January 1995

Security Council Resolution 808: A Step Toward a Permanent International Court for the Prosecution of International Crimes and Human Rights Violations

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SECURITY COUNCIL RESOLUTION 808: A STEP TOWARD A PERMANENT INTERNATIONAL COURT FOR THE PROSECUTION OF INTERNATIONAL CRIMES AND HUMAN RIGHTS VIOLATIONS

I. INTRODUCTION

The United Nations recently created international tribunals to prosecute international crimes and human rights violations in Rwanda¹ and Yugoslavia.² On February 22, 1993, the United Nations' Security Council passed Resolution 808 which proclaimed that "an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law in the territory of former Yugoslavia since 1991."³

² See also, Luis Torres de la Llosa, Council Approves UN Criminal Tribunal on Rwanda, AGENCE FRANCE PRESSE, Nov. 8, 1994, available in LEXIS, Nexis Library, News File (reporting that the United Nations Security Council decided to establish an international tribunal on the genocide in Rwanda despite opposition from the current Tutsi-dominated Rwandan government).
³ Id. See also Peter S. Canellos, Bosnia War Crimes Tribunal Poses Test, THE BOSTON GLOBE, November 6, 1994, at 21 (reporting that the United Nations Tribunal would convene in The Hague on Tuesday, November 8, 1994. At the tribunals' opening session the chief prosecutor, Richard Goldstone, a South African Judge, is expected to request that Germany turn over Dusan (Dule) Tadic, a Bosnian Serb suspected in the genocide of Muslims in the Bosnian region of Prijedor. Tadic has been charged with torturing and murdering prisoners at a Bosnian Serb camp full of Muslim civilians.).
Previous attempts to create international criminal courts have failed. The court established by Resolution 808 may faltter for similar reasons. Two primary obstacles must be overcome to ensure Resolution 808 is effective. First, earlier courts failed due to the lack of consensus in defining what constitutes an offense against international law. The tribunal established under Resolution 808 must find and apply a concrete body of international criminal and humanitarian law in order to operate successfully. Second, previously attempted international courts failed because nations were reluctant to surrender a part of their sovereignty necessary for the creation of an effective system of international justice.

This comment examines the difficulties involved in implementing Resolution 808, and also its contribution to the development of a permanent international criminal court (hereinafter "ICC"). The comment begins with an overview of Security Council Resolution 808. The comment next considers the factors that have stopped previous attempts to create an ICC. Finally, the author proposes that a permanent ICC could and should be implemented and that the earlier difficulties in establishing such a tribunal have been overcome.

II. RESOLUTION 808

A. ALLEGED VIOLATIONS IN FORMER YUGOSLAVIA

The need for an international court which deters and prosecutes international crimes is evidenced by the alleged viola-
tions in former Yugoslavia. Substantial evidence exists that grave violations of humanitarian law have occurred in former Yugoslavia since 1991. Civilians have been tortured and executed. These atrocities encompass inhumane treatment and execution of hospitalized civilians, pillaging and burning of villages, and murder of unarmed civilian children. Police forces have tortured, raped and killed; soldiers have destroyed houses, mosques, and cemeteries, and mass executions are alleged. Reports of mistreatment in detention centers include allegations of severe beatings, the disappearance of individuals, denial of food and water, humiliating treatment, torture, unsanitary conditions, and killings.

The United States has completed its own investigation

10. Commission of Experts on Former Yugoslavia Will Submit Final Report by 2 May, FEDERAL NEWS SERVICE, April 18, 1994, available in LEXIS, Nexis Library, News Files. The final report of the United Nations Commission of Experts on Former Yugoslavia has found that the number of incidents of rape, torture and murder are "appallingly high." The commission concluded that (1) the events in Opstina Prijedor since April 1992 constitute crimes against humanity and that it would probably be possible to establish that genocide has been committed there; (2) a large number of persons have been subjected to torture, rape and other forms of sexual assault; (3) the civilian population has been deliberately attacked on numerous occasions in and around Sarajevo, since April 1992; (4) acts of wanton destruction were committed in the Medak Pocket in September 1993; and (5) civilian person and civilian objects, including cultural property, were deliberately attacked in Dubrovnik during the St. Nicholas Day bombardment of 6, December 1991.
12. Id.
13. Id. at 8.
14. Id.
15. Id.
16. Letter from the Charge D'Affaires, supra note 11, at 9.
17. Id. at 10.
18. Beatings include being kicked and hit by bats, pieces of wood, metal bars, hoses, and wire cables. Id.
19. Incidents of torture include cutting prisoners, breaking fingers and arms and then repeating the process once the victims healed. Id. at 13. Also, there are reports of forcing a prisoner to rip another's testicles with his teeth. Id. at 14, 15.
20. Id. at 12.
into the plight of former Yugoslavia. The resulting report attempted not to duplicate information provided by other nations. The report contains allegations of the execution of entire families, decapitation of prisoners, torture, and sexual abuse. These are crimes against humanity, and they are not limited to former Yugoslavia. Yet without an ICC to deter and prosecute crimes against humanity, these atrocities will likely go unpunished.

B. RESOLUTION 808

The United Nation's Security Council unanimously adopted Resolution 808 on February 22, 1993. Resolution 808 establishes an international tribunal to prosecute the flagrant violations of humanitarian law in former Yugoslavia. The Security Council recalled paragraph 10 of its resolution 764 reaffirming that all parties in former Yugoslavia are bound to
comply with their obligations under international law, and in particular under the Geneva Conventions of August 12, 1949.\textsuperscript{34}

Through Resolution 808 the Security Council sounded an alarm at continuing reports of widespread violations of international humanitarian law,\textsuperscript{35} including reports of mass killings and the systematic perpetration of ‘ethnic cleansing’ occurring within the territory of the former Yugoslavia.\textsuperscript{36} Resolution 808 requested that the Secretary-General of the United Nations submit a proposal on the steps deemed necessary for the creation and operation of the tribunal.\textsuperscript{37}

C. THE REPORT OF THE SECRETARY-GENERAL OF THE UNITED NATIONS

On May 3, 1993, pursuant to Resolution 808 and the draft proposals of the member states, the Secretary-General submitted his report.\textsuperscript{38} The report examines the legal basis, competence, organization, proceedings, and general provisions of the international tribunal.\textsuperscript{39} The Secretary-General concluded

\textsuperscript{34} Id. Furthermore, the Security Council reaffirmed that persons who commit or order the commission of grave breaches of the conventions are individually responsible in respect of such breaches. Id. See also Convention of the Amelioration of the Condition of Wounded and Sick of Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for Amelioration of the Condition of Wounded, Sick and Shipwrecked of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 and the Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

\textsuperscript{35} S.C. Res. 808, supra note 2, at 2.

\textsuperscript{36} Id.

\textsuperscript{37} Id. The Secretary-General was required to submit his proposal within 60 days of the adoption of Resolution 808. Id.


\textsuperscript{39} Id. at 3-4. The introduction of the report restates the previous actions of the Security Council, specifically Resolutions 684, 771, and 780.

Resolution 764 of July 13, 1992, reaffirms that all parties are bound to comply with the international humanitarian law, including the Geneva Convention and that all persons who commit grave breaches will be held personally responsible.

Resolution 771 of August 13, 1992, in part, expresses the Security Council’s alarm at reported violations of humanitarian law including mass forcible expulsion
that the Security Council would not be legislating new law, but would apply existing international humanitarian law.\textsuperscript{40} The Secretary-General proposed that the Security Council, under Article 29 of the UN Charter,\textsuperscript{41} establish the international tribunal,\textsuperscript{42} and suggested the adoption of a statutory scheme relating to jurisdiction, court procedure, rights of the accused, judgments, appeals, enforcement, and general provisions.\textsuperscript{43}

III. PRIMARY OBSTACLES TO THE IMPLEMENTATION OF AN INTERNATIONAL CRIMINAL COURT

Difficulties inherent in the concept of an ICC can best be appreciated through examination of previous failed attempts.\textsuperscript{44} The concept of an international criminal tribunal, which holds individuals responsible for crimes against humanity, dates back at least five centuries.\textsuperscript{45} Two obstacles defeated
past efforts to create an effective international tribunal. First, the lack of consensus as to the governing international law and second, the resistance of nations to surrender limited sovereignty.46

A. THE LACK OF INTERNATIONAL LAW

A Court designed to deter offenses against humanity and serve world peace was conceived as early as 1865.47 The idea was never realized in part because of the lack of governing international law.48

In 1895, the Red Cross suggested the creation of a court to sanction the continuing violations of the rules of war.49 However, the Institute of International Law rejected this idea because no code existed which specified either penalties or enforcement procedures.50

The lack of an international criminal code has continued to be one of the recurring controversies connected with the creation of an international criminal tribunal.51 Nullum crimen sine lege52 is a general principle of penal law which means

...
there is no crime without the law. Since this general principle of penal law is recognized by all legal systems, no nation could legitimately recognize an international tribunal which had no laws to enforce. 53

After World War I, the victors attempted to establish an international court to try offenses against humanity. 54 The British government argued for an international tribunal to prosecute the German Kaiser and other offenders, for crimes against the laws of humanity. 55 The theory that a head of state was responsible for international crimes and that superior orders might not serve as a defense in every case added a new dimension to legal developments in international penal law. 56

Ultimately the Dutch Government refused to extradite 57 the exiled Kaiser, citing as a ground for refusal the absence of an international statute defining the specific offenses alleged to have been committed. 58 Prosecution of offenses against hu-
manity would again be prevented by the lack of international law.\(^9\)

The United Nations has repeatedly failed to adopt an international criminal code.\(^60\) In 1954, the International Law Commission (hereinafter "ILC") drafted the *Code of Offenses Against the Peace and Security of Mankind*\(^61\) (hereinafter "the Code") and submitted it to the Sixth Committee of the United Nations.\(^62\) In the past thirty-nine years the Code has been reintroduced numerous times, but neither the Code nor any other comprehensive international criminal code has been adopted.\(^63\)

**B. REFUSAL TO SURRENDER THE SOVEREIGNTY NECESSARY FOR AN INTERNATIONAL COURT**

The Hague Peace Conferences of 1899 and 1907 displayed the unwillingness of nations to submit to the jurisdiction of an international court.\(^64\) The First Hague Peace Conference occurred when Emperor Nicholas II of Russia, in 1899, convened twenty-six sovereign states to discuss the arms race and disarmament.\(^65\) The conference failed to create an international court with compulsory jurisdiction which would transcend national boundaries.\(^66\) Although the Hague Conference did

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\(^{59}\) Id.


\(^{63}\) See A Step, supra note 47 (providing a detailed history of failed attempts to create an international criminal code).

\(^{64}\) A Step, supra note 47, at 7-14.

\(^{65}\) The Queen of the Netherlands made the Royal Palace at The Hague available for participating diplomats, military officials and Ministers to discuss ways and means to preserve peace. This event is significant in that it marks "the first truly international assemblies meeting in time of peace for the purpose of preserving peace." Id. at 7.

\(^{66}\) Id. at 7-8.
create the Permanent Court of Arbitration, the court never functioned on a permanent basis. In eighty years, the Permanent Court of Arbitration decided roughly twenty cases.

The Permanent Court of Arbitration exemplifies the second difficulty in establishing a court for the prosecution of international crimes, namely, the unwillingness of nations to be bound by an impartial international body. In fact, the United States expressly reserved the power to answer any "purely American question." The Permanent Court of Arbitration was a tribunal lacking mandatory jurisdiction, and therefore without any actual authority. This scenario fore-shadowed the fate of subsequent attempts to establish an international court. The failure of the Permanent Court of Arbitration demonstrated that unless there is a willingness on the part of nations to surrender a part of their sovereignty, an impartial international tribunal will never succeed.

The Second Hague Conference further revealed how nationalism deters the implementation of a tribunal to settle

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67. The Permanent Court of Arbitration was a "list of possibly non-professional persons who would sit when and if the parties to a dispute called upon them. The only thing that was permanent about it was its location. It was established in the Hague and it is still there to this very day." Id. at 8.
68. Id.
70. Id. at 9.

The United States had submitted a plan for an International Tribunal rather than an arbitration panel but even that proposal left it completely up to the disputing parties whether or not they turned to arbitration, and the United States suggestion received scant consideration. That should have come as no surprise since the United States left no doubt about the fact that nothing in the Convention could be 'construed to imply a relinquishment by the United States of America of its traditional attitude toward purely American questions.' That reservation, which was to crop up repeatedly in the following years, echoed the Monroe Doctrine that as far as the western hemisphere was concerned, all other States were to keep hands off the United States preserve.

Id.

71. Id. at 9.
72. See id.
international disputes. At the Second Hague Conference, the United States supported a non-political international court made up of fifteen judges who would construct a body of international law in fifteen year terms. Nevertheless, the United States still reserved the right to resolve “any purely American issue.” Ultimately, the nations failed to agree on the basis of power of the international tribunal and thereby prevented the creation of the court. The conference ended with the statement “the understanding necessary for the establishment and operation of the projected institution has not been reached.”

The League of Nations and the efforts associated with it also failed in part due to the continuing reluctance of states to surrender sovereignty. In 1919, the Covenant of the League of Nations was adopted. The Covenant stated that the purpose of the League was to “promote international cooperation and to achieve international peace and security by the acceptance of obligations not to resort to war . . . by establishment . . . of international law as the actual rule of conduct among Governments, and by maintenance of Justice.” The Permanent Court of International Justice (hereinafter “PCIJ”) was an offspring of the League, although not an integral organ of the organization. The PCIJ’s jurisdiction was limited to

73. See generally id. for a discussion of the historical and political background of the Second Hague Peace Conference.

74. Id. at 11-12. The United States had put forth this proposal at the First Hague Peace Conference in 1899. Joseph H. Choate, aided by James Brown Scott, submitted the proposal as directed by Secretary of State Elihu Root. The United States Delegate emphasized that “the court should sit as a judicial, not as a diplomatic or political tribunal. Questions of special national interest should be excluded because the intent clearly is to decide a controversy not by national law but by international law.” Id. at 12.

75. A Step, supra note 47, at 11-12 (citing Heinrich Lammasch, Compulsory Arbitration at the Second Hague Conferences, 2 AM. J. INT’L L., 731 (1908)). “The United States continued to insist, as it had in the past, that it would not relinquish its right to exclude issues that, in its own view, involved vital interests, independence, and honor” or that were “purely American questions.” Id.

76. Id. The center of conflict was the issue of binding arbitration. Only two nations, Denmark and the Dominican Republic, were willing to submit all disputes to binding arbitration. A Step, supra note 47, at 12.

77. Id. at 13.

78. See id. at 25-27.

79. Id. at 26.

80. Id. See LEAGUE OF NATIONS COVENANT, art. 1, para. 1.
disputes “which the parties thereto submit to it.” 81 Again, the United States consistently reserved the right to settle any issue which affected its interests. 82 This recurring and consistent attitude of the United States remained unchanged. 83 The PCIJ, a court without mandatory jurisdiction, was yet another failed attempt at an international court. 84 An international court cannot function effectively without a code of law and compulsory jurisdiction. 85

Attempts in the 1930's to establish an international tribunal suffered from obstructions which could still threaten the effective implementation of an ICC. 86 The world economic depression which followed World War I shifted the focus away from international issues and toward more domestic concerns. 87 Then, in 1934, King Alexander of Yugoslavia was assassinated in the Balkans. 88 The assassination resulted in discussions about drafting an international penal code to define terrorism, and a statute to create an International Penal Court to hear cases involving that crime. 89 The League of Nations held a conference in Geneva in 1935, and drafted the Anti-Terrorism Convention and the Convention for an International Criminal Court. 90 However, these conventions never entered into force because nations failed to ratify them. 91 The refusal of nations to surrender a fraction of their sovereignty defeated the International Penal Court for the prosecution of terror-

81. A Step, supra 47, at 27.
82. Id. Art. 21 of the Covenant of the League of Nations “allowed the United States to exclude from the obligations of the Covenant its own understandings regarding its rights under the Monroe Doctrine.” Id.
83. Id. at 34, Ironically, the United States never joined the League of Nations due to the Senate’s failure to ratify the Covenant. Although a majority of the United States Senate voted in favor of joining the League, it failed to achieve the required two-thirds vote.
84. Id.
85. See generally A Step, supra note 47.
86. Id at 48.
87. Id.
88. Id.
89. Id. See also, First Draft of a League Convention on Terrorism and an International Court, May 8, 1935.
90. A Step, supra note 47, at 48.
91. Id. at 54. India was the only nation to ratify the Convention on Terrorism. No nation ratified the Convention for an International Criminal Court. A Step, supra note 47, at 54. See U.N. Doc. A/C.6/418 (1972).
ism, and this resistance still threatens the implementation of Resolution 808.

IV. DEVELOPMENTS WHICH MAKE AN INTERNATIONAL CRIMINAL COURT POSSIBLE TODAY

A. INTERNATIONAL CRIMINAL LAW EXISTS TODAY

1. The Hague Peace Conventions

The conventions created at the Hague Peace Conferences were the beginnings of substantive international criminal law. While the Hague Peace Conferences did not succeed in establishing an international court, they nevertheless resulted in major developments in international law. The Hague Conferences resulted in a treaty that is one of the fundamental bases for the substantive law that an international criminal court would apply. The Hague Peace Conferences adopted the "Convention with Respect to the Laws and Customs of War on Land." The convention stated in its preamble that "populations and belligerents remain under the protection and empire of the principles on international law...." The convention prohibits the attacking of undefended areas, and the pil­lage and confiscation of private property. The convention further states that "the right of belligerents to adopt means of injuring the enemy is not unlimited." The convention repre­sents a major step in the condemnation of the unlawfulness of war and the protection of human rights. The conventions

92. Id.
93. See generally, MANLEY O. HUDSON, INTERNATIONAL TRIBUNALS, PAST AND FUTURE (1944) (discussing the contributions of the Hague Conventions to the de­velopment of international law).
94. Id.
96. BENJAMIN FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARDS WORLD PEACE (1980) at 10-11 [hereinafter "A Step"]).
97. Id. at 9-10.
98. Id. at 10.
99. Id.
100. See id. at 10.
resulting from the Hague Conferences are significant in that they are part of the substantive international humanitarian law which the international tribunal for former Yugoslavia will apply. Furthermore, the Hague Convention provides the foundation for the law to be applied by a permanent ICC.

2. The International Military Tribunals

The Nuremberg and Tokyo War Crimes Trials evidenced that crimes against humanity have been accepted as offenses under international law. After the first World War, prosecution of persons for offenses against humanity was precluded by the lack of an applicable penal code. Furthermore, the privileges of a sovereign head of state traditionally included immunity from the criminal jurisdiction of the courts of another nation. However, the atrocities of World War II led to the inclusion of crimes against humanity as part of accepted, customary international law.

In the face of Nazi atrocities, the United States and the United Kingdom informed Germany that offenders would be tried and punished for violations of international law. The

102. Id. In the view of the Secretary-General, the application of the principle nullum crimen sine lege requires that the international tribunal should apply rules of international humanitarian law which are beyond doubt part of customary law so that the problem of adherence of some but not all nations to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law. Id.
103. A Step, supra note 96, at 62-63. Dr. Bohuslav Ecer of Czechoslovakia submitted a document showing the evolution of aggressive war as an international crime to the United Nations War Crimes Commission (UNWCC). In it, Dr. Ecer refers to the Covenant of the League of Nations, the 1924 Geneva Protocol for the Pacific Settlement of Disputes, the Kellogg-Briant Pact of 1928, and the work of the German jurist Jhering. Id.
104. See Id.
106. Id.
107. A Step, supra note 96, at 56 (citing Statements by Pres. Franklin D. Roosevelt and Prime Minister Winston Churchill on Oct. 25, 1941; Punishment for War Crimes, the Inter-Allied Declaration signed at St. James Palace, London on January 13, 1942, and relative documents, (HMSO); Report of Robert H. Jackson United States Representative to the International Conference on Military Trials,
London Charter of August 8, 1945, established the International Military Tribunals (hereinafter “IMT”) for the trial of major war criminals at Nuremberg and Tokyo.

The charter of the IMT cited treaties and international declarations stating that aggressive war and war crimes are punishable regardless of rank or station. Crimes against humanity were defined in the charter as murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during a war, or persecutions on political, racial, or religious grounds. The IMT Charter was accepted as valid international law, therefore the maxim *nullum crimen sine lege* was upheld, and the accused were held responsible for their acts.

The IMT for the Far East was based on the Nuremberg Charter. It created an *ad hoc* international court to hear cases of crimes against peace, war crimes and crimes against humanity. The Tokyo trials generated more criticism than the Nuremberg trials because they involved intricate questions of procedure, crimes of omission, and acts of retaliation. Extreme precautions were taken to ensure not only...
that justice was done, but also that justice appeared to have been done. The Tokyo and Nuremberg trials resulted in a total of forty-seven convictions of international crimes against humanity, for which nineteen major war criminals were hanged.


The Genocide Convention of 1948 and the Geneva Conventions of 1949 are additional concrete bodies of substantive international law. These conventions minimize the problem presented by the lack of a criminal code for an international court. These conventions codify war crimes and crimes against humanity, and diminish the ex post facto impediment to an international court.

The 1948 Convention for the Prevention and Punishment of Genocide was an attempt by the United Nations to deter future atrocities like those committed in Nazi Germany.

117. The trials lasted over two years, admitted more than four thousand documents into evidence and called more than four-hundred witnesses. The official reports of the Tokyo Trial consisted of almost fifty-thousand pages, approximately one hundred volumes. Id. at 78.


121. Report of the Secretary-General, supra note 95, at 9.

122. Meron, supra note 54, at 6. The author suggests that although the definition of war crimes is now well developed, the same is not true of the penalties for the offenses. The Geneva Conventions define the offenses but allows for the contracting parties to determine the sanctions to be implemented. Therefore, the terms of imprisonment used by the tribunal should not exceed the national laws of states implementing the convention and of former Yugoslavia.

123. A Step, supra note 96, at 11-12. See also, supra note 52 and accompanying text and Report of the Secretary-General, supra note 95, at 9.

124. A Step, supra note 96, at 5-16.
The charter of the United Nations encourages the "progressive
development of international law." Consequently, the Sixth
Committee of the United Nations General Assembly unani­
mously resolved that genocide be confirmed as a grave crime
for which perpetrators and their accomplices should be held
criminally liable. The 1948 Convention for the Prevention
and Punishment of Genocide established genocide as a crime
under international law whether committed in time of war or
in time of peace. The Genocide Convention represents a
portion of the international criminal law that an ICC could en­
force.

The atrocities of Nazi Germany also resulted in further
codification of international humanitarian law. The Geneva
Conventions of 1949, which constitute an essential part of
the body of international humanitarian law, contain provisions
on willful killing, torture or inhumane treatment, destruction
of property, unlawful deportation, and the taking of civilians as
hostages.

125. Id. at 6 (citing U.N. Charter, art. 13, ¶ 1(a)).
126. Id. at 15.
127. The Genocide Convention, supra note 119 at art. I.
128. Id. The Convention specifically outlaws Genocide, with specific sections
relating to killing members of a group, causing serious bodily or mental harm to
members of the group, and deliberately inflicting on the group conditions of life
calculated to bring about its physical destruction in whole or in part. See also,
Report of the Secretary-General, supra note 38, at 9.
130. The Geneva Conventions, supra note 120. In 1949, the Red Cross opened
the four conventions for signature. Draft Code, supra note 105, at 11. See also,
Gutterage, The Geneva Conventions of 1949, 16 BRIT. Y. B. INT'L L. 294 (1949);
(1952).
131. The Convention Relative to the Protection of Civilian Persons in Time of
War, supra note 120, art. I (1949). The convention defines the following as inter­
national crimes:
a) willful killing;
b) torture or inhuman treatment, including biological experiments;
c) willfully causing great suffering or serious injury
to body or health;
d) extensive destruction and appropriation of property,
not justified by military necessity and carried out unlawfully and wantonly;
e) compelling a prisoner of war or a civilian to serve
in the forces of a hostile power;
f) willfully depriving a prisoner of war or civilian of
the rights of a fair and regular trial;
g) unlawful deportation or transfer or unlawful confinement of a civilian;
The Geneva Conventions expanded the basic principles of humanitarian law set forth in the Nuremberg Charter. These treaties restate and redefine acts which violate human rights under an objective standard of international law. However, despite the fact that one hundred countries have agreed to the Geneva Conventions, the great missing piece is a permanent court.

4. Draft International Criminal Codes

Finally, a draft international criminal code exists today. Scholars and members of the United Nations have made substantial progress in drafting an international criminal code. Terrorism, aircraft hijacking, and world environmental crimes are a few examples of modern incidents which call for international solutions.

M. Cherif Bassiouni published a draft international criminal code (hereinafter Draft Code) in 1980. The first part of the Draft Code surveys the history, scope and content of international criminal law. The second part is the main body of the work which lists and defines crimes, and includes

and
h) taking civilians as hostages.

Id.

132. Id. These Conventions codified existing customary international law, updating the 1907 Hague Convention Respecting the Laws and Customs of War on Land. See also, Draft Code, supra note 105, at 11.
133. See Draft Code, supra note 105, at 11.
134. Omicinski, supra note 118, at 1.
138. Professor Bassiouni, LL.B., J.D., LL.M., S.J.D., is a Professor of Law at DePaul University, the Secretary-General of the International Association of Penal Law, and the Dean of the International Institute of Higher Studies in Criminal Sciences.
139. Draft Code, supra note 105.
sections on enforcement and defenses. The Draft Code also details relatively new crimes such as hijacking, hostage-taking, crimes against internationally protected persons, theft of national treasures and unlawful medical experimentation. Professor Bassiouni's Draft Code was submitted to the Sixth United Nations Congress in Caracas in 1980.

The International Law Commission, a sub-division of the United Nations, has also made great strides in developing a draft international criminal code. The ILC drafted a model statute for a new criminal court and a model international criminal code listing international crimes. Although the Draft Code has not been ratified to date, the International Law

141. Draft Code, supra note 105, at 52-106. Art. V, § 1, of the Draft International Criminal Code, "Acts Constituting Crimes Against Humanity," is drawn directly from the United Nations Declaration of the Principles of the Nuremberg Charter and Judgement. The enumerated crimes consist of murder, extermination, enslavement, deportation, and other inhumane acts done against a civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried out in the execution of, or in connection with any crime against peace or any war crime. Id. at 75.

142. Id.


144. See Crawford, supra note 136, at 141.

145. Waddell, supra note 137, at A18. In 1954, the Commission first presented the General Assembly with a Draft Code of Offenses Against the Peace and Security of Mankind, but it was not approved. Several proposals for an international criminal tribunal and international criminal codes have been offered since then, however none of these have been ratified to date.

See, Draft Code, supra note 105, at ix, stating that the resistance of States towards the international code was connected with the advent of the cold war and the ensuing era of distrust among nations with different political ideologies.

See also, William M. Evan, The Case for an International Court, Chicago Tribune, May 4, 1991, at 21. The only current permanent judicial body of the United Nations is the International Court of Justice [hereinafter ICJ]. The ICJ is concerned exclusively with civil matters and with States, as opposed to protecting individual rights. The author suggests that there is a high consensus that aggression, genocide, the use of force against internationally protected persons and the taking of civilians as hostages, are international crimes.
Commission continues to develop its draft for a permanent international court for the prosecution of human rights violations.\textsuperscript{146}

B. \textbf{NATIONS ARE DETERMINED TO PROSECUTE INTERNATIONAL CRIMES}

The willingness of Nations to surrender the fraction of their sovereignty necessary for the prosecution of international crimes has taken generations to develop.\textsuperscript{147} At the Second Hague Peace Conference of 1907,\textsuperscript{148} thirty-nine nations agreed to the formation of an international court with compulsory jurisdiction.\textsuperscript{149} The acceptance of an international court in theory was a major advancement in the field of international law.\textsuperscript{150} However, the court never came to life due to the nations' failure to ratify the convention.\textsuperscript{151} It was not until the Nuremberg and Tokyo Tribunals that the modern determination to prosecute international crimes was displayed.\textsuperscript{152}

The Nuremberg and Tokyo Trials of major war criminals serve as successful examples of temporary international criminal courts.\textsuperscript{153} In the light of the terrible human rights violations of World War II, nations manifested the willingness to enforce the growing body of international criminal law and to surrender the sovereignty necessary for an effective tribunal to function.\textsuperscript{154} The accused men, responsible for the worst atroc-
ities yet seen by man, received "the kind of trial which they, in
the days of their pomp and power, never gave to any man."\textsuperscript{166} The major world powers chose to abide by international legal
principles, demonstrating a willingness to forego their tradi
tional sovereign rights and national legal systems.\textsuperscript{166} Both
the Nuremberg and Tokyo trials marked a crucial turning
point in the development of enforcement measures for interna
tional crimes,\textsuperscript{157} by clearly demonstrating that governments
can overcome political differences in the service of world peace
and order.\textsuperscript{158} The creation of an ICC would be but another
application of the principles which have become time honored
since Nuremberg and Tokyo.\textsuperscript{159}

Today, there is a growing movement in the international
community towards acceptance of an international criminal
court and an international penal code.\textsuperscript{160} Moreover, the Unit-
ed States, which had been one of the strongest opponents of an
ICC,\textsuperscript{161} recently announced a major policy reversal.\textsuperscript{162} The
United States has declared its commitment towards resolving
the remaining legal and practical issues necessary to establish
an international criminal court.\textsuperscript{163}

\textsuperscript{155} Christian Science Monitor, Oct. 9, 1992, at 18.

\textsuperscript{156} Id. at 72.

\textsuperscript{157} Id.

\textsuperscript{158} Id. The trials confirmed beyond a shadow of a doubt that the initiation of
any war of aggression constitutes an offense against peace, and that no man or
country can pretend to remain above the law. Id. at 80. See, M.C. Bassiouni, The
Time Has Come For An International Criminal Court, 1 Ind. Int'l & Comp. L.R.
at Appendix II, Chronology of Contemporary U.S. Positions on the Establishment of
an International Criminal Court, for the evolution of the United States in support
of an ICC.

\textsuperscript{159} See Timothy Evered, An International Criminal Court: Recent Proposals
and American Concerns, 6 Pace Int'l L. Rev. 121 (1994), for an analysis of the
current position of the United States toward the proposal of an international crim-
nal court.

\textsuperscript{160} Id.

\textsuperscript{161} See United Nations: U.S.-Led Opposition May Delay Criminal Court, Inter

\textsuperscript{162} Michael P. Scharf, Getting Serious About an International Criminal Court,
6 Pace Int'l L. Rev. 103 (1994).

\textsuperscript{163} Id. See U.S. Department of State, Comments of the United States on the
Report of the Working Group of the International Law Commission on the Question
of an International Criminal Jurisdiction, (May 1, 1993) available in LEXIS, Nexis
Additionally, an ICC can look for guidance to international regional human rights tribunals which are functioning effectively today.\textsuperscript{164} The European Court of Human Rights is one such tribunal. The European Court of Human Rights was an offspring of The Universal Declaration of Human Rights of December 10, 1948.\textsuperscript{165} The European Convention on Human Rights was signed on November 4, 1950, giving birth to the European Commission and the European Court of Human Rights.\textsuperscript{166} This convention held governments accountable to their own citizens for violations of international law.\textsuperscript{167} Although the convention did not include mandatory jurisdiction, most nations undertook to abide and be bound by its decisions.\textsuperscript{168} The European Court served as a model for the Inter-American Court of Human Rights twenty-five years later.\textsuperscript{169}

The European Court is of major significance for two rea-

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My government has decided to take a fresh look at the establishment of [an international criminal] court. We recognize that in certain instances egregious violations of international law may go unpunished because of a lack of an effective national forum for prosecution. We also recognize that, although, there are certain advantages to the establishment of ad hoc tribunals, this process is time consuming and may thus diminish the ability to act promptly in investigating and prosecuting such offenses. In general, although the underlying issues must be appropriately resolved, the concept of an international criminal court is an important one, and one in which we have a significant and positive interest. This is a serious and important effort which should be continued and we intend to be actively and constructively involved.
\end{flushright}

\textit{Id.}

\textsuperscript{164} A Step, \textit{supra} note 96, at 30.
\textsuperscript{166} A Step, \textit{supra} note 96, at 30.
\textsuperscript{167} \textit{Id.}
\textsuperscript{168} \textit{Id.}
\textsuperscript{169} \textit{Id.} at 30-31.
sons. First, it was the first regional tribunal endowed with jurisdiction to adjudicate questions of human rights violations.\textsuperscript{170} More importantly, the court demonstrated that several sovereign states agreed to surrender a significant portion of their sovereignty to ensure the protection and enforcement of fundamental rights by an international court of law.\textsuperscript{171}

V. RESOLUTION 808: A STEP TOWARD THE CREATION OF A PERMANENT INTERNATIONAL CRIMINAL COURT

The trials following World War II were thought to have established a deterrent to international human rights violations.\textsuperscript{172} They have not.\textsuperscript{173} The world continues to hold contempt for international law; the human rights of individuals continue to be flouted.\textsuperscript{174} After Nuremberg, President Truman approved a proposal that the United Nations draft a code of international criminal law.\textsuperscript{175} The proposal has not been fulfilled to date.\textsuperscript{176}

Recently, the Secretary-General of the United Nations concluded that the Security Council has the authority to establish an international court to prosecute international crimes in former Yugoslavia.\textsuperscript{177} The Secretary-General stated that the creation of such a tribunal is legally justified "both in terms of the object and purpose of the decision."\textsuperscript{178}

\textsuperscript{170} Id. at 30.

\textsuperscript{171} A Step, supra note 96, at 30 (citing Egon Schwelb, Human Rights and the International Community (1964); Fred Castberg, The European Convention on Human Rights (1974)).

\textsuperscript{172} Id.


\textsuperscript{174} Id.

\textsuperscript{175} Id.

\textsuperscript{176} Id.

\textsuperscript{177} Report of the Secretary-General Pursuant to S.C. Res. 808, U.N. Doc. S/25704 (1993). The Report of the Secretary-General, pursuant to Resolution 808, concluded regarding the Legal Basis for the Establishment of the International Tribunal, that the court may be created by the Security Council under Chapter VII of the United Nations Charter. The Secretary-General stated that this action was justified since it constitutes a measure to maintain or restore international peace and security. Id.

\textsuperscript{178} Id.
United Nations Security Council Resolution 808 calls for the creation of an *ad hoc* international tribunal for the prosecution of violations of international law in former Yugoslavia. Resolution 808 shows that many of the obstacles to the creation of an ICC can be overcome. A reasonable volume of customary international law, international conventions and drafts of an international criminal code, exist to realize Resolution 808.

Resolution 808 will utilize previously defined international law, thus no new substantive law need be created. The Secretary-General stated that “the application of the principle *nullum crimen sine lege* requires application of international law which are beyond doubt part of customary law.” The Secretary-General specifically stated that the Geneva Conventions, the Hague Convention, the Convention for the Prevention and Punishment of the Crime of Genocide, and the Charter of the International Military Tribunal meet this standard.

The *ad hoc* international criminal tribunal will have a clear body of substantive law to apply, as well as a solid framework for procedures and organization. The report of the Secretary-General provides the necessary foundation for an

181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.* The remaining section of part II of the Secretary-General’s Report, the Competence of the International Tribunal, identifies issues related to personal, territorial, temporal and concurrent jurisdiction and suggests their solution. Section III, details the Organization of the Tribunal including the composition of the Chambers, Qualifications and election of Judges, Officers and Members of the Chambers, Rules of Procedure and Evidence, the Prosecutor and the Registry. Sections IV and V address Investigation, Pre-Trial, Trial and Post-Trial Proceedings. Included are the rights of the accused, protection of victims and witnesses, judgments, penalties, appellate and review proceedings, enforcement and sentencing.

Sections VI and VII are the Cooperation and Judicial Assistance, and General Provisions, respectively. The latter specifies the status, privileges and immunities of the Tribunal. It proposes the cite of the Court in The Hague, French and English as its working languages and rules regarding the expenses of the Tribunal.
effective and fair court.\footnote{185} Lastly, the eleven judges, representing all major legal systems, have been elected.\footnote{186}

Previously, nations lacked the determination to prosecute international crimes.\footnote{187} Now, support for a court to prosecute the atrocities\footnote{188} in former Yugoslavia has come from almost every section of the globe.\footnote{189} Today, the will and political determination to establish justice by means of an international criminal court grows ever stronger.\footnote{190} The next logical step is the creation of court to protect the human rights of all the world’s populations.

The successful implementation of Resolution 808 will demonstrate the progress of the world community in ensuring the prosecution of international human rights violations. The tri-

\footnotesize{\textsuperscript{185}} Report of the Secretary-General, supra note 38, at 9.
\footnotesize{\textsuperscript{186}} United Nations Press Release, U.N. GAOR, U.N. Doc. GA/8500 (1993), available in LEXIS, Nexis library, News file. The judges who were elected by the United Nations General Assembly and will serve four year terms effective November 17, 1993 are: Gabrielle Kirk McDonald (United States), Jules Deschenes (Canada), Antonio Cassese (Italy), Georges Michel Abi-Saab (Egypt), Li Haopei (China), Germain Le Foyer De Costil (France), Lal Chan Vohrah (Malaysia), Sir Ninian Stephen (Australia), Adolphus Godwin Karibi-Whyte (Nigeria), Rustam S. Sidwa (Pakistan) and Elizabeth Odio Benito (Costa Rica).
\footnotesize{\textsuperscript{187}} See supra notes 63-90 and accompanying text.
\footnotesize{\textsuperscript{188}} Yugoslavia: Buotros-Gali Proposes War Crimes Tribunal, INTER PRESS SERVICE, May 5, 1993, available in LEXIS, Nexis library, News file (reporting 150,000 dead in Bosnia and 1.5 million refugees).
\footnotesize{\textsuperscript{190}} See supra notes 154-71, and accompanying text.
bunal for war crimes in former Yugoslavia, though improvised and temporary, can serve as an experiment in the larger project of enforcing human rights with international law.\textsuperscript{191} We have international criminal law, but no permanent international criminal court.\textsuperscript{192}

VI. CONCLUSION

The concept of an international criminal court with the jurisdiction to resolve international disputes has been developing for over a century,\textsuperscript{193} yet international crime has expanded, including terrorism, drug trafficking, genocide, and environmental crimes.\textsuperscript{194} Absence of an international criminal code and the continuing insistence by states on the retention of an archaic concept of national sovereignty in an absolute and uncompromising manner prevented the deterrence and punishment of international crimes.\textsuperscript{195}

With the emergence of customary international law, the experience of the International Military Tribunal Charters, the Convention for the Prevention and Punishment of Genocide, and the Hague and Geneva Conventions, followed by Security Council Resolution 808, as well as the work of scholars, there has emerged a considerable body of positive international criminal and humanitarian law.\textsuperscript{196} Undeniably, a recognized corpus of international criminal law exists.\textsuperscript{197} This corpus provides a firm foundation for the arrest, prosecution, and punishment of those criminally responsible for acts of atrocity and other human rights violations in former Yugoslavia.\textsuperscript{198} But these crimes are not limited to one nation or region.\textsuperscript{199} The

\begin{itemize}
\item \textsuperscript{191} John Hay, \textit{UN war crimes policy is nonsense - but it may lead to good law some day}, \textsc{The Ottawa Citizen}, March 7, 1993, at B5 (stating that with Resolution 808 "[t]he UN starts to give life to something new; the development of an international criminal code, complete with an international criminal court for trying offenders"). \textit{Id}.
\item \textsuperscript{192} \textit{Id}.
\item \textsuperscript{193} \textit{See supra} notes 44-56 and accompanying text.
\item \textsuperscript{194} Jonathan Power, \textit{War Crimes Investigations in ex-Yugoslavia a Signal to Thugs}, \textsc{The Vancouver Sun}, October 24, 1994, at A8.
\item \textsuperscript{195} \textit{See supra} notes 64-92 and accompanying text.
\item \textsuperscript{196} Report of the Secretary-General, \textit{supra} note 177, at 9.
\item \textsuperscript{197} \textit{Id}.
\item \textsuperscript{198} \textit{Id}.
\item \textsuperscript{199} \textit{See Addis Ababa, Red Terror Relived}, \textsc{The Economist}, August 5, 1994, at
\end{itemize}
prosecution of international crimes is not strictly a Yugoslav­
an question, every section of the globe has witnessed the hor­rors of human rights violations.200

The political will and determination of the international community to curtail a part of national sovereign authority is currently discernable in order to establish justice and order in former Yugoslavia.201 The United Nations has created a court, recognized the applicable international penal law, developed equitable procedures and elected the judges necessary to conduct hearings and trials.202 These measures have been approved by nations representing every geographical region of the world.203

The international community has the power and indeed the opportunity, as never before, to avoid the use of force and to rely on an international court to uphold justice, maintain international peace, and support the dignity of the human person. Through the United Nations, the existence of a practical working judicial court to protect and enforce, the basic rights of every member of humankind regardless of color, gender, and political affiliation has become a living reality in international relations. The next step is the creation of a permanent ICC.

In this new era of international relations, the necessity for “the law of force” to be substituted by “the force of law” has become ever-increasingly apparent.204 The law of force

38; see also John Pilger, Cambodia's forgotten war crimes, NEW STATESMAN & SOCIETY, Mar. 5, 1993, at 14; WALL STREET JOURNAL, Sept. 21, 1994, at A1 (reporting on massive human rights violations in Ethiopia, Cambodia and Rwanda). 200. Id.
201. See Comments of Council Members and related reports, supra note 189.
202. Report of the Secretary-General, supra note 38. See also, supra note 186 and accompanying text.
203. See comments of Council Members and related reports, supra note 189.
204. BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARDS WORLD PEACE (1980) at 2.
belongs to the past. Its ghost continues to haunt us if we fail to recognize the need for the force of law to prevail.

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* Golden Gate University School of Law, Class of 1995. The author would like to thank Robin Sackett Smith for her advice and editing suggestions. The author would also like to thank Professor Sompong Sucharitkul for his contributions and support.