

# In Search of Peace and Justice: War Criminals at Large in the Former Yugoslavia

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A . . . powerful lesson of Bosnia . . . is that peace is not possible without justice. . . . So long as Radovan Karadzic and scores of other indicted war criminals continue to be free there can be no lasting peace in Bosnia.<sup>1</sup>

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## I. Introduction

The International Criminal Tribunal for the former Yugoslavia<sup>2</sup> faced its greatest challenge this past year—the unwillingness of the international community to actively search for and arrest war criminals indicted by the tribunal for some of the most unconscionable crimes against humanity committed in the twentieth century. The overwhelming success of the international community in suspending Europe's bloodiest conflict since World War II has not been matched by progress in establishing peace<sup>3</sup> and remains overshadowed by complaints of its minimalism

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1. John Shattuck, *Seventh Annual Review of the Field—Promoting the Rule of Law: A Tribute to Louis F. Powell, Jr.*, 1997 A.B.A. STANDING COMMITTEE ON LAW AND NATIONAL SECURITY. The Honorable John Shattuck currently serves as the United States Assistant Secretary of State for Democracy, Human Rights, and Labor.

2. In 1993, the international community established an "international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia" since 1991. See U.N.S.C. Res. 827 (May 25, 1993). The official abbreviated title for this tribunal is "The International Criminal Tribunal for the former Yugoslavia" [hereinafter the International Tribunal]. 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS, xvii n. 2 (1995). For a detailed discussion of the evolution and jurisdiction of the International Tribunal, see Douglas Stringer & Diana M. Amann, *International Criminal Tribunal for the Former Yugoslavia*, 31 INT'L LAW. 611 (1997).

3. See, e.g., William Drozdiak, *Passivity Tempers U.S. Progress in Bosnia: Critics Say Fear of Casualties Prevents More Effective Intervention*, WASH. POST, Dec. 21, 1997, at A1.

efforts to arrest war criminals who freely and openly roam the streets in the former Yugoslavia.<sup>4</sup> Twenty-two of the seventy-eight suspects indicted by the International Tribunal were in custody as of December 21, 1997.<sup>5</sup> While three of these indicted suspects were arrested by military forces serving the international community during two separate operations, forty-seven remain free with their whereabouts known.<sup>6</sup>

Critics of international inaction have focused on what they believe the international community ought to do. For example, Britain's chief prosecutor at Nuremberg believes that the International Tribunal "will fail unless those indicted for the most serious war crimes in the former Yugoslavia are arrested so they can be brought to justice" and that the key to maintaining Bosnia's fragile peace depends upon bringing the war criminals to justice.<sup>7</sup> Similarly, the first chief prosecutor for the International Tribunal believes that "ANATO's refusal to order its troops to arrest Bosnian Serb leaders accused of atrocities threatens to undermine the fragile peace in the Balkans."<sup>8</sup> In contrast to this discussion of what the international community ought to do, there has been very little discussion as to what the international community is obligated to do, as a matter of international law.

This short essay surveys existing international law to identify the obligations of states to search for and arrest war criminals that have been indicted by the International Tribunal.<sup>9</sup> Part II will discuss the general obligations of states under international law to search for and arrest war criminals, and part III will focus specifically on the international legal obligations of states under the Charter of the United Nations to search for and arrest persons in the former Yugoslavia who have been indicted by the International Tribunal. This essay concludes with a few final reflections on the deterrent value of the rule of law.

## II. General Obligations of States under International Law

Individual criminal responsibility for violations of the laws and customs of war is an undisputed part of customary international law.<sup>10</sup> Criminal responsibility can extend to individual combatants, government officials, and heads of state,<sup>11</sup> regardless of whether they are leaders, organizers, instigators, or accomplices.<sup>12</sup> War crimes are universal crimes, and suspected war criminals may be prosecuted by any state.<sup>13</sup>

4. See, e.g., John F. Hector, *Why US Troops Must Arrest War Criminals*, 19 A.B.A. NAT'L SECURITY L. REP. 7 (1997).

5. See Drozdiak, *supra* note 3, at A1; see also *Wanted but Free in Bosnia*, WASH. POST, Dec. 13, 1997, at A19.

6. *Id.*

7. Hartley Shawcross, *Let the Tribunal Do Its Job*, N.Y. TIMES, May 22, 1996, at A17.

8. Jane Perlez, *War Crimes Prosecutor Vents Frustrations*, N.Y. TIMES, May 22, 1996, at A8.

9. For a more detailed discussion of these obligations and an examination of whether states have met their international obligations to search for and arrest war criminals in the context of the crimes within the jurisdiction of the International Tribunal, see Walter Gary Sharp, Sr., *International Obligations to Search for and Arrest War Criminals: Government Failure in the Former Yugoslavia?*, 7 DUKE J. COMP. & INT'L L. 411 (1997).

10. *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, princ. 1, [1950] 2 Y.B. INT'L L. COMM'n 374, U.N. Doc. A/1316 [hereinafter *1950 Nuremberg Principles*], reprinted in *THE LAWS OF ARMED CONFLICTS* 923 (Dietrich Schindler & Jiri Toman eds., 3d ed. 1988); *INTRODUCTION TO DOCUMENTS ON THE LAWS OF WAR* 12 (Adam Roberts & Richard Guelff eds., 2d ed. 1989) [hereinafter *LAWS OF WAR*].

11. *1950 Nuremberg Principles*, *supra* note 10, prins. III-IV.

12. Opinion and Judgment of the International Military Tribunal, Nuremberg, Sept. 30, 1946, 22 TRIAL OF THE MAJOR WAR CRIM. BEFORE THE INT'L MIL. TRIBUNAL 411 (1948), extracts reprinted in *LAWS OF WAR*, *supra* note 10, at 155.

13. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 305 (3d ed. 1979).

## A. GRAVE BREACHES OF THE FOUR GENEVA CONVENTIONS OF 1949

Each of the four Geneva Conventions of 1949<sup>14</sup> contain a provision that specifies what constitutes a grave breach under that Convention.<sup>15</sup> Grave breaches of the four Geneva Conventions of 1949 are within the jurisdiction of the International Tribunal.<sup>16</sup> The second paragraph of common article 49/50/129/146 of the four Geneva Conventions of 1949 sets forth the obligation of state parties to search for and arrest persons alleged to have committed such grave breaches. This common article provides that:

[e]ach High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High

14. Collectively, these four conventions are referred to as the four Geneva Conventions of 1949. Individual citations are as follows: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter 1949 Geneva Convention No. I], *reprinted in LAWS OF WAR, supra* note 10, at 171; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter 1949 Geneva Convention No. II], *reprinted in LAWS OF WAR, supra* note 10, at 194; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter 1949 Geneva Convention No. III], *reprinted in LAWS OF WAR, supra* note 10, at 216; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter 1949 Geneva Convention No. IV], *reprinted in LAWS OF WAR, supra* note 10, at 272.

15. Art. 50 of the 1949 Geneva Convention No. I and art. 51 of the 1949 Geneva Convention No. II contain identical provisions that define grave breaches with respect to the wounded and sick in the field and at sea. These two articles provide that:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Art. 130 of the 1949 Geneva Convention No. III defines grave breaches with respect to the protection of prisoners of war as follows:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

Art. 147 of the 1949 Geneva Convention No. IV defines grave breaches with respect to the protection of civilians as follows:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

16. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶¶ 37-40, U.N. Doc. S/25704 (May 3, 1993) [hereinafter *Report of the Secretary-General Pursuant to S.C. Res. 808*]. A draft Statute of the International Tribunal was submitted to the Security Council for its approval as an annex to the *Report of the Secretary-General Pursuant to S.C. Res. 808*. This draft was adopted by the Security Council under its chapter VII coercive authority U.N.S.C. Res. 827, ¶ 2 (May 25, 1993) [hereinafter Statute of the International Tribunal].

Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.<sup>17</sup>

The four Geneva Conventions of 1949 do not define the breadth of the obligation to search for and arrest persons suspected of committing grave breaches in any further detail, and do not impose any geographic, temporal, or other limitations on this obligation. As customary international law, common article 49/50/129/146 imposes an obligation on all states to search for and arrest persons suspected of grave breaches in all territories where the state is authorized by international law to exercise jurisdiction.<sup>18</sup>

## B. VIOLATIONS OF THE LAWS OF CUSTOMS OF WAR

The laws and customs of war that are within the jurisdiction of the International Tribunal are codified in the 1907 Hague Convention No. IV Respecting the Laws and Customs of War on Land and the Regulations annexed thereto.<sup>19</sup> Although the 1907 Hague Convention No. IV and the 1907 Hague Regulations do not explicitly address any obligation to search for or arrest war criminals, the competence of states to prosecute their own nationals and enemy nationals for war crimes was an accepted part of customary international law in 1907.<sup>20</sup>

Notwithstanding the authority to prosecute all war criminals, a general customary international law obligation in 1907 to prosecute war criminals "could be construed at most, if at all, with respect to a State's nationals."<sup>21</sup> A general customary international law obligation of a state to prosecute war criminals that are not its own nationals, or to search for and arrest them, clearly did not exist in 1907 and was not created by the 1907 Hague Convention No. IV or its annexed regulations.<sup>22</sup> A duty to search for and arrest war criminals did not exist until such an obligation was created by the four Geneva Conventions of 1949 and this obligation was explicitly imposed upon state parties only with respect to persons alleged to have committed grave breaches.<sup>23</sup>

17. 1949 Geneva Convention No. I, *supra* note 14, art. 49; 1949 Geneva Convention No. II, *supra* note 14, art. 50; 1949 Geneva Convention No. III, *supra* note 14, art. 129; 1949 Geneva Convention No. IV, *supra* note 14, art. 146 [emphasis added].

18. The two protocols to the four Geneva Conventions of 1949 fail to advance or clarify the obligation to search for and arrest war criminals. See *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 1125 U.N.T.S. 3, arts. 85-91 (1977) reprinted in *LAWS OF WAR*, *supra* note 10, at 389; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, 1125 U.N.T.S. 6009, art. 6, (1977), reprinted in *LAWS OF WAR*, *supra* note 10, at 449.

19. *Report of the Secretary-General Pursuant to S.C. Res. 808*, *supra* note 16, ¶¶ 41-44. Specifically, article 3 of the Statute of the International Tribunal provides that:

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, by whatever means, of undefended towns, villages, dwellings, or buildings;
- (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
- (e) plunder of public or private property.

20. FRITS KALSHOVEN, *CONSTRAINTS ON THE WAGING OF WAR* 68 (2d ed. 1991).

21. *Id.*

22. *See id.*

23. *Id.* at 68-69.

### C. GENOCIDE

The International Tribunal also has jurisdiction over the customary international law crime of genocide as codified by the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide.<sup>24</sup> Although the 1948 Genocide Convention imposes an absolute obligation on state parties to prosecute persons accused of genocide,<sup>25</sup> it does not explicitly address an obligation to search for and arrest persons suspected of genocide.<sup>26</sup> The obligation under the 1948 Genocide Convention to search for and arrest persons suspected of genocide is derived from a state party's obligations under article I "to prevent and to punish" genocide and under article V, to enact "the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide."<sup>27</sup>

The determination that a customary international law obligation of all states to prosecute embraces the obligation to search for and arrest suspected criminals within all territories where states, either individually or collectively, are authorized by international law to exercise jurisdiction is even more compelling for the crime of genocide.<sup>28</sup> History has demonstrated that genocide cannot occur without the participation or acquiescence of the government that has the responsibility for ensuring public order where the genocide occurs.<sup>29</sup> The obligation to search for, arrest, and prosecute those suspected of genocide must remain an obligation of the international community, because to leave it to the state where the crime occurred would allow the "absurd position of the future criminal being entrusted with ensuring his own punishment."<sup>30</sup>

### D. CRIMES AGAINST HUMANITY

The final category of crimes that are within the jurisdiction of the International Tribunal is crimes against humanity, which are inhumane acts of a very serious nature, such as willful killing, torture, or rape, aimed at the civilian population.<sup>31</sup> During a conference in 1988 that

24. *Report of the Secretary-General Pursuant to S.C. Res. 808*, *supra* note 16, ¶ 45. Article 4, paragraphs (2)-(3), of the Statute of the International Tribunal proscribe those acts of genocide precisely as defined in articles II and III of the 1948 Genocide Convention. See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 11, 1948, 78 U.N.T.S. 277 [hereinafter 1948 Genocide Convention], *reprinted in LAWS OF WAR*, *supra* note 10, at 158.

25. Michael P. Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?* 31 *TEX. INT'L L.J.* 1, 21 (1996).

26. See 1948 Genocide Convention, arts. I-XIX, Dec. 11, 1948, 78 U.N.T.S. 277, *reprinted in LAWS OF WAR*, *supra* note 10, at 158.

27. 1948 Genocide Convention, arts. I, V, Dec. 11, 1948, 78 U.N.T.S. 277, *reprinted in LAWS OF WAR*, *supra* note 10, at 158.

28. See LEO KUPER, *GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY* 37 (1981). See also HUMAN RIGHTS WATCH, *WAR CRIMES IN BOSNIA-HERCEGOVINA* 2 (1992) ("Genocide is the most unspeakable crime in the lexicon. The authorization that the Convention provides to the United Nations to prevent and suppress this crime carries with it an obligation to act. The only guidance the Convention provides as to the manner of action is that it should be 'appropriate.' We interpret this as meaning it should be effective.").

29. KUPER, *supra* note 28, at 37.

30. *Id.* at 37-38.

31. *Report of the Secretary-General Pursuant to S.C. Res. 808*, *supra* note 16, ¶¶ 47-48. Specifically, article 5 of the Statute of the International Tribunal provides that:

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

addressed general human rights violations, leading academic and governmental experts concluded there was "no duty under customary international law to prosecute such violators and that such a duty existed only where there was a relevant treaty obligation."<sup>32</sup> Subsequently, several of those same experts focused on the issue of crimes against humanity and concluded that a duty does exist under customary international law to prosecute persons suspected of those crimes.<sup>33</sup> Citing sixty-four separate international conventions that establish a duty to prosecute or extradite, one scholar concluded, in his treatise on crimes against humanity, that a rule of customary international criminal law exists that imposes a general duty on all states to prosecute crimes against humanity.<sup>34</sup> As was previously discussed for the crime of genocide, an obligation to prosecute embraces the obligation to search for and arrest suspected criminals within all territories where states, either individually or collectively, are authorized by international law to exercise jurisdiction.

#### E. THE CHARTER OF THE UNITED NATIONS

The General Assembly adopted a resolution in 1970 that regretfully noted that war criminals were not being punished and specifically addressed the issue of their arrest as follows:

*Convinced* that a thorough investigation of war crimes and crimes against humanity, as well as the arrest, extradition and punishment of persons guilty of such crimes . . . are important elements in the prevention of similar crimes now and in the future, and also in the protection of human rights and fundamental freedoms, the strengthening of confidence and the development of co-operation between peoples and the safeguarding of international peace and security . . .

2. *Calls upon* all States to take measures, in accordance with recognized principles of international law, to arrest such persons and extradite them . . . so that they can be brought to trial and punished . . .

4. *Also calls upon* all the States concerned to intensify their co-operation in the collection and exchange of information which will contribute to the detection, arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity . . .

5. *Once again requests* the States concerned . . . to take the necessary measures . . . for the detection, arrest, extradition and punishment of all war criminals.<sup>35</sup>

One year later, the General Assembly affirmed that a state's refusal "to cooperate in the arrest, extradition, trial and punishment" of persons accused or convicted of war crimes and crimes against humanity is "contrary to the United Nations Charter and to generally recognized norms of international law."<sup>36</sup> The General Assembly later noted the "special need for international action" in order to ensure the prosecution of war criminals in its Resolution on Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity.<sup>37</sup> Two of the nine principles in this Resolution provide that:

32. Scharf, *supra* note 25, at 28.

33. *Id.*

34. M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 500-01 (1992).

35. U.N.G.A. Res. 2712 (Dec. 15, 1970), *reprinted in* THE LAW OF WAR: A DOCUMENTARY HISTORY 757, 757-58 (Leon Friedman ed., 1972) [emphasis added].

36. BASSIOUNI, *supra* note 34, at 504 n.107.

37. U.N.G.A. Res. 3074 (Dec. 3, 1973), *reprinted in* BASSIOUNI, *supra* note 34, at 701.

1. War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment. . . . [; and]

2. States shall assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes and, if they are found guilty, in punishing them. . . .<sup>38</sup>

Even as non-binding expressions of the will of the General Assembly,<sup>39</sup> these resolutions identify and reinforce the principles of customary international law that states have an obligation to search for, and arrest war criminals, as well as cooperate in an international effort to search for and arrest war criminals.<sup>40</sup> In contrast, Security Council resolutions adopted pursuant to the authority of article 39 of the Charter of the United Nations (the Charter) are legally binding obligations.<sup>41</sup> Member states of the United Nations have conferred upon the Security Council the "primary responsibility for the maintenance of international peace and security,"<sup>42</sup> and have agreed that they will "accept and carry out the decisions of the Security Council in accordance with the present Charter."<sup>43</sup> Should the Security Council determine that a threat to the peace, breach of the peace, or act of aggression, as defined under article 39 at the Charter, has occurred, it then has the coercive authority to adopt a legally binding decision as to what measures shall be taken to maintain or restore international peace and security in accordance with articles 41 and 42.<sup>44</sup> The Security Council also has the authority to "establish such subsidiary organs as it deems necessary for the performance of its functions"<sup>45</sup> and delegate the necessary authority to the subsidiary organ for it to accomplish those assigned functions.<sup>46</sup>

### III. The Former Yugoslavia: A Situational Analysis

#### A. THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

To ensure that the International Tribunal was effective and had the cooperation of all states, the Security Council made the following decision under chapter VII of the Charter:

4. *Decides* that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute.<sup>47</sup>

38. *Id.* [emphasis added].

39. THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 236-37 (Bruno Simma ed., 1994).

40. See BASSIOUNI, *supra* note 34, at 527; THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 39, at 240.

41. *Id.* at 605-16.

42. U.N. CHARTER art. 24, para 1. It is important to note that this delegation of authority does not derogate from a state's inherent right of individual and collective self-defense. U.N. CHARTER art. 51.

43. U.N. CHARTER art. 25.

44. THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 39, at 613. Articles 39-51 are found in chapter VII of the Charter. Accordingly, the coercive authority of the Security Council to adopt a legally binding decision as to what measures shall be taken in accordance with articles 41 and 42 to maintain or restore international peace and security is frequently referred to as chapter VII authority.

45. U.N. CHARTER art. 29.

46. THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 39, at 482.

47. S.C. Res. 827, U.N. Doc. S/RES/827 (1993) [emphasis added].

Article 19(2) of the statute specifically authorizes the judge of a Trial Chamber to issue an arrest warrant, and article 29 requires states to comply with an order of a Trial Chamber to arrest or detain an indicted suspect.<sup>48</sup>

Pursuant to its authority granted in article 15 of the statute,<sup>49</sup> the International Tribunal adopted its rules of procedure and evidence on February 11, 1994.<sup>50</sup> Rules 54 to 61 govern the procedures for orders and warrants. Upon indictment, the prosecutor may seek an arrest warrant pursuant to rule 55 that is signed by a single judge and is only addressed to the "national authorities of the State in whose territory or under whose jurisdiction or control the accused resides, or was last known to be, or is believed by the Registrar to be likely to be found. . . ."<sup>51</sup> Rule 56 reiterates the obligation of states by providing the "State to which a warrant of arrest . . . is transmitted shall act promptly and with all due diligence to ensure proper and effective execution thereof, in accordance with Article 29 of the statute."<sup>52</sup> If an arrest warrant is not executed within a reasonable time, then rule 61 permits the Trial Chamber to issue an international arrest warrant that is addressed to all states.

## B. THE DAYTON PEACE AGREEMENT

After more than three years of diplomatic efforts by the international community and the U. S.-led Balkan peace talks in Dayton, Ohio, from November 1-21, 1995, the Presidents of Bosnia and Herzegovina, Croatia, and the Federal Republic of Yugoslavia signed the General Framework Agreement for Peace in Bosnia and Herzegovina (the Dayton Peace Agreement) on December 14, 1995.<sup>53</sup> This document consists of eleven short articles that set forth general principles of agreement and refer to eleven more detailed annexes.<sup>54</sup> In article IX of the Dayton Peace Agreement, the parties acknowledge and reaffirm "the obligation of all Parties to cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law."<sup>55</sup> Similarly, the parties agree in article X of annex 1-A to "cooperate fully with the International Tribunal for the Former Yugoslavia."<sup>56</sup>

The parties also invited the Security Council to establish a multinational Implementation Force (IFOR) under its chapter VII authority to ensure compliance with the military aspects of the Dayton Peace Agreement that are delineated in annex 1-A.<sup>57</sup> This force is authorized to operate under the authority and subject to the direction and political control of the North

48. *Report of the Secretary-General Pursuant to S.C. Res. 808, supra* note 16, Annex, arts. 19, 29 (Statute of the International Tribunal).

49. *Id.* Annex, art. 15 (Statute of the International Tribunal).

50. Rules of Procedure and Evidence, *as amended*, U.N. Doc. IT/32/Rev. 8 (Apr. 23, 1996).

51. *Id.* rule 55.

52. *Id.* rule 56.

53. *Peace Agreements bring a 'long-delayed birth of hope': Multinational Force set up in Bosnia to replace UNPROFOR*, 1 UN CHRON., No. 1, 25 (1996).

54. *The General Framework Agreement for Peace in Bosnia and Herzegovina*, U.N. Doc. S/1995/999 (Dec. 14, 1995) [hereinafter *Dayton Peace Agreement*] (These eleven annexes address the following topics, respectively: 1-A, Agreement on Military Aspects of the Peace Settlement; 1-B, Agreement on Regional Stabilization; 2, Agreement on Inter-Entity Boundary Line and Related Issues; 3, Agreement on Elections; 4, the Constitution of Bosnia and Herzegovina; 5, Agreement on Arbitration; 6, Agreement on Human Rights; 7, Agreement on Refugees and Displaced Persons; 8, Agreement on the Commission to Preserve National Monuments; 9, Agreement on Bosnia and Herzegovina Public Corporations; 10, Agreement on Civilian Implementation; and, 11, Agreement on International Police Task Force).

55. *Id.* art. IX.

56. *Id.* Annex 1-A, art. X.

57. *Id.* Annex 1-A, arts. I.1, VI.

Atlantic Council (NAC) through the North Atlantic Treaty Organization (NATO) chain of command.<sup>58</sup> The parties specifically understand and agree that:

the IFOR Commander shall have the authority, without interference or permission of any Party, to do all that the Commander judges necessary and proper, including the use of military force, to protect the IFOR and to carry out the responsibilities listed above in paragraphs 2, 3 and 4, and they shall comply in all respects with the IFOR requirements.<sup>59</sup>

Paragraphs two through four are detailed, but include the right "to monitor and help ensure compliance by all Parties" with annex 1-A, "to help create secure conditions for the conduct by others of other tasks associated with the peace settlement, including free and fair elections," and to implement "further directives from the NAC [that] may establish additional duties and responsibilities for the IFOR in implementing this Annex."<sup>60</sup> Should the parties not fully cooperate with the International Tribunal and fail to execute arrest warrants, these provisions of the Dayton Peace Agreement are a grant of authority to the IFOR to use military force to search for and arrest persons indicted by the International Tribunal.

On December 15, 1995, the Security Council acted under chapter VII of the Charter and announced its support of the Dayton Peace Agreement by authorizing states to establish the IFOR to fulfill the role specified in the Dayton Peace Agreement and by reaffirming that:

all States shall cooperate fully with the International Tribunal for the Former Yugoslavia and its organs in accordance with the provisions of resolution 827 (1993) of 25 May 1993 and the Statute of the International Tribunal, and shall comply with requests for assistance or orders issued by a Trial Chamber under article 29 of the Statute . . .<sup>61</sup>

Operative paragraph 15 of this Resolution also authorizes all states participating in the IFOR to take all necessary measures to effect the implementation of and to ensure compliance with Annex 1-A of the Peace Agreement.<sup>62</sup> Should the parties not fully cooperate with the International Tribunal and fail to execute arrest warrants, this Resolution is also a grant of authority to the states contributing troops to the IFOR to use military force to search for and arrest persons indicted by the International Tribunal. Additionally, this Resolution imposes an obligation upon all states to comply with arrest warrants issued by the International Tribunal that is independent of the authority to search for and arrest persons suspected of war crimes granted by the parties to the Dayton Peace Agreement. On December 20, 1995, a 60,000 personnel IFOR was deployed in the former Yugoslavia in accordance with the Dayton Peace Agreement and Resolution 1031.<sup>63</sup>

### C. THE OBLIGATION TO SEARCH FOR AND ARREST

The International Tribunal has the authority to impose a legal obligation upon all states, such as those participating in the IFOR, to search for and arrest persons located in the territory of the former Yugoslavia.<sup>64</sup> In addition to these obligations that may be imposed by the

58. *Id.*

59. *Id.* Annex 1-A, art. VI.5.

60. *Id.* Annex 1-A, art. VI.2-4.

61. U.N.S.C.Res. 1031 (Dec. 15, 1995) [emphasis added].

62. *Id.*

63. *Peace Agreements bring a 'long-delayed birth of hope': Multinational Force set up in Bosnia to replace UNPROFOR*, *supra* note 53, at 26.

64. See MORRIS & SCHARF, *supra* note 2, at 208-10. See also Ruth Wedgwood, *Prosecuting War Crimes*, 149 MIL. L. REV. 217, 224 (Summer 1995) ("Ultimately, the Security Council may feel the need to consider direct execution of international arrest warrants, if that is needed to make the tribunal effective.").

International Tribunal, the Dayton Peace Agreement imposes an obligation upon its parties to search for and arrest war criminals, and authorizes the IFOR to search for and arrest war criminals in the former Yugoslavia. These obligations and authorities are in addition to those under customary international law and international agreements discussed *supra* in part II.

Given that an obligation exists to obey the orders of the International Tribunal, the language of a specific arrest warrant must be analyzed to determine whether an obligation has been imposed. On July 11, 1996, a Trial Chamber of the International Tribunal issued an "International Arrest Warrant and Order for Surrender" to all states and to the IFOR in the cases of Radovan Karadzic and Ratko Mladic.<sup>65</sup> The operative language in both of these arrest warrants is the same:

HEREBY DIRECTS the authorities and officers and agents of all States to act promptly with all due diligence to secure the arrest, detention and transfer to the Tribunal of:

Radovan KARADZIC born on 19 June 1945, in Pretnjica, in the municipality of Savnik, believed to be residing in Pale, Han Pijesak, or Jahorina;

Hereby Directs the authorities and officers and agents of all States to act promptly with all due diligence to secure the arrest, detention and transfer to the Tribunal of:

Ratko MLADIC born on 12 March 1943, in the village of Bozanovic near Kalinovik, in the Republic of Bosnia and Herzegovina, believed to be residing in Pale, Han Pijesak, Belgrade or Banja Luka.<sup>66</sup>

Since the arrest warrants were issued to all states and to the IFOR while identifying the locations of the accused in the former Yugoslavia, the Trial Chamber has clearly imposed an obligation on states participating in the IFOR to "act promptly with all due diligence to secure the arrest, detention and transfer [of Karadzic and Mladic] to the Tribunal. . . ." Indeed, the very purpose of the Trial Chamber issuing an international arrest warrant to all states is to overcome the failure of an individual state to give effect to the arrest warrant issued to it.

#### IV. Conclusions

The international legal obligations of a state to search for and arrest war criminals indicted by the International Tribunal should be the central focus of any public debate over what the international community ought to be doing to support the International Tribunal. There exists a legal, as well as a moral, imperative to uphold the rule of law, regardless of the consequences. When the international community fails to support the International Tribunal and allows indicted war criminals to roam free in their home state, the rule of law becomes illusory.<sup>67</sup> If the international community fails to bring to justice those indicted of the heinous crimes committed in the former Yugoslavia, then the real cost "may be in giving an impression for the future that such depraved actions are acceptable and will incur no responsibility."<sup>68</sup> Without swift action by the international community, the real legacy of the International Tribunal will not be peace and justice but a demonstrated inability of the international community to establish and defend the rule of law.

65. International Arrest Warrant and Order for Surrender, Case Nos. IT-95-5-R61/IT-95-18-R61 (July 11, 1996).

66. *Id.*

67. Shawcross, *supra* note 7, at 17.

68. See JOHN N. MOORE, CRISIS IN THE GULF: ENFORCING THE RULE OF LAW 303 (1992).