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From Nuremberg to Bosnia: Consistent Application of International Law

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I. INTRODUCTION

In the post-1945 era, international human rights law has undergone a dramatic shift, from almost total absorption with the protection of aliens to an ever-widening concern for the way governments treat their own citizens in virtually every aspect of human endeavor. Certainly, the major catalyst for this positive turn of events was the Nazi slaughter of six million Jews.

The ad hoc International Military Tribunal at Nuremberg in 1945-46 was a milestone event in the development of international law. It infused international law with fundamental moral principles that contributed to the modern international law of human rights. The facts of international life, however, seem to make a mockery of the Nuremberg principles. Events in the former Yugoslavia stand in striking contrast to the hopes implicit in the Nuremberg judgments. The commission of crimes in Bosnia defies well-established rules of international law and completely disregards elementary dictates of humanity.

This note argues that international law, properly informed by the Nuremberg principles, deserves consistent application by the ad hoc International Tribunal (hereinafter Yugoslav Tribunal) in "prosecut[ing] persons responsible for serious violations of international humanitarian law

committed in the territory of the former Yugoslavia [since] 1991 . . ."¹ At the request of the Security Council of the United Nations (hereinafter UN), the UN Secretary-General submitted a proposal to create the Yugoslav Tribunal to prosecute responsible persons in the former Yugoslavia.² The Security Council approved that report and, acting under Chapter VII of the United Nations Charter, adopted the Statute of the International Tribunal annexed to that report.³ In so doing, the Security Council consistently imparted the Nuremberg principles regarding *nullum crimen sine lege* (no crime without law) and individual responsibility to the Statute of the Yugoslav Tribunal.

In November of 1992, prior to the adoption of the Statute, the American Bar Association (hereinafter ABA) offered its assistance to the United Nations regarding the punishment of persons accused of war crimes or crimes against humanity in Bosnia-Herzegovina.⁴ As a result, the ABA Section of International Law created a Task Force to analyze the Statute and report on its implementation.⁵ The Task Force submitted a report to the UN which supported the creation of the Yugoslav Tribunal, but offered modifications of the Statute.⁶ Although the Statute has already been adopted, the Task Force

¹Statute of the International Tribunal, art. 1 [hereinafter Statute]. Acting under Chapter VII of the Charter of the United Nations, this Statute was adopted by the Security Council pursuant to paragraph 2 of Security Council Resolution 827. See S.C. Res. 827, U.N. SCOR, § 2, Doc. S/25626 (1993). Chapter VII of the U.N. Charter provides the Security Council with the power to carry out its function of maintaining and restoring international peace and security. The Security Council, moreover, established the Yugoslav Tribunal in Resolution 827. See CHARTER OF THE UNITED NATIONS, Chapter VII.

²The Report of the Secretary-General was submitted in May of 1993. See *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, Doc. S/25704 (1993) [hereinafter *Sec-Gen. Rep.*] (unpublished report on file with author). The Security Council decided in paragraph 1 of resolution 808 (1993) of February 22, 1993, that the Yugoslav Tribunal would be established. *Id.* at 3. This provision was later adopted by the Council in resolution 827. *Supra* note 1. Paragraph 2 of Resolution 808 requested the Secretary-General to submit a report on "all aspects of th[e] [Yugoslav] matter" *Sec-Gen. Rep.*, *supra* at 3. The report's primary purpose was to provide a detailed plan for the Yugoslav Tribunal's structure and legal procedures. *Id.* at 6.

³*Supra* note 1.

⁴At its meeting in November of 1992, the Board of Governors of the American Bar Association adopted a resolution which offered the ABA's assistance. Pursuant to the mandate of that resolution, the Section of International Law and Practice established the Task Force on War Crimes in the Former Yugoslavia [hereinafter Task Force]. See SPECIAL TASK FORCE OF THE ABA SECTION OF INTERNATIONAL LAW AND PRACTICE, REPORT ON THE INTERNATIONAL TRIBUNAL TO ADJUDICATE WAR CRIMES COMMITTED IN THE FORMER YUGOSLAVIA 1 (1993) [hereinafter ABA REP.].

⁵*Id.*

⁶*Id.* at 2.

believes that the UN may still consider its recommendations before implementing the Statute.⁷

This note argues that such modifications need not be considered any further for the following two reasons. First, as the result of universal acceptance of the Nuremberg judgment as customary international law,⁸ some of the proposed changes are superfluous. Second, other modifications detour significantly from the path of consistency. Thus, the modifications as set forth by the Task Force should continue to be disregarded by the Security Council.

Part II of the note briefly explores the history of the Nuremberg proceedings and the law of war. This background is necessary to fully appreciate the principles embraced at Nuremberg. Part III examines several of the principles set forth at Nuremberg and addresses how these principles have been integrated into modern international law. The primary focus is on the principle of *nullum crimen sine lege*, relating to the defense of ex post facto law, and the principle of individual responsibility as regards the defense of superior orders. Parts IV and V, respectively, examine the major events leading to the establishment of the Yugoslav Tribunal and adoption of the Nuremberg principles by the Tribunal.

II. THE NUREMBERG CONTRIBUTION

The International Military Tribunal (hereinafter IMT) and the war crimes trials held in Nuremberg from 1945-46 are continuously looked to as a source and test of the international law of war.⁹ Although other military tribunals have existed since World War II, none possess the precedential value that has been attributed to Nuremberg.¹⁰ The trial of the major war criminals at Nuremberg

⁷*Id.* Although the Task Force would like the UN to further consider its recommendations, the Security Council is under no obligation to do so.

⁸*See Sec-Gen. Rep., supra* note 2, at 10, § 35.

⁹TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 4 (1992). An assistant prosecutor in the first trial of Nazi leaders at Nuremberg, Germany, in 1945, Mr. Taylor became the chief prosecutor in the subsequent war crimes trials. *See* 1-15 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (Oct. 1946-Apr. 1949) [hereinafter CONTROL COUNCIL]. These legal prosecutions were waged by the military tribunals of the occupational authorities in their respective zones. American military tribunals operated in Nuremberg pursuant to Allied Control Council Law No. 10 (signed December 20, 1946, by the Control Council). TAYLOR, *supra*, at 275. According to Mr. Taylor, "Control Council Law No. 10, together with the amended Executive Order, laid the legal and administrative basis for the war crimes cases at Nuremberg which were to follow the pending trial before the International Military Tribunal." *Id.* at 276. Control Council Law No. 10 established uniform legal bases of punishment. *Id.* at 275. The principles discussed in Section III are those of the International Military Tribunal, as well as the subsequent American trials. Thus, the principles discussed will encompass the Nuremberg Charter, the agreement of the major powers that defined the jurisdiction and functions of the ad hoc Nuremberg Tribunal, and Control Council Law No. 10.

¹⁰ABA REP., *supra* note 4, at 5. Paralleling the Nuremberg proceedings was an extensive trial in Tokyo of both civil and military Japanese leaders accused of

was the first major attempt to punish the perpetrators of crimes cruel and inhuman to a degree not previously known to humanity.¹¹

Millions of innocent civilians, including Jews, Gypsies, and homosexuals, were systematically murdered by the Nazis.¹² Prisoners of war and civilian populations were tortured and murdered at will.¹³ Some innocent civilians were subjected to the Nazis' infamous medical experiments conducted specifically to evoke the utmost pain and suffering.¹⁴ Entire populations were deported to provide slave labor under the most horrible conditions in German factories.¹⁵ Moreover, random villages were destroyed and their inhabitants disposed of as suited the German purposes.¹⁶ The list of war crimes and crimes against humanity is virtually endless.¹⁷ Undoubtedly, the majority of these crimes arose from the Nazi conception of "total war," where everything, from rules and regulations to assurances and treaties, became subordinate to the overpowering dictates of war.¹⁸

A. The Law of War

Throughout history, war has consistently been restricted by humanity. These limits are designed to protect certain classes of enemy persons during war. Evidence of such limits can be traced back to the 1907 Hague Conventions¹⁹

responsibility for waging a war of aggression. The Tokyo trials lasted two and a half years but have not become as significant a precedent as Nuremberg. *Id.* at 4.

¹¹ See generally 24-42 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL (1947) [hereinafter IMT] (documents in evidence at Nuremberg).

¹² ROBERT E. CONOT, JUSTICE AT NUREMBERG 37-38 (1983) (describing the abundance of German documents available to the International Military Tribunal).

¹³ *Id.* at 227; see also 1 IMT, *supra* note 11, at 227.

¹⁴ CONOT, *supra* note 12, at 286-96.

¹⁵ 1 IMT, *supra* note 11; TAYLOR, *supra* note 9, at 427-31 (describing forced labor program).

¹⁶ CONOT, *supra* note 12, at 227; see also 1 IMT, *supra* note 11, at 228.

¹⁷ The Charter of the International Military Tribunal, which defined the constitution, jurisdiction, and functions of the IMT, lists three types of crimes for which the Nazis were indicted: (a) crimes against peace, (b) war crimes, and (c) crimes against humanity. CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL, reprinted in 1 IMT 173, *supra* note 11, art. 6, at 173-74 [hereinafter NUREMBERG CHARTER]. Any references in Sections IV and V of this note to Article 6 of the Charter will only pertain to (b) and (c), for the crimes within the Bosnia Tribunal's jurisdiction do not involve crimes against peace.

¹⁸ 1 IMT, *supra* note 11, at 226-27.

¹⁹ See Hague Convention (No. IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations [hereinafter Hague Regulations], 36 Stat. 2277, T.S. No. 539; JAMES BROWN SCOTT, THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907 (2d ed. 1915).

and the Geneva Convention of 1929,²⁰ where the modern law of war has its roots.

The progressive development of norms of humanitarian law culminated after World War II in the adoption of the Geneva Conventions of 1949.²¹ Each of the four conventions of 1949 further endorsed the 1929 Geneva Convention by qualifying violations of humanitarian law.²² The 1977 adoption of the supplementary protocols to the Geneva Conventions of 1949 affirmed and expanded upon the norms of humanitarian law.²³

The Hague and Geneva Conventions contributed to the development of modern international law. The law of war, however, is to be found not only in conventions and treaties, but in the customs and practices of states and the general principles of law recognized by civilized nations.²⁴

The IMT reminded the world that international law is not the product of an international legislature, and that international agreements have to deal with general principles of law, and not with administrative matters of procedure.²⁵ The law of war is not static, but by continual adaptation follows the needs of a changing world.²⁶ Indeed, in many cases, treaties do no more than express and define for more accurate reference the principles of law already existing.²⁷ The Nuremberg principles, therefore, have become a part of international customary law.

The IMT and the national tribunals that acted in accordance with its principles defended profoundly humane values—life, liberty, human dignity,

²⁰Convention of Treatment of Prisoners of War, Geneva, July 27, 1929; see G.I.A.D. Draper, *The Development of International Humanitarian Law*, in INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW 67 (1988) (discussing the role of the 1929 Geneva Convention).

²¹Geneva Conventions of 1949, 75 U.N.T.S. 31-32, 85-96, 135-36, 287-88.

²²See *id.*

²³See Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (entered into force, Dec. 7, 1978), reprinted in 16 I.L.M. 1391 (1977), and Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (entered into force, Dec. 7, 1978), reprinted in 16 I.L.M. 1442 (1977).

²⁴Charter of the United Nations and Statute of the International Court of Justice, June 26, 1945 (entered into force Oct. 24, 1945), art. 38, § 1, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153, 1976 Y.B.U.N. 1052 [hereinafter Statute of ICJ]; 1 IMT, *supra* note 11, at 221; see also GEORGE GINSBURGS & V.N. KUDRIAVTSEV, THE NUREMBERG TRIAL AND INTERNATIONAL LAW 172 (1990) ("The Hague and Geneva rules have become part of general international law and bind all states irrespective of whether they ratified this or that convention.").

²⁵1 IMT, *supra* note 11, at 221.

²⁶*Id.*

²⁷*Id.*

culture, peace and human rights.²⁸ The Nuremberg principles are proof for the peoples of the world that these principles can be used to prosecute violations of international humanitarian law no matter where they occur in the world.²⁹ According to UN Secretary-General Boutros Boutros-Ghali:

The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the International Military Tribunal of 8 August 1945.³⁰

Nuremberg, therefore, is an established legal precedent, and its principles are a vital part of international law today.³¹

Conventional international law evidences the United Nations' dedication to continue to promulgate human rights resolutions that further elaborate the Nuremberg principles.³² As Secretary-General Boutros-Ghali demonstrated, these resolutions have succeeded in promoting and establishing respect for human rights as a part of customary international law.³³

²⁸GINSBURGS & KUDRIAVTSEV, *supra* note 24, at 282-83; see CONTROL COUNCIL, *supra* note 9.

²⁹In a unanimous resolution adopted in 1946, the UN General Assembly affirmed the principles of international law recognized by the Nuremberg Charter. See U.N.G.A. Res. 95(I), U.N. Doc. A/236, at 1144 (1946).

³⁰*Sec-Gen. Rep.*, *supra* note 2, at 9.

³¹*Id.*

³²Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948 (entered into force, Jan. 12, 1951), 78 U.N.T.S. 277 [hereinafter Genocide Convention]; Universal Declaration of Human Rights, Dec. 10, 1948, U.N.G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948); International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, U.N.G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. No. 16, at 49, U.N. Doc. A/6316 (1967), *reprinted in* 6 I.L.M. 360 (1967); International Covenant on Civil and Political Rights, Dec. 16, 1966, U.N.G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1967), *reprinted in* 6 I.L.M. 368 (1967); Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, Nov. 25, 1981, U.N.G.A. Res. 36/55, 36 U.N. GAOR, Supp. No. 51, at 171, U.N. Doc. A/36/684 (1981), *reprinted in* 21 I.L.M. 205 (1982); Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984 (entered into force June 26, 1987), U.N.G.A. Res. 39/46 Annex, 39 U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. E/CN.4/1984/72, Annex (1984), *reprinted in* 23 I.L.M. 1027 (1984).

³³*Sec-Gen. Rep.*, *supra* note 2, at 9; see also BURNS H. WESTON ET AL., INTERNATIONAL LAW AND WORLD ORDER 733 (2d ed. 1990) ("Moreover, any doubts we may feel as to the effectiveness of conventions as an instrument of change should not blind us to their important role as an obstacle to retrogression. Conditions change and seemingly unimportant ramifications today may become significant tomorrow . . .").

B. Significant Provisions of the Nuremberg Charter

The Nuremberg Charter and judgment left an indelible mark on the law of war, particularly because it encompassed the notion of individual responsibility for violations of international law.³⁴ The following acts were considered crimes for which the International Military Tribunal found individual responsibility:

(a) **CRIMES AGAINST PEACE:** namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

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

(c) **CRIMES AGAINST HUMANITY:** namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.³⁵

Provisions (b) and (c) of Article 6 involve norms regarding military operations and the protection of human rights in military conflicts, respectively. These are the norms that constitute international humanitarian law and strive to suppress and prevent war crimes.

The Nuremberg Charter also provided that "[t]he official position of defendants, whether as Heads of State or responsible officials in Government departments, shall not be considered as freeing them from responsibility."³⁶ Further, "[t]he fact that the Defendant acted pursuant to order of [the]

³⁴For example, Article 6 held leaders, organizers, instigators, and accomplices all responsible for the execution of plans by any individuals. NUREMBERG CHARTER, *supra* note 17, art. 6 (enumerating crimes for individual responsibility); see Gary Komarow, *Individual Responsibility Under International Law: The Nuremberg Principles in Domestic Legal Systems*, 29 INT'L & COMP. L.Q. 21, 22-24 (1980) ("From time immemorial, customary international law has established individual responsibility for violation of some of its general norms.").

³⁵NUREMBERG CHARTER, *supra* note 17, art. 6, T. 17 (a), (b), (c); see 1 CONTROL COUNCIL, *supra* note pmb1., art. 2 (listing corresponding definitions of these crimes).

³⁶NUREMBERG CHARTER, *supra* note 17, art. 7.

Government or of a superior shall not free [the individual] from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."³⁷ These provisions relate to the defense of superior orders, an individual's attempt to shift the responsibility for the crime committed. The following section expounds on this defense.

III. MAJOR PRINCIPLES THAT EMERGED FROM NUREMBERG AND HOW THEY HAVE BEEN INCORPORATED INTO INTERNATIONAL LAW

The crimes set forth in Article 6 of the Charter are the crimes that seem impossible to prevent, to avoid, or to forget. And they have a way of focusing the mind. The defendants at the Trial of the Major War Criminals at Nuremberg, however, focused on the protection that they believed the law afforded them, by asserting the defenses of *ex post facto* application of law and the related principle of *nullum crimen sine lege* (no crime without law) and the defense of superior orders and the related principle of individual responsibility.³⁸

A. The Status of Aggressive War

A great controversy existed relating to the legal criminal status of waging aggressive war.³⁹ The defendants challenged the Tribunal's authority to make aggressive war a crime.⁴⁰

It was urged [at Nuremberg] on behalf of the defendants that a fundamental principle of all law—international and domestic—is that there can be no punishment of crime without a pre-existing law. "*Nullum crimen sine lege, nulla poena sine lege.*" It was submitted that *ex post facto* punishment is abhorrent to the law of all civilized nations, that no sovereign power had made aggressive war a crime at the time that the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its

³⁷*Id.* art. 8.

³⁸1 IMT, *supra* note 11, at 219. An "*ex post facto*" law is a law passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed. Further, it is every law which, in relation to the offense or its consequences, alters the situation of a person to his disadvantage. BLACK'S LAW DICTIONARY 580 (6th ed. 1990). Historically, *ex post facto* law also refers to the situation of an act being generally regarded as criminal and otherwise wrong at the time of commission but lacking authoritatively an expressly prescribed punishment at that time. WESTON, *supra* note 33, at 55. *Ex post facto* is based on the maxim *nulla poena sine lege*, no punishment without law. JOHN A. APPLEMAN, MILITARY TRIBUNALS AND INTERNATIONAL CRIMES 47 (1971).

³⁹1 IMT, *supra* note 11, at 219-23; *see* United States v. Von Leeb ("The High Command Case"), 10 CONTROL COUNCIL, *supra* note 9, at 364-66 (closing statement for defendant Von Leeb); TAYLOR, *supra* note 9, at 581.

⁴⁰The Tribunal held that the Charter made aggressive war a crime, and that it was "therefore not strictly necessary to consider whether and to what extent aggressive war [had previously been] a crime . . ." 1 IMT, *supra* note 11, at 219.

commission, and no court had been created to try and punish offenders.⁴¹

The indictment charged the defendants with crimes against peace "by the planning, preparation, initiation, and waging of wars of aggression, which were also wars in violation of international treaties, agreements, and assurances."⁴² As a result, the defendants applied the ex post facto defense to those charges.⁴³

The Tribunal used the 1928 Pact of Paris to convict the Nazi defendants on violations of crimes against peace.⁴⁴ It was the Tribunal's belief that nations who signed the treaty or adhered to it unconditionally condemned recourse to war for the future as an instrument of policy and expressly renounced it.⁴⁵ The signatories declared in Article 1 of the Pact of Paris that "they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations to one another."⁴⁶ The Tribunal further held that renunciation involved the notion that such a war is illegal in international law.⁴⁷

The defendants argued that the Pact did not expressly claim that aggressive wars are crimes or set up courts to try those who make such wars.⁴⁸ The defendants made the same argument relating to the rules of the Hague Convention. They claimed that the rules of the Hague Convention were obsolete and obedience to orders and military necessity justified everything they had done.⁴⁹ The Tribunal agreed that, like the Pact of Paris, the Hague Convention did not expressly enact that certain methods of waging war are criminal.⁵⁰ The Tribunal considered it sufficient, however, that these prohibitions had been enforced long before 1907 and that individuals guilty of

⁴¹*Id.*

⁴²*Id.* at 171. This charge is further documented in Article 6 (a) of the Charter. *See supra* note 17.

⁴³TAYLOR, *supra* note 9, at 581-82; *see also* 3 IMT, *supra* note 11, at 91, 93-601.

⁴⁴1 IMT, *supra* note 11, at 219-20. The Pact (also known as the Kellogg-Briand Pact) was binding on Germany at the outbreak of war in 1939. *Id.* at 219; *see also* TAYLOR, *supra* note 9, at 20 (discussing Pact's existence before the Charter as a treaty of nonaggression so that no element of ex post facto existed regarding crimes against peace).

⁴⁵1 IMT, *supra* note 11, at 220; *see also* TAYLOR, *supra* note 9, at 20.

⁴⁶1 IMT, *supra* note 11, at 220.

⁴⁷*Id.* The Tribunal's opinion on the illegality of aggressive war international law defeated the defendants' challenge relating to the legal effect of the Pact. *Id.*

⁴⁸*Id.*

⁴⁹TAYLOR, *supra* note 9, at 487.

⁵⁰1 IMT, *supra* note 11, at 220.

violating such prohibitions had previously been tried and punished by military tribunals.⁵¹

The problems that certain Nazis had with the vagueness of the Charter's laws defining crimes were insignificant in the light of their knowledge of the illegality of aggressive war.⁵² In the words of Judge Walter Beals:

To assert that it is *unjust* to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances, the attacker must know that he is doing wrong; and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.⁵³

Judge Beals also believed that the defendants occupied positions in the Nazi hierarchy where they would have known of treaties and that therefore, the defendants must have known that deliberate acts of aggression and invasion were clearly in violation of international law.⁵⁴ Those who know they are wrong when they act should be prepared to accept a fair punishment.

In complete defiance of the Nuremberg judgment and the principles set forth therein, the view has been advanced that under *nullum crimen sine lege*, punishment on the grounds of the customary law or on the grounds of the general principles of justice or by analogy is forbidden.⁵⁵ Further, only a clear formulation of the criminal laws is to be observed, as a judge interpreting a vague law may easily create a new offense under the pretext of applying the law.⁵⁶

The Nuremberg Charter and judgment are the documents that most articulately demonstrate that the world does not subscribe to a legalistic notion

⁵¹*Id.* at 221. It was the Tribunal's opinion that "those who wage aggressive war are doing that which is equally illegal, and of much greater moment than a breach of one of the rules of the Hague Convention." *Id.*

⁵²*Id.* at 220.

⁵³PAUL BURMAN, *THE FIRST GERMAN WAR CRIMES TRIAL: CHIEF JUDGE WALTER B. BEALS' DESK NOTEBOOK OF THE DOCTORS' TRIAL, HELD IN NUREMBERG, GERMANY, DECEMBER, 1945 TO AUGUST, 1947* 72 (1985). Judge Walter Beals served as Presiding Judge over the Doctors' Trial, one of the subsequent Nuremberg proceedings that occurred under Control Council Law No. 10. During the nine months of that trial, some of the most brilliant and influential German doctors and medical administrators were brought to account for the murder and mutilation of thousands of human test subjects. *Id.*

⁵⁴*Id.* The Tribunal declared that "the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice." 1 IMT, *supra* note 11, at 219. In line with Judge Beals' beliefs, the Tribunal was inclined to rule out any *ex post facto* defense against crimes against peace on the basis of this interpretation alone. *Id.*

⁵⁵STANISLAW POMORSKI, *AMERICAN COMMON LAW AND THE PRINCIPLE NULLUM CRIMEN SINE LEGE* 25 (1975).

⁵⁶*Id.* Interpretation of indecisive language is believed to promote arbitrary judicial power. *Id.*

of the law of war, but rather to a more general notion of moral tolerance.⁵⁷ A legalistic view of the law of war may be more appropriate for common law. The function of international law, however, is to establish broad general principles of law and justice recognized by nations.

The role of custom in international law should be emphasized to demonstrate the greater freedom associated with *ex post facto* application of international law.⁵⁸ For example, the prologue to the Hague Convention specifies that:

[I]n cases not included in the Regulations adopted by [the contracting parties], the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.⁵⁹

Thus, written rules on aggressive war were not necessary in order to convict and punish individuals for the commission of aggressive war.⁶⁰ And subsequently, no *ex post facto* application of law occurred when the defendants were convicted and punished by the Tribunal for the commission of crimes against peace.

B. War Crimes and Crimes Against Humanity

The International Military Tribunal was bound by the Charter's definitions of war crimes and crimes against humanity.⁶¹ The crimes defined in Article 6 (b), however, were already recognized as war crimes under international law.⁶² Further, the documentary and oral evidence that the prosecution presented left no doubt that international law had been violated to a degree never before known.⁶³ The *ex post facto* argument, therefore, was not applied to Count Three (war crimes).⁶⁴

⁵⁷E. Thomas Moroney, Jr., *Military Dissent and the Law of War: Uneasy Bedfellows*, 58 S. CAL. L. REV. 871, 877 (1985).

⁵⁸APPLEMAN, *supra* note 38, at 48 ("For in international law there is no restriction as to *ex post facto* law—the question can be only the enforcement of law which is found in the common conscience . . .").

⁵⁹Hague Regulations, *supra* note 19, at 2280.

⁶⁰TAYLOR, *supra* note 9, at 485.

⁶¹1 IMT, *supra* note 11, at 253.

⁶²*Id.* War crimes, as defined by the Charter, "were covered by Articles 46, 50, 52, and 56 of the Hague Convention of 1907, and Articles 2, 3, 4, 46, and 51 of the Geneva Convention of 1929." *Id.*; see also *supra* notes 49-51.

⁶³1 IMT, *supra* note 11, at 226-27.

⁶⁴The Tribunal found: "[t]hat violation of [the] provisions [in the Hague and Geneva Conventions regarding war crimes] constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument." *Id.* at 253.

The defendants argued, instead, that the Hague Convention did not apply at all.⁶⁵ They pointed to Article 2 of the Convention which provides: "The provisions contained in the Regulations [Respecting the Laws and Customs of War on Land] referred to in Article 1, as well as in the present Convention, do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention."⁶⁶ In the eyes of the Tribunal, this argument was a red herring.⁶⁷ What mattered was that the rules of the Convention had been "recognized by all civilized nations and were regarded [, moreover,] as declaratory of the laws and customs of war . . . referred to in Article 6 (b) of the Charter."⁶⁸

The war crimes committed by the Nazis were so atrocious that no legal precedent would have been necessary in order to punish the defendants. Villages were burned and their inhabitants buried dead or alive.⁶⁹ German hospitals were established, not to heal, but to kill the patients.⁷⁰ Human beings served as guinea pigs in the infamous Nazi medical experiments.⁷¹ Others were deported to partake in the Nazis' forced labor program for as long as they could withstand it.⁷² Gas chambers and crematoriums awaited at the concentration camps.⁷³ The world's conscience convicted the defendants. Any *ex post facto* claim would have been laughable.

With regard to Count Four (crimes against humanity), the overwhelming and damning evidence of the Nazis' vast scale of racial and religious persecution again eliminated concern about *ex post facto* claims.⁷⁴ On the road to colonization, the Nazis searched only for people of "purely Germanic blood."⁷⁵ The "final solution" consisted of the planned and systematic

⁶⁵*Id.*

⁶⁶Hague Regulations, *supra* note 19, art. 2.

⁶⁷The Tribunal felt that it was not necessary to decide the question of the status of several belligerents with regard to the 1907 Hague Convention. 1 IMT, *supra* note 11, at 253-54.

⁶⁸*Id.* at 254.

⁶⁹TAYLOR, *supra* note 9, at 314.

⁷⁰*Id.* at 312.

⁷¹*Id.* at 301.

⁷²See 1 IMT, *supra* note 11, at 243-47. Certain crimes overlap and are, therefore, counted as war crimes and crimes against humanity. Deportation is such a crime. See NUREMBERG CHARTER, *supra* note 17, at art. 6, §§ (b), (c).

⁷³1 IMT, *supra* note 11, at 251-52.

⁷⁴*Id.* at 254. The closest argument that remotely resembled an *ex post facto* claim involved Dr. Robert Servatius' defense of Fritz Sauckel. TAYLOR, *supra* note 9, at 485 (relating Servatius' claim that the Charter did not clearly define certain crimes); cf. TAYLOR, *supra* note 9, at 428-29 ("But deportation . . . was a crime under the provisions of the Hague Conventions.").

⁷⁵1 IMT, *supra* note 11, at 237.

annihilation of the Jews.⁷⁶ Human ashes were used for fertilizer, and fat from the victims' bodies proved resourceful in the manufacture of soap.⁷⁷

It is not possible to recount fully the instances of horror in this note. The systematic implementation of the crimes is just as shocking as the crimes themselves. Although the *ex post facto* question is rendered much easier by a finding of treaty violation, the Tribunal's resort to customs and international principles was sufficient in this case.⁷⁸ Clearly, the trial was a trial of first impression.

C. Superior Orders

The defendants at the Trial of the Major War Criminals also submitted on their behalf the defense of superior orders.⁷⁹ This defense involves the question of whether or not a person in the military acting under the orders of a superior may be exonerated from any wrongdoing committed pursuant to such orders. The defendants at Nuremberg made the defense based on the principle of absolute loyalty to the Führer's will.⁸⁰ The Tribunal rejected their plea.⁸¹ Article 8 of the Nuremberg Charter specifically provided: "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."⁸² The Tribunal, therefore, adhered to the Charter and held that superior orders could be considered only in mitigation of the offense.⁸³

"Mitigation of punishment does not in any sense . . . reduce the degree of the crime" or undo any damage already done.⁸⁴ As completely illegal orders, they should not have been obeyed in the first place. Any soldier who commits a war crime is guilty of committing a war crime and subsequently, deserves to be punished.⁸⁵ "The conventional view of superior orders as a plea in mitigation

⁷⁶*Id.* at 250.

⁷⁷*Id.* at 252.

⁷⁸See Statute of ICJ, *supra* note 24.

⁷⁹1 IMT, *supra* note 11, at 223-24.

⁸⁰*Id.* at 223.

⁸¹*Id.* at 224.

⁸²NUREMBERG CHARTER, *supra* note 17, art. 8; see CONTROL COUNCIL, *supra* note 9, art. 2, § 4 (a)-(b) (enumerating corresponding rules on superior orders). It is also significant to note that "there was no dissent as to the rejection of superior orders as a defense." See LESLIE C. GREEN, SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW 279-80 (1976).

⁸³1 IMT, *supra* note 11, at 224.

⁸⁴See APPLEMAN, *supra* note 38, at 191.

⁸⁵It is of interest that an article by Dr. Joseph Goebbels, the Reich Minister of Public Enlightenment and Propaganda, which appeared in the VOELKISCHER BEOBACHTER, the official Nazi publication, on May 28, 1944, contained the following statement of law:

of punishment [does not hold an individual] 100% liable for the war crime."⁸⁶ The fact that a person was ordered to commit a crime may be allowed in mitigation of his responsibility, though not in exoneration of it.⁸⁷ Those accused of crimes have potentially much to gain from the superior orders defense since it may help reduce the severity of their punishment.

Although the Tribunal rejected the defense of superior orders at Nuremberg, there are certain moral and legal issues to consider when deciding to eliminate superior orders as a defense. Whether superior orders is an excuse or a justification for illegal action centers first and foremost on the issue of obedience versus moral choice.⁸⁸ For example, if an order is illegal and obeyed, a judge may question whether the soldier acted in obedience to his superiors or on his own discretion. The Tribunal's task involved the determination of whether a soldier is ever obligated to follow illegal orders.⁸⁹

The evidence presented at the Nuremberg trials provided history with the prototype of "crimes of obedience."⁹⁰ Certain Nazi defendants such as Alfred Jodl believed that "obedience is really the ethical basis of the military pro-

It is not provided in any military law that a soldier in the case of a despicable crime is exempt from punishment because he passes the responsibility to his superior, especially if the orders of the latter are in evident contradiction to all human morality and every international usage of warfare.

CONOT, *supra* note 12, at 513; see also 11 CONTROL COUNCIL, *supra* note 9, at 509.

⁸⁶See Anthony D'Amato, *Superior Orders vs. Command Responsibility*, 80 A.J.I.L. 604 (1986) (explaining that the defense of superior orders does not go to the determination of guilt).

⁸⁷*Id.* Although the Nuremberg Charter provides for superior orders as a plea in mitigation, *supra* note 82, the responsibility of individual defendants is acknowledged as follows:

Superior orders, even to a soldier, cannot be considered in mitigation where crimes have been committed consciously, ruthlessly and without military excuse or justification Participation in such crimes as these has never been required of any soldier and [they] cannot now shield [themselves] behind a mythical requirement of soldierly obedience at all costs as [their] excuse for commission of these crimes.

GREEN, *supra* note 82, at 279 (quoting from the Nuremberg judgment).

⁸⁸The Tribunal believed that "the true test . . . is not the existence of the order, but whether moral choice was in fact possible." See 1 IMT, *supra* note 11, at 224; see also HERBERT C. KELMAN & V. LEE HAMILTON, *CRIMES OF OBEDIENCE* ii (1989) (describing the source of superior orders as unquestioning obedience versus principled resistance).

⁸⁹See KELMAN & HAMILTON, *supra* note 88, at 48 ("Soldiers are not obligated to follow orders that are unlawful; in fact, they are obligated to disobey them.").

⁹⁰*Id.* at 31-32. A "crime of obedience" is loosely defined here as an act performed in response to orders from superiors that is considered illegal or immoral by the larger community. Further, an act of obedience becomes a crime of obedience with evidence that the actor either knew or should have known that the order was illegal. *Id.* at 46-47.

fession."⁹¹ For Jodl, it was not a matter of obedience versus moral choice. Instead, obedience was to be equated with moral choice, and superior orders excused his criminal actions.⁹²

Jodl's beliefs tend to portray the soldier as an automaton trained to respond not as a person but as a machine. Soldiers are taught to follow orders, and military effectiveness depends on the obedience of others. Special attention is also given to the obedience of orders on the battlefield.⁹³ The illegality of an order is not important; obeying an order is what counts.

Strangely enough, the German soldier in World War I and even under the Nazi regime was told in his book of military law that he was not to carry out orders he knew were illegal.⁹⁴ Adopted in 1872, Article 47 of the German Military Penal Code provided the following:

If the execution of a military order in the course of duty violates the criminal law, then the superior officer giving the order will bear the sole responsibility therefor. However, the obeying subordinate will share the punishment of the participant: (1) if he has exceeded the order given to him, or (2) if it was within his knowledge that the order of his superior officer concerned an act by which it was intended to commit a civil or military crime or transgression.⁹⁵

Pursuant to the German military code, therefore, the subordinate incurred a share of responsibility for an order if he understood its criminal character.⁹⁶

⁹¹ See TAYLOR, *supra* note 9, at 437. Jodl was the equivalent of an American four-star general and the highest German rank before Field Marshal. See also David Daube, *The Defence of Superior Orders in Roman Law*, Inaugural Lecture Before the University of Oxford (Feb. 8, 1956), at 13 (discussing "the defence of superior orders [as] raised by a soldier, from whom discipline is expected.").

⁹² TAYLOR, *supra* note 9, at 437; see also *id.* at 248 (discussing the defense of superior orders to the absolute).

⁹³ See Moroney, *supra* note 57, at 880; see also 11 CONTROL COUNCIL, *supra* note 9, at 511 ("They were soldiers—not lawyers.").

⁹⁴ 2 IMT, *supra* note 11, at 150; see also 11 CONTROL COUNCIL, *supra* note 9, at 509.

⁹⁵ 2 IMT, *supra* note 11, at 150. Robert Jackson, the American Chief Prosecutor at the Nuremberg trial, referred to this provision of the German military code. See APPLEMAN, *supra* note 38, at 51.

⁹⁶ In addition to the provision in the German military code regarding superior orders, Goebbels provided additional evidence of the Nazis' knowledge that the superior orders defense would not exculpate a person from his crimes. Goebbels stated in a German newspaper on May 28, 1944:

No international law of warfare is in existence which provides that a soldier who has committed a mean crime can escape punishment by pleading as his defense that he followed the commands of his superiors. This holds particularly true if those commands are contrary to all human ethics and opposed to the well established international usage of warfare.

See APPLEMAN, *supra* note 38, at 312 (quoting Goebbels).

"There is a growing tendency to reject the view that the soldier is an automaton."⁹⁷ As a human being capable of making moral choices, the soldier always has options. Moral choices may be more difficult to make on the battlefield, but, nevertheless, soldiers do have the ability to make choices. Thus, the varying degrees of difficulty do not justify a defendant's claim that he had no choice, that he was just following orders.⁹⁸

Another related issue involves whether the soldier had reasonable means for knowing an order was illegal. This question typically involves consideration of knowledge possessed, the discretion to act or to decline to act, and the motives of the individual.⁹⁹ The degree of perceived illegality of an order plays a significant role in determining the appropriate punishment for the accused.¹⁰⁰ Telford Taylor advocates an extremely lenient view where "[i]f the defendant did not know, and had no basis for knowing, that the order he had obeyed was unlawful, the defendant should not be held liable at all."¹⁰¹ Taylor believes superior orders should not be limited to consideration only in mitigation.¹⁰² Instead, Taylor embraces superior orders as a limited defense, but a defense nonetheless.

On the other hand, those who know they are wrong when they act should be prepared to accept a fair punishment. Certainly, the position of the recipient of the order in the military hierarchy influences adjudication of a superior orders plea in mitigation of punishment. As the Trial of the Major War Criminals demonstrated, the higher the soldier's rank, the less weight will be given to such a plea.¹⁰³ Those higher in the chain of command are presumably more likely to be in a position to take initiatives and to derive personal benefits

⁹⁷ See GREEN, *supra* note 82, at 247 (discussing the expansion of compulsory education and the resulting expectation that the ordinary soldier exercise some measure of judgment).

⁹⁸ See Moroney, *supra* note 57, at 890.

⁹⁹ APPLEMAN, *supra* note 38, at 55; see also 11 CONTROL COUNCIL, *supra* note 9, at 510 ("For a defendant to be held criminally responsible, there must be a breach of some moral obligation fixed by international law, a personal act voluntarily done with knowledge of its inherent criminality under international law.").

¹⁰⁰ See 11 CONTROL COUNCIL, *supra* note 9, at 512 ("In any event in determining the criminal responsibility of the defendants . . . , it becomes necessary to determine not only the criminality of an order in itself but also as to whether or not such an order was criminal on its face.").

¹⁰¹ See TAYLOR, *supra* note 9, at 630.

¹⁰² *Id.*

¹⁰³ For example, Field Marshal Wilhelm Keitel, who maintained the highest rank in the army, was responsible for carrying out Hitler's orders; his signature was on the orders. Thus, the Tribunal believed it was an injustice to let him get away with the defense and declared that Keitel was to have "nothing in mitigation." *Id.* at 589 (quoting Keitel). It is noteworthy that the crimes committed by the Nazis were not the result of excesses on the part of individual soldiers, but the consequence of the execution of orders and plans of the high command.

from their actions. They are also presumed to be better able to discriminate between legal and illegal orders and to challenge orders that they find questionable.¹⁰⁴

Both the individual's position in the military and the type of war crime committed factor into consideration of a superior orders plea in mitigation of punishment. For example, the clearer or more heinous the war crime, the less weight generally will be given to the plea that the perpetrator was only following orders.¹⁰⁵ Certainly, a gas chamber operator would have a more difficult time making a successful plea in mitigation than an ordinary soldier or a staff officer.¹⁰⁶

It is generally accepted that those who know that the order called for illegal acts should be found guilty. In this scenario, however, coercion or duress is advocated as a factor to be relied on only as a matter of mitigation.¹⁰⁷ It is possible to see mixed motives in obedient actions, and it is very likely that an obedient subordinate may respond out of fear, in addition to or even instead of, obligation.¹⁰⁸ For example, a soldier low in the military chain, not as aware of military plans, and not as educated as higher ranked officials may believe that resistance will result in his death or in harm to his family. Regarding coercion, Nuremberg left us with the following standard:

To establish the defense of coercion or necessity in the face of danger there must be a showing of circumstances such that a reasonable man would apprehend that he was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong.¹⁰⁹

¹⁰⁴KELMAN & HAMILTON, *supra* note 88, at 50n; *see also* CONOT, *supra* note 12, at 494 (explaining the mockery made by many of the Nazi defendants of the soldiers' oath of obedience to military orders).

¹⁰⁵Daube, *supra* note 91, at 6 ("[I]t is here, where the gravity of the offense must be obvious to any decent person, that the recipient of the order ought to make a stand.").

¹⁰⁶*See* 11 CONTROL COUNCIL, *supra* note 9, at 513 (describing the commission of a criminal act under international law by a staff officer who takes personal action to see that a criminal order is properly distributed to make it effective); *see also* Daube, *supra* note 91, at 12 ("Clearly, from the responsibility for some offenses no duty to a superior and no duress can exonerate you.").

¹⁰⁷TAYLOR, *supra* note 9, at 630.

¹⁰⁸KELMAN & HAMILTON, *supra* note 88, at 49n. Regarding the element of fear, it is interesting that Hitler never pushed one of his subordinates beyond his principles if it became clear that an act went against the man's conscience. For example, no concentration camp guard was punished for his refusal to commit murder. CONOT, *supra* note 12, at 513-14; *see also* APPLEMAN, *supra* note 38, at 56 (describing Nazis who safely retired from the regime or contemplated resignation without any fear).

¹⁰⁹11 CONTROL COUNCIL, *supra* note 9, at 509. Certain Nazi defendants argued that obedience to orders and military necessity justified everything they had done. *See* TAYLOR, *supra* note 9, at 487; *cf.* APPLEMAN, *supra* note 38, at 313 (describing military

Thus, if coercion was a factor, it would need to be immediate rather than remote.

The increasing expectation of courts that an ordinary soldier exercise some measure of judgment and conscience comes with the growing tendency to reject the view that the soldier is an automaton.¹¹⁰ The expansion of compulsory education and the use of a general draft account for this sentiment. Courts presume that a soldier has the mental ability to recognize and more importantly, to refuse to obey, a manifestly unlawful order.¹¹¹ The morals and values of an individual are related to these presumptions. Value-oriented individuals are more likely to focus on the consequences of their actions and subsequently, are more inclined to challenge authority.¹¹² The value of a human being's life is the most fundamental value a soldier would be expected to have and to appreciate.

Another issue related to the superior orders defense is the doctrine of Act of State, where the state answers for the individual since the act of the leader is deemed the act of the sovereign.¹¹³ Presumably, the state adopts the position of the superior in a highly ranked official's defense of superior orders. Article 7 of the Nuremberg Charter rejected the principle of international law, which under certain circumstances, protects the representatives of a state.¹¹⁴ The Tribunal further held: "He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law."¹¹⁵ As the authors of acts condemned as criminal by international law, the Nuremberg defendants could not hide behind their official positions in order to be freed from punishment. Under the Charter, no defense based on either the doctrine of superior orders or the doctrine that a person's crimes were acts of state was permitted.¹¹⁶

IV. THE YUGOSLAV DILEMMA

In 1946, the ten month Nuremberg trial was thought to have established an international legal precedent, and maybe a deterrent. It has done neither. The world continues to hold contempt for international law; the human rights of

necessity as an excuse for certain types of conduct, but not for the abandonment of the rules of international law).

¹¹⁰GREEN, *supra* note 82, at 247.

¹¹¹*Id.*

¹¹²See KELMAN & HAMILTON, *supra* note 88, at 276.

¹¹³See APPLEMAN, *supra* note 38, at 54; *see also* CONOT, *supra* note 12, at 514.

¹¹⁴1 IMT, *supra* note 11, at 223.

¹¹⁵*Id.*

¹¹⁶See 2 IMT, *supra* note 11, at 150 (discussing the principle of personal liability and the intolerableness of permitting a state to become the basis of personal immunity).

ordinary people continue to be flouted. The Nazis desired a "Greater Germany" and the elimination of all undesirables. Today, the Serb ambition for a "Greater Serbia" continues to drive them to dominate the region and its Slav peoples.¹¹⁷

Bosnia-Herzegovina had been sidelined from the world stage since Archduke Ferdinand, heir to the throne of the Austro-Hungarian empire, was assassinated in its capital, Sarajevo, in 1914, sparking off World War I. A political conflict regarding disagreement over whether the six republics of the former Yugoslavia should form a loose confederation or a strong federation reinstated Bosnia in the media limelight.¹¹⁸ That political conflict evolved into an ethnic conflict that spilled over borders and ignited the Balkan War.¹¹⁹ The division of the former Yugoslavia into separate nation-states has divided ethnic groups rather than united them and has been "met in each of the other regions with fierce resistance from highly mobilized minority populations whose ethnic preferences" have led them to seek shelter with their "own" state.¹²⁰

The breakup of the former Yugoslav state has resulted in severe internal ethnic violence. Bosnia-Herzegovina's central location and mixed ethnic and religious profile have made it a natural battleground between forces on opposite sides of the confederation-federation conflict.¹²¹ It is of interest that religious differences did not impede interethnic social contact in either Serbia

¹¹⁷See Eric Bourne, *The Nuremberg Precedent*, CHRISTIAN SCIENCE MONITOR, Oct. 9, 1992, at 18 (describing Serbs' Hitlerian "total war" against the non-Serbs of Bosnia).

¹¹⁸See Chuck Sudetic, *A Yugoslav Republic Holds a Contested Election*, N.Y. TIMES, Nov. 19, 1990, at A7. The six republics of the former Yugoslavia, which have very different degrees of economic development and a variety of peoples, religions, languages and cultures, include the following: Bosnia-Herzegovina, Croatia, Serbia, Montenegro, Macedonia, and Slovenia. Today, Yugoslavia is comprised of Serbia and Montenegro, the only two republics in favor of a strong federation, but only with Serbian predominance. *Id.* If the other regions proved unwilling to accept a federation as such, Serbia was in favor of secession as well, but not without taking with it the parts of Croatia and Bosnia containing substantial numbers of Serbs. Aleska Djilas, *A Paper House: The Ending of Yugoslavia*, NEW REPUBLIC, Jan. 25, 1993, at 38; see also *infra* note 120.

¹¹⁹See Wlodzimerz Sochacki, *Yugoslavia: The Nationalists' Time Has Come*, GAZETA INT'L, Dec. 6, 1990, at 2 (describing the considerations of the republics on the confederation-federation conflict). By the end of 1990, a series of local elections had transformed the political landscape of the former Yugoslavia. See Sabrina Petra Ramet, *War in the Balkans*, FOREIGN AFFAIRS, Sept. 1992, at 79.

¹²⁰The division is the direct result of the settlement of the nationality groups of the former Yugoslavia across regional boundaries. See Steven Burg, *Nationalism and Democratization in Yugoslavia*, WASHINGTON QUARTERLY, Oct. 1991, at 3. For example, when the Muslims and Croats voted to separate Bosnia from Yugoslavia, Bosnian Croats were not in favor of independence, only for secession from Yugoslavia. Like the Bosnian Serbs, the Croats do not want to be a part of Bosnia; they want to unite with Croatia. Djilas, *supra* note 118.

¹²¹Sudetic, *supra* note 118. Bosnia's population is split between Europe's largest Muslim community, which accounts for 40% of the population; the Eastern Orthodox Serbs, 32%; the Roman Catholic Croats, 19%, and other people who claim they are ethnic Yugoslavs. *Id.*

or Bosnia-Herzegovina until Serbia's politicians began to manipulate religious sensitivity to ignite hatred for non-Serbs.¹²² That hatred fueled the siege of the Bosnian capital of Sarajevo by Serbian forces in March of 1992.¹²³

"Ethnic cleansing," the forced removal of people from their homes because of their religious or ethnic roots, characterizes the method employed by the Serbs for killing and driving out all non-Serbs.¹²⁴ The war crimes and human rights abuses perpetrated on defenseless Bosnian Muslims by Serbian forces have been well-documented. Whole villages have been buried, but not before they were looted.¹²⁵ Patients have been taken from their hospital beds, robbed and shot.¹²⁶ Mosques dating back to the sixteenth century have been destroyed,¹²⁷ and systematic rape has been performed on thousands of women.¹²⁸ The list of crimes is endless, and the number of persons murdered and tortured countless.

Serbian military leadership does not understand the futility of applying military solutions to political questions. After more than two years of perpetual war, Serbian president Slobodan Milosevic presumably would have concluded as much.¹²⁹ As politicians continue to search for a solution to the region's

¹²²Ramet, *supra* note 119, at 81.

¹²³*Id.* The war proper began in Croatia in the summer of 1991, soon after Croatia's secession. The conflict spread to Bosnia, however, after that republic's secession in March, 1992. See *The Future of the Balkans: An Interview With David Owen*, FOREIGN AFFAIRS, Mar. 1993, at 1; see also Djilas, *supra* note 118 (describing the Serbs' portrayal of contemporary Croatia as a reincarnation of the fascist state of World War II that massacred Serbian civilians, as well as thousands of Jews and gypsies).

¹²⁴Although all groups are blamed for their treatment of innocent civilians in the Yugoslav Conflict, the greatest victims have been the Muslims, and the greatest victimizers the ethnic Serbs in Bosnia. Thus, the Serbs have been singled out. See Djilas, *supra* note 118; see also Gertrude Samuels, *Putting War Crimes On The Un Agenda: Nuremberg Reaffirmed*, NEW LEADER, Mar. 8, 1993, at 7.

¹²⁵See Aryeh Neier, *Watching Rights*, THE NATION, Aug. 31, 1992, at 202 (describing the order of General Ratko Mladic, the commander of Serbian forces in Bosnia and Herzegovina, to "[b]urn it all"); see also Adrian Lithgow & Paul Keel, *Generals of Genocide*, MAIL ON SUNDAY, Apr. 18, 1993, at 1, 5 (reporting the discovery of a mass grave following the disappearance of more than 3,000 persons from a town after its seizure by the Serbs).

¹²⁶Samuels, *supra* note 124.

¹²⁷Chuck Sudetic, *U.N. Says 'Ethnic Cleansing' by Serbs Intensifies*, N.Y. TIMES, Jan. 30, 1994, at A13 (reporting the destruction of mosques "to teach minorities to respect Serb law" and "to eras[e] all traces of a Muslim religious and cultural presence . . .").

¹²⁸Samuels, *supra* note 124; see also Lithgow & Keel, *supra* note 125.

¹²⁹Leaders such as Milosevic, Radovan Karadzic, Bosnia's Serbian leader, and General Ratko Mladic, commander of the Serbian military forces in Bosnia and Herzegovina, were on a list of people named as suspected Serb war criminals by United States Secretary of State Lawrence Eagleburger in a speech delivered to an international conference on the war in former Yugoslavia in December, 1992. See *Eagleburger Names Suspected War Criminals*, Dec. 16, 1992, available in LEXIS, Nexis Library, Press Association Newsfile.

problems, the world has concluded that judicial intervention is necessary to bring to account those who are responsible for the commission of war crimes in the former Yugoslavia since 1991.¹³⁰ With the establishment of the Yugoslav Tribunal, the world has secured the means to prosecute the responsible persons.

The United Nations Security Council had an adequate legal basis under Chapter VII of the UN Charter, in conjunction with previous resolutions concerning the territory of the former Yugoslavia, to establish an international tribunal to prosecute war crimes committed in this territory.¹³¹ Given its broad decision-making authority when acting under Chapter VII of the UN Charter and the binding nature of its decisions, the Security Council's act of establishing the Yugoslav Tribunal imparts continuing legal effect to the Nuremberg principles. As Madeleine K. Albright, the United States Ambassador to the UN, so aptly proclaimed:

There is an echo in this chamber today. The Nuremberg principles have been reaffirmed The lesson that we are all accountable to international law may have finally taken hold in our collective memory Serbian "ethnic cleansing" has been pursued through mass murders, systematic beatings and the rapes of Muslims and others Our conscience revolts at the idea of passively accepting such brutality.¹³²

Moreover, in May of 1993, the Security Council adopted the Statute of the International Tribunal which serves as the legal basis for all prosecutions of war crimes in the former Yugoslavia.¹³³

V. ADOPTION OF THE NUREMBERG PRINCIPLES BY THE YUGOSLAV TRIBUNAL

Since Nuremberg, the foundation of international law has been greatly fortified. The rules of war have never been more clearly defined. For example,

¹³⁰On February 22, 1993, after repeated demands that parties to the Yugoslav conflict cease from all breaches of international humanitarian law, the United Nations 15-member Security Council voted unanimously to establish the Yugoslav Tribunal to prosecute the responsible persons. *Sec-Gen. Rep.*, *supra* note 2, at 3.

¹³¹Chapter VII provides the Security Council with the authority to determine threats to international peace and security and to take appropriate steps to remedy the situation. *See* UN CHARTER, chapter VII, arts. 39-41; *supra* note 1. Continuing reports of widespread violations of international humanitarian law, including reports of mass killings and the continuation of the practice of "ethnic cleansing" led the Security Council to conclude that this situation constituted a threat to international peace and security. *See Sec-Gen. Rep.*, *supra* note 2, at 4. According to the Secretary-General, the Yugoslav Tribunal is legally established as a subsidiary organ in conformance with Article 29 of the UN Charter. *Id.* at 8.

¹³²Samuels, *supra* note 124.

¹³³The Statute was originally annexed to the Report of the Secretary-General pursuant to Security Council Resolution 808. S.C. Res. 808, U.N. SCOR, 3175th mtg., at 2 (1993). *See supra* note 1.

the 1907 Hague Conventions and the 1929 Geneva Conventions highly influenced decisionmaking for the Nuremberg Tribunal.¹³⁴ Successive UN documents, notably the 1949 Geneva Conventions and the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, embody some of the lessons learned from World War II and further refine international law as it relates to war crimes and crimes against humanity.¹³⁵

To fully understand how the Nuremberg principles affect international law, and more precisely adjudication for the Yugoslav Tribunal, it is necessary to explore the components of international law. The Statute of the International Court of Justice provides a summary of the sources of international law which apply when adjudicating a conflict.¹³⁶ Article 38 (1) of the Statute enumerates the following:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.¹³⁷

The Nuremberg principles may qualify as accepted international law on all counts. With regard to widespread acceptance in United Nations' instruments, however, they are established under (a) and (c) above.

Without an international legislature, it is difficult for international law to develop by legislation. It develops, instead, by adapting settled principles to new situations.¹³⁸ The Nuremberg Tribunal declared that "by 1939 th[e] rules laid down in the [Hague] Conventions were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war . . ."¹³⁹ Today, in addition to the Hague Conventions, there is universal acceptance of conventions such as the 1949 Geneva Conventions, the Genocide Convention, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as treaties.¹⁴⁰ The adoption of the Nuremberg

¹³⁴See *supra* notes 19-20, 49-51, 65-68.

¹³⁵See *Sec-Gen. Rep.*, *supra* note 2, at 9 (relating the undisputed embodiment of the 1949 Geneva Conventions and the 1948 Genocide Convention in international customary law).

¹³⁶See Statute of ICJ, *supra* note 24.

¹³⁷*Id.* art. 38.

¹³⁸See APPLEMAN, *supra* note 38, at 52 ("[V]iolations of international law have long been punishable, even in the absence of legislative material fixing the punishments.").

¹³⁹TAYLOR, *supra* note 9, at 582-83.

¹⁴⁰*Supra* note 32; see Theodor Meron, *The Geneva Conventions as Customary Law*, 81 A.J.I.L. 348 (describing the Geneva Conventions as binding on even more states than the UN Charter).

principles by the UN, moreover, contributes significantly to the expansive body of law from which the newly established Yugoslav Tribunal may draw when adjudicating the Yugoslav conflict.

Proposed first by the Secretary-General of the United Nations, the Statute of the International Tribunal imparts legal effect to the Nuremberg principles.¹⁴¹ The Statute declares the Tribunal's subject-matter jurisdiction to be the prosecution of "serious violations of international humanitarian law . . ."¹⁴² Articles 2 through 5 further define that jurisdiction to include prosecution of grave breaches of the 1949 Geneva Conventions (Article 2), violations of the laws or customs of war (Article 3), genocide (Article 4), and crimes against humanity (Article 5).¹⁴³ The Yugoslav Tribunal's jurisdiction, unlike that of the Nuremberg Tribunal, does not extend to crimes against peace. The Charter's provisions relating to war crimes and crimes against humanity, however, have been adopted by the Security Council and incorporated into the Statute.¹⁴⁴

The comprehensive Report of the UN Secretary-General relating to "all aspects of [the former Yugoslav] matter"¹⁴⁵ and the Statute of the Tribunal annexed thereto have been approved and adopted by the UN Security Council, respectively.¹⁴⁶ The Special Task Force (hereinafter Task Force) created by the Section of International Law of the American Bar Association to analyze the Statute and report on its implementation believes that the Statute still merits significant modification.¹⁴⁷ As outlined below, the changes proposed by the Task Force conflict with the Statute's consistent application of the Nuremberg

¹⁴¹Statute, *supra* note 1.

¹⁴²*See supra* note 1.

¹⁴³Article 2 authorizes the Yugoslav Tribunal to prosecute violations that qualify as war crimes or "grave breaches" under the four Geneva Conventions of 1949. Article 3 grants the power to prosecute persons violating the laws or customs of war. The Secretary-General's Report demonstrates that such laws are comprised of the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto. *Sec-Gen. Rep.*, *supra* note 2, at 11, §§ 41-44. Article 4 authorizes prosecution of acts of genocide, and article 5, crimes against humanity when committed in armed conflict. *See Statute, supra* note 1, arts. 2-5. It is of interest that the Nuremberg Tribunal refused to consider crimes against humanity committed before the outbreak of war within their jurisdiction. 1 IMT, *supra* note 11, at 254. Article 5 of the Statute, however, is silent regarding that issue.

¹⁴⁴*See Statute, supra* note 1, arts. 2-5. The definition of genocide under article 4 of the Statute may be traced to Article 6 (c) of the Nuremberg Charter. NUREMBERG CHARTER, *supra* note 17.

¹⁴⁵*See Sec-Gen. Rep.*, *supra* note 2, at 3.

¹⁴⁶*Supra* note 1.

¹⁴⁷The recommendations were not intended to suggest that debate over adoption of the Statute be reopened. Instead, the Task Force acknowledged the adoption of the Statute and proposed that its current status would facilitate the Security Council's consideration of the recommendations. ABA REP., *supra* note 4, at 2.

principles and therefore, should continue to be disregarded by the Security Council.¹⁴⁸

A. The Principle of Nullum Crimen Sine Lege (No Crime Without Law)

The Nuremberg Tribunal confronted the Nazi defendants' *ex post facto* challenges relating to crimes against peace. Although the Yugoslav conflict is unrelated to such crimes, concern about potential defenses based on the principle of *nullum crimen sine lege*, nevertheless, exists.¹⁴⁹ Anticipating an *ex post facto* defense, the UN Secretary-General advocated the following view in his Report: "[T]he international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise."¹⁵⁰ According to the Report, the following conventions are considered beyond doubt a part of international customary law: the 1907 Hague Conventions, the 1949 Geneva Conventions, the 1948 Genocide Convention, and the 1945 Nuremberg Charter.¹⁵¹ This limitation of the Yugoslav Tribunal's jurisdiction to rules that have become accepted as customary international law ensures adherence to the principle of *nullum crimen sine lege*.

The Task Force concurred in the Secretary-General's determination to define the Tribunal's subject-matter jurisdiction so as to ensure adherence to the principle of *nullum crimen sine lege*.¹⁵² They felt it was necessary, however, to modify Article 3 ("Violations of the laws or customs of war") and Article 5 ("Crimes against humanity").¹⁵³

The Statute grants the Tribunal the power to prosecute persons violating the laws or customs of war.¹⁵⁴ Under Article 3:

Such violations shall include, but not be limited to:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;

¹⁴⁸Telephone Interview with Sushan Demirjian, Committee Programs Coordinator for the ABA Section of Int'l Law and Practice (Jan. 12, 1994).

¹⁴⁹*See Sec-Gen. Rep.*, *supra* note 2, at 9.

¹⁵⁰*Id.*

¹⁵¹*Id.*

¹⁵²ABA REP., *supra* note 4, at 12-13.

¹⁵³*Id.* at 13.

¹⁵⁴Statute, *supra* note 1, art. 3.

(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(e) plunder of public or private property.¹⁵⁵

The crimes listed under Article 3 are not an exhaustive list, as indicated by its language. The Task Force, however, believes it is necessary to reinforce the Statute's adherence to the principle of *nullum crimen sine lege* by further enumerating that list of crimes to include certain acts especially forbidden by the Hague Regulations.¹⁵⁶

Almost fifty years ago, the Nuremberg Tribunal recognized that the 1907 Hague Regulations were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war.¹⁵⁷ Approximately fifty years later, the Secretary-General has reaffirmed the Tribunal's finding by explicitly stating in his Report that the Hague Convention IV and its Regulations "ha[ve] beyond doubt become part of international customary law."¹⁵⁸ In the light of universal acceptance of the Hague IV and its annexed Regulations, any additional enumeration of crimes under Article 3 would be superfluous.¹⁵⁹ Thus, the Security Council's recommendation regarding Article 3 has little, if any, merit.

With respect to Article 5, the Task Force believes that subparagraphs (g) and (i) require further elaboration.¹⁶⁰ Under the Statute, Article 5 is set forth as follows:

¹⁵⁵*Id.*

¹⁵⁶ABA REP., *supra* note 4, at 13-14. The Task Force followed the language of Article 23 of the Hague Regulations, *supra* note 19, in its recommendation to modify Article 3 to conclude as follows:

(f) killing or wounding treacherously individuals belonging to the hostile nation or army;

(g) killing or wounding an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion;

(h) declaring that no quarter will be given;

(i) making improper use of a flag of truce, of the national flag, or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Red Cross or Red Crescent;

(j) declaring abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party.

ABA REP., *supra* at 13. In the light of the specific enumeration of each of the "grave breaches" of the 1949 Geneva Conventions in Article 2, and the detailed enumeration of acts which constitute genocide and conduct punishable thereunder in Article 4, the Task Force believes that modification of Article 3 is necessary. *Id.*

¹⁵⁷*Sec-Gen. Rep.*, *supra* note 2, at 11.

¹⁵⁸*Id.* at 9; *supra* note 151.

¹⁵⁹*Sec-Gen. Rep.*, *supra* note 2, at 9.

¹⁶⁰ABA REP., *supra* note 4, at 14-16. In addition to the Task Force's conviction that modification of Article 5 (g) and (i) would reinforce adherence to the principle of *nullum crimen sine lege*, it believes that such modifications would confirm that these crimes will

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts.¹⁶¹

The Task Force recommended an expansion of subparagraph (g) to include specific reference to "enforced prostitution, enforced pregnancy, and other widespread sexual offenses."¹⁶² Article 5 provides the Yugoslav Tribunal with great leeway in which to accommodate the sexual offenses that concern the Task Force. Those crimes may fall under subparagraph (i) as "other inhuman acts." In the light of the commission of systematic rape and other forms of sexual assault on women in the former Yugoslavia, such a revision of subparagraph (g), which incorporates other sexually related offenses, would eliminate unwanted ex post facto claims and thereby reinforce adherence to the principle of *nullum crimen sine lege*.¹⁶³ The expansive nature of subparagraph (i), however, demonstrates that the recommendation to extend the Statute's definition of rape is not essential and need not be considered further by the Security Council.

The Task Force proposed to replace Article 5, subparagraph (i) with certain provisions of common Article 3 of the Geneva Conventions not already covered in subparagraphs (a) through (h).¹⁶⁴ It claims that the phrase "other inhuman acts" in subparagraph (i) remains "vulnerable to criticism as vague and imprecise, since the Charter did not define that term."¹⁶⁵ The Charter's failure to define that term, however, does not make it necessary to do so now. Like the

be within the Tribunal's subject-matter jurisdiction, even if it should determine that they were committed in a non-international armed conflict. *Id.* at 15.

¹⁶¹Statute, *supra* note 1, art. 5.

¹⁶²ABA REP., *supra* note 4, at 15. The Task Force based its recommendation on the Secretary-General's description of crimes against humanity in the former Yugoslavia as "widespread and systematic rape and other forms of sexual assault, including enforced prostitution." *Id.*; see also *Sec-Gen. Rep.*, *supra* note 2, at 13.

¹⁶³ABA REP., *supra* note 4, at 15. It is of interest that although crimes against humanity were first recognized in the Nuremberg Charter and judgment, *Sec-Gen. Rep.*, *supra* note 2, at 13, the crime of rape was not specifically listed under Article 6(c). Instead, it probably would have fallen under the provision "and other inhumane acts committed against any civilian population." See NUREMBERG CHARTER, *supra* note 17, art. 6(c). Thus, it may be extremely beneficial to establish a more inclusive definition of rape in the Statute.

¹⁶⁴ABA REP., *supra* note 4, at 14-15; see 1949 Geneva Conventions, *supra* note 21, art. 3.

¹⁶⁵ABA REP., *supra* note 4, at 14. The Task Force traced the phrase "other inhuman acts" back to article 6(c) of the Nuremberg Charter, where crimes against humanity were first recognized. See NUREMBERG CHARTER, *supra* note 17, art. 6(c).

argument above relating to universal acceptance of the Hague IV as a part of international customary law, the same holds true for common Article 3 of the Geneva Conventions and the Charter.¹⁶⁶ Moreover, the phrase "other inhuman acts" is a "catch-all" which allows the Tribunal enormous flexibility in its adjudication. As such, there is no need to better define what is meant by "other inhuman acts," for to do so would be a waste of time.

B. The Principle of Individual Responsibility

With regard to crimes committed in the former Yugoslavia, the Security Council adopted the Nuremberg principle that persons committing criminal violations of international law are individually responsible for such violations.¹⁶⁷ Thus, Article 7, subparagraph 1 of the Statute enumerates the following: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime . . . shall be individually responsible for the crime."¹⁶⁸ The Security Council also adopted the Nuremberg holding that following superior orders was not an excuse for the perpetration of a crime.¹⁶⁹ Under Article 7, subparagraph 4 of the Statute, therefore, "[t]he fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires."¹⁷⁰ Thus, the language of the Statute regarding superior orders is consistent with that of the Nuremberg Charter.¹⁷¹

The Task Force concurred in the Statute's treatment of individual criminal responsibility in Article 7, with two exceptions.¹⁷² First, as explained below, the Task Force proposed a modification of the Statute's rejection of the defense of

¹⁶⁶*Supra* notes 151, 157-59.

¹⁶⁷In his report, the Secretary-General stated "that all persons who participate in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia contribute to the commission of the violation and are, therefore, individually responsible." *Sec-Gen. Rep.*, *supra* note 2, at 14; *see also* 1 IMT, *supra* note 11, at 222-23.

¹⁶⁸Statute, *supra* note 1, art. 7, § 1.

¹⁶⁹*Id.* art. 7, § 4; *see* NUREMBERG CHARTER, *supra* note 17, art. 8.

¹⁷⁰Statute, *supra* note 1, art. 7, § 4. The Secretary-General promulgated the Nuremberg conviction that superior orders do not relieve the perpetrator of the crime of his criminal responsibility and should not be a defense. *Sec-Gen. Rep.*, *supra* note 2, at 15, § 57. Further, the Secretary-General reaffirmed that obedience to superior orders may be considered a mitigating factor, should the Tribunal determine that justice so requires. *Id.*

¹⁷¹NUREMBERG CHARTER, *supra* note 17, art. 8.

¹⁷²*See* ABA REP., *supra* note 4, at 37-41.

superior orders.¹⁷³ The second exception involved limiting mitigation of punishment to those instances that involve duress.¹⁷⁴

The Task Force proposed that Article 7, subparagraph 4 be clarified to include a limited exception recognizing the defense of superior orders in cases where a defendant acting under military authority in armed conflict did not know the orders to be unlawful and a person of ordinary sense and understanding would not have known the orders to be unlawful.¹⁷⁵ The Task Force based that proposal on consideration of both the varying ranks of defendants and the facial illegality of orders.¹⁷⁶ The Task Force's modification, however, creates a dangerous loophole.¹⁷⁷

The proposed change regarding the defense of superior orders detours from the path of consistency. Nuremberg rejected the defense of superior orders, and there is no good reason to depart from that standard now.¹⁷⁸ The standard of reasonableness proposed by the Task Force would be better suited to the Tribunal's adjudication of mitigation of punishment. Clearly, a competent Tribunal would apply the correct standard of reasonableness in the more appropriate sphere of adjudication—mitigation of punishment.¹⁷⁹

Second, the Task Force suggested that the Statute's treatment of superior orders as grounds for mitigation of punishment should be restricted to apply

¹⁷³*Id.*

¹⁷⁴*Id.* at 40-41.

¹⁷⁵*Id.* at 40. The Task Force recommends the following language for revising Article 7, subparagraph 4:

The fact that an accused person subject to military authority and discipline in armed conflict acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility unless he did not know that the order was unlawful and a person of ordinary sense and understanding would not have known the order to be unlawful. The fact that an accused person acted pursuant to an unlawful order may be considered in mitigation of punishment if the accused carried out the order under duress.

Id. at 41.

¹⁷⁶*Id.* at 38-39; *see also supra* notes 100-04. The Task Force argues that such a limited exception to the defense of superior orders would make the Statute more consistent with the Nuremberg proceedings subsequent to the Trial of the Major War Criminals. ABA REP., *supra* at 38-39. Under Control Council Law No. 10, however, the defense of superior orders was rejected, and no limited exception existed. *See* 11 CONTROL COUNCIL, art. 2, § 4 (b).

¹⁷⁷If even a limited exception to the defense of superior orders were acknowledged, justice would not be served. *See supra* note 85; *cf. TAYLOR, supra* note 9, at 630.

¹⁷⁸*Supra* notes 81-83.

¹⁷⁹The "reasonable factor" ought to be a factor considered by the Tribunal in mitigation of punishment. After all, a look at the Nuremberg precedent reveals that "[t]he Charter imp[li]e[d] common sense limits to liability just as it place[d] common sense limits upon immunity." 2 IMT, *supra* note 11, at 151.

only in cases of duress.¹⁸⁰ Thus, if the superior orders defense were rejected because the defendant should have known that the order was illegal, the Task Force claims that mitigation of punishment would only be justified if the order was performed under duress.¹⁸¹ Moreover, the Task Force believes that such a modification would make the Statute even more consistent with standards adopted in the Nuremberg proceedings subsequent to the Trial of the Major War Criminals.¹⁸²

Article 7, subparagraph 4, as it stands, however, remains consistent with the Nuremberg Charter and Control Council Law No. 10.¹⁸³ It is the recommendation of the Task Force that departs from the Nuremberg standards. Further, as the Statute rejects the defense of superior orders, mitigation of punishment will cover a wide range of circumstances.¹⁸⁴ Thus, it would be more beneficial to not limit the mitigation of punishment to only cases of duress.

VI. CONCLUDING REMARKS

The Yugoslav crisis has been marked not only by the blatant rejection of international law by Serbia, but also by an unusual focus on international law by the international community and the revival of a collective security system based on the UN Charter. Acting under Chapter VII of the UN Charter, the Security Council created the Yugoslav Tribunal for the prosecution of violations of international humanitarian law in the former Yugoslavia and adopted the Statute for the Tribunal recommended by the Secretary-General of the United Nations in his Report.

The Nuremberg precedent served as a guiding light for the Secretary-General. His Report relied heavily upon Nuremberg with regard to the establishment of the Yugoslav Tribunal and its Statute. In an effort to avoid any claims of *ex post facto* application of law, the subject-matter jurisdiction of the Yugoslav Tribunal, as defined by the Statute, explicitly reaffirms the acceptance by the Nuremberg Tribunal of the Hague and Geneva Conventions

¹⁸⁰ABA REP., *supra* note 4, at 40; *see also supra* note 175; *cf.* NUREMBERG CHARTER, *supra* note 17, art. 8.

¹⁸¹ABA REP., *supra* note 4, at 40.

¹⁸²*Id.* at 41. Once again, the Task Force proposes that such a modification of the Statute would create greater consistency with the Nuremberg proceedings under Control Council Law No. 10. *See supra* note 176. Law No. 10, however, contradicts that claim because no exception existed which provided only for cases of duress. Instead, it provided: "The fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation." CONTROL COUNCIL, *supra* note 9, art. 2, § 4 (b).

¹⁸³The Statute's language with regard to the defense of superior orders and mitigation of punishment mirrors that of the Charter and Control Council Law No. 10. *See* NUREMBERG CHARTER, *supra* note 17, art. 8; *see also* CONTROL COUNCIL, *supra* note 9, art. 2, § 4 (b).

¹⁸⁴Statute, *supra* note 1, art. 7, § 4.

as customary international law. Moreover, the Statute's provisions relating to the principle of individual responsibility and the defense of superior orders mirror those of the Nuremberg Charter. Thus, the Statute represents a consistent application of the Nuremberg principles.

The Task Force of the American Bar Association has tried without success to modify the Statute. Although the Statute has already been adopted, the Task Force has not given up hope that the Security Council will yet change specific provisions in the Statute. Some of the proposed changes are superfluous and therefore, their implementation would be a waste of the Security Council's time. Other recommendations conflict with the Nuremberg path of consistency; enacting such changes would involve an inconsistent application of international principles of law. Thus, there is no need for the Security Council to consider further any of the modifications set forth by the Task Force.

The portion of the Nuremberg Judgment that dealt with war crimes and crimes against humanity committed by the defendants and criminal organizations concerned, in large measure, the persecution and murder of the Jewish people.¹⁸⁵ The Judgment also described evidence on war crimes and crimes against humanity concerning murder and ill treatment of both prisoners of war and civilian populations, pillage of public and private property, and slave labor policy.¹⁸⁶ In its analysis of the crimes, the Tribunal found it appropriate to single out the persecution of the Jews as a manifestation of consistent and systematic inhumanity on a huge scale. Today, the evidence which the Yugoslav Tribunal must evaluate singles out the persecution of the Muslims and relates to similar crimes performed on a different scale.

After Nuremberg, devoting maximum effort to the definition and implementation of human rights remained high among our priorities. Thus, it makes sense that the Yugoslav Tribunal has received international recognition. Recognition, however, is not enough. While Nuremberg was thought to have established a legal precedent and maybe a deterrent, it did neither. Events in the former Yugoslavia attest to this. The fact that the UN had to take great pains to establish another ad hoc tribunal further demonstrates the failure of the international community to establish human rights as the foundation of international law.¹⁸⁷

The Nuremberg Trial was the first of its kind in history. It was designed to punish the leaders of a regime and an army who were responsible for atrocious crimes committed in the framework of their policy and its implementation. In their adjudication, the judges appointed to the Tribunal undoubtedly followed the law and their conscience. Once again, an International Tribunal has been

¹⁸⁵1 IMT, *supra* note 11, at 228-53.

¹⁸⁶*Id.*

¹⁸⁷See Paul W. Kahn, *Lessons for International Law from the Gulf War*, 45 STAN. L. REV. 425, 440 (1993) ("For human rights to be the end, however, state sovereignty must be displaced as the central value of the international legal system.").

formed, this time to prosecute those responsible for great atrocities in the former Yugoslavia.

The Statute's adoption of the Nuremberg precedent signifies a consistent application of the principles of international law. Is this the best consistency, however, that Nuremberg calls for? In his final report as Chief Prosecutor at the Nuremberg trials, Brigadier General Telford Taylor wrote: "Unless the United States and the other governments . . . seriously endeavor to establish a permanent international penal jurisdiction, the inevitable conclusion will be that Nuremberg was for Germans only."¹⁸⁸ For a long time, there has been talk of creating a permanent international criminal court, and yet nothing has come of it.¹⁸⁹ We agree all too often on principles, but practice and enforcement have not kept pace with pronouncements. First came Nuremberg, and now, Bosnia. It is time for the international community to take the appropriate steps toward creating a permanent tribunal—the remedy for the best consistency.

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¹⁸⁸Samuels, *supra* note 124, at 9 (quoting TAYLOR, *supra* note 9).

¹⁸⁹See Alan Ferguson, *Panel of Experts Wrong to Bosnia War Crimes, Lawyers Say*, TORONTO STAR, Oct. 9, 1992, at A20; *supra* note 126; *see also* Commentary on Draft Statute for an International Criminal Tribunal, in Report of the International Law Commission (45th session)-3 May-23 July 1993, General Assembly (48th session), Supp. No. 10 (A/48/10) (explaining authority of permanence if linked to UN, by establishing Tribunal as organ thereof) (on file with author).

¹⁹⁰The author wishes to thank Professor Henry T. King, Jr., for his help in preparing this note.

