

GENOCIDE TREATY-ETHNIC CLEANSING-SUBSTANTIVE AND PROCEDURAL HURDLES IN THE APPLICATION OF THE GENOCIDE CONVENTION TO ALLEGED CRIMES IN THE FORMER YUGOSLAVIA

I. FACTUAL BACKGROUND

On Tuesday, October 15, 1991, in a controversial vote, the parliament of the Yugoslav republic of Bosnia-Herzegovina proclaimed their republic a sovereign state and adopted documents to secede from Yugoslavia.¹ In so doing, Bosnia-Herzegovina joined Croatia and Slovenia who declared independence in June of 1991.² Fearing political and economic domination by the communist, Serbian controlled government of Yugoslavia,³ the nearly two million Muslims and eight hundred thousand Croats within Bosnia-Herzegovina voted in a landslide public election in favor of independence in December of 1991.⁴

¹ Timothy Heritage, *Bosnia Moves Toward Independence in Fresh Blow to Yugoslavia*, Reuters, para. 2 (Oct. 15, 1991).

² Slovenia and Croatia, resenting the economic drain of the less wealthy southern republics pushed for democratic governments in their own region and a loose federation for all the republics of Yugoslavia. Serbia, dissimilarly, wanted to retain the communist system with a strong centralized government which could retain the resources of the other republics while protecting the serb minorities within them. Charles L. Nier III, *The Yugoslavian Civil War: An Analysis of the applicability of the Laws of War Governing Non-International Armed Conflicts in the Modern World*, 10 DICK. J. INT'L L. 310.

As of January, 1993 as many as 10,000 people have died in the civil war in Croatia resulting from Croatia's declaration of independence. *Chronology of Yugoslav War*, Press Association Newsfile, para. 3 (Jan. 23, 1993).

³ The Yugoslavia of 1991 was a nation of 23 million inhabitants of diverse ethnic and regional identity. Yugoslavia was composed of six semi-autonomous republics. The ethnic groups within Yugoslavia were largely associated with their home republic (i.e. Serbs come from Serbia, Croats from Croatia, and Slovenes from Slovenia). However, there has been a great deal of migration over the centuries. Consequently there are a large number of Serbs within Bosnia and Croatia, and Croats within Bosnia. No one ethnic group constitutes a majority in what was Yugoslavia, but Serbs (9.3 million) were the largest of all the ethnic groups. Furthermore, no one ethnic group constitutes a majority within the Republic of Bosnia. See *infra* part II, HISTORICAL BACKGROUND OF THE YUGOSLAV PEOPLE.

⁴ The fear of political and economic domination by communist- ruled Serbia similarly led the republics of Croatia and Slovenia to seek independence from Yugoslavia. *Bosnia-Herzegovina Decides to Seek Independence*, United Press Int'l, para. 7 (Dec. 20, 1991).

The ninety-nine percent majority in favor of independence⁵ did not, however, truly express the unanimous sentiment of the republic's citizenry. Total turnout was only sixty-three percent, as the Serbian population, which comprises thirty-one percent of Bosnia's total population, boycotted the vote.⁶ The Serbian population within Bosnia-Herzegovina overwhelmingly favored remaining in the Yugoslavian federation dominated by Serbian leadership.⁷ As a consequence, resentment between the ethnic populations within Bosnia-Herzegovina increased, prompting the formation of "sectarian militias" of Serbs, Croats and Moslems intent on ethnic violence.⁸

When the European Community recognized Bosnian independence on April 6, 1992, Bosnian Serbs declared independence from the new state⁹ and the ethnic violence erupted into civil war.¹⁰ From April of 1992 to January

⁵ Bosnian officials reported 66.4 percent of eligible voters participated with 99.43 percent of those in favor of independence in the vote taken to win recognition from the European Community. Roy Gutman, *Bosnian Independence Proclaimed*, *NEWSDAY*, Mar. 4, 1992, at 15.; see also, *Official Results of Bosnia-Herzegovina Referendum on Independence*, British Broadcasting Corp., para. 1 (Mar. 4, 1992) (revealing identical results).

⁶ *Bosnian Independence*, *supra* note 5, at 15; *Official Results of Bosnia-Herzegovina Referendum on Independence*, *supra* note 4, para 6; Carol J. Williams, *Regional Vote in Yugoslavia Risks Conflict; Referendum: A Move to Independence for Bosnia-Herzegovina in this Weekend's Already Deadly Election Could Draw the Republic Into the Civil War*, *L.A. TIMES*, Mar. 1, 1992, at A1.

⁷ Serbs overwhelmingly voted to keep Bosnia-Herzegovina within a Yugoslav federation in a November referendum. *Bosnia-Herzegovina Decides to Seek Independence*, *United Press Int'l*, para. 11 (Dec. 20, 1991).

⁸ In the months before Bosnia's vote for independence, outbreaks of ethnic violence increased as did a flood of illegal arms into the region. Sectarian militias were formed as the Serb-dominated federal army added to its troops there. The Serb militias are supported by the Federal Yugoslav Army which "purged" its top ranks of non-Serbs shortly before the referendum on Bosnian independence. *Id.* para 17.

Aside from its ethnic composition, the army is fervently opposed to secession because the majority of its lucrative military industry is located in Bosnia, *Regional Vote in Yugoslavia*, *supra* note 6, para. 16.

⁹ From their stronghold in the region of Banja Luka, northeast of Sarajevo, Bosnian Serbs declared independence and the formation of a "Serbian Republic of Bosnia-Herzegovina." Victoria Stegic, *Independence Brings Civil War for Bosnia*, *Agence France Presse*, para. 3 (Apr. 7, 1992).

¹⁰ European Community foreign ministers granted recognition to Bosnia-Herzegovina on Monday, April 6, 1992. *EC Recognizes Independence of Bosnia-Herzegovina*, *Xinhua Gen. News Service*, Apr. 6, 1992.

Serbs living in Bosnia were confronted with the prospect of becoming a minority in the new nation of Bosnia-Herzegovina rather than members of the largest ethnic block in the

of 1993, the number of persons killed in Bosnia-Herzegovina is estimated at more than 17,000, though the actual number of persons killed is likely much higher.¹¹ The true horror of the conflict, however, may be the plight of over two million refugees who flee not only the fighting but the practice of what has become known as "ethnic cleansing".¹²

The practice of "ethnic cleansing," also referred to as "ethnic purification," involves the elimination of rival ethnic groups of political opposition.¹³ The practice may also constitute genocide¹⁴ which requires condemnation by the international community under the Genocide Convention.¹⁵ In the

nation of Yugoslavia. This was a proposition that led many Serbs to declare independence from the new nation in a show of allegiance to the old. *Independence Brings Civil War*, *supra* note 9, para. 8.

Fighting raged throughout Bosnia when the EC recognized Bosnian independence as Bosnian Serbs proclaimed their own "Serbian Republic of Bosnia Herzegovina" in defiance of the newly recognized state of Bosnia-Herzegovina. *Id.* at paras. 3,4.

¹¹ More than 17,000 have died in Bosnian fighting with over two million refugees fleeing from fighting and "ethnic cleansing." *Chronology of Yugoslav War*, *supra*, note 2, para 3.

Sen. Larry Pressler (R) of South Dakota, the ranking member of the Senate Foreign Relations Subcommittee on European Affairs, estimates 40,000 people dead or missing and two million driven from their homes. Larry Pressler, *Justice Must Be Demanded for 'Ethnic Cleansing' Crimes*, THE CHRISTIAN SCI. MONITOR, Dec. 29, 1992, 19. Rep. Fred McCloskey (D) of Indiana, a member of the House Armed Services and Foreign Affairs Committees, estimates that Serb forces in Bosnia have killed between 128,000 and 200,000 Bosnians or one out of ten Muslims in Bosnia. Fred McCloskey, *The U.S. is Appeasing Fascism and Genocide*, THE CHRISTIAN SCI. MONITOR, Dec. 31, 1992, 19.

¹² One aspect of "ethnic cleansing" which has "shocked the world" is the forced removal of Croats and Muslims from their homes by Serbian forces. H.D.S. Greenway, *Balkan Divide Is Again Europe's Flashpoint; In a Post-Soviet 'Void,' Yugoslavia is Again Splintered Into Its Tribes*, THE BOSTON GLOBE, Dec. 4, 1992, at 18.

¹³ *Trade Subcomm. Of The House Ways and Means Comm.: Hearing on HR 5258, Withdraw Most Favored Nation (MFN) Status From Yugoslavia* (1992), (Statement of Representative Wolf) [hereinafter Statement of Representative Wolf]. Ethnic purification on the part of Serbia involves the slaughter of every ethnic group except their own and conjures up memories of Nazis activities during World War II.

¹⁴ *Id.* (statement of Holly Burkhalter, Washington Director Human Rights Watch) [hereinafter statement of Holly Burkhalter]. "Ethnic cleansing" is genocide. The Serb practice includes the deliberate slaughter of civilians for no other reason than that they are Croat or Muslim, the deliberate practice of creating refugees, and the creation of ghettos for the purpose of starvation.

¹⁵ *Id.* See Convention on the Prevention and Punishment of Genocide, 78 U.N.T.S. 277 [hereinafter Genocide Convention], Article I declares that "genocide . . . is a crime under international law which [contracting parties] undertake to prevent and to punish."

past year there has been a steady outcry from political leaders, journalists, and human rights activists for the application of the Genocide Convention to the alleged crimes occurring in Bosnia-Herzegovina.¹⁶ But as of yet, despite the numerous reports of "ethnic cleansing," including civilian killings, mutilation, torture, starvation, operation of detention centers, executions, mass graves, systematic rape, and mass terrorization of Croats and Muslims,¹⁷ no authoritative action has been taken beyond the creation of a United Nations Commission to study the action.¹⁸

¹⁶ "The Genocide Convention indeed demands that the international community put a stop to genocide. . . . it's well past time for the international community to make good on their promises under the Convention." Statement of Holly Burkhalter, *supra* note 14.

"Lining up Muslim males in town after town, killing them randomly, burning villages, raping women, dotting the land with 'detention centers' that practice torture and execution - all say to Muslims: leave. . . . Both Slobodan Milosevic [Serbian president] and Bosnian Serb leader Radovan Karadzic must be investigated." *Bosnia: Do Something*, CHRISTIAN SCI. MONITOR, Aug. 12, 1992, at 20.

Prima facie evidence of genocide reveals violations of the Genocide Convention prompting the call for the formation of an international criminal court to prosecute such violations. Leonard Doyle, *Call For Serbs To Face War Crimes Trial*, THE INDEPENDENT, Aug. 13, 1992, at 7.

German Foreign minister Klaus Kinkel accused Serbia of attempting to carry out "ethnic cleansing" which would be a crime under the Genocide Convention which is binding on Serbia and other successor states. Richard Murphy, *Bonn Wants Human Rights Court To Try Serbs*, THE REUTER LIB. REP., paras. 2,3 (Aug. 19, 1992).

¹⁷ The United Nations Commission on Human Rights adopted a resolution on December 1, 1992, condemning acts of "ethnic cleansing" including the killings, torture, and systematic practice of rape. *U.N. Condemns Violation of Human Rights in Ex-Yugoslavia*, Xinhua News Agency, Dec. 1, 1992.

It is alleged that Serbs have concocted detention and concentration camps to torture and murder non-Serbs. Statement of Rep. Wolf, *supra* note 13.

The U.S. assistant secretary of state is quoted as saying "people are systematically abused, tortured and executed" in Bosnia-Herzegovina. Bosnian Vice President Ejup Ganic cites mass graves, mutilated corpses, people beaten to death, and women repeatedly raped and then murdered. *War Crimes Tribunal Gains Ground*, Agence France Presse, paras. 6,8 (Aug. 13, 1992).

¹⁸ The U.N. Security Council authorized the creation of a special commission to examine evidence of atrocities in former Yugoslavia on October 6, 1992. *U.N. Creates Panel to Examine Atrocities in Yugoslavia*, THE GAZETTE (Montreal), Oct. 7, 1992, at B5.

The Commission was set up to examine evidence of "appalling crimes" committed by all sides of the conflict, including execution of prisoners and the murder, rape, and torture of civilians. Alan Ferguson, *U.N. Set to Probe Yugoslav 'crimes'*, TORONTO STAR, Oct. 7, 1992, at A1.

II. HISTORICAL BACKGROUND OF THE YUGOSLAV PEOPLE

To understand the conflicts in the former Yugoslavia, it is helpful to first have some knowledge of the history of the Yugoslavian people and the ensuing ethnic tensions.¹⁹ The term "Yugoslav" translates into South Slav, the name given to the people who migrated to the Baltic region from the north in the fourth century A.D.²⁰ The common origin of these people has not, however, prevented the escalation of ethnic tension among them into warfare and claims of genocide in the 1990's.

Southeast Europe, and the Balkans in particular, represent a cultural and geographical crossroads where the same routes taken by the South Slav tribes of the fourth century were followed by other invaders in the centuries to come, each leaving an indelible mark on the people of that region. Within the different areas, the people speak different languages, practice different religions, and write with different alphabets.²¹ The term "Yugoslav" itself did not come into existence until the eighteenth century,²² and before the creation of Yugoslavia in 1918, the South Slav people had never been united in a single state.²³

¹⁹ FRED SINGLETON, *A SHORT HISTORY OF THE YUGOSLAV PEOPLES* ix (1985) (noting that historical experiences are deeply embedded in the consciousness of the Yugoslav people).

²⁰ *Id.* at 13-14.

²¹ The country is a contrasting combination of geographies, histories, cultures, religions, languages and economies. JAMES GOW, *LEGITIMACY AND THE MILITARY: THE YUGOSLAV CRISIS 2* (1992).

By 1918, the South Slavs had come to think of themselves as Slovenes, Croats, Serbs, and Montenegrins with ethnic muslims adding to the heterogeneity. SABRINA P. RAMET, *NATIONALISM AND FEDERALISM IN YUGOSLAVIA, 1962-1991* intro (1992); *see also* SINGLETON, *supra* note 19 at 115 (noting that historical experiences are deeply imbedded in the consciousness of the Yugoslav people); *but see* ALEKSA DJILAS, *THE CONTESTED COUNTRY* 181 (1991) (recognizing that Yugoslavia could be defined as a mono-ethnic state with closely related languages but with different political consciousness).

²² SINGLETON, *supra* note 19, at 115. The term became popular during a period of national awakening among the slavs in the region. *Id.* at 14.

²³ Singleton points out that even when the South Slavs were independent of foreign rule, they never united as a people beyond their immediate region:

The South Slav nationalists of the nineteenth century could . . . boast of medieval greatness under Slav rulers. For them, however, there was no single champion who had forged a South Slav empire which flourished before the arrival of the alien invaders . . . Each national group had its own glorious epoch which it did not share with its neighbors; in fact, the glories of one medieval kingdom were often achieved at the expense of

The Slavic marauders who entered the Balkans in the fourth century A.D. followed the lead of their Roman predecessors who expanded into the area in the third century B.C. By the end of the sixth century A.D., the Slavs had gradually settled into the region.²⁴ During the eighth century, the areas now known as Slovenia and Croatia fell under the control of the Holy Roman Empire as these Slavs became indoctrinated into the culture and religion of the West.²⁵ A century later, Christianity came to the eastern regions of Serbia and Macedonia from the Byzantine emperors. Thus, the religious and cultural split between the Eastern Orthodox and Western Roman Catholic Christian Empires found its geographical boundary in the Balkans.²⁶ The central area of Bosnia-Herzegovina, though it had no clear national identity of its own until the late twelfth century, marked the dividing line.²⁷

In the fourteenth century, the Ottoman Turks invaded the region from the south bringing a new cultural and religious influence in the form of Islam. An early census of the fifteenth century noticed the quick conversion of a large percentage of Bosnians resulting in the formation of "a native-born, Slav speaking Muslim aristocracy."²⁸ The Ottoman Turks eventually gained control over Serbia, Macedonia, and Albania. The Serbs, however, maintained their Orthodox Christianity. When the Serbian lead Slavic nationalism movement met with harsh retaliation from the Turks in the

its neighbors. The cynical definition of a nation as a group of people united by a common error as to their origins and a common dislike of their neighbors' has a tragic relevance in the history of the Yugoslav peoples.

Id. at 23.

²⁴ *Id.* at 14.

²⁵ *Id.* at 15.

²⁶ In addition, the Eastern Slavs developed a separate alphabet from the Greek Cyrillic script which in turn influenced the Slavonic language of that region. *Id.* at 16-17.

"In 1054, when the great schism split Christendom between the Roman Catholic Church and the Orthodox East, the fault line lay along the Drina, the river that now marks the Serbian-Bosnian Border." H.D.S. Greenway, *Balkan divide is again Europe's flashpoint; In a post-Soviet 'void,' Yugoslavia is again splintered into its tribes*, THE BOSTON GLOBE, Friday, Dec. 4, 1992, at 18.

²⁷ "The relative openness of Bosnia to influences from Croatia in the north and from Serbia in the south and east facilitated invasion and conquest from Croats, Hungarians, Serbs, Macedonians, Byzantines and Turks." SINGLETON, *supra* note 19, at 31.

²⁸ A census of 1520-30 showed an increase in Muslim Bosnians to 46% from 18.4% in 1489; the Muslims in Bosnia today are descendants of those converts. *Id.* at 20.

nineteenth century, the Turkish Muslims developed a reputation for religious persecution that consequentially contributes to Serbian resentment today.²⁹

Serbia, backed by the Orthodox Russian government, gained independence from the Turks in 1878.³⁰ However, much to the chagrin of the newly autonomous Serbian nation, Bosnia-Herzegovina merely shifted from Turkish control to Austrian annexation in 1908.³¹ Then, as now, Bosnia-Herzegovina had a large Serb population and when Austrian Archduke Franz Ferdinand visited Sarajevo, Bosnia on Serbia's national day, he was killed by radical Serbian nationalists there.³² As a result, Austria had its excuse for territorial aggression against Serbia and the First World War ensued.

Serbia, despite a courageous effort, fell under Austrian occupation during the war. Many Serbs fled to the Adriatic Coast in exile where, with other Southern Slavs in exile, they agreed to form a united nation of South Slavs upon termination of foreign occupation.³³ The defeat of the Austrian alliance led to the creation of this unified South Slav state in 1918. The victorious allies formed the nation by taking the former Austrian territories of Croatia, Slovenia and Bosnia-Herzegovina and connecting them to Serbia and Montenegro. The nation, then known as the Kingdom of Serbs, Croats,

²⁹ *Id.* at 21-22; *see also*, Statement of Holly Burkhalter, *supra* note 14 (reporting that Serbs refer to Bosnian Muslims as Bosnian Muslim Turks as an ethnic slur).

³⁰ Inspired by western influence in the region, Serbians formed a united front to expel the Turks in the mid-nineteenth century. Serbia was recognized as a state at the Berlin Congress in 1878. Nier, *supra* note 2, at 305.

³¹ Due in part to the influence of the French revolution, the 19th century was a time of growing nationalism in the Balkans. This nationalism created animosity against the Austro-Hungarians as well as the Turks. As the Balkans strived for independence, other nations in Europe sought to assert their influence in the region to gain a strategical advantage. Thus the region became a political battle ground with the Russians backing the Orthodox Slavs, and the Austro-Hungarians asserting control over the Roman Catholics. When Austria annexed Bosnia-Herzegovina in violation of the agreement reached at the Congress of Berlin, it infuriated Serbia which had just recently gained its own independence from the Turks. Greenway, *supra* note 12.

³² The visit of Archduke Ferdinand was anticipated to offend the Serbs within Bosnia. The choice of Serbia's national day as the date of the visit has been compared to sending a member of the British royal family to Dublin on St Patrick's day at the height of the British resentment there. It may be inferred that the Austrians hoped for a violent reaction by the local Serb population as an excuse for territorial aggression to add Serbia to its empire. Nier, *supra* note 2, at 306.

³³ The agreement was officially formed with the Declaration of Corfu on July 20, 1917. Nier, *supra* note 2, at 307.

and Slovenes, was renamed Yugoslavia in 1929.³⁴ By this time in history, however, the inhabitants of this new nation, though of common ethnic origin, were a heterogeneous population with different concepts of national identity.

In the years following World War I, the new nation of Yugoslavia was an amalgamation of different religious, linguistic, cultural, and political groups that could not easily form a unified national identity. The Croats saw the new nation as an equal partnership between themselves and the Serbs. Serbians viewed the new union as merely an enlarged Serbia. All the while, the individual and defining characteristics of the smaller communities within the new nation formed a bond of cultural identity that was stronger than any concept of Yugoslav nationality.³⁵ These differences evolved into friction between the various groups seeking power within the political framework of the new nation.

Because they represented the largest ethnic group within the new nation and because they fought on the side of the victors in the war with Austria, the Serbs envisioned themselves as the natural leader and dominant power within Yugoslavia. The technologically and industrially superior Slovenes and Croats resented this domination and in many ways retained an identity that was distinctly western.³⁶ Bosnia, even with its large Serb and Croat populations, also contained a large Muslim population which was, of course, descended from those who converted over to the religion of the hated Turks.

World War II did little to ease the ethnic tensions in Yugoslavia as Nazi occupation resulted in genocidal mass executions between the ethnic populations.³⁷ Three main factions developed within the region. In Croatia, the Nazi-like Croat organization known as Ustashi (or Ustaxhi) conducted a campaign of ethnic purification aimed at the Serbs within

³⁴ *Id.*

³⁵ While the notion of a unified state may have had some meaning to some, the majority of the population within the newly formed nation viewed government from a cynic's perspective. Their view of government was a body that taxed their labor, drafted their sons, and threatened their liberty without representation. Rather than trust a government, these people based their loyalty on the religious and cultural identity they knew in their immediate community. SINGLETON, *supra* note 19, at 131-133.

³⁶ The Croats and Slovenes, both former members of the Austrian Empire, resented the Serbs who they considered "uncultured and eastern." Greenway, *supra* note 12.

³⁷ A genocidal Nazi-like Croat organization known as the Ustashi practiced extermination of Serbs, as well as Jews and Gypsies in Croatia. This action met with retaliation on the part of Serb nationalists who carried out massacres of Croat and Muslim populations in mixed areas. *Id.*

Croatia.³⁸ Two other political groups formed to combat the Germans and the Ustasa. One of the groups, known as the Chetniks, favored a greater Serbia under the rule of a Yugoslav monarchy, and the other group was a Communist organization under the command of Josip Broz Tito who had aligned himself with the Soviet Union. Though united in their hatred for the Germans, these two groups were too dissimilar and eventually fought each other.³⁹

From the turmoil of World War II, Tito's communist group emerged as the leaders of a unified nation. Due in large part to his personal strength and vision, Tito guided his nation under the new Federative People's Republic of Yugoslavia, together under communist rule with unprecedented success.⁴⁰ However, when Tito died in 1980, he left a nation without its unifying force.⁴¹

The political leaders that followed based their strength on ethnic and regional interests.⁴² In June of 1991, Croatia and Slovenia declared independence resulting in an on again, off again civil war in Croatia between the local Roman Catholic Croats and the Orthodox Christian Serb minority

³⁸ *Id.* The Ustashi was responsible for numerous atrocities against the Serbs in Croatia. Nier, *supra* note 2, at 308.

³⁹ Throughout the war, Yugoslavia was the battleplace of several mini-wars: the war against the Germans, the war against the Ustashi, and the war between the Chetniks and the Communists. Nier, *supra* note 2, at 309.

⁴⁰ Yugoslavia under Tito's leadership was renowned for its impressive social, economic, cultural, and political advancements. Tito himself was instrumental in the unification of Yugoslavia; under his leadership, Yugoslavia endured as a unified state longer than any previous unified Southern Slav nation. *Id.*

⁴¹ The transition began smoothly but without the single source of strength to lead the government that Tito demonstrated. Factions developed within the collective leadership. Adding to the divisive elements were the economic deterioration in the early 1980's and the Kosovo revolution in Serbia in 1981. RAMET, *supra* note 21, at xvii.

Croatia and Slovenia were the more prosperous and industrious regions in Yugoslavia. As such they no longer wished to subsidize the poorer republics such as Serbia. Serbia, by contrast wanted to retain its power over the government institutions and in so doing continue to receive the economic advantages of association with Slovenia and Croatia. Conflict among the leaders of these regions heightened in 1991, when Serbia and its allies blocked the rotation of the country's presidency to Stipe Mesic, a Croat who the Serbs and their President Slobodan Milosevic feared would assist in de-centralization. Nier, *supra* note 2, at 310.

⁴² RAMET, *supra* note 21 at xvii; see also GOW, *supra* note 21, at 7-8 (noting that no individual could assume Tito's role, but rather those in power represented provincial interests).

with the backing of the Serb dominated Yugoslavian Army.⁴³ Just as the regional and ethnic concerns led Croatia and Slovenia to declare independence, those same concerns persuaded the Roman Catholic Croats within Bosnia and Muslim Bosnians to unite in a majority vote for independence in early March of 1992.⁴⁴ The European Community recognized the independence of Bosnia-Herzegovina a month later.⁴⁵ The next day, April 7, Bosnian Serbs declared their own independence from the newly recognized state of Bosnia-Herzegovina as fighting among the Croats, Muslims and Serbs there escalated into civil war. As in Croatia, the Yugoslav Army sided with the Serb rebels.⁴⁶ More than seventeen thousand had died fighting by late January, 1993 with an additional two million refugees remaining in Bosnia.⁴⁷

⁴³ Slovenia and Croatia, resenting the economic drain of the less wealthy southern republics, pushed for democratic governments in their own region and a loose federation for all the republics of Yugoslavia. Serbia, dissimilarly, wanted to retain the communist system with a strong centralized government which could retain the resources of the other republics while protecting the Serb minorities within them. Nier, *supra* note 2, at 310.

⁴⁴ Of the almost two million citizens who turned out to vote, ninety nine per cent voted in favor of an independent and autonomous republic with those opposed to the election, primarily Christian Orthodox Serbs within Bosnia, boycotting the election. *Bosnian Independence Proclaimed*, *NEWSDAY*, Mar. 4, 1992, at 15.

Forty-two per cent of the population of Bosnia-Herzegovina is Muslim, with thirty two per cent Serb and seventeen per cent Croat. Nick Thorpe, *Yugoslavia: Muslims in Serbian Gunsights - Bosnia Declares Independence*, *Reuter Textline Observer* (Oct. 20, 1991).

The Muslim and Roman Catholic Croat populations in Bosnia fear economic and political domination by communist-ruled Serbia, just as the people of Croatia and Slovenia, shortly before their independence. *Bosnia-Herzegovina decides to seek independence*, *supra* note 7.

⁴⁵ The European Community agreed to recognize the independence of Bosnia-Herzegovina on April 6, 1992. *EC Recognizes Independence of Bosnia - Herzegovina*, *supra* note 10.

⁴⁶ Carol J. Williams, *supra*, note 6. Whereas Croatia and Slovenia had the industry that Serbia and the centralized Yugoslav government could not afford to lose, Bosnia is the home of many ethnic Serbs and most of the federal army's defense industries:

The Yugoslav People's Army purged its top ranks of moderates and non-Serbs just two days before the referendum (for Bosnian independence on March 3), and the pro-Serbian presidency that commands it has vowed not to pull troops out of Bosnia even if voters decide to secede. . . . Bosnia is home to about 1.35 million Serbs and most of Yugoslavia's defense industries.

Id.

⁴⁷ In addition, ten thousand have died in Croatia where fighting resumed again in January 1992 after a year long ceasefire. *Chronology of Yugoslav War*, *Press Ass'n Newsfile* (Jan. 23, 1993).

III. LEGAL BACKGROUND

In the sixteenth century, Grotius charged that certain acts against individuals violated the "law of nature or of nations" thereby solidifying the conceptual notion of crimes against humanity.⁴⁸ The term genocide,⁴⁹ however, did not arrive until Dr. Raphael Lemkin introduced the phrase in response to Winston Churchill's description of Nazi crimes in Poland as "crime[s] without a name."⁵⁰ Inspired by the Nuremberg prosecutions and the need for the prevention and punishment of the crime of genocide,⁵¹ the General Assembly of the United Nations unanimously adopted Resolution 96(I)⁵² establishing genocide as a crime under international law and appealing to member states to enact legislation for the prevention and punishment of genocide. Two years later, on December 9, 1948, the General Assembly approved a draft of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).⁵³

⁴⁸ Bunyan Bryant, *Substantive Scope of the Convention*, 16 HARVARD INT'L L. J. 686 (1975) (citing Goldberg, *Crimes Against Humanity*, 10 W. ONT. L.R. 27 (1971)).

⁴⁹ The term is derived from the Greek word *genos* which means race, and the Latin word *cide*, meaning killing. R. LEMPKIN, *AXIS RULES IN OCCUPIED EUROPE* 79 (1944).

⁵⁰ Kutner, *A World Genocide Tribunal-Rampart Against Future Genocide: Proposal For Planetary Preventive Measures Supplementing A Genocide Early Warning System*, 18 VAL. U. L. REV. 373, at 378 (1983), (citing 127 Cong. Rec. S10519 (Daily ed. Sept. 25, 1981) (statement of Sen. Proxmire quoting Winston Churchill)).

⁵¹ The drafting records indicate that the overriding purpose of the genocide convention was to prevent the recurrence of genocide by assuring punishment of offenders. Diane F. Orentlicher, *Settling Accounts: The Duty To Prosecute Human Rights Violations Of A Prior Regime* 100 YALE L.J. 2537, at 2563 n.105 (1991) (citing U.N. GAOR, 178th, 179th plen. mtg., at 811 (remarks of Soviet delegate); *id.* at 819 (remarks of delegate from Pakistan); *id.* at 820 (remarks of U.S. delegate); *id.* at 823 (remarks of Australian delegate); *id.* at 840 (remarks of Polish delegate)).

⁵² On December 11, 1946, the United Nations General Assembly passed Resolution 96-I which defined genocide as "the denial of the right of existence of entire human groups" such as to shock the conscience. G.A. Res. 96(I), U.N. Doc. A/231 (1946).

⁵³ Kurtner, *supra* note 50, at 379. The Convention came into force on January 12, 1951 after twenty instruments of ratification or accession had been deposited in accordance with Article XIII of the Convention. One of the original states to ratify the convention was Yugoslavia on August 29, 1950. Convention on the Prevention and Punishment of Genocide, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

A. *An Overview of the Genocide Convention*

The first four articles of the Genocide Convention prescribe the substantive principles that now constitute the crime of genocide by declaring genocide "a crime under international law,"⁵⁴ defining genocide as any one of an enumerated list of acts,⁵⁵ designating what acts of genocide constitute "punishable acts,"⁵⁶ and establishing persons punishable for committing genocide under the convention.⁵⁷ Articles V through IX procedurally effectuate the substantive principles of the Convention through a call for local legislation,⁵⁸ establishment of jurisdiction,⁵⁹ defining obligations of extradition,⁶⁰ and recognition of the International Court of Justice (ICJ) as the forum for resolving disputes of interpretation and state responsibility.⁶¹ Articles V through IX envision enforcement through domestic and international procedures. Nevertheless, the vagueness of definition in the former substantive articles and the intrinsic weakness of the enforcement mecha-

⁵⁴ Genocide Convention art. I.

⁵⁵ Article II of the Genocide Convention states:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such:

- (a) Killing members of a group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Genocide Convention art. II.

⁵⁶ Article III of the Genocide Convention provides:

The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

Genocide Convention art. III.

⁵⁷ Genocide Convention art. IV. provides: "[p]ersons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."

⁵⁸ Genocide Convention art. V.

⁵⁹ Genocide Convention art. VI.

⁶⁰ Genocide Convention art. VII.

⁶¹ Genocide Convention art. IX.

nisms provided in the latter procedural articles hinder enforcement of the Genocide Convention.⁶²

The Genocide Convention is not currently enforced on the international level largely because questions of substance and procedure are still unanswered. Though over 100 states have ratified the Convention, no international tribunal has been established to prosecute individuals for offenses under the Convention leaving questions of procedure up to individual states.⁶³ In some instances, a state whose political leaders are

⁶² Situations that arguably call for enforcement have in the past resulted in non-enforcement. The call for application of the Convention in the wake of religious and cultural persecution of the Buddhist population in Tibet by the People's Republic of China in 1959 and 1960 was not answered despite evidence of "killing religious leaders, desecrating Buddhist sanctuaries, prohibiting the practice of the Buddhist religion, and forcibly transferring thousands of Tibetan children to China in an attempt to destroy the Tibetans as a religious group." Paul Starkman, *Genocide and International Law; Is there a Cause of Action?*, 8 ASILS Int'l L.J. 1, at 13,14 (1984).

Similarly the call for application of the Convention after the use of natural disaster and starvation on the part of the Ethiopian government to gain control of Eritrea in 1988 fell upon deaf ears. Jean E. Zeiler, *The Applicability of the Genocide Convention to Government Imposed Famine in Eritria*, 19 GA. J. INT'L & COMP. L. 589 (1989) ("Mengistu is engaged in a deliberate, genocidal attempt to starve the Eritrean people into submission"); see also Lawrence J. LeBlanc, *The Intent to Destroy Groups in the Genocide Convention; the Proposed U.S. Understanding*, 78 AM. J. INT'L L. 369, at 380 (1984).

Another example of non-enforcement may be found in the continuous treatment of the Ache' Indians in Paraguay. The Indians stand in the way of government cultivation of the rain forests. Because of their stance it has been asserted that the government has sought to eradicate the Indians. Several organizations have charged the Paraguay government of attempting to exterminate the Ache' Indians through killing, starving, and incarceration on controlled reservations. "When pressed on the issue, however, the Paraguayan Government cloaked itself in the words 'intent to destroy.' In short, the government claimed that there was no intent to destroy the Ache' Indians, hence genocide was not being committed." Zeiler, *supra*, at 604.

Other claims have been made in regard to actions against Bengalis and Hindus by East Pakistan, actions of Pol Pot in Cambodia (1975-78), and practices of Idi Amin in Uganda (1971-1978). *Id.*; see also, *German Parliament Wants Serbs Branded For Genocide*, The Reuters Lib. Rep. (July 22, 1992) (noting that the U.N. convention against genocide has been difficult to apply, even to the mass killings of a million people under the Khmer Rouge in Cambodia where there was no definitive ethnic group fighting another).

⁶³ Kutner, *supra* note 50, at 387.

accused of genocide may be required under article VI to punish itself.⁶⁴ Additionally, given the ambiguity of language within the first four articles, particularly article II which describes "intent" and defines the victimized "group," there is a great deal of flexibility allowing nations to obscure issues and avoid judicial scrutiny.⁶⁵

B. Substantive Issues

The substantive heart of the Convention is article II which defines genocide as follows:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.⁶⁶

To meet the minimum requirements of this definition, three elements are necessary: (1) an identifiable national, ethical, racial or religious group as the victim; (2) an intent to destroy the group in whole or in part; and (3) identifiable acts in conjunction with the intent to destroy the identified group

⁶⁴ Article VI allows that "persons charged with genocide . . . be tried by a competent tribunal of the State in the territory of which the act was committed." Genocide Convention, art. VI.

It is doubtful that any one person is capable of committing genocide. More likely, acts of genocide are committed under government direction. However, a government that would commit genocide would not likely allow its own law to be exercised against itself. M. Cherif Bassiouni, *International Law and the Holocaust*, 9 CAL. W. INT'L L.J. 201, at 252 (1979).

⁶⁵ See LeBlanc, *supra* note 62 at 380 and Starkman, *supra* note 62, at 38, giving examples such as the situation of the Ache' Indians in Paraguay.

⁶⁶ Genocide Convention, art. II.

victim.

1. *Defining the Victim*

The plain language of article II classifies the victim of genocide as a member of one of the identifiable but limited groups listed: a national, ethical, social, or religious group. Political groups are conspicuously not on the list because some states feared that the inclusion of such an arguably unstable category would create an obstacle to the Convention's ratification. Unfortunately, an unscrupulous entity could attempt to avoid application of the Convention in cases of discriminate killings by labelling the victims as a political group.⁶⁷

2. *Intent*

Related to the question of an identifiable group is the question of intent. Once the victimized group is identified, the plain language of article II states that it is the INTENT to destroy, in whole or in part, a group combined with the acts to carry out this intent that constitute a violation of the Convention. Thus genocide occurs when the intent is to eradicate the individuals for no other reason than that they are a member of the specified group. The destruction of this group without the intent to eliminate the group may be construed as something other than genocide.⁶⁸ Conversely, an unsuccessful attempt to eradicate a group may be punishable under article II if accompanied by the requisite intent to do so.⁶⁹

Further clouding the question of intent is the issue of scope. An assault on members of an identified group, motivated by their inclusion within that group, is not genocide unless accompanied by an intent to destroy that group

⁶⁷ Through the assertion of what amounts to an affirmative defense, the accused state may characterize victims as "political" or "economic" opponents, or even deny that the group exists at all, and in doing so avoid responsibility under the Convention. Starkman, *supra* note 62, at 37.

⁶⁸ "An intended action that results in destruction of a group without intent to eliminate the group is not genocide." P. DROST, *THE CRIME OF STATE* 82 (1959), *quoted in* Zeiler, *supra* note 62, at 604; *see also* Kutner, *supra* note 50, at 381 (noting that "[a]cts committed without intent are not within the purview of the Convention").

⁶⁹ It is not necessary that the actual destruction of the group occurs if intent is shown. Kutner, *supra* note 50, at 381.

in whole or in part.⁷⁰ The ordinary language of article II therefore suggests that genocide does not require the intent to eliminate the whole group, but rather an intent to eliminate the group "in part" is sufficient. Still, it has been argued that intent must contemplate elimination of the entire group, although the actions may eliminate only a portion of the group.⁷¹ This distinction has added significance when one considers that the number of victims may play a key evidentiary factor.⁷² The victim count can be used to demonstrate intent, especially if the aggressor has not expressly asserted his genocidal intention beyond his actions. Therefore, a flexible interpretation of intent is critical if the Convention is to become applicable before an excessive portion of the identified group is eliminated.⁷³

3. Acts

Compared to the vagaries of defining "intent," finding the requisite "acts" is clear. Article II lists specific acts. If any acts are perpetrated with the intent to destroy in whole or in part the identified national, ethnic, racial or religious group, genocide has been committed.⁷⁴ These acts vary from killing members of the group to the forced transfer of children from one group to another, but all the acts listed in article II possess one common characteristic: each act listed depicts an action or actions which would

⁷⁰ Bassiouni, *supra* note 64, at 251; *see also* Bryant, *supra* note 48, at 691 explaining the scope of article II:

From the ordinary meaning of article II of the Genocide Convention, it would seem that the killing of a single person could be considered genocide if the killing were done with the intent to destroy, in whole or in part, the national, ethnic, racial, or religious group of which the victim was a member. On the other hand, without this intent to destroy the group, in whole or in part, mass killings of members of the group would presumably not constitute genocide under the Convention.

Id. at 691.

⁷¹ Some representatives of the Sixth Committee argued that the intent must be to destroy an entire group, but that genocide could be accomplished in stages, initially affecting only parts of the group. LeBlanc, *supra* note 62, at 374.

⁷² Bryant *supra* note 48, at 692.

⁷³ Recognizing the costly evidentiary burden that a requirement of the killing of a very high proportion of group members would impose for application of the Convention, the drafters found it imperative to specify that partial destruction of a group would constitute genocide. *Id.* at 692.

⁷⁴ *See supra* note 55.

contribute to the destruction of the victim group in whole or in part.

The first act described in article II(a), killing members of the group, is a straight forward criteria, but a significant number of group members killed may be required to prove intent. Though it is the most obvious act, killing is not an essential act to constitute genocide. Sections (b) through (e) pose alternative methods such as causing bodily or mental harm, inflicting conditions of life intended to destroy the group, preventing births within the group, and forcibly transferring children from one group to another.

Section (b)—“causing serious bodily or mental harm to members of the group,”—contains broad language that requires some degree of interpretation. No definition of the “mental harm” referred to in section (b) exists elsewhere in the article. However, if section (b) is read in context with the rest of article II, “mental harm” would seem to describe the sort of psychological damage inflicted upon members of the group that would lead to the destruction of that group.⁷⁵ The “mental harm” need not be permanent, nor particularly brutal to constitute the requisite “act” so long as the group can be effectively destroyed through psychological destruction.⁷⁶ Similarly, the conceivable destruction of the group is the requisite behind section (c)—“deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part,”—section (d)—“imposing measures intended to prevent births within the group,”—and section (e)—“forcibly transferring children of the group to another group.”⁷⁷

C. *Jurisdiction and Extradition*

1. *Subject Matter Jurisdiction*

Although the language of Article VI suggests that the drafters envisioned the creation of a world criminal court, such a court has yet to be established. The International Court of Justice (ICJ) is evidence that a world court is possible, but the ICJ is itself limited in that it cannot hear claims against

⁷⁵ See Bryant, *supra* note 48, at 694 (noting that racial, ethnic, or religious epithets are not applicable to the Genocide Convention since they “lack the potential to destroy the group”).

⁷⁶ Bryant gives as an example of mental harm a situation where drugs or brainwashing may be used to prevent parents of a group from instructing their children in the characteristic ways of their group, thus destroying the group, even if the harm to the individual member of the group is reversible. *Id.* at 694.

⁷⁷ Genocide Convention, art. II.

individuals.⁷⁸ Absent an international criminal court, jurisdiction over enforcement of the Genocide Convention against individuals is limited to domestic tribunals.⁷⁹ The plain language of article VI—"persons charged . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed"—designates jurisdiction,⁸⁰ but there remains some question as to the limiting effect of this language. Whereas a narrow interpretation of the language leads to a conclusion that the express terms of article VI limit jurisdiction exclusively to the state where the offense

⁷⁸ Only a state may be a party to a contentious case before the International Court of Justice. International organizations and private persons are excluded. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 903 cmt. a.

As early as 1949, the United Nations International Law Commission (ILC) concluded that an international criminal court is both desirable, and possible. However, as of yet, the only international criminal tribunals established were the much criticized ad hoc Nuremberg and Tokyo tribunals (neither Germany nor Japan participated in the formation of these tribunals which were criticized for violating due process through pre-judgment of guilt, judicial bias, application of ex post facto laws, judges with unclean hands, and procedural irregularities). Michael P. Scharf, *The Jury is Still Out on The Need for an International Criminal Court*, 1 DUKE J. COMP. & INT'L L. 135, at 138-139 (1).

Early attempts to create an international criminal court and a draft Code of Offenses Against the Peace and Security of Mankind were stalled due to a lack of agreement over the definition of aggression. There is, however, evidence of a new call for the establishment of an international criminal court. In 1990, the ILC, U.N. Crime Congress, and the ABA, have all endorsed the concept of an international criminal court. Despite this evidence of growing support for the establishment of such a court, no such court yet exists. *Id.* at 135-139.

⁷⁹ Genocide Convention, art. VI.

⁸⁰ Article VI appears to grant jurisdiction exclusively to the territorial state, but a resolution adopted by a majority of the Legal Committee when considering the Convention professed that the article nonetheless allows any State to bring its own nationals to trial for acts committed outside the forum State. Robert H. Jones, *Jurisdiction and Extradition Under the Convention*, 16 HARV. INT'L L.J. 696, (citing 3 U.N. GAOR, 1st part, 6th Comm., at 717, U.N. Doc. A/633 (1948)); see also SENATE COMMITTEE ON FOREIGN RELATIONS, REPORT ON THE INTERNATIONAL CONVENTION FOR THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, EXEC. REPT. 99-2, 99th Cong. 1st Sess., 23 (1985) [hereinafter REPORT ON GENOCIDE CONVENTION] commenting on nationality jurisdiction:

That the pledge to grant extradition in accordance with a state's laws and treaties in force found in Article VII extends only to acts which are criminal under the laws of both the requesting and the requested state and nothing in Article VI affects the right of any state to bring to trial before its own tribunals any of its nationals for acts committed outside a state.

Id. at 23.

occurred,⁸¹ a more subjective interpretation might conclude that the Convention did not remove the sovereign right of a nation to try its own citizen. At least the majority of states in the Sixth Committee, including the United States, intended that the Convention would not deprive them of the fundamental attribute of sovereignty through the right to try their own citizens.⁸² Therefore, under a subjective analysis, article VI would have to include nationality jurisdiction thereby allowing a state to adjudicate a claim against its own national.

Notwithstanding the language of article VI, the territorial jurisdiction⁸³ established by the Convention may not be exclusive under international law. Should a state find difficulty meeting the subject matter jurisdiction expressly provided within the Genocide Convention, it could argue for universal jurisdiction under customary law. Universal jurisdiction under customary law allows any state to take jurisdiction over genocidal acts, regardless of the offender's nationality and place of commission.⁸⁴

⁸¹ The terms of the article are not ambiguous ("persons charged shall be tried by a competent tribunal of the State in the territory of which the act was committed") and if the signatory states wished to give concurrent jurisdiction they could have. In addition, though such concurrent jurisdiction was favored by a majority of the Sixth Committee, all the signatories did not, nor is there any evidence that such an interpretation was acquiesced in the resolution. Finally, because the accused may have been acting on orders from the government of his state of nationality, such an interpretation in favor of concurrent jurisdiction would be contrary to the object and purpose of the Convention. Jones, *supra* note 80 at 698, (citing 3 U.N. GAOR 1st part, 6th Comm. at 718, U.N. Doc. A/633 (1948)).

⁸² This is the current understanding of the United States Government. *Id.* at 699; *see also* REPORT ON GENOCIDE CONVENTION, *supra* note 80 at 23 (providing "nothing in Article VI affects the right of any state to bring to trial before its own tribunals any of its nationals for acts committed outside a state").

⁸³ The territorial principle provides that a state may assert jurisdiction over genocidal acts taking place substantially within its territorial boundaries. Starkman, *supra* note 62, at 46.

⁸⁴ Universal jurisdiction expands jurisdiction to any state, regardless of the situs of the crime, victim, or offender, due to the inhuman nature of the offence. *Id.* at 49; *See also* Orentlicher, *supra* note 51, at 2562 (noting that customary law establishes universal jurisdiction over human rights violations). Universal jurisdiction for the crime of genocide was widely accepted after Nuremberg, although no state has exercised universal jurisdiction where no other basis for jurisdiction exists. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987), Reporter's notes 1. Israel relied in part on universal jurisdiction in the *Eichmann* case. *See* Israel v. Eichmann, 36 INT'L L. REP. 277 (Sup. Ct. Israel 1962). *Id.* (citing 36 INT'L L. REP. 277 (Sup. Ct. Israel 1962)). In *Matter of Barbie*, the Supreme Court of France ruled that the charges against the defendant transcended local rules of procedure since they implicated crimes against all humanity, as defined by, among

2. *Personal Jurisdiction/Extradition*

Assuming a tribunal procures subject matter jurisdiction, the tribunal must pass the additional procedural hurdle of obtaining jurisdiction over the defendant. Article IV provides the basis for jurisdiction over individuals, including high ranking public officials by mandating punishment for all persons committing genocide "whether they are constitutionally responsible rulers, public officials or private individuals."⁸⁵

Thus the next procedural hurdle for trying the crime of genocide is gaining custody over the defendant. Extradition is the usual method of gaining custody over a defendant located in a foreign land. Extradition requires the exercise of territorial sovereignty by one state over individuals within its borders for the benefit of prosecution and punishment by another state.⁸⁶ Article VII of the Genocide Convention mandates that "[c]ontracting Parties pledge themselves in [cases of genocide] to grant extradition in accordance with their laws and treaties in force."⁸⁷ Such an exercise, however, is not obligatory absent an extradition treaty between the nations.⁸⁸

Unless the defendant is already within the state asserting jurisdiction or a state willing to extradite the accused, asserting personal jurisdiction will be an immense obstacle. Given that such accused individuals may be high ranking public officials as article IV suggests, convincing a state to extradite, even if an extradition treaty exists, may not be possible absent an unconditional surrender.⁸⁹

other things, the Charter of the International Military Tribunal at Nuremberg. *Id.* (citing [1983] Gaz. Pal. Jur. 710 (Cass. crim. Oct. 6, 1983)).

⁸⁵ Genocide Convention, art. IV.

⁸⁶ Extradition is defined as follows: "The surrender by one state or country to another of an individual accused or convicted of an offense outside its own territory and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands the surrender." BLACK'S LAW DICTIONARY 585 (6th ed. 1990).

⁸⁷ Genocide Convention, art. VII.

⁸⁸ The Genocide Convention explicitly recognizes this limitation. In the Convention, state parties pledge only to grant extradition "in accordance with [their] laws and treaties in force." *Id.*

⁸⁹ Article VII of the Genocide Convention provides that a request for extradition must be complied with regardless of the political offense exception, but it does not otherwise facilitate extradition causing states to resort to extralegal methods of gaining personal jurisdiction. Starkman, *supra* note 62, at 51 n.240.

3. Jurisdiction Over States

Although the language of article IV applies to individuals, including state officials, it does not imply that a state could not or should not also take accountability for acts of genocide. Draft Articles on State Responsibility composed by the ILC classify genocide as an international crime subject to state responsibility,⁹⁰ suggesting that a state should be subject to adjudication.⁹¹

Article IX of the Genocide Convention appears to establish compulsory ICJ jurisdiction for adjudication against states:

Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.⁹²

Realistically speaking, however, this provision lacks strength in application. A significant number of states, including the United States, have filed

⁹⁰ Article 19 states in relevant part:

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.

2. An internationally wrongful act which results from the breach by a State of international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime.

3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia*, from: . . .

(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and *apartheid*; . . .

Draft Articles on State Responsibility, Report of the International Law Commission to the General Assembly, 35 U.N. GAOR Supp. No. 10 at 49, 59-68, U.N. Doc. A/35/10 (1980).

⁹¹ "In order to seriously contemplate state responsibility for genocide, it is imperative that the dialogue rise to the level of formal adjudication, rather than mere allegation." Starkman, *supra* note 62, at 26.

⁹² Genocide Convention, art. IX.

reservations to article IX.⁹³ Furthermore, states may attempt to assert their sovereign right to refuse to submit to jurisdiction before the ICJ or to recognize its judgments.⁹⁴ Even if the jurisdiction of the ICJ is considered compulsory under article IX, there is no guarantee that the accused state will choose to attend or comply with decisions of the court.⁹⁵

While the Convention provides jurisdiction over individuals in domestic courts, it makes no reference to jurisdiction over states beyond the ICJ. No rule of international law forbids states to adjudicate claims of genocide committed by another state, but the domestic courts have limited competence under international law to adjudicate claims brought against foreign sovereign states.⁹⁶ Aside from these difficulties, a foreign state such as Yugoslavia or its republics may claim immunity from adjudication and execution of claims against it in the domestic forum of another sovereign state due to lack of consent to jurisdiction.⁹⁷

IV. ANALYSIS

A. Article II Violations

The alleged incidents of "ethnic cleansing" in the former Yugoslavia would provide the ideal working model for application of article II of the

⁹³ Genocide Convention Implementation Act of 1987, 28 I.L.M. 754, 779-84 (1988).

⁹⁴ Starkman, *supra* note 62, at 27.

⁹⁵ See Mark W. Janis, *Somber Reflections on the Compulsory Jurisdiction of the International Court*, 81 AM. J. INT'L L. 144 (1987), (giving the following examples of compulsory jurisdiction cases before the ICJ that were plagued by missing defendants: Iceland in the *Fisheries Jurisdiction* cases, France in the *Nuclear Tests Cases*, Turkey in the *Aegean Sea Continental Shelf* case, Iran in the *Diplomatic and Consular Staff* case, and the United States in the *Military and Paramilitary Activities* case).

⁹⁶ A domestic court can not have valid subject matter jurisdiction over the offense unless by virtue of its national law and can not have jurisdiction over a foreign state unless by virtue of a recognized principle of jurisdiction in international law. Starkman, *supra* note 49, at 34-35; see also RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 451 providing:

Under international law, a state or state instrumentality is immune from the jurisdiction of the courts of a foreign state, but not with respect to claims arising out of activities in the foreign state of the kind that may be carried on by private persons.

⁹⁷ Starkman, *supra* note 62, at 36 (citing *United Nations, Materials on Jurisdictional Immunities of States and Their Property*, U.N. Doc. ST/LEG/Ser.B/20 (1982)).

Genocide Convention. The following indispensable elements of article II are present in the situation in the former Yugoslavia and should be explored in a judicial proceeding: (1) an established identifiable national, ethnic, racial or religious group as the victim; (2) an intent to destroy the group or groups in whole or in part; and (3) identifiable acts in conjunction with the intent to destroy the identified group victim.⁹⁸

1. Bosnian Muslims, Croats, and Serbs are Identifiable Victims within the Meaning of "Group" in Article II

Article II requires the existence of an identifiable national, ethnic, racial or religious group as the victim. An ethnic group is distinguishable as a religious, racial, national or cultural group.⁹⁹ Bosnian Muslims fit this description as well regardless of interpretation of ethnicity.¹⁰⁰ Although it could be argued that Bosnian Muslims are of the same Slavic ethnicity as Serbs, the fact that they constitute a separate religious, social, and at least arguably national block suggests that article II would apply.

Similarly, Croats fall within the definition of "ethnic group" as well as the meaning of "group" in article II. Though Christian like Serbs, Croats belong to the Roman Catholic sect as opposed to the Orthodox Serbs. Additionally, the Croats constitute a separate nationality due to the independence of the former Yugoslav republic of Croatia.

Although most of the attention has been focused on the alleged "ethnic cleansing" on the part of Serbians against Bosnian Muslims and Croats, it must be recognized that many Serbs have also been the victims of ethnic violence within other ethnic enclaves in Bosnia and they too are within the meaning of "group" in article II. In some areas dominated by Bosnian Muslims or Croats, Serbs are, as they have been in the past,¹⁰¹ subject to persecution because of their ethnicity, religion and nationality with possible

⁹⁸ See *infra* section III(A) for an explanation of these substantive requirements.

⁹⁹ THE AMERICAN HERITAGE DICTIONARY 467 (2d ed. 1982).

¹⁰⁰ Prior to 1971, perhaps due to their common South Slav origin, census officials did not even consider Bosnian Muslims a separate ethnic category. Though not recognized as a separate ethnic group until the 1971 census, Muslims today constitute the largest ethnic block in Bosnia. Greenway, *supra* note 12, at 18.

¹⁰¹ See *supra* note 37 (describing the Croat Ustaxhi and their genocidal extermination of Serbs).

genocidal implications.¹⁰²

Though Bosnian Muslims, Croats and Serbs share the same South Slavic ancestry, they have nonetheless developed separate religious, national and cultural identities. Because of these differences between groups, any acts committed with the intent to destroy, in whole or in part, members of the other groups would constitute genocidal action against an identifiable victim within the meaning of article II.

2. "Ethnic Cleansing" on the Part of Military and Paramilitary Forces Against the Bosnian Muslim, Croat, and Serb Civilian Populations in the Former Yugoslavia Implies Genocidal Intent

In cases of civil war, the issue of intent can be easily clouded. A strict interpretation of intent, effectively used, may act as an affirmative defense to charges of genocide.¹⁰³ In Bosnia, the motivation of the Serb forces has been attributed to such factors as political gain¹⁰⁴ and land grab.¹⁰⁵ Forces in Yugoslavia, whether they be Serb, Croat or Muslim, can assert that their actions are primarily directed to suppress political rather than ethnic, religious, social, or national groups.¹⁰⁶

¹⁰² Findings of the Helsinki Watch indicate that serious abuses have occurred on all sides, but "the conditions of detention in Serbian-controlled areas of Bosnia have been particularly brutal." See U.S. Commission on Security and Cooperation in Europe (*Helsinki Commission*), Fed. News Service (Jan. 6, 1993) (statement of D. Pokenpner).

Sources in Belgrade estimate that around 20,000 Serbs are being held captive in detention camps in Bosnia-Herzegovina and Croatia. The "Serbian Council", an independent institution specializing in documenting crimes against Serbs in the former Yugoslavia, reported killings of men in these camps as well as rape of men, women, and children. In addition, the source indicated that Muslims are involved in the slave trade of Serbian children. *Belgrade Centre Says Around 20,000 Serbs Detained in Camps in Bosnia*, Brit. Broadcasting Corp. (Mar. 1, 1993).

¹⁰³ One example occurred in Brazil where the government denied charges of genocide against Indians of the Amazon river by claiming an intent to take possession of their land rather than to eradicate their existence, even though that may be the ultimate result. L. KUPER, *GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY* (1981) cited in Kutner, *supra* note 50, at 94.

¹⁰⁴ See *supra* note 68 and accompanying text for discussion of "political intent" as an affirmative defense.

¹⁰⁵ See Statement of Holly Burkhalter, *supra* note 14 (noting that despite the centuries of ethnic tension, what is really going on is a Serbian "land grab").

¹⁰⁶ See Statement of Rep. Wolf, *supra* note 13 (describing Serbian slaughter of rival ethnic groups as an attempt to eliminate political opposition).

As a result of this possible political action defense, the challenge for the proponent of article II enforcement lies in distinguishing between acts of war directed against a governmental opponent and acts of genocide against the general population.¹⁰⁷ When the acts focus on the identified civilian group, then the charge of genocide is appropriate.¹⁰⁸ Thus where the facts are clear, that "ethnic cleansing" is directed at a civilian population within one of the described groups, ulterior motives such as political or territorial gain should not form an appropriate defense to the charge of genocide.¹⁰⁹

Moreover, it should not be relevant that Serbs view Muslims and Croats as political opponents. Where Serbian actions clearly demonstrate an attempt to eradicate the civilian population of a group victim within the meaning of article II, the claim of political action should not be an appropriate defense to the charge of genocide. An analogous situation would arise should Bosnian or Croat actions against Serb civilian populations take place, even in a war for political independence.

Furthermore, assertions that intent is to eradicate only portions of the identified group, whether Muslim, Serb, or Croat, should also fail. Though some uncertainty exists concerning the scope of intent in this regard,¹¹⁰ the ordinary meaning of the language in Article II suggests that requisite intent includes partial destruction of the identified group.¹¹¹ Thus, any defense of intent to eradicate only a portion of the group would backfire as such intentions will be punishable under Article II.

¹⁰⁷ Zeiler recognized this problem in her article on the Eritrean situation:

Putting aside the question of the Eritreans' right to self-determination, the difficulty lies in distinguishing genocide from deaths normally occurring in the course of war. Inevitably, civilians die during a war, but a legitimate war is *directed* against states/governments and armed forces, and not against general populations.

Zeiler, *supra* note 62, at 605 (emphasis in original).

¹⁰⁸ *Id.*

¹⁰⁹ See *supra* notes 11-18 for specific examples of acts directed against civilian populations.

¹¹⁰ See *supra* notes 68-74 and accompanying text for an analysis of the scope of genocidal intent.

¹¹¹ See Leblanc, *supra* note 62 at 374.

3. *Acts of "Ethnic Cleansing" are Intended to Destroy the Victimized Group in Whole or in Part and Therefore are Acts of Genocide within the Meaning of Article II*

Article II lists several specific acts, each of which depicts an action or actions which would contribute to the destruction of the victim group in whole or in part. The atrocious acts committed in Bosnia certainly would contribute to the destruction of the victim group in whole or in part and are so numerous that every specific subdivision of Article II potentially applies. The incidents of civilian killings are well documented and fall within the definition of Article II(a) "killing members of the group." Similarly episodes of torture, starvation, systematic rape in detention centers, and terrorization in general fall within the scope of Article II(b), "causing serious bodily or mental harm to members of the group," and II(c), "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part."¹¹²

Though less obvious, Article II(d), "imposing measures intended to prevent births within the group," and II(e), "forcibly transferring children of the group to another group," may also be applicable. Arguably, systematic rape of women combined with the slaughter of males within an identified group¹¹³ demonstrate an attempt to prevent further births within that group and to transfer the offspring children of one group to another by forcing Bosnian women to have only Serbian children.¹¹⁴

These particular acts of "ethnic cleansing" in Yugoslavia clearly fall within the substantive provisions set forth in article II. Killing, torture, rape, starvation, the creation of refugees, and terrorization in general constitute actions provided in the enumerated list of genocidal "acts" set forth in article

¹¹² See *supra* notes 11-18 and accompanying text for examples of ethnic killing, rape, torture, burning of villages, the practice of creating refugees, the creation of ethnic ghettos for the purpose of starvation, the creation of detention centers, and systematic abuse in general.

¹¹³ See *Bosnia: Do Something*, *supra* note 16 for specific examples of rape and killing in Bosnia.

¹¹⁴ It has been alleged that the intent of Serbs committing rape of Bosnian Muslim women was to impregnate them with "Christian" babies. *The Babies of Bosnia*, THE GUARDIAN, Jan. 8, 1993.

Alternatively, Serbs have alleged that Bosnian Muslims are engaged in the slave trade of Serbian children. *Belgrade Centre Says Around 20,000 Serbs Detained in Camps in Bosnia*, *supra*, note 102.

II. Taken as a whole, there can be little doubt that acts of "ethnic cleansing" directed at an identifiable "group" within the meaning of the Genocide Convention also contain the necessary element of intent to qualify these actions as genocide within the meaning of Article II of the Convention.

B. Jurisdiction and Extradition

Regardless of the substantive applicability of the Genocide Convention, the document will be of little use without access to a court for adjudication. It is imperative that the international community come together and clear the procedural hurdles that threaten application of the Genocide Convention to atrocities in the former Yugoslavia.

1. Universal Subject Matter Jurisdiction for the Crime of Genocide in Yugoslavia is Open to Any Nation Choosing to Assert It

The situation in the former Yugoslavia has renewed an outcry for the creation of a world criminal court to administer claims of genocide and war crimes violations,¹¹⁵ but the delay in implementing such an organ could create too great an obstacle to realization of an international criminal court in time to adjudicate charges of genocide in the former Yugoslavia.¹¹⁶ Article VI also provides for jurisdiction in the state in which the alleged violations occurred. In addition, alternative jurisdictional means exist outside the convention in the form of nationality and universal jurisdiction.

Because most of the alleged atrocities have occurred in Bosnia-

¹¹⁵ U.N. Creates Panel to Examine Atrocities in Yugoslavia, *supra* note 18; Niall Ferguson, *Why the butchers of Bosnia may not be brought to book in the face of torture executions and 'ethnic cleansing', demands grow for the Serb leaders to be tried for war crimes*, THE DAILY TELEGRAPH, Sept. 2, 1992 at 14; Doyle, *supra* note 16; E.C. official worried by lack of progress at talks, Agence France Presse (Jan. 6, 1993).

¹¹⁶ Canada has requested the creation of an international criminal court to judge alleged crimes in Bosnia-Herzegovina, but diplomats admit that such a tribunal could take two years to come into fruition, even if it gets support. Ferguson, *supra* note 18.

The Committee of Ministers of the Council of Europe gave the go-ahead to the creation of a Court of Human Rights to adjudicate crimes in the former Yugoslavia in November of 1992. EC: Committee of Ministers Favor Setting Up Court For Human Rights in Bosnia, REUTER TEXTLINE, Nov. 7, 1992. But see Starkman, *supra* note 62, at 33 (noting that even where "parties to the European Convention agree to abide by all judicial decisions, as a matter of sovereignty, states retain the power to ignore the decisions of the Court and the Committee of Ministers").

Herzegovina, that country may provide the preferred jurisdiction under article VI. Regrettably, there is no guarantee that Bosnia-Herzegovina will still exist as an independent nation at the time of adjudication. For this reason, a limited interpretation of Article VI, confining jurisdiction to an international tribunal that does not exist or in the state where the offense occurred, would not be effective to protect the victims of an aggressor nation intent on committing genocide.

An alternative jurisdictional option is nationality jurisdiction. Under nationality jurisdiction, the rump Yugoslav republic of Serbia-Montenegro,¹¹⁷ as well as Bosnia and Croatia, could try its own nationals for alleged crimes in Bosnia-Herzegovina before either an international tribunal could be created or another state could assert jurisdiction.¹¹⁸ Such a proposition may already have been contemplated by the current Yugoslav government which on December 16, 1992 submitted a bill to parliament calling for a state committee to examine allegations of human rights violations.¹¹⁹ However, the obvious concern of objectivity inherent in nationality jurisdiction limits the desirability of this choice.¹²⁰

The best alternative is universal jurisdiction by a neutral state, assuming

¹¹⁷ CONST. OF THE FED. REP. OF YUGO. The Constitution was adopted on April 13, 1992 with the consent of the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro. The document certifies that Yugoslavia has an uninterrupted existence as an international entity composed of a voluntary association of Serbia and Montenegro. Furthermore, Article II states that other republics may join the Federal Republic of Yugoslavia as member republics, in keeping with this Constitution.

¹¹⁸ Yugoslav Deputy Federal Minister for Human Rights and Minorities Konstantin Obradovic is quoted as saying that preconditions exist in Yugoslavia for bringing to justice Geneva Convention violators at the national level with appropriate international monitoring. *Reaction to U.N. Resolution On War Crimes*, Brit. Broadcasting Corp. (Oct. 15, 1992).

¹¹⁹ The committee would submit findings to competent judicial bodies. If it should be unable to establish co-operation with judicial bodies outside the Federal Republic of Yugoslavia, the committee may ask for U.N. arbitration. *Yugoslav Government Asks Parliament to Approve War Crimes Investigation*, Brit. Broadcasting Corp. (Dec. 18, 1992).

¹²⁰ In the case of Croat soldiers captured by Serb forces and tried in Serbia for alleged war crimes against civilians, Amnesty International reported that the soldiers were tortured into confession. Marc Weller, *Soldiers Charged By a State in Limbo*, TIMES NEWSPAPERS LIMITED, July 21, 1992. Though this situation is distinct from the scenario of a Serbian trial for alleged war crimes committed by Serbs, it is some evidence of a lack of objectivity in Serbian judicial proceedings.

that one exists and is willing.¹²¹ Under universal jurisdiction, a third party country could assert jurisdiction regardless of the situs of the crime, victim, or offender, due to the nature of the offenses.¹²² Such a scenario could eliminate problems of partiality inherent in nationality jurisdiction, as well as the problem of delay due to the lack of an international criminal court. However, even assuming such universal jurisdiction is established, gaining personal jurisdiction will remain a procedural hurdle.

2. An Extraordinary Effort on Behalf of the International Community will be Required to Gain Personal Jurisdiction Over Many of the Potential Defendants

If charged with failing to ensure their forces comply with the Convention, or actually promoting "ethnic cleansing," Article IV would allow jurisdiction over such political leaders as Serbian President Slobodan Milosevic, Bosnian Serb leader Radovan Karadzic, and Bosnian Serb military commander Ratko Mladic.¹²³ Jurisdiction would also be appropriate for other private individuals alleged to have committed acts of genocide whether they be Serb, Croat or Muslim.¹²⁴ However, achieving personal jurisdiction over the alleged perpetrators in Yugoslavia may prove more difficult.¹²⁵ Although article

¹²¹ During his U.S. Senate confirmation hearings, Secretary of State Warren Christopher said the Clinton Administration would support a specially created war crimes tribunal with jurisdiction in the United States for atrocities committed in the Balkans. Elaine Sciolino, *U.S. Moves Ahead on War-Crimes Tribunal*, N.Y. TIMES, Jan. 27, 1993, at A3.

¹²² Starkman, *supra* note 62, at 49.

¹²³ Lawrence Eagleburger, the US Secretary of State under the Bush administration, named Milosevic, Karadzic and Mladic as potential criminals as well as two Serb paramilitary leaders, Vojislav Seselj and Zeljko Raznjatovic. Annika Savill and Tony Barber, *West Intensifies the Pressure Over Bosnia*, THE INDEPENDENT, Dec. 17, 1992, at 1. Eagleburger calls for those responsible for war crimes in Yugoslavia, including Milosevic, be brought to trial, comparing the "ethnic horror" in Yugoslavia to Nazi genocide. Norman Kempster, *Eagleburger Seeks Balkan Atrocity Trials*, L.A. TIMES, Dec. 17, 1992, at A1.

¹²⁴ Other persons named as possible criminals include a Bosnian Serb who has confessed to the killing of more than two hundred civilians, members of a Croatian paramilitary unit that attacked a convoy of buses killing over fifty Serbian women and children, a leader of a Serbian paramilitary force that has been linked to the practice of expelling non-Serbs from Serb controlled areas in Bosnia, the mass murder of three thousand civilians, a commander of a detention camp where mass execution and torture has occurred, and the camp commander of another camp where fifteen Serbs were beaten to death. Kempster, *id.*

¹²⁵ See *infra* part IV.B.2. for a discussion of personal jurisdiction.

VII of the Convention provides that genocide "shall not be considered as political crimes for the purpose of extradition,"¹²⁶ the Convention does not otherwise facilitate the extradition of alleged violators.

It is unclear as to whether the rump Serbia-Montenegro Yugoslavia would adhere to any existing extradition treaties promulgated in accord with the Genocide Convention. Article XVI of the new Yugoslav Constitution proclaims that the "Federal Republic of Yugoslavia will fulfill in good measure the obligations that arise from international treaties of which it is a party."¹²⁷ However, Article XVII of the Constitution declares that a "Yugoslav citizen may not be deprived of citizenship, deported from the country, nor extradited to another state."¹²⁸ Thus, if Article XVII is read to trump Article XVI, it is doubtful that Serbia-Montenegro will be willing to extradite its own nationals accused of genocide, and an alternative method for obtaining personal jurisdiction will be necessary.

One alternative for gaining custody of Serbian culprits is a decisive Bosnian victory combined with unconditional surrender on the part of the alleged offenders. However, unless the early indications suggesting an unwillingness on the part of the international community to go beyond monitoring the situation¹²⁹ are incorrect, such a result seems unlikely.¹³⁰ Unquestionably, an extraordinary effort on behalf of the international community will be required to compel personal jurisdiction if some of the alleged perpetrators remain in power.

¹²⁶ Genocide Convention, art. VII.

¹²⁷ 1992 YUGO. CONST. art. 16.

¹²⁸ 1992 YUGO. CONST. art. 17.

¹²⁹ E.C. officials suggest the following reasons for continued unwillingness to get tough over Yugoslavia: fear of being dragged into the fighting, a growing suspicion that Moslems as well as Serbs are guilty of provocation, and evidence that existing U.N. trade sanctions are bringing the Serbian economy to its knees. Brocket Hall, *E.C. Takes "Softly Softly" Approach in Yugoslavia*, Agence France Presse (Sept. 13, 1992).

However, western foreign ministers are moving closer to endorsing a proposed United Nations Security Council resolution that would permit the use of force to stop Serbian military flights in Bosnia-Herzegovina, though no country as of yet is prepared to commit ground troops. Annika Savill and Tony Barber, *supra* note 132.

¹³⁰ As of January 6, 1993 Serb forces occupied two thirds of Bosnian territory. *Peace Plan for Bosnia Gets Push*, ATLANTA J. CONST., Jan. 6, 1993 at A3.

3. *Jurisdiction by the ICJ Over the Baltic States Will Not Adequately Develop the Law of Genocide*

Given the difficulty of obtaining personal jurisdiction over the alleged offenders of the Genocide Convention, political leaders may be willing to settle for adjudication before the ICJ.¹³¹ Achieving Article IX jurisdiction of the ICJ over the Baltic states of the former Yugoslavia may, however, be an overly optimistic goal as it is unlikely the warring factions there would participate. Considering that a state accused of genocide would likely evade this kind of public condemnation, it is doubtless that such a state would refuse voluntary submission to the Court's jurisdiction, even if jurisdiction is considered compulsory.¹³²

If jurisdiction is considered compulsory, a ruling absent participation and compliance by one party would have some value in the development of the law of genocide. However, while the importance of clarifying the substantive provisions of Article II is substantial, the practical implications of such a ruling in regard to extracting compliance or punitive effect in the former Yugoslavia may be nothing more than wishful thinking. It is doubtful that a country willing to flaunt international law through the practice of genocide would adhere to an adverse ruling of the ICJ.

Before the dispute is over, it is unlikely that Serbia, Croatia, or Bosnia would voluntarily submit to the kind of scrutiny the ICJ would subject upon them. Once the war is over, jurisdiction over the victors would be even less likely.¹³³ Without jurisdiction, compliance, and participation by all parties to the dispute, a ruling by the ICJ would have limited effect. Therefore, while the ICJ may be a source of some substantive clarification in regard to article II, such jurisdiction will probably fail to adequately develop the law of genocide.

¹³¹ As an alternative to the specially created tribunal in the United States, Secretary of State Warren Christopher also suggested that the Clinton administration would support war crimes trials before the ICJ for the alleged atrocities committed in the Balkans. Sciolino, *supra* note 21, at A3.

¹³² Starkman, *supra* note 62, at 27.

¹³³ In addition, war crimes trials would be unlikely until the war is over. "If you win, you can try the other side's leaders; if you lose, you can try your own scapegoats." Ferguson, *supra*, note 115, at 14.

V. CONCLUSION

The vague notions of intent and group identity described in Article II of the Genocide Convention are in need of the kind of scrutiny and clarification that often are the product of an adversarial proceeding. Clearly, the situation in the former Yugoslavia could provide the substance with which to decide these issues to its jurisdiction.

However, absent the assertive intervention and co-operation on the part of the international community unparalleled since Nuremburg, effective judicial proceedings against alleged genocide in Bosnia-Herzegovina faces formidable procedural obstacles. In the absence of an international criminal court, subject matter jurisdiction may be limited to local tribunals. Even assuming a competent tribunal is formed or found, it is unlikely high ranking Serbian officials would submit.

It is imperative that the international community come together in some form, either in the formation of a permanent or ad-hoc international tribunal, or some other fashion to establish a competent organ to adjudicate issues under the Genocide Convention. It has been asserted that the Genocide Convention was inspired by the Nazi holocaust. The question in regard to its application in Bosnia-Herzegovina must be, 'how much more inspiration do we need?'

John Webb