

# KOSOVO'S WAR VICTIMS: CIVIL COMPENSATION OR CRIMINAL JUSTICE FOR IDENTITY ELIMINATION?

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## INTRODUCTION

On Thursday, May 27, 1999, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia Since 1991<sup>1</sup> announced that Yugoslav President Slobodan Milosevic<sup>2</sup> had "been indicted for his role in atrocities and mass deportations carried out by military forces under his command in Kosovo. . . ."<sup>3</sup> The move to indict Milosevic was a bold one for the prosecutor and for the Tribunal. It was an act on which few would have been willing to place a bet.<sup>4</sup> Noteworthy was the fifth

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<sup>1</sup> This Tribunal was established by the United Nations Security Council Resolution 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/Res/827 (1993). It is sometimes referred to as the ICTY, but I prefer Yugoslav Tribunal or The Tribunal. It was created following an historic "special session" of the U.N. Commission on Human Rights, meeting for the first time since its inception in 1946, and produced a broad-ranging resolution. See Payam Akhavan, *Punishing War Crimes in the Former Yugoslavia: A Critical Juncture for the New World Order* 15 HUM. RTS. Q. 262 (1993). Mr. Akhavan was arguing for the establishment of an International Tribunal, which could investigate and prosecute, in a manner consistent with due process, crimes against humanity and of genocide; if successful, he believed that this could help maintain and restore international peace and security. *Id.* at 274.

<sup>2</sup> Christopher Wren, *Judge says Yugoslavia Impedes Work of War Crimes Tribunal*, N.Y. TIMES, Nov. 9, 1999, at A7.

<sup>3</sup> Charles Trueheart, *War Crimes Charge to be Announced Against Milosevic*, WASH. POST, May 27, 1999, at A1. In March 2000, several months after the indictment, the U.S. planned to issue a "Wanted" poster for Milosevic, Radovan Karadzic, and Ratko Mladic, for the massacre of 6,000 Bosnian Muslims in 1995. *U.S. Issues 'Wanted' Poster for Milosevic*, N.Y. TIMES, Mar. 3, 2000, at A8.

<sup>4</sup> See Michael Scharf, *The Prosecutor v. Dusko Tadic: An Appraisal of the First International War Crimes Trial Since Nuremberg*, 60 ALB. L. REV. 861, 877 (1994). "But will the prosecutor have the fortitude to indict Slobodan Milosevic if the

count of the indictment, which referred to the "deliberate destruction of personal documents held by those who were forced out of the country."<sup>5</sup>

Prior to the indictment of Milosevic, there was little hope that the Yugoslav Tribunal would attempt to hold anyone criminally responsible for this type of "ethnic cleansing." And; while the indictment was not solely based on document destruction, and this author is unaware of any indictment by the Tribunal based solely on this type of "plundering," as it has been termed, the inclusion of this charge in Milosevic's indictment indicates a recognition of the serious nature of these acts. Until this indictment, the only options for attempting to gain even a modicum of formal justice<sup>6</sup> for Milosevic's acts would have been bringing charges against the Federal Republic of Yugoslavia in the European Court of Human Rights,<sup>7</sup> the efficacy of which is questionable. Now, at least, it may be possible to hold accountable those who have committed these grave breaches of the principles of international human rights.<sup>8</sup>

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mounting evidence establishes his culpability? From a political point of view, such action in the near future would seem to be folly." *Id.*

<sup>5</sup> Trueheart, *supra* note 3.

<sup>6</sup> If justice is defined as "judgment and sentence," the statute has so far provided the victims with very little of it. See Anna L. Quintal, *Rule 61: The "Voice of the Victims" Screams Out For Justice*, 36 COLUM. J. TRANSN'L L. 725 (1998).

<sup>7</sup> See discussion in Part II, *infra*.

<sup>8</sup> In this study, I have not attempted to question whether the rights alleged to have been violated, the rights attendant upon maintaining one's identity, are not rights that are universal. I have simply made the assumption that this identity elimination constitutes a breach of a fundamental right of being human. See Judge Learned Hand's opinion in *Grant v. Reader's Digest Ass'n.*, 151 F.2d 733 (2d Cir. 1945). In this assumption, I have not attended to the thoughtful comments of Professors Pannikkar and Klare, who have opined in various writings that perhaps human rights are not universal. "Could it not also be that Human Rights are not observed because in their present form they do not represent a universal symbol powerful enough to elicit understanding and agreement?" Although in this case I wonder, who could disagree? Maybe some, on the other side of the aisle, could. "It is claimed that Human Rights are universal. This alone entails a major philosophical query. Does it make sense to ask about conditions of universality when the very question about conditions of universality is far from universal?" Raimundo Pannikkar, *Is the Notion of Human Rights a Western Concept?* 120 DIOGENES 75, 76

Charges of this manifestation of ethnic cleansing,<sup>9</sup> or "identity elimination," surfaced in the spring of 1999, and were confirmed by State Department Spokesman Jamie Rubin, when he explained that, "[i]n addition to killings and forced expulsions, Serb forces are also engaged in identity elimination: destroying of birth certificates, property deeds and other documents."<sup>10</sup> This eradicates evidence of the ethnic Albanian presence in Kosovo and makes return much more difficult."<sup>11</sup> Apparently, identity elimination began "with the plundering of official files in Pristina and reaches all the way to the border, where refugees are being

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(1982). Similarly, Professor Klare opines that "rights concepts are sufficiently elastic so that they can mean different things to different people . . . [t]hat is because, like all of legal discourse, rights theory is an arena of conflicting conceptions of justice and human freedom." Karl E. Klare, *Legal Theory and Democratic Reconstruction: Reflections on 1989*, 25 U. BRIT. COLUM. L. REV. 69, 100 (1991). For example, "[h]uman rights discourse holds that its claims are universal yet also embodies a belief in the right of all peoples to cultural autonomy and self-determination." In order to resolve rights conflicts, it is necessary to step outside the discourse." *Id.*

<sup>9</sup> When the war in Bosnia-Herzegovina ended, it might have been thought that the world had seen the last of so-called "ethnic cleansing." This is the process by which at least one side in a conflict acts with the specific intention of at least chasing from their homes, but more often killing, members of the opposition because of the fact that they belong to a different ethnic group. The form of ethnic cleansing that seems to have occurred in Kosovo is one step more sophisticated in that the perpetrators did more than evict and kill people, they added to their deeds by intentionally destroying the very proof of who those evicted were, where they lived, and what property they owned.

<sup>10</sup> When I began working on this paper, in the fall of 1999, active hostilities between the Serbs and the Albanians had largely ended, and some Albanians were returning home. More recently, though, Albanians are being accused of retaliatory atrocities against Serbs. Many Serbs have left the area. There are presently 60,000 to 70,000 Serbs in Kosovo, down from about 200,000 to 250,000 two years ago. Steven Erlanger, *Chaos and Intolerance Prevailing in Kosovo Despite UN's Efforts*, N.Y. TIMES, Nov. 22, 1999, at A1 [hereinafter Erlanger, *Chaos and Intolerance*]; *Morning Edition: Partition Widening Between Northern and Southern Regions of Mitrovica, Kosovo, and thus Between Serbs and Albanians* (National Public Radio broadcast, Feb. 15, 2000). Further, what may have begun to be a sort of peace has recently erupted into violence in the Kosovoan town of Mitrovica, where Serbs and Albanians are now living in a situation of greatly heightened tension. Carlotta Gall, *Dozens Wounded as Violence Erupts Anew in Torn Kosovo City*, N.Y. TIMES, Mar. 8, 2000, at A10 [hereinafter Gall, *Dozens Wounded*].

<sup>11</sup> CNN *the World Today: Serb Forces in Kosovo Carrying out a Campaign of 'Identity Elimination' Against Ethnic Albanians* (CNN television broadcast, Transcript #99033102V23, Mar. 31, 1999).

stripped of one of the few things they have left to lose: their identities."<sup>12</sup> Even the license plates from their cars are being captured.<sup>13</sup> NATO suggests that Serbian forces apparently intended these actions to have the obvious result of making it difficult for ethnic Albanians to return home.<sup>14</sup> Says one commentator, "This is a kind of Orwellian scenario of attempting to deprive a people and a culture of the sense of past and a sense of community on which it depends."<sup>15</sup>

The question of the consequences that might flow from the actions of the Serbian Kosovars in destroying thousands of identity documents of the Albanian Kosovars fleeing or

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<sup>12</sup> *Id.* Plundering of entire communities occurred earlier in the 1990s during the war in Bosnia-Herzegovina. Many of the perpetrators of that destruction are just finding their justice. See *Prosecutor v. Kupreskic et al.*, Judgment, IT-95-16-T (Jan. 14, 2000), International Criminal Tribunal for the Former Yugoslavia Web Site, <http://www.un.org/icty> (last visited Feb. 20, 2001) [hereinafter ICTY Web Site]. In *Kupreskic*, five out of six accused were convicted of murder, inhuman acts, and persecution as crimes against humanity in the attack on the village of Ahmici in central Bosnia on April 16, 1993. One-hundred-sixteen Muslims were killed, 24 were wounded, and 2 mosques were destroyed. *Id.* Judge Cassese, in summarizing the judgment, stated that "[t]he primary purpose of the massacre was to expel the Muslims from the village, by killing many of them, by burning their houses, slaughtering their livestock, and by illegally detaining and deporting the survivors to another area. The ultimate goal . . . was to spread terror . . . so as to deter the members of that particular ethnic group from ever returning to their houses." The problem of an overwhelming lack of identity documents continues. *Id.* See also Erlanger, *Chaos and Intolerance*, *supra* note 10.

<sup>13</sup> CNN, *supra* note 11.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* In the fall of 1999, retaliation by Albanians against Serbs began in earnest. Some blame the NATO bombing and NATO forces in general. B.J. Sullivan, *Letter to the Editor: The Chaos in Kosovo*, N.Y. TIMES, Nov. 28, 1999, at 10, § 4. "The Spring ethnic cleansing of ethnic Albanians accompanied by murder, torture, looting and burning of houses has been replaced by the Fall ethnic cleansing of Serbs, Romas, Bosniaks and other non-Albanians accompanied by the same atrocities." Erlanger, *Chaos and Intolerance*, *supra* note 10. The fact that this now occurs in the presence of United Nations peace-keeping forces raises the level of irony. Similarly, in retaliation for Serbs having destroyed or damaged many mosques used by Albanians during the war, more than 70 Serbian Orthodox churches, monasteries, and holy places have been damaged or destroyed since the arrival of NATO forces in June 1999. Erlanger, *Chaos and Intolerance*, *supra* note 10. See also, *Destruction of the Serbian Orthodox Churches and Monasteries in Kosovo and Metohija* at <http://decani.yunet.com/destruction.html>.

forcibly removed from their homes during the recent war is an important one. Many of the victims have no proof of who they are, where they lived, or what they owned. Provisions are already being made to effect their return home, and many of them have returned home.<sup>16</sup> Others are being prevented from returning by displays of violence occurring directly in front of NATO-led peacekeepers.<sup>17</sup> However, if the returnees cannot establish their identity, return and recoupment of their property could be impossible.<sup>18</sup> In that event, perhaps a process that provides some form of compensation for their losses could be established, although challenges abound in making appropriate monies available and in developing a system of standards to apply in determining appropriate compensation. Also, given the difficulties expected in making identifications because of identity elimination, it will not be a simple matter to identify those entitled to compensation.

This Article is presented in three Parts. The first Part examines the likelihood that the displaced war victims could receive some type of civil compensation for their losses through the local courts in Yugoslavia. Part II scrutinizes the basic international human rights doctrines and systems of enforcement to determine whether they may offer remedies for the victims of identity elimination. Part III explores the likelihood that, through the Yugoslav

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<sup>16</sup> Apparently "15% of the Albanian population have not yet returned from abroad, and some are bound to be dead." Steven Erlanger, *In Victory's Wake, a Battle of Bureaucrats*, N.Y. TIMES, Nov. 28, 1999, at D5 [hereinafter Erlanger, *In Victory's Wake*]. As of early December 1999 over 800,000 deportees had reportedly returned to their homes. *Statement by the Secretary General of NATO, Lord Robertson, on the OSCE Report on Kosovo*, Press Release 161 (Dec. 6, 1999), at NATO Web Site, <http://www.nato.int/docu/pr/1999/p99-161e.htm> (last visited Feb. 20, 2001).

<sup>17</sup> *Serbs Stone Albanians in Divided Kosovo City*, N.Y. TIMES, Mar. 3, 2000, at A8 (describing the plight of ethnic Albanians attempting to return home to Mitrovica, Kosovo meeting "with a rain of stones as they crossed a footbridge laid down hours earlier by the . . . peacekeeping force.").

<sup>18</sup> For example, many of the refugees lack their passports, identity cards, and other documents proving who they are. Erlanger, *In Victory's Wake*, *supra* note 16.

Tribunal, those responsible for identity elimination may be held criminally responsible for their actions in Kosovo.

I. COULD THE DISPLACED WAR VICTIMS RECEIVE CIVIL  
COMPENSATION THROUGH THE LOCAL YUGOSLAVIAN COURTS?

The war crimes that have been committed surely seem to call for criminal prosecutions. Nonetheless, given the losses suffered by the displaced—identity elimination and concomitant inability to reclaim property—a natural question arises as to whether the local Yugoslavian courts could aid these victims in seeking civil restitution in the form of both financial compensation, as well as injunctive relief against Serbians who remain in the homes of Albanians.<sup>19</sup> Perhaps, through these remedies, the victims could begin the lengthy process of rebuilding their lives—either by returning home or by finding new places in which to create communities.

For the time being, the running of the government in Kosovo has been delegated to the United Nations Interim Administration Mission in Kosovo (UNMIK).<sup>20</sup> The success

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<sup>19</sup> Evictions of people occupying the homes of refugees had been underway, but were almost halted from November 1999 until April 2000. In the last instance, though, suspension of the evictions was annulled by the High Representative. Had this suspension taken effect, it "would only serve to deny refugees and displaced persons their right to return to their homes. Hundreds of thousands still do not have access to their apartments, and it is imperative that the process of property repossession is not delayed or temporarily suspended." NATO, Joint Press Conference, Coalition Press Information Center, Tito Barracks (Nov. 18, 1999), at <http://www.nato.int/sfor/trans/1999/t991118a.htm> (last visited Feb. 28, 2001) [hereinafter SFOR Transcript].

<sup>20</sup> Security Council Resolution 1244 (1999) provides that UNMIK provides transitional civil administration while establishing and overseeing the development of provisional democratic self-governing institutions. S.C. Res. 1244, U.N. SCOR, 4011th mtg., U.N. Doc. S/RES/1244 (1999). The Resolution specifies that the international civilian administration is empowered to "change, repeal or suspend existing laws to the extent necessary for the carrying out of his functions, or where existing laws are incompatible with the mandate, aims and purposes of the interim civil administration." *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, U.N. SCOR, at para. 39, U.N. Doc. S/1999/779

of this process is surely in doubt. Both the U.N. and the Organization for Security and Cooperation in Europe (OSCE) are seen as building large "bureaucratic structures for long-term international administration rather than encouraging eventual self-government. Able to offer much higher salaries than local employers, they have drawn educated Kosovars to their payrolls at the expense of schools, law offices and other professions . . . [u]nless there is a significant reining in of the international bureaucracy and greater efforts to involve the Kosovars more directly in the economy and administration, the outlook is disheartening."<sup>21</sup> What this means is that, whatever the condition of the Yugoslavian courts prior to the outbreak of violence over the past year, their present structure is far weaker, their personnel far more compromised, and their overall effectiveness far more limited.

Generally, when the United Nations steps in to assist in local governance following a crisis such as the present one, the local laws will still apply in court cases unless the laws conflict with international standards of human rights such as the prohibition of discrimination on grounds of "language, religion, political or other opinion, national, ethnic or social origin, association with a national community, property, birth or other status."<sup>22</sup> But regardless of whether the government is being run locally

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(1999). Once elections occur—and they were to be scheduled prior to the end of 2000—the elected body will be termed the "Kosovo Transitional Authority. For background information on this report, see Barbara Crossette, *U.N. Council Urged to Debate Political Future of Kosovo*, N.Y. TIMES, Mar. 7, 2000, at A6. On December 15, 1999, the senior U.N. administrator, Bernard Kouchner, signed a power-sharing agreement with Albanian leaders and invited the Serb leadership to join in. The agreement creates a new interim administration to run the province of Kosovo. Mihaela Armaselu, *Kosovo Albanian Leaders Sign Plan*, BOSTON GLOBE, Dec. 16, 1999, at A42.

<sup>21</sup> *Failures of Peace in Kosovo*, N.Y. TIMES, Nov. 24, 1999, at A22. For discussion of the bureaucratic infighting and competition among the various U.N. agencies working in Kosovo, see Erlanger, *In Victory's Wake*, *supra* note 16.

<sup>22</sup> Regulation No. 1999/1, at § 2, United Nations Mission in Kosovo, UNMIK/Reg/1999/1 (July 25, 1999) (effective Mar. 24, 1999).

or by UNMIK, and regardless of the governing law, significant evidence has surfaced that the Yugoslavian courts are unable to operate fairly and impartially; assuming this to be true, these local courts are not a viable option for the victims of identity elimination. Justice is hard to come by, and the province of Kosovo has neither police nor the legal institutions necessary for a functioning justice system.<sup>23</sup> With KFOR, the United Nations Kosovo force, without the power to either build a local judicial system or to issue identity documents, "there's no legal system, and this is a paradise for crime."<sup>24</sup> Hence, while it is surely preferable for the former Yugoslavia to be able to respond to its crisis by putting its own governmental processes to work to address these grave problems, at least at this time that option seems remote.

The likelihood of using the extant local judicial system to exact any form of appropriate compensation or justice has been undermined recently by violence and by attacks on the KFOR peacekeepers.<sup>25</sup> There remain large caches of weapons in the hands of both sides, each aiming for revenge.<sup>26</sup> Symbols of normalcy, such as NATO-sponsored buses transporting Serbians back and forth, are short-lived when these buses are attacked by ethnic Albanians retaliating for suffering "at Serbian hands during the

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<sup>23</sup> Erlanger, *Chaos and Intolerance*, *supra* note 10; see also *Failures of Peace in Kosovo*, *supra* note 21; see also Crossette, *UN Council Urged to Debate Political Future of Kosovo*, *supra* note 21.

<sup>24</sup> Erlanger, *Chaos and Intolerance*, *supra* note 10. Now, Albanians have complained that the French KFOR troops are shielding the Serbians during the throwing of grenades and the shrapnel that comes from them. Gall, *Dozens Wounded*, *supra* note 10.

<sup>25</sup> See, e.g., Elana Becatoros, *Kosovo Serbs Attack Peacekeepers*, CHI. TRIB., Feb. 21, 2000, at 3; Carlotta Gall, *Bus Ambush in Kosovo costs NATO Faith of Serbs*, N.Y. TIMES, Feb. 4, 2000, at A5 [hereinafter Gall, *Bus Ambush*].

<sup>26</sup> KFOR Press Update, Apr. 26, 2000, at [http://www.kforonline.com/news/reports/nr\\_26apr00.htm](http://www.kforonline.com/news/reports/nr_26apr00.htm) (last visited Feb. 25, 2001). In late February 2000, NATO troops mounted a strong effort to "strip Mitrovica of weapons . . ." Bradley Graham, *NATO Chief Makes Appeal for Additional Kosovo Troops*, WASH. POST, Feb. 24, 2000, at A13.



war.<sup>27</sup> Rumors abound that there are cadres of both Albanians and Serbians who "want peace to fail."<sup>28</sup> And with political assassinations ongoing, from the upper reaches of leadership<sup>29</sup> to lesser-known participants,<sup>30</sup> it remains difficult to imagine that a local judicial system could be operational.

Given the apparent present inability of the Yugoslav courts to provide civil remedies to the victims at issue here, the question follows whether the United-Nations-created Yugoslav Tribunal might offer any assistance in developing a system to provide civil compensation to the victims. Unfortunately, the answer to that question is apparently negative, for the statute establishing the Tribunal does not provide for financial "or other compensation for damages suffered by the victims" of the war.<sup>31</sup>

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<sup>27</sup> Gall, *Bus Ambush*, *supra* note 26.

<sup>28</sup> Carlotta Gall, *Kosovo Peacekeepers Warn that Extremists "Want Peace to Fail"* N.Y. TIMES, Feb. 15, 2000, at A13 (describing gunfights between Serbs, Albanians, and KFOR forces in Mitrovica, "the last multiethnic town in Kosovo where Serbs and Albanians are still living side by side, if uneasily.").

<sup>29</sup> Steven Erlanger, *Yugoslav Defense Chief Slain; Was a Close Ally of Milosevic*, N.Y. TIMES, Feb. 8, 2000, at A1 (discussing assassination of Pavle Bulatovic, an important member of Milosevic's allied party in Montenegro, the Socialist People's Party).

<sup>30</sup> *Id.* (discussing killing of Serbian paramilitary and criminal leader, Zeljko "Arkan" Raznatovic, apparently shot dead in a Belgrade hotel). In an interview conducted with a U.S.-born Yugoslav-American on March 16, 2000, I learned that the American Yugoslav community has serious doubts as to whether Arkan is dead, as there was little attention in Yugoslavia paid to his death and, as an important leader, he would ordinarily have been granted a funeral of some prominence. (Notes of Interview on file with author).

<sup>31</sup> Jeri Laber & Ivana Nizich, *The War Crimes Tribunal for the Former Yugoslavia: Problems and Prospects*, 18 FLETCHER FORUM OF WORLD AFFAIRS, 7, 24 (1994); see also Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991, adopted pursuant to S.C. Res 827, U.N. SCOR 3217th mtg., U.N. Doc. S/RES/827 (1993), available at ICTY Web Site, *supra* note 12 [hereinafter ICTY Statute]. An obvious question arises: where any such compensation would come from? The answer to that question would not be easy, but it is certainly a likelihood that the NATO countries could contribute toward these types of reparations, as they have in the past.

Even though civil remedies for intentional identity elimination are likely to be unavailable at this time through either the Tribunal or the presently-constituted Kosovoan courts, scrutiny of other nations' responses to similar crises may provide some momentum for creative problem-solving and eventual resolution of the issues raised here. Given the close proximity of Kosovo to Bosnia-Herzegovina, both in geography and political history, post-war developments there may be instructive for post-war Kosovo.

The Dayton Accords ("Accords") formalized provisions for post-war Bosnia and Herzegovina. Under the Accords, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), along with its Protocols, applies and has priority over conflicting laws, whether national or local.<sup>32</sup> Among other rights, citizens are granted the right to property and to a fair hearing in civil cases.<sup>33</sup> The new Bosnian Constitution provides that those who fled or were deported during the war have "restored to them property of which they were deprived in the course of hostilities . . . and . . . be compensated for any such property that cannot be restored to them."<sup>34</sup> Refugees and those who were displaced are accorded the right to freely "return to the homes of origin" and to be either returned to their property or to be compensated for its value.<sup>35</sup> The Accords provide for the appointment of a commission under the supervision of the European Court of Human Rights to address issues surrounding property claims.<sup>36</sup> This Property Commission has been delegated the authority "to gain access to records, determine lawful title

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<sup>32</sup> See Timothy William Waters, *The Naked Land: The Dayton Accords, Property Disputes, and Bosnia's Real Constitution*, 40 HARV. INT'L L.J. 517, 530 (1999) (referring to the General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, Dec. 14, 1995, 35 I.L.M. 75).

<sup>33</sup> *Id.* at 531 n.41.

<sup>34</sup> *Id.* at 533 n.55.

<sup>35</sup> *Id.* at 533 n.56.

<sup>36</sup> *Living History Interview: Judge Richard Goldstone*, 5 TRANSNAT'L LAW & CONTEMP. PROBS 373, 380 (1995) [hereinafter *Living History Interview*]; see also Waters, *supra* note 32, at 534 nn.63-64.

and value, and dispose of property."<sup>37</sup> For example, in the Bosnian area of Kopaci, the issue of the return of pre-war property persists. The local Housing Administration has been issuing decisions; unfortunately, 200 decisions issued recently may have been invalid because of a technicality.<sup>38</sup>

In addition to the new laws applicable in Bosnia-Herzegovina following the Dayton Accords, after the war both nations attempted to incorporate into their systems provisions of the legal systems that had operated under the former Yugoslavia.<sup>39</sup> Some could not be incorporated, as they conflicted with principles of the Dayton Accords. For example, on the important issue of reclaiming abandoned property, neither states' laws met the principles of the Accords, so new laws regulating abandoned property were adopted in 1998.<sup>40</sup> The Accords provide for the presumptive right of return to "[a]nyone who abandoned his property after April 30, 1991... absent a showing that they abandoned the property for reasons unrelated to the war."<sup>41</sup> To achieve this return, though, claimants have to present documentary evidence to support their claim to an occupancy right, such as contracts for exchange, court or administrative decisions, or less formal evidence, such as copies of bills or the statements of witnesses.<sup>42</sup> The right to and process of property reclamation will be a key issue in post-war Kosovo, as many of the Albanian refugees were evicted from their homes, which are now occupied by Serbs. Given that the Serbs remain in control of whatever local organs of government are operating, property reclamation would have to be administered by neutral parties.

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<sup>37</sup> Waters, *supra* note 32, at 545 nn.65-67.

<sup>38</sup> SFOR Transcript, *supra* note 19. The decisions were undated. Apparently, because the decisions have to be implemented within 90 days of their issuance, failure to date them made them ineffective.

<sup>39</sup> Waters, *supra* note 32, at 536.

<sup>40</sup> *Id.* at 538.

<sup>41</sup> *Id.* at 551 n.133.

<sup>42</sup> *Id.* at 551 nn.139-40.

Further, while the process of reclaiming property established through the Accords certainly seems fair, problems will arise in applying these rules in Kosovo, precisely because of the destruction of so many documents. It will be difficult, if not impossible, for many returning home to produce the requisite documentary evidence of an occupancy right. It almost as if the Kosovo Serbs knew what the Dayton Accords required and accordingly destroyed the very documents that would enable the refugees to eventually return home.

## II. MAY INTERNATIONAL HUMAN RIGHTS PRINCIPLES BE EMPLOYED TO ACHIEVE JUSTICE FOR THE WAR VICTIMS?

Principles of the law of international human rights, as expressed in the United Nations Charter and various Protocols, should be considered to determine whether they offer remedies for those who suffered identity elimination during the war in Kosovo.

### A. *The Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights*

The Universal Declaration of Human Rights (UDHR) was adopted by the United Nations General Assembly on December 10, 1948.<sup>43</sup> Not until 1966, with another decade passing before they were ratified by sufficient nations in order to be in force, were its two principal treaties approved, the International Covenant on Civil and Political Rights (ICCPR)<sup>44</sup> and the International Covenant on

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<sup>43</sup> Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., pt. 1, U.N. Doc. A/217A (1948) [hereinafter UDHR].

<sup>44</sup> International Covenant on Civil and Political Rights, *adopted by the General Assembly* Dec. 16, 1966, *entered into force* Mar. 23, 1976, 999 U.N.T.S. 171 (1967) [hereinafter ICCPR].

Economic, Social and Cultural Rights (ICESCR).<sup>45</sup> Together, these three documents are now considered to constitute an "International Bill of Rights."<sup>46</sup> They create affirmative obligations on the state-parties to organize their legal systems in a way that ensures protection of rights and provides effective remedies for breaches of those rights.<sup>47</sup> The UDHR does not have the force of a treaty; rather, is "hortatory and aspirational, recommendatory rather than" formally binding.<sup>48</sup> Nonetheless, some of its provisions have become incorporated into the customary law of nations.<sup>49</sup> The Covenants do bind the state parties.<sup>50</sup>

The ICCPR created an ongoing institution, the Human Rights Committee ("Committee"), which provides support for the Covenant's obligations.<sup>51</sup> During the past decade, in

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<sup>45</sup> International Covenant on Economic, Social and Cultural Rights, *adopted by the General Assembly* Dec. 16, 1966, *entered into force* Jan. 3, 1976, 993 U.N.T.S. 3 (1977). For purposes of this Article, provisions of the ICESCR are not particularly relevant.

<sup>46</sup> LOUIS HENKIN ET AL., HUMAN RIGHTS 320 (1999).

<sup>47</sup> *Id.* at 489.

<sup>48</sup> HENRY STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 123 (1996).

<sup>49</sup> HENKIN, *supra* note 46, at 322. "By customary law, we refer to conduct . . . of states that becomes in some measure a part of international legal order." STEINER & ALSTON, *supra* note 48, at 28. "Customary law was not *made*, it *resulted*, from an accretion of practices, though often the practice of individual States was intended to conform to what others had done, and often it was thought to be required by law." *Id.* at 142 (quoting LOUIS HENKIN, INTERNATIONAL LAW: POLITICS, VALUES AND FUNCTIONS, 54 (1989) (emphasis in original)). "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102.2 (1987).

<sup>50</sup> HENKIN, *supra* note 46, at 322.

<sup>51</sup> STEINER & ALSTON, *supra* note 48, at 124. The Human Rights Committee ("Committee") is intended to be the "guardian" of the Covenant. HENKIN, *supra* note 46, at 491 (citation omitted). After receiving complaints, it invites responses from the states involved and produces its own reports, which have often contained expressions of serious concern about past practices and specific recommendations. *Id.* at 496. For example, after investigating reports against Peru in 1996, the Committee urged it "to take effective measures to investigate allegations of summary executions, disappearances, cases of torture and ill-treatment, and arbitrary arrest and detention, to bring the perpetrators to justice, to punish them and to compensate the victims." *Id.* at 498 (referring to *Preliminary Observations of*

addition to accepting complaints, conducting investigations, and issuing reports, the Committee began to be more active in expecting states to comply with its unfavorable decisions. It now requests a response, within 90 days, from a country against which it has made a finding that the ICCPR has been violated.<sup>52</sup> In addition, probably in order to pressure defending nations, it has started to publish compliance information and publicly identify each state that refuses to implement its remedies.<sup>53</sup> But, in its own words, a "major shortcoming" of the Committee, and hence a shortcoming in implementing the ICCPR's principles, is that, under international law, the Committee's views are not binding on the parties.<sup>54</sup>

Scrutiny of the UDHR and the ICCPR results in the conclusion that many of their provisions are particularly relevant to the issues raised in this paper. Article 2 of the UDHR, for instance, maintains that its provisions apply to everyone, regardless of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>55</sup> Further, all are entitled to equal protection of the law, without discrimination, under Article 7.<sup>56</sup> Article 15 provides for the right of all to maintain a nationality.<sup>57</sup> Article 18 protects the rights to free thought and religion, including freedom "either alone or in community with others and in public or private, to manifest

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*the Human Rights Committee: Peru*, U.N. Doc. CCPR/C/79/Add.67 (1996)). The Committee has expressed similar views on forced disappearances in Uruguay (1982) and the Dominican Republic (1994). *Id.* at 506, 511.

<sup>52</sup> HENKIN, *supra* note 46, at 501 (citation omitted). Unfortunately, the Committee's staff is part-time, leading to a large percentage of overdue reports. *Id.* at 520.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 503.

<sup>55</sup> UDHR, *supra* note 43, art. 2.

<sup>56</sup> UDHR, *supra* note 43, art. 7.

<sup>57</sup> UDHR, *supra* note 43, art. 15.

his religion or belief in teaching, practice, worship and observance."<sup>58</sup>

Many of the provisions of the ICCPR reflect the UDHR, but are more specifically attuned to political rights. Article 17, for example, protects people from "arbitrary or unlawful interference with . . . privacy, family, home or correspondence. . . ."<sup>59</sup> Article 18 mirrors the Article of the same number in the UDHR, providing for freedom of thought, conscience, and religion, including "freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."<sup>60</sup> And a subsection of the ICCPR protects people from "coercion that would impair his freedom to have or to adopt a religion or belief of his choice."<sup>61</sup> Article 27 specifically addresses the rights of ethnic, religious, or linguistic minorities, by protecting them against denials of the right "to enjoy their own culture, . . . practise their own religion, or to use their own language."<sup>62</sup>

Clearly, the provisions of the UDHR and the ICCPR are relevant to the inhumane identity elimination of the Kosovo war victims. Because this war was fought largely between distinct ethnic groups, the anti-discrimination provisions of the UDHR's Article 7 are raised by the injustices that prevailed. The destruction of religious, property, and other identifying documents were attempts to deprive groups of, among other things, their nationality, in violation of the UDHR's Article 15. Articles 18 of both documents are implicated by the concerted attempts to breach communities that lived in close contact and shared common religious faiths. Several sections of the ICCPR are also

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<sup>58</sup> UDHR, *supra* note 43, art. 18.

<sup>59</sup> UDHR, *supra* note 43, art. 17.

<sup>60</sup> UDHR, *supra* note 43, art. 18.

<sup>61</sup> *Id.*

<sup>62</sup> UDHR, *supra* note 43, art. 27

directly related to the injustices perpetrated during the Kosovo fighting. For example, Article 17 was breached by the destruction of identity documents and concomitant interference with privacy and correspondence. Finally, Article 27 of the ICCPR, which protects cultural minorities, is at stake in the elimination of the identities of members of particular ethnic and cultural groups.

One provision in the ICCPR that could prove to be helpful in claiming justice for the victims in Kosovo is that interference by non-governmental, private actors could be held to have impaired the right to "security of person" provided by Article 9, just as much as if the actor were governmental.<sup>63</sup> The government's duty to provide effective remedies for breaches of rights can thus be read to "attach to conduct that was initially non-governmental."<sup>64</sup> This provision could be used to vitiate governmental attempts to limit scrutiny of their actions by claiming that any ICCPR violations were non-governmental. Such a claim is unconvincing.

While the statements of rights of both the UDHR and the ICCPR are laudatory, for several reasons, breaches of those rights during the war in Kosovo seem unlikely to give rise to remedies. First, claims are generally envisioned (under ICCPR Article 41, for example) to be espoused by one state party filing a claim against another. While it is true that acts of private persons could give rise to complaints where non-governmental actions have impaired the rights protected by the Convention,<sup>65</sup> it is not readily apparent that complaints that fall into this category will be treated effectively.

Second, breaches of either document do not carry with them remedies to redress the effects of identity elimination.

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<sup>63</sup> UDHR, *supra* note 43, art. 9. Violations of security of person could include crimes such as rape and other sexual assaults perpetrated against Albanian women.

<sup>64</sup> STEINER & ALSTON, *supra* note 48, at 125.

<sup>65</sup> UDHR, *supra* note 43, art. 9.



A complaint of a breach of the ICCPR would initiate an investigation and a report to be presented within a year.<sup>66</sup> If a solution is reached, a statement of facts and of the solution is prepared; otherwise, the report contains a statement of facts, written submissions, and a record of oral submissions by the state parties.<sup>67</sup> If, at that time, the matter is not resolved satisfactorily, an ad hoc Conciliation Commission is to be appointed, which writes yet another report, again within a year.<sup>68</sup> If there is still no resolution, the Conciliation Commission's report is to include the written and oral submissions of the parties, findings on all issues of fact, and the Commission's views on the likelihood of an amicable solution.<sup>69</sup> This process, from an initial filing of a complaint, to a final report, takes time. Further, given the interim nature of the situation in Kosovo area, it is unclear which state would actually file the initial claim. It is true that nations not contiguous with the region, but who are signatories to the documents, could file the claim, leaving the United States and other nations in Europe free to file complaints, as well as neighboring states. To be sure, though, the process of proceeding according to the rules of the ICCPR is not likely to result in speedy, efficient resolution of the issues of identity elimination.<sup>70</sup>

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<sup>66</sup> *Rules of procedure of the Human Rights Committee*, U.N. Doc. CCPR/C/3/Rev.5 (Basic Reference Document, Rules 72-77) (1997); see also UDHR, *supra* note 43, art. 41.

<sup>67</sup> UDHR, *supra* note 43, arts. 41-42.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> In considering possible of the violations of the UDHR and the ICCPR, it could be persuasive to refer to the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES. While not having formal statutory authority, Restatements, drafted by the respected American Law Institute, are well respected by the judiciary, and most likely would be by the international judiciary, as well. The most recent version of the RESTATEMENT, last published in 1987, "reflect[s] the broad positions taken by the United States rather than, say, inconsistent or polar positions taken by other, perhaps hostile states." STEINER & ALSTON, *supra* note 48, at 147. One section applies to the issues raised in this paper. Section 702, entitled "Customary International Law of Human Rights," specifies that a "state violates international law if, as a matter of state policy, it practices, encourages, or condones [among other

*B. The European Court of Human Rights*

The European Court of Human Rights ("European Court") is available in some instances to hear complaints against its various state members that rights under the European Convention on Human Rights have been violated. The European Convention ("European Convention") is a treaty under which several European states have agreed to guarantee certain fundamental rights.<sup>71</sup> About half of the contracting states<sup>72</sup> have incorporated the European Convention into their domestic laws, making the treaty's norms enforceable in national courts. The others have given effect to the judgments by legislation or administrative regulations.<sup>73</sup> Rights recognized by the

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things] "... (d) torture or other cruel, inhuman, or degrading treatment or punishment, ... (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights." *Id.* at 145.

The comment to section 702 specifies that clause (g) was meant to include infringements of recognized human rights that are not violations of customary law when committed singly or sporadically, but that rise to that level "if the state is guilty of a 'consistent pattern of gross violations' as state policy. . . . All the rights proclaimed in the UDHR and protected by the principal International Covenants are internationally recognized human rights, but some rights are fundamental and intrinsic to human dignity. Consistent patterns of violation of such rights as state policy may be deemed 'gross' *ipso facto*. These include, for example, systematic harassment, invasions of the privacy of the home, arbitrary arrest and detention . . . denial of the right to return to one's country; mass uprooting of a country's population; denial of freedom of conscience and religion; denial of personality before the law; and invidious racial or religious discrimination. A state party to the [ICCPR] . . . is responsible even for a single, isolated violation of any of these rights; any state is liable under customary law for a consistent pattern of violations of any such right as state policy." *Id.* at 146-47.

Based on that comment, if the accusations of intentional identity elimination are supported by facts, gross violations of section 702 of the Restatement will have been proved. The examples cited above incorporate identity elimination: systematic harassment and invasion of the privacy of the home by forcibly evicting people from their homes and by forcibly evicting entire communities, denial of the right to return to one's country by intentionally destroying documents needed to prove the identity, mass uprooting of a country's population, and denial of personality before the law by erasing any traces of identity from hundreds of victims.

<sup>71</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter *European Convention*].

<sup>72</sup> There are currently 41 contracting states. HENKIN, *supra* note 46, at 339.

<sup>73</sup> HENKIN, *supra* note 46, at 552.

European Convention that are relevant to identity elimination include the right to life, freedom from torture and inhuman or degrading treatment, liberty and security of person, respect for privacy and family life, freedom of thought, conscience, and religion, freedom of expression, and peaceful assembly and association.<sup>74</sup> The substantive provisions of the European Convention are similar to those of the ICCPR.<sup>75</sup>

While the basic procedures of the European Court envision that, on the whole, complaints will be filed by states against other state members, there is the option for individuals to lodge directly complaints of noncompliance.<sup>76</sup> However, it is only following the unsuccessful prosecution of all possible administrative and judicial procedures that a complaint can be filed at the Council of Europe for violations of rights under the European Convention.<sup>77</sup>

The European Court operates under a number of other limitations, as well. First, it cannot intervene directly on behalf of the complaining party. Its power to issue injunctions is thereby limited. Second, the complainant must be the one who has personally suffered as a result of a particular state's actions.<sup>78</sup> This requirement eliminates the possibility of cases being brought on behalf of injured groups, in the form of class-action cases, in which the complainants may not all be named, but have suffered similar violations. Third, one can only complain "about matters which are the responsibility of a public authority . . . of one of these States."<sup>79</sup> There is, then, no

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<sup>74</sup> European Convention, *supra* note 71, arts. 2, 3, 5, 8-11.

<sup>75</sup> HENKIN, *supra* note 46, at 339.

<sup>76</sup> European Convention, *supra* note 71, art. 34.

<sup>77</sup> European Convention, *supra* note 71, art. 26.

<sup>78</sup> *Notice for the attention of persons wishing to apply to the European Court of Human Rights*, European Court of Human Rights Web Site, <http://www.dhcour.coe.fr/NoticesForApplicants/NoticeEnglish.html>, para. 2 (last visited Feb. 25, 2001) [hereinafter European Court Web Site]; see also European Convention, *supra* note 71, art. 25.

<sup>79</sup> European Court Web Site, *supra* note 78, para. 4.

jurisdiction over complaints of private individuals or organizations, presumably even if they acted with the assistance, approval, or apparent authority of the public authority. This rule seems to prevent many situations in which the complainant is a member of a disfavored minority group who suspects that she will not get justice, and it also seems to eliminate cases in which the court system in a particular country is effectively not functioning, in which case it is futile to attempt the process in that state.

For several reasons, resort to the European Court of Human Rights is not likely to be an effective remedy for the victims of identity elimination. First, because the legal system in Yugoslavia is either not operating or operating in a substantially impaired condition,<sup>80</sup> it is probable that neither the administrative nor judicial prerequisites for appeal to the European Court will be satisfied. Second, the inability of the Court to intervene directly on behalf of the complaining party limits invariably the effectiveness of any rulings from the court. Third, the limitation against class-action cases will hinder severely the ability of the Court to afford any true measure of justice for the victims of identity elimination; individual complaints will require so much of the Court's resources that by the time each complaint is heard, many years will have passed. Finally, the fact that one can only complain about actions or responsibilities of the "public authority" of a state party will impede follow-up on these cases, as many of the responsible parties, while acting with the "blessing" of their states, may not be able to be tied directly to them.

### III. SHOULD THE PERPETRATORS OF IDENTITY ELIMINATION BE PROSECUTED BY THE YUGOSLAV TRIBUNAL?

While civil reparations would no doubt be welcomed by the war victims, a different form of justice can be achieved

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<sup>80</sup> See *supra* text accompanying notes 20-39.

by the successful prosecution of criminal actions against the perpetrators of identity elimination. The recent charges brought against Milosevic, which include destruction of personal documents, certainly make that prosecution a possibility. To uncover whether success in this arena is possible in the current social and political circumstances, it is fruitful to examine ongoing or completed prosecutions that have occurred in the region during the past decade.

The May 1993 creation of the Yugoslav Tribunal was primarily intended to prosecute those responsible for serious violations of international humanitarian law committed in the former Yugoslavia, specifically as a result of the war in Bosnia-Herzegovina.<sup>81</sup> It can indict neither governments nor international organizations.<sup>82</sup> Given the variety of indictments against men involved in the recent conflict in Kosovo, it is clear that the prosecutors see their

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<sup>81</sup> *Living History Interview*, *supra* note 36, at 378. The Tribunal was established to prosecute and punish those responsible for "grave breaches" of the 1949 Geneva Conventions and their 1977 First Additional Protocol. Article 147 of the Geneva Convention states, "[g]rave breaches . . . shall be those involving any of the following acts, if committed against persons or property protected by the present Convention [civilians]: wilful killing, torture or inhuman treatment, . . . wilfully causing great suffering or serious injury to body and health, unlawful deportation or transfer or unlawful confinement of a protected person, . . . taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly." Protected persons' are defined in Article 4 of the Geneva Convention as "[t]hose who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." See Laber & Nizich, *supra* note 31, at 7 n.1.

There have been many calls for the creation of a permanent, international criminal court, rather than continuing to "reinvent the wheel" each time atrocities demand international prosecutions. See generally David J. Scheffer, *International Judicial Intervention*, 102 FOREIGN POL'Y 34 (1996); see also Akhavan, *supra* note 1. The Pentagon has "strongly opposed" such a plan, "fearing that a strong and independent court would expose American troops sent overseas to prosecution outside the American judicial system." Steven Lee Myers, *Kosovo Inquiry Confirms U.S. Fears of War Crimes Court*, N.Y. TIMES, Jan. 3, 2000, at A6. As a result of an internal report filed in late December 1999, the possibility has been raised that the NATO allies committed war crimes during their campaign against Yugoslavia. *Id.*

<sup>82</sup> Associated Press, *UN Court Examines NATO's Yugoslavia War*, N.Y. TIMES, Dec. 29, 1999, at A5.

actions as falling within the United Nations mandate. The United Nations Resolution creating the Tribunal binds all member-states, including parties to the conflict in the former Yugoslavia.<sup>83</sup> Jurisdiction is limited to prosecutions for grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide, and crimes against humanity.<sup>84</sup> Plundering is included in the offenses to be prosecuted by the Tribunal, as it is also specifically identified as an offense under Article 3, "Violations of the Laws or Customs of War."<sup>85</sup> Destruction of documents from churches and mosques can also be brought within the meaning of that part of Article 3 which prohibits "destruction or wilful damage . . . to institutions dedicated to religion . . ."<sup>86</sup> These acts can also constitute violations of Article 2, "Grave breaches of the Geneva Conventions of 1949," as acts of "extensive destruction and appropriation of property. . ."<sup>87</sup> and of Article 4, "Genocide," by deliberately "inflicting on the group conditions of life

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<sup>83</sup> Laber & Nizich, *supra* note 31, at 12.

<sup>84</sup> *Living History Interview*, *supra* note 36, at 375. The Geneva Convention of 1949 attempted to codify and enhance humanitarian practices following World War II and addressed the rights of civilians in international armed conflict and in occupied territory resulting from that conflict. THOMAS G. WEISS ET AL., *THE UNITED NATIONS AND CHANGING WORLD POLITICS* 142 (2d ed., 1989). The first use of the phrase "crimes against humanity" is found in a letter written by George Washington Williams, a Baptist minister and journalist, to U.S. Secretary of State Blain in 1890. Williams used the term in reference to the acts of King Leopold of Belgium in the Congo. HENKIN, *supra* note 46, at 73. The concept behind the phrase is that, in charging Nazi leaders with crimes against humanity, the former Allies had decided that there was a principle in international customary law "rendering it a violation of international law for states to commit such atrocities even against their own population." *Id.* at 306. See also Herman von Hebel, *An International Tribunal for the Former Yugoslavia: An Act of Powerlessness or a New Challenge for the International Community?* 11 NETHERLANDS Q. HUM. RTS. 441, 448 (1993). One of the problems with charges of crimes against humanity is precisely when do acts constitute such crimes. For, "the terrible persecution of the Jews and liberals within Germany before the war" were held not to have been subject to international law, but these same acts were, once the war began, as they were held to have been committed in execution of the war. STEINER & ALSTON, *supra* note 48, at 110.

<sup>85</sup> ICTY Statute, *supra* note 31, art. 3.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* art. 2.

calculated to bring about its physical destruction in whole or in part,"<sup>88</sup> as well as violation of Article 5, "Crimes against humanity," for "persecutions on political, racial and religious grounds" and for "other inhumane acts."<sup>89</sup>

The goals expressed when the Tribunal was created, "to establish truth and determine individual accountability for crimes," are truly laudatory, and, of course, crucial to the process of regional reconciliation.<sup>90</sup> In recent years, the number of indictments has increased.<sup>91</sup> Nonetheless, other than the fact of its existence, its effect in muting violence in the area is unclear. Some claim that detailed indictments, even without successful arrest and prosecution, can serve the important purpose of severely restricting the movements of those indicted, for they would be subject to universal jurisdiction if they left their own countries and could be tried for their offenses in any court, without regard

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<sup>88</sup> *Id.* art. 4. To prove genocide, there must be proof beyond a reasonable doubt "either that an act of genocide was perpetrated . . . or that [one] committed such an act . . . with the intent to destroy . . . a national, ethnical, racial, or religious group . . ." *Id.* Genocide is defined in the Convention on the Prevention and Punishment of the Crime of Genocide as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, (b) causing serious . . . 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 . . . . A state violates customary law if it practices or encourages genocide, fails to . . . punish persons guilty of it, or otherwise condones genocide." Convention on the Prevention and Punishment of the Crime of Genocide, approved and proposed for signature and ratification or accession by the General Assembly Dec. 9, 1948, entry into force Jan. 12, 1951.

<sup>89</sup> ICTY Statute, *supra* note 31, art. 5.

<sup>90</sup> Laber & Nizich, *supra* note 31, at 14. Without taking decisive steps to bring the perpetrators of these war crimes to justice, the signal will be sent that only "symbolic condemnations" need be feared, not true punishment. Akhavan, *supra* note 1, at 17, 20. The question of whether "justice" has any role in the laws of war crimes, in particular the crimes that have been endured during the wars this past decade in the former Yugoslavia, was raised in a provocative article by Gerry J. Simpson, *Didactic and Dissident Histories in War Crimes Trials*, 60 ALB. L. REV. 801 (1997).

<sup>91</sup> A GLOBAL AGENDA: ISSUES BEFORE THE 54TH GENERAL ASSEMBLY OF THE UNITED NATIONS, 1999-2000, at 263 (John Tessitore & Susan Woolfson eds, 1999) [hereinafter GLOBAL AGENDA].

to territorial limits on jurisdiction.<sup>92</sup> Others speculate that the mere existence of the Tribunal could help to improve the conditions of the newly created refugees; still others suggest that continuing violence might actually evidence a "defiance of the threat of ICTY prosecution."<sup>93</sup> And the Federal Republic of Yugoslavia's (FRY) assertion, admittedly weak,<sup>94</sup> that the Tribunal has no jurisdiction over the situation in Kosovo,<sup>95</sup> strengthens the claim that, at least in the present climate, the Tribunal does not have a great chance of significantly effecting justice in Yugoslavia.

The weak position in which the Tribunal finds itself is not for want of indictments. At last count, it had indicted ninety-one individuals,<sup>96</sup> mostly Serbs.<sup>97</sup> Of these, six have died,<sup>98</sup> indictments against eighteen individuals have been dropped, ten persons have been tried,<sup>99</sup> and eight have been convicted.<sup>100</sup> Twenty remain in custody.<sup>101</sup> International arrest warrants have issued against Bosnian Serb wartime

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<sup>92</sup> Laber & Nizich, *supra* note 31, at 13. For discussion of the possibility of using U.S. military tribunals to punish offenses against the Law of Nations, see Robinson O. Everett & Scott L. Silliman, *Forums for Punishing Offenses Against the Law of Nations*, 29 WAKE FOREST L. REV. 509 (1994).

<sup>93</sup> Scheffer, *supra*, note 77, at 39.

<sup>94</sup> This assertion has been rejected on several occasions since the establishment of the Tribunal and onset of the prosecution brought thereunder. See also *infra* notes 115-25 and accompanying text.

<sup>95</sup> "Milosevic and his government have consistently rejected the U.N. Tribunal's jurisdiction . . ." *What Now? If Peace Comes, its no great victory for Nato*, NEWSDAY, June 6, 1999, at B1.

"The Office for the Prosecution of the Yugoslavia War Crimes Tribunal affirmed its jurisdiction on March 10, 1998 and again on June 12, 1998 and again in July 1998 . . . that it had jurisdiction over the events in Kosovo . . . . The United States agreed with the prosecutor's statement . . . that Belgrade's attempt to deny the tribunal's jurisdiction on the grounds that Kosovo is a quote, unquote, 'police action' is simply wrong both in law and in fact." News Briefing by Ambassador at Large David Scheffer, Washington, D.C., April 9, 1999, p. 5/15.

<sup>96</sup> Wren, *supra* note 2.

<sup>97</sup> GLOBAL AGENDA, *supra* note 87, at 264.

<sup>98</sup> Wren, *supra* note 2.

<sup>99</sup> *Id.*

<sup>100</sup> GLOBAL AGENDA, *supra* note 91, at 264.

<sup>101</sup> *Id.* The numbers cited were current as of March 2000. The current trials orders, and judgments are available on the ICTY Web Site, *supra* note 12.



leader Radovan Karadzic and military chiefs Ratko Mladic, Mile Mrksic, Veselin Sljivancanin and Miroslav Radic, who remain at large.<sup>102</sup> A Croat indicted for war crimes, Mladen Natetic, has not been turned over by Croatia.<sup>103</sup> The indictment of Milosevic and other powerful Serbian ministers on May 27, 1999 certainly raises the stakes, but it also adds to the pressure the Tribunal finds itself under, as it has had a difficult time bringing the indictees into custody.<sup>104</sup> With the Tribunal lacking its own police force, and with little financial backing, it has to rely on either various national authorities or NATO forces for the capture of the many men against whom arrest warrants remain outstanding.<sup>105</sup> Yet today, "a majority of suspected war criminals indicted by the Tribunal are walking about free in Serbia. . . . Territories have become safe havens for individuals indicted for the most serious offenses against humanity."<sup>106</sup> In the event substantial financial support is generated, and the Tribunal does become more successful in

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<sup>102</sup> GLOBAL AGENDA, *supra* note 91, at 264; *see also* Wren, *supra* note 2. The Yugoslavian-American community is under the general belief that these men could be "rounded up at any time" if there were the will to do so, given that they are notorious and are not necessarily even making serious efforts to evade arrest. Interview with US-born Yugoslavian-American (Mar. 16, 2000), *supra* note 30.

<sup>103</sup> Wren, *supra* note 2.

<sup>104</sup> GLOBAL AGENDA, *supra* note 91, at 264. The leader of the UN Mission in Bosnia has speculated that a "lack of political will was the reason former Bosnian Serb leader and indicted war crimes suspect Radovan Karadzic had not yet been arrested." Fredrik Dahl, *U.N. Chief in Bosnia calls for the arrest of Karadzic*, BOSTON GLOBE, Jan. 6, 2000, at A3. "French and American forces in Bosnia have come under heavy criticism from human rights groups for not going more aggressively after leaders charged with war crimes." Craig R. Whitney, *NATO Arrests Serb Ex-General on War Crimes Charges*, N.Y. TIMES Dec. 21, 1999, at A14.

<sup>105</sup> GLOBAL AGENDA, *supra* note 91, at 264; *see also* Lawyers Committee for Human Rights, *A Fragile Peace: Threats to Justice in Kosovo*, Oct. 1999, which cites the myriad of problems with the judicial system established by the UN, and recommends that urgent action be taken to strengthen the justice and policing system in Kosovo. Some of the problems include a lack of personnel, its complicated structure, inadequate resources, untrained judges, a limited ability to prosecute crimes, and the difficulties of having fair trials.

<sup>106</sup> Wren, *supra* note 2 (quoting departing Judge Gabrielle Kirk McDonald's speech to the U.N. General Assembly).

gaining the arrest of its indictees,<sup>107</sup> the fact that there is no statute of limitations on these offenses<sup>108</sup> could aid in the search for justice in the region.<sup>109</sup>

In spite of the difficulties it has faced, the Tribunal has been successful in seeing a number of cases through trial. Some of the Court's precedents, particularly those more remote cases that originated from the Bosnia-Herzegovina conflict, lend support for the suggestion that crimes of identity elimination can and should be prosecuted by this Tribunal. Notwithstanding the difficulties, several men accused of war crimes committed during that war have been tried before the Tribunal.<sup>110</sup> More recent indictments of various Croatian officials have included claims of ethnic cleansing and other charges akin to the charge of identity elimination. Moreover, in March 1999, under its procedures,<sup>111</sup> the Tribunal recommended the indictment of three Croatian generals on charges of summary executions, indiscriminate shelling of civilians, and "ethnic cleansing" that occurred in 1995.<sup>112</sup> Indictments over the past year against Mladen Naletilic and Vinko Martinovic are also based on their alleged involvement in the Croatian army's campaign of ethnic cleansing of the Mostar municipality,

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<sup>107</sup> As of January 6, 2000, more than 30 Bosnian Serbs remained at large. Dahl, *supra* note 105.

<sup>108</sup> Scheffer, *supra* note 77, at 6, 11.

<sup>109</sup> Recent pledges of more than \$2 billion in aid may help, although it is unclear whether any of that money has been earmarked to help fund the Tribunal. *Nations, Aid Groups Vow \$2 Billion to Rebuild Kosovo; Total Exceeds Estimates for Immediate Work; U.S. Pledges 25% of Amount*, BALTIMORE SUN, July 29, 1999, at 13A.

<sup>110</sup> There have been trials before the Tribunal that will not be mentioned in this text, not due to lack of import, but because the circumstances surrounding the accusations are not akin to the issues raised in this paper. One example is the trial of Bosnian Serb General Radislav Krstic, in March 2000, for the July 1995 slaughter of at least 7,500 Muslim men and boys at Srebrenica, a U.N.-declared demilitarized zone in Bosnia. Jerome Socolovsky, *Bosnian Serb Commander is Tried for Genocide*, BOSTON GLOBE, Mar. 14, 2000, at A2.

<sup>111</sup> The ICTY Rules of Procedure and Evidence provides for the prosecutor to present an indictment to the judge for approval. ICTY R. P. Evid. 47, IT/32/Rev.18, ICTY Web Site, *supra* note 12.

<sup>112</sup> GLOBAL AGENDA, *supra* note 91, at 265.

following the Muslim and Croat alliance against the Serbs in the armed conflict.<sup>113</sup>

One of the consistent claims of the FRY is that the conflict in Kosovo is not an "international" one, and that therefore, the Tribunal does not have jurisdiction.<sup>114</sup> This allegation should be considered to have been largely and successfully disputed, at least by analogy from cases that arose out of events in the Republic of Bosnia-Herzegovina. The basic structure of the jurisdiction argument was elucidated in the case *Prosecutor v. Tadic*.<sup>115</sup> In the Decision on Jurisdiction, the Appeals Chamber drew from the ICTY Statute and Common Article 3 of the Geneva Conventions: that Article 3 of the ICTY statute is a "general clause" covering violations of general humanitarian law, including Common Article 3 of the Geneva Conventions;<sup>116</sup> that the ICTY Statute Article 3 thus gives the Tribunal jurisdiction of such violations;<sup>117</sup> that the Geneva Conventions are binding both as conventional and customary law; and that violations of Common Article 3 of the Geneva Conventions, which apply both to internal and international conflicts, can lead to criminal liability.<sup>118</sup>

A later case, *Prosecutor v. Rajic*,<sup>119</sup> involved a prosecution of a Croatian for killing civilians and destroying a Muslim

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<sup>113</sup> *Id.* at 266.

<sup>114</sup> One can argue that, if refugees are fleeing into other countries as a result of the conflict, the conflict becomes international. Interview with US-born Yugoslavian-American (Mar. 16, 2000), *supra* note 103. Articles 1 and 6 of the ICTY Statute provide for the Tribunal to have the power to prosecute natural persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. ICTY Statute, *supra* note 31, arts. 1, 6. Article 2 provides for prosecution for grave breaches of the Geneva Conventions of 1949; Article 3, prosecutions for violations of the laws or customs of war; Article 4, genocide; and Article 5, crimes against humanity. *Id.* arts. 2-5.

<sup>115</sup> *Prosecutor v. Tadic*, Appeal on Jurisdiction, IT-94-1-AR72 (Oct. 2, 1995). ICTY Web Site, *supra* note 12.

<sup>116</sup> *Id.* ¶ 89.

<sup>117</sup> *Id.* ¶ 91.

<sup>118</sup> *Id.* ¶¶ 119, 127, 134, 135.

<sup>119</sup> *Prosecutor v. Rajic*, IT-95-12-R61, para. 13 (Sept. 13, 1996), ICTY Web Site, *supra* note 12.

village in central Bosnia. The Tribunal, in 1995, stated that the conflict was international, based on "significant and continuous military action by the armed forces of Croatia in support of the Bosnian Croats against the forces of the Bosnia Government on the territory of the latter."<sup>120</sup> Using a rather creative analysis, the Chamber held that "an agency relationship between Croatia and the Bosnian Croats would be sufficient to establish that the conflict between the Bosnian Croats and the Bosnian Government was international in character."<sup>121</sup> Most importantly, the Tribunal found that attacks on civilian populations are prohibited under conventional and customary law, both in internal and international conflicts.

In addition to resolving the issue of jurisdiction, several other key issues have already been determined by the Tribunal that will assist generally in the proposed prosecutions. First, in July 1999, the Tribunal's Appeals Chamber released its decision in the first case brought and tried before its Trial Chamber, that against Dusko Tadic, for his acts during the Bosnia-Herzegovina conflict.<sup>122</sup> Again the Chamber confirmed that the conflict between Bosnia and Herzegovina and the FRY was in fact an international armed conflict.<sup>123</sup> Further, addressing the doctrine of common purpose and the elements required to prove charges of crimes against humanity, the Chamber held that an act carried out for purely personal motives, but planned nonetheless, can support this charge.<sup>124</sup> This can

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<sup>120</sup> *Rajic*, IT-95-12-R61.

<sup>121</sup> *Id.*

<sup>122</sup> *Prosecutor v. Tadic*, Summary of Appeals Chamber Judgment, IT-94-1-A (July 15, 1999), ICTY Web Site, *supra* note 12.

<sup>123</sup> This is a jurisdictional requirement of Article 2 of the Statute governing the Tribunal. ICTY Statute, *supra* note 31, art. 2. Tadic was convicted and sentenced to 20 years in prison for murder, torture, and beating of Bosnian Muslims in villages and prison camps. He had appealed the verdict, which, largely as a result of an activist jurist, had resulted in conviction for nine charges in addition to those originally charged. His 25-year sentence was reduced by five years in January 2000. *UN Tribunal Reduces Murderer's Sentence*, BOSTON GLOBE Jan. 27, 2000, at A10.

<sup>124</sup> GLOBAL AGENDA, *supra* note 87, at 267.

assist the prosecution of offenders who claim that destruction of records resulted from a mere instinct during the heat of battle, and was not a planned, organized military action. The argument that these acts do not constitute crimes against humanity has thereby been weakened.

The Court's view, derived from *Tadic*, that the prohibition on attacking civilians was a fundamental rule of customary international law<sup>125</sup> applicable to all armed conflicts was also asserted by the Trial Chamber in the 1996 case of *Prosecutor v. Martić*. *Martić* involved a proceeding under Rule 61 of the Tribunal's statute, during which the Tribunal approved the indictment.<sup>126</sup> There, the Court opined that "the general principle that the right of the parties to the conflict to choose methods or means of warfare is not unlimited and the prohibition on attacking the civilian population as such, or individual civilians, are both undoubtedly part of... customary law."<sup>127</sup> "[N]o circumstances," the Tribunal exhorted, "would legitimise an attack against civilians even if it were a response proportionate to a similar violation perpetrated by the other

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<sup>125</sup> For discussion of customary law, see *supra* note 51.

<sup>126</sup> *Prosecutor v. Martić*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, IT-95-11-R61 (Sept. 13, 1996), discussed in Faiza P. King & Anne-Marie La Rosa, *The Jurisprudence of the Yugoslavia Tribunal: 1994-1996*, 18 EUR. J. INT'L L. 123 (1997).

<sup>127</sup> *Martić*, IT-95-11-R61. *Martić*, like many other cases from the Tribunal, was prosecuted under Rule 61 of the Tribunal's Rules of Procedure. Once an indictment has been issued, Rule 61 provides for the issuance of an international arrest warrant when the Trial Chamber is satisfied, upon representations of the prosecutor, that reasonable steps have been taken to effectuate personal service and inform the accused of the existence of the indictment by means of publication. It was formulated with awareness that many indictees would likely avoid arrest. While due process prevents trials in absentia, the UN wanted a means to publicize war crimes and compile on the public record "without conducting a highly controversial trial in absentia." Quintal, *supra* note 6, at 723 (1998). In the end, Rule 61 can be said to have created a type of "truth commission-type function of publicizing crimes," but "may distract from or create a disincentive on the part of the international community to arrest suspected criminals and try them in person at the Hague." *Id.* at 725-26.

party."<sup>128</sup> No circumstances, not even those of war, justify the elimination of the identities of civilians living in nations engaged in a war.

Several cases brought before the Tribunal for approval of indictments have evidenced the Judges' willingness to be particularly active,<sup>129</sup> apparently viewing broadly their authority to control the nature of the indictments. In *Prosecutor v. Nikolic*, for example, the Chamber invited the prosecutor to amend the indictments, recharacterize the charges, and add new ones; charges of rape were also deemed to constitute grave breaches of the 1949 Geneva Convention and killing, torture, and illegal transfer of civilians were deemed to constitute crimes against humanity.<sup>130</sup> Cognizance of this tendency among the Tribunal judges could be capitalized upon by humanitarian and civil rights groups seeking to convince the prosecutors and judges at the Tribunal that indictments for charges of identity elimination are overdue.

The notion that customary international law forbids warring populations from attacking the civilian population will be of great assistance if those who were forcibly deported from their homes and towns, and from whom identity documents were destroyed, come forward to prosecutors and request that charges are brought against the "plunderers." At this time, it is premature to assume that prosecutors will be likely to bring these cases without

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<sup>128</sup> *Martic*, IT-95-11-R61; see also King, *supra* note 123.

<sup>129</sup> *Prosecutor v. Nikolic*, IT-94-2-R61, discussed in King, *supra* note 123; see also *Prosecutor v. Kikolic*, IT-94-2-I (Feb. 12, 1999) (amended indictment for wilful killings, torture, illegal transfer of civilians), ICTY Web Site, *supra* note 12.

<sup>130</sup> *Nikolic*, IT-94-2-I. The narrow interpretation of the definition of crimes against humanity undertaken by the Nuremberg Tribunal has fortunately not been the case in similar tribunals since that time. David Turns, *War Crimes without War?—The Applicability of International Humanitarian Law to Atrocities in Non-International Armed Conflicts*, 7 AFRICAN J. INT'L COMP. L. 804, 812 (1995). In Nuremberg, the Tribunal refused to find that any crimes committed "against the Jews in Germany between 1933 and 1939 constituted crimes against humanity," because they were not "linked inextricably to the state of hostilities or to preparations for aggressive war." *Id.*

some urging from international human rights organizations. For, while the charge of plundering is among those brought against some of those indicted in Yugoslavia, it does not appear that plundering as the sole charge has been made against an accused.<sup>131</sup> To be sure, these cases will prove challenging for the prosecutors, although less difficult where the accused have already been shown to have been commanders in specific zones during the war in Kosovo.

Two rulings of the Tribunal support the claim that prosecutions for identity elimination are appropriate under the Statute. In the 1995 case against Mile Mrksic, Miroslav Radic, and Veselin Sljivancanin, the Trial Chamber approved indictments for crimes against humanity and issued international arrest warrants for all.<sup>132</sup> Allegedly officers in the Yugoslav Peoples' Army, the accused were charged with attacking a hospital and removing the ill as well as those seeking shelter, and then beating and shooting them to death.<sup>133</sup> The crimes seemed to have been perpetrated as part of a widespread and systematic attack on the civilian population of the city of Vukovar. The Chamber emphasized that the indictment showed "first and foremost that a crime against humanity was committed."<sup>134</sup>

In *Rajic*, discussed above, the Chamber examined the requirements for application of Article 3 of the Statute, which addresses violations of the laws or customs of war.

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<sup>131</sup> For example, a recent conviction was achieved in a case brought in the Tribunal against six Croats for actions taken in 1993 during the Bosnian conflict. *Kupreskic et al*, No. IT-95-16-T. The charges in these cases ranged from murder of 116 inhabitants of a Muslim village, Ahmici, and also for the destruction of 169 homes and two mosques. Sentences ranged from 6 to 25 years. One defendant was acquitted.

<sup>132</sup> Prosecutor v. Mrksic, Radic, Sljivancanin, IT-95-13a, Indictment (Nov. 7, 1995), First Amended Indictment (Apr. 3, 1996), Second Amended Indictment (Dec. 2, 1997), ICTY Web Site, *supra* note 12; see also King, *supra* note 123.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* In *Kupreskic*, IT-95-16-T, the Trial Chamber affirmed that crimes against humanity need not necessarily be state-sponsored.

Both charges, wanton destruction of a village and attack on a civilian population, were found to fall under the purview of Article 3. Agreeing with the *Martic* analysis on jurisdiction of the Tribunal, the Chamber held that it had jurisdiction over the subject matter of the charges regardless of the nature of the conflict.<sup>135</sup>

The systematic attack on the civilian population of Vukovar (and those in its hospital) and the destruction of the village in the *Rajic* case are good examples of what the Statute means when it forbids crimes against humanity and violations of the laws or customs of war. The point is that civilians in armed conflict are to be spared from the fighting, unless inadvertently involved.<sup>136</sup> They are not fighting, and international human rights law prohibits treating them as if they were. The destruction of the two villages in these cases is an exaggerated form of the identity elimination at issue here. And while the damage and destruction is more obvious in these two cases than is the identity elimination suffered by the Kosovo refugees, the effects on the civilians who are first deported from their age-old homes and then unable to prove who they are, where they lived, or what they owned, surely constitutes destruction severe enough to establish both crimes against humanity and violations of the laws or customs of war.

Perhaps the case of *Prosecutor v. Karadzic and Mladic*, most closely resembles the identity elimination at issue here.<sup>137</sup> The indictment in this case alleged a general policy of "ethnic cleansing" and charged grave breaches of the 1949 Geneva Convention against the laws or customs of war, genocide and/or crimes against humanity, based on a

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<sup>135</sup> *Rajic*, IT-95-12-R61.

<sup>136</sup> See, e.g., Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 3, 6 U.S.T. 3114 (entered into force Oct. 21, 1950).

<sup>137</sup> *Prosecutor v. Karadzic and Mladic*, IT-95-5-R61 (July 24, 1995) and IT-95-18-R61 (Nov. 16, 1995); available on ICTY Web Site, *supra* note 12; see also King, *supra* note 123.



series of serious violations of international humanitarian laws in Bosnian territory since 1992.<sup>138</sup> The Chamber confirmed the indictments and issued international arrest warrants.<sup>139</sup> The charges of "ethnic cleansing," in spite of varying in intensity of physical destruction, can be compared with the identity elimination that has been charged against the Serbian Kosovars.

Inherent problems lie in the prosecution of the war criminals in Kosovo. First, because the conflict is ongoing and no one is really in command, it has been difficult if not impossible to arrest many of the accused.<sup>140</sup> Second, often there is no "paper trail" or other documents to sustain the prosecutions; rather, conviction depends on first-hand, eye-witness testimony. Third, although more a problem with enforcement than legality, some of the parties still do not accept the jurisdiction of the Tribunal.<sup>141</sup> Fourth, there is neither a mechanism through which one can be extradited nor sanctions to be taken against parties who do not cooperate with the Tribunal. Finally, because the decision-makers and military leaders are often the very same people who are negotiating a political settlement, it has been feared that the "major" criminals of this war will, in any final agreement, be allowed to remain free from indictment or punishment.<sup>142</sup> Granted, given the indictment of

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> Thus, creation of the Rule 61 hearings has been necessary. As has already been said (*supra* note 103), many with relations still living in the Yugoslav area believe it is not nearly as difficult as it is being portrayed to arrest the accused.

<sup>141</sup> Laber & Nizich, *supra* note 31, at 12.

<sup>142</sup> M. Cherif Bassiouni, *Former Yugoslavia: Investigating Violations of International Humanitarian Law and Establishing an International Criminal Tribunal*, 18 FORDHAM INT'L L. J., 1191, at 1206-07, 1209 (1995). The fact that the investigations of alleged criminal conduct by military and political leaders who are essential to achieving peaceful political settlements can make it difficult to simultaneously pursue political settlements while seeking justice is likely to result in "compromising justice in favor of political settlements" and is "why so many international . . . conflicts have resulted in . . . immunity for the leaders, as well as most of the perpetrators of international humanitarian law and international human rights law violations." Others agree with this caution. See, e.g., Laber &

Milosevic in the spring of 1999, this eventuality now seems less likely. And commitment to the process, which requires support from both the political as well as the financial worlds<sup>143</sup>—support from the European governments who can help arrest those accused, and financial support from the Security Council of the U.N. and its member nations—will determine whether or not the Tribunal is effective in bringing to justice those who have stolen it from the residents of Kosovo. We do know that presently the required support is largely lacking.<sup>144</sup> Nations in the region have been charged with avoiding arresting the accused, even when they are in their midst and could be apprehended with little risk. The U.N., U.S., and other western nations have been accused of failing to provide financial support for the NATO mission, thereby rendering it weak and, some say, nearly crippled.

#### CONCLUSION

Justice surely seems to require that the international community reach out in more ways than it has to aid the victims of Kosovo's war. Working through the United Nations, which can help provide a means by which the Kosovars might rebuild their lands, is one option. Additional options have been examined in this Article.

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Nizich, *supra* note 31, at 8, who remind us that those responsible for human rights abuses are likely to seek immunity from prosecution prior to agreeing to halt their aggression; but see *President Milosevic and four other senior FRY officials indicted for murder, persecution and deportation in Kosovo*, ICTY Press Release JL/PIU/403-E (May 27, 1999), available at ICTY Web Site, *supra* note 12.

<sup>143</sup> Bassiouni, *supra* note 139, at 1207-08.

<sup>144</sup> Calls have been made recently for more troops, as these numbers have been reduced since their high numbers of the summer of 1999. Bradley Graham, *supra* note 26; U.S. Officials have hesitated to put their troops "in harm's way." Jane Perlez, *Joint Chiefs Chairman Protests Troops' Mission to Kosovo Town*, N.Y. TIMES, Mar. 1, 2000, at A10. Steven Erlanger, *UN's Kosovo Chief Warns That Mission is 'Barely Alive'* N.Y. TIMES, Mar. 4, 2000, at A7 (discussing financial difficulties of the mission); Jane Perlez, *Kosovo's Unquenched Violence Dividing U.S. and NATO Allies*, N.Y. TIMES, Mar. 12, 2000, at 1.

While it is not likely that whether civil compensation will be offered in the near future, it is surely an attainable goal, assuming the financial help of the international community. To be sure, support for the International Tribunal could help the victims achieve a modicum of justice through criminal prosecutions of those who destroyed their identities via the new form of ethnic cleansing which is identity elimination.