

# INTRASTATE ETHNIC CONFLICTS AND INTERNATIONAL LAW: HOW THE RISE OF INTRASTATE ETHNIC CONFLICTS HAS RENDERED INTERNATIONAL HUMAN RIGHTS LAWS INEFFECTIVE, ESPECIALLY REGARDING SEX-BASED CRIMES

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\* J.D./M.A., 2001, Washington College of Law, American University. I would like to thank Professor Paul Williams for his invaluable insight and comments in the development of this Comment. My sincere appreciation goes out to my husband and my family for all of their love, encouragement and support which made this endeavor possible.

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## I. INTRODUCTION

After World War II, the international community united to denounce the atrocities that ravaged entire cultures during the war. Because of these atrocities, the international community gathered together to form the United Nations, an international organization designed to protect future generations from the scourge of war by preventing these horrific acts from ever again dominating the international arena.<sup>1</sup> The post-World War II period also witnessed the promulgation of several international human rights laws and treaties to further the goal of international peace.<sup>2</sup> These international human rights laws never fully realized their potential during the Cold War, when international conflicts were the main cause of global concern and ethnic uprisings were stifled by the hegemonic superpowers.<sup>3</sup> With the end of the Cold War, a

1. See ANTHONY CLARK AREND & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE* 92 (1993) (discussing the motivation behind the formulation of a united, international body); see also Kimberly D. Barnes, *International Law, the United Nations, and Intervention in Civil Conflicts*, 19 SUFFOLK TRANSNAT'L L. REV. 117, 127 (1995) (stating that the events of World War II influenced the Allied countries' decision to formulate an international body).

2. See ARYEH NEIER, *WAR CRIMES: BRUTALITY, GENOCIDE, TERROR, AND THE STRUGGLE FOR JUSTICE* 75 (1998) (observing that after the Nuremberg trials, many nations signed human rights treaties that obligated them to punish those who violated human rights).

3. See PAUL HIRST, *MILITARY INTERVENTION IN EUROPEAN CONFLICTS: SECURITY*

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geopolitical shift took place, with the threat of nuclear disaster no longer pervading the consciousness of the global community.<sup>4</sup> The dawning of this new era, however, brought another threat to the tenuous peace of the international community: the proliferation of intrastate ethnic conflicts.<sup>5</sup> The rise of intrastate ethnic conflict has tested the effectiveness of both the United Nations Charter and various international human rights laws and treaties, as well as the resolve of the international community to protect human rights and preserve international peace.<sup>6</sup>

This Comment examines the difficulties inherent in reconciling international human rights laws and treaties with the current state of world conflicts, and it will attempt to discern the reasons behind the failure of those laws to protect persons for whom they were intended. Part II outlines the various human rights laws and treaties, including their historical origins, purpose, and significance. Part III discusses the failure of these laws to prevent the recent occurrences of violent intrastate ethnic conflicts in Yugoslavia and how to bring the perpetrators of ethnic violence to justice. Part IV analyzes the provisions of international law which prevent effective enforcement of human rights laws. These provisions, present throughout international human rights documents, were drafted in such a way as to protect the notion of sovereignty, and are evident in the numerous

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CHALLENGES IN POST-COMMUNIST EUROPE 175 (Lawrence Freedman ed., Blackwell Publishers 1994) (examining the superpowers' role during the Cold War, where the United States and the Soviet Union fought for control of Europe and summarily quashed any other crisis, which had the potential of diverting them from their purpose).

4. See Barnes, *supra* note 1, at 117 (stating the end of the Cold War has decreased the threat of nuclear war).

5. See NICHOLAS KITTRIE, *THE WAR AGAINST AUTHORITY* 1 (1995) (discussing the rise of intrastate ethnic conflicts in the post-Cold War era). Professor Kittrie strongly asserts that

[w]hile sundry scholars and agencies . . . keep speculating about where the next decade's or era's international arenas of conflict are likely to be, it is highly probable that the greatest contemporary and forthcoming world crises will be domestic. The escalating global disorder seems to derive from the internal, rather than international, confrontations.

*Id.* See also Paul J. Magnarella, *Preventing Interethnic Conflict and Promoting Human Rights Through More Effective Legal, Political, and Aid Structures: Focus on Africa*, 23 GA. J. INT'L & COMP. L. 327, 327-28 (1993) (noting that the rise of intrastate ethnic conflicts represent the greatest threats to the global order); Nicholas Kittrie, *Introductory Remarks: International Responses to Secessionist Conflicts*, 90 AM. SOC'Y INT'L L. PROC. 296, 297 (1996) (observing that the end of the Cold War has brought about the resurgence of dormant ethnic hostilities); Tom Farer, *Negotiating the Settlement of Secessionist Conflicts: International Responses to Secessionist Conflicts*, 90 AM. SOC'Y INT'L L. PROC. 296, 304 (1996) (commenting that the end of the Cold War has aggravated ethnic tensions); David Wippman, *Treaty-Based Intervention: Who Can Say No?*, 62 U. CHI. L. REV. 607, 607 (1995) (remarking on the acceleration of intrastate conflicts after the end of the Cold War).

6. See discussion *infra* Part IV and accompanying notes (discussing the recent failures of the international community to utilize international human rights laws in their efforts to bring peace and justice to Yugoslavia).

reservations to treaties currently in force. Part V recommends how the international community should utilize the international human rights laws and treaties to accomplish the purpose for which they were intended, namely to deter and punish the states which violate those norms. It also recommends methods to bring about peace in the New World Order through more uniform implementation of the dictates of international law.

## II. INTERNATIONAL HUMAN RIGHTS LAWS AND TREATIES

Throughout history, several international laws and treaties were formulated to deal both directly and indirectly with the notion of human rights.<sup>7</sup> The Covenant of the League of Nations dealt expressly with human rights in Article 23;<sup>8</sup> the pre-World War II Geneva Conventions regulated the treatment of civilians;<sup>9</sup> and the 1899 and 1907 Hague Conventions (“Hague Conventions”) both mandated that the lives of persons be respected.<sup>10</sup> Perhaps the most important aspect of the Hague Conventions was that they based their normative principles on the value of the “laws of humanity,”<sup>11</sup> a concept which would later lead to the “crimes against humanity” provisions of international human rights laws.<sup>12</sup> The atrocities committed during World War II reinforced the need for international instruments designed for the sole purpose of protecting

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7. The first military laws that were formulated dealt indirectly with the protection of civilian populations. See Leo Gross, *The Punishment of War Criminals: The Nuremberg Trial*, 2 NETH. INT'L L. REV. 356, 358 (1955) (detailing the various laws that provide for the protection of civilians). For a general overview of these laws see M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL LAW 302 (1992) [hereinafter CRIMES AGAINST HUMANITY] (noting the historical foundations of the protections of civilians).

8. See LEAGUE OF NATIONS COVENANT art. 23 (stating that the League would regulate labor conditions and treatment of individuals in member states' territories).

9. See NEIER, *supra* note 2, at 22 (observing that the Geneva Conventions were formulated to regulate the treatment of both civilians and combatants during war).

10. See Hague Convention Respecting the Laws and Customs of War, 26 Martens (2d) 949, 32 Stat. 1803, T.S. No. 403, *reprinted in* 1 AM. J. INT'L L. 129 (1907) [hereinafter Hague Convention] (providing for the protection of civilian populations during times of war). Article 46 of both Conventions states in part: “Family honour and rights, the lives of persons, and private property, as well as religious convictions and practices, must be respected.” *Id.* art. 46. See also CRIMES AGAINST HUMANITY, *supra* note 7, at 302 (discussing the 1899 and 1907 Hague Conventions as providing for protection of civilian populations from deportation).

11. Hague Convention, *supra* note 10, pmbl., para. 9. Paragraph 9 reads in part: “[P]opulations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established among civilized peoples, from the laws of humanity, and the requirements of the public conscience.” *Id.*

12. See CRIMES AGAINST HUMANITY, *supra* note 7, at 165-66 (stating that the “crimes against humanity” provisions in later human rights laws were developed by the Hague Conventions' use of the term “laws of humanity”).

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human rights.<sup>13</sup> Thus, during the post-World War II period, the international community promulgated several international human rights treaties explicitly detailing the protection of human rights.<sup>14</sup> These treaties included the United Nations Charter, the statutes of the Tokyo and Nuremberg tribunals,<sup>15</sup> and the four Geneva Conventions.<sup>16</sup> The Nuremberg statute proved exceedingly important because it transformed the nature of international criminal law.<sup>17</sup> The Nuremberg Tribunal stood for the proposition that “[t]hose who authorized and committed crimes against the peace, war crimes and humanitarian crimes would be personally responsible for those crimes and would be made to suffer the consequences of their conduct.”<sup>18</sup> That premise thrust human rights into the international spotlight and paved the way for the promulgation of modern human rights laws.

This discussion focuses on four of human rights documents and their relevant provisions. These documents include the United Nations Charter (“U.N. Charter”); the Convention on the Prevention

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13. See KELLY DAWN ASKIN, *WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS* 231 (1997) (commenting on how the brutality of World War II finally persuaded nations to promulgate instruments to protect civilian populations during wartime).

14. See NEIER, *supra* note 2, at xiii (observing that the post-World War II era’s increase in human rights laws was a result of the atrocities of the Nazis).

15. See William A. Schabas, *War Crimes, Crimes Against Humanity and the Death Penalty*, 60 ALB. L. REV. 733, 737 (1997) (explaining that the post-World War II tribunals had jurisdiction to adjudicate war crimes, crimes against peace, and crimes against humanity). The Charter of the International Military Tribunal defined crimes against humanity as:

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, art. 6(c), 82 U.N.T.S. 279, 288; see generally *CRIMES AGAINST HUMANITY*, *supra* note 7 (detailing the various provisions of the Charter).

16. The 1949 Geneva Conventions include: the [Geneva] Convention (I) For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), Aug. 12, 1949, 75 U.N.T.S. 31; the [Geneva] Convention (II) For the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (Second Geneva Convention), Aug. 12, 1949, 75 U.N.T.S. 85; the [Geneva] Convention (III) Relative to the Treatment of Prisoners of War (Third Geneva Convention), Aug. 12, 1949, 75 U.N.T.S. 135; the [Geneva] Convention (IV) Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]. See *CRIMES AGAINST HUMANITY*, *supra* note 7, at 134 (noting that each of these documents purported to create a system whereby international rights would be protected).

17. See Winston P. Nagan, *Strengthening Humanitarian Law: Sovereignty, International Criminal Law and the Ad Hoc Tribunal for the Former Yugoslavia*, 6 DUKE J. COMP. & INT’L L. 127, 149 (1995) (observing how the war crimes trials in Nuremberg decentralized the character of international law).

18. *Id.* at 150.

and Punishment of the Crime of Genocide (“Genocide Convention”); the Universal Declaration of Human Rights (“Declaration”) and the subsequent adoption of the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social, and Political Rights (“International Covenants”); and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (“Torture Convention”).

### A. *The United Nations Charter*

#### 1. *Historical Background*

After the failure of the League of Nations, the international community replaced it with the United Nations, but kept the goals of the League as the primary thrust of this new organization.<sup>19</sup> The Allied powers felt that this was the only type of institution that would eliminate the problems which led to World War II.<sup>20</sup> The members of the United Nations developed the U.N. Charter during the last weeks of World War II as the means by which the member states could prevent another global catastrophe.<sup>21</sup> Its adoption in 1945 “represented an enormous advance because it legitimized international efforts to protect human rights everywhere.”<sup>22</sup>

Given the nature of conflicts during this period, the purpose of the U.N. Charter was to promote a more peaceful and secure global community.<sup>23</sup> The drafters of the Charter designed its provisions to

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19. See WILLIAM R. SLOMANSON, *FUNDAMENTAL PERSPECTIVES ON INTERNATIONAL LAW* 74 (1990) (examining the circumstances surrounding the formation of the League of Nations). The establishment of The League of Nations in 1920 resulted from the memory of World War I. *Id.* The hope that The League would prevent another world war was dashed as global governments refused to give up their sovereignty in an isolationist era. *Id.* For a general discussion on the League of Nations see F.P. WALTERS, *A HISTORY OF THE LEAGUE OF NATIONS* (1952) (describing in detail the effects of World War I, the subsequent establishment of the League of Nations, and its ultimate failure to unite the governments of the world in a single organization for the purpose of global peace).

20. The United Nations was formed as a result of World War II and the need to promote the common interests of the international community. The allied forces met in 1945 in San Francisco to draft what would become the U.N. Charter. See generally AREND & BECK, *supra* note 1, at 1 (detailing the 1945 meeting between the Allied powers); see also UNITED NATIONS PUBLICATIONS, *EVERYONE’S UNITED NATIONS* 3 (10th ed. 1986) [hereinafter *EVERYONE’S UNITED NATIONS*] (discussing the creation of the U.N. Charter at the end of World War II).

21. See *EVERYONE’S UNITED NATIONS*, *supra* note 20, at 3 (expressing the desire of the Allied powers to create a document for the purpose of establishing binding norms on the nations of the world).

22. NEIER, *supra* note 2, at 22.

23. See U.N. CHARTER pmbl. The United Nations Charter’s Preamble reads in part:

We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth

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“achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights . . . .”<sup>24</sup> Within the context of the Charter’s purposes, these drafters created provisions used to develop friendly relations with nations;<sup>25</sup> to achieve international cooperation in resolving problems;<sup>26</sup> to cooperate to attain the Charter’s goals;<sup>27</sup> and to set up a system to control armed conflicts aimed at civilian populations.<sup>28</sup>

## 2. *Relevant Provisions of the U.N. Charter Incorporating Human Rights*

Based on the purposes behind the formation of the U.N. Charter, the drafters attempted to internationalize the concept of human rights for all persons. As such, the U.N. Charter provides that the “United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”<sup>29</sup> To ensure that this provision is carried out, the Charter maintains that all United Nations’ members work in conjunction with the international community to achieve the goals set out in Article 55<sup>30</sup> and provide for the expulsion of any member state found to be in violation of the Charter’s principles.<sup>31</sup> Article 1, paragraph 2 further states that there is to be respect for the principle of “equal rights and self-determination.”<sup>32</sup>

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of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom . . . .

U.N. CHARTER pmbl. *See also* U.N. CHARTER art. 1, para. 1 (outlining the Charter’s main purpose of maintaining international peace and security); Barnes, *supra* note 1, at 127-29 (describing the purposes of the U.N. Charter regarding its international character).

24. U.N. CHARTER art. 1, para. 3.

25. *See id.* art. 1, para. 2.

26. *See id.* art. 1, para. 3.

27. *See id.* art. 1, para. 4 (stating that in order to maintain international peace and security, the member states must respect the equal rights and self-determination of peoples and work together to achieve common goals).

28. *See* ANTONIO TANCA, FOREIGN ARMED INTERVENTION IN INTERNAL CONFLICT 5 (1993) (stating that the Charter was designed to prevent the atrocities of World War II).

29. U.N. CHARTER art. 55(c).

30. *See id.* art. 56 (dictating that all member states shall work together to promote the purposes of Article 55, including economic and social progress and creating solutions to economic and social problems).

31. *See id.* art. 6 (detailing the expulsion of a member which is contingent upon a recommendation by the Security Council).

32. *Id.* art. 1, para. 2.

Chapter VII of the Charter addresses actions taken with respect to threats to peace, breaches of the peace, and acts of aggression.<sup>33</sup> This Chapter authorizes the Security Council to take various measures, including non-force and armed force measures, which it deems appropriate to maintain peace.<sup>34</sup> This aspect of the Charter has proven extremely important in recent years with the rise of humanitarian intervention,<sup>35</sup> where ethnic violence has reached catastrophic levels.<sup>36</sup> Commentators argue that Chapter VII should be utilized by the United Nations in authorizing humanitarian assistance to victims of ethnic violence,<sup>37</sup> given the nature of conflicts today.<sup>38</sup>

*B. The Convention on the Prevention and Punishment of the Crime of Genocide*<sup>39</sup>

*1. Historical Origins, Purpose, and Significance of the Convention*

The Genocide Convention resulted from the horrors of World War II<sup>40</sup> and from an eagerness on the part of the international

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33. See *id.* Ch. VII, arts. 39-51 (summarizing the enforcement actions that may be taken by the Security Council).

34. See *id.* Ch. VII, art. 39 (proclaiming the Security Council's power to decide which measures shall be taken when a threat to the peace exists).

35. Although humanitarian intervention is not explicitly authorized under the Charter, some scholars have argued that since the United Nations has been unable to effectively protect human rights, such intervention is warranted. See generally FERNANDO TESON, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY I (1997) (discussing the legal aspects of humanitarian intervention); see also discussion *infra* Part IV.C.1 and accompanying notes (discussing the current view on humanitarian intervention). But see Thomas M. Franck & Nigel S. Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT'L L. 275, 300-01 (1973) (arguing that unilateral humanitarian intervention violates international law).

36. See Nagan, *supra* note 17, at 128 (stating that the number of persons killed by their own governments in ethnic conflicts is approximately 170,000,000); see also R.J. RUMMEL, DEATH BY GOVERNMENT 9 (1994) (finding that sovereign governments have murdered over 100 million of their own citizens).

37. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 701 (1987) (calling for the legitimization of intervention to protect human rights).

38. See discussion *infra* Part IV.C.1 and accompanying notes (detailing the arguments for and against humanitarian intervention under the United Nations' Chapter VII enforcement powers).

39. Genocide, for the purposes of the Genocide Convention and this Comment, is defined as "acts committed with intent to destroy, in whole or part, a national, ethnic, racial or religious group . . . ." Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948, art. 2, 78 U.N.T.S. 277, 277 [hereinafter Genocide Convention].

40. See Nicole M. Procida, *Ethnic Cleansing in Bosnia-Herzegovina, A Case Study: Employing United Nations Mechanisms to Enforce the Convention on the Prevention and Punishment of the Crime of*

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community to create an instrument that would hold perpetrators of such violence accountable for their actions.<sup>41</sup> After the affirmation by the United Nations General Assembly that the Nuremberg principles existed in international law,<sup>42</sup> the international community drafted the Genocide Convention in an attempt to garner international cooperation to punish those states and individuals who violate the Nuremberg principle regarding genocide.<sup>43</sup> The overall purpose of the Genocide Convention is to protect religious, national, racial, and ethnic groups from harm from both government officials and private citizens.<sup>44</sup> Additionally it provides for individual criminal responsibility for violations of the provisions therein.<sup>45</sup>

## 2. *Relevant Provisions of the Genocide Convention With Respect to Human Rights*

Given the atrocities committed by the Nazis during World War II, the international community thought it was imperative for the United Nations to formulate a document that would garner international cooperation to provide for the protection of human rights.<sup>46</sup>

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*Genocide*, 18 SUFFOLK TRANSNAT'L L. REV. 655, 666 (1995) (noting that the Genocide Convention resulted from the atrocities that occurred during World War II).

41. See Genocide Convention, *supra* note 39, pmb. (recognizing that genocide is a crime under international law). The drafters' concern with genocide is evident in the preamble, which states in part: "[r]ecognizing that at all periods of history genocide has inflicted great losses on humanity; and [b]eing convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required . . ." *Id.* See also Raphael Lemkin, *Genocide As a Crime Under International Law*, 41 AM. J. INT'L L. 145, 150 (1947) (defining the concept of genocide and describing the obligation of states to prevent such occurrences), Procida, *supra* note 40, at 666-67 (detailing the origins of the Genocide Convention after World War II and the United Nation's role in drafting the Convention).

42. See Affirmation of the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal, G.A. Res. 95(1), U.N. GAOR, 1st Sess., U.N. Doc. A/236 (1947) (affirming the Nuremberg principles as a part of international criminal law); see also Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 114 (1986) (noting that in 1946, the Nuremberg principles were affirmed as existing in international law by the United Nations General Assembly).

43. See Genocide Convention, *supra* note 39, arts. 2, 4 (defining genocide as an act designed to destroy "national, ethnical, racial or religious group[s]" and providing for punishment of both leaders and individuals). Article 1 provides that: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish." *Id.* art. 1. See also CRIMES AGAINST HUMANITY, *supra* note 7, at 433 (observing that after the 1946 United Nations' resolution, the United Nations prepared the Genocide Convention).

44. Genocide Convention, *supra* note 39, art. 2 (proclaiming that these groups are to be protected from genocide).

45. Genocide Convention, *supra* note 39, art. 4 (providing for the punishment of those responsible for genocidal acts).

46. See Dieter Kastrup, *From Nuremberg to Rome and Beyond: The Fight Against Genocide, War Crimes, and Crimes Against Humanity*, 23 FORDHAM INT'L L.J. 404, 405 (1999) (stating that the intention of the signatories in creating the Genocide Convention was to avoid such atrocities from occurring in the future).

Although the Genocide Convention codified the principle of genocide as a crime under international law,<sup>47</sup> the Convention provided contracting parties with leave to implement national laws giving effect to the provisions of the Convention.<sup>48</sup> The Genocide Convention further provided for criminal trials for persons charged with genocide<sup>49</sup> and extradition for persons found to have committed genocide in the territory of another contracting party.<sup>50</sup> The Genocide Convention also made genocide a specific intent crime, the elements of which include the intent to kill or physically destroy members of a group or cause serious bodily injury or mental harm to them, as well as preventing births or forcibly removing children from a group.<sup>51</sup> Aggressors' use of genocide as a tool of war is punishable under Article 6 of the Genocide Convention.<sup>52</sup>

Additionally, the Genocide Convention delineates the means by which the international community can enforce compliance with its mandates. The Convention allows for the establishment of an international tribunal to adjudicate and punish violators;<sup>53</sup> authorizes the United Nations to take action where warranted and appropriate;<sup>54</sup> and gives the International Court of Justice the jurisdiction to resolve disputes regarding any provision of the Genocide Convention.<sup>55</sup>

The Genocide Convention is significant in that, at its inception, it was a definitive representation of the will and desires of governments around the world to prevent another holocaust from occurring.<sup>56</sup> Its

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47. See Genocide Convention, *supra* note 39, art. 1 (confirming that genocide is a crime under international law).

48. See Genocide Convention, *supra* note 39, art. 5 (providing that the contracting parties will enact "in accordance with their respective Constitutions, 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 . . ."). This was thought necessary in order to garner support for the Convention domestically.

49. See Genocide Convention, *supra* note 39, art. 6 (asserting that such a person shall be tried in the territory where the act was committed, or by an international tribunal).

50. See Genocide Convention, *supra* note 39, art. 7 (declaring the responsibility of member states to extradite the perpetrators of genocide in accordance with domestic laws).

51. See Genocide Convention, *supra* note 39, art. 2 (defining the acts which constitute genocidal aggression).

52. See Genocide Convention, *supra* note 39, art. 6 (providing for the prosecution of individuals responsible for genocidal actions).

53. See Genocide Convention, *supra* note 39, art. 6 (giving the tribunal jurisdiction to try individuals indicted for genocidal actions).

54. See Genocide Convention, *supra* note 39, art. 8 (establishing the right of a member state to call upon the United Nations to take action under the United Nations Charter).

55. See Genocide Convention, *supra* note 39, art. 9 (authorizing disputants to submit requests for clarification of the Convention to the International Court of Justice); Procida, *supra* note 40, at 668-69 (discussing the jurisdictional aspects of the Genocide Convention).

56. See Anne Bodley, *Weakening the Principle of Sovereignty in International Law: The International Criminal Tribunal for the Former Yugoslavia*, 31 N.Y.U. J. INT'L L. & POL. 417, 424

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provisions seek not only to prevent genocidal atrocities, but also to act as a deterrent to states and individuals who seek to destroy certain groups.<sup>57</sup> Under the Genocide Convention, compliance with the dictates of human morality was guaranteed by the threat of punishment from the international community as a whole.

*C. The Universal Declaration of Human Rights*

*1. The Historical Significance*

The United Nations wanted to create a system whereby the value of human rights was recognized by member states as an important aspect of international law.<sup>58</sup> The Universal Declaration of Human Rights was drafted for this purpose and its adoption created an international bill of rights.<sup>59</sup> Prior to the creation of the United Nations and subsequent adoption of the U.N. Charter, an individual's only recourse for violations of human rights laws was under his/her<sup>60</sup> own domestic laws.<sup>61</sup> The Declaration established the first of many United Nations Resolutions outlining its determination to formulate comprehensive guidelines on the handling of human rights issues and to promote respect for human rights.<sup>62</sup> The United Nations

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(1999) (detailing the desires of the Allied forces to create an instrument codifying the principles of the Nuremberg Charter to allow for punishment of crimes against humanity).

57. *See id.* (stating that the Genocide Convention allows an international criminal tribunal to try suspected perpetrators of genocidal aggressions).

58. *See* The Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., U.N. Doc. A/810, pmbl. (1948) [hereinafter Declaration of Human Rights] (advocating respect for human rights). The preamble goes on further to state that the Declaration is

[A] common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among peoples of territories under their jurisdiction.

*Id.*

59. *See* SLOMANSON, *supra* note 19, at 372 (noting that the United Nations began drafting numerous human rights treaties designed to create an international bill of rights to fulfill its human rights goals).

60. For the purposes of this Comment, the pronoun "his" represents both masculine and feminine connotations.

61. *See* SLOMANSON, *supra* note 19, at 372 (commenting on how the international bill of rights guaranteed a forum for individuals seeking recourse for violations of their rights).

62. *See* Declaration of Human Rights, *supra* note 58, pmbl. (advocating a comprehensive system for the protection of human rights). The protection of human rights was essential, in the member states' view, to prevent another holocaust. *Id.* This view was set forth in the preamble which states in relevant part: "Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy . . . freedom from fear and want has been proclaimed as the highest aspiration of the common people . . ." *Id.*

General Assembly Resolution 217 A (III), regarding the Declaration, was formally adopted without dissent on December 10, 1948.<sup>63</sup> The importance of the Declaration is twofold. First, the Declaration asserted freedom and equality for everyone, stating that “[a]ll human beings are born free and equal in dignity and rights.”<sup>64</sup> Second, it contains two important human rights provisions expounding on the principles of freedom and equality.<sup>65</sup>

## 2. *Relevant Human Right Provisions of the Declaration and Their Significance in International Law*

The first provision of the Declaration deals with “civil and political rights,” including the rights to life, liberty, and security;<sup>66</sup> the right to travel freely;<sup>67</sup> freedom from slavery;<sup>68</sup> discrimination;<sup>69</sup> arbitrary arrest;<sup>70</sup> freedom to marry<sup>71</sup> and practice one’s own religion without interference.<sup>72</sup> The second provision which guarantees “economic, social, and cultural rights” outlines the right to own property,<sup>73</sup> to work,<sup>74</sup> and to receive an education.<sup>75</sup> Although these provisions were originally designed to constitute a statement of principles,<sup>76</sup> they are

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63. See Declaration of Human Rights, *supra* note 58, at introduction (noting that the five members representing the Soviet bloc, Saudi Arabia, and South Africa all abstained from voting).

64. Declaration of Human Rights, *supra* note 58, art. 1.

65. See Declaration of Human Rights, *supra* note 58, pmb. (reiterating the member states’ belief in the fundamental freedom and inherent equal rights of all human beings).

66. See Declaration of Human Rights, *supra* note 58, art. 3 (proclaiming that “everyone has the right to life, liberty and security of person”).

67. See Declaration of Human Rights, *supra* note 58, art. 13 (confirming that every person has the right to “freedom of movement and residence within the borders of each state,” and the right to leave and return to one’s own country).

68. See Declaration of Human Rights, *supra* note 58, art. 4 (declaring that slavery and slave trade are prohibited).

69. See Declaration of Human Rights, *supra* note 58, art. 7 (asserting that all persons are equal and are therefore entitled to equal protection without discrimination).

70. See Declaration of Human Rights, *supra* note 58, art. 9 (maintaining that no person will be forced into detention or exile, nor subject to arbitrary arrest).

71. See Declaration of Human Rights, *supra* note 58, art. 16 (detailing the rights of persons to marry with the consent of both parties, and the protection of the family by the state).

72. See Declaration of Human Rights, *supra* note 58, art. 18 (affirming freedom of thought and religion and the right to practice one’s religion in any manner deemed fit).

73. See Declaration of Human Rights, *supra* note 58, art. 17 (detailing the right to own property and not to be arbitrarily deprived of such property).

74. See Declaration of Human Rights, *supra* note 58, art. 23 (declaring that consistent with the right to work, persons are entitled to equal and adequate pay for their services).

75. See Declaration of Human Rights, *supra* note 58, art. 26 (confirming the principle that everyone is entitled to a free education at the elementary level).

76. In 1948, Eleanor Roosevelt, as U.S. Representative to the United Nations General Assembly, stated that the Declaration was only meant as a declaration of basic human rights principles and was not to be construed as a statement of legal obligation. See MARJORIE MILLACE

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now seen by some legal scholars and judges as binding under international law.<sup>77</sup>

These provisions led to the promulgation of two multilateral treaties, the International Covenant on Civil and Political Rights<sup>78</sup> and the International Covenant on Economic, Social, and Cultural Rights<sup>79</sup> which, together with the Universal Declaration of Human Rights, create an international bill of rights.<sup>80</sup>

In 1966, as a corollary to the Declaration,<sup>81</sup> the United Nations General Assembly drafted the International Covenants. These Covenants were important because they were drafted as a multilateral treaty, thereby obligating the signatory states to adopt mechanisms of enforcement.<sup>82</sup> The Covenants included an obligation by states to adopt legislation to enforce the provisions of the Covenants;<sup>83</sup> to provide effective remedies for violations of the provisions;<sup>84</sup> and to ensure enforcement of those remedies when granted.<sup>85</sup> Since both International Covenants share many of the same substantive

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WHITEMAN, DIGEST OF INTERNATIONAL LAW 243 (1965) (explaining the understanding of the signatories that the Declaration of Human Rights was to be viewed as a goal rather than a statement of law).

77. See Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 3, at 55 (1970) (Ammoun concurrence). His opinion reads in part: “[a]lthough the affirmations [are not possessed of the capacity of an immediately binding] international convention . . . they can bind states on the basis of custom . . . because they have acquired the force of custom through a general practice [of states] accepted [by them] as law . . .” *Id.* See also RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW § 701 (1987) (declaring that the parties to the United Nations Charter are legally obligated by the Declaration).

78. International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 1, U.N. Doc. A/6546 (1966), *reprinted in* 999 U.N.T.S. 171 [hereinafter Covenant on Civil and Political Rights].

79. International Covenant on Economic, Social and Cultural Rights, adopted Dec. 21, 1966, 993 U.N.T.S. 3 [hereinafter Covenant on Social and Cultural Rights].

80. See ASKIN, *supra* note 13, at 231 (declaring that the Covenants and the Declaration of Human Rights create an International Bill of Rights).

81. See Covenant on Civil and Political Rights, *supra* note 78, pmb. (proclaiming its congruence with the Universal Declaration of Human Rights); Covenant on Social and Cultural Rights, *supra* note 79, pmb. (stating that the Covenant is in accord with the Universal Declaration of Human Rights).

82. See Covenant on Civil and Political Rights, *supra* note 78, art. 2, paras. 1-3 (detailing the mechanisms signatory states undertake to adopt to ensure the rights enumerated in the Covenant); see also SLOMANSON, *supra* note 19, at 392 (listing the obligations signatory states have in adopting legislation to enforce the provisions of the Covenants).

83. See Covenant on Civil and Political Rights, *supra* note 78, art. 2, para. 2 (declaring that member states undertake, within their own constitutional processes, to adopt domestic legislation giving effect to the Convention).

84. See Covenant on Civil and Political Rights, *supra* note 78, art. 2, para. 3(1) (maintaining that such remedies shall be determined by “competent judicial, administrative or legislative authorities . . .”).

85. See Covenant on Civil and Political Rights, *supra* note 78, art. 2, para. 3(2) (ensuring that the authorities within each state will enforce the remedies granted).

principles outlined in the Declaration, the principles outlined in the Declaration now have the force of law with regards to those states ratifying the Covenants.<sup>86</sup>

The Covenant on Civil and Political Rights provides for the creation of a Human Rights Committee, whose purpose is to monitor compliance with human rights laws.<sup>87</sup> The Committee is authorized to receive complaints detailing human rights violations from both state parties and, under the Optional Protocol, from individuals.<sup>88</sup>

#### *D. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

##### *1. Historical Aspects of the Torture Convention*

The Torture Convention<sup>89</sup> represents the desire of the international community to further incorporate human rights into international law by adopting an instrument designed to prevent specific types of activities used against civilian populations.<sup>90</sup> Utilizing the principles announced in the U.N. Charter and the Declaration,<sup>91</sup>

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86. See David Wippman, *Hearing Voices Within the State: Internal Conflicts and the Claims of Ethno-National Groups*, 27 N.Y.U. J. INT'L L. & POL. 585, 587 (1995) (stating that individual rights are recognized in international law).

87. See Scott Splittgerber, *The Need for Greater Regional Protection for the Human Rights of Women: The Cases of Rape in Bosnia and Guatemala*, 15 WIS. INT'L L.J. 185, 189 (1996) (outlining the various provisions of the Covenant on Civil and Political Rights, which provide for a human rights monitoring body).

88. See Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 302 (entered into force Mar. 23, 1976) (authorizing the Commission to receive complaints from individuals); see also Splittgerber, *supra* note 87, at 189 (outlining who can bring complaints regarding human rights violations).

89. Torture, for the purposes of the Torture Convention is defined as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining . . . a confession, punishing him for an act he . . . has committed or is suspected of having committed, or intimidating or coercing him . . . or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent . . . of a public official or other person acting in an official capacity.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR, Supp. No. 51, U.N. Doc. A/RES/39/708, art. 1 (1984) [hereinafter Torture Convention].

90. See Torture Convention, *supra* note 89, pmbl. The desires of the United Nations General Assembly are expressed in part in the preamble which states that there is a need "to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world . . ." *Id.*

91. See Torture Convention, *supra* note 89, pmbl. (declaring its intentions to expound the principles outlined in the United Nations Charter and the Universal Declaration of Human Rights). The authors took particular notice of Article 55 in the United Nations Charter, which provides for the promotion of respect for human rights and fundamental freedoms, and the Declaration's provisions in Article 5 relating to torture and cruel treatment or punishment. See U.N. Charter art. 55 (outlining the United Nations' belief in the promotion of human rights

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the parties to this Convention created a binding obligation on states to adopt the necessary measures to prevent torturous conduct by individuals towards its population.<sup>92</sup>

## 2. *Important Provisions of the Torture Convention*

The Torture Convention enumerates several provisions that protect the rights of individuals residing in the jurisdiction of parties to the Convention.<sup>93</sup> One of the obligations imposed on signatory states is the provision that torture is not to be used under any circumstances and includes the penalties to be assessed for the violation thereof.<sup>94</sup> Article 2, paragraph 3 provides that: “[n]o exceptional circumstances whatsoever, whether in a state of war or threat o[f] war, internal political instability or any other public emergency, may be invoked as a justification of torture.”<sup>95</sup>

The Torture Convention also provides for redress and compensation for an individual subjected to torture.<sup>96</sup> It also makes torture an extraditable offense.<sup>97</sup> Furthermore, the Convention establishes a Committee against Torture,<sup>98</sup> which reviews the reports submitted by member states to evaluate measures taken towards compliance with the Torture Convention.<sup>99</sup> If there is a finding of torture within a particular state party, the Committee invites the state to cooperate in any investigations,<sup>100</sup> and a report is then submitted to

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and fundamental freedoms); *see also* Declaration of Human Rights, *supra* note 58, art. 5 (providing that no person may be subjected to torture).

92. *See* Torture Convention, *supra* note 89, art. 2, para. 1 (obligating states to effect proper legislative, administrative, judicial, and other measures to prevent acts of torture).

93. *See* Torture Convention, *supra* note 89, art. 2, para. 1 (providing that member states undertake to prevent torture in any territory under their jurisdiction).

94. *See* Torture Convention, *supra* note 89, art. 4, para. 1 (ensuring that torture is punishable under a state’s criminal law).

95. Torture Convention, *supra* note 89, art. 2, para. 3. Article 2, paragraph 4 further provides that a superior order may not be invoked as a defense or justification to torture an individual. *Id.* art. 2, para. 4.

96. *See* Torture Convention, *supra* note 89, art. 14, para. 1 (declaring that every member state shall ensure that its legal system is capable of sufficiently redressing acts of torture committed against an individual and providing adequate compensation).

97. *See* Torture Convention, *supra* note 89, art. 8, para. 1 (providing that the perpetrator of acts of torture is subject to extradition).

98. *See* Torture Convention, *supra* note 89, art. 17, paras. 1-7 (outlining the formulation of the Committee and how its members are elected).

99. *See* Torture Convention, *supra* note 89, art. 19, paras. 1-4 (describing the process through which reports are submitted to the Committee).

100. *See* Torture Convention, *supra* note 89, art. 20, paras. 1-5 (detailing how the Committee deals with reports of torture within a member state). Once reports have been gathered detailing torturous practices in a member state, the Committee shall invite that state to cooperate in the investigation. *Id.* para. 1. The Committee may then designate a member to make a confidential inquiry, including a visit to the territory in question. *Id.* art. 20, paras. 2-3.

the Secretary General of the United Nations.<sup>101</sup>

World War II was the catalyst that brought the governments of the world together in the hopes of creating a more peaceful coexistence through the creation of human rights laws. These documents represent a rise in global awareness of the importance of human rights. They also represent the collective effort of the international community in formulating an international system of rights, recognized as the guiding principles for states in dealing with their populations. Despite the success in creating these new human rights laws, they have only served to highlight the deficiencies in the system regarding enforcement of the human rights treaties and laws under the international legal system. The rise of intrastate ethnic conflicts has only increased the cognizance of states as to the failures and consequences of non-enforcement.

### III. THE FAILURE OF INTERNATIONAL HUMAN RIGHTS LAWS

#### A. *The Case of Yugoslavia*

The war in the former Yugoslavia began as a result of the desires of the republics to secede.<sup>102</sup> This desire manifested itself because of Serbia's continued policy of repression of the Albanians in Kosovo—a policy condemned by the other republics and the international community as a whole,<sup>103</sup> and the Serbs' attempted takeover of the League of Communists party ("LCY").<sup>104</sup> The controversy over Kosovo and the LCY precipitated the walkout of the Slovenian, Croatian, Bosnian, and Macedonian delegations from the Yugoslav Congress, and their subsequent elections and referendums for

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After the proceedings have been completed, the Committee may decide to include an account of the results in its annual report. *Id.* art. 20, para. 5.

101. See Torture Convention, *supra* note 89, art. 21 (outlining the jurisdictional aspects of the Committee with regard to member states).

102. See LAURA SILBER & ALLAN LITTLE, YUGOSLAVIA: DEATH OF A NATION 147 (1996) (discussing the resentment of the various republics with Milosevic's regime and their desire for independence).

103. See BOGDAN DENITCH, ETHNIC NATIONALISM: THE TRAGIC DEATH OF YUGOSLAVIA 22 (1994) (stating that the "rest of the federation became unwilling to use its resources and prestige in pursuing a policy that was increasingly condemned internationally"); see also Warren Zimmerman, *The Last Ambassador*, FOREIGN AFFAIRS, Mar.-Apr. 1995, at 2 (commenting on Serbia's treatment of ethnic Albanians in Kosovo). Zimmerman goes on further to state that "human rights had become a major element of U.S. Policy, and Yugoslavia's record on that issue was not good—particularly in the province of Kosovo, where an authoritarian Serbian regime was systematically depriving the Albanian majority of its basic civil liberties." *Id.*

104. See DENITCH, *supra* note 103, at 56-58 (detailing the importance of control over the party and the Serb's attempted takeover of it).

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independence.<sup>105</sup> In 1990, both Croatia and Slovenia held their first free elections, in which the parties played to the growing nationalist sentiments of their populations. Croatia in particular took nationalism to new heights by employing emblems used by the Nazi aligned Ustaše during World War II,<sup>106</sup> inciting fear and anger in the Serb minority living in Croatia. The parties campaigning on secessionist platforms won handily, and the dissolution of Yugoslavia seemed imminent.

During this time, the international community began to take measures designed to prevent the breakup of Yugoslavia. In 1991, the European Union<sup>107</sup> Council of Ministers convened a conference in an attempt to keep Yugoslavia united.<sup>108</sup> When this failed, the European Union used economic deterrence in the concurrent aims of keeping the republics from claiming independence and preventing the Serbian government from using military force to enforce unity.<sup>109</sup> The European Union also threatened denial of EC membership if the Yugoslav state dissolved.<sup>110</sup> Ultimately, the actions taken by the international community failed to keep Yugoslavia unified, and with the recognition of Croatia, Slovenia and Bosnia-Herzegovina as independent republics, the squirmishes which that took place in late 1991 through early 1992 turned into an all out war.<sup>111</sup>

In an attempt to protect its minority populations in the various

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105. See DENITCH, *supra* note 103, at 22, 42-45 (outlining the progression from the original walkout from Congress by the various republics to the subsequent elections calling for secession).

106. The Ustaše were Croats who aligned themselves with the Nazis during World War II. Some of the worst atrocities of World War II took place at the notorious concentration camp Jasenovac, located in Croatia, where it is estimated that between one hundred thousand to one million Serbs, Jews and Gypsies were murdered. See DENITCH, *supra* note 103, at 20-32 (remarking on the Ustaše's role in the atrocities of World War II).

107. At the start of the Yugoslav crisis, the European Union was known as the European Community. For the sake of continuity, this Comment will refer to the unified European states as the European Union.

108. See Paul Szasz, *Theme Panel II: The Rise of Nationalism and the Breakup of States—The Fragmentation of Yugoslavia*, 88 AM. SOC'Y INT'L L. PROC. 33, 34 (1994) (summarizing the European Union's efforts to keep Yugoslavia unified by convening a conference for that purpose). The Conference formulated a plan whereby some republics would function independently of Yugoslavia and others would remain "more closely associated." *Id.* This plan would keep Yugoslavia united, but in a somewhat different fashion. *Id.*

109. See SAADIA TOUVAL, *MANAGING GLOBAL CHAOS: LESSONS OF PREVENTIVE DIPLOMACY IN YUGOSLAVIA* 404, 404-05 (Chester Crocker et al. eds., 1996) (discussing the tools utilized by the European Union to keep Yugoslavia together).

110. See MICHAEL S. LUND, *PREVENTING VIOLENT CONFLICTS: A STRATEGY FOR PREVENTIVE DIPLOMACY* 61 (1997) (examining the various ways the European Union sought to prevent dissolutionment).

111. See SILBER & LITTLE, *supra* note 102, at 169 (noting the beginning of the Yugoslav war).

republics and to retain its hold over various portions of land, the Serbian government began its assault,<sup>112</sup> first in Slovenia and Croatia and then in Bosnia. The war that ensued in Bosnia “generated grave breaches of the main precepts of humanitarian law,”<sup>113</sup> and the international community sought to prevent further breaches of its international human rights laws.<sup>114</sup>

### *1. Violations of Human Rights Under the Rubric of Ethnic Cleansing*

During the war, both the Croatian and Serbian armies utilized torture, rape, ethnic cleansing, and genocide as a means of war,<sup>115</sup> in direct contravention of their obligations under the various human rights laws and treaties.<sup>116</sup> These human rights violations were observed by various organizations, including the International Committee of the Red Cross, Amnesty International, and the United Nations Human Rights Commission.<sup>117</sup> It was through these organizations that the world would soon learn of the horrors of the Yugoslav war.

#### *a. Torture*

The parties to the Bosnian conflict instituted a plan of systematic torture of civilian populations in Yugoslavia, in direct contravention of their obligations under the Torture Convention.<sup>118</sup> Detention centers were set up as a means of degrading and punishing persons of certain ethnic heritage.<sup>119</sup> This was accomplished through a variety of means, including beating prisoners with iron bars, rifles, hammers, and wooden clubs, and forcing prisoners to drink motor oil and mud.<sup>120</sup> One of the most horrific acts of torture occurred in the

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112. See Nagan, *supra* note 17, at 153 (noting that the Yugoslav war began with the attack of Slovenia and Croatia in 1991).

113. Nagan, *supra* note 17, at 154.

114. See discussion *infra* Part IV.C and accompanying notes (describing the actions of the United Nations, the European Union, and the United States in trying to prevent further atrocities).

115. See Catherine A. MacKinnon, *Crimes of War, Crimes of Peace*, 4 U.C.L.A. WOMEN'S L.J. 59, 86 (1993) (describing the use of torture, death camps, genocide, and rape as strategies of war).

116. See discussion *supra* Part II and accompanying notes (describing the various obligations of United Nations member states under both the U.N. Charter and other international human rights documents).

117. See NEIER, *supra* note 2, at 124 (noting the monitoring operations led by numerous human rights organizations in Yugoslavia).

118. See discussion *supra* Part II.D and accompanying notes (describing the definition of torture and the provisions of the Torture Convention).

119. See NEIER, *supra* note 2, at 134 (describing the proliferation of detention centers reminiscent of the concentration camps used by the Nazis in World War II).

120. See MICHAEL P. SCHARF, *BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL*

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Omarska death camp, when the Serb jailers forced one of the prisoners to bite off the testicles of another.<sup>121</sup> Croatian forces also established a detention center in the city of Pakracka Poljana, near Zagreb, where Serbian civilians were regularly tortured, usually by being doused with gasoline and burned alive.<sup>122</sup> The constant use of torture and detention gravely breached both the Torture Convention<sup>123</sup> and the Fourth Geneva Convention.<sup>124</sup> The violators are therefore subject to prosecution as provided for in those instruments. However, these remedies were not pursued by the international community.<sup>125</sup>

*b. Rape*

The Geneva Convention and other human rights documents recognize rape as a crime against humanity.<sup>126</sup> The act of rape as seen during the Yugoslav war was also a form of genocide, orchestrated by the combatants to not only humiliate and degrade, but to impregnate in order to destroy ethnicity.<sup>127</sup> During the war, international human rights organizations learned that rape was occurring on a regular basis by factions on all sides as a weapon of war.<sup>128</sup> Serb armies in particular regularly used rape as a strategy of war, both as an attempt

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WAR CRIMES TRIAL SINCE NUREMBERG XI (1997) [hereinafter BALKAN JUSTICE] (detailing some of the means used to torture inmates in the Omarska death camp).

121. See *id.* (summarizing some of the torture tactics of Serbian jailers towards their Muslim prisoners).

122. See NEIER, *supra* note 2, at 148 (explaining the use of torture tactics by Croatian forces in various detention centers).

123. See discussion *supra* Part II.D.1-2 and accompanying notes (discussing the provisions of the Torture Convention).

124. See Fourth Geneva Convention, *supra* note 16, art. 147 (stating that the unlawful confinement of a protected person is a grave breach of the Convention). The Convention defines a protected person as a "noncombatant who has fallen into the hands of a party to the conflict or an occupying power and who has not been detained as a spy or saboteur or on suspicion of engaging in activities hostile to the occupying power." NEIER, *supra* note 2, at 138.

125. See discussion *infra* Part IV (describing the reluctance of the international community to use the provisions of its own human rights laws as a means for bringing justice to the victims).

126. See Fourth Geneva Convention, *supra* note 16, art. 27 ("[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.").

127. See ASKIN, *supra* note 13, at 274 (detailing how rape in order to impregnate women is used as genocide). Because these acts are designed with the intent to destroy certain ethnic, racial or religious groups, they fall under the definition of genocide as codified in the Genocide Convention. *Id.* at 275; see also Nagan, *supra* note 17, at 164 (commenting on how rape, when systematically employed as a means of war, can be seen as genocide).

128. See ASKIN, *supra* note 13, at 282 (commenting on the rape camps run by Bosnian and Croatian forces for the purpose of raping Serbian women); see generally Stephen Schwartz, *Rape as a Weapon of War in the Former Yugoslavia*, 5 HASTINGS WOMEN'S L.J. 69, 69 (1994) (detailing how the warring parties used rape in their arsenal of war tactics).

to ethnically cleanse certain areas, and to assert Serb domination.<sup>129</sup> Bosnian Muslim women were often taken to warehouses and raped repeatedly.<sup>130</sup>

*c. Genocide*

Although genocide was committed by all sides, the Serbs pervasively used genocide as a tool of war. Serbs consistently killed, imprisoned or forcibly transferred over ninety percent of Muslims living in Bosnia.<sup>131</sup> Those Bosnian Muslims not killed or forcibly transferred were taken to Serb run death camps and were starved, summarily executed, or beaten to death.<sup>132</sup> On certain occasions as many as 7,000 Muslims were executed within a five-day period.<sup>133</sup> The Genocide Convention specifically prohibits the use of genocide as a tool of war, and the perpetrators of genocidal aggressions are subject to the provisions of that Convention.<sup>134</sup>

The international community was unable to stop the proliferation of atrocities in Yugoslavia despite the numerous international human rights treaties specifically designed to prevent such horrors. Ironically, after World War II, the international community promised itself and its population that the devastation of that war would never again pervade any sector of the world.<sup>135</sup> The violence that took place in Yugoslavia undermined that promise as thousands were killed in the name of ethnic homogeneity. The international community is replete with an arsenal of laws designed to protect the very people killed in the Yugoslav conflict. In order to understand the

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129. See Amy E. Ray, *The Shame of It: Gender-Based Terrorism in the Former Yugoslavia and the Failure of International Human Rights Law to Comprehend the Injuries*, 46 AM. U. L. REV. 793, 801-02 (1997) (detailing the Serb's use of rape as a strategy of war). The Serb army regularly raped women in public in order to force Croatian and Bosnian populations to flee, effectively cleansing those areas. *Id.*

130. See MISHA GLENNY, *THE FALL OF YUGOSLAVIA: THE THIRD BALKAN WAR* 208 (1992) (describing the pervasive use of rape utilized by the Serbs for the purposes of territorial gain and psychological abuse).

131. See BALKAN JUSTICE, *supra* note 120, at 29 (detailing the ethnic cleansing of the Muslim populations in the Serb run sections of Bosnia).

132. See NEIER, *supra* note 2, at 136 (describing the execution techniques utilized by Serb soldiers).

133. See *Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: Srebrenica Report*, U.N. GAOR 5th Comm., 72d mtg., U.N. Doc. A/RES/53/35 (1998) (detailing the massacres of thousands of unarmed boys and men by Serb forces).

134. See discussion *supra* Part II.B.1-2 and accompanying notes (describing the various human rights documents that prohibit specific war crimes and the punishment for violations of their provisions).

135. See Martha Minow, *The Work of Remembering: After Genocide and Mass Atrocity*, 23 *FORDHAM INT'L L.J.* 429, 429 (1999) (stating that after World War II, the international community swore that such a tragedy would never occur again).

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catastrophic failure of the international community to prevent these ethnic massacres, it is necessary to delve into the contributing factors behind the failures.

IV. SOVEREIGNTY, NON-INTERVENTION, RESERVATIONS AND  
GEOPOLITICAL CIRCUMSTANCES: THE FAILURE OF THE INTERNATIONAL  
COMMUNITY TO ENFORCE HUMAN RIGHTS LAWS

The tragedy in Yugoslavia brought the failures of international human rights laws into the public realm. Although efforts were made by various actors and organizations to bring about a peaceful resolution to the conflict, they were largely unsuccessful as the atrocities taking place reached a crescendo.<sup>136</sup> With the proliferation of human rights laws, the devastation of ethnic cleansing seemed an impossibility in the world today. Despite the international community's goal of alleviating human suffering through the implementation of human rights laws,<sup>137</sup> these laws are often seen as just that, goals, rather than enforceable norms of our international society.<sup>138</sup> The problems inherent in our system of international law are most evident in the context of the Yugoslav war, where the rules regarding the treatment of human beings, as codified by the international community as a whole, were largely disregarded.<sup>139</sup> Although enforcement mechanisms were implemented for such violations, the international community failed to utilize them in their

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136. See JAMES GOW, *MILITARY INTERVENTION IN EUROPEAN CONFLICTS—NERVOUS BUNNIES: THE INTERNATIONAL COMMUNITY AND THE YUGOSLAV WAR OF DISSOLUTION, THE POLITICS OF MILITARY INTERVENTION IN A TIME OF CHANGE* 14 (Lawrence Freedman ed., Blackwell Publishers 1994) (commenting on the fact that although efforts were taken by the international community to stop the atrocities, these ultimately failed).

137. See John Norton Moore, *Enhancing Compliance with International Law: A Neglected Remedy*, 39 VA. J. INT'L L. 881, 882 (1999) ("Subsequent to the Holocaust, with increasing urgency and impetus, international law has also developed an impressive body of rules and principles to control the behavior of governments toward their own peoples.").

138. See Harold Hongju Koh, *How is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1401 (1999) (detailing the explanations regarding how nations perceive international human rights laws and why they obey its dictates). Koh details five theories to explain why certain nations obey international law, including power, self interest, rule legitimacy, communitarian, and legal process explanations. *Id.* The first explanation is that nations do not obey international law but are forced to comply by other nations. *Id.* The second explanation is that nations obey because they are motivated by their own self-interest to comply with international law because of their dealings with other states. *Id.* Nations may also comply because the rules announced in international law are legitimate ones, consistent with a state's own notion of "distributive justice." *Id.* at 1403. The communitarian theory draws its source from the international community itself, where nations are drawn together by their ties to various organizations. *Id.* at 1405. The last theory regarding international legal process, which Koh adopts, is based upon both the horizontal relationships between governments and the vertical relationships between governments and their domestic citizenry. *Id.* at 1406.

139. See discussion *supra* Part III (detailing the various abuses and violations of international human rights laws evidenced by the parties to the Yugoslav war).

attempts to end the war. Despite the numerous reasons for this failure, this Comment will focus on three key reasons in an attempt to discern the motivations behind the actions taken by the international community. These include (1) the principle of sovereignty, (2) non-intervention in international law and (3) geopolitical timing.

A. *Sovereignty as a Bar to Enforcement of International Human Rights Laws*

1. *The Historical Prominence of the Principle of Sovereignty*

The principle of sovereignty<sup>140</sup> is synonymous with international law.<sup>141</sup> Historically international law was designed to preserve the autonomy of states within the international arena.<sup>142</sup> Sovereignty thus served the purpose of “identif[ying] the nation-state as the legitimate international actor entitled to the protection of international law,”<sup>143</sup> and traditionally protected the rights of states in the conduct of their own affairs.<sup>144</sup> Hence, the principle of sovereignty was often viewed by states as one of their most fundamental, if not absolute, rights.<sup>145</sup> This view of sovereignty began to erode as humanitarian concerns took center stage<sup>146</sup> and was dealt a devastating blow in the aftermath of

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140. For the purposes of this Comment, under the principle of sovereignty, “the exercise of jurisdiction by one state over matters and parties within the territorial limits of another independent state,” is forbidden. Patricia McKeon, *An International Criminal Court: Balancing the Principle of Sovereignty Against the Demands for International Justice*, 12 ST. JOHN’S J. LEGAL COMMENT. 535, 535-36 (1997).

141. See Johan D. van der Vyver, *Sovereignty and Human Rights in Constitutional and International Law*, 5 EMORY INT’L L. REV. 321, 327 (1991) (describing the evolution of the concept of sovereignty from the 16th century through the present day). van der Vyver describes two theories commonly utilized in discussing sovereignty. *Id.* The first deals with the absolutist concept of sovereignty where the sovereign was identified as the supreme power and the populace was seen as being under the sovereign’s complete control. *Id.* at 327-31. The second theory is that of popular sovereignty where the citizenry are largely in control of the governance of their state. *Id.* at 332. This theory is derived from the doctrine of natural rights as enunciated by John Locke. *Id.* See also Bodley, *supra* note 56, at 420-22 (observing that the concept of absolute sovereignty was merely a fiction, especially since the advent of the World Wars).

142. See David J. Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention*, 23 U. TOL. L. REV. 253, 259-60 (1992) (providing the historical background of the concept of sovereignty in the formation of international law).

143. *Id.* at 260.

144. Ravi Mahalingam, *The Compatibility of the Principle of Nonintervention With the Right of Humanitarian Intervention*, 1 U.C.L.A. J. INT’L L. & FOREIGN AFF. 221, 222 (1996) (describing the traditional positivist theory of international law that states are the “primary subjects of international law”). This theory suggests that because states represent the interests of their populations, human beings do not have a voice in international law. *Id.*

145. See Claudio Grossman & Daniel D. Bradlow, *Are We Being Propelled Towards a People-Centered Transnational Legal Order?*, 9 AM. U. J. INT’L L. & POL’Y 1, 1 (1993) (discussing how the concept of sovereignty pervades international law); see also McKeon, *supra* note 140, at 536 (explaining the pervasive feelings that states have towards their perceived right to sovereignty).

146. See discussion *supra* Part II (detailing the various documents which purported to create

## World War II.

2. *The Changing Face of Sovereignty after World War II*

The horrific occurrences of World War II brought about the institution of a war crimes tribunal for the prosecution of those responsible for the atrocities.<sup>147</sup> The Nuremberg Tribunal is credited with piercing the notion of sovereignty by allowing for the prosecution of individuals responsible for criminal acts.<sup>148</sup> “Nuremberg made the sovereign state and its officials subject to the international rule of law.”<sup>149</sup> This was important in two respects. First, the Nuremberg decision cast doubt upon the notion that the purpose of international law was to protect the interests of nation-states.<sup>150</sup> By rejecting the claim of sovereignty as a defense for those charged with war crimes, the Nuremberg Tribunal paved the way for the punishment of those responsible for atrocities including not only individuals, but also the sovereign state itself.<sup>151</sup> The effect of this decision was to redistribute power away from the sovereign state and to the international community for the purpose of punishing criminality.<sup>152</sup>

The Nuremberg trials became the catalyst that changed the face of international law.<sup>153</sup> Nuremberg’s denial of sovereignty as

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protections for civilian populations during times of war).

147. See Rocco P. Cervoni, *Beating Plowshares into Swords—Reconciling the Sovereign Right to Self-Determination with Individual Human Rights Through An International Criminal Court: The Lessons of the Former Yugoslavia and Rwanda as a Frontpiece*, 12 ST. JOHN’S J. LEGAL COMMENT. 477, 499 (1997) (examining the circumstances surrounding the establishment of the Nuremberg International Military Tribunal); see also Bodley, *supra* note 56, at 424 (summarizing the agreement between the Allied powers to establish a Tribunal for the purpose of trying war criminals). Because of the devastation wrought by both the Nazi and Japanese governments, the Allies sought a means by which war criminals could be brought to justice. *Id.* The Allies first established a War Crimes Commission to investigate war crimes and their perpetrators. *Id.* They then issued the Moscow Declaration stating that both political and military leaders would be tried for war crimes and crimes against humanity. *Id.* The Allies then determined that an international tribunal was the most effective means by which to accomplish their objectives, and in 1945, the Nuremberg International Military Tribunal was formally instituted. *Id.*

148. See Henry T. King, *Nuremberg and Sovereignty*, 28 CASE W. RES. J. INT’L L. 135, 136-37 (1996) (discussing the importance of the Nuremberg Tribunal in penetrating the curtain of sovereignty); see also McKeon, *supra* note 140, at 537 (describing the Tribunal’s decision “reject[ing] the argument that state sovereignty could be used as a defense for unconscionable acts”).

149. Nagan, *supra* note 17, at 150.

150. See Nagan, *supra* note 17, at 150 (discussing how Nuremberg changed the conception that international law was for protection of the sovereignty of states).

151. See Nagan, *supra* note 17, at 150 (summarizing the effects of the Nuremberg Tribunal’s decision to reject a sovereignty defense).

152. See Nagan, *supra* note 17, at 152 (analyzing the reallocation of power to the international community).

153. See Bodley, *supra* note 56, at 424 (detailing some of the changes which took place in

authorization for perpetrating heinous acts against one's own population, displaced the deep rooted notions regarding the status of states and their rights and obligations under international law.<sup>154</sup> The prevalence of humanitarian concerns after World War II, manifested in the Nuremberg Tribunal's decision, replaced the normative definition of sovereignty with a more humanistic view of the obligations of international law. However innovative and unprecedented the decision was in terms of the global consequence as to the future of sovereignty, it has remained merely a judicial mandate as to the treatment of sovereignty within the jurisdiction of a court system. In recent years, this has been increasingly evident in the context of intervention, where the absolute sovereignty doctrine has continued to play a large role in the conduct of the international community.

The salient blow to sovereignty discerned at Nuremberg has failed to manifest itself in states' dealings with each other, and only undermined sovereignty within the confines of judicial decisions.<sup>155</sup> The Tribunal's rejection of the ancient view of sovereignty has ultimately failed to bring about a consensus as to the future viability of the concept, despite protestations indicating otherwise.<sup>156</sup> The archaic notion of sovereignty as the basis of the international legal order is perceptible throughout the international community<sup>157</sup> and

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international law after the Nuremberg trials). Some of the changes included the affirmation of the principles of the Nuremberg Charter into international law, the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide, and the creation of an international body for the purpose of maintaining global peace and security. *Id.* at 424-26.

154. See William Sanders, "Multilateral Diplomacy," XXI Bulletin, Dep't of State, No. 526, Aug. 8, 1949, at 163, 199, *reprinted in* Digest of International Law § 15, at 261 (1963) (stating that sovereignty will not be a bar to the involvement of the international community when the lives of citizens are at stake).

155. See Nagan, *supra* note 17, at 152 (describing the application of the Nuremberg decision outside of the judicial realm).

156. See The Nuremberg Decision, 6 F.R.D. 69, 110 (1946) (setting forth the Tribunal's holding regarding sovereignty). The Tribunal stated in part that "[h]e who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing such action moves outside its competence under International Law." *Id.*; see also Robert H. Jackson, *Final Report to the President of the United States on the Nuremberg Trials* (Oct. 7, 1946), *cited in* ROBERT H. JACKSON, THE NUREMBERG CASE XVI-XV (1947) (declaring the components of crimes deemed to be international). Justice Jackson stated that:

An agreement between the major powers for the first time made explicit and unambiguous what was theretofore, as the Tribunal has declared, implicit in International Law namely, that to prepare, incite, or wage a war of aggression . . . is a crime against international society, and that to persecute, oppress, or do violence to individuals or minorities on political, racial or religious grounds in connection with such a war, or to exterminate, enslave, or deport civilian populations, is an international crime . . . .

*Id.* as quoted in Nagan, *supra* note 17, at 152.

157. See Bodley, *supra* note 56, at 426 (stating that the United Nations was founded on the

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in the documents which provide the basis of international law and human rights.<sup>158</sup> Thus, the recognition of sovereignty seems to exclude any type of intervention by other member states.<sup>159</sup>

*B. The Non-Intervention Principle: The Permissibility of Intervention In a Sovereignty Minded International Society*

Intervention is a necessary corollary to the principle of sovereignty and is similarly enshrined in international law.<sup>160</sup> The relationship between the two concepts is extremely controversial given the often conflicting mandates they present in the international arena. The United Nations Charter itself provides the best example of the glaring inconsistencies which pervade the international community and prevent the effective enforcement of human rights laws through intervention. The purported goal of the United Nations to encourage “respect for human rights and fundamental freedoms”<sup>161</sup> conflicts with the actual sovereignty constraints placed on it by member states<sup>162</sup> in the name of maintaining international peace and protecting territorial integrity.<sup>163</sup> The protection of the principle of sovereignty places the requirement that not only must member states respect each other as sovereign equals,<sup>164</sup> they must also refrain “in

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principle of sovereignty); see also U.N. CHARTER art. 2, para. 1 (confirming that the “[o]rganization is based on the principle of the sovereign equality of all its Members.”).

158. See U.N. Charter art. 2, para. 7 (providing that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.”).

159. See Josh Delbruck, *A Fresh Look at Humanitarian Intervention Under the Authority of the United Nations*, 67 IND. L.J. 887, 889 (1992) (examining the role of sovereignty in the permissibility of intervention by outside forces). Prohibition against intervention takes two forms. *Id.* at 889-90. The first argues for a broad interpretation of sovereignty because of its legal basis in international law. *Id.* Therefore, non-intervention, as it is analogous to the independence of sovereign states, should be a rigid principle under international law. *Id.* at 890. The second argues that the principles of sovereignty and non-intervention should be restricted given the nature of the world today. *Id.* Because of growing state responsibility towards its citizens, as recognized in the United Nations’ Charter and other international legal documents, sovereignty and non-intervention must give way in the name of international peace and security. *Id.*

160. See *id.* at 889 (describing the relationship between sovereignty and intervention).

161. U.N. CHARTER art. 1, para. 3.

162. See Elizabeth E. Ruddick, *The Continuing Constraint of Sovereignty: International Law, International Protection, and the Internally Displaced*, 77 B.U. L. REV. 429 (1997) (describing the inconsistencies between the guarantees of sovereignty and the commitment to human rights).

163. See Philip Chase, *Conflict in the Crimea: An Examination of Ethnic Conflict Under the Contemporary Model of Sovereignty*, 34 COLUM. J. TRANSNAT’L L. 219, 239 (commenting on the importance of protecting sovereignty for the purpose of international peace and security); see generally U.N. CHARTER art. 24, para. 1 (conferring on the Security Council the responsibility for maintaining international peace and security).

164. See U.N. CHARTER art. 2, para. 1 (“The Organization is based on the principle of the sovereign equality of all its Members.”).

their international relations from the threat or use of force against the territorial integrity or political independence of any state . . . .”<sup>165</sup> Therefore, the importance of sovereignty is reinforced by the United Nations and has had a dampening effect on intervention.<sup>166</sup> These constraints have the effect of limiting international organizations and member states in their attempts to enforce international human rights laws through both forcible and non-forcible intervention.<sup>167</sup> The consequences of this non-intervention policy were most pronounced in the war in Yugoslavia.

*C. How Sovereignty and the Principle of Non-Intervention Contributed to the Devastation in the Yugoslav War*

The brutality of the Yugoslav war has led some to question the international law dictates, which hindered any effective intervention by the international community to protect the rights of ethnic minorities. In retrospect, the “international community . . . reacted slowly, unwilling or unable to take action to end [the] violence that has essentially consumed some nations.”<sup>168</sup> To better understand the hesitance by the international community to become involved in such tragedies, which lead to its ineffectiveness in protecting human rights as a whole, it is necessary to ascertain how the sovereignty and non-intervention principles affected the decisions of the international players.

During the early stages of the crisis, the United Nations showed its reluctance to become involved in the affairs of the Yugoslav state

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165. *Id.* art. 2, para. 4.

166. In an attempt to further clarify the intervention principle and reinforce the notion of sovereignty, the United Nations adopted the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations. It states that “[n]o State or Group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State . . . .” Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR 6th Comm., 25th Sess., Supp. No. 28, U.N. Doc. A/8082 (1970). See Chase, *supra* note 163, at 240-41 (summarizing how the United Nations has dealt with intervention by any means, including coercive economic and political measures).

167. See Chase, *supra* note 163, at 239-40 (examining the legal limits on various types of intervention). Although the legal limitations on the use of force within a sovereign state are well accepted in international law, other types of non-forcible intervention such as political and economic measures are more controversial. *Id.* The lack of concrete international standards by which member states and international organizations can operate in the context of non-forcible intervention had led to inconsistencies in state responses to various conflicts. *Id.* See also TOMISLAV MITROVIC, NON-INTERVENTION IN THE INTERNAL AFFAIRS OF STATES: PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND COOPERATION 219 (M. Sahovic ed., 1972) (detailing two theories regarding both forcible and non-forcible intervention).

168. Barnes, *supra* note 1, at 118.

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because of the principle of non-intervention in internal affairs.<sup>169</sup> The human rights abuses in Yugoslavia, however, finally prompted action on the part of the Security Council in 1992. The horrors of the atrocities, such as the use of death camps, torture, and rape as tools of war, which are prohibited by international law, commanded that something be done. As such, in 1992, the Security Council drew attention to the human rights abuses by passing a series of Resolutions. The first, Security Council Resolution 713, imposed an arms embargo on the warring parties in an attempt to eliminate the tools of warfare.<sup>170</sup> Security Council Resolution 764<sup>171</sup> “drew particular attention to obligations under international humanitarian law, suggesting the possibility of individual responsibility for grave violations.”<sup>172</sup> The Security Council, concerned with the frequent attacks on humanitarian convoys by Serb forces, adopted Resolution 770.<sup>173</sup> This Resolution authorized governments to take “all necessary measures” to ensure that relief aid would be safely delivered to Bosnia. Security Council Resolution 771 obligated states to submit their own reports detailing violations of human rights laws.<sup>174</sup>

On October 16, 1992, the Security Council, worried about the alarming number of human rights violations and dismayed at its inability to effectuate a reduction in the perpetuation of violence, adopted Resolution 780.<sup>175</sup> This Resolution expressed “its ‘grave alarm’ at the continuing reports of widespread violations of international humanitarian law, including mass killings and the abhorrent practice of ethnic cleansing . . . .”<sup>176</sup> The Resolution authorized the establishment of a Commission of Experts to investigate violations of human rights and to submit those reports to

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169. See AGE EKES, *THE UNITED NATIONS AND CIVIL WARS: THE UNITED NATIONS' PREDICAMENT IN THE FORMER YUGOSLAVIA* 109 (Thomas G. Weiss ed., Lynne Rienner Publishers 1995) (analyzing how the non-intervention principle delayed the United Nations' response to the crisis).

170. See S.C. Res. 713, U.N. SCOR, 46th Sess., 3009th mtg., U.N. Doc. S/RES/713 (1991) [hereinafter S.C. Res. 713] (banning the sale of arms to the parties engaged in the conflict).

171. See S.C. Res. 764, U.N. SCOR, 47th Sess., 3093d mtg., U.N. Doc. S/RES/764 (1992) (mandating that the warring parties comply with international human rights laws).

172. Nagan, *supra* note 17, at 154.

173. See S.C. Res. 770, U.N. SCOR, 47th Sess., 3105th mtg., U.N. Doc. S/RES/771 (1992) (authorizing member states to use the necessary means to effectuate the deliverance of humanitarian aid).

174. See S.C. Res. 771, U.N. SCOR, 47th Sess., 3106th mtg., U.N. Doc. S/RES/771 (1992) (declaring that all parties to the conflict immediately cease their violations of human rights laws).

175. See S.C. Res. 780, U.N. SCOR, 47th Sess., 3119th mtg., U.N. Doc. S/RES/780 (1992) [hereinafter S.C. Res. 780] (establishing the Commission of Experts).

176. Bodley, *supra* note 56, at 431.

the Secretary-General.<sup>177</sup> The report that was submitted pursuant to Resolution 780 led the Security Council to conclude that ethnic cleansing had in fact taken place in Yugoslavia.<sup>178</sup> The policy of ethnic cleansing as carried out by the warring parties included “murder, torture, arbitrary arrest and detention, extra-judicial executions, rape and sexual assault, confinement of civilian population in ghetto areas, forcible removal, displacement and deportation of civilian population, deliberate military attacks or threats of attacks on civilians and civilian areas, and wanton destruction of property.”<sup>179</sup> More importantly, the Commission concluded that such crimes constituted war crimes, crimes against humanity, and genocide.<sup>180</sup>

These findings led to Resolution 808, recommending the establishment of an international tribunal for the “prosecution of persons responsible for violation[s] of international humanitarian law . . . .”<sup>181</sup> This recommendation came to fruition with the passage of Resolution 827 establishing an international tribunal to prosecute the perpetrators who violated international humanitarian laws.<sup>182</sup> The Statute of the International Tribunal gives it the jurisdiction to prosecute grave breaches of the Geneva Convention of 1949,<sup>183</sup>

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177. See S.C. Res. 780, *supra* note 175 (providing for the establishment of a Commission to assess information already acquired by the Security Council and to investigate violations of human rights laws).

178. See Bodley, *supra* note 56, at 432 (describing the Commission of Experts’ finding that grave breaches of human rights laws had occurred in Yugoslavia).

179. Letter Dated February 9, 1993 from the Secretary-General Addressed to the President of the Security Council, Annex I (Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)), U.N. Doc. S/25274, para. 55 (1993).

180. See VIRGINIA MORRIS & MICHAEL SCHARF, AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 28, 106 (1995) (commenting on the conclusions of the Commission of Experts regarding the ethnic cleansing policies in Yugoslavia); see also Bodley, *supra* note 56, at 433 (detailing the findings of the Commission of Experts and their subsequent conclusions regarding ethnic cleansing).

181. See S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., at 2, U.N. Doc. S/RES/808 (1993) [hereinafter S.C. Res. 808] (authorizing the formation of an international tribunal under its Chapter VII powers).

182. See S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827, art. 1 (1993) [hereinafter S.C. Res. 827] (adopting the Statute of the International Tribunal and outlining the jurisdictional aspects).

183. See *id.* art. 2 (allowing for the prosecution of persons who have committed grave breaches of the Geneva Conventions). Article 2 describes the acts against persons or property that constitute grave breaches. *Id.* These include:

willful killing; torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health; extensive destruction and appropriation of property . . . ; compelling a prisoner of war a civilian to serve in the forces of a hostile power; willfully depriving a prisoner of war or a civilian of the rights of fair and regular trial; unlawful deportation or transfer or unlawful confinement of a civilian; taking civilians as hostages.

*Id.*

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violations of the laws or customs of war,<sup>184</sup> genocide,<sup>185</sup> and crimes against humanity.<sup>186</sup> The Statute also provides for individual criminal responsibility of persons who, in any way, contributed to the perpetration of crimes enumerated in the Statute.<sup>187</sup>

Despite its attempts to alleviate the suffering of the Yugoslav people and to bring to justice the perpetrators of ethnic violence, the international community failed to prevent the rising instances of ethnic cleansing as the Security Council's actions proved to be too little, too late.<sup>188</sup> Its outrage at the hostilities taking place persuaded its members to pass the Resolutions aimed at averting further massacres.<sup>189</sup> These Resolutions, however, failed to achieve their purpose as the human rights violations continued unchecked.<sup>190</sup> In fact, the Security Council's Resolutions were largely ineffective because they failed to take any real action to bring an end to the human rights abuses.<sup>191</sup> Security Council Resolution 770, modeled on

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184. See *id.* art. 3 (detailing the jurisdiction of the Tribunal to prosecute individuals for violations of the laws or customs of war). The violations include employing weapons calculated to cause suffering; destruction of cities not militarily justified; attacks on undefended areas; destruction of civilian institutions such as churches, schools, and historic monuments; and plunder of property. *Id.*

185. See *id.* art. 4 (authorizing the prosecution of genocidal aggressors). This provision utilizes the definition of genocide as codified in the Genocide Convention. *Id.* art. 4, para. 2(a-e). Article 4 also designates certain acts as punishable including: "genocide; conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; and complicity in genocide." *Id.* art. 4, para. 3(a-e).

186. See *id.* art. 5 (stating that the Tribunal has the authority to prosecute persons for crimes against humanity in an armed conflict regardless of whether the conflict is international or internal). These crimes include "murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial and religious grounds; and other inhumane acts." *Id.*

187. See S.C. Res. 808, *supra* note 181, art. 7 (proclaiming the criminal liability of individual persons including heads of state and subordinates).

188. See Sven Alkalaj, Essay, *Never Again?*, 23 *FORDHAM INT'L L. J.* 357, 358 (1999) (observing that in Bosnia, over "200,000 people are dead or missing, over 220,000 people are wounded, and over two million [are] displaced . . .").

189. See discussion *supra* Part IV.C.1 and accompanying notes (detailing the Resolutions passed by the Security Council).

190. See Cervoni, *supra* note 147, at 502 (discussing the inability of the Security Council to put an end to the genocidal aggressions taking place in Yugoslavia).

191. See *BALKAN JUSTICE*, *supra* note 120, at 33 (commenting on the general unwillingness of the Security Council to take vigorous action). This unwillingness is highlighted in the various Resolutions themselves including,

[A] one-sided arms embargo; . . . authorization [of] the use of military force which was never implemented; . . . toothless economic sanctions that were so riddled with loopholes as to be completely ineffective; . . . a "no-fly zone" which was violated over four hundred times with impunity; . . . and [the creation of] "safe areas" which became the sites of the conflict's worst massacres."

*Id.*; see also NEIER, *supra* note 2, at 112 (observing that the Security Council was hesitant to become involved militarily and instead passed Resolutions to show that something was being done to stop the massacres).

Resolution 678 authorizing force against Iraq, did not have the same effect in Bosnia.<sup>192</sup> There was no plan for military intervention, despite the language in the Resolution allowing governments to use force if necessary.<sup>193</sup> The Resolutions, far from being a check on the atrocities taking place, were seemingly inconsequential to the warring parties, as some of the worst human rights abuses took place after the passage of the Security Council Resolutions.<sup>194</sup> In some instances, the Resolutions only served to increase the hostilities that caused the massacre of thousands of Bosnian Muslims.<sup>195</sup> This then begs the question: why was the United Nations so reluctant to enforce its own mandates?

The answer to this question is in the non-intervention principle. Since the primary notion behind the creation of the United Nations' Charter was non-intervention in the affairs of other states, the United Nations has been reluctant to interfere in situations within the borders of other states, regardless of the gross violations taking place.<sup>196</sup> The Charter provides for an exception to the principle under its Chapter VII powers by stating that non-intervention "shall not prejudice the application of enforcement measures under Chapter VII."<sup>197</sup> Chapter VII of the U.N. Charter endows the Security Council with the ability to protect international peace and stability when it is threatened.<sup>198</sup> According to Article 39, the Security Council may employ any means necessary, including armed force, when there is a "threat to peace, breach of peace, or act of aggression . . . ."<sup>199</sup>

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192. See BALKAN JUSTICE, *supra* note 120, at 33 (noting that Resolution 770, unlike its predecessor 678, did not bring about the use of force to dispel enemy attacks).

193. See BALKAN JUSTICE, *supra* note 120, at 33 (describing the reluctance of member states to use force against Serbian aggression).

194. See U.N. Secretary-General, *Eighth Periodic Report on the Situation of Human Rights in the Territory of Former Yugoslavia*, 49th Sess., at 7, U.N. Doc. S/1994/967 (1994) (detailing the continuation of ethnic cleansing by Bosnian Serb forces).

195. See Cervoni, *supra* note 147, at 499 (observing how the imposition of an arms embargo left the Muslim people at the mercy of the better armed Croatian and Serbian forces). Security Council Resolution 713 mandated an arms embargo to Yugoslavia, effectively eliminating Bosnia's ability to defend itself and its people. *Id.* at 500. See generally S.C. Res. 713, *supra* note 170, at paras. 3-6 (providing in part the implementation of a "general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia . . .").

196. See Michael Bazylar, Symposium, *Panel III-War Crimes and other Human Rights Abuses in the Former Yugoslavia: The Legality of Humanitarian Intervention and the Case of Bosnia*, 36 WHITTIER L. REV. 433, 448 (1995) (discussing the non-intervention principle's implicit bar against humanitarian intervention).

197. U.N. CHARTER art. 2, para. 7.

198. See U.N. CHARTER ch. 7, art. 39 (authorizing the Security Council to take measures to restore peace).

199. See TANCA, *supra* note 28, at 5 (discussing the Security Council's ability to intervene under its Chapter VII powers).

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This provision seems to allow intervention despite a state's claims to sovereignty even in situations which are of an internal matter,<sup>200</sup> if the Security Council finds that the controversy is not "essentially within the jurisdiction" of the state and that it constitutes a "threat to international peace and security."<sup>201</sup> This enforcement power under Chapter VII is thus contingent on a finding that the conflict is international, and because there is no provision allowing for humanitarian assistance, most of the flagrant human rights abuses are normally left unchecked.<sup>202</sup> In this instance, however, intervention under both the U.N. Charter and the various human rights documents was not improper because Yugoslavia was a signatory to the Charter, as well as numerous other human rights documents.<sup>203</sup> Despite this, the Security Council was reticent to use intervention and instead passed Resolutions. These Resolutions were mere rhetoric because they lacked any real resolve by the international community to enforce them.<sup>204</sup> As the U.N. commander in Yugoslavia, Lieutenant General Francis Briquemont stated in 1994, "[t]here is a fantastic gap between the resolutions of the Security Council, the will to execute those resolutions, and the means available to commanders in the field."<sup>205</sup>

This reticence to enforce its own mandates is rooted in the deeply held beliefs regarding the non-intervention principle articulated in Article 2(7) and the lack of provisions authorizing humanitarian assistance.<sup>206</sup> Because of the relatively new concept regarding humanitarian intervention, international law is largely silent on the subject of whether human rights abuses are "essentially within the domestic jurisdiction" of a state because of the relationship between a government and its citizens.<sup>207</sup> This may explain the reluctance of the

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200. See TANCA, *supra* note 28, at 5 (interpreting the provision to stand for the proposition that state sovereignty must be surrendered when international peace and security are at stake).

201. See Bazzyler, *supra* note 196, at 449 (summarizing the exceptions to the non-intervention principle).

202. See Bazzyler, *supra* note 196, at 449 (examining the reasons why human rights violations are "not a threat to 'international peace and security'").

203. See David M. Kresock, Note, "Ethnic Cleansing" in the Balkans: *The Legal Foundations of Foreign Intervention*, 27 CORNELL INT'L L.J. 203, 219-20 (1994) (discussing Yugoslavia's adoption of various human rights treaties and the U.N. Charter which authorized intervention when human rights are at issue).

204. See *id.* at 203 (analyzing the United Nations' tolerance of human rights abuses as evidenced by its reluctance to either intervene or enforce its own Resolutions because of sovereignty concerns).

205. *U.N. Bosnia Commander Wants More Troops, Fewer Resolutions*, N.Y. TIMES, Dec. 31, 1993, at A1.

206. See U.N. CHARTER art. 2, para. 7 (affirming the non-intervention principle).

207. See Delbruck, *supra* note 159, at 892 (explaining the relationship between the Security

United Nations and its member states to intervene even when grave breaches of human rights laws have been committed.<sup>208</sup> Member states are especially concerned with a formal right of humanitarian intervention because they “fear the consequences to their own survival should the focus of international law shift to individuals.”<sup>209</sup> This fear became evident during the meetings of the Security Council, where Russia and China refused to authorize military force against the Serbs, who were committing gross atrocities, for fear that such action would create a dangerous precedent for them.<sup>210</sup> Instead, the United Nations and its constituent member states felt that the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) was the appropriate forum to ensure that the violators of the international human rights laws were brought to justice.<sup>211</sup>

The international community’s reliance on the ICTY as the means for deterring and halting such egregious conduct has largely failed.<sup>212</sup> In fact, as of December 1999, only six individuals had been tried and convicted, with the ring leaders of ethnic violence still at large.<sup>213</sup> The international community has thus far been reluctant to lend any real support to the ICTY, rendering it virtually useless in apprehending even those participants in ethnic cleansing who have been indicted.<sup>214</sup>

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Council’s Chapter VII powers and the non-intervention principles outlined in Article 2(7)).

208. See Joseph L. Falvey, Jr., *United Nations Justice of Military Justice: Which is the Oxymoron? An Analysis of the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia*, 19 *FORDHAM INT’L L.J.* 475, 481 (1995) (detailing the atrocities in Yugoslavia which were broadcasted daily on various news programs); see also Splittgerber, *supra* note 87, at 200 (noting that international law gives deference to states regarding human rights).

209. Mahalingam, *supra* note 144, at 224.

210. See Byron F. Burmester, Comment, *On Humanitarian Intervention: The New World Order and Wars to Preserve Human Rights*, 1994 *UTAH L. REV.* 269, 320 (1994) (analyzing the reasons behind the Security Council’s reluctance to use force). See generally David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 *FORDHAM INT’L L.J.* 473 (1999) (discussing the United Nations’ unwillingness to take military action in order to stop the conflict).

211. See S.C. Res. 827, *supra* note 182 (expressing its hope that the Tribunal would ensure that human rights violations “are halted and effectively addressed”).

212. See Wippman, *supra* note 210, at 476 (arguing that the risk of prosecution is so slight that the potential political benefits gained by violating international human rights laws outweighs it).

213. See Fact Sheet, International Criminal Court for the Former Yugoslavia (visited Dec. 30, 1999), at <http://www.un.org/icty/glance/fact.htm/>.

214. See Wippman, *supra* note 210, at 481 (noting how the lack of political and state support will likely result in few prosecutions); see also Carol J. Williams, *CRISIS IN YUGOSLAVIA, Wheels of Justice Turn Slowly at Tribunal for War Crimes: U.N. Panel’s Record on Bringing Suspects to Trial Suggests 5 Latest Indictees May Remain Free*, *L.A. TIMES*, May 28, 1999, at A20 (observing that thirty-five indicted war criminals, including the senior officials, remain free); see also Walter Gary Sharp, Sr., Symposium, *International Obligations to Search for and Arrest War Criminals: Government Failure in the Former Yugoslavia?*, 7 *DUKE J. COMP. & INT’L L.* 411, 450-52 (1997) (analyzing the reasons behind the international community’s reluctance to pursue indicted war criminals). One of the main reasons behind the ICTY’s lack of progress in prosecuting war criminals is the reluctance of the western world to disrupt the implementation of the Dayton Accords by

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This reluctance “again reflects the strength of the principles of sovereignty and non-intervention.”<sup>215</sup> The failure of the ICTY to prosecute those responsible for war crimes is not only a travesty of justice for the victims of these atrocities, but has broader implications for the future of international human rights laws and any deterrent effect they may have on others.<sup>216</sup>

*D. Geopolitical Timing and its Effects on Intervention and Enforcement of Human Rights Laws*

Concern over human rights led to the adoption of many human rights instruments.<sup>217</sup> Although many merely profess ideological sentiments, the Genocide Convention and the Convention Against Torture both provide for strict enforcement measures, enabling the international community to force compliance with those laws.<sup>218</sup> The member states, however, failed to utilize those documents to bring an end to the savagery of the war. The reason for this may be answered by analyzing the geopolitical circumstances surrounding the war and the effects this had on meaningful intervention in the conflict. At any given period in time, certain events play a role in the actions and policies of member states. Such geopolitical timing was a key factor in the responses and involvement of the international actors in the Yugoslav conflict and played a large role in its evolution from a crisis to a disaster.

*1. “This is the Hour of Europe.” The European Union and Its Initial Response to the Yugoslav Crisis and the Reports of Human Rights Violations*

At the time the Yugoslav crisis began, Europe experienced monumental changes with the Maastricht treaty and the reunification of Germany as it sought to create a united European community.<sup>219</sup> This geopolitical occurrence created a sense of euronationalism, where the Europeans, assured by their newly acquired sense of

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pursuing the arrest of Serb war criminals. *Id.*

215. McKeon, *supra* note 140, at 563.

216. See Wippman, *supra* note 210, at 481 (noting that the failure of the ICTY sends a mixed message for others inclined to use ethnic cleansing as a means to an end).

217. See discussion *supra* Part II (detailing the various human rights documents).

218. See Procida, *supra* note 40, at 681 (commenting on the enforcement provisions of the Genocide Convention which allow for intervention).

219. See SAMANTHA POWER, WITH NO PEACE TO KEEP—UN PEACEKEEPING AND THE WAR IN THE FORMER YUGOSLAVIA: THE RELUCTANT SUPERPOWER 149 (1999) (recounting the European Union’s belief that it was the only power capable of restoring peace to Yugoslavia). Some of the member countries to the European Union believed that Yugoslavia would provide the needed incentive to create a common foreign and security policy. *Id.*

foreign policy confidence, took the lead in attempting to deescalate the Yugoslav crisis.<sup>220</sup> This European position proved an ill fated mistake as the European Union's preoccupation with its internal operations left very little time and resources available for an effective strategy regarding the Yugoslav crisis.<sup>221</sup> In the beginning of the crisis, the EU utilized both its diplomatic forces and economic incentives in an attempt to prevent the dissolution of Yugoslavia.<sup>222</sup> On the diplomatic front, the European Union dispatched its Council of Ministers to mediate the conflict.<sup>223</sup> At the same time, the EU was also using economic deterrence in the twin aims of keeping Croatia and Slovenia from claiming independence and preventing the federal government from using military force to enforce unity.<sup>224</sup> It also made economic aid contingent on the continued unity of Yugoslavia and threatened denial of EU membership if the Yugoslav state dissolved.<sup>225</sup> Additionally, the European Union became involved in monitoring cease-fires and human rights abuses.<sup>226</sup> Despite these efforts, by the spring of 1992 the world realized that the European Union had failed miserably as the body count grew and the conflict continued to escalate without any end in sight.<sup>227</sup>

The European Union failed in its attempts to prevent war in Yugoslavia for several reasons. First, its institutional egotism contributed to its shortsightedness and blinded it to the fact that it did not have the requisite tolls that would enable it to handle such a

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220. See EKNES, *supra* note 169, at 109 (discussing the European Union's control of the Yugoslav situation during the early stages of the crisis).

221. See PHILIP TOWLE, *MILITARY INTERVENTION IN EUROPEAN CONFLICTS: THE BRITISH DEBATE ABOUT INTERVENTION IN EUROPEAN CONFLICTS* 99 (Lawrence Freedman ed., Blackwell Publishers 1994) (discussing Britain's internal debate over intervention in Yugoslavia); see also LAWRENCE FREEDMAN, *MILITARY INTERVENTION IN EUROPEAN CONFLICTS: AN INTRODUCTION* 5 (Lawrence Freedman ed., Blackwell Publishers 1994) (analyzing the dichotomy between the European Union's perceived role as the preeminent force in European conflicts and the reality of the European Union as a fledgling power). The European Union was unprepared for the task of intervening in a crisis that had the potential of escalating into an ethnic war because of its inability to create a security system capable of handling such conflicts. *Id.*

222. See GOW, *supra* note 136, at 16 (discussing the tools utilized by the European Union in the Yugoslav crisis).

223. See GOW, *supra* note 136, at 16 (noting that the European Union sent mediators for the purpose of ending the conflict).

224. See TOUVAL, *supra* note 109, at 406 (analyzing the tools utilized by the European Union to prevent dissolutionment).

225. See LUND, *supra* note 110, at 61 (recounting the economic measures taken to ensure a unified Yugoslav state).

226. See GOW, *supra* note 136, at 17 (describing the European Union's operational role in Yugoslavia).

227. See POWER, *supra* note 219, at 150 (observing that by the spring of 1992, Bosnia was being decimated by the Serb and Croat forces).

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conflict.<sup>228</sup> Rather than utilizing the Genocide Convention and the Convention against Torture, the European Union felt it could resolve the war through diplomatic and economic means.<sup>229</sup> However, it “sacrificed the interests of peace in the region to their own desire to forge a semblance of foreign policy competence.”<sup>230</sup> This failure is evident in the continued mishandling of the Yugoslav situation by the Europeans from the beginning. Second, the European Union’s attempts at diplomacy failed because its timing was wrong. Diplomatic efforts were not undertaken until 1991 when ethnic tensions were high and minor squirmishes had already erupted.<sup>231</sup> Third, its use of economic deterrence proved useless and only furthered the resolve of the secessionist leaders who used it to fuel nationalistic tendencies.<sup>232</sup> Fourth, the European Union was inconsistent in its dealings with Yugoslavia by continually qualifying its statements and failing to project clear goals and a unified stance on the crisis.<sup>233</sup> In fact, its actions may have contributed to the continued atrocities in violation of the very international human rights laws it purported to enforce. “The uncertainties that western policies created led each of the contending Yugoslav parties to believe that its actions would not be punished, but rather, that after a brief interval of time, they would be accepted and perhaps supported by the western governments.”<sup>234</sup> The failure of the European Union to enforce the laws announced in the Genocide Convention and the Convention Against Torture can be attributed to its inability to foresee the consequences inherent in its actions and the geopolitical circumstances surrounding the dissolution of Yugoslavia.<sup>235</sup>

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228. See JANE M. O. SHARP, *MILITARY INTERVENTION IN EUROPEAN CONFLICTS: APPEASEMENT, INTERVENTION AND THE FUTURE OF EUROPE* 47 (Lawrence Freedman ed., Blackwell Publishers 1994) (discussing the extreme incompetence of the European Union in the Yugoslav crisis).

229. See *id.* at 49 (commenting on the “inept diplomacy” of the European Union).

230. *Id.*

231. See GOW, *supra* note 136, at 22 (concluding that by the time the European Union sent mediators, there was no hope of reintegrating Slovenia and Croatia). The most disturbing aspect of this delay was that there had been reports of potential problems in the region from as far back as 1980 and especially with the walkout of the Yugoslav Congress in 1989. *Id.*

232. See TOUVAL, *supra* note 109, at 407 (examining the sentiments of the Yugoslav people at the time when economic inducements were offered). In situations where ethnic tensions are high, the economic stability of a state is not a priority to its citizens. *Id.*

233. See GOW, *supra* note 136, at 22 (stating that the actions of the European Union were ineffective because of its inability to portray a clear stance on the conflict).

234. TOUVAL, *supra* note 109, at 407; see DENITCH, *supra* note 103, at 7 (“Thus, all those who support the creation of ethnic or national states, instead of states that will embrace all their citizens, support, consciously or unconsciously, policies of ethnic cleansing.”).

235. See GOW, *supra* note 136, at 24 (examining the reasons behind the failure of the European Union to resolve the crisis in Yugoslavia).

2. *"We Are Not the World's Policeman" — the United States' Reluctance to Involve Itself in the Yugoslav Conflict*

America's hesitance to enforce the provisions of international human rights laws was evident in Yugoslavia.<sup>236</sup> Concern over the breakup of the Soviet Union and the recent debacle in Somalia caused the United States' reluctance to become involved in an uncertain situation.<sup>237</sup> As such, the United States felt that the United Nations and the European Union would project its sentiments that it would not allow the policies of ethnic cleansing to take place in Yugoslavia.<sup>238</sup> The United States assumed that the European Union and the United Nations were capable of bringing peace to the region through whatever means necessary,<sup>239</sup> a sentiment consistent with United States' foreign policy that it will not continue to be the world's policeman. President Clinton reiterated this position throughout the conflict and in his address to the United Nations in 1999, where he reaffirmed that "some are troubled that the United States and others cannot respond to every humanitarian catastrophe in the world. We cannot do everything, everywhere . . . ."<sup>240</sup> America's reticence regarding intervention in the burgeoning crisis through enforcement of human rights laws may also be explained by examining its position regarding the Genocide Convention and other human rights laws.

The United States has historically been unenthusiastic about human rights laws and treaties. Its concerns derive both from the feeling that the U.S. Constitution affords adequate protection of human rights, and from sovereignty concerns.<sup>241</sup> "Treaties on human

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236. See POWER, *supra* note 219, at 149 (noting that the United States was content to allow the European Union to take charge of the situation in Yugoslavia).

237. See POWER, *supra* note 219, at 149 (examining the reasoning behind the United States' reluctance to become involved in Yugoslavia).

238. See THOMAS HALVERSON, *MILITARY INTERVENTION IN EUROPEAN CONFLICTS-DISENGAGEMENT BY STEALTH: THE EMERGING GAP BETWEEN AMERICA'S RHETORIC AND THE REALITY OF FUTURE EUROPEAN CONFLICTS* 90 (Lawrence Freedman ed., Blackwell Publishers 1994) (discussing America's involvement at the initial stages of the Yugoslav conflict). The "U.S. government saw no reason why it should intervene and pay disproportionately to protect these principles when they seemed logically more salient in this case to her European allies." *Id.* at 91.

239. See *id.* (observing the United States' position regarding involvement in the Yugoslav crisis by the United Nations and European Union).

240. Colum Lynch, *U.N. Should Understand Its Limits, Clinton Says*, WASH. POST, Sept. 22, 1999, at A25. Clinton reiterated this position by stating that the United States "need not respond by [itself] to each and every outrage of violence." HALVERSON, *supra* note 238, at 84.

241. See Ann Elizabeth Mayer, Article, *Reflections on the Proposed United States Reservations to CEDAW: Should the Constitution be an Obstacle to Human Rights?*, 23 HASTINGS CONST. L.Q. 727, 727 (1996) (examining the prevalent feelings of the United States towards its Constitution). The Constitution is often used as an excuse to override certain provisions in human rights

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rights are likely to jeopardize the sovereignty of state parties without, at the same time, offering them a commercial advantage that may render a compromise of sovereignty worthwhile.”<sup>242</sup> The refusal of the United States to ratify treaties, or to ratify them with a staggering number of reservations designed to protect its interests, commonly occurs.<sup>243</sup> Historically, human rights treaties are ill received in the U.S. Senate, whose members often argue that the ratification of such instruments would jeopardize the Constitution.<sup>244</sup> This opposition to human rights treaties is most evident in the ratification debate over the Genocide Convention, which was signed by President Truman and only recently ratified in 1988.<sup>245</sup> Hence, the United States’ refusal to utilize these human rights laws as enforcement mechanisms against the perpetrators of ethnic violence in Yugoslavia is not surprising.<sup>246</sup>

## V. RECOMMENDATIONS

The tragedy in Yugoslavia should have been avoided. The numerous human rights laws promulgated after the atrocities of World War II sent a message to states that such abuses would not be tolerated by the international community. Their provisions provided adequate enforcement mechanisms for the purpose of deterring the kind of systematic violence witnessed during the Holocaust. Nations such as Yugoslavia, however, refuse to abide by the dictates of these

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treaties. *Id.* This includes provisions which provide better protection than the Constitution affords. *Id.*

242. Rebecca J. Cook, *Reservations to the Convention on the Elimination of all Forms of Discrimination Against Women*, 30 VA. J. INT’L L. 643, 650 n.30 (1990).

243. *See id.* (noting that reservations often reassure signatories that their interests will be protected).

244. *See* Mayer, *supra* note 241, at 749 (commenting on the rhetoric used by opponents to human rights laws to garner public support for their position). This rhetoric includes statements such as “Covenant on Human Slavery,” “legal basis for the most repressive measures of atheistic tyranny,” and an “attempt to repeal the Bill of Rights.” *Id.* (describing Senator Bricker’s opposition to the ratification of the International Covenants). *See also* NATALIE HEVENER KAUFMAN, *HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION* 1, 1-36 (1990) (detailing the findings of her study on the Senate’s attitudes towards human rights laws).

245. *See* Mayer, *supra* note 241, at 749-50 (commenting on the reluctance of the Senate to ratify even those treaties which purport to codify basic human rights).

246. *See* Mayer, *supra* note 241, at 755 (observing that the numerous reservations and prolonged ratification process lends doubt to the obligations of the United States); *see also* M. Cherif Bassiouni, Symposium, *Reflections on the Ratification of the International Covenant on Civil and Political Rights by the U.S. Senate*, 42 DEPAUL L. REV. 1169, 1179-80 (1993) (noting that United States ratification of human rights laws creates uncertainties in the international community). “The Senate’s practice of de facto rewriting treaties, through reservations, declarations, understandings, and provisos, leaves the international credibility of the United States shaken and its reliability as a treaty-negotiating partner with foreign countries in doubt.” *Id.* at 1173.

laws with impunity, confident that their actions would not suffer the consequences of such violations because of the lack of will to enforce them. This persistent feeling led to the tragic death of thousands of innocent human beings as the world watched. In order to ensure that such flagrant human rights abuses will not be tolerated, this Comment attempts to provide recommendations designed to prevent such instances from occurring.

The states themselves present some of the most prevalent problems with effective enforcement of human rights laws. Human rights laws depend on the will of the states to enforce their provisions through both accommodation and coercion.<sup>247</sup> The provisions regarding human rights lose their potency in the bureaucratic melee of domestic concerns and sovereignty interests because they rely on states to force compliance with the dictates of international law. Because the international system is state based, the burden of ensuring that states comply with their international obligations is necessarily placed on the citizens.<sup>248</sup> The promotion of human rights must be internalized into domestic legal systems in order for states to fulfill their international obligations.<sup>249</sup> Only then can we begin to see a change in the way the international community, comprised of states themselves, responds to acts of aggression that violate not only human rights laws, but our own sense of morality and decency.

The dichotomy between protecting human rights and respect for sovereignty presents another problem inherent in enforcing compliance with human rights. In the context of modern day society, "the human rights values embraced by the international community"<sup>250</sup> necessarily limits the notion of sovereignty. As such, sovereignty should not be a bar to enforcement of the international human rights laws that the world as a whole embraces.<sup>251</sup> The U.N. Charter has adequate provisions designed to limit states from encroaching on the sovereignty of others and allows for the breach of sovereignty only in extreme situations.<sup>252</sup> Thus, the limitations placed

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247. See Koh, *supra* note 138, at 1408-09 (discussing the "horizontal" approach of international human rights law enforcement which is predicated on the pressure states put on each other to comply with certain norms).

248. See Koh, *supra* note 138, at 1416 (observing the state centered notion behind international law).

249. See Koh, *supra* note 138, at 1416 (describing the obligations of citizens to force their states to comply with international legal doctrines).

250. S. James Anaya, *The Capacity of International Law to Advance Ethnic or Nationality Rights Claims*, 75 IOWA L. REV. 837, 843 (1990).

251. See *id.* (analyzing how sovereignty concerns are superceded by the human rights values member states share).

252. See *id.* (detailing those provisions of the U.N. Charter which limit the encroachment on

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on member states by international human rights laws are not an abandonment of sovereignty, but merely a means for “preserving the world we live in for present and future generations . . . .”<sup>253</sup> States that abide by their international obligations in their actions towards their citizens have no reason to fear a violation of their rights as sovereign nations.<sup>254</sup> Instead, by enforcing compliance with international human rights laws, they are reinforcing their status as a sovereign nation and ensuring international peace and security.<sup>255</sup>

A general lack of will as shown by member states hinders the enforcement of human rights laws.<sup>256</sup> A related problem includes the lack of tools necessary to compel compliance with human rights norms.<sup>257</sup> Numerous legal scholars have propounded the theory that the establishment of a permanent international court would stifle such acts of violence and promote conformity with human rights laws.<sup>258</sup> An effective tool in combating instances of ethnic violence entails the creation of an international criminal court, but only if other changes are instituted giving the international court the ability to efficaciously do its job. These changes include a consensus by the member states to agree to the jurisdiction of the court in prosecuting human rights violations, domestic legislation submitting member states to the jurisdiction of the court, and the apprehension and deportment of individuals indicted by the court. In theory, such a court would be an effective deterrent to future violations of human rights principles by employing a universal *jus cogens* approach to prosecution.

In reality, the establishment of a permanent court may not be effective in bringing perpetrators of ethnic violence to justice for

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a state's sovereignty).

253. van der Vyver, *supra* note 141, at 443.

254. See Mahalingam, *supra* note 144, at 262 (observing that intervention only allows the international community to deal with violators while “respecting the sovereignty of those who abide by basic standards”).

255. See Mahalingam, *supra* note 144, at 262 (noting that there is a balance between sovereignty concerns and human rights concerns).

256. See discussion *supra* Part IV.D and accompanying notes (describing the general lack of will on the part of member states to enforce human rights laws).

257. See Yoram Dinstein, Panel, *Human Rights: Implementation Through the UN System*, 89 AM. SOC'Y INT'L L. PROC. 225, 243 (“The greatest problem faced by the UN system for the protection of human rights is the inadequate availability of tools to ensure implementation of binding norms.”).

258. See Cervoni, *supra* note 147, at 527-33 (arguing for the implementation of a permanent International Criminal Court). The Tribunal in Yugoslavia was created by the United Nations, and its effectiveness is therefore hampered by existing United Nations conventions, which limit its jurisdictional reach. *Id.* at 527. An International Criminal Court would be able to bypass the current limitations of the present system by creating a universal jurisdictional system to reach all perpetrators of war crimes, regardless of state involvement. *Id.* at 529.

several reasons. First, states may be unwilling to submit to the jurisdiction of such a court because of a lack of consensus as to an international criminal code.<sup>259</sup> Second, the sovereignty concerns of states may be a bar to the adoption of a permanent court.<sup>260</sup> The current state of affairs suggests that the establishment of a permanent international court is merely a theoretical suggestion rather than a concrete proposal given the international community's unwillingness to seriously entertain the possibility.<sup>261</sup>

In order to prevent another tragic occurrence of ethnic violence that was witnessed in Yugoslavia, the United Nations represents the best hope to human kind. The United Nations is replete with the authority to intervene when "international peace and security" are threatened and play a pivotal role in monitoring potential conflicts.<sup>262</sup> As a preventive institution, the United Nations has the authority to intervene diplomatically under its Chapter VI<sup>263</sup> powers by sending mediators to facilitate discourse between parties before violence occurs.<sup>264</sup> If mediation fails, the Security Council Chapter VII powers authorizes the use of force. Because international peace and security must be threatened before the Security Council can act pursuant to Chapter VII, genocide and crimes against humanity must be redefined. As it stands now, such acts utilized by governments and their agents against their own populations are not deemed to threaten international peace and security because they occur within a state's sovereign territory.<sup>265</sup> Until the global community realizes that these crimes, regardless of the territorial boundaries where they occur, threaten the world as a whole, such horrific acts will continue to pervade the international arena. Once this realization occurs,

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259. See Cervoni, *supra* note 147, at 532 (analyzing the problems inherent in the creation of an international criminal court).

260. See Cervoni, *supra* note 147, at 533 (noting the sovereignty concerns of states if a permanent court were established).

261. See Cervoni, *supra* note 147, at 533 (observing the reluctance of states to create an international criminal court).

262. See Steven R. Ratner, *Theme Panel II: The Rise of Nationalism and the Breakup of States: Controlling the Breakup of States: Toward a United Nations Role*, 88 AM. SOC'Y INT'L L. PROC. 33, 44 (1994) (noting that one of the main functions of the United Nations is monitoring potential "hot spots" which threaten international peace and security and violate human rights laws).

263. See U.N. CHARTER ch. VI, art. 33 (mandating that the parties to a dispute shall negotiate a peaceful settlement and authorizing the Security Council to take appropriate action when the dispute threatens international peace and security).

264. See Ratner, *supra* note 262, at 44 (discussing the critical preventive and diplomatic role of the United Nations); see generally BOUTROS BOUTROS-GHALI, AN AGENDA FOR PEACE 1 (1995) (discussing the future role of the United Nations in the areas of preventive diplomacy, peacemaking, and peacekeeping).

265. See Barnes, *supra* note 1, at 144-45 (noting that the U.N. Charter is ineffective when faced with internal ethnic conflicts).

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then the Security Council can utilize its enforcement powers to stop the horrifying effects of ethnic cleansing.

## VI. CONCLUSION

This Comment analyzed both the tragedy of the Yugoslav conflict and the human rights laws designed to prevent it. The rise of intrastate ethnic conflicts has emphasized the deficiencies in our current international human rights system, namely the unwillingness of the international community to enforce its provisions.<sup>266</sup> Until the international community deems violations of human rights laws as potential threats to global peace and security, we are destined to relive the consequences of ethnic violence despite our protestations of “never again.”

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266. See Alkalaj, *supra* note 188, at 358-59 (describing the hesitance of the international community to apply human rights principles).