

ALL IS NOT FAIR IN WAR: THE NEED FOR A PERMANENT WAR CRIMES TRIBUNAL

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I. INTRODUCTION

No man is an Island, intire of it selfe; every man is a peece of the Continent, a part of the maine; if Clod bee washed away by the Sea; Europe is the lesse, as well as if a Promontorie were, as well as if a Mannor of thy Friends or of thine owne were; any mans death diminishes me, because I am involved in Mankinde; And therefore never send to know for whom the bell tolls; It tolls for thee.¹

On July 11, 1992, the leader of a Serb group announced over a megaphone that there was going to be a "bloody bajram (holiday), Balkan style."² A car containing six Muslims was then driven onto a stone bridge

1. JOHN DONNE, *Meditation XVII*, in DEVOTIONS UPON EMERGENT OCCASIONS 109 (Univ. of Michigan Press 1959) (1624).

2. *Eighth Report on War Crimes in the Former Yugoslavia*, 4 DEP'T ST. DISPATCH, July 26, 1993, at 539 [hereinafter *War Crimes Report*]. For the texts of the first seven reports detailing the atrocities committed during the civil war in the former Yugoslavia, see the

over the Drina River in the town of Visegrad.³ The heads of those then-living Muslims were chopped off and their bodies thrown into the river.⁴ The same brutal procedure occurred over and over for the next three or four days.⁵ A witness estimated at least 450 people were killed.⁶ This is but one example of the kinds of atrocities committed during the civil war in the former Yugoslavia.

Perhaps most disturbing about the war, however, were the atrocities committed against civilians as all sides engaged in "ethnic cleansing."⁷ During the week of April 15, 1993, "Bosnian Croatian and Muslim forces attacked civilians of each other's ethnic group in Vitez, executing entire families in their homes."⁸ Muslim women were often the victims of multiple rapes.⁹ The warring factions held Sarajevo under siege beginning in April 1992, "with scores of innocent civilians killed nearly every day by artillery shelling."¹⁰ During May and June of 1992, "between 2,000 and 3,000 Muslim men, women, and children" were murdered "by Serb irregular forces at a brick factory and pig farm near Brcko."¹¹ In August 1992, "two members of a Croatian paramilitary force attacked a convoy of buses carrying more than 100 Serbian women and children, killing over half of them."¹² This appalling list goes on and on.

In response to the shocking nature of the atrocities being committed, the United Nations Security Council on February 22, 1993, adopted Resolution 808, establishing an 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."¹³ This is the first international war crimes tribunal established since Nuremberg after World War

following issues of the *Department of State Dispatch*: Vol. 3, at 732; Vol. 3, at 802; Vol. 3, at 825; Vol. 3, at 917; Vol. 4, at 75; Vol. 4, at 243; Vol. 4, at 257.

3. *War Crimes Report*, *supra* note 2, at 539.

4. *Id.*

5. *Id.*

6. *Id.*

7. Madeline K. Albright, *U.N. Security Council Adopts Resolution 808 on War Crimes Tribunal*, 4 DEP'T ST. DISPATCH, Mar. 22, 1993, at 166. United States Secretary of State Warren Christopher described the ethnic cleansing in Yugoslavia, particularly the actions by the Serbs, as "pursued through mass murders, systematic beatings and the rapes of Muslims and others, prolonged shellings of innocents in Sarajevo and elsewhere, forced displacement of entire villages, inhumane treatment of prisoners in detention camps and the blockading of relief to sick and starving civilians." *Id.* (citing statement made by Secretary of State Warren Christopher on March 10, 1993).

8. *War Crimes Report*, *supra* note 2, at 537.

9. *Id.*; see also Emily MacFarquhar, *Remembrance of Things Not Yet Past*, U.S. NEWS & WORLD REP., Apr. 26, 1993, at 13 (reporting on the history of Serbian atrocities in Bosnia-Herzegovina).

10. Lawrence Eagleburger, *The Need to Respond to War Crimes in the Former Yugoslavia*, Statement at the International Conference on the Former Yugoslavia, Geneva, Switzerland (Dec. 16, 1992), in 3 DEP'T ST. DISPATCH, Dec. 28, 1992, at 923.

11. *See id.* at 924.

12. *Id.*

13. Albright, *supra* note 7, at 167.

II and the first tribunal mandated by the United Nations to try crimes against humanity.¹⁴ The purpose of this tribunal is not only to prosecute those guilty of violating international humanitarian law, but to prevent the same types of atrocities from occurring in the future.¹⁵

Whether the Yugoslavian tribunal will be able to accomplish its mission remains to be seen. There is speculation that amnesty will be granted to offenders as part of a peace plan.¹⁶ In addition, lack of adequate funding continues to haunt the tribunal.¹⁷ Nonetheless, Chief Prosecutor Richard Goldstone is undeterred and recently charged twenty-one Serbs "with war crimes and crimes against humanity" for the roles they played in the atrocities committed at Serbian concentration camps.¹⁸

The Yugoslavian tribunal is not the only war crimes tribunal recently created by the United Nations Security Council. On November 8, 1994, the United Nations Security Council established an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in Rwanda.¹⁹ The tribunal prosecuted Rwandan citizens for genocide and other such violations committed in the territory of neighboring states as well.²⁰ The atrocities committed in Rwanda are staggering and incomprehensible—estimates show that almost 2.5 million Rwandans were systematically murdered as part of ethnic cleansing by the Hutus.²¹ The evidence of this genocide reportedly "includes dossiers documenting the training and arming of radical Hutu militias, minutes of meetings in which an extermination campaign was planned, and tapes of broadcasts inciting Hutus to 'fill the half-empty grave' once the killing began."²²

This Note explores the feasibility of establishing a permanent war crimes tribunal for violations of international humanitarian law.²³ The world must demonstrate that certain conduct during war is unacceptable and will not be tolerated. When universal fundamental rights, such as the right not to be murdered, tortured, or raped,²⁴ go unenforced, those rights become meaning-

14. Gertrude Samuels, *Nuremberg Reaffirmed: Putting War Crimes on the U.N. Agenda*, NEW LEADER, Mar. 8, 1993, at 7.

15. See, e.g., Albright, *supra* note 7, at 166.

16. Gary J. Bass, *Courting Disaster: The U.N. Goes Soft on Bosnia. Again.*, NEW REPUBLIC, Sept. 6, 1993, at 13.

17. Elizabeth Neuffer, *War Crimes Tribunal Under Siege Despite New Indictments*, U.N. Body Fears Loss of International Funds, Backing, BOSTON GLOBE, Feb. 19, 1995, at 29.

18. Marjorie Miller, *U.N. War Crimes Tribunal Charges 21 Bosnia Serbs*, L.A. TIMES, Feb. 14, 1995, at A1.

19. Madeline K. Albright, *U.N. Security Council Establishes International Tribunal for Rwanda*, 5 DEP'T ST. DISPATCH, Nov. 21, 1994, at 781.

20. *Id.*

21. Tom Masland, *Will It Be Peace or Punishment?*, NEWSWEEK, Aug. 1, 1994, at 37 (crediting the Rwandan ethnic cleansing to the group officially responsible—the radical Hutu militia).

22. *Id.*

23. See *infra* part III.

24. See *infra* notes 114-19 and accompanying text.

less. A permanent tribunal will send a clear message that atrocities committed during war will not be tolerated. The fact that the Yugoslavian tribunal is the first of its kind since World War II demonstrates the difficulty in obtaining the support needed to establish a war crimes tribunal.

This Note begins by briefly exploring the history of war crimes.²⁵ The political and legal problems associated with the Leipzig Trials at the end of World War I and the Nuremberg Trials at the end of World War II will be examined in particular.²⁶ This Note then reviews the articles of the Yugoslavian tribunal and uses them as a model in determining how a permanent court should be structured.²⁷ Finally, this Note concludes that establishing a permanent tribunal is not only realistic, but worth the effort and cost.²⁸

II. A BRIEF HISTORY OF WAR CRIMES TRIBUNALS

A. *Pre-World War I*

The development of the concept of responsibility for war crimes is "intimately connected with the history of the law of war."²⁹ In ancient Greece, rules prohibiting "the use of certain means of warfare" were developed.³⁰ The Amphictyons of ancient Greece, for example, "swore not to poison springs and wells: [t]hose who violated such rules were considered perjurers."³¹

The roots of the "unlawful war" concept, however, go back to the Romans and the idea of "*bellum justum*."³² To the Romans, *bellum justum* required war to be declared in conformity with certain accepted formalities.³³ By the Middle Ages, the concept of *bellum justum* had assumed a completely different meaning: War was permissible only if "*justa causa*" existed.³⁴

Although humanitarianism later influenced the development of the laws of war, in the beginning "the prime motivations were commercial and military."³⁵ "Changes in the 'art' of war were the most immediate cause for the customs and practices, limiting the means and manners of warfare, which later turned into rules and then laws."³⁶ It was not until the 18th century that "the

25. See *infra* part II.

26. See *infra* part II.B-C.

27. See *infra* part III.D-H.

28. See *infra* part IV.

29. Remigiusz Bierzanek, *War Crimes: History and Definition*, in 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW: CRIMES AND PUNISHMENT 559, 559 (M. Cherif Bassiouni & Ned P. Vanda eds., 1973).

30. *Id.*

31. *Id.*

32. *Id.* "Bellum" means war in Latin. BLACK'S LAW DICTIONARY 107 (6th ed. 1991).

33. Bierzanek, *supra* note 29, at 559.

34. *Id.*

35. TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 5 (1992).

36. *Id.* at 6.

Law of War began to pay some attention to humanitarian considerations."³⁷ Instead of focusing on the right to resort to war, the focus shifted to conduct during war.³⁸

Individuals such as Jean-Jacques Rousseau advocated a more humanitarian concept of warfare. Rousseau argued that "hostilities should not extend beyond members of armed forces or encroach upon private property."³⁹ In 1864, the first Red Cross Convention dealing with the treatment of the sick and wounded in the field during armed conflict was held in Geneva.⁴⁰ In 1907, over forty nations signed the Second Hague Convention on the laws of land warfare.⁴¹ Additionally, the Hague Convention of 1907 formed "a fairly comprehensive body of rules imposing on belligerents numerous restrictions in dealing with enemy armies and civilian populations."⁴² The Hague Convention went so far as to require a state whose armies violated the laws of warfare "to make reparations or to punish persons guilty of those violations."⁴³

Waging war, however, had been one of the sovereign rights of every state for centuries.⁴⁴ Thus, the act of war itself was not considered unlawful, even if the aggressor state lacked *justa causa*.⁴⁵ Even with the rules of the Hague Convention in place, however, the protection of individuals before World War I was still far from satisfactory.⁴⁶ "The position of the individual in the Law of War was still that of an object of the Law and not that of a legal

37. G.I.A.D. Draper, *Human Rights and the Law of War*, 12 VA. J. INT'L L. 326, 326 (1972).

38. Bierzanek, *supra* note 29, at 560.

39. *Id.* Rousseau believed: "War is not, therefore, any relation between man and man, but a relation between state and state in which individuals are enemies only accidentally, not as men, or even as citizens, but as soldiers . . ." Draper, *supra* note 37, at 326 (citing 1 JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 13 (D.I. Eaton ed., 1795)).

40. Bierzanek, *supra* note 29, at 561.

41. TAYLOR, *supra* note 35, at 10. The preamble to the Hague Convention on the Laws and Customs of War on Land, which shows the effect of the influence of humanitarian sentiment in the second half of the 19th century, reads in part:

Being animated by the desire to serve, even in this extreme case (the resort to armed conflict), the interest of humanity and the ever progressive needs of civilization; . . . Until a more complete code of the laws of war can be drawn up, the High Contracting Parties deem it expedient to declare that, in cases not covered by the rules adopted by them, the inhabitants and the belligerents remain under the protection and governance of the principles of the law of nations, derived from the usages established among civilized peoples, from the laws of humanity and from the dictates of the public conscience.

Draper, *supra* note 37, at 327 (quoting Hague Convention on the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539).

42. Bierzanek, *supra* note 29, at 561.

43. *Id.*

44. *Id.*

45. *Id.* at 562.

46. *Id.*

persona endowed with rights under the Law of Nations."⁴⁷ The concept of war crimes was only a "general notion without any practical legal consequence."⁴⁸

B. The Leipzig Trials

World War I marked a new chapter in the development of responsibility for war crimes.⁴⁹ Contemporaries were horrified by the number and gravity of war crimes committed during World War I and the flagrancy of the violations.⁵⁰ Violations of the rules and customs of war included "[m]assacres, torture, the arrest and execution of hostages, artillery and aerial bombardments of open towns, . . . [the] use of shields formed of living human beings, attacks on hospitals, [and] disregard of the rights of the wounded, prisoners of war, and women and children."⁵¹ Public opinion demanded those responsible for the atrocious crimes be punished.⁵²

Article 228 of the Treaty of Versailles gave the Allied and Associated Powers the right to bring before military tribunals "persons accused of having committed acts in violation of the laws and customs of war."⁵³ In conjunction with this power, the treaty initially required Germany to hand over to the Allies for trial 901 persons accused of violating the laws of war.⁵⁴ Germany resisted this, however, arguing that turning over these alleged "war criminals" would result in a political and social revolution in Germany—undermining the entire peace structure.⁵⁵

47. Draper, *supra* note 37, at 328.

48. Bierzanek, *supra* note 29, at 583.

49. *Id.* at 562.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 565. The full text of Article 228 reads as follows:

The German Government recognizes the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such person shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies.

The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office, or employment which they held under the German authorities.

Id. at 586-87 (citing 3 TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS, AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS, 1910-1923, at 3329 (C.F. Redmond ed. 1923)).

54. *Id.* at 566.

55. *Id.* (citing Von Lersner, *Die Auslieferung Der Deutschen Kriegsverbrecher*, in 1 ZEHN JAHRE VERSAILLES 22 (H. Schnee & H. Draeger eds., 1929)).

In addition to the protests of Germany, each of the Allied countries adopted a different position with respect to the trial of war criminals.⁵⁶ The Japanese delegates, for instance, were wary of the precedent created in international law by the prosecution of enemy heads of state by the opposite party for violations of the laws and customs of war.⁵⁷ Moreover, the "American Delegates refused to give their assent to 'creating an international criminal court for the trial of individuals, for which a precedent [was] lacking and appear[ed] to be unknown in the practice of nations.'"⁵⁸

Conscious of this lack of consensus among the Allies, Germany was able to push through a compromise in which Germany itself was given the responsibility for punishing Germans found guilty of committing war crimes.⁵⁹ The Allies eventually agreed to the trials of a significantly reduced number of Germans by German national courts.⁶⁰

The trial of German war criminals began in May 1921 and lasted until June 1922.⁶¹ "The result of the Leipzig trials was that of the 901 persons on the list of war criminals accused of the most appalling crimes, 888 were either not tried, acquitted or summarily released . . ."⁶² The thirteen convicted and sentenced were not required to serve their terms.⁶³ Several managed to escape and the prison wardens who engineered these "escapes" were publicly congratulated.⁶⁴

The Treaty of Versailles clearly illustrates why allowing defeated but not wholly occupied states to prosecute their own war criminals is not feasible.⁶⁵ Because of nationalistic, patriotic, or propagandistic problems, national prosecutions have been rare.⁶⁶ In the case of the Leipzig trials at the end of World War I, the "trials took place in an atmosphere of 'patriotic indignation' against the humiliation of Germany: applause and bouquets greeted the appearance of 'national heroes unjustly' accused and sentenced."⁶⁷

C. The Nuremberg Trials

The critical period in the development of the idea that individuals should have specified human rights under international law arrived with the tragic experiences of World War II and the establishment of the Charter of the United Nations in 1945.⁶⁸ The events of World War II finally gave the

56. *Id.* at 567.

57. *Id.*

58. *Id.* (citing Von Lersner, *supra* note 55, at 26).

59. *Id.* at 567.

60. Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, 72 FOREIGN AFF. 122, 123 (1993).

61. Bierzanek, *supra* note 29, at 567.

62. *Id.* at 568.

63. *Id.*

64. *Id.*

65. Meron, *supra* note 60, at 123.

66. *Id.*

67. Bierzanek, *supra* note 29, at 568.

68. Draper, *supra* note 37, at 330.

historic idea of punishing war criminals real effect.⁶⁹ The complete disregard of the individual through the act of genocide had "reached dimensions unprecedented in history," when approximately six million Jews were systematically murdered by the Nazis during World War II.⁷⁰

During the war, the Allied governments made numerous declarations that war criminals would be prosecuted.⁷¹ On October 20, 1943, the United Nations decided to establish a commission for the investigation of war crimes.⁷² The commission, influenced by memories of the failure to punish German war criminals after World War I, devoted much of its attention to the definition of war crimes.⁷³

The commission understood war crimes to encompass not only violations of the customs and laws of war, but also crimes against humanity and peace.⁷⁴ In addition to its influence on the definition of war crimes, the commission also "contributed much to the solution of the legal issues raised by the prosecution and punishment of war criminals . . . connected with investigating and recording the facts involved."⁷⁵

On August 8, 1945, the Allies, "acting in the interests of all the United Nations," signed the London Agreement, which established an "International Military Tribunal for the trial of war criminals of the European Axis."⁷⁶ The three categories of crimes coming within the jurisdiction of the International Military Tribunal were: "(1) crimes against peace," which included "planning, preparation, initiation, or waging of a war of aggression; . . . (2) war crimes (violations of the laws and customs of war) and (3) crimes against humanity" ⁷⁷ War crimes were thus defined as not only incorporating the Hague Conventions of 1907 and other customary international law regulating warfare, but the humanitarian principles enunciated in the Charter of the United Nations.⁷⁸

69. Bierzanek, *supra* note 29, at 571.

70. Forum Before the International and Comparative Law Section of the American Bar Association (August 12, 1970), in *Nuremberg Revisited: The Judgment of Nuremberg in Today's World*, 1970 A.B.A. SEC. INT'L & COMP. LAW 4 (quoting Adrian Fisher) [hereinafter *Nuremberg Revisited*].

71. Bierzanek, *supra* note 29, at 572-73.

72. *Id.* at 573.

73. *Id.* at 573-74.

74. *Id.* at 574.

75. *Id.* at 573.

76. *Id.* at 575.

77. *Id.* at 576.

78. Article 1 of the United Nations Charter states:

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

Although the idea of "crimes against humanity" played only a marginal role in deciding the guilt of the accused under the London Agreement, it "affirmed the existence of certain fundamental human rights superior to the law of the State and protected by international criminal sanction even if violated in pursuance of the law of the State."⁷⁹ In addition, the Agreement established other important precedents for the development of international law.⁸⁰ For example, the Nuremberg trials made clear that a plea of "superior orders" would no longer justify the commission of a war crime, although it might be considered as a mitigating factor.⁸¹

Jurisdiction of the tribunal was premised on the sovereign legislative power of the countries to which Germany had unconditionally surrendered.⁸² Additionally, the tribunal determined that the chief Nazi criminals had violated the Paris Pact of 1928, to which Germany was a party, even though the pact did not provide for any sanctions.⁸³ The tribunal reasoned that violations of international law entail liability under international law even if no specific provisions speak to such a breach or potential sanctions.⁸⁴ The United Nations Charter, which was passed and entered into force in 1945, also spe-

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

U.N. CHARTER art. 1, ¶¶ 1-4. Article 2 of the United Nations Charter states:

The Organization and its Members . . . shall act in accordance with the following Principles.

1. The Organization is based on the principle of the sovereign equality of all its Members.

2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.

3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

U.N. CHARTER art. 2, ¶¶ 1-4.

79. Draper, *supra* note 37, at 331.

80. Quincy Wright, *The Law of the Nuremberg Trial*, in *INTERNATIONAL CRIMINAL LAW* 239, 244 (Gerhard O.W. Mueller & Edward M. Wise eds., 1965).

81. *Nuremberg Revisited*, *supra* note 70, at 18 (quoting Joseph Bishop).

82. Wright, *supra* note 80, at 251.

83. Bierzanek, *supra* note 29, at 576.

84. *Id.* at 576-77, 577 n.31.

cifically stated that nonmember States may be forced to act in accordance with the Charter's principles.⁸⁵

In the end, the International Military Tribunal at Nuremberg sentenced nineteen of the twenty-two major offenders who were tried.⁸⁶ In contrast to the Leipzig trials, the trials at Nuremberg were quite successful. At Nuremberg, however, the Allies had complete authority over Germany.⁸⁷ They were usually able to find, arrest, and obtain evidence against the accused.⁸⁸ The Nuremberg trials were held in the setting of a completely defeated country.⁸⁹ Conversely, the challenge today is to prosecute those who are members of victorious factions.

III. THE REQUISITES FOR ESTABLISHING A PERMANENT WAR CRIMES TRIBUNAL

A. *Defining the Law of War*

1. *Historical Roots*

Since the Middle Ages, "people have thought about the association between justice and warfare from two basic standpoints: from the standpoint of the decision to resort to war (*jus ad bellum*), and from the standpoint of the actual conduct of the war once hostilities [have] begun (*jus in bello*)."⁹⁰ While pioneers of the modern law of war in the 19th century devoted attention to developing rules for the humane treatment of soldiers, it was not until the 20th century that any attention was directed toward the development of detailed rules for the protection of civilians.⁹¹ The reason for the late development of rules protecting civilians arose out of the thought that civilians were already protected by the sharp distinction drawn between them and combatants.⁹² During the 20th century, however, it became apparent that this distinction no longer afforded sufficient protection for civilians and, consequently, it "would be necessary for the law of war to broaden its concerns in certain important ways."⁹³

In 1946, the International Military Tribunal (IMT) at Nuremberg relied on treaties and the customs and practices of countries in defining the law of

85. U.N. CHARTER art. 2, ¶ 6. The provision states: "The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security." *Id.* Chapter I of the U.N. Charter outlines the purposes and principles. *Id.* art. 1-25; *see supra* text accompanying note 78.

86. Wright, *supra* note 80, at 239.

87. Meron, *supra* note 60, at 124.

88. *Id.*

89. *Id.* at 123.

90. RICHARD B. LILICH, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 774 (1991).

91. *Id.*

92. *Id.*

93. *Id.*

war.⁹⁴ "The Fourth Hague Convention, which codified the principal laws of war on land, . . . provided the normative core" for the IMT's reliance.⁹⁵ Article 6 of the IMT's Charter, which defines crimes against peace, war crimes, and crimes against humanity, provides precedent for prosecuting violations of international humanitarian law.⁹⁶

2. *The Four Geneva Conventions of 1949*

Three years after the Nuremberg trials, the Geneva Conventions of 1949 were adopted.⁹⁷ The first three conventions "replaced earlier instruments dealing with (1) Wounded and Sick in the Armed Forces in the Field; (2) Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea; and (3) Prisoners of War."⁹⁸ It was the Fourth Convention, the Protection of Civilian Persons in Time of War, however, which made a significant contribution toward "safeguarding the elementary rights of the civilian population."⁹⁹

94. The IMT stated: "The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts." International Military Tribunal (Nuremberg), Judgment and Sentences (Oct. 1, 1946), *reprinted in* 41 AM. J. INT'L L. 172, 219 (1947) [hereinafter Judgment].

95. Meron, *supra* note 60, at 127. See *supra* text accompanying note 41 for the text of the preamble to the Fourth Hague Convention.

96. The relevant provisions of Article 6 of the IMT Charter are as follows:

(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, violation 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.

Leaders, organizers, instigators, and accomplices, participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Judgment, *supra* note 94, at 174-75.

97. LILLICH, *supra* note 90, at 779.

98. *Id.*

99. Bierzanek, *supra* note 29, at 580.

The most important articles of the Fourth Convention are articles 27, 31, 32, 33, and 34.¹⁰⁰ Article 27 provides for the humane treatment of all persons,¹⁰¹ Article 31 prevents the use of physical or moral coercion (torture),¹⁰² Article 32 prevents states from causing the suffering or extermination of protected persons,¹⁰³ Article 33 prevents protected persons from being punished for crimes they did not commit,¹⁰⁴ and Article 34 prevents the taking of hostages.¹⁰⁵ Currently 166 nations have signed this convention.¹⁰⁶ The Fourth Convention enumerates basic human rights provisions which should be included in any rules governing the law of war.

Article 2 of the Yugoslavian Tribunal describes grave breaches of the Geneva Conventions of 1949 as including the following: willful killing, tor-

100. LILLICH, *supra* note 90, at 779.

101. Article 27 states:

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.

Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion, or political opinion.

However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

LILLICH, *supra* note 90, at 779 (quoting Geneva Convention on the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, 306, 308-09 [hereinafter Fourth Geneva Convention]).

102. Article 31 states: "No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties." *Id.* (quoting Fourth Geneva Convention, *supra* note 101, at 306, 308-09).

103. Article 32 states:

The High Contracting Parties specifically agree . . . each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents.

Id. at 780 (quoting Fourth Geneva Convention, *supra* note 101, at 306, 308-09).

104. Article 33 states that "[n]o protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited. Pillage is prohibited. Reprisals against protected persons and their property are prohibited." *Id.* (quoting Fourth Geneva Convention, *supra* note 101, at 306, 308-09).

105. Article 34 states: "The taking of hostages is prohibited." *Id.* (quoting Fourth Geneva Convention, *supra* note 101, at 306, 308-09).

106. LILLICH, *supra* note 90, at 780.

ture or inhumane treatment (including biological experiments), willfully depriving a prisoner of war or a civilian of the right to a fair trial, and taking civilian hostages.¹⁰⁷ All of these principles "have unquestionably passed into customary international law."¹⁰⁸

3. *Incorporating Other Standards of Customary International Law*

Other conventions applicable to international humanitarian law include the Convention on Genocide and the Convention Against Torture.¹⁰⁹ The Convention on Genocide defines genocide as "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group."¹¹⁰ Over 100 states are parties to the Convention on Genocide.¹¹¹ Article 4 of the Yugoslavian Tribunal defines the following acts as punishable: "(a) genocide; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempt to commit genocide; [and] (e) complicity in

107. The full text of Article 2 reads as follows:

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

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

Statute of the International Tribunal, Annex to the Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), reprinted in Monroe Leigh et al., Report on the International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia, 1993 A.B.A. SEC. INT'L L. & PRAC. 61 [hereinafter Statute of the Yugoslavian Tribunal].

108. Monroe Leigh et al., *Report on the International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia*, 1993 A.B.A. SEC. INT'L L. & PRAC. 12-13 [hereinafter A.B.A. Report].

109. See Convention of the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/RES/39/46 (1984).

110. Convention of the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. II, 78 U.N.T.S. 277, 288.

111. LILICH, *supra* note 90, at 170-71.

genocide."¹¹² The Convention on Genocide is clearly part of customary international law.¹¹³

Although only forty-nine countries are parties to the Convention on Torture, all nations seem to unquestionably agree that there is no right to torture.¹¹⁴ While perhaps not all states abide by the Convention in practice, all countries deny they engage in torture and agree that this is part of coherent international law.¹¹⁵ Article 5 of the Yugoslavian Tribunal statute lists torture as one of the crimes against humanity.¹¹⁶ Article 3 of the Yugoslavian Tribunal statute lists other violations of the "laws or customs of war" as including:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
- (d) seizure of, destruction or willful 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.¹¹⁷

112. *Statute of the Yugoslavia Tribunal*, *supra* note 107, at 62.

113. *A.B.A. Report*, *supra* note 108, at 13.

114. Daniel Derby, Lecture at Moscow University (June 11, 1993).

115. *Id.*

116. *Statute of the Yugoslavian Tribunal*, *supra* note 107, at 62-63. Article 5 defines crimes against humanity as the following: "(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." *Id.*

In adherence to customary international law, or the principles of *nullem crimen sine lege* (no crime without law), the A.B.A. Task Force has proposed the following modifications to paragraphs (f) through (i) and the addition of two other categories of crimes:

- (f) torture and mutilation;
- (g) rape, including enforced prostitution and enforced pregnancy, and other forms of sexual assault;
- (h) persecution on political, racial and religious grounds;
- (i) taking of hostages;
- (j) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (k) the passing of sentence and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

A.B.A. Report, *supra* note 108, at 15-16. In particular, the A.B.A. Task Force thought the phrase "other inhumane acts" in paragraph (i) of the Yugoslavian Tribunal statute could "be vulnerable to criticism as vague and imprecise, since the Charter [of the IMT at Nuremberg] did not further define that term." *Id.* at 14.

117. *Statute of the Yugoslavian Tribunal*, *supra* note 107, at 61-62.

Noting that these violations were part of customary international law, the A.B.A. Task Force would have added additional provisions to the list,¹¹⁸ but agreed that a list of breaches of the laws concerning war customs should include these provisions at a minimum.¹¹⁹

B. *Encompassing the Three Different Types of Wars*

There are three different types of wars: international or interstate armed conflicts, internal armed conflicts, and wars of national liberation.¹²⁰ The Geneva Conventions of 1949, with the exception of Common Article 3, apply only to interstate armed conflicts.¹²¹ During the 1970s, the International

118. The A.B.A. Task Force, while noting the list was not intended to be exhaustive, would have added the following provisions especially forbidden by Article 23 of the Hague Regulations:

- (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 . . . 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.

A.B.A. Report, *supra* note 108, at 13-14. The A.B.A. Task Force thought "enumeration of measures especially forbidden by the Hague Regulations would appropriately parallel the enumeration of 'grave breaches' of the Geneva Conventions in Article 2, and would reinforce the [Yugoslavian Tribunal's] adherence to the principle of *nullem crimen sine lege*." *Id.* at 14.

119. A.B.A. Report, *supra* note 108, at 13-14.

120. R.R. Baxter, *Modernizing the Law of War*, 78 MIL. L. REV. 165, 170 (1978).

121. *Id.* at 169. Common Article 3 of the Geneva Conventions of 1949, which Baxter points out was thought to be radical at the time, contains the following:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

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

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

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of execution without previous judgment pronounced by a regularly constituted court, affording all

Committee of the Red Cross began work on reaffirming and developing international humanitarian law applicable to armed conflicts.¹²² As a result, two protocols to the Geneva Conventions of 1949 were adopted in 1977.¹²³

Protocol I,¹²⁴ which deals with international armed conflicts, was defined to include wars of national liberation.¹²⁵ As a result, all aspects of the Geneva Conventions of 1949, not just Common Article 3, are applicable to wars of national liberation.¹²⁶ This created the problem "that a national liberation movement or any other entity or authority constituting the moving party in a war of national liberation would not be a party to the Geneva Conventions or Protocol I."¹²⁷ This was resolved by requiring the constituted entity or authority in a war of national liberation to undertake application to "the Protocol and the Conventions by a unilateral declaration addressed to Switzerland, the depository of the Protocol."¹²⁸ The United States never ratified Protocol I.¹²⁹ Because Protocol I has yet to gain universal acceptance, its principles should not be relied upon in establishing a permanent court.

the judicial guarantees which are recognized as indispensable by civilized peoples.

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

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Common Article 3, 75 U.N.T.S. 287, 288-90.

122. LILLICH, *supra* note 90, at 808.

123. *Id.*

124. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), U.N. Doc. A/32/144, reprinted in 16 I.L.M. 1391 (1977) [hereinafter Protocol I].

125. LILLICH, *supra* note 90, at 808. "Wars of national liberation" are defined in Article 1, paragraph 4, as armed conflicts:

[i]n which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.

Baxter, *supra* note 120, at 172 (quoting Protocol I, *supra* note 124, art. 1, ¶ 4).

126. Baxter, *supra* note 120, at 172.

127. *Id.* at 173.

128. *Id.*

129. President Ronald Reagan argued that by automatically classifying "wars of national liberation" as international conflicts, the world would legitimize "groups that employ terrorist practices." LILLICH, *supra* note 90, at 824 (quoting *Message From the President Transmitting Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of Noninternational Armed Conflicts*, S. TREATY DOC. No. 2, 100th Cong., 1st Sess. III-V (1987)). Reagan also believed provisions granting combatant status to irregular forces,

Protocol II to the Geneva Conventions of 1949 deals with internal, or intranational, armed conflicts.¹³⁰ Before Protocol II applies, however, a high threshold must be met.¹³¹ "[T]he dissident armed forces must be under responsible command; they must exercise control over a part of the state's territory so as to enable them to carry out sustained and concerted military operations; and they must be able to implement Protocol II."¹³² Most internal conflicts, however, take years before reaching this threshold.¹³³ In addition, only in the most obvious of situations would a government admit that it violated provisions of Protocol II.¹³⁴

Assuming the necessary conditions for invoking Protocol II are met, Article 4 of this protocol provides fundamental guarantees for the humane treatment of civilians.¹³⁵ Other articles of Protocol II provide additional pro-

the purpose of which was to distinguish combatants from civilians, "would endanger civilians among whom terrorists and other irregulars try to conceal themselves." *Id.* at 823. Reagan further stated that classifying wars as "international or non-international should turn exclusively on objective reality, not on one's view of the moral qualities of each conflict." *Id.*

130. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), U.N. Doc. A/32/144, reprinted in 16 I.L.M. 1442 (1977) [hereinafter Protocol II].

131. Daniel Smith, *New Protections for Victims of International Armed Conflicts: The Proposed Ratification of Protocol II by the United States*, 120 MIL. L. REV. 59, 67 (1988).

132. *Id.*

133. *Id.*

134. *Id.* Article 1 of Protocol II provides as follows:

This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

... This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

Protocol II, *supra* note 130, art. 1 (emphasis added).

135. The first two paragraphs of Article 4 provide as follows:

1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.

2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:

tections for civilians¹³⁶ and for treatment of the sick and wounded.¹³⁷ Because Protocol II requires such a high standard before it is applicable, and thus avoids the potential problem of legitimizing groups that employ terrorist practices, this Note recommends its incorporation as part of any permanent tribunal.

C. Jurisdiction

"Jus cogens" are peremptory norms of general international law.¹³⁸ A peremptory norm of general international law is defined as "a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."¹³⁹ In order to gain broad support, the jurisdiction of a permanent tribunal to adjudicate violations of international humanitarian law during war should be limited to jus cogens of general international law. The articles of the Yugoslavian Tribunal, for instance, are intended to limit that tribunal's jurisdiction to "those 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."¹⁴⁰

One way to establish the jurisdiction of the tribunal would be by treaty. Each country that signed the treaty would become subject to its provisions. Theoretically, because the tribunal would apply only customary international humanitarian law, the country would not be giving up any rights. Article I of the United Nations Charter states that one of the purposes of the United Nations is to maintain international peace and security and to take measures to achieve that goal.¹⁴¹ Because acts of aggression and breaches of peace violate the purposes of the United Nations Charter, all nations that are currently

(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) collective punishments;

(c) taking of hostages;

(d) acts of terrorism;

(e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) slavery and the slave trade in all their forms;

(g) pillage;

(h) threats to commit any of the foregoing acts.

Id. art. 2, ¶ 1-2.

136. *Id.* arts. 13-18.

137. *Id.* arts. 7-12.

138. See *Vienna Convention on the Law of Treaties*, art. 53, U.N. GAOR, 24th Sess., U.N. Doc. A/Conf. 39/27, reprinted in 8 I.L.M. 679, 698-99 (1969).

139. *Id.*

140. A.B.A. Report, *supra* note 108, at 11-12 (citing *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. Doc. S/25704 (1993)).

141. U.N. CHARTER art. 1, ¶ 1. For the text of this provision, see *supra* note 78.

United Nations members should have no difficulty accepting a treaty to create a permanent war crimes tribunal.¹⁴²

Another way to create a permanent war crimes tribunal is under Chapter VII of the United Nations Charter.¹⁴³ Chapter VII provides the Security Council of the United Nations with the power to maintain international peace and security.¹⁴⁴ The Yugoslavian Tribunal, for example, was created under the Security Council's Chapter VII authority.¹⁴⁵ Thus, if enough members of the Security Council decided that a permanent tribunal was necessary to maintain peace, a permanent tribunal's jurisdiction could be created.

Articles covering jurisdiction, which may encompass either treaty members or members of the United Nations or both, should be expanded to provide for concurrent jurisdiction with national courts.¹⁴⁶ While the tribunal would not want to deter national courts from trying those not prosecuted by the tribunal, the article should contain a supremacy clause that would prevent states from trying those already prosecuted by the tribunal.¹⁴⁷ The jurisdictional article should also provide that the tribunal cannot try a person twice

142. *See id.*

143. Article 41 of Chapter VII specifically gives the Security Council the power to "decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures." U.N. CHARTER art. 41.

144. *Id.*

145. *Statute of the Yugoslavian Tribunal*, *supra* note 107, at 61.

146. Article 9 of the Yugoslavian Tribunal statute, for example, provides:

1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.

2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.

Id. at 63-64.

147. *See id.* The "double jeopardy" article of the Yugoslavian Tribunal statute, Article 10, provides:

1. No person shall be tried before a national court for acts . . . for which he or she has already been tried by the International Tribunal.

2. A person who has been tried by a national court . . . may be subsequently tried by the International Tribunal only if: (a) the act for which he or she was tried was characterized as an ordinary crime; or (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Id. at 64.

for the same act.¹⁴⁸ Another provision should be included to prevent "multiple conviction and punishment for the same acts constituting more than one crime."¹⁴⁹

D. Composition and Structure of the Court

The composition and structure of the Yugoslavian Tribunal provides a good model for establishing a permanent tribunal.¹⁵⁰ The Yugoslavian Tribunal statute organizes the tribunal into two trial chambers: an appeals chamber and an office of the prosecutor.¹⁵¹ Three judges are assigned to each of the trial chambers and five judges to the appeals chamber.¹⁵² A registry provides secretarial services for both the chambers and the office of the prosecutor.¹⁵³ Because conflicts could arise, however, it would be better to provide a separate registry for each chamber.¹⁵⁴

The statute for the Yugoslavian Tribunal also provides judges "shall be elected by the General Assembly from a list submitted by the Security Council."¹⁵⁵ A permanent tribunal could provide a similar mechanism for election. Allowing any one nation to elect only one judge would ensure representation of the entire international community.¹⁵⁶

Provisions should also be included to allow the numbers of judges to increase if the work load increases.¹⁵⁷ Rotation of judges among the trial chambers would prevent prosecutors and defense counsel from attempting to try their cases before a certain judge.¹⁵⁸ Judges could be limited to four year terms to prevent re-election concerns from interfering with any judge's impartiality.¹⁵⁹ Terms also could be staggered to ensure a smooth transition.¹⁶⁰

The prosecutor, under the statute of the Yugoslavian Tribunal, is nominated by the Secretary-General of the United Nations and appointed by the Security Council.¹⁶¹ The prosecutor and his or her staff are given responsibility "for investigation and prosecution of persons responsible for serious

148. See, e.g., A.B.A. Report, *supra* note 108, at 44.

149. *Id.*

150. See *id.* at 18.

151. Statute of the Yugoslavian Tribunal, *supra* note 107, at 64.

152. *Id.* at 64.

153. *Id.* at 66.

154. The A.B.A. Task Force expressed concern that a "shared Registry may interfere with the impartiality and legitimacy of the Tribunal." A.B.A. Report, *supra* note 108, at 18. This Note agrees with the A.B.A. Task Force. The functions of the chambers and the office of the prosecutor "are different and sometimes incompatible with the rights of the accused." *Id.* at 19.

155. Statute of the Yugoslavian Tribunal, *supra* note 107, at 64-65.

156. A.B.A. Report, *supra* note 108, at 23.

157. *Id.* at 22.

158. *Id.*

159. *Id.* at 23.

160. *Id.*

161. Statute of the Yugoslavian Tribunal, *supra* note 107, at 66.

violations of international humanitarian law."¹⁶² The office of the prosecutor is to act as an independent organ of the tribunal and "shall not seek or receive instructions from any Government or from any other source."¹⁶³ The prosecutor serves a four year term and is eligible for reappointment.¹⁶⁴

A permanent tribunal should also include an office of defense counsel.¹⁶⁵ This would ensure adequate representation for accused parties not able to afford counsel.¹⁶⁶ Providing defense counsel for the accused would also "promote acceptance within the international community that the Tribunal has served the interests of justice."¹⁶⁷ The office of defense counsel could be elected through the same procedure as the office of the prosecutor.

E. Rules of Evidence and Procedure

Article 21 of the Yugoslavian Tribunal statute states that "the accused shall be presumed innocent until proven guilty."¹⁶⁸ Article 21 also states that the accused shall be provided with the following minimum guarantees:

to be informed promptly . . . of the nature and cause of the charges against him; . . . to have adequate time and facilities for the preparation of his defence; . . . to have legal assistance assigned to him[; to be able] to examine, or have examined, the witnesses against him . . . [and] not to be compelled to testify against himself or to confess guilt.¹⁶⁹

Article 22 provides for the protection of witnesses through the use of "*in camera* proceedings and the protection of the victim's identity."¹⁷⁰ Article 23 provides that opinions of the court shall be published in writing, and dissenting or concurring opinions may be included.¹⁷¹ Similar provisions should be included in creating a permanent tribunal.

The Yugoslavian Tribunal statute has no guidelines concerning the standard of proof at trial. The A.B.A. Task Force recommends the equivalent of the American "reasonable doubt" standard.¹⁷² A permanent tribunal

162. *Id.*

163. *Id.*

164. *Id.*

165. A.B.A. Report, *supra* note 108, at 19.

166. *Id.*

167. *Id.* at 19-20.

168. Statute of the Yugoslavian Tribunal, *supra* note 107, at 68.

169. *Id.*

170. *Id.*

171. *Id.* at 69.

172. A.B.A. Report, *supra* note 108, at 27-28. The A.B.A. Task Force recommends adoption of the instruction on reasonable doubt in the U.S. Army *Military Judges' Benchbook*, which states:

By "reasonable doubt" is intended not a fanciful or ingenious doubt or conjecture, but an honest, conscientious doubt suggested by the material evidence or lack of it in the case. It is an honest misgiving caused by insufficiency of proof of guilt. Proof beyond reasonable doubt means proof to a moral certainty although not necessarily an absolute or mathematical

should adopt such a standard in the interest of justice and to add validity to the court.

F. *Process for Bringing Charges Before the Court*

Under Article 16 of the Yugoslavian Tribunal statute, the prosecutor has the responsibility of investigating and prosecuting persons responsible for "violations of international humanitarian law."¹⁷³ Article 23 permits the prosecutor to obtain information from any source, including the reports of nongovernmental organizations, and allows for its use at trial.¹⁷⁴ The prosecutor is also required to prepare an indictment "containing a statement of the facts and the crime or crimes with which the accused is charged."¹⁷⁵ Article 19 requires the trial chamber to review the indictment and approve it only if it is "satisfied that a prima facie case has been established."¹⁷⁶ This Note advocates including such provisions in a permanent tribunal.

A permanent tribunal might also contain a petition mechanism to alleviate the fears countries may have that their citizens could be unfairly indicted on incredible or biased evidence.¹⁷⁷ This petition mechanism should require at least twelve nations to sign a petition agreeing to the investigation of a country's citizens for possible violations of international humanitarian law during war. This would ensure that a country's citizen is investigated only when a good portion of the world community believes war crimes have been committed.

G. *Sentencing Guidelines*

Article 24 of the Yugoslavian Tribunal statute provides for a maximum penalty of life imprisonment.¹⁷⁸ Article 24 also requires the trial chamber to

certainty. A "reasonable doubt" is a doubt which would cause a reasonably prudent person to hesitate to act in important and weighty personal affairs. The proof must be such as to exclude not every hypothesis or possibility of innocence but every fair and rational hypothesis except that of guilt. The rule as to reasonable doubt extends to every element of the offense although each particular fact advanced by the prosecution which does not amount to an element, need not be established beyond reasonable doubt. However, if, on the whole evidence, you are satisfied beyond reasonable doubt of the truth of each and every element, then you should find the accused guilty.

Id. (citing *Military Judges' Benchbook*, in DEP'T OF THE ARMY PAMPHLET 27-9, at 2-34 (1988)).

173. *Statute of the Yugoslavian Tribunal*, *supra* note 107, at 66.

174. *Id.* at 67. Helsinki Watch, for instance, has done a painstaking job of collecting and verifying evidence in Yugoslavia and "intends [for] its eyewitness accounts to serve as evidence for war-crimes trials." MacFarquhar, *supra* note 9, at 13.

175. *Statute of the Yugoslavian Tribunal*, *supra* note 107, at 67.

176. *Id.*

177. *See, e.g.*, Daniel Derby, *supra* note 114.

178. *Statute of the Yugoslavian Tribunal*, *supra* note 107, at 69. The full text of Article 24 is as follows:

"take into account such factors as the gravity of the offence and the individual circumstances of the convicted person" when imposing sentences.¹⁷⁹ Article 27 states that the sentence be served in a country which has indicated a willingness to accept convicted persons.¹⁸⁰ The applicable law of the sentencing country is then followed regarding imprisonment, "subject to the supervision of the International Tribunal."¹⁸¹ Article 28 calls for the pardon or commutation of sentences when required in the interest of justice.¹⁸² Article 7 explains that acts carried out pursuant to a superior order will not relieve the accused of criminal responsibility, although it may be considered a mitigating factor in sentencing.¹⁸³ These sentencing provisions, therefore, provide a good basis for those to be used in a permanent tribunal.

H. Enforcement Mechanisms

Article 29 of the Yugoslavian Tribunal statute requires nations to cooperate in the "investigation and prosecution of persons accused of committing serious violations of international humanitarian law."¹⁸⁴ No provision

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. . . .

2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Id.

179. *Id.*

180. *Id.* at 69-70.

181. *Id.* The full text of Article 27 provides:

Imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal.

Id.

182. *Id.* at 70. The full text of Article 28 provides:

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of the sentence, the State concerned shall notify the International Tribunal accordingly. The President of the International Tribunal, in consultation with the judges, shall decide the matter on the basis of the interest of justice and the general principles of law.

Id.

183. *Id.* at 63. Article 7, paragraph 4 provides: "The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment . . ." *Id.*

184. *Id.* at 70. Article 29 provides:

1. States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

exists, however, for the punishment of those nations refusing to cooperate. One solution would be to place offenders on an international "most wanted" list.¹⁸⁵ These offenders would be subject to arrest upon entering any foreign country.¹⁸⁶ The international community could also impose economic sanctions on countries that refuse to cooperate. The country could be required to turn over the offenders to the tribunal before normal relations would resume.¹⁸⁷

IV. CONCLUSION

*Ignorance was the alibi for nonintervention during two earlier spasms of genocide, in Nazi Germany and Khmer Rouge Cambodia. Decades later, we build Holocaust museums and finance billion-dollar peace plans in penance for underestimating the satanic ambitions of Hitler and Pol Pot. See-no-evil is [no longer] an option . . . [in an age] where cameras track artillery-riddled bodies and reporters interview victims of gang rape and other tortures.*¹⁸⁸

The United Nations should be lauded for establishing ad hoc tribunals for the prosecution of those responsible for egregious violations of international humanitarian law in the former Yugoslavia and in Rwanda. Conversely, the world has "failed to prosecute those responsible for egregious violations . . . in Uganda, Iraq, and Cambodia."¹⁸⁹ Unfortunately, war is an evil the world seems unable or unwilling to live without. Creating a permanent war crimes tribunal would be a step toward protecting innocent civilians from the revolting atrocities committed during war.

Unquestionably, everyone has certain universal and fundamental rights, including the right not to be murdered, tortured, or raped. When those rights go unenforced, however, they lose their meaning and purpose. The theoretical framework for a permanent court can be established by: defining violations of undisputed customary international humanitarian law, providing adequate procedural rules, ensuring that the structure and composition of the

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

- (a) the identification and location of persons;
- (b) the taking of testimony and the production of evidence;
- (c) the service of documents;
- (d) the arrest or detention of persons;
- (e) the surrender or the transfer of the accused to the International Tribunal.

Id.

185. See Meron, *supra* note 60, at 134.

186. See *id.*

187. See *id.*

188. MacFarquhar, *supra* note 9, at 13.

189. Meron, *supra* note 60, at 135.

court results in fair and impartial proceedings, providing legitimate means of bringing charges and fair sentencing, and providing for adequate enforcement mechanisms. Vindicating humanitarian rights would give meaning to fundamental human rights and deter the occurrence of future violations.

There has been speculation that amnesty could be granted to those involved in committing atrocities in the former Yugoslavia in exchange for peace.¹⁹⁰ This demonstrates the inherent problems with creating ad hoc tribunals. The Serbs, for example, are undoubtedly the victors in the former Yugoslavia; therefore, they have the leverage to ensure that their leaders escape liability. A permanent tribunal could avoid this pitfall by making it clear that those responsible for heinous violations of international humanitarian law will *always* be prosecuted. A permanent war crimes tribunal is, therefore, realistic, achievable, and much needed.

Dennis J. Mitchell

190. Neuffer, *supra* note 17, at 29.

APPENDIX

In advocating the establishment of a permanent tribunal which would prosecute persons responsible for serious violations of international humanitarian law, this Note recommends that the statute creating and governing such a tribunal contain, at a minimum, the following provisions:

STATUTE OF THE INTERNATIONAL TRIBUNAL

Purpose

ARTICLE 1

The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law in accordance with the provisions of this Statute.¹⁹¹

*Violations of the Laws and Customs of War
(Peremptory Norms of International Law)*

ARTICLE 2

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

- (a) willful killing;
- (b) torture or inhuman treatment, including biological experiments;
- (c) willfully causing great suffering or serious injury to body or health;
- (d) extensive destruction and appropriation of property not justified by military necessity, and carried out unlawfully and wantonly;
- (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- (f) willfully depriving a prisoner of war or a civilian of the right to a fair and regular trial;
- (g) unlawful deportation, transfer, or unlawful confinement of a civilian; and
- (h) taking civilians as hostages.¹⁹²

191. Modeled after Article 1 of the *Statute of the Yugoslavian Tribunal*, *supra* note 107, at 61.

192. Modeled after Article 2 of the *Statute of the Yugoslavian Tribunal*, *supra* note 107, at 61.

ARTICLE 3

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. 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 of undefended towns, villages, dwellings, or buildings;
- (d) seizure, destruction, or willful damage to institutions dedicated to religion, charity, education, the arts and sciences, historic monuments, and works of art and science;
- (e) plunder of public or private property;
- (f) killing, or wounding treacherously, individuals belonging to a hostile nation or army;
- (g) killing or wounding an enemy who, having laid down his arms, or having no means of defense, has surrendered at discretion;
- (h) declaring that no quarter will be given;
- (i) making improper use of a flag of truce, the national flag, the military insignia and uniform of the enemy, or distinctive badges of the Red Cross or Red Crescent; and
- (j) declaring abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party.¹⁹³

ARTICLE 4

- 1. The following acts shall be punishable:
 - (a) genocide;
 - (b) conspiracy to commit genocide;
 - (c) direct and public incitement to commit genocide;
 - (d) attempt to commit genocide; and
 - (e) complicity in genocide.
- 2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group:
 - (a) killing members of the group;
 - (b) causing serious bodily or mental harm to members of the group;
 - (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
 - (d) imposing measures intended to prevent births within the group; and

193. Paragraphs (a) through (e) are modeled after Article 3 of the *Statute of the Yugoslavian Tribunal*, *supra* note 107, at 61-62; paragraphs (f) through (j) are modeled after the suggestions of the *A.B.A. Report*, *supra* note 108, at 13-14.

- (e) forcibly transferring children of the group to another group.

3. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 1 of this article.¹⁹⁴

ARTICLE 5

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 and mutilation;
- (g) rape, including enforced prostitution, enforced pregnancy, and other forms of sexual assault;
- (h) persecution on political, racial, and religious grounds;
- (i) taking of hostages;
- (j) outrages upon personal dignity, including humiliating and degrading treatment;
- (k) the passing of sentence and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees recognized as indispensable by civilized peoples.¹⁹⁵

Jurisdiction

ARTICLE 6

The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.¹⁹⁶

ARTICLE 7

1. A person who planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of a crime

194. Modeled after Article 4 of the *Statute of the Yugoslavian Tribunal*, *supra* note 107, at 62.

195. Paragraphs (a) through (e) are modeled after Article 5 of the *Statute of the Yugoslavian Tribunal*, *supra* note 107, at 61-62; paragraphs (f) through (k) are modeled after the suggestions of the *A.B.A. Report*, *supra* note 108, at 14-16.

196. Modeled after Article 6 of the *Statute of the Yugoslavian Tribunal*, *supra* note 107, at 63.

referred to in Articles 2 through 5 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in Articles 2 through 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines justice so requires.¹⁹⁷

ARTICLE 8

1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law.

2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.¹⁹⁸

ARTICLE 9

1. No person shall be tried before the International Tribunal for serious violations of international humanitarian law twice for the same act.

2. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute for which he or she has already been tried by the International Tribunal.

3. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law under the present Statute may subsequently be tried by the International Tribunal only if the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

4. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall take into

197. Modeled after Article 7 of the *Statute of the Yugoslavian Tribunal*, *supra* note 107, at 63.

198. Modeled after Article 9 of the *Statute of the Yugoslavian Tribunal*, *supra* note 107, at 63-64.

account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.¹⁹⁹

Composition and Structure

ARTICLE 10

The International Tribunal shall consist of the following organs:

- (a) Two Trial Chambers;
- (b) An Appellate Chamber;
- (c) An Office of the Prosecutor;
- (d) An Office of Defense Counsel;
- (e) Separate Registries to provide secretarial services to the Trial and Appellate Chambers, the Office of the Prosecutor, and the Office of Defense Counsel; and
- (f) A President, and any other officers the Security Council deems necessary, to handle administrative matters.²⁰⁰

ARTICLE 11

The Trial and Appellate Chambers shall be composed of eleven independent judges, elected by the General Assembly of the United Nations from a list submitted by the Security Council. No more than one judge may represent any one nation for staggered four year terms.

- (a) Three judges shall serve in each of the Trial Chambers on a rotating basis.
- (b) Trial judges shall serve as the trier of fact.
- (c) Five judges shall serve in the Appellate Chamber.

The number of judges and the number of both Trial and Appellate Chambers may be increased upon the approval of the General Assembly.²⁰¹

ARTICLE 12

The Prosecutor shall be nominated by the Secretary-General of the United Nations and appointed by the Security Council. The Prosecutor and his or her staff are responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law. The Office of the Prosecutor shall act as an independent organ of the tribunal and shall not seek or receive instructions from any Government or from any

199. Modeled after Article 10 of the *Statute of the Yugoslavian Tribunal*, *supra* note 107, at 63.

200. Modeled after Article 11 of the *Statute of the Yugoslavian Tribunal*, *supra* note 107, at 64, and the suggestions of the A.B.A. Report, *supra* note 108, at 18-21, 23-24.

201. Modeled after Article 12 of the *Statute of the Yugoslavian Tribunal*, *supra* note 107, at 64, and the suggestions of the A.B.A. Report, *supra* note 108, at 21-24.

other source. The Prosecutor serves a four year term and is eligible for reappointment.²⁰²

ARTICLE 13

The Chief Defense Counsel shall be nominated by the Secretary-General of the United Nations and appointed by the Security Council. Chief Defense Counsel and his or her staff are responsible for the investigation and defense of indigent persons allegedly responsible for serious violations of international humanitarian law. When representation of multiple defendants would cause a conflict of interest, the Office of Defense Counsel shall assign the representation of as many defendants as necessary to private attorneys to avoid the conflict. The Office of Defense Counsel shall act as an independent organ of the tribunal and shall not seek or receive instructions from any Government or from any other source. Chief Defense Counsel serves a four year term and is eligible for reappointment.²⁰³

Rules of Procedure and Evidence

ARTICLE 14

(a) The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials, appeals, the admission of evidence, the protection of victims and witnesses, and other appropriate matters.

(b) The standard of proof at trial, however, shall be beyond a "reasonable doubt."

(c) "Reasonable doubt" is defined as follows:

Not a fanciful or ingenious doubt or conjecture, but an honest, conscientious doubt suggested by the material evidence or lack of it in the case. It is an honest misgiving caused by insufficiency of proof of guilt. Proof beyond reasonable doubt means proof to a moral certainty although not necessarily an absolute or mathematical certainty. A "reasonable doubt" is a doubt which would cause a reasonably prudent person to hesitate to act in important and weighty personal affairs. The proof must be such as to exclude not every hypothesis or possibility of innocence but every fair and rational hypothesis except that of guilt. The rule as to reasonable doubt extends to every element of the offense although each particular fact advanced by the prosecution which does not amount to an element, need not be established beyond reasonable doubt. However, if, on the whole evidence, you are satisfied beyond reasonable doubt of the

202. Modeled after Article 16 of the *Statute of the Yugoslavian Tribunal*, *supra* note 107, at 66.

203. Modeled after the suggestions of the *A.B.A. Report*, *supra* note 108, at 19-21.

truth of each and every element, then you should find the accused guilty.²⁰⁴

ARTICLE 15

1. All persons shall be equal before the International Tribunal.
2. In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to Article 16 of the Statute.
3. The accused shall be presumed innocent until proven guilty according to the provisions of the present Statute.
4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees:
 - (a) to be informed promptly and in detail, in a language which he or she understands, the nature and cause of the charge against him or her;
 - (b) to have adequate time and facilities for the preparation of his or her defense and to communicate with counsel of his or her own choosing;
 - (c) to be tried without undue delay;
 - (d) to be present at trial, to defend himself or herself in person or through legal assistance of his or her own choosing or that provided; and to be informed of this right;
 - (e) to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
 - (f) to have the free assistance of an interpreter if he or she cannot understand or speak the language used in the International Tribunal; and
 - (g) to not be compelled to testify against himself or herself or to confess guilt.²⁰⁵

ARTICLE 16

The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the use of *in camera* proceedings and the protection of the victim's identity.²⁰⁶

204. Modeled after the suggestions of the A.B.A. *Report*, *supra* note 108, at 26-29 (quoting *Military Judges' Benchbook*, in DEP'T OF THE ARMY PAMPHLET 27-9, at 2-34 (1988)).

205. Modeled after Article 21 of the *Statute of the Yugoslavian Tribunal*, *supra* note 107, at 68.

206. Modeled after Article 22 of the *Statute of the Yugoslavian Tribunal*, *supra* note 107, at 68.

ARTICLE 17

Judgments shall be rendered by a majority of the judges and accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.²⁰⁷

Process for Bringing Charges Before the International Tribunal

ARTICLE 18

At least twelve nations must sign a petition alleging serious violations of international humanitarian law against an individual or individuals before charges can be brought against those individuals before the International Tribunal.²⁰⁸

Sentencing

ARTICLE 19

1. The maximum penalty that may be imposed is life imprisonment. The Trial Chamber has the discretion to impose lesser sentences. In imposing sentences, the Trial Chamber shall consider the gravity of the offense and the individual circumstances of the convicted person.

2. In addition to imprisonment, the Trial Chamber may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

3. Imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal.

4. If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal accordingly. The President of the International Tribunal, in consultation with the judges, shall decide the matter on the basis of the interests of justice and the general principles of law.²⁰⁹

207. Modeled after Article 23 of the *Statute of the Yugoslavian Tribunal*, *supra* note 107, at 69.

208. See, e.g., Derby, *supra* note 114.

209. Modeled after Articles 24, 27, and 28 of the *Statute of the Yugoslavian Tribunal*, *supra* note 107, at 69-70.

Appellate and Review Proceedings

ARTICLE 20

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers, or from the Prosecutor, if it finds:

- (a) an error on a question of law; or
- (b) an error of fact which affected the outcome of the Trial Chamber proceedings.

2. The Appeals Chamber may affirm, reverse, revise, or remand decisions it reviews.²¹⁰

ARTICLE 21

Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which would have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal an application for review of the judgment.²¹¹

Enforcement Mechanisms

ARTICLE 22

Those persons accused of committing serious violations of international humanitarian law will be placed on an international list to be distributed to all countries and are subject to arrest upon entering any foreign country. The Security Council may impose economic sanctions on countries who refuse to cooperate in turning suspects over to the International Tribunal.²¹²

Cooperation and Judicial Assistance

ARTICLE 23

1. States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

- (a) the identification and location of persons;
- (b) the taking of testimony and the production of evidence;
- (c) the service of documents;
- (d) the arrest or detention of persons; and

210. Modeled after Article 25 of the *Statute of the Yugoslavian Tribunal*, *supra* note 107, at 69, and the suggestions of the A.B.A. *Report*, *supra* note 108, at 42-43.

211. Modeled after Article 26 of the *Statute of the Yugoslavian Tribunal*, *supra* note 107, at 69.

212. Modeled after suggestion in Meron, *supra* note 60, at 134.

(e) the surrender or the transfer of the accused to the International Tribunal.²¹³

213. Modeled after Article 29 of the *Statute of the Yugoslavian Tribunal*, *supra* note 107, at 69.

