and Ratko Mladic, are not currently in custody.[174] Actual enforcement of ICTFY indictments has been highly problematic.[175] In addition, there has been little cooperation with the Tribunal by the FRY, Srpska, or Croatia.[176]

The ICTFY has no arrest powers of its own.[177] International enforcement is

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[171] This comment issued from John Fox, Director of the US-based Open Society Institute. *Podgers*, *supra* note 168 at 53.

[172] R. Goldstone, "The War Crimes Tribunal: Lessons for the Future" (Address to the Canadian Peacebuilding Coordinating Committee and the Parliamentary International Forum, Ottawa, 8 October 1996) [unpublished].

[173] T. Appleby, "UN urged not to fetter war court: Security Council powers asked to put justice, not own interests, first," *The [Toronto] Globe and Mail* (5 March 1998) A3 [hereinafter "UN urged not to fetter war court"].

[174] R.S. Clark & M. Sann, "Coping with Ultimate Evil through the Criminal Law" 7(1) Crim. L. F. 1 at 5 (1996); "Answering" *supra* note 33.

[175] See *e.g.* "Yugoslav Tribunal," *supra* note 25 at 277-278; *Podgers*, *supra* note 168 at 61.

[176] "Answering," *supra* note 33 at 4.

[177] The *ICTFY Statute* does not provide the Tribunal with any direct enforcement mechanism for ensuring the execution of arrest warrants by, and the transfer of an accused to the ICTFY from, states unwilling or unable to comply with such orders. See *e.g.* N. Figa-Talamanca, "The Role of NATO in the Peace Agreement for Bosnia and Herzegovina," (1996) 7 Eur. J. Int'l. L. 164 at 173.

However, the ICTFY *Rules of Procedure and Evidence* outline measures to be taken following a failure by a state to execute an ICTFY arrest warrant. See *International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991: Rules of Procedure and Evidence*, 14 March 1994, UN Doc. IT/32, 33 I.L.M. 484, and *Morris & Scharf*, *supra* note 1, vol. 2 at 39-86 [hereinafter *ICTFY Rules*]. If a state is unable to execute a warrant, it is required to transmit notice of such failure, and the reasons for it, to the Tribunal. *ICTFY Rules*, *ibid.* at Rule 59(A). Rule 59 provides that if no such notice is given and the warrant has not been executed "within a reasonable time," the Tribunal may determine that a failure of execution has occurred and may subsequently inform the UNSC of this failure. The ICTFY may also call on the national authorities in question to publish newspaper advertisements publicly informing an indictee that the service of such indictment is being sought. *ICTFY Rules*, *ibid.* at Rule 60.

The last resort of the ICTFY in cases of non-compliance is outlined in Rule 61 of the ICTFY Rules. Once "all reasonable steps" have been taken to serve an indictment, the indictment may be submitted publicly to the Tribunal Trial Chamber along with all of the evidence collected prior to its original issue. *Ibid.*, Rule 61(B). With reference to this evidence, the Trial Chamber

therefore crucial in order for the Tribunal to be effective at actually fulfilling the publicly-stated goals of the UNSC. However, this conclusion did not and has not translated into full practical international military enforcement support of the Tribunal.

Prior to the adoption of the *Dayton Accords*, the main international military presence in the Former Yugoslavia was UNPROFOR. This force did not possess sufficient resources to provide adequate protection to civilians in UNSC-designated "safe areas" such as Srebrenica, let alone to investigate IHL violations or enforce ICTFY indictments. Instead, the main function of UNPROFOR involved the provision of humanitarian aid and the policing of local cease-fires. The UNSC was reluctant to take further, more forceful action to halt IHL abuses or physically bring alleged war criminals to justice.[178] A strong argument can be made that UN forces allowed abuses to continue (and perpetrators to therefore remain free) in order to minimize violence to its own forces.[179] In fact, although international forces did prepare some dossiers of information concerning atrocities in the Former Yugoslavia, the mandate of UNPROFOR did not even authorize the arrest of alleged perpetrators of gross IHL violations.[180]

The only effective international enforcement activity prior to the *Dayton Accords* was ironically undertaken outside of the Former Yugoslavia. This involved the arrest of suspected Yugoslavian criminals in Denmark, Germany and Switzerland.[181] Additionally, the process of adopting legislation to internally execute ICTFY arrest warrants was begun in many third-party states; at least twenty states, including the US,

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is empowered under Rule 61(C) to determine the existence of "reasonable grounds for believing that the accused has committed all or any of the crimes." Under Article 21(4)(d) of the *ICTFY Statute* the Tribunal appears prohibited from conducting a trial of an accused *in absentia*. However, a determination pursuant to Rule 61(C) would create a substantial public record relating to the possible guilt of an accused and the legal reasons for such a finding.

The Trial Chamber is authorized to issue and transmit globally an international arrest warrant for an absent indictee: *ICTFY Rules*, Rule 61(D). The final powers of the ICTFY in relation to the arrest of an individual accused are contained within Rule 61(E). This provision states that if the Trial Chamber is satisfied on evidence brought by the Prosecutor that such a failure occurred:

> due in whole or in part to a failure or refusal of a State to cooperate with the Tribunal in accordance with Article 29 of the Statute [requiring State compliance with ICTFY orders], the Trial Chamber shall so certify, in which event the President [of the ICTFY] shall notify the Security Council.

The Tribunal has no internal arrest powers. Once notification is transmitted to the UNSC the role of the ICTFY is legally concluded regarding the apprehension of indictees.

[178] J.A. Schear, "Bosnia's Post-Dayton Traumas" (1996) 104 (Fall) Foreign Pol. 87 at 89; *Thornberry, supra* note 57 at 78.

[179] R. Johansen, "The Future of United Nations Peacekeeping and Enforcement: A Framework for Policymaking" (1996) 2 Global Governance 299 at 310.

[180] J.R.W.D. Jones, "The Implications of the Peace Agreement for the International Criminal Tribunal for the Former Yugoslavia" (1996) 7 Eur. J. Int'l. L. 226 at 238.

[181] *Forsythe, supra* note 25 at 405-06.

now have such legislation in place.[182] However, while important, such actions were certainly not an effective substitute for actions ensuring the Tribunal's success on the ground in the Former Yugoslavia.

Problems with international enforcement of IHL norms in the Former Yugoslavia did not end with the adoption of the *Dayton Accords* in late 1995. These documents generally served only to further the appearance of public international support for the Tribunal, albeit in a limited way. Although the documents were witnessed by the EU, France, Germany, Russia, the UK and the US, this constituted no more than a political gesture and did not entail the undertaking of a legal obligation by these nations to ensure the actual compliance of the Parties with the terms of the *Dayton Accords*.[183]

For the Tribunal, the most significant aspects of the *Dayton Accords* involved the creation of the fifty-five thousand member Implementation Force (IFOR) to replace UNPROFOR on the ground in the Former Yugoslavia.[184]

It is clear that IFOR may enforce ICTFY arrest warrants, which is a significant step. However, in spite of this authorization, IFOR practices following the *Dayton Accords* did little to affect the characterization of the ICTFY as an international "fig leaf". Members of the UNSC providing troop contributions to IFOR interpreted the *Dayton Accords* in a limited fashion.[185] While acknowledging the authorization to arrest, they stressed that this does not correspond to a *duty* to enforce ICTFY indictments. In a statement prior to the adoption of resolution 1031 (1995), the UNSC representative from the UK upheld this position, noting that:

> should it be decided that, in the execution of its assigned tasks, the Implementation Force should detain and transfer to the appropriate authorities any persons indicted by the Tribunal *who come into contact with it* in Bosnia, then the authority to do so is provided by the draft resolution before us, read together with the provisions of the [Dayton] Peace Agreement.[186]

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[182] "Report: Round Table with the Hon. Jules Deschenes" (Nov.) Update: Canadian Network for an International Criminal Court 6 (1996) [hereinafter "Deschenes Round Table"]. See also R. Kushen & K.J. Harris, "Surrender of Fugitives by the United States to the War Crimes Tribunals for Yugoslavia and Rwanda" (1996) 90(3) Am. J. Int'l. L 510.

In a related civil matter, the Second Circuit US Federal Court of Appeals decision in *Kadic* v. *Karadzic* held that Bosnian Serb leader Radovan Karadzic could be served with a civil suit, even as an invitee of the UN, because this process was undertaken outside of the headquarters of the UN. Reprinted in "United States: Court of Appeals for the Second Circuit Decision in *Kadic* v. *Karadzic* (Alien Torture Act; Torture Victim Act; the Law of Nations; Subject Matter Jurisdiction) [October 13, 1995]" (1996) 34 I.L.M. 1592 at 1610.

[183] P. Gaeta, "The Dayton Agreements and International Law" (1996) 7 Eur. J. Int'l. L. 147 at 149, 154.

[184] Article 1(a), *Annex* 1-A.

[185] This contrasts sharply with the statement from a member of the Office of the US Joint Chiefs of Staff that "the U.S. military's interests are best served by the Tribunal's success," and with the further acknowledgment that without "political resolve" for enforcement, the creation of the ICTFY "may actually be a step backwards." S. J. Lepper, "Remarks: Prosecuting and Defending Violations of Genocide and Humanitarian Law: The International Tribunal for the Former Yugoslavia" The American Society of International Law: Proceedings of the 88th Annual Meeting, Washington, D.C., April 6-9, 1994, 239 at 245.

[186] "Yugoslav Tribunal," *supra* note 25 at 277 [emphasis added].

This interpretation was echoed by other UNSC Members.[187] Clearly, the UNSC did not envision active enforcement measures in support of Tribunal indictments.

IFOR practice in the Former Yugoslavia mirrored this UNSC reluctance to support effective enforcement. The majority of this force's work involved creating a buffer zone between the parties to the conflicts, and rebuilding and securing roads and other transportation links in Bosnia.[188] On a positive note, an agreement was reached in late 1996 under which IFOR provided some limited protection to ICTFY investigators in Srpska.[189]

A high-ranking officer within IFOR summarized his view of the role of the ICTFY with the statement that enforcing the indictments of the Tribunal was, "not worth shedding the blood of one IFOR soldier."[190] Although not an official public policy statement, IFOR practice did little to refute this officer's value judgment. In fact, in one reported case, IFOR actually delayed beginning a mission in Bosnia in order to not meet Mladic en route, thus avoiding any possibility of an obligation to enforce the ICTFY indictment against him.[191] One international observer bluntly concluded that "[t]he problem in Bosnia is staying out of the way [of suspects] ... We have to work to avoid these guys."[192]

Unconfirmed reports indicate that stronger international enforcement measures to support ICTFY indictments might be forthcoming.[193] Recent activities in Bosnia suggest growing international support for more active enforcement of the *Dayton Accords*. In two separate incidents in July 1997, British soldiers in the post-IFOR international Stabilisation Force (SFOR) made efforts to apprehend individuals in the Former Yugoslavia under secret ICTFY indictment when they "came across these people irregularly in the course of ... normal duties."[194] These soldiers captured one indicted individual and shot and killed a second who resisted arrest.[195]

However, apart from these notable exceptions, international efforts have not

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[187] *Ibid.*

[188] *Schear, supra* note 178 at 92.

[189] "Update on the Tribunals" (Nov.) Update: Canadian Network for an International Criminal Court 9 (1996).

[190] *Goldstone, supra* note 172.

[191] *Ibid.*

[192] *Podgers, supra* note 168 at 61.

[193] See S. Erlanger, "Days are Numbered for Milosevic, Tudjman" *The [Toronto] Globe and Mail* (28 January 1997) A9. This report states that the US is "seriously considering plans for commandos to capture ... people indicted on charges of war crimes." See also T. Walker, "Karadzic offered an out, leader says: Bosnian Serb President reveals U.S. gave suspect chance to avoid capture" *The [Toronto] Globe and Mail* (13 August 1997) A1, A9 [hereinafter "Karadzic offered an out"].

[194] "NATO/SFOR: LANDCENT Transcript of Press Briefing, July 11, 1997" 11 July 1997, 1100 hours, Coalition Press Information Centre, Holiday Inn, Sarajevo, located on world wide web at http://www.nato.int/ifor/landcent/t970711a.htm. See also T. Appleby, "Tribunal adopts get-tough strategy: Judge accelerates war-crimes arrests" *The [Toronto] Globe and Mail* (4 August 1997) A1, A4.

[195] T. Walker, "Serb suspects caught off guard: NATO troops kill one, capture three near site of former Bosnian prison camp" *The [Toronto] Globe and Mail* (11 July 1997) A1, A8.

focussed on the arrest of ICTFY indictees.[196] Instead, SFOR has directed these activities towards the political stabilisation of Srpska, undertaking actions such as the seizure of police stations in areas maintaining loyalty to the ousted Karadzic.[197] In sharp contrast to earlier statements in support of prosecution, the US is reported to have offered Karadzic immunity from prosecution and safe passage to a third-country in an effort to stabilize the internal political situation in Srpska.[198] Domestic US political concerns over limiting American casualties, coupled with pro-Serbian French sentiments, may help to explain this general SFOR ambivalence.[199]

International enforcement efforts have so far not succeeded in removing the impression that the ICTFY was created to be merely a "fig leaf" covering previous international inaction. Ironically, many indicted criminals in the Former Yugoslavia remain active within their local police forces. The absence of any forceful international efforts to bring these men to justice leads one to wonder, "[a]re they supposed to arrest themselves?"[200] Given the substantial practical limitations posed by this lack of international enforcement, has the Tribunal succeeded in solidifying the theoretical link between justice and peace in the context of the Former Yugoslavia?

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[196] Recent news reports indicate that NATO forces from France, the Netherlands, the UK and the US have begun training for the arrest of Karadzic. NATO officials estimate that up to eight hundred soldiers, backed by helicopter gunships and armoured vehicles, would be required for such an undertaking. These reports also suggest Karadzic is considering surrendering himself to the ICTFY in return for conditions such as pre-trial detention in a favourable location. "Karadzic to turn himself in to UN, diplomat says: Bosnian war-crimes suspect may surrender for 'special' terms such as location of jail" *The [Toronto] Globe and Mail* (10 April 1998) A9 [hereinafter "Karadzic to turn himself in"]. See also P. Koring, "Leak scuttled NATO plan to abduct Karadzic: France denies operation compromised by 'questionable' behaviour of one of its officers" *The [Toronto] Globe and Mail* (24 April 1998) A8. However, these reports must be viewed with caution as Karadzic has not yet surrendered nor has he been arrested.

[197] See *e.g.* T. Walker, "NATO takes over police stations: Huge cache of arms found as West throws weight behind Bosnian Serb President" *The [Toronto] Globe and Mail* (21 August 1997) A1, A10 [hereinafter "NATO"].

[198] Walker, "Karadzic offered an out," *supra* note 193. Karadzic maintains strong support and power throughout much of Srpska. International efforts are now underway to lessen this unofficial political control. See *e.g.* "NATO," *ibid.*; T. Walker, "UN troops tear-gas Bosnian Serbs: Mobs smash peacekeeping vehicles in Karadzic's towns as revolt spreads" *The [Toronto] Globe and Mail* (29 August 1997) A1, A11 [hereinafter "UN troops"].

[199] B. D. Kaplan, "There's a reason no top Bosnian war criminals have been caught" *The [Toronto] Globe and Mail* (2 January 1998) A18.

[200] Lawrence Weschler in R. M. Brown, "*A Fronte Praecipitium A Tergo Lupi*: Towards an Assessment of the Trial of Dusko Tadic before the ICTY" (1997) 3 ILSA Int'l. & Comp. L. 597 at 599-600 fn. 7.

Although waiting for such actions is obviously not an optimal policy, a number of indicted war criminals have in fact turned themselves in to face ICTFY charges. These individuals included 4 Bosnian Serbs and 10 Croats, including the top-ranking Croatian ICTFY indictee, Dario Kordic. See *e.g.* Appleby, "UN urged not to fetter war court" *supra* note 173; M. Corder, "Bosnian Croat war-crimes suspects surrender" *The [Toronto] Globe and Mail* (7 October 1997) A11. Using information from an unnamed diplomatic source, a recent news report also suggested that Karadzic may be considering surrendering himself to the ICTFY. "Karadzic to turn himself in," *supra* note 196.

1. Immediate Effects on Peace

The ICTFY was established by the UNSC on May 25, 1993. In a superficial analysis of its immediate impact, it is obvious that its creation did not prevent the ultimate adoption of the *Dayton Accords*. However, its impact on the achievement of peace should not be so easily dismissed.

UNSC Member States were strong in their public support for the creation of an international criminal tribunal during the conflicts in the Former Yugoslavia. However, following through on this support in practice proved problematic in light of actual peace negotiations.[201] A British Foreign Office official even recommended delaying the creation of the ICTFY because "[a]rresting the warlords at the negotiating table would hardly be an effective way of achieving ... a deal."[202]

These problems were perhaps most evident in regard to the ICTFY indictment of specific Balkan leaders. Prior to the adoption of the *Dayton Accords*, then ICTFY Chief Prosecutor, Goldstone, stated his belief that the impact of indictments on the negotiation process was "irrelevant." [203] In fact, the ICTFY issued new indictments against Karadzic and Mladic, the second for both men, just as the Dayton negotiations were beginning. ICTFY Deputy Prosecutor, Graham Blewitt, acknowledged that this timing was not coincidental:

> I'd be less than frank if I said we were not conscious of that [the timing in relation to peace negotiations]. ... The indictments would send a strong reminder to negotiators that there were major criminals who had to be dealt with. We wanted to make it harder for them to do away with the tribunal.[204]

Russia was critical of these indictments. Britain and France also voiced concerns over possible reprisal versus peacekeepers in Bosnia.[205]

Regardless, the new indictments served to remind negotiators of the seriousness of the Tribunal's function, and the previous indictments effectively prevented the Bosnian Serb leaders from participating in the Dayton negotiations. Instead, these men were forced to rely on representation by FRY President Milosevic at Dayton.[206] Substantial concerns also existed, however, regarding the criminality of Milosevic himself. For example, as early as 1992, then US Secretary of State Lawrence Eagleburger publicly stated that Karadzic *and* Milosevic should in future be tried for war crimes.[207] He later observed that this statement was so controversial and unpopular that making it felt like "farting in church."[208] Richard Holbrooke, the lead US

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[201] See *e.g.* Anonymous, "Human Rights in Peace Negotiations" (1996) 18 Hum. Rts. Q. 249 [hereinafter *Anonymous*]; *Forsythe*, *supra* note 25 at 407; F.D. Gaer, "UN-Anonymous: Reflections on *Human Rights in Peace Negotiations*" (1997) 19 Hum. Rts. Q. 1; Mak, *supra* note 59 at 556; *Schmandt*, *supra* note 24 at 361.

[202] *Schmandt*, *ibid.* at 363.

[203] *Ibid.* at 358 fn. 208.

[204] *Podgers*, *supra* note 168 at 61.

[205] *Schmandt*, *supra* note 24 at 364 fn. 264.

[206] *Gaeta*, *supra* note 183 at 162.

[207] *Baker*, *supra* note 30 at 566.

[208] *Schmandt*, *supra* note 24 at 363 fn. 252.

negotiator at Dayton, substantially confirmed Eagleburger's impression by stating that it is "not my role here to make a judgment ... You can't make peace without President Milosevic."[209]

The absence of Karadzic and Mladic at Dayton may actually have served to facilitate the ultimate adoption of a Balkan peace accord. The Bosnian Serb leaders would likely not have been willing to cooperate in negotiations.[210] It is also far from clear that Bosnian Muslim or Croatian leaders would have agreed to any peace agreement which provided for an amnesty for ICTFY indictees.[211] Most early ICTFY indictments were directed against Bosnian Serbs.[212] Milosevic was therefore in the position to accept the *Dayton Accords* — without an amnesty — on behalf of the Bosnian Serbs. It is far from certain that this is an action which would have been undertaken had the Bosnian Serb leaders themselves been present at the negotiations.[213]

However, the presence of Milosevic at Dayton raises some concerns. It would certainly be problematic for justice if indictments were issued only against those with nothing to bargain.[214] Unconfirmed claims have been made that high-ranking international officials directed that evidence implicating Karadzic and Milosevic in IHL violations should not be pursued.[215] If true, this may signal a practical victory for conflict managing over democratizing, regardless of early public pronouncements by the UNSC in favour of the latter. This conclusion is strengthened with reference to the strong international political support for negotiating with Milosevic. A US official even remarked that a failure at Dayton to achieve cooperation with the ICTFY by the parties would not be a "show stopper."[216]

The pursuit of justice in the Former Yugoslavia may have actually prolonged the conflict.[217] There is some evidence to indicate that earlier international negotiators

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[209] *Anonymous*, *supra* note 201 at 253.

[210] *Thornberry*, *supra* note 57 at 74.

[211] *Schmandt*, *supra* note 24 at 366.

[212] "Answering," *supra* note 33 at 6. Concerns have been raised that indictments have been directed primarily at Serbians and do not include proportional representation of other factions involved in the war in the Former Yugoslavia. See *e.g.* Thornberry, *supra* note 57.

However, Goldstone argues that this reflects not only the more active role of Serbian forces in gross IHL violations, but also a lack of Serbian cooperation with Tribunal investigations of alleged crimes against Serbians: *Goldstone*, *supra* note 172. In some respects this argument is circular. Schrag notes that Serbian non-compliance is often justified with reference to perceived Tribunal bias. However, Schrag further argues that the careful and impartial conduct of ICTFY proceedings will likely serve to limit this superficial appearance of bias: *Schrag*, *supra* note 73 at 20-21.

[213] "Answering," *ibid.* at 6. This may also have given Milosevic greater practical responsibility for the implementation of the *Dayton Accords* than may otherwise have resulted with Karadzic and Mladic present at the negotiations.

[214] *Thornberry*, *supra* note 57 at 74-75.

[215] *Forsythe*, *supra* note 25 at 407; *Schmandt*, *supra* note 24 at 361.

[216] *Anonymous*, *supra* note 201 at 256. In fact, cooperation with the Tribunal was not expressly provided for within the *General Framework Agreement*. However, Article X, *Annex 1-A* of the *Dayton Accords* states that "[t]he Parties shall cooperate fully with all entities involved in implementation of this peace settlement .... including the International Tribunal for the Former Yugoslavia."

[217] See *e.g. Anonymous*, *ibid.*; *Mak*, *supra* note 59.

asked that the Tribunal be "toned down" as they viewed it as disruptive to the negotiations.[218] Between 1992 and the adoption of the *Dayton Accords*, there were five failed peace proposals advanced for the Former Yugoslavia. However, Gaer argues that more significant problems than the existence of the ICTFY prevented the negotiation of an earlier peace. These factors included ineffective negotiators backed by varying international support, the lack of international intervention and enforcement in support of human rights principles and the failure of negotiators to address the root causes of the Balkan conflict.[219]

If the impact of justice on the achievement of a negotiated peace is unclear, then its role as a specific deterrent is even less obvious. The existence of the ICTFY did not prevent the commission of further IHL violations in the Former Yugoslavia.[220] In fact, over two years after the passage of Resolution 827 in 1993, the greatest single atrocity of the war, the massacre of thousands of civilians in Srebrenica, occurred in July 1995.[221]

It is an entirely different question whether this lack of deterrent success resulted simply from the lack of international efforts to actually enforce IHL norms and prevent human rights abuses in the Former Yugoslavia.[222] Karadzic provided a possible, but not conclusive, answer in February 1994. Following an international threat to pursue air raids against Serbian military positions, he restrained his soldiers with the following words, "[t]he shelling of civilian targets is a war crime which will be met with severe punishment, and the enemy wants to accuse you of such crimes."[223] With this in mind, it is certainly not inconceivable that earlier forceful actions by the international community may have prevented some of the later widespread IHL abuses in the Former Yugoslavia.

2. Long-term Effects on Peace

The *Dayton Accords* were adopted less than three years ago. The recent nature of this development renders it difficult to determine beyond a doubt the impact of the ICTFY on the consolidation of post-conflict internal and international peace. A number of indications exist for the conclusion that the Tribunal may have a significant positive impact in these areas. However, as Goldstone has observed, the lack of international enforcement of justice may yet prove to be a "mortal wound" for the Tribunal.[224]

(a) *Long-Term Internal Effects*

As previous theories and policy justifications would indicate, the existence of the ICTFY could have a far-reaching impact on long-term peace in the Former Yugoslavia for a number of reasons. Possible long-term benefits include deterrence, the creation

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[218] *Mak, ibid.* at 556.
[219] *Gaer, supra* note 201 at 2-5.
[220] *Burns, supra* note 24 at 376-77.
[221] "Answering," *supra* note 33 at 6.
[222] *Forsythe, supra* note 25 at 403.
[223] *Schmandt, supra* note 24 at 353 fn. 160.
[224] *Goldstone, supra* note 172.

of a historical record of abuses, the individualization and decollectivization of guilt, the provision of closure for victims and the furtherance of legal and democratic norms. There are indications that progress has been or could be made in the consolidation of peace throughout many of these areas. However, without international enforcement of ICTFY indictments, these potential gains may well disappear.

General deterrence is an extremely difficult process to measure. This complication is compounded when deterrence is viewed in a short time frame. It appears logical to conclude, however, that if deterrence is effective when criminal sanctions are imposed domestically, the same should hold true in an international context.[225]

Unfortunately, this deterrent effect may well be negated by a lack of current enforcement of ICTFY indictments. This is especially true for leaders for whom there is now little practical accountability for wartime actions.[226] On a positive note, Rule 61 proceedings have already been initiated against some leaders, including Karadzic and Mladic, and these could serve in some minor respects to mitigate the potential negative effects of international non-enforcement.[227]

Without question, the existence of the ICTFY and the process leading to its creation led to the widespread documentation of wartime abuses within the Former Yugoslavia. Although much of this documentation began prior to the formation of the ICTFY, it is doubtful whether this UN-sponsored process would have occurred without a strong likelihood of the future prosecution of individuals accused of these IHL abuses. UNSC resolution 780(1992) requested the establishment of the Commission of Experts to gather *evidence* of such legal violations.

The creation of this historical record may serve to individualize guilt for wartime atrocities, in conjunction with the issuance of almost eighty indictments and the trial of individuals in ICTFY custody.[228] However, this process will be truly effective only if wartime leaders are actually tried.[229] The *Dayton Accords* created a basic structural framework for this individualization process. Only the most serious IHL violations would be internationally prosecuted, while those individuals responsible for "lesser" crimes would be removed from positions of power or tried in national courts in Bosnia.[230] Prosecution efforts were to be concentrated on leaders. While this indictment of leaders has begun, enforcement in this area has been virtually non-existent.[231]

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[225] This is certainly the view of Goldstone, *ibid.* See Schmandt, *supra* note 24 at 352 fn. 155. Although deterrence is a contentious subject, national criminal justice systems worldwide have historically justified punishment on the philosophical basis of deterrence. In fact, international criminal law is itself premised primarily on concepts of deterrence. See F. Hassan, "The Theoretical Basis of Punishment in International Criminal Law" (1983) 15(1) Case W. Res. J. Int'l. L. 39 at 48.

[226] *Baker*, *supra* note 30 at 566.

[227] *Burns*, *supra* note 24 at 370; *Thornberry*, *supra* note 57 at 83. For a more detailed discussion of Rule 61 proceedings see *supra* note 177 and related text.

[228] See *e.g. Schmandt*, *supra* note 24 at 353.

[229] *Thornberry*, *supra* note 57 at 85.

[230] *Kritz*, *supra* note 48 at 596.

[231] Goldstone stated that this indictment process has not yet concluded, and implied that non-Serbian political leaders may be the target of future indictments. He declined to comment on specific future indictees on the grounds that this would undermine the integrity and/or future

Ironically, ICTFY potential for the individualization of guilt may have been undermined by the *Dayton Accords* themselves. The peace agreement recognized many of the internal borders defined by processes of "ethnic cleansing" during the Yugoslav conflicts.[232] The ICTFY is not empowered to prosecute individuals accused of crimes against peace, such as the aggression which defined many of the current internal borders of Bosnia.[232] This resulted from conscious UNSG and UNSC decisions to avoid the politicization of ICTFY trials.[233] Coupled with the failure to prosecute wartime leaders, as illustrated above, this could prove extremely problematic both for the individualization of wartime guilt and in regard to the consolidation of long-term peace in the region.

As with deterrence, the provision of closure to victims is a difficult process to measure. In contrast, a strong argument may be made that the creation of an historical record of abuses followed by little actual international efforts to enforce justice may be counterproductive in the achievement of this goal.

While theoretically the creation of a criminal tribunal may serve to advance internal respect for legal and democratic norms, the realization of these goals has not occurred in the Former Yugoslavia as a result of the formation of the ICTFY. While the legitimacy of wartime leaders may have been slightly undermined by the indictment process and by Rule 61 proceedings, these leaders remain in official or unofficial power throughout the Former Yugoslavia.

(b) *Long-Term International Effects*

Once again, the actual impact of the ICTFY on long-term international peace is difficult to determine. Many of the above-outlined criticisms also apply in the international arena. Furthermore, subsequent international action has failed to convincingly consolidate the potential international gains made by the pursuit of justice in the Balkans.

The link made by the UNSC between peace and IHL has important precedential and deterrence value, especially in regard to the potential enforceability of the *Genocide Convention*.[234] However, an international failure to facilitate actual ICTFY prosecution of leaders can serve only to undermine these legal principles. For such reasons Orentlicher concludes that if the ICTFY fails, "its establishment will have done far more harm to fundamental principles of international law than if criminal accountability had

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efforts of the Office of the Prosecutor. *Goldstone*, *supra* note 172.

[232] *Baker*, *supra* note 30 at 566. This may lead to a situation foreseen by Akhavan in 1994, where:

> the enormity of the crimes left unaddressed out in the hills of Bosnia so dwarf those raised before the tribunal that it mocks justice. A trial, Nuremberg taught, puts the symbolic seal of justice on what armies have rectified with force. ... In other words, to hold a war crimes trial in the former Yugoslavia today would be like holding Nuremberg after acquiescing in the German annexation of Poland, the Ukraine, and the rest of the eastern lands.

"Yugoslav Tribunal," *supra* note 25 at 268.

[233] *Schmandt*, *supra* note 24 at 364.

[234] "Enforcement," *supra* note 70 at 243. The *Genocide Convention* has not previously been applied in an international context.

never been attempted."[235] Such a failure would significantly undermine the global credibility of IHL and would serve to highlight international impotence in the face of gross violations of human rights.[236] This is surely a dangerous precedent for the international community to set.

On the other hand, the creation of the ICTFY may have furthered efforts for the creation of an ICC.[237] This international effort could have removed some of the "more principled concerns of states," such as questions regarding potential legal jurisdiction.[238] Furthermore, the *ICTFY Rules* provide a strong foundation for procedural aspects of a future ICC. The ICTFY has also proven that international criminal trials are feasible, if difficult. However, lack of international enforcement could substantially weaken the long-term precedential value of the Tribunal.[239]

Some hope for the consolidation of international peace may be found in action undertaken by the international community subsequent to the creation of the ICTFY. As theorists have noted, for a criminal tribunal to be effective as an international deterrent and precedent, it must be followed by consistent similar action in other areas of conflict. This was the case in 1994, when the UNSC created an international criminal tribunal to address widespread acts of genocide within Rwanda.[240]

Unfortunately, the Yugoslavian and Rwandan precedents may have been seriously weakened by recent international action regarding IHL violations in Haiti. Here, the US and the UN pressured ousted President Jean-Bertrand Aristide to accept an amnesty for Haitian military leaders and others guilty of massive IHL violations.[241] This internationally-brokered amnesty sets a dangerous example, offered as it was during on-going UN action in Haiti under Chapter VII of the *UN Charter.* As Scharf warns, "like a genie that has been let out of a bottle, this precedent cannot be undone."[242] While the linkage between international peace and IHL may not have been broken in Haiti, it has certainly been weakened.

B. *Legality of the Creation of the ICTFY*

Clear theoretical and policy arguments in favour of a correlation between the international prosecution of IHL violators and the consolidation of peace in the Former

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[235] *Forsythe, supra* note 25 at 414.

[236] "Yugoslav Tribunal," *supra* note 25 at 261; *Mak, supra* note 59 at 557.

[237] See *e.g. Burns, supra* note 24 at 380; "Answering," *supra* note 33 at 6-7.

[238] *Burns, supra* note 24 at 380.

[239] "Answering," *supra* note 33 at 7.

[240] On 8 August 1994 the UNSC created the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations in the territory of neighbouring States, between 1 January 1994 and 31 December 1994. This action was undertaken pursuant to Security Council resolution 955 (1994), 8 August 1994, UN Doc. S/Res/955 (1994).

In addition to strengthening the ICTFY precedent, this action helped erase concerns over UNSC "eurocentrism" resulting from its previously unique establishment of the ICTFY to address atrocities committed only within Europe. Meron, *ibid.*

[241] See "Swapping Amnesty," *supra* note 29 at 6-8.

[242] *Ibid.* at 39.

Yugoslavia led directly to the institution of the ICTFY. These arguments are compelling and convincing. However, while in theory the creation of such a criminal tribunal may be legal under international law, this conclusion does not necessarily apply to the specific establishment of the ICTFY by the UNSC in May 1993.

As acknowledged by the UNSG, the creation of the Tribunal by the UNSC through the use of Chapter VII powers was not the approach which would have been followed "in the normal course of events."[243] Ordinarily, such a body would be created through an explicit international treaty ratified by the states to which it would apply, perhaps with the involvement of the more internationally representative UNGA. Such an international treaty would generally bind only those states expressing consent to be bound by the treaty through established formal measures such as ratification.[244]

In the specific case of the Former Yugoslavia, this "normal" approach was not followed due to a perceived need for urgent action to address the widespread and widely publicized humanitarian abuses occurring in this conflict, coupled with the obvious difficulty of achieving full Yugoslavian acquiescence to the establishment by treaty of an international criminal tribunal. In particular, the UNSG argued that the creation of an international tribunal by the UNSC:

> would have the advantage of being expeditious and of being immediately effective as all States would be under a binding obligation to take whatever action is required to carry out a decision taken as an enforcement measure under Chapter VII.[245]

Articles 25 and 48 of the *UN Charter* mandate obligatory State compliance with UNSC decisions relating to enforcement measures authorized under Chapter VII.

However, it does not automatically follow from this assertion that the specific and unprecedented creation of the ICTFY was justified under international law. And, even if this conclusion holds true, does the same finding of international legality necessarily extend to the substantive laws applicable by the ICTFY under the provisions of the *ICTFY Statute*? These two complex and interrelated issues form the basis for the following inquiry.

1. Establishment by the UNSC

A significant preliminary difficulty with an analysis of the validity of the UNSC establishment of the Tribunal is the determination of the proper forum to provide a legitimate answer. In fact, efforts to address this very question underlay many of the ICTFY responses to the defence counsel objections to UNSC jurisdiction raised in the preliminary stages of the trial of Dusko Tadic, the first contested case to come before

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[243] *Report of the Secretary-General, supra* note 20 at 7.

[244] As discussed above in "Establishment by Treaty," Article 34 of the *Vienna Convention on Treaties* provides that "[a] treaty does not create either obligations or rights for a third state without its consent." However, Article 38 provides that a third party state would nonetheless be bound by any treaty provisions considered to be customary international law. *Supra* note 126.

[245] *Report of the Secretary-General, supra* note 20 at 8.

the ICTFY.[246]

Unless the ICJ is asked to rule directly on this matter, which appears unlikely,[247] the answer of the Tribunal remains the preeminent statement on the legality of its own creation under international law. The legal principle allowing a judicial body to review the scope of its own jurisdiction is widely accepted and not unique to the ICTFY. Known as *Kompetenz-Kompetenz* or "*la compétence de la compétence*," the Tribunal recognized it as a "major part of the incidental or inherent jurisdiction of any judicial or arbitral tribunal, consisting of its 'jurisdiction to determine its own jurisdiction.'"[248] For example, Article 36(6) of the *ICJ Statute* provides that "[i]n the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."

As the ICTFY maintained, the ICJ has also affirmed the principle of a tribunal exercising the "incidental" jurisdiction necessary to analyse the validity of the UN actions leading to its own establishment.[249] The Appellate Chamber cited the ICJ argument that:

> in the exercise of its judicial function and since objections [to UNGA and UNSC

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[246] The ICTFY Appellate Chamber ruled on UNSC jurisdiction in *Prosecutor* v. *Dusko Tadic a.k.a. "Dule," Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1-AR72 (2 October 1995), 35 I.L.M. 32, 7(1) Crim. L. F. 51 at 56-73 (1996) [hereinafter *Tadic*]. This decision revised and discussed at length earlier Trial Chamber findings on the same question found in *Prosecutor* v. *Dusko Tadic a/k/a "Dule,"* Case No. IT-94-I-T, (10 August 1995).

The crimes with which Tadic was charged generally focussed on abuses perpetrated against civilians. Enumerated in ICTFY superseding Indictment IT-94-1-T, the 34 counts of violations of Articles 2, 3, and 5 of the *ICTFY Statute* charged Tadic with "willful killing, torture or inhumane treatment, inhumane acts, etc." against civilians in Bosnia, during Serb-offensives in Bosnia and at Bosnian Serb concentration camps at Omarska, Trnoplje and Keraterm in Bosnia. See generally *Brown*, *supra* note 200 at 606.

[247] An analysis of this question by the ICJ may only occur under specific circumstances (if at all). Article 34(1) of the *ICJ Statute* provides that "[o]nly States may be parties in cases before the Court." This would necessitate an application to the ICJ by a state directly affected by the establishment of the ICTFY (for instance the FRY) involving a legal action brought against another state or states. Such an action appears improbable as the creator of the Tribunal, the UNSC, is not a legal state. It would be difficult to argue that outside of the institutional context of the UNSC the individual Member States of the UNSC are legally responsible for this body's actions.

Although the ICJ is permitted greater latitude in answering requests for advisory opinions, this is also not likely to lead to an analysis by this court of the method of creation of the ICTFY. Through the operation of Article 65(1) of the *ICJ Statute* coupled with Article 96 of the *UN Charter* the ICJ may receive requests for such opinions from the UNSC, the UNGA or any organization authorized by the UNGA. However, the exercise of this option does not appear probable given the clear policy support for the ICTFY expressed by both the UNGA and UNSC.

[248] *Tadic, supra* note 246 at 60. Watson argues that this practice is not universal, however, and that international and national tribunals are often not able to exercise jurisdiction over the means of their establishment or the validity of enabling legislation. He asserts that, with this in mind, "the Tribunal's decision to assess its own legitimacy seems novel." *Watson, supra* note 55 at 705.

[249] *Tadic, ibid.* at 58-63.

> resolutions] have been advanced, the Court [ICJ], in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions.[250]

In exercising jurisdiction over the direct enforcement actions of the UNSC, the ICTFY has expanded on earlier ICJ-enunciated principles relating to UN constitutional review. Alvarez notes that this decision "strongly supports those who see the UN Charter not as unblinkered licence for police action but as an emerging constitution of enumerated, limited powers subject to the rule of law."[251] However, this has also led to some concern that the appropriate body to rule conclusively on such matters is not an *ad hoc* tribunal established by the UNSC but rather the ICJ itself.[252] The anticipated ruling by the ICJ on the merits of the *Lockerbie* case may provide a more concrete answer to this concern in the near future.

In any case, as previously outlined, the creation of a criminal tribunal by the UNSC could be legal if such an entity were established for the purpose of restoring or maintaining international peace and security under Chapter VII of the *UN Charter*. As Article 39 stipulates, the determination that a threat exists to international peace and security is within the authority of the UNSC. Although defence counsel withdrew on appeal their legal objection to this UNSC discretionary power, the Appellate Chamber of the Tribunal nonetheless affirmed this UNSC discretion in *Tadic* in non-binding *obiter* discussions.[253]

However, this Chamber's majority argument on this matter is controversial. Essentially, it indicated that past UNSC characterizations of internal conflicts as international threats authorized it to do the same in relation to the Former Yugoslavia, and the ICTFY relied on past UN actions in the Congo, Liberia and Somalia as an indication of international customary acceptance of this practice.[254] This is a rather circular argument at best, and the statement that all such UNSC characterizations garnered international acceptance rests upon contested historical foundations.[255] Furthermore, *UN Charter* Article 2(4) explicitly prohibits only the international use of force,[256] and this broad determination by the ICTFY Appellate Chamber could cause significant alarm for many members of the UN concerned by a growing perception of an international willingness to infringe national sovereignty on humanitarian grounds. The Separate Opinion of Judge Sidhwa simply states that the effects of an internal conflict will likely be international in scope. His decision in support of a UNSC determination of a threat to international peace and security is based on this far less controversial finding.[257]

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[250] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, [1971] I.C.J. Rep. 16 at 45.

[251] *Alvarez, supra* note 136 at 249.

[252] See *e.g. Watson, supra* note 55 at 702-06.

[253] See *Tadic, supra* note 246 at 66-67.

[254] *Ibid.* at 67.

[255] See *Alvarez, supra* note 136 at 256-57.

[256] However, *UN Charter*, Article 2(4), also prohibits the threat or use of force "in any other manner inconsistent with the Purposes of the United Nations."

[257] *Alvarez, supra* note 136 at 256-57.

Defence counsel for Tadic did not withdraw legal objections to the validity of the creation of the ICTFY as a measure to restore international peace and security under Chapter VII of the *UN Charter*. The Appellate Chamber responded tersely that the *UN Charter* did not prohibit the creation of a criminal tribunal as "[i]t is evident that the measures set out in Article 41 are merely illustrative *examples* which obviously do not exclude other measures."[258]

However, the "obvious" nature of this assertion is far from clear. The Appellate Chamber did not directly address the issue of the intention of the framers of the *UN Charter* to provide the means to create a body such as the ICTFY.[259] The Tribunal ruled instead that the UNSC was permitted to create the Tribunal due to the negative definition of its powers under Article 41 (*i.e.* "measures not involving the use of armed force"). This is a broad definition and concerns have been raised that it is so broad as to be ambiguous. The possible ambiguity of these enumerated powers could require an examination of the history of the *UN Charter* under the terms of the *Vienna Convention on Treaties*.[260] However, even upon a possible finding of ambiguity, it is unlikely that a legal analysis under the *Vienna Convention* would lead to an examination of the intent of the *UN Charter* framers. Under Article 31 of the *Vienna Convention* an analysis of Article 41 of the *UN Charter* based on its "ordinary meaning" with regard to its "object and purpose" (primarily international peace and security) would first have to be undertaken, and fail to resolve the ambiguity, prior to such an historical analysis.

In its ultimate rejection of the defence motion regarding UNSC jurisdiction the Appellate Chamber concluded:

> [i]t would be a total misconception of what are the criteria of legality and validity in law to test the legality of such measures *ex post facto* by their success or failure to achieve their ends (in the present case, the restoration of peace in the former Yugoslavia, in quest of which the establishment of the International Tribunal is but one of many measures adopted by the Security Council).[261]

As readily discernable, in practice this decision granted substantial deference to the decisions of the UNSC.

The opinions expressed in *Tadic* by the ICTFY in relation to its formation do not conclusively answer, without a doubt, all of the legal criticisms to which the Tribunal

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[258] *Tadic, supra* note 246 at 71 [emphasis added].

[259] In fact, an explicit intention to provide the means for the creation of judicial bodies by the UNSC did not exist in the minds of the framers of the *UN Charter*. However, as Kirgis argues, "it is not farfetched to find an implied power to create war crimes tribunals if the conditions for applying chapter VII are met and principles of fundamental adjudicatory fairness are followed." *Kirgis supra* note 6 at 522.

[260] Preparatory work of treaties may properly be used as a "supplementary means of interpretation" under the provisions of Article 32 of the *Vienna Convention on Treaties* in the event of ambiguity or absurdity in the application of general rules of treaty interpretation. For a more detailed analysis of the application of this provision to the establishment of the ICTFY see *Alvarez, supra* note 136 at 253.

[261] *Tadic, supra* note 246 at 73.

could be and has been subject.[262] However, the binding nature of UNSC measures undertaken under Chapter VII, coupled with *UN Charter* primacy over all other international agreements under Article 103, strongly favours an interpretation that the legality of actions undertaken following a determination of an international threat under Article 39, such as the creation of the ICTFY, cannot be challenged effectively under international law.[263]

2. Substantive Law Analysis

(a) *Characterization of the Conflict*

The *ICTFY Statute* provides the Tribunal with subject matter jurisdiction over four areas of international criminal law: Article 2, grave breaches of the *Geneva Conventions*; Article 3, violations of the laws or customs of war; Article 4, genocide; and Article 5, crimes against humanity. These norms form the core of modern IHL generally applicable in armed conflict. However, defence counsel in *Tadic* raised legal challenges to this subject matter jurisdiction based on arguments relating to the internal nature of the conflict in the Former Yugoslavia.

The ICTFY Appeals Chamber upheld in *Tadic* the continued legitimacy of the international/ internal dichotomy in IHL applicability noting, however, that it was a "clearly sovereignty-oriented distinction" adopted by the States Parties to IHL instruments in order to minimize potential limitations on state conduct of hostilities during armed insurrection and other internal military concerns.[264] While the Tribunal recognized that such an abstract limitation is "losing its value," it argued that this moral and political trend has not yet translated into a complete practical and legal removal of this dichotomy.[265]

While recognizing a distinction between international and internal conflict, the ICTFY supported an extended territorial applicability of IHL in all cases in a four to one majority decision on the issue in *Tadic*. This decision held that the aspects of the *Geneva Conventions* applicable in any given situation apply throughout the whole of the territories in which an armed conflict is occurring, not simply in the specific location of the actual conflict at any given time, and remain in force until the peaceful negotiated settlement of hostilities is concluded or until a peaceful settlement is achieved, in the case of an internal conflict.[266] Tadic had argued that IHL provisions did not apply to his

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[262] Alvarez advances a strong argument that these concerns and criticisms may well be misplaced. Based on political and moral necessity, he argues that:

> [f]ortunately for those who support prosecutions of these horrible crimes, the fulfilment of particularistic legal niceties may not be the sole test of legitimacy. Just as compliance with law does not ensure justice, justice may not always comply strictly with law.

Alvarez, supra note 136 at 264. This certainly holds true for the trials at Nuremberg.

[263] *Gowlland-Debbas, supra* note 136 at 660-61.

[264] *Tadic, supra* note 246 at 112.

[265] *Ibid.* at 113.

[266] *Ibid.* at 93. The Appellate Chamber held that until such a cessation of hostilities, "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

actions as there was no immediate armed conflict in the vicinity of these alleged criminal violations.[267]

However, the maintenance of the artificially dichotomous nature of IHL applicability necessitated an analysis by the ICTFY of the nature of the conflict(s) in the Former Yugoslavia. Many commentators have argued that the entire conflict in the region may be characterized as international in nature.[268] However, the Tribunal in *Tadic* did not accept such a wide ranging characterization, concluding instead "that the conflicts in the former Yugoslavia have both internal and international aspects," and that the UNSC "intended to empower the International Tribunal to adjudicate violations of humanitarian law that occurred in either context."[269]

(b) *Legality of the ICTFY Statute*

Reversing the trial decision and rejecting US *amicus curiae* submissions, the ICTFY Appeals Chamber found Article 2 of the *ICTFY Statute* applicable only in relation to conflicts of an international character. The Tribunal thus maintained previous limitations on the criminality of grave breaches of the *Geneva Conventions* under international law.[270]

ICTFY *obiter dicta* in *Tadic* gave Article 3 a far broader interpretation, arguing that this provision "functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International

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actual combat takes place there." *Ibid.*

Scharf notes that this expansive interpretation of the *Geneva Conventions* serves to undermine arguments that the ICTFY is not applying *ex post facto* law. He argues that this determination clearly constitutes the progressive development of international law rather than the application of existing law. M.P. Scharf, "A Critique of the Yugoslavia War Crimes Tribunal" (1997) 25(2) Denv. J. Int'l. L. & Pol'y. 305 at 307 [hereinafter "Critique"].

[267] For specific discussion of the argument advanced by Tadic in relation to the absence of armed conflict in the region, and the ICTFY rejection of this contention, see *Tadic, ibid.* at 90-94.

[268] Judge Li of the ICTFY Appellate Chamber dissented on this point. *Greenwood, supra* note 55 at 274. Greenwood also discusses the controversial nature of this finding, *ibid.* See also *Bassiouni, supra* note 3 at 479, who argues that strong reasons exist for a finding that the fighting in the region resulted from a single international conflict. For a more detailed discussion of the specific characteristics of conflict in the Former Yugoslavia see "Background Facts on the Yugoslavia Conflicts," above, *Bassiouni, supra* note 3 at 1-5.

[269] *Tadic, supra* note 246 at 99. This ambiguous definition of conflict in the Former Yugoslavia presents some difficulty when coupled with the maintenance by the ICTFY of distinctions between IHL applicable in international and internal armed conflict. In each case now brought before the Tribunal a characterization of the specific nature of the conflict involving the alleged actions must first be undertaken, and identical actions may have radically different legal ramifications depending upon the result. While obviously not optimal for the effective and impartial application of justice in the Former Yugoslavia, this distinction is not without precedent. An analogous case concerns US involvement in the Nicaraguan civil war, which was held by the ICJ to have "internationalized" the conflict regarding US interactions with Nicaraguan actors, while the internal actions of the original belligerents continued to be governed by internally applicable tenets of IHL. *Military and Paramilitary Activities, supra* note 143. See *e.g.* C. Emanuelli, *Les Actions Militaires de l'ONU et le Droit International Humanitaire*, la Collection Bleue (Montreal: Wilson & Lafleur, 1995) at 28.

[270] *Tadic, supra* note 246 at 101-05.

Tribunal."[271] With reference to explanatory statements made by UNSC Members subsequent to the adoption of the *ICTFY Statute* pursuant to resolution 827 (1993),[272] and following a lengthy historical analysis, the Tribunal argued that the statutory provisions underlying the prohibited acts outlined in Article 3 have gained customary international acceptance to the extent that ICTFY jurisdiction over these actions is legal "regardless of whether they occurred within an internal or an international armed conflict."[273]

Defence counsel for Tadic did not question the jurisdictional applicability of Article 4 regarding genocide, as violations of this provision were not included in the indictment against their client. However, as previously noted, it is clear that the *Genocide Convention* is applicable in all types of armed conflict and even in the complete absence of conflict. The UNSG recognized this fact, and Article 4 of the *ICTFY Statute* simply reproduces the relevant portions of this international convention.[274]

Article 5 of the *ICTFY Statute* unnecessarily restricted the application of crimes against humanity to crimes "committed in armed conflict, whether international or internal in character." The ICTFY recognized that it is "now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict ... [or to] any conflict at all."[275] The Tribunal therefore

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[271] *Ibid.* at 109.

[272] Concerns have been raised regarding the Tribunal argument that an expansive interpretation of Article 3 may in part be justified by the uncontested nature of the explanatory statements of some UNSC Members *after* the adoption of the *ICTFY Statute*. These statements did not form the basis for the adoption of the *ICTFY Statute* by the UNSC as a whole but rather indicated the underlying reasons for individual Member State support. For example, the ICTFY in *Tadic* cited the US delegate's statement that:

> it is understood that the "laws or customs of war" referred to in Article 3 include all obligations under humanitarian law agreements in force on the territory of the former Yugoslavia at the time the acts were committed, including common article 3 of the 1949 Geneva Conventions, and the 1977 Additional Protocols to these Conventions.

Ibid. at 108. The Tribunal also noted that the Hungarian delegate stressed:

> the importance of the fact that the jurisdiction of the International Tribunal covers the whole range of international humanitarian law and the entire duration of the conflict throughout the territory of the former Yugoslavia.

Ibid. For a detailed discussion of the questionable nature of legal reasoning based on the retroactive application of these explanations to the underlying rationale of the UNSC adoption of the *ICTFY Statute* see *Watson*, *supra* note 55 at 711-13.

[273] *Tadic*, *ibid.* at 134. The discussion of the applicability of Article 3 to armed conflicts of international and/or internal character is outlined in *Tadic*, *ibid.* at 106-134. As these arguments were not necessary for the ultimate disposition of the issues in *Tadic* they simply reflect the opinion of the ICTFY on the likely current state of international law. For a discussion of potential problems involved with raising this important issue in *obiter dicta* see *Greenwood*, *supra* note 55 at 276-279.

[274] *Report of the Secretary-General*, *supra* note 20 at 123.

[275] *Tadic*, *supra* note 246 at 135. Meron recognizes that "[t]he Tribunal's affirmation that crimes against humanity can be committed in peacetime is of major importance." T. Meron, "The Continuing Role of Custom in the Formation of International Humanitarian Law" (1996) 90 Am.

rather easily concluded that international law supports the applicability of Article 5 to actions undertaken in all types on conflict in the Former Yugoslavia.

(c) *Individual Criminal Responsibility and the Duty to Prosecute*

Article 7 of the *ICTFY Statute* provides for individual criminal responsibility for breaches of Articles 2 through 5. Grave breaches of the internationally-applicable provisions of the *Geneva* and *Hague Conventions* have always incurred individual criminal responsibility. Genocide and crimes against humanity legally have also incurred individual criminal responsibility.[276]

However, the individual criminalization of breaches of the internally-applicable common Article 3 is a recent development which occurred only through the judgment in *Tadic*.[277] Such an extension of the criminalization of IHL violations to internal conflicts appears logically to follow from the earlier limited extension of IHL applicability to such conflicts.[278] There are obviously good moral reasons for this extension.[279] Strong legal justifications also exist for such a finding. For example, internal atrocities of this nature were already criminal under the Military Code of Conduct of the SFRY and the Criminal Code of the FRY.[280] This addresses many of the concerns regarding the potential application of *ex post facto* laws at the Tribunal by ensuring conformity with the twin legal principles, *nullum crimen sine lege* and *nulla poena sine lege*.

The ICTFY also addressed the existence of a duty on states to prosecute IHL violations in the Former Yugoslavia. In the case of grave breaches of the internationally-applicable provisions of the *Geneva* and *Hague Conventions*, or in the event of genocide, an absolute legal obligation for either the prosecution or the extradition to a state which will prosecute exists in regard to alleged individual violators.[281] However, *Tadic* did not extend the duty to prosecute violations of the *Geneva Conventions* to the provisions governing the regulation of internal conflict.[282]

V. CONCLUSION

In theory and in principle there are substantial reasons for the creation of a criminal tribunal as a measure to consolidate peace. The immediate impact of such an institution on peace negotiations remains unclear at best. However, regardless of its immediate

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J. Int'l. L. 238 at 242. It must be cautioned, however, that this ICTFY argument is also *obiter dicta*.

[276] For a general discussion of this issue see *e.g.* "International Criminalization," *supra* note 156 at 558; "Swapping Amnesty," *supra* note 29 at 20-39.

[277] *Tadic*, *supra* note 246 at 104, 110, 130-31.

[278] See *e.g. Greenwood*, *supra* note 55 at 280-81.

[279] For a detailed discussion of the evolution of internal individual criminal application of IHL see "International Criminalization" *supra* note 156.

[280] Relevant portions of these documents are reprinted as, respectively, Appendices II and III of *Bassiouni*, *supra* note 3 at 633, 679.

[281] "Swapping Amnesty," *supra* note 29 at 20; *Tadic*, *supra* note 246 at 104-05.

[282] *Tadic*, *ibid.* at 105.

impact, an international criminal tribunal can serve to significantly strengthen long-term post-conflict regional and international peace.

The UNSC created the ICTFY for the ostensible purpose of holding individuals accused of wartime atrocities accountable before an international court of law for their actions. This action was legal. However, actual international support for this endeavour has been extremely problematic. Apart from two recent isolated incidents, international efforts to support the work of the Tribunal through the enforcement of its decisions have been virtually non-existent.

If this trend continues, it will remain exceedingly difficult to refute the characterization of the ICTFY as nothing more than a "fig leaf" designed to cover the inaction of the international community in the face of a scale of atrocities not witnessed in Europe since the end of the Second World War. The precedent that this inaction may set could be dangerous not only for the Former Yugoslavia but throughout the international community.

The single most important conclusion which can be drawn from the Yugoslav example is that principles mean little without a corresponding willingness to ensure their fulfilment. In fact, if the ICTFY illustrates anything, it is that half-hearted efforts to achieve justice in the face of conflict are dangerous for the achievement and consolidation of peace. A significant lesson for the future may be that while an ICC with jurisdiction over IHL violations may be a valid and principled idea, its premature creation without corresponding enforcement capabilities and an international willingness to use such powers would render such a court useless and possibly harmful to the maintenance of peace. This is also a lesson which the international community would be well-advised to heed prior to any future creation of additional *ad hoc* criminal tribunals to address IHL violations in conflicts in other areas of the world. Perhaps the most telling example of all was provided in 1993 by a colonel in the Yugoslav People's Army who lamented, "[s]omehow, we have to be rescued. Without principles we shall keep going down and down into hell."[283]

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[283] *Thornberry, supra* note 57 at 82.