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## The Republic of Bosnia-Herzegovina and Article 51: Inherent Rights and Unmet Responsibilities

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# The Republic of Bosnia-Herzegovina and Article 51: Inherent Rights and Unmet Responsibilities

Gideon A. Moor

## **Abstract**

This Note argues that the Security Council has not met its responsibility to restore international peace and security in Bosnia, and that it therefore must rescind Resolution 713 as it pertains to Bosnia. Part I provides a background of the events surrounding the outbreak of conflict in Bosnia, and introduces the standard by which the United Nations may preempt a member state's right to self-defense. Part I also presents the international human rights documents that are relevant to the conflict. Part II examines U.N. attempts to restore international peace and security in Bosnia. Part III argues that the continuation of massive human rights violations necessitates that the United Nations either immediately and effectively implement its resolutions, or lift the arms embargo and permit Bosnia to exercise its Article 51 right to self-defense. This Note concludes that the Security Council's failure to restore international peace and security and to satisfy the Article 51 criteria for terminating a member state's right to self-defense undermines the ability of the United Nations to respond to future conflicts.

# THE REPUBLIC OF BOSNIA-HERZEGOVINA AND ARTICLE 51: INHERENT RIGHTS AND UNMET RESPONSIBILITIES

Gideon A. Moor\*

## INTRODUCTION

The ability of the United Nations to respond effectively to regional conflicts has been directly challenged by the conflict in the Republic of Bosnia-Herzegovina ("Bosnia").<sup>1</sup> On September

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1. See BARBARA JELAVICH, 2 HISTORY OF THE BALKANS 296 (1989). The Northwest Balkans are populated by a majority of South Slavs who share a common literary language. *Id.* at 7. They are divided, however, by religion: Croats and Slovenes are Catholic, while Serbs are Eastern Orthodox. *Id.* Many Christians converted to Islam during the five centuries of Ottoman rule. *Id.* at 1-2. During World War II, Josip Broz Tito led a multi-ethnic army of communists, known as the Partisans, against the Nazi-puppet state of Croatia and a Serb-dominated army defending the Serb-dominated Kingdom of Yugoslavia. *Id.* at 264-69. Under Tito, the Partisans played a decisive role in defeating the Axis forces and their allies. *Id.* at 267-87. After World War II, in an attempt to heal national strife, Tito organized the Federal Republic of Yugoslavia into six federal republics: Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia. *Id.* at 296.



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25, 1991, the U.N. Security Council<sup>2</sup> ("Security Council") adopted Resolution 713,<sup>3</sup> which imposed an arms embargo on the republics of the former Yugoslavia.<sup>4</sup> By imposing this arms embargo, which prevented Bosnia from exercising its inherent right to self-defense under Article 51 of the U.N. Charter,<sup>5</sup> the Security Council assumed the responsibility for taking effective measures to end the conflict and to restore international peace and security in Bosnia.<sup>6</sup>

For the last three years, the Security Council has issued resolutions intended to end the bloodshed and bring the combatant parties to the negotiating table, with little success.<sup>7</sup> Despite repeated Security Council resolutions demanding an end to human rights abuses and all hostilities, the conflict and the accompanying violations of international human rights law have continued unabated.<sup>8</sup> In response to the inability of the Security Council to enforce its resolutions and, therefore, to restore international peace and security in the territory of the former Yu-

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During the Cold War, Tito suppressed nationalist movements within Yugoslavia. *Id.* at 395-401. After Tito's death in 1980, however, a rotating national presidency was established to govern the federal republic. *Id.* at 403-05. The Republic of Bosnia-Herzegovina is comprised of Muslims, Serbs, and Croats, who, prior to the current conflict, lived in mixed communities. *Id.* at 400. Use of the terms "Bosnian Serbs" and "Serb forces," in this Note, only refers to those Serbs who have aligned themselves with the effort to carve independent Serb-states out of Bosnia and Croatia.

2. See U.N. CHARTER art. 23. Article 23 provides the composition of the Security Council. *Id.* The Security Council is responsible for maintaining international peace and security. *Id.* art. 24(1).

3. S.C. Res. 713, U.N. SCOR, 3009th Sess., U.N. Doc. S/RES/713 (1991) [hereinafter Resolution 713].

4. *Id.*; see HELSINKI WATCH, WAR CRIMES IN BOSNIA-HERZEGOVINA 23 (1992). The six republics of the former Yugoslavia are Slovenia, Croatia, Bosnia-Herzegovina, Macedonia, Serbia, and Montenegro. *Id.*

5. U.N. CHARTER art. 51. "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attacks occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security." *Id.*

6. See Resolution 713, *supra* note 3, at 3.

7. Roger Cohen, *U.N. Commander Set to Leave Bosnia, After a Year of Triumph and Disaster*, N.Y. TIMES, Jan. 22, 1995, § 1, at 6; Roger Cohen, *West Finding Serbs Call the Shots Even if Few Are Fired*, N.Y. TIMES, Jan. 14, 1995, § 1, at 3 [hereinafter *Serbs Call Shots*]; Barbara Crossette, *At U.N., Thoughts About Bosnia But No Action*, N.Y. TIMES, Dec. 9, 1994, at A12 [hereinafter *Thoughts About Bosnia*].

8. Roger Cohen, *Conflict in the Balkans: The Overview*, N.Y. TIMES, Dec. 1, 1994, at A1 [hereinafter *Conflict in the Balkans*]; Roger Cohen, *Fighting Erodes Cease-Fire in Bosnia*, N.Y. TIMES, Feb. 13, 1995, at A8 (reporting 1500 rounds of tank, artillery, and mortar fire into civilian community over one weekend) [hereinafter *Fighting Erodes Cease-Fire*].

goslavia, the General Assembly adopted several resolutions urging the Security Council to lift the arms embargo on Bosnia.<sup>9</sup>

This Note argues that the Security Council has not met its responsibility to restore international peace and security in Bosnia,<sup>10</sup> and that it therefore must rescind Resolution 713 as it pertains to Bosnia.<sup>11</sup> Part I provides a background of the events surrounding the outbreak of conflict in Bosnia, and introduces the standard by which the United Nations may preempt a member state's right to self-defense. Part I also presents the international human rights documents that are relevant to the conflict. Part II examines U.N. attempts to restore international peace and security in Bosnia. Part III argues that the continuation of massive human rights violations necessitates that the United Nations either immediately and effectively implement its resolutions, or lift the arms embargo and permit Bosnia to exercise its Article 51<sup>12</sup> right to self-defense. This Note concludes that the Security Council's failure to restore international peace and security and to satisfy the Article 51 criteria for terminating a member state's right to self-defense undermines the ability of the United Nations to respond to future conflicts.

### I. CONFLICT IN BOSNIA AND INTERNATIONAL HUMAN RIGHTS LAW

Serbian nationalist maneuverings, intended to elevate the Republic of Serbia to a hegemonic status within the Federal Republic of Yugoslavia, led the Republics of Slovenia and Croatia to simultaneously declare independence.<sup>13</sup> Convinced that it could

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9. G.A. Res. 48/88, U.N. GOAR, 48th Sess., at 1, pmb., U.N. Doc. A/RES/48/88 (1993) [hereinafter General Assembly Resolution 48/88]; Provisional Verbatim Record of the Three Thousand Two Hundred and Forty-Seventh Meeting, U.N. Doc. S/PV.3247 (1993); G.A. Res. 49/10, U.N. GOAR, 49th Sess., at 6, ¶ 22, U.N. Doc. A/RES/49/10 (1994) [hereinafter General Assembly Resolution 49/10].

10. See U.N. CHARTER art. 51. Article 51 recognizes a member states' inherent right to self-defense "until the Security Council has taken the measures necessary to maintain international peace and security." *Id.*

11. See Resolution 713, *supra* note 3. The Security Council imposed an arms embargo on all the republics of the former Yugoslavia to further the establishment of peace and stability. *Id.* at 3, ¶ 6.

12. U.N. CHARTER, art. 51.

13. Blaine Harden, *Yugoslav Army Attacks Slovenia, Meets Resistance at Border Posts*, WASH. POST, June 28, 1991, at A1. Slovenia and Croatia were the former Yugoslavia's most prosperous republics, and wanted to distance themselves from hard-line Communist Serbia. *Id.*

not survive in a federal republic dominated by a nationalist Serbia, Bosnia declared independence.<sup>14</sup> In response to the outbreak of conflict between Croatia and Serbia when Croatia tried to assert her independence, the United Nations imposed an arms embargo on the republics of the former Yugoslavia.<sup>15</sup> Because the arms embargo terminated Bosnia's Article 51 right to exercise self-defense, the United Nations took measures intended to maintain international peace and security within Bosnia.<sup>16</sup> Despite the adoption of U.N. resolutions mandating the observance of basic human rights, these measures failed to prevent the widespread commission of human rights atrocities, primarily by Bosnian nationalist Serbs, in violation of international human rights law.<sup>17</sup> In response to the apparent widespread violation of human rights throughout the territory of the former Yugoslavia, the U.N. Commission on Human Rights appointed a Special Rapporteur to investigate and report on the abuse.<sup>18</sup>

#### A. Background of Events Leading to the Independence of Bosnia

The anti-communist revolutions that engulfed Eastern Europe in 1989 and the consequent collapse of the Soviet Union precipitated a nationalist renaissance throughout Eastern and Southern Europe.<sup>19</sup> This political wave of nationalist self-determination resonated within the various ethnic and religious populations of the Federal Republic of Yugoslavia, and stirred

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14. NOEL MALCOLM, *BOSNIA: A SHORT HISTORY* 230 (1994).

15. Resolution 713, *supra* note 3, at 1-3, pmbl., ¶ 6.

16. *Id.* at 3, ¶ 6.

17. *Seventh Periodic Report on the Situation of Human Rights in the Territory of the Former Yugoslavia*, U.N. Commission on Human Rights, 51st Sess., Item 12, at 4, U.N. Doc. E/CN.4/1995/4 (1994) [hereinafter *Seventh Report*].

18. *Report of the Commission on Human Rights on its First Special Session*, U.N. Commission on Human Rights, 1st Special Sess., Agenda Item 4, pmbl., ¶¶ 12, 41, U.N. Doc. E/CN.4/1992/S-1/8 (1992) [hereinafter *First Special Session*].

19. Stojan Cerovic, *The Rise of Serbian Nationalism*, 26 N.Y.U. J. INT'L L. & POL. 527 (1994); Vjekoslav Radovic, *Eastern Europe: Upheavals in Eastern Europe Mark End of Communism Says Djilas*, Reuters News Service, Dec. 31, 1989, available in LEXIS, Nexis Library, News File (reporting Milovan Djilas' forecast of communist demise due to anti-communist upheavals across Eastern Europe); see *Albania: Albanian Leader Dismisses Unrest Reports, Denounces Yugoslavia*, Reuter News Service, Jan. 15, 1990, available in LEXIS, Nexis Library, News File (reporting Soviet reforms unleashed waves of popular unrest throughout Eastern Europe); Peter Humphrey, *Romania: Balkans Seek to Heal Rifts and Enter Europe*, Reuter News Service, Oct. 23 1990, available in LEXIS, Nexis Library, News File (reporting that communism's collapse in Eastern Europe unleashed nationalist and ethnic turmoil in Southeastern Europe).

long-suppressed aspirations for independence.<sup>20</sup> In response to this international ideological transition, from states founded on communism to states based on national identity,<sup>21</sup> Yugoslav Communist Party bosses attempted to preserve their power and status by recasting themselves as national and cultural revivalists.<sup>22</sup> No Communist Party official was able to more effectively make this transition than the leader of the Serbian Communists, Slobodan Milosevic.<sup>23</sup>

By the Summer of 1989, Slobodan Milosevic had fomented nationalist sentiment throughout Serbia, and in doing so became the nation's most popular figure.<sup>24</sup> Milosevic planted himself firmly in the nationalist camp when he delivered a speech at the site of the Battle of Kosovo to celebrate its six-hundredth anniversary.<sup>25</sup> At the gathering, icon-style posters of Jesus, Prince Lazar,<sup>26</sup> and Slobodan Milosevic were offered for sale.<sup>27</sup> Flanked by black-robed priests of the Orthodox Church, singers in traditional Serbian dress, and security police in dark suits and sunglasses,<sup>28</sup> Milosevic told the crowd that the Serbian people were yet again engaged in a battle, and that it might someday become an armed battle.<sup>29</sup> In addition to his increasingly ag-

20. MALCOLM, *supra* note 14, at 214; see John Tagliabue, *Conflict in Yugoslavia*, N.Y. TIMES, July 3, 1991, at A6 (describing political successors in Yugoslavia as former communists who evoke old national aspirations).

21. Klas Bergman, *Yugoslav President Calls for Talks*, CHRISTIAN SCI. MONITOR, Feb. 9, 1990, at 3. At an emergency session of the Yugoslav parliament, the Yugoslav President observed: "Nationality has been placed above everything else and has become more important than democracy, economic success, and individual human rights." *Id.*

22. Marlise Simons, *Upheaval in the East; Yugoslavia Catching East Europe's Political Fever*, N.Y. TIMES, Jan. 21, 1990, § 1, at 1 [hereinafter *Upheaval in the East*].

23. MALCOLM, *supra* note 14, at 211; see Peter Bale, *Romania: Muted Nostalgia for the Hard Old Men of Communism*, Reuter Textline, Nov. 3, 1994, available in LEXIS, Nexis Library, News File (reporting how only Milosevic survived Eastern Europe's upheaval against Balkan communist leaders); Aleksa Dijlas, *A Profile of Slobodan Milosevic*, FOREIGN AFF., Summer 1993, at 95 (discussing Milosevic's ideological transition from communism to nationalism).

24. MALCOLM, *supra* note 14, at 213.

25. *Id.* Kosovo, site of the old Patriarshia and other Serbian orthodox monasteries, is considered by many the "cradle of Serbia." Cerovic, *supra* note 19, at 528 & n.4. In popular Serb myth and folklore, the Serb defeat at the battle of Kosovo in 1389 represents the beginning of Turkish rule. *Id.*

26. MALCOLM, *supra* note 14, at 213. Prince Lazar led Serbian troops against Turkish forces in the Battle of Kosovo. *Id.*

27. *Id.*

28. *Id.* at 213; MISHA GLENNY, *THE FALL OF YUGOSLAVIA* 35 (1993).

29. Slobodan Milosevic, *Slobodan Milosevic Addresses Rally at Gazimestan*, Brit. Broadcasting Corp., June 30, 1989, available in LEXIS, Nexis Library, News File. "After six

gressive rhetoric,<sup>30</sup> Milosevic continued to consolidate his power within Serbia. By eliminating the autonomous status of certain territories within Serbia,<sup>31</sup> and by filling key Politburo positions with his own loyalists,<sup>32</sup> Milosevic controlled enough votes to single-handedly rewrite the federal constitution.<sup>33</sup> Milosevic's consolidation of power, in combination with his antagonistic rhetoric,<sup>34</sup> worried the other republics within Yugoslavia that he might try to institutionalize Serbia's dominance within the Federal Republic of Yugoslavia.<sup>35</sup>

By the Fall of 1989, Slovenia had prepared for Milosevic's impending constitutional coup.<sup>36</sup> Legislators in Slovenia passed a new Slovenian constitution that established the supremacy of Slovenian law over Yugoslav law, and that explicitly declared Slovenia's right to secede.<sup>37</sup> In the Spring of 1990, Slovenia held multi-party elections, which produced a liberal-nationalist coali-

centuries, we are again engaged in battles and quarrels. They are not armed battles, but this cannot be excluded yet." *Id.*

30. MALCOLM, *supra* note 14, at 214. Because Milosevic encouraged the use of anti-Croat rhetoric, official Serb media began to use the World War II Croatian fascist name "Ustasa" to refer to leading Croatian Communists. *Id.*

31. Peter Humphrey, *Serbs Threaten Mass Protest at Communist Party Plenum*, Reuters News Service, July 25, 1988, available in LEXIS, Nexis Library, News File. In 1974, Tito drafted a new Yugoslav constitution that granted the Serbian provinces of Vojvodina and Kosova autonomous status. *Id.* Serbs regard Kosovo as the birthplace of their ethnic heritage. Jonathan S. Landay, *Serbian President at Odds With Other Yugoslav Republics*, UPI, June 25, 1990, available in LEXIS, Nexis Library, News File. Currently, Kosovo is populated by 1.7 million Albanians and 200,000 Serbs. *Id.*

32. Blaine Harden, *Balkan Elections Signal Failure of "Yugoslavism"*, WASH. POST, May, 1, 1990, at A14 [hereinafter *Failure of "Yugoslavism"*]. After Milosevic installed a puppet government in Kosovo, protest demonstrations by ethnic Albanians were violently suppressed by Serbian police. *Id.*

33. MALCOLM, *supra* note 14, at 211-12.

34. *Yugoslav Police Try to Prevent Flareups Between Ethnic Groups*, CHIC. TRIB., Aug. 18, 1990, at 9 (reporting strong support by state-run media in Serbia for Croatian Serbs and characterization of Croatian government as fascist and racist). Milosevic's Serbian media intensified attacks on the Croatian government with references to Croatian fascism and Croatian guilt for crimes committed against Serbs during World War II. SABRINA RAMET, NATIONALISM AND FEDERALISM IN YUGOSLAVIA, 1962-1991 244 (2d ed. 1992).

35. *Failure of "Yugoslavism"*, *supra* note 32, at A14; see Andrej Gustincic, *Albanians Boycott Kosovo Battle Anniversary as Serbs Celebrate*, Reuters News Service, June 28, 1989, available in LEXIS, Nexis Library, News File (discussing Slovenia and Croatia's fear that Milosevic wanted to restore Serbia's dominance in Yugoslavia).

36. JAMES GOW, LEGITIMACY AND THE MILITARY: THE YUGOSLAV CRISIS 78-94 (1992); MALCOLM, *supra* note 14, at 214 (discussing Slovenian anticipation and preparation for constitutional challenge by Milosevic).

37. BRANKA MAGAS, THE DESTRUCTION OF YUGOSLAVIA 224-25 (1993).

tion government.<sup>38</sup>

Croatians, meanwhile, were also preparing for Milosevic's anticipated constitutional maneuvering during the Fall of 1989. Croat citizens of Croatia had been particularly encouraged by the emergence of nationalist independent states throughout Eastern Europe<sup>39</sup> and, on April 22, 1990, elected the nationalist party, led by Franjo Tudjman, to power.<sup>40</sup> Between August 19 and September 3, 1990, however, Croatian Serbs living in the Krajina<sup>41</sup> region of Croatia held a local referendum on autonomy in defiance of the Croatian government.<sup>42</sup> The federal army troops, with their Serb-dominated officer corps and strong loyalty to Milosevic, Belgrade, and the Serbs,<sup>43</sup> assisted Croatian Serb militias as they began to patrol the region shortly after the referendum.<sup>44</sup> When conflicts between Serb militias and Croatian police escalated in frequency and violence, federal troops were sent in to maintain order.<sup>45</sup> Croatia objected to the federal army's presence and its apparent aiding of the Serb militias, but was unable to convince the federal government, dominated by Milosevic, to remove the troops.<sup>46</sup> In fact, the Croatian Serbs made a practice of inciting riots in order to justify requesting

38. MALCOLM, *supra* note 14, at 215.

39. *Upheaval in the East*, *supra* note 22, § 1, at 1.

40. *Id.*; see Blaine Harden, *Croatian President-Elect Plans 'Sovereign State'*, WASH. POST, Apr. 30, 1990, at A13 (reporting victory by Franjo Tudjman's nationalist party in Croatia's first free election since World War II).

41. Glenny, *supra* note 28, at 4. Throughout the seventeenth century, the Habsburg Empire populated the military frontier, "Krajina" in Serbo-Croatian, with Serbs to protect the Empire from any Ottoman invasion. *Id.*

42. Jonathan S. Landay, *Yugoslavia's Serbs Casts Ballots in Autonomy Referendum*, UPI, Aug. 19, 1990, available in LEXIS, Nexis Library, News File (reporting referendum of 600,000 Croatian Serb minority in Krajina region); see Marcus Tanner, *Confused Reports About Violence in Yugoslav City*, INDEPENDENT, Aug. 18, 1990, at 12 (reporting Croatian police attempts to seal off rebellious region and regain control).

43. See Jim Fish, *Yugoslav Army Upended in Slovenia*, WASH. POST, July 2, 1991, at A1 (discussing federal army domination by Serbs and how it symbolizes Serbian manhood); Harden, *supra* note 13, at A1 (reporting federal army officer corps was seventy percent Serbian); *Yugoslav Police Try to Prevent Flareups Between Ethnic Groups*, CHI. TRIB., Aug. 18, 1990, at 9 (reporting interception of Croatian Interior Ministry helicopters by federal army jets).

44. MALCOLM, *supra* note 14, at 216.

45. *Id.* at 216; see Fish, *supra* note 43, at A1 (reporting how federal army intervened to protect rebel Serbs in Croatia from retaliatory attack by Croatian police and army).

46. MALCOLM, *supra* note 14, at 216; see Marcus Tanner, *Armed Serbian Uprising Raises Civil War Fear*, INDEPENDENT, Aug. 18, 1990, at 1 (reporting federal army aid to rebel Serbs and Croatian President Tudjman's insistence that federal army units cease unauthorized activities within Croatia).

that federal troops be called in to quell the unrest.<sup>47</sup>

Meanwhile, in Bosnia, the Communist Party had disintegrated and national parties had been formed.<sup>48</sup> Elections held in December 1990 yielded a distribution of parliament seats roughly proportionate to the populations of the Muslims, Serbs, and Croats: 41%, 35%, and 20%, respectively.<sup>49</sup> By the time Alija Izetbegovic's<sup>50</sup> unity government took office in November 1990,<sup>51</sup> the struggle between Serbia and the two independence-minded republics of Slovenia and Croatia had intensified.<sup>52</sup> Indeed, by early 1991, Milosevic was declaring publicly that if either republic attempted to alter the federal structure of Yugoslavia, through independence or otherwise, he would seek to annex portions of Croatia and Bosnia.<sup>53</sup> In May 1991, however, Serbia provided the watershed event that led to full-scale conflict by refusing to recognize a Croatian, Stipe Mesic, as the next holder of the rotating federal presidency.<sup>54</sup> Consequently, on June 25, 1991, both Croatia and Slovenia declared independence.<sup>55</sup>

After a column of federal army tanks met with well-organized and stiff resistance in Slovenia,<sup>56</sup> the tanks withdrew and turned their attention on Croatia.<sup>57</sup> The federal army had two strategic objectives within Croatia: (1) to intimidate Croatia as a whole, and (2) to consolidate the pockets of Serb-populated ter-

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47. MALCOLM, *supra* note 14, at 217.

48. *Id.*

49. *Id.* at 222.

50. Terry Atlas, *U.S. Set to Recognize 3 Yugoslav Republics*, CHI. TRIB., Apr. 7, 1992, at 3. Alija Izetbegovic is the President of the Republic of Bosnia and Herzegovina. *Id.*

51. Nesho Djuric, *Ethnic Rivalry Threatens Yugoslavia's Bosnia-Herzegovina Republic*, UPI, Oct. 15, 1991, available in LEXIS, Nexis Library, News File.

52. MALCOLM, *supra* note 14, at 223.

53. *Id.*; Vjekoslav Radovic, *Serbia to Demand Revision of Borders if Yugoslavia Falls Apart*, Reuter Library Report, June 25, 1990, available in LEXIS, Nexis Library, News File.

54. MALCOLM, *supra* note 14, at 225; see R.C. Longworth, *Yugoslavia's Outlook Darkens as Presidential Deadlock Persists*, CHI. TRIB., May 18, 1991, at 4; Celestine Bohlen, *Yugoslavia Fails to Fill Presidency*, N.Y. TIMES, May 18, 1991, § 1, at 1.

55. Peter Green, *EC nations, other states recognize Croatia, Slovenia*, UPI, Jan. 15, 1992, available in LEXIS, Nexis Library, News File.

56. John Tagliabue, *Yugoslavia Fails to Oust Militias*, N.Y. TIMES, June 27, 1991, at A1; see *supra* note 43 and accompanying text (reporting how federal army generals underestimated Slovenian resistance).

57. MALCOLM, *supra* note 14, at 225.

ritory that were already controlled by armed Serbs.<sup>58</sup> By late August 1991, Serbia and Croatia were engaged in full-scale conflict.<sup>59</sup> A U.N. negotiated cease-fire between Croatia and Serbia went into effect in February 1992, establishing "U.N.-protected" zones around the territory conquered by Croatian Serb and federal forces.<sup>60</sup>

When the fighting in Croatia began to abate in January and February 1992, the United Nations authorized the "withdrawal" of federal army tanks and artillery into Bosnia.<sup>61</sup> Meanwhile, the Bosnian Serbs had used the winter to construct heavy artillery positions around major Bosnian towns, including Sarajevo, and had received large troop reinforcements from the federal army.<sup>62</sup> In light of the massive mobilization of the Bosnian Serbs and the departure of Slovenia and Croatia as counter-weights to Serbia within the federal framework, Bosnia declared independence.<sup>63</sup> On April 7, 1992, the European Community ("EC") recognized Bosnia as an independent state.<sup>64</sup> On May 22, 1992, Bosnia was admitted as a member state to the United Nations.<sup>65</sup>

#### B. *U.N. Arms Embargo and the Article 51 Right to Self-Defense*

The United Nations was chartered to achieve several purposes: to maintain international peace and security, to develop friendly relations among nations, and to promote cooperation in

58. *Id.*

59. *Id.* at 226.

60. *Id.* at 230.

61. *Id.*; see Hugh Pain, *After EC Recognition, Search For Yugoslav Peace Set to Resume*, Reuter Library Report, Dec. 17, 1991, available in LEXIS, Nexis Library, News File (reporting Bosnia's intent to declare independence if its neighbors left Yugoslavia).

62. *Bosnia-Herzegovina Serbs Declare Independence Referendum 'Void'*, UPI, Jan. 27, 1991, available in LEXIS, Nexis Library, News File; MALCOLM, *supra* note 14, at 227. The Interior Minister of Serbia and the federal army had been steadily arming the Bosnian Serbs, so that by the time they requested "protection" they were already well armed. *Id.*

63. MALCOLM, *supra* note 14, at 230.

64. James Gow, *One Year of War in Bosnia and Herzegovina*, Radio Free Europe/Radio Library Research Rep., June 4, 1993, at 1.

65. MALCOLM, *supra* note 14, at 243. Article 34 of the Vienna Convention on Succession of States in Respect of Treaties provides that the obligations and rights of predecessor states bind their successors, making the continuity of obligations the rule. Vienna Convention on the Succession of States in Respect of Treaties, Aug. 28, 1978, U.N. Doc. A/Conf. 80/31 (1978). The Bosnian Government is in control of only thirty percent of its territory, while the Bosnian Serb authorities have effective control of approximately seventy percent of Bosnian territory, and have declared an independent state, Republika Srpska. 2 HELSINKI WATCH, WAR CRIMES IN BOSNIA-HERZEGOVINA 9 (1993).

solving international economic, social, cultural and humanitarian problems.<sup>66</sup> The Charter of the United Nations ("U.N. Charter") established six principal organs of the United Nations, among them the General Assembly and the Security Council.<sup>67</sup> The Security Council's adoption of Resolution 713,<sup>68</sup> on September 25, 1991, imposed an arms embargo on Bosnia.<sup>69</sup> While the U.N. Charter contains a general prohibition on the use of force by individual member states,<sup>70</sup> Article 51 guarantees every member state the right to exercise individual or collective self-defense.<sup>71</sup>

### 1. The United Nations: Constituent Bodies and Their Jurisdictions

The General Assembly consists of all the member states of the United Nations.<sup>72</sup> The General Assembly is empowered by the U.N. Charter to discuss,<sup>73</sup> consider,<sup>74</sup> and make recommendations to other constituent bodies of the United Nations on any subject, including issues concerning the maintenance of international peace and security.<sup>75</sup> In addition, the General Assembly may recommend measures for the peaceful resolution of situations that it deems likely to impair friendly relations among nations.<sup>76</sup> The General Assembly, however, may not make any recommendations regarding disputes that are either before the Security Council, or upon which the Security Council is exercising its chartered functions.<sup>77</sup>

The Security Council is comprised of fifteen members of the United Nations: five permanent members,<sup>78</sup> and ten non-

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66. U.N. CHARTER art. 1.

67. *Id.* art. 7.

68. Resolution 713, *supra* note 3, at 3, ¶ 6.

69. *Id.*

70. U.N. CHARTER art. 2(4).

71. *Id.* art. 51.

72. *Id.* art. 9(1).

73. *Id.* art. 10.

74. *Id.* art. 11(1).

75. *Id.* art. 11(2).

76. *Id.* art. 14.

77. *Id.* art. 12(1).

78. *Id.* art. 23(1). The five permanent members of the Security Council are China, France, the Union of Soviet Socialist Republics (inherited by the Russian Federation), the United Kingdom, and the United States. *Id.* Each permanent member has the power of a veto over all Security Council measures. *Id.*

permanent members who are elected to two-year terms.<sup>79</sup> The Security Council, on behalf of U.N. members, bears primary responsibility for the maintenance of international peace and security.<sup>80</sup> Upon the determination of a threat to international peace, the Security Council has the power to exercise both economic and military force to maintain international peace and security.<sup>81</sup>

## 2. Security Council Resolution 713

On September 25, 1991, the Security Council adopted Resolution 713, which prohibited the importation of arms and military equipment to the former Federal Republic of Yugoslavia.<sup>82</sup> The Security Council, however, has continued to enforce the arms embargo against Bosnia since its independence.<sup>83</sup> The Bosnian government has argued that, as a result of Resolution 713, its right to self-defense is being denied.<sup>84</sup>

## 3. Article 51: The Exception to the General Prohibition on the Individual Use of Force

The U.N. Charter contains a general prohibition on the use of force by individual member states without U.N. authorization.<sup>85</sup> As the exception to this prohibition, Article 51 provides for an inherent right to individual and collective self-defense when an armed attack occurs against a member.<sup>86</sup> There are no cases, however, that offer an interpretation of the scope of Arti-

79. *Id.* art. 23(2).

80. *Id.* art. 24(1).

81. *Id.* arts. 24(2), 39.

82. See Resolution 713, *supra* note 3, at 2, ¶ 6. Under the provisions of Chapter VII of the U.N. Charter, in order for the Security Council to impose an embargo on a member state it must determine the existence of an Article 39 "threat to international peace and security." U.N. CHARTER art. 39.

83. *Further Report of the Secretary-General Pursuant to Security Council Resolution 721*, at 7, ¶ 33, U.N. Doc. S/23363 (1992). This Note does not examine the argument that the United Nation's recognition of Bosnia as an independent U.N. member state should exempt Bosnia from any restrictions imposed by the Security Council on the former Federal Republic of Yugoslavia and its constituent states.

84. Provision Verbatim Record of the Three Thousand Two Hundred and Forty-Seventh Meeting, *supra* note 9, at 9-17.

85. U.N. CHARTER arts. 2(4), 39-48.

86. *Id.* art. 51. "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security." *Id.*

cle 51's grant of an inherent right to self-defense.<sup>87</sup> Consequently, the International Court of Justice's<sup>88</sup> ("ICJ") interpretation of Article 51 as a part of customary international law in *Nicaragua v. United States*<sup>89</sup> provides the sole starting point for an analysis of Article 51.<sup>90</sup> The ICJ, however, only interpreted the first clause of Article 51, which provides the criteria required for a state to exercise its inherent right to self-defense.<sup>91</sup> The ICJ did not address the second clause<sup>92</sup> of Article 51, which qualifies this right to self-defense.<sup>93</sup> Consequently, the standard that the Security Council must meet in order to deprive a member state of its Article 51 right to self-defense remains in question.<sup>94</sup>

In *Nicaragua*,<sup>95</sup> the ICJ held that in order to exercise the right to individual self-defense, a state must be the victim of an armed attack.<sup>96</sup> The ICJ went on to examine the nature of acts that can be classified as "armed attack."<sup>97</sup> The ICJ held that an "armed attack" occurs when one state sends or sponsors an armed band, mercenaries, or irregulars that commit acts of force against another state, thereby presenting a threat comparable to that of a regular force.<sup>98</sup>

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87. See Jane A. Meyer, *Collective Self-Defense and Regional Security: Necessary Exceptions to a Globalist Doctrine*, 11 B.U. INT'L L.J. 391, 392-99 (discussing generally accepted interpretations of Article 51 in absence of definitive interpretation by ICJ).

88. U.N. CHARTER art. 92. The ICJ is the principal judicial organ of the United Nations. *Id.*

89. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 1986 I.C.J. 14 (Merits and Judgment) [hereinafter *Nicaragua*].

90. *Id.* at 92. The Court interpreted the language of Article 51 "nothing in the present Charter shall impair," to mean that a state's right to exercise self-defense is part of pre-existing customary international law. *Id.*

91. *Id.* at 93-95.

92. U.N. CHARTER art. 51. The second clause of Article 51 provides that a member state has the right to exercise self-defense "until the Security Council takes the measures necessary to maintain international peace and security." *Id.*

93. See *supra* note 86 and accompanying text (discussing Article 51 as exception to general prohibition against individual use of force). The second clause of Article 51 provides: "until the Security Council has taken the measures necessary to maintain international peace and security." *Id.*

94. See Meyer, *supra* note 87, at 398-400 (interpreting second clause of Article 51, terminating states' right to exercise self-defense, in absence of ICJ interpretation).

95. *Nicaragua*, 1986 I.C.J. 14.

96. *Id.* at 93.

97. *Id.*

98. *Id.* The Court, quoting from Article 3, paragraph (g) of the Definition of Aggression annexed to General Assembly Resolution 3314, held that:

"armed attack" means "the sending by or on behalf of a State of armed bands,

The ICJ, in *Nicaragua*, also held that any state that is attacked must request assistance in order for another state to exercise collective self-defense on behalf of the attacked state.<sup>99</sup> This request for assistance must follow the state's declaration that it is under attack.<sup>100</sup> The state's right to self-defense terminates when the Security Council fulfills the terms of Article 51's second clause by "tak[ing] the measures necessary to maintain international peace and security."<sup>101</sup>

The ICJ has not interpreted the meaning of the Article 51 clause that terminates a member state's right to exercise self-defense.<sup>102</sup> Thus, this clause can be interpreted using any one, or combination of, the four generally accepted schools of treaty interpretation: (1) textual,<sup>103</sup> (2) systematic,<sup>104</sup> (3) intentional,<sup>105</sup> and (4) teleological.<sup>106</sup> The textual school employs a "plain meaning" reading of ambiguous words within their immediate context, without looking to the intent of the drafters.<sup>107</sup> The systematic school keeps within the "four corners" of the document,

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groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to' (*inter alia*) an actual armed attack conducted by regular forces, 'or its substantial involvement therein.'

*Id.*; see G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 143, annex, arts. 1-4, U.N. Doc. A/3314 (1974) (defining "armed aggression").

99. *Id.* at 94.

100. *Id.* at 95; see *U.N. Admits Bosnia, Croatia and Slovenia*, L.A. TIMES, May 23, 1992, at A6. While speaking before the General Assembly, Bosnian Foreign Minister Haris Silajdzic declared, "[w]e call on this body to come to our aid in the hour of our greatest need." *Id.*; Elaine Sciolino, *Bosnian Asks G.O.P. Lawmakers to Help End Arms Embargo*, N.Y. TIMES, Jan. 31, 1995, at A3 (reporting Bosnian Prime Minister's lobbying Congress to lift arms embargo on Bosnia if United Nations is unable to get Bosnian Serbs to agree to peace plan).

101. See *supra* note 92 and accompanying text (presenting text of second clause of Article 51 terminating right to exercise self-defense).

102. See Meyer, *supra* note 87, at 398-400 (interpreting second clause of Article 51 in absence of ICJ interpretation); U.N. CHARTER art. 51 ("until the Security Council has taken the measures necessary to maintain international peace and security.").

103. 1 GEORG SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 153 (4th ed. 1960).

104. 1 *Id.* at 153-54.

105. 1 *Id.* at 154.

106. 1 *Id.*; see Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, 1980 Gr. Brit. T.S. No. 58, 18 (Cmd. 7964), 8 I.L.M. 679, 691-92. The four methods are implied in the language of Article 31. See *id.* (describing general rule of treaty interpretation).

107. 1 SCHWARZENBERGER, *supra* note 103, at 153; see 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 952 (8th ed. 1955) (indicating that terms in treaty must be interpreted according to their usual meaning in everyday life, barring their use for technical meaning).

and gives words a meaning that is consistent throughout the entire document.<sup>108</sup> The intentional school looks to the intentions of the parties at the time of signing.<sup>109</sup> The teleological school of interpretation focuses on the purpose of the treaty over time.<sup>110</sup>

### C. *International Human Rights Treaties*

Due to the military hardware and troop support provided by the federal army, nationalist Serb forces in Bosnia quickly captured seventy percent of Bosnian territory.<sup>111</sup> While capturing territory, the Bosnian Serb army engaged in human rights violations, commonly known as "ethnic cleansing."<sup>112</sup> Although numerous international instruments prohibit the mistreatment of civilians in areas of conflict and military combatants, there are two common problems in enforcing international human rights treaties: (1) treaties often require that the state that is host to a violation enforce the provisions of that treaty, and (2) perpetrators of human rights violations frequently elude apprehension and thereby escape prosecution by third-party states.<sup>113</sup>

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108. 1 SCHWARZENBERGER, *supra* note 103, at 153-54.

109. 1 *Id.* at 154. It is a well established rule in international law that preparatory papers (*travaux préparatoires*) may be used to determine the intentions of drafting parties. 1 OPPENHEIM, *supra* note 107, at 957.

110. 1 SCHWARZENBERGER, *supra* note 103, at 154.

111. Roger Cohen, *Serbs Close in on Bosnian Town; U.N. and NATO Unable to Act*, N.Y. TIMES, Nov. 29, 1994, at A1 [hereinafter *U.N. and NATO Unable to Act*]; see General Assembly Resolution 48/88, *supra* note 9, at 3, ¶ 5 (condemning continued supply of military arms, equipment, and services to Bosnian Serb paramilitary units by Federal Republic of Yugoslavia (Serbia and Montenegro)).

112. *Report on the Situation of Human Rights in the Territory of the Former Yugoslavia*, U.N. Secretary-General, at 7, U.N. Doc. A/48/92 and S/25341 (1994) [hereinafter *Report on Human Rights*]. The term "ethnic cleansing" refers to the Bosnian Serb forces' policy of harassment, discrimination, beatings, torture, rape, summary executions, expulsions, shelling of civilian population centers, relocation of populations by force, confiscation of property, and destruction of homes and places of worship conducted with the intent to drive non-Serb populations from conquered territory. *Id.*; *Report on the Situation of Human Rights in the Territory of the Former Yugoslavia*, U.N. Commission on Human Rights, 1st Special Sess., Agenda Item 3, at 2, U.N. Doc. E/CN.4/1992/S-1/9 (1992) [hereinafter *First Report*].

113. RICHARD B. LILlich, *INTERNATIONAL HUMAN RIGHTS* 177 (2d ed. 1991). Because the United Nations cannot intervene in a state's domestic jurisdiction, treaty enforcement is left to the signatory state. *Id.* at 576-604.

### 1. Treaties Requiring States to Enforce Human Rights Violations Within Their Borders

Several international human rights treaties, to which the former Yugoslavia was a party, address the variety of atrocities that are being committed in Bosnia, primarily, though not exclusively, by the Bosnian Serbs.<sup>114</sup> The majority of international human rights treaties, however, speak to "States Parties,"<sup>115</sup> not individual actors within a state's territory.<sup>116</sup> Consequently, the signatory state bears the responsibility for taking measures to enforce the various articles of each agreement, and to see that persons within that state's territorial jurisdiction are held accountable.<sup>117</sup>

The Convention on the Elimination of all Forms of Discrimination Against Women<sup>118</sup> orders states to eliminate any distinction, exclusion, or restrictions of human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field on the basis of gender.<sup>119</sup> A report authorized by the European Community concluded that at least 20,000 Muslim women had been raped during the Bosnian Serb conquest, and that some of these rapes had occurred in special detention centers set up for women and children.<sup>120</sup> Muslim women were found to comprise the overwhelming majority of rape victims in the conflict.<sup>121</sup>

The Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment<sup>122</sup> orders states to prevent acts of torture in any territory under their jurisdic-

114. *Seventh Report, supra* note 17, at 4 (reporting Bosnian Serb massive violations of human rights as not comparable to violations committed by government forces); Roger Cohen, *CIA Report on Bosnia Blames Serbs for 90% of the War Crimes*, N.Y. TIMES, Mar. 9, 1995, at A1.

115. INTERNATIONAL HUMAN RIGHTS, *supra* note 113, at 177.

116. *Id.* The language "States Parties" identifies the signatory state as the obligor under the provisions of the treaty, not the individual. *Id.*

117. *Id.* at 177-78.

118. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980).

119. *Id.* art. 1, 1249 U.N.T.S. at 16, 19 I.L.M. at 36.

120. ROY GUTMAN, *A WITNESS TO GENOCIDE* 146 (1993).

121. *Id.*

122. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, U.N. Doc. A/RES/39/46 (1984), 1991 Gr. Brit. T.S. No. 107 (Cm. 1775).

tion,<sup>123</sup> to include torture as an offense under their criminal law,<sup>124</sup> and to punish offenses with penalties appropriate to the severity of the crime.<sup>125</sup> Article 1 defines torture as the intentional infliction of pain or suffering, either physical or mental, by a person acting in an official capacity for purposes of intimidation, coercion, or for any reason based on discrimination.<sup>126</sup> Article 2 provides that a state of war does not justify the use of torture.<sup>127</sup>

The Convention on the Rights of the Child<sup>128</sup> orders states to give the best interests of the child primary consideration<sup>129</sup> and to ensure, to the maximum extent possible, the survival and development of the child.<sup>130</sup> James P. Grant, the Executive Director of United Nations Children's Fund ("UNICEF"), in a letter to the Chairman of the Commission on Human Rights dated February 25, 1993, stated UNICEF's position in response to the violations of the rights of women and children in the former Yugoslavia.<sup>131</sup> Grant drew particular attention to the prevalent use of rape of women and girls by soldiers as a weapon of war.<sup>132</sup> Grant's letter cites reports compiled by the Commission on Human Rights, which assert that the rape of women and girls is widespread, and that persons in positions of authority do not intervene, or attempt to stop the rapes.<sup>133</sup> In fact, some authori-

123. *Id.* art. 2(1), U.N. Doc. A/RES/39/46 at 3, 1991 Gr. Brit. T.S. No. 107 at 3.

124. *Id.* art. 4(1), U.N. Doc. A/RES/39/46 at 4, 1991 Gr. Brit. T.S. No. 107 at 4.

125. *Id.* art. 4(2), U.N. Doc. A/RES/39/46 at 4, 1991 Gr. Brit. T.S. No. 107 at 4.

126. *Id.* art. 1(1), U.N. Doc. A/RES/39/46 at 3, 1991 Gr. Brit. T.S. No. 107 at 3.

Article 1(1) defines "torture," in part, as: "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted . . . for such purposes as intimidating or coercing . . . or for any reason based on discrimination . . . when such pain or suffering is inflicted by . . . a public official, or other person acting in an official capacity." *Id.*

127. *Id.* art. 2(2), U.N. Doc. A/Res/39/46 at 3, 1991 Gr. Brit. T.S. No. 107 at 3.

128. Convention on the Rights of the Child, Nov. 20, 1989, U.N. Doc. A/RES/44/25, 1992 Gr. Brit. T.S. No. 44 (Cm. 1976).

129. *Id.* art. 3(1), U.N. Doc. A/RES/44/25 at 5, 1992 Gr. Brit. T.S. No. 44 at 4.

130. *Id.* art. 6(2), U.N. Doc. A/RES/44/25 at 6, 1992 Gr. Brit. T.S. No. 44 at 4.

131. Letter dated 25 February 1993 from the Executive Director of United Nations Children's Fund to the Chairman of the Commission on Human Rights, U.N. Commission on Human Rights, 49th Sess., Agenda Item 27, U.N. Doc. E/CN.4/1993/107 (1993) [hereinafter Letter from UNICEF Executive Director].

132. *Id.* at 2.

133. *Id.*

[T]hey (the team of experts) heard of no attempts made by anyone in a position of authority to try and stop the raping of women and girls. In fact, some of those in power actively participated in it . . . Rape of females has encom-

ties actually participated in the raping of women and girls.<sup>134</sup> Grant cited the sections of the Convention on the Rights of the Child where the violations have been most egregious, particularly: (1) the right of children to be protected from discrimination and punishment based on status or a parent's beliefs,<sup>135</sup> (2) the right of children to be protected from all forms of physical and mental abuse,<sup>136</sup> (3) the right of children to a standard of living adequate for healthy development,<sup>137</sup> (4) the right of children to be protected from exploitation and sexual abuse,<sup>138</sup> (5) the right of children to be protected from torture, cruel or degrading treatment,<sup>139</sup> (6) the right of children to be protected from unlawful or arbitrary deprivation of liberty,<sup>140</sup> and (7) the right of children to have their human rights protected during

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passed the entire age spectrum, from children to elderly women, in all areas of the conflict . . . Rape of women including minors has occurred on a large scale."

*Id.*

134. *Id.*

135. *Id.* at 3. Article 2(2) of the Convention on the Rights of the Child provides that "States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members." Convention on the Rights of the Child, *supra* note 128, art. 2(2), U.N. Doc. A/RES/44/25 at 5, 1992 Gr. Brit. T.S. No. 44 at 4.

136. Letter from UNICEF Executive Director, *supra* note 131, at 3. Article 19, sub. 1, provides that "States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse . . . including sexual abuse." Convention on the Rights of the Child, *supra* note 128, art. 19(1), U.N. Doc. A/RES/44/25 at 10, 1992 Gr. Brit. T.S. No. 44 at 7.

137. Letter from UNICEF Executive Director, *supra* note 131, at 3. Article 27(1), provides that "States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development." Convention on the Rights of the Child, *supra* note 128, art. 27(1), U.N. Doc. A/RES/44/25 at 14, 1992 Gr. Brit. T.S. No. 44 at 10.

138. Letter from UNICEF Executive Director, *supra* note 131, at 3. Article 34 provides that "States Parties undertake to protect the child from all forms of exploitation and sexual abuse." Convention on the Rights of the Child, *supra* note 128, art. 34, U.N. Doc. A/RES/44/25 at 16, 1992 Gr. Brit. T.S. No. 44 at 11.

139. Letter from UNICEF Executive Director, *supra* note 131, at 4. Article 37(a) provides that "[n]o child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment." Convention on the Rights of the Child, *supra* note 128, art. 37(a), U.N. Doc. A/RES/44/25 at 17, 1992 Gr. Brit. T.S. No. 44 at 12.

140. Letter from UNICEF Executive Director, *supra* note 131, at 4. Article 37(b) provides that "no child shall be deprived of his or her liberty unlawfully or arbitrarily." Convention on the Rights of the Child, *supra* note 128, art. 37(b), U.N. Doc. A/RES/44/25 at 17, 1992 Gr. Brit. T.S. No. 44 at 12.

armed conflict.<sup>141</sup>

## 2. Treaties Enforceable By Third-Party States

The Convention on the Prevention and Punishment of the Crime of Genocide<sup>142</sup> ("Genocide Convention") marked the first effort by the United Nations to combat human rights violations through a treaty.<sup>143</sup> The Genocide Convention reaches all persons "whether they are constitutionally responsible rulers, public officials or private individuals."<sup>144</sup> The Genocide Convention was drafted to deter and punish those who would engage in acts of genocide.<sup>145</sup> Article IV of the Genocide Convention specifies that any person who commits acts of genocide can be held accountable under the terms of this convention.<sup>146</sup>

Article III of the Geneva Convention Relative to the Protec-

141. Letter from UNICEF Executive Director, *supra* note 131, at 3. Article 38(4) provides: "In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict." Convention on the Rights of the Child, *supra* note 128, art. 38(4), U.N. Doc. A/RES/44/25 at 18, 1992 Gr. Brit. T.S. No. 44 at 12.

142. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, 1970 Gr. Brit. T.S. No. 58 (Cmd. 4421) [hereinafter Genocide Convention].

143. RICHARD B. LILICH, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE* 178 (2d ed. 1991). Article II of the Genocide Convention defines genocide as:

any . . . acts committed with intent to destroy, in whole or in part, a national, ethnical, 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.

Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 142, art. II, 78 U.N.T.S. at 280, 1970 Gr. Brit. T.S. No. 58 at 4. Article III of the Genocide Convention defines those acts which shall be punishable as:

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

*Id.* art. III, 78 U.N.T.S. at 280, 1970 Gr. Brit. T.S. No. 58 at 4.

144. *Id.* art. IV, 78 U.N.T.S. at 280, 1970 Gr. Brit. T.S. No. 58 at 4.

145. *Id.* pmb1, 78 U.N.T.S. at 278, 1970 Gr. Brit. T.S. No. 58 at 4.

146. *Id.* art. IV, 78 U.N.T.S. at 280, 1970 Gr. Brit. T.S. No. 58 at 4.

tion of Civilian Persons in Time of War<sup>147</sup> articulates the minimum standard for the treatment of non-combatant persons present in a conflict not of an international character.<sup>148</sup> Article 3(1) mandates that persons taking no active role in hostilities must be treated humanely without discrimination, regardless of racial, social, religious, or economic distinctions.<sup>149</sup> Accordingly, Article 3(1) prohibits certain acts commonly perpetrated against non-combatant persons in regions of armed conflict: (1) murder, mutilation, cruel treatment, and torture,<sup>150</sup> (2) taking of hostages,<sup>151</sup> (3) humiliating and degrading treatment,<sup>152</sup> (4) the passing of sentences without adequate due process of law.<sup>153</sup> Additionally, Article 3(2) mandates care for the sick and wounded.<sup>154</sup>

#### D. U.N. Commission on Human Rights Appoints Special Rapporteur

When the U.N. Commission on Human Rights became aware that Bosnian Serb forces were systematically employing ethnic cleansing to drive non-Serb populations from Serb-held regions of Bosnia, the Chairman of the Commission appointed Mr. Tadeusz Mazowiecki, former Prime Minister of Poland, as

147. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 75 U.N.T.S. 287, 1958 Gr. Brit. T.S. No. 39 (Cmnd. 550) [hereinafter Geneva Convention].

148. *Id.*; see LILICH, *supra* note 143, at 776-79 (providing background leading to adoption of Geneva Convention).

149. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 147, art. 3(1), 75 U.N.T.S. at 288-90, 1958 Gr. Brit. T.S. No. 39 at 216. Article 3(1) provides, in part, that: "Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria." *Id.*

150. *Id.* art. 3(1)(a), 75 U.N.T.S. at 290, 1958 Gr. Brit. T.S. No. 39 at 216. Article 3(1)(a) prohibits "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture." *Id.*

151. *Id.* art. 3(1)(b), 75 U.N.T.S. at 290, 1958 Gr. Brit. T.S. No. 39 at 216.

152. *Id.* art. 3(1)(c), 75 U.N.T.S. at 290, 1958 Gr. Brit. T.S. No. 39 at 216. Article 3(1)(c) prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment." *Id.*

153. *Id.* art. 3(1)(d), 75 U.N.T.S. at 290, 1958 Gr. Brit. T.S. No. 39 at 216. Article 3(1)(d) prohibits "the passing of sentences and the carrying out of execution without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id.*

154. *Id.* art. 3(2), 75 U.N.T.S. at 290, 1958 Gr. Brit. T.S. No. 39 at 216-18.

Special Rapporteur.<sup>155</sup> The Special Rapporteur was instructed to make recommendations for ending human rights violations, and to gather information on possible human rights violations that may constitute war crimes.<sup>156</sup> According to reports filed by the Special Rapporteur, violations of human rights committed in Bosnia have been grave and pervasive.<sup>157</sup>

## II. U.N. ATTEMPTS TO RESTORE INTERNATIONAL PEACE AND SECURITY

Within the first few weeks of Bosnia's recognized independence, the federal army and Bosnian Serb paramilitary forces captured more than sixty percent of Bosnian territory.<sup>158</sup> This quick victory was largely attributed to the federal army's contribution of approximately 100,000 troops, weaponry, and a constant supply of ammunition, food, and fuel from Serbia.<sup>159</sup> The military advantage provided by the federal army's support proved indispensable to the Bosnian Serb forces' policy of ethnically cleansing non-Serb populations from Serb-held territory.<sup>160</sup>

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155. *First Special Session*, *supra* note 18, at 2, 13. On August 14, 1992, the U.N. Commission on Human Rights adopted Resolution 1992/S-1/1 which requested its Chairman to appoint a special rapporteur to "investigate first hand the human rights situation in the territory of the former Yugoslavia, in particular within Bosnia and Herzegovina." *Id.*

156. *Id.* at 5.

157. *Tenth Periodic Report on the Situation of Human Rights in the Territory of the Former Yugoslavia*, U.N. Commission on Human Rights, 51st Sess., Item 12, at 5-6, 11-12, U.N. Doc. E/CN.4/1995/ 57 (1995) [hereinafter *Tenth Report*]; *Ninth Periodic Report on the Situation of Human Rights in the Territory of the Former Yugoslavia*, U.N. Secretary-General, 49th Sess., at 5-6, 21, U.N. Doc. A/49/641, and S/1994/1252 (1994) [hereinafter *Ninth Report*]; *Eighth Periodic Report on the Situation of Human Rights in the Territory of the Former Yugoslavia*, U.N. Secretary-General, 49th Sess., at 6, U.N. Doc. S/1994/967 (1994) [hereinafter *Eighth Report*]; *Seventh Report*, *supra* note 17, at 1; *Sixth Periodic Report of the Situation of Human Rights in the Territory of the Former Yugoslavia*, U.N. Commission on Human Rights, 50th Sess., Agenda Item 12, at 4, U.N. Doc. E/CN.4/1994/110 (1994) [hereinafter *Sixth Report*]; *Fifth Periodic Report on the Situation of Human Rights in the Territory of the Former Yugoslavia*, U.N. Commission on Human Rights, 50th Sess., Agenda Item 12, at 4-5, U.N. Doc. E/CN.4/1994/47 (1994) [hereinafter *Fifth Report*]; *First Report*, *supra* note 112, at 2.

158. MALCOLM, *supra* note 14, at 238.

159. *Id.* at 239.

160. *Id.* at 239-40. The Bosnian government, unprepared to mount a military defense of its territory, had a defense force numbering only 3500 in the spring of 1992. *Id.* at 240. It was estimated, in September 1992, that the Bosnian government army possessed only two tanks and two armored personnel carriers ("APCs"). *Id.* at 243. By contrast, the Bosnian Serb forces possessed 300 tanks, 200 APCs, 800 artillery pieces, and 40 aircraft. *Id.*

The reports compiled by the Special Rapporteur for the Commission on Human Rights catalogued the widespread human rights violations that occurred during the conflict.<sup>161</sup> Since the Security Council terminated Bosnia's Article 51 right to self-defense under Resolution 713,<sup>162</sup> it has passed numerous resolutions, each constituting an element of the three-year effort to restore international peace and security in Bosnia.<sup>163</sup> On February 21, 1994, the Special Rapporteur issued a report which examined the effectiveness of U.N. efforts to address the human rights violations in Bosnia, and also made recommendations for both the enforcement of present resolutions and the drafting of future resolutions.<sup>164</sup>

#### A. A Catalogue of Human Rights Violations

Since the Special Rapporteur began collecting evidence of human rights abuses in the territory of the former Yugoslavia, he has documented the commission of human rights violations on a massive scale.<sup>165</sup> To the extent that he has been able, the Special Rapporteur has travelled throughout the various republics of the former Yugoslavia in the performance of his mandate.<sup>166</sup> Throughout his fourteen periodic reports,<sup>167</sup> the Special Rapporteur has focused on those violations committed most perva-

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161. *Sixth Report*, *supra* note 157, at 43-44.

162. Resolution 713, *supra* note 3, at 3, ¶ 6. On September 25, 1991, the Security Council adopted Resolution 713, which provides "under Chapter VII of the Charter of the United Nations, that all States shall, for the purposes of establishing peace and stability in Yugoslavia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia." *Id.*

163. See General Assembly Resolution 49/10, *supra* note 9, at 1-4, pmb. (noting that relevant Security Council resolutions, intended to restore international peace and security, have not been implemented).

164. *Sixth Report*, *supra* note 157, at 43-53.

165. *First Report*, *supra* note 112, at 11. The Special Rapporteur, in his first periodic report to the Commission on Human Rights, concluded that "[m]assive and grave violations of human rights are occurring throughout the territory of Bosnia and Herzegovina." *Id.*

166. Letter Dated 15 September 1994 from the Secretary-General Addressed to the President of the Security Council, U.N. Doc. S/1994/1066 (1994). The Special Rapporteur responded to comments made by the government of the Federal Republic of Yugoslavia (Serbia and Montenegro) which criticized his sixth periodic report. *Id.* at 4. In his letter, the Special Rapporteur defended the objectivity of his reports, and noted that the government of the Federal Republic of Yugoslavia was obstructing the Special Rapporteur's efforts to perform his mandate in Serbia and Montenegro. *Id.*

167. *Tenth Report*, *supra* note 157, at 29-31.

sively in Bosnia, including: terrorization of civilians,<sup>168</sup> detention,<sup>169</sup> ethnic cleansing,<sup>170</sup> rape,<sup>171</sup> military attacks on civilians,<sup>172</sup> and interference with the delivery of humanitarian aid.<sup>173</sup>

### 1. Terrorization of Civilians

The Special Rapporteur reported that the terrorization of civilians was most prevalent in areas controlled by Bosnian Serbs and Bosnian Croats.<sup>174</sup> The Special Rapporteur also noted that the campaign of civilian terrorization was particularly intense in the Banja Luka region<sup>175</sup> of Bosnia, which is held, primarily, by Bosnian Serb forces.<sup>176</sup> Additionally, the Special Rapporteur reported that there was an escalation in the rate of ejecting Bosnian Muslim and Croat tenants from their apartments between November 1993, and March 1, 1994.<sup>177</sup> Apparently, a "housing agency" facilitated the allocation of apartments to incoming Serb displaced persons by selecting accommodations and then evicting the Muslim or Croat tenants.<sup>178</sup> Accompanying this threat of eviction, Muslim residents of the Banja Luka area were also victims of frequent shootings, assault, threats and robberies.<sup>179</sup> At the time of the Special Rapporteur's report, 202 mosques and twenty-one percent of Roman Catholic buildings in the Banja Luka diocese had been razed.<sup>180</sup> The Special Rapporteur concluded that the authorities of Banja Luka were attempting to eliminate all traces of the Muslim and Croat com-

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168. *Sixth Report, supra* note 157, at 5-7.

169. *Id.* at 8.

170. *Id.* at 9-10.

171. *Id.* at 11.

172. *Id.* at 11.

173. *Id.* at 12.

174. *Id.* at 4.

175. *Id.* at 5. Banja Luka is a region of Bosnia populated by a Serb majority. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* This "housing agency" reputedly received payments for its services in the form of possessions left behind by the previous occupants. *Id.*

179. *Id.*

180. *Id.*; see *Fifth Report, supra* note 157, at 14. In the Special Rapporteur's fifth periodic report, he reported that "[f]ive out of six mosques in Serb-held Bijeljina and almost all mosques in Banja Luka were reportedly blown up in 1993. Eyewitnesses claimed that the demolition was systematic and the sites were quickly replanted with trees." *Id.*

munities.<sup>181</sup>

## 2. Detention

According to the Special Rapporteur, in 1993, the International Committee of the Red Cross<sup>182</sup> visited 200 detention centers and 16,900 detainees held throughout Bosnia.<sup>183</sup> During detention, thousands of prisoners were executed and many more were repeatedly raped and tortured.<sup>184</sup> While all parties to the conflict have detained persons under poor conditions,<sup>185</sup> and many detainees have been subjected to forced labor, according to the Special Rapporteur, neither the Bosnian Croat nor Bosnian government forces has orchestrated the practice.<sup>186</sup> The Special Rapporteur attributed incidents of forced labor in camps controlled by these two parties to the initiative of local commanders.<sup>187</sup>

## 3. Ethnic Cleansing

Although the Bosnian government has been accused of attempting to empty certain territory of ethnic Serbs, the Special

181. *Sixth Report*, *supra* note 157, at 5.

182. LILICH, *supra* note 143, at 344. The International Committee of the Red Cross ("ICRC") investigates and reports conditions in which prisoners are held during conflict. *Id.*; see *First Special Session*, *supra* note 18, at 3 (demanding, in Commission on Human Rights Resolution 1992/S-1/1, that ICRC have unimpeded access to all camps, prisons, and other places of detention within Bosnia); *Report on the Visit to Former Yugoslavia by a Member of the Working Group on Enforced or Involuntary Disappearances*, U.N. Commission on Human Rights, 50th Sess., Agenda Item 10(c), at 6, U.N. Doc. E/CN.4/1994/26/Add.1 (1994) (discussing role of ICRC in documenting and locating missing persons).

183. *Sixth Report*, *supra* note 157, at 8. According to the Special Rapporteur's sixth periodic report, "[d]uring 1993 the ICRC visited 16,900 detainees, 14,400 of them for the first time; 10,440 of those 16,900 were released during the year and some 1000 were removed from the 'active' register by reason of death, escape or for other reasons." *Id.*

184. *Report on Human Rights*, *supra* note 112, at 12-21. The International Tribunal investigating the commission of war crimes in the former Yugoslavia charged the Serbian commander of the Omarska concentration camp in Bosnia with genocide. Roger Cohen, *Tribunal Charges Genocide By Serb*, N.Y. TIMES, Feb. 14, 1995, at A1. Twenty other Serbian commanders, guards, and visitors at the camp were also charged with war crimes. *Id.*

185. *Sixth Report*, *supra* note 157, at 8. The Special Rapporteur cited international observers of the detention camps who characterized the camp conditions as "very bad" when prisoners suffered from cold, hunger, abuse, and lack of basic necessities. *Id.*

186. *Id.*

187. *Id.* at 8.

Rapporteur concluded that the Bosnian government was not applying a policy comparable to ethnic cleansing.<sup>188</sup> Indeed, in one report, the Special Rapporteur warned that the Bosnian Muslim community was threatened with extermination.<sup>189</sup> According to the Special Rapporteur's first report,<sup>190</sup> the process of ethnically cleansing territory followed a common pattern throughout Bosnian Serb-held territory.<sup>191</sup> Witnesses testified that Serbian extremists forcibly replaced officials who were moderates or who refused to cooperate with a policy of violence against Muslims and Croats.<sup>192</sup> Once authorities sympathetic to the policy of ethnically cleansing were installed, non-Serb populations were subjected to harassment, discrimination, and violence perpetrated by Serbian soldiers and Serbian mercenaries.<sup>193</sup> Serbian villagers also participated in acts of violence against their Muslim and Croat neighbors.<sup>194</sup> This violent intimidation has been extensively used to drive non-Serbs out of Bosnian Serb-held territory.<sup>195</sup> One common form of intimidation is to direct gunfire at Bosnian Muslim and Croat homes, or to detonate them by throwing explosives.<sup>196</sup> Once deciding to leave, residents were frequently forced to sign documents stating that they would never return.<sup>197</sup> Prior to departure, residents generally sold their homes for whatever price they could get or turned their keys over to the municipality for "safekeeping."<sup>198</sup> The Special Rapporteur also found that Bosnian Muslims and Croats who remained in Bosnian Serb-held territory were fired from their public sector jobs due to their ethnic origin.<sup>199</sup> It was also reported that private shops and businesses owned by non-

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188. *First Report*, *supra* note 112, at 5; see *Seventh Report*, *supra* note 17, at 4 (noting that government forces have been responsible for violations of human rights, though not on scale comparable with that of Bosnian Serb forces); *Eighth Report*, *supra* note 157, at 7 (reporting ongoing commission of ethnic cleansing in areas under control of Bosnian Serb forces).

189. *Fifth Report*, *supra* note 157, at 36.

190. *First Report*, *supra* note 112, at 5.

191. *Id.* at 2.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at 3.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

Serbs were burned and looted.<sup>200</sup> According to the Special Rapporteur, Bosnian Serb forces continue to engage in the practice of ethnic cleansing throughout Bosnia.<sup>201</sup>

#### 4. Rape

The Bosnian Serb army has sponsored rape as a tool for ethnically cleansing territories under its control.<sup>202</sup> In his most recent report, the Special Rapporteur concluded that the war in Bosnia continues to be characterized by the widespread rape and sexual abuse of women, committed primarily, though not exclusively, by Bosnian Serb and Bosnian Croat forces.<sup>203</sup> In addition, the Special Rapporteur concluded that the de facto Bosnian Serb authorities had continued their policy of ethnic cleansing during the entirety of his mandate.<sup>204</sup> Indeed, the Special Rap-

200. *Id.*

201. *Ninth Report, supra* note 157, at 20. The Special Rapporteur found that the Bosnian Serb forces were engaged in their largest campaign of ethnic cleansing since the summer of 1992. *Id.* The Special Rapporteur also noted that reports of continued ethnic cleansing by Bosnian Serb forces were received from locations throughout Bosnia, such as: Prijedor, Rogatica, Bijeljina and Banja Luka. *Eighth Report, supra* note 157, at 7.

202. MALCOLM, *supra* note 14, at 245 & n.27. According to a team of experts sent to the former Yugoslavia by the Special Rapporteur "[r]ape has been used as one method to terrorize civilian populations in villages and forcing ethnic groups to leave." *Report on Human Rights, supra* note 112, at 72. In their report, the team of experts described an example of how Bosnian Serb forces use rape as a tool of ethnic cleansing. *Id.* Serb paramilitary units would enter a village and publicly rape several women, so that word of the rape would spread throughout the village and create a climate of fear. *Id.* Several days later, the federal army would enter the village offering safe passage out of the village to all non-Serbs. *Id.* Male villagers who otherwise might stay and try to defend the village, seize the opportunity to escape the village and protect their women and children from being raped. *Id.* In January 1993, European Community investigators compiled a report in which they concluded that Serb forces had raped "up to 20,000 Slavic Muslim women and girls in Bosnia as part of a systematic policy of terror designed to intimidate, demoralize, and drive them from their homes." William Drozdiak, *Serbs Raped 20,000 EC Team Says*, WASH. POST, Jan. 9, 1993, at A12, A17; *Rape Goes to War*, ECONOMIST, Jan. 23, 1993, at 46.

203. *Sixth Report, supra* note 157, at 4-5. The Special Rapporteur, in his report, states that

[w]ar continues unabated in Bosnia and Herzegovina and continues to be characterized by wholesale violation of human rights and of humanitarian law. Whole populations remain victim to terrorization and harassment, particularly, though not exclusively, on territory controlled by Bosnian Serb and Bosnian Croat forces. . . . The commission of rape and other forms of sexual abuse against women continues.

*Id.*

204. *Sixth Report, supra* note 157, at 44. In his report, the Special Rapporteur con-

porteur found that the Bosnian Serb army established and maintained detention centers for the sole purpose of sexually abusing young women.<sup>205</sup>

### 5. Military Attacks on Civilians

The Special Rapporteur concluded that the Bosnian Serb forces continued to target civilians throughout the areas in which they were fighting.<sup>206</sup> The Special Rapporteur expressed particular concern for Bosnian Serb offensives against the U.N. safe areas of Sarajevo, Tuzla, and Gorazde.<sup>207</sup> During the month of January 1994, residents of Sarajevo were subjected to 1000 indiscriminate shelling and rocket attacks from Bosnian Serb positions, per day.<sup>208</sup> Meanwhile, in Tuzla, Bosnian Serbs forces repeatedly attacked residents with cluster bombs and anti-personnel rockets, producing many casualties.<sup>209</sup> In Gorazde, the Bosnian Serb forces conducted an offensive that included the deliberate targeting of civilian areas, including hospitals and humanitarian supply routes.<sup>210</sup> Most of the fatalities associated with the offensive were caused by direct mortar and missile attacks on the city.<sup>211</sup> Weapons of greater destructive force, however, were

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cluded that "[d]uring the whole period of the Special Rapporteur's mandate the policy of 'ethnic cleansing,' initiated by the *de facto* Bosnian Serb authorities, has continued unabated." *Id.*

205. *Fifth Report, supra* note 157, at 6. The Special Rapporteur found that young women were detained in Bosnian Serb army barracks, which served as brothels. *Id.* Additionally, 100 young women, aged 15 to 17, were held in the "Westphalia" coffee house for purposes of sexual abuse. *Id.*

206. *Sixth Report, supra* note 157, at 11.

207. *Id.*

208. *Id.* While the Special Rapporteur noted that some of the Bosnian Serb shelling was retaliatory for government attacks launched from the city, he concluded that most were indiscriminate. *Id.* UNPROFOR was unable to establish the origin of a February 5, 1994, mortar attack on a Sarajevo marketplace that killed 68 civilians and wounded 200. *Id.*

209. *Id.* at 11-12. In December 1993, the Bosnian Serbs intentionally targeted the city's chemical factories, despite the risks this posed to the civilian population. *Id.*

210. *Seventh Report, supra* note 17, at 2. The ethnic Serb minority that lived in Gorazde was not subjected to any significant harassment prior to the Bosnian Serb offensive against Gorazde. *Id.* Many civilians wounded in the attacks died of their casualties because the medical staff was unable to provide proper care during the hospital's constant shelling. *Id.* The Bosnian Serbs forces claimed that the hospital was being used as a "military command centre." *Id.* Relying on first-hand accounts by international observers, the Special Rapporteur concluded that the hospital did not serve any military function. *Id.*

211. *Id.* The Bosnian Serb forces destroyed the water station that supplied Gorazde, forcing residents to line up for water at wells. *Id.* at 3. Exposed while waiting

also used against Gorazde.<sup>212</sup>

### 6. Interference with the Delivery of Humanitarian Aid

Interference with the delivery of humanitarian aid has resulted in great hardship for many isolated and besieged populations.<sup>213</sup> Shortages of aid supplies have created tension between ethnic communities in cities where relations have otherwise been civil.<sup>214</sup> Tensions are exacerbated by the relative success of local Serb and Croat agencies in arranging for the delivery of aid from Belgrade and Zagreb, while the local Muslim agencies frequently have their aid blocked by Serb and Croat forces.<sup>215</sup>

#### B. Security Council Resolutions

On February 21, 1992, the Security Council adopted Resolution 743 establishing a United Nations Protection Force ("UNPROFOR").<sup>216</sup> UNPROFOR's mission was to facilitate the creation of a suitable environment for peace negotiations, which might lead to an overall settlement of the war in the former Yugoslavia.<sup>217</sup> In May 1992, however, shortly after UNPROFOR's arrival within Bosnia, the conflict intensified.<sup>218</sup>

Security Council Resolution 752<sup>219</sup> demanded that the fed-

on line, many were killed by sniper fire. *Id.* The number of fatalities from sniper fire rose as the offensive progressed. *Id.* at 2.

212. *Id.* at 3. These weapons included wire guided missiles and "aerosol bombs." *Id.* A Bosnian Serb attack on the Vitkovici chemical plant, which contained ammonium nitrate, exposed the residents and livestock to health risks. *Id.*

213. *Id.* The people of Gorazde were deprived of a mobile hospital while their own hospital was filled well beyond capacity. *Id.*; see *Eighth Report, supra* note 157, at 6 (discussing humanitarian crisis resulting from blockade of humanitarian aid destined for Bihac); *Sixth Report, supra* note 157, at 12 (discussing serious shortages of food, medicines, and basic "winterization" materials resulting from looting of aid supplies throughout Bosnia).

214. *Sixth Report, supra* note 157, at 8. Tuzla is a case in point. *Id.* Tuzla received only 14.5% of the aid that the United Nations High Commissioner for Refugees ("UNHCR") estimated was necessary to feed adequately its population in December 1993. *Id.*

215. *Id.*

216. S.C. Res. 743, U.N. SCOR, 3055th mtg. at 2, ¶ 5, U.N. Doc. S/RES/743 (1992).

217. *Id.* Resolution 743 states that "the [UNPROFOR] should be an interim arrangement to create the conditions of peace and security required for the negotiations of an overall settlement of the Yugoslav crisis." *Id.*

218. *United Nations and the Situation in the Former Yugoslavia*, at 5, U.N. Doc. DPI/1312/Rev. 2 (1994).

219. S.C. Res. 752, U.N. SCOR, 3075th mtg., U.N. Doc. S/RES/752 (1992).

eral army units within Bosnia be immediately withdrawn, placed under the authority of the Bosnian government, or be disbanded and disarmed.<sup>220</sup> In addition, the Security Council called upon parties to immediately cease the practice of forcing the expulsion of persons from regions where they live, with the intention of altering the ethnic composition of a territory's population.<sup>221</sup> Despite the Security Council's adoption of Resolution 752, Bosnian Serb forces continued to receive direct military support from the federal army and other irregular forces originating outside of Bosnia.<sup>222</sup> Consequently, on May 30, 1992, the Security Council imposed wide-ranging sanctions on the Federal Republic of Yugoslavia (Serbia and Montenegro) to discourage further military assistance to the Bosnian Serbs, and to encourage compliance with Resolution 752.<sup>223</sup>

Taking note of the continued reports of human rights atrocities within Bosnia, including violations of the Geneva Convention,<sup>224</sup> the Security Council, on August 13, 1992, adopted Reso-

220. *Id.* Resolution 752 states that "those units of the Yugoslav People's Army (JNA) and elements of the Croatian Army now in Bosnia-Herzegovina must either be withdrawn, or be subject to the authority of the Government of Bosnia-Herzegovina, or be disbanded and disarmed with their weapons placed under effective international monitoring." *Id.* at 2, ¶ 4.

221. *Id.* at 2, ¶ 6. Resolution 752 calls on parties to "ensure that forcible expulsions of persons from the areas where they live and any attempts to change ethnic composition of the population, anywhere in the former Socialist Federal Republic of Yugoslavia, cease immediately." *Id.*

222. S.C. Res. 757, U.N. SCOR, 3082nd mtg. at 1-3, pmb., U.N. Doc. S/RES/757 (1992). Resolution 757 reiterates the unfulfilled demands made in Resolution 752, including:

- that all parties and others concerned in Bosnia and Herzegovina stop the fighting immediately,
- that all forms of interference from outside Bosnia and Herzegovina cease immediately,
- that action be taken as regards units of the [federal army] in Bosnia and Herzegovina, including the disbanding and disarming with weapons placed under effective international monitoring of any units that are neither withdrawn nor placed under the authority of the Government of Bosnia and Herzegovina,
- that all irregular forces in Bosnia and Herzegovina be disbanded and disarmed . . . .

*Id.*

223. *Id.* at 3-6, ¶¶ 1-13.

224. *See supra* note 147 and accompanying text (discussing conduct prohibited under Geneva Convention).

lution 771.<sup>225</sup> In Resolution 771 the Security Council expressed alarm at continuing reports of human rights violations, including the mass expulsion and deportation of civilians, abuse of civilians in detention centers, and deliberate attacks on non-combatants.<sup>226</sup> In addition, the Security Council strongly condemned the practice of ethnic cleansing as a violation of international human rights law.<sup>227</sup> It further demanded that international humanitarian relief organizations be granted unimpeded and continuous access to all prison camps and detention centers.<sup>228</sup>

On September 14, 1992, the Security Council adopted Resolution 776,<sup>229</sup> which authorized the enlargement of UNPROFOR's mandate and strength so that it would be in a position to assume primary responsibility for the protection and delivery of humanitarian assistance to civilian populations.<sup>230</sup> The Special Rapporteur has repeatedly cited the Bosnian Serbs for their practice of hijacking, harassing, and charging tolls for the safe passage of humanitarian relief convoys. This interference has greatly contributed to the shortage of food, medicines, and fuel for the operations of hospitals in non-Serb civilian communities.

In response to reports of widespread and systematic detention and rape of women, particularly Muslim women, in Bosnia,<sup>231</sup> the Security Council adopted Resolution 798, on December 18, 1992, demanding that all detention camps be immediately closed.<sup>232</sup> This Resolution specifically called for the closure of camps that detained exclusively women.<sup>233</sup> In addition, Resolution 798 expressed the Security Council's support for the European Community's investigations into the alleged widespread

225. S.C. Res. 771, U.N. SCOR, 3106th mtg., U.N. Doc. S/RES/771 (1992) [hereinafter Resolution 771].

226. *Id.* at 1, pmb1. In Resolution 771 the Security Council also expressed "grave alarm at continuing reports of . . . deliberate attacks on . . . hospitals and ambulances, impeding the delivery of food and medical supplies to the civilian population, and wanton devastation and destruction of property." *Id.*

227. *Id.* at 1, ¶ 2.

228. *Id.* at 1, ¶ 4.

229. S.C. Res. 776, U.N. SCOR, 3114th mtg., U.N. Doc. S/RES/776 (1992).

230. *Id.* at 2, ¶ 2.

231. S.C. Res. 798, U.N. SCOR, 3150th mtg. at 1, pmb1, U.N. Doc. S/RES/798 (1992) [hereinafter Resolution 798].

232. *Id.*

233. *Id.*

abuse of women in Bosnia.<sup>234</sup>

In response to Bosnian Serb aerial bombing raids, and the use of aircraft for other military operations, the Security Council adopted Resolution 781, on October 9, 1992, banning all military flights within Bosnia.<sup>235</sup> In response to the use of military aircraft in the March 13, 1993, bombing of two Bosnian Muslim villages,<sup>236</sup> the Security Council, on March 31, 1993, adopted Resolution 816<sup>237</sup> authorizing member states to take "all necessary measures" to ensure compliance with the flight ban,<sup>238</sup> and authorized the North Atlantic Treaty Organization ("NATO") to act as the U.N. enforcement arm.<sup>239</sup> In Resolution 816, the Security Council determined that the repeated violation of the ban on military flights in Bosnia constituted a continuing threat to international peace and security.<sup>240</sup>

In response to Bosnian Serb attempts to ethnically cleanse the non-Serb civilian population of Srebrenica,<sup>241</sup> the Security Council, on April 16, 1993, adopted Resolution 819, which classified the eastern Bosnian town of Srebrenica as a "safe area,"<sup>242</sup> and demanded that Bosnian Serb paramilitary units cease their attacks against Srebrenica.<sup>243</sup> Noting the recommendations of a

234. *Id.* at 1, ¶ 1-5.

235. S.C. Res. 781, U.N. SCOR, 3122th mtg. at 2, ¶ 1, U.N. Doc. S/RES/781 (1992) [hereinafter Resolution 781]. Between the time the United Nations began monitoring the flight ban and a March 17, 1993 report on the status of the ban, there had been 465 reported violations of the "no-fly zone." *United Nations and the Situation in the Former Yugoslavia*, *supra* note 218, at 13. The U.N. Secretary-General requested an explanation of the flight-ban violation from the Federal Republic of Yugoslavia (Serbia and Montenegro). *Id.* The response given the Secretary-General stated that "airplanes and helicopters of the Air Forces of the Army of Yugoslavia have not violated the airspace of Bosnia and Herzegovina since the no-fly zone came into effect." *Id.*

236. *Id.* at 14.

237. S.C. Res. 816, U.N. SCOR, 3191st mtg., U.N. Doc. S/RES/816 (1993).

238. *Id.* at 2, ¶ 4.

239. *United Nations and the Situation in the Former Yugoslavia*, *supra* note 218, at 14. Between the establishment of the "no-fly zone" and March 1, 1994, 1484 violations of the ban had been reported. *Id.*

240. S.C. Res. 816, U.N. SCOR, 3191st mtg. at 1, pmb., U.N. Doc. S/Res/816 (1993).

241. S.C. Res. 819, U.N. SCOR, 3199th mtg. at 2, ¶ 6, U.N. Doc. S/RES/819 (1993) [hereinafter Resolution 819]. In Resolution 819, the Security Council condemned the Bosnian Serb forces' attempt to "force the evacuation of the civilian population from Srebrenica and its surrounding area . . . as part of its overall abhorrent campaign of 'ethnic cleansing'." *Id.*

242. *Id.* at 2, ¶ 1.

243. *Id.* at 2, ¶ 2.

fact-finding mission to Bosnia,<sup>244</sup> the Security Council, in Resolution 824 of May 6, 1993, concluded that the critical security and humanitarian needs of towns in eastern Bosnia necessitated the extension of the safe area concept.<sup>245</sup> Consequently, in Resolution 824 the Security Council declared that Sarajevo, Tuzla, Zepa, Gorazde, and Bihac should be treated as safe areas, and should be free from armed attack.<sup>246</sup> On May 25, 1993, the Security Council adopted Resolution 827,<sup>247</sup> which established an International Tribunal<sup>248</sup> to prosecute persons responsible for violating international human rights law in the territory of the former Yugoslavia.<sup>249</sup>

On June 4, 1993, the Security Council adopted Resolution 836, which extended the authorized mandate of UNPROFOR to include the use of force in response to bombardments or armed incursions into the U.N. safe areas.<sup>250</sup> UNPROFOR's new authority to use all necessary means in the defense of safe areas, however, did not deter the Bosnian Serbs from continuing their offensive against Sarajevo. To this day, Bosnian Serb snipers continue to target civilians in Sarajevo, U.N. aircraft operating at Sarajevo's airport continue to be attacked by Bosnian Serb forces, public utilities remain turned off, and humanitarian relief supplies continue to be hijacked and blocked.<sup>251</sup>

On April 22, 1994, the Security Council adopted Resolution 913 in response to a ferocious Bosnian Serb offensive against the

244. S.C. Res. 824, U.N. SCOR, 3208th mtg. at 1-2, pmb., U.N. Doc. S/RES/824 (1993) [hereinafter Resolution 824].

245. *Id.* In Resolution 824, the Security Council considered the "urgent security and humanitarian needs faced by several towns in the Republic of Bosnia and Herzegovina as exacerbated by the constant influx of large numbers of displaced persons including, in particular, the sick and wounded" and the "continuing armed hostilities by Bosnian Serb paramilitary units against several towns [in Bosnia]" when it decided to extend the safe haven concept. *Id.*

246. *Id.* at 2, ¶ 3.

247. S.C. Res. 827, U.N. SCOR, 3217th mtg., U.N. Doc. S/RES/827 (1993) [hereinafter Resolution 827].

248. *Id.* at 1-2, pmb., ¶ 1; *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. Secretary-General, annex, art. 1, at 36, U.N. Doc. S/25704 (1993).

249. Resolution 827, *supra* note 247, at 2, ¶¶ 1-2. In Resolution 827, the Security Council approved the report of the Secretary-General and established the International Tribunal. *Id.*

250. S.C. Res. 836, U.N. SCOR, 3228th mtg. at 3, ¶ 5, U.N. Doc. S/RES/836 (1993) [hereinafter Resolution 836].

251. *Aid Slows in Bosnia as Serbs Hamper Convoys*, N.Y. TIMES, Mar. 3, 1995, at A7.

safe area of Gorazde.<sup>252</sup> Resolution 913 condemned the Bosnian Serbs in the strongest terms for: the shelling and attacks against Gorazde,<sup>253</sup> attacks against relief workers,<sup>254</sup> the harassment and detention of UNPROFOR personnel,<sup>255</sup> and their failure to respect cease-fire agreements, negotiated by representatives of the United Nations and the Russian Federation, regarding Gorazde.<sup>256</sup> Resolution 913 demanded the release of all U.N. personnel being held by Bosnian Serb forces,<sup>257</sup> and that UNPROFOR's freedom of movement be unimpeded in the performance of all its tasks.<sup>258</sup>

On September 23, 1994, the Security Council adopted Resolutions 941, 942, and 943 in an attempt to persuade the Bosnian Serb authorities to accept a peace-plan proposed by the Contact Group.<sup>259</sup> The proposed plan would have divided the territory of Bosnia and Herzegovina between the Bosnian Serbs and the Bosnian government, forty-nine percent and fifty-one percent, respectively.<sup>260</sup> The Bosnian government agreed to the Contact Group peace-plan, while the Bosnian Serb authorities rejected it.<sup>261</sup> The adoption of the following resolutions was precipitated by the Bosnian Serb rejection of the Contact Group's peace initiative.<sup>262</sup>

Security Council Resolution 941 condemned the Bosnian Serb forces for systematically perpetrating a "campaign of ter-

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252. S.C. Res. 913, U.N. SCOR, 3367th mtg. at 1-2, pmb., U.N. Doc. S/RES/913 (1994). The Bosnian Serb offensive against Gorazde "resulted in the death of numerous civilians and tremendous human suffering." *Id.*

253. *Id.* at 2-3, ¶ 3.

254. *Id.* at 1-2, pmb.

255. *Id.*

256. *Id.*

257. *Id.* at 3, ¶ 5.

258. *Id.* at 3, ¶ 6.

259. Roger Cohen, *A Cease-Fire Called Winter Settles Over Bosnia*, N.Y. TIMES, Dec. 22, 1994, at A12 [hereinafter *A Cease-Fire Called Winter*]. The term "Contact Group" refers to the United Kingdom, United States, France, Russia, and Germany. *Id.* Together, the diplomats of these nations attempted to craft a peace plan that would prove acceptable to all parties, and might bring about a cessation of hostilities. *Conflict in the Balkans*, *supra* note 8, at A1.

260. *Conflict in the Balkans*, *supra* note 8, at A1.

261. *Id.*

262. S.C. Res. 942, U.N. SCOR, 3428th mtg. at 1-2, ¶¶ 1-3, U.N. Doc. S/RES/942 (1994).

ror<sup>263</sup> in Banja Luka, Bijeljina and other territory under their control.<sup>264</sup> In addition, Resolution 941 reaffirmed the Security Council's demand that the Bosnian Serb authorities cease their campaign of ethnic cleansing,<sup>265</sup> and that all individuals who have committed or have ordered the commission of acts of ethnic cleansing will be held individually accountable for those acts.<sup>266</sup> Resolution 941 further recognized that the International Tribunal has jurisdiction over serious violations of international human rights law committed within the territory of the former Yugoslavia.<sup>267</sup> In Resolution 941, the Security Council determined that the situation in Bosnia continued to constitute a threat to international peace and security.<sup>268</sup>

Resolution 942 expressed the Security Council's approval of the proposed peace-plan drafted by the Contact Group,<sup>269</sup> recognized that all parties other than the Bosnian Serbs had accepted the territorial settlement,<sup>270</sup> and condemned the Bosnian Serbs for their rejection of the settlement.<sup>271</sup> In addition, Resolution 942 demanded that the Bosnian Serbs accept the proposed peace settlement "unconditionally and in full."<sup>272</sup> Resolution 942 also concluded that the situation in the former Yugoslavia continued to constitute a threat to international peace and security.<sup>273</sup>

Resolution 943 suspended restrictions, prohibiting certain commercial activities, which had been placed on the Federal Republic of Yugoslavia (Serbia and Montenegro), in exchange for the Republic's apparent closing of the international border between Bosnia and the Federal Republic of Yugoslavia with respect to non-humanitarian supplies.<sup>274</sup> The suspension of these

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263. S.C. Res. 941, U.N. SCOR, 3428th mtg. at 1-2, pmb., U.N. Doc. S/RES/941 (1994).

264. *Id.* at 2, ¶ 2.

265. *Id.* at 2, ¶ 4.

266. *Id.* at 2, ¶ 2.

267. *Id.* at 1-2, pmb.

268. *Id.* at 2, ¶ 2.

269. S.C. Res. 942, U.N. SCOR, 3428th mtg. at 1, ¶ 1, U.N. Doc. S/RES/942 (1994).

270. *Id.* at 2, ¶ 2.

271. *Id.* at 2, ¶ 3.

272. *Id.*

273. *Id.* at 1, pmb.

274. S.C. Res. 943, U.N. SCOR, 3428th mtg. at 1-2, pmb., ¶ 1, U.N. Doc. S/RES/943 (1994).

restrictions was made subject to review every 100 days, to ensure compliance.<sup>275</sup> Nevertheless, recent events suggest that arms continue to be smuggled across the border from the Federal Republic of Yugoslavia.<sup>276</sup> According to the Deputy Prime Minister and Foreign Minister of Croatia, Mate Granic, the Russian-made surface-to-air missiles ("SAMs") used by the Bosnian Serbs in the Bihac region against NATO warplanes during the week of December 1, 1994, were smuggled into the area from the Federal Republic of Yugoslavia.<sup>277</sup> Recent U.N. reports have confirmed that advanced versions of SAMs have recently been distributed to the Bosnian Serb forces across Bosnia to thwart any potential retaliatory airstrikes by NATO for the kidnapping of UNPROFOR personnel.

C. *Reports of the Special Rapporteur: A Critique of U.N. Efforts*

U.N. efforts to restore peace and security in Bosnia have been criticized in the reports of the Commission on Human Rights' Special Rapporteur on the situation in the former Yugoslavia. Because the Special Rapporteur is the primary authority upon whom the Commission on Human Rights, General Assembly, Security Council, and Secretary General rely in formulating measures to deal with the human rights violations in the territory of the former Yugoslavia, his analysis of the effectiveness of the United Nations in addressing human rights violations must be given great significance. On February 21, 1994, the Special Rapporteur issued his sixth periodic report on the situation of human rights in the territory of the former Yugoslavia, in which he restates the primary recommendations contained in previous reports and analyzes their implementation.<sup>278</sup> He examined the commission of ethnic cleansing, the interception of humanitarian aid, the unlawful imprisonment of persons within detention

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275. *Id.* at 2, ¶ 1.

276. Roger Cohen, *Serbian Helicopter Flights Are One More Sign of Bosnia's Woes*, N.Y. TIMES, Feb. 6, 1995, at A3 [hereinafter *Serbian Helicopter Flights*]; Barbara Crossette, *United Nations Reports Serbian Helicopter Sorties in Bosnia, a Violation of Flight Ban*, N.Y. TIMES, Feb. 8, 1995, at A12 [hereinafter *United Nations Reports Serbian Helicopter Sorties*]; Barbara Crossette, *U.N. Suspects Serbia of Aiding Serbs in Bosnia*, N.Y. TIMES, Feb. 9, 1995, at A10 [hereinafter *Aiding Serbs in Bosnia*].

277. *Yugoslav Path Cited For Missiles at Bihac*, N.Y. TIMES, Dec. 10, 1994, at A7.

278. See *Sixth Report*, *supra* note 157, at 43-44 (presenting Special Rapporteur's main recommendations for addressing human rights violations and analysis of their follow-up).

camps and centers, the commission of war crimes and U.N. efforts to prosecute perpetrators, and the administration of U.N. safe areas.<sup>279</sup>

### 1. Ethnic Cleansing

The Special Rapporteur identified "ethnic cleansing" as an organized purge of the civilian population according to ethnic criteria in order to force that population to abandon the territory it occupies.<sup>280</sup> In light of this tactic, the Special Rapporteur concluded that the United Nations must uphold two inviolable principles: (1) a right of return to their homes for all refugees and, (2) that there should be no recognition of any transfer of property made under duress or acquired by force.<sup>281</sup> After recounting the numerous resolutions that were passed by the Security Council and the General Assembly embracing these two principles, the Special Rapporteur observed that the Bosnian Serb policy of "ethnic cleansing" had continued unabated throughout the entire period of his mandate.<sup>282</sup> The Special Rapporteur also concluded that, although Bosnian Serb authorities initiated the policy of ethnic cleansing, the international community's inadequate reaction prompted other sides to use the same methods.<sup>283</sup>

The Special Rapporteur received repeated assurances from the Security Council, the General Assembly, and the International Conference on the Former Yugoslavia ("ICFY"), that the validity of property taken by force would not be recognized.<sup>284</sup> The Special Rapporteur warned that the international community's repeated assertions that ethnic cleansing would not be tolerated were insignificant unless accompanied by measures to enforce those assertions.<sup>285</sup> The Special Rapporteur observed that as a consequence of his warnings going unheeded, the situation deteriorated to such an extent that the Co-Chairmen of the Steering Committee of the ICFY felt compelled to plan for the

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279. *Id.* at 44-50. The term "safe areas" refers to communities that were designated as areas to be protected by UNPROFOR against attack. *Id.* at 46. Srebrenica, Sarajevo, Tuzla, Zepa, Bihac and Gorazde were all designated as U.N. "safe areas." *Id.*

280. *Id.* at 44.

281. *Id.*

282. *Id.* at 45.

283. *Id.*

284. *Id.*

285. *Id.*

partition of Bosnia and the permanent transfer of populations.<sup>286</sup> The Special Rapporteur also concluded that the progress of events leading towards the partition of Bosnia was identifiable and preventable, yet the international community made "no serious attempt" to avoid this.<sup>287</sup>

## 2. Humanitarian Aid

The Special Rapporteur recommended an increase in the delivery of humanitarian assistance to all persons in the areas of Bosnia affected by the conflict, and the creation of "humanitarian relief corridors" to provide an effective means of protecting aid convoys.<sup>288</sup> In light of the U.N.'s efforts, the Special Rapporteur noted that the failure to create protected corridors led to frequent and lengthy delays at Bosnian Serb and other checkpoints.<sup>289</sup> UNPROFOR's failure to protect these aid convoys allowed the convoys to be used as political tools by the Bosnian Serbs and Bosnian Croats.<sup>290</sup>

## 3. Prisoners and Detainees

The Special Rapporteur recommended that the International Committee of the Red Cross ("ICRC") be granted full access to all detention camps and centers.<sup>291</sup> The Special Rapporteur observed that, although access had been granted to many detention camps, summary executions, severe beatings, rapes and torture, and other deplorable conditions contin-

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286. *Id.*

287. *Id.* The Special Rapporteur's concluding observations provide a final critique of the international community's conduct during the period in which he was mandated to report on the situation in the territory of the former Yugoslavia:

The conflicts in the former Yugoslavia and in particular in Bosnia and Herzegovina have once again proved that human rights only play a secondary role in the context of international politics. A number of formal steps which have been undertaken may be considered as a substitute or excuse for political inertia . . . The international community has, *de facto*, tolerated massive violations of human rights and international humanitarian law. Such a policy undermines some of the most fundamental principles upon which international law and the system of human rights protection have been built.

*Id.* at 54.

288. *Id.* at 46.

289. *Id.* at 47.

290. *Id.*

291. *Id.* at 48.

ued.<sup>292</sup> The Special Rapporteur also called for the release of prisoners and detainees.<sup>293</sup> While some camps had since been closed, the Special Rapporteur noted that many thousands of people remained prisoners or detainees in violation of the Fourth Geneva Convention.<sup>294</sup>

#### 4. War Crimes

The Special Rapporteur recommended that a commission of experts be established to investigate violations of international human rights law, and that violators of international human rights law be prosecuted.<sup>295</sup> Heeding the Special Rapporteur's recommendation, the Security Council created such a commission of experts, in addition to an International Tribunal to prosecute violators of international human rights law.<sup>296</sup> The Special Rapporteur, however, criticized the inadequate financial and organizational support appropriated the commission of experts, and concluded that additional resources were required in order to allow the International Tribunal to effectively carry out its mandate.<sup>297</sup>

#### 5. "Safe Areas"

The Special Rapporteur recommended the creation of "security zones" within Bosnia for the protection of displaced persons.<sup>298</sup> The Special Rapporteur concluded that the "safe areas" created were overcrowded, short of basic food and medical resources, and vulnerable to shelling and military attacks. These conditions led the Special Rapporteur to comment that the "safe areas" were " 'safe' only on paper."<sup>299</sup>

#### D. *United Nations Response to Recent Developments in Bosnia*

Throughout the latter half of November 1994, the Bosnian

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292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.* at 48-49.

296. *Id.*

297. *Id.*; International Tribunal, *supra* note 248, arts. 1-10, at 36-39. The International Tribunal is mandated to prosecute persons responsible for violating the Geneva Convention, the Genocide Convention, violations of the laws or customs of war, and crimes against humanity. *Id.* arts. 1-5, at 36-38.

298. *Sixth Report, supra* note 157, at 46.

299. *Id.*

Serb forces, aided by Croatian Serb forces, launched an assault on the "safe area" of Bihac.<sup>300</sup> The city of Bihac, due to the mass influx of displaced persons, has swollen to a population of approximately 70,000 civilians.<sup>301</sup> The residents of Bihac have lived under siege throughout the war, and have been constantly subjected to the random shelling of the inner city by Bosnian Serbs positioned on neighboring hilltops.<sup>302</sup> In an effort to root out a division of the Bosnian Government army, "V Corps," the Bosnian Serb forces launched a full-scale assault on the safe area.<sup>303</sup> These assaults continue to challenge the authority and ability of the United Nations to provide for the protection of civilians who sought refuge in this U.N. protected area.<sup>304</sup>

In response to this crisis, the United Nations drew a proverbial line in the sand, and threatened that if the Bosnian Serb offensive reached the border of the safe area, NATO airstrikes would be ordered.<sup>305</sup> The Bosnian Serb forces ignored the U.N. threats, and, in fact, escalated their offensive by dropping napalm and cluster bombs on residential neighborhoods from fixed-wing aircraft.<sup>306</sup> The flight of the aircraft originated in the Serb held area of Croatia, Krajina.<sup>307</sup> Shortly thereafter, the Bosnian Serbs kidnapped and held hostage UNPROFOR personnel stationed in Bihac to discourage retaliatory NATO airstrikes.<sup>308</sup>

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300. Michael R. Gordon, *Conflict in the Balkans: The Policy*, N.Y. TIMES, Dec. 4, 1994, at A1 [hereinafter *Balkan Conflict Policy*]; see Paul Quin-Judge, *US Reaching for Clarity on Bosnia Policy*, BOSTON GLOBE, Nov. 30, 1994, at 2 (concluding that elements of Yugoslav Army crossed into Croatia to free up Croatian Serb units for battle around Bihac); Roger Cohen, *Serbs Press Drive On Bosnian Town, Using Helicopter*, N.Y. TIMES, Nov. 23, 1994, at A1 (concluding that attack has been clearly and fully coordinated between Croatian and Bosnian Serbs) [hereinafter *Serbs Using Helicopters*].

301. *Balkan Conflict Policy*, *supra* note 300, at A1.

302. See *Serbs Using Helicopters*, *supra* note 300, at A1; *U.N. and NATO Unable to Act*, *supra* note 111, at A1.

303. *Id.*

304. *Conflict in the Balkans*, *supra* note 8, at A1.

305. *Serbs Using Helicopters*, *supra* note 300, at A1.

306. *Tenth Report*, *supra* note 157, at 7; John Pomfret, *Bombed Croatian Serb Airfield Repaired and Possibly in Use*, WASH. POST, Dec. 5, 1994, at A25 (reporting Serb use of napalm and cluster bombs against Muslims in Bihac region); Roger Cohen, *NATO, Expanding Bosnia Role, Strikes a Serbian Base in Croatia*, N.Y. TIMES, Nov. 22, 1994, at A1 (reporting use of napalm and cluster bombs in Serb attack on Bihac region).

307. Chuck Sudetic, *Jet Attacks Bosnian Town*, N.Y. TIMES, Nov. 10, 1994, at A8.

308. Roger Cohen, *Serbs Close in on Bosnian Town*, N.Y. TIMES, Nov. 29, 1994, at A1; *World Mediators Trying to Get Bosnian Muslims to Accept Peace Proposal*, DALLAS MORNING NEWS, Nov. 30, 1994, at 1A; see *Serbs Using Helicopters*, *supra* note 300, at A1 (reporting U.N. troop shortages of food and weapons in Bihac due to Bosnian Serbs).

The United Nations responded to the Serb disregard of its ultimatum by requesting NATO airstrikes on the airfield from which the bombing raids had originated.<sup>309</sup> NATO, however, was instructed to exclude the following targets: aircraft, munitions dumps, command headquarters, and heavy weapons positions.<sup>310</sup> NATO was only authorized to bomb the airfield itself, which rendered that particular airstrip inoperative for a matter of hours.<sup>311</sup> The Serb forces responded to the NATO airstrikes by firing SAMs at warplanes passing overhead, and threatening further retaliation.<sup>312</sup> The Bosnian and Croatian Serbs methodically continued to consolidate their control over the city of Bihac.<sup>313</sup> U.N. commanders on the ground in Bihac repeatedly submitted requests to their superiors for airstrikes to protect their positions in the city, and to repel Bosnian and Croatian Serb advances.<sup>314</sup> These requests were denied.<sup>315</sup> NATO officials asserted that U.N. commanders refused requests for airstrikes because they feared the Bosnian and Croatian Serbs would retaliate against their peacekeepers.<sup>316</sup>

By December 9, 1994, the United Nations had abandoned the threat of force as a means of pressuring the Bosnian Serb forces into compliance with existing Security Council resolutions and participating in settlement negotiations in good faith.<sup>317</sup> Consequently, the Serb forces continued their mortar and artillery attacks on Bihac.<sup>318</sup> Shortly after the United Nations abandoned the threat of force to deter attacks against "safe havens,"

309. Roger Cohen, *NATO, Expanding Role, Strikes a Serbian Base in Croatia*, N.Y. TIMES, Nov. 22, 1994, at A1.

310. See *Balkan Conflict Policy*, *supra* note 300, at A1 (discussing NATO targets).

311. *Id.* Since the NATO bombing raid, Udbina airfield has been used to launch aircraft destined for Bosnia. Roger Cohen, *A Fragile Truce in Bosnia: No Will or No Way*, N.Y. TIMES, Jan. 19, 1995, at A3 (reporting Udbina airfield as origin of 20 helicopter sorties resupplying Serbian positions around Bihac).

312. *Serbs Using Helicopters*, *supra* note 300, at A1.

313. *World Mediators Trying to Get Bosnian Muslims to Accept Peace Proposal*, *supra* note 308, at 1A.

314. Michael R. Gordon, *Britain Cool to French Plan to Step Up U.N. Bosnia Effort*, N.Y. TIMES, Dec. 14, 1994, at A10.

315. *Id.*

316. *Id.*

317. *Thoughts About Bosnia*, *supra* note 7, at A12; Roger Cohen, *Bosnia Truce Frayed by Fighting and Disputes*, N.Y. TIMES, Jan. 17, 1995, at A4.

318. *A Cease-Fire Called Winter*, *supra* note 259, at A12; see *Bosnia Truce Frayed by Fighting and Disputes*, *supra* note 317, at A4 (reporting continued Serbian shelling of town center of Bihac).

however, former U.S. President Jimmy Carter went to Bosnia and negotiated a four-month cease-fire agreement ("cease-fire") between the Bosnian government and Bosnian Serb authorities.<sup>319</sup>

The cease-fire took effect on January 1, 1995.<sup>320</sup> Although the cease-fire was initially successful in reducing the level of fighting across Bosnia,<sup>321</sup> when peace negotiations between the Bosnian government and the Bosnian Serb authorities stalled, it rapidly began to unravel.<sup>322</sup> In disregard of the cease-fire, Serbian forces continued their assault against Bihac, and escalated their offensive in early February with the aid of 1000 new Serbian fighters from Croatia.<sup>323</sup> Meanwhile, sixty-two Serbian helicopter sorties flew from Serbia into eastern Bosnia on what appeared to be military resupply missions<sup>324</sup> in violation of the U.N. flight-ban over Bosnia.<sup>325</sup> Throughout Bosnia, the parties recognized the impending failure of the cease-fire and intensified their preparations for renewed fighting.<sup>326</sup>

### III. THE FAILURE OF THE SECURITY COUNCIL TO RESTORE INTERNATIONAL PEACE AND SECURITY VIOLATES BOSNIA'S ARTICLE 51 RIGHT TO SELF-DEFENSE

Article 51 must be interpreted to guarantee member states a

319. *Serbs Call Shots*, *supra* note 7, § 1, at 3.

320. Stephen Kinzer, *Cease-Fire in Bosnia Starts, and Sides Meet on Details*, N.Y. TIMES, Jan. 2, 1995, § 1, at 3. The agreement called for the two armies to pull their troops back from the front lines, and, in some areas, U.N. troops were to serve as a buffer between them. Stephen Kinzer, *Bosnian Muslims and Serbs Agree to Four-Month Truce*, N.Y. TIMES, Jan. 1, 1995, § 1, at 8.

321. *Cease-Fire in Bosnia Starts, and Sides Meet on Details*, *supra* note 320, § 1, at 3.

322. *Fighting Erodes Cease-Fire*, *supra* note 8, at A8.

323. *Id.* Over the weekend of February 11-12, 1995, approximately 1500 rounds of tank, artillery and mortar fire rained down on the Bihac region, including the direct Serbian shelling of the town of Bihac. *Id.* According to the U.N. High Commissioner for Refugees, on February 8, 1995, food supplies were running desperately low for the 180,000 residents of the Bihac region. *United Nations Reports Serbian Helicopter Sorties*, *supra* note 276, at A12.

324. *United Nations Reports Serbian Helicopter Sorties*, *supra* note 276, at A12; see *Serbian Helicopter Flights*, *supra* note 276, at A3 (reporting initial detection of helicopter flights and assumption as military resupply); *Aiding Serbs in Bosnia*, *supra* note 276, at A10 (reporting repeated denial of U.N. observer access to monitoring radar).

325. See *supra* note 235 and accompanying text (discussing military flight ban within Bosnia imposed by Resolution 781); Resolution 781, *supra* note 235, at 2, ¶ 1.

326. *A Fragile Truce in Bosnia: No Will or No Way*, *supra* note 311, at A3. The terms of the cease-fire called for the Bosnian Serbs to restore utilities in Sarajevo, but the city continued to be virtually without gas in freezing temperatures. *Id.*

right to self-defense that cannot be terminated until the Security Council takes measures that restore international peace and security, and protect the member state from armed attack. Human rights violations serve as a barometer for measuring whether international peace and security has been restored, or if effective steps have been taken towards that end. Since the Security Council has failed to effectively enforce its resolutions, thereby permitting the continued widespread violation of human rights, it has failed to restore international peace and security. The Security Council's failure to restore international peace and security does not satisfy the Article 51 criteria for terminating a state's right to self-defense. Therefore the Security Council must rescind the arms embargo against Bosnia,<sup>327</sup> and permit Bosnia to exercise its Article 51 right to self-defense.<sup>328</sup>

#### A. *Article 51: A Safeguard Against Collective Abandonment*

Accepting the ICJ interpretation of what constitutes an armed attack<sup>329</sup> for purposes of applying Article 51, the Republic of Bosnia-Herzegovina has suffered repeated and continuous "armed attacks" by the Federal Republic of Yugoslavia (Serbia and Montenegro).<sup>330</sup> Throughout the last three years, the Bosnian government has repeatedly declared that it was under attack, and requested that the international community lift the Security Council-mandated arms embargo.<sup>331</sup> The Bosnian government, therefore, has met all the criteria defined in *Nicaragua v.*

327. Resolution 713, *supra* note 3, at 3, ¶ 6.

328. U.N. CHARTER art. 51.

329. See *supra* note 98 and accompanying text (discussing what constitutes "armed attack" for interpreting Article 51). The Court, quoting from Article 3, paragraph (g) of the Definition of Aggression annexed to General Assembly Resolution 3314 (XXIX), held that:

"armed attack" means "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" (*inter alia*) an actual armed attack conducted by regular forces, "or its substantial involvement therein . . . ."

*Nicaragua*, 1986 I.C.J. at 93.

330. General Assembly Resolution 48/88, *supra* note 9, at 3, ¶ 5 (condemning continued supply of military arms, equipment and services to Bosnian Serb paramilitary units by Federal Republic of Yugoslavia (Serbia and Montenegro)); General Assembly Resolution 49/10, *supra* note 9, at 1-6, pmbl., ¶¶ 5, 13, 15.

331. See *U.N. Admits Bosnia, Croatia and Slovenia*, *supra* note 100, at A6 (reporting Bosnian Foreign Minister requesting U.N. assistance in defending Bosnia); *supra* note 100 and accompanying text (reporting Bosnian government lobbying for unilateral lift-

U.S. for exercising its Article 51 right to self-defense.<sup>332</sup> Having determined that the Bosnian government is qualified to invoke the Article 51 right to self-defense,<sup>333</sup> the question becomes whether the Security Council's attempts to restore international peace and security satisfy the Article 51 criteria for terminating that right.<sup>334</sup> To determine what criteria the Security Council must satisfy before terminating a member state's Article 51 right to self-defense, the second clause of Article 51 must be interpreted according to the four schools of treaty interpretation.<sup>335</sup>

The systematic school of interpretation, however, must be discarded because in cases where a treaty has been drafted over many years, the meaning of words may have changed between earlier articles and later ones.<sup>336</sup> Similarly, the teleological school of interpretation causes problems because, in looking to the purpose of the treaty over time, it forces courts to legislate rather than to judge.<sup>337</sup> Interpretations using the textual and intentional schools, however, yield more conservative and constructive interpretations.<sup>338</sup>

In Resolution 713, the Security Council determined that the fighting in the former Yugoslavia, causing a heavy loss of life and

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ing of arms embargo if U.N. efforts fail to compel Bosnian Serb acceptance of peace plan).

332. *Nicaragua*, 1986 I.C.J. 14; see *supra* notes 95-100 and accompanying text (discussing requirements, as established by ICJ, for states invoking Article 51 right to exercise self-defense).

333. See *supra* notes 95-100 and accompanying text (establishing test for invoking Article 51 right to self-defense); General Assembly Resolution 48/88, *supra* note 9, at 1-5, pmb., ¶¶ 4-5, 17-18 (determining Bosnia's right as member of United Nations to invoke Article 51 and exercise self-defense, and urging Security Council to exempt Bosnia from arms embargo); General Assembly Resolution 49/10, *supra* note 9, at 1-4, 6-7, pmb., ¶¶ 22-23 (reaffirming Bosnia's right to invoke Article 51 and exercise self-defense, and, once again, urging Security Council to exempt Bosnia from arms embargo).

334. See *supra* note 92 and accompanying text (discussing clause of Article 51 providing for Security Council's termination of Article 51 right to self-defense).

335. I SCHWARZENBERGER, *supra* note 103 and accompanying text (introducing four methods of treaty interpretation).

336. See *id.* at 153-54; *supra* notes 94, 98 (presenting systematic school of treaty interpretation).

337. See *id.* at 154 (presenting teleological school of treaty interpretation); *supra* note 110 and accompanying text (discussing teleological school as requiring judges to evaluate treaty purposes over time, shifting their role from traditional judicial interpretation to discovering or legislating new interpretations of treaties).

338. I D.P. O'CONNELL, *INTERNATIONAL LAW* 271-74 (1965) (advocating use of intentional school for treaty interpretation); L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 952-53 (8th ed. 1955) (advocating use of textual and intentional schools for interpreting treaties).

material damage, constituted a threat to international peace and security.<sup>339</sup> In light of the Resolution 713 definition of what constitutes a threat to international peace and security, the widespread fighting that continues to cause a heavy loss of life and property damage within Bosnia must not qualify as international peace and security.<sup>340</sup> The Security Council's equation of international peace and security with an absence of heavy fighting should equally apply to an absence of massive human rights violations.<sup>341</sup> Therefore, the Special Rapporteur's report that rampant, unabated human rights violations continue throughout the territory of Bosnia illustrates that international peace and security has not been restored.<sup>342</sup> The meaning of "measures necessary" is, therefore, the only question remaining.<sup>343</sup>

### 1. Textual Interpretation

Applying the textual school of interpretation to "measures necessary" requires a determination of the plain meaning of these words.<sup>344</sup> According to *Webster's Dictionary*, "measures necessary" means "acts essential."<sup>345</sup> Having determined the plain meaning of "measures necessary," this phrase must be examined in relation to its immediate context.<sup>346</sup> When "measures necessary" is examined in the immediate context of Article 51, the qualification of a member state's inherent right to self-defense is

339. Resolution 713, *supra* note 3, at 1-2, pmbl.

340. *Id.* In Resolution 713, the Security Council concluded that fighting which causes a heavy loss of life and property damage constitutes a threat to international peace and security. *Id.*

341. *Id.*; see General Assembly Resolution 49/10, *supra* note 9, at 1-4, pmbl. (declaring that continued armed hostilities and aggression are threats to international peace and security); General Assembly Resolution 48/88, *supra* note 9, at 1-3, pmbl. (declaring Bosnia's right to invoke Article 51 right to self-defense and condemning Bosnian Serb practice of ethnic cleansing).

342. *Tenth Report*, *supra* note 157, at 11-12; *Ninth Report*, *supra* note 157, at 6, 20-21.

343. See *supra* note 107 and accompanying text (discussing textual interpretation as utilizing "plain meaning" reading).

344. I SCHWARZENBERGER, *supra* note 103, at 153 (presenting textual school of interpretation); *supra* note 107 and accompanying text (discussing how textual school reads words to have their usual, everyday, meaning unless used for technical purposes); L. OPPENHEIM, *supra* note 107, at 952.

345. See WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 1115 (2d ed. 1980). "Measure" is defined as "an act, step, or proceeding designed for the accomplishment of an object." *Id.* "Necessary" is defined as "essential," "unavoidable," and "indispensable." *Id.* at 1200.

346. I SCHWARZENBERGER, *supra* note 103, at 153.

not precluded until the Security Council has taken the "acts essential" to maintain international peace and security.<sup>347</sup>

## 2. Intentional Interpretation

An intentional interpretation of "measures necessary" looks to the intent of the parties at the time of signing.<sup>348</sup> Customary international law has always recognized the right to act in self-defense as an inherent right of every sovereign state.<sup>349</sup> Article 51, the only exception to the prohibition of the "use of force" by individual members in Article 2(4), merely represents the codification of this pre-existing right under customary international law.<sup>350</sup> Recognizing that the intended purpose of Article 51 was to guarantee states the right to protect themselves from armed attack, the Security Council can only deny a member state the right to individual or collective self-defense when the Security Council itself provides protection.<sup>351</sup> "Measures necessary" must, therefore, be read as measures that are "adequate" or "sufficient" to maintain international peace and security.<sup>352</sup>

### B. *Massive Violations of International Human Rights Conventions Constitute Absence of International Peace and Security*

The conflict in Bosnia has been characterized by grave and pervasive violations of international human rights conventions.<sup>353</sup> While recognizing that all parties to the conflict have engaged in human rights violations, the Bosnian Serb forces' orchestrated campaign of ethnic cleansing has inflicted human suffering in Bosnia, on a scale not comparable to the other parties.<sup>354</sup> Because the Bosnian Serb policy of ethnic cleansing en-

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347. U.N. CHARTER art. 51; *supra* note 86 and accompanying text (presenting full text of Article 51 and recognizing it as sole exception to Article 2(4) prohibition on use of force).

348. I SCHWARZENBERGER, *supra* note 103, at 154.

349. *Nicaragua*, 1986 I.C.J. at 84; *see supra* note 90 and accompanying text (discussing I.C.J. holding that self-defense constitutes customary international law that pre-dates Article 51).

350. *Nicaragua*, 1986 I.C.J. at 84.

351. *See* U.N. CHARTER art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security.").

352. *Id.*

353. *Ninth Report*, *supra* note 157, at 20; *First Report*, *supra* note 112, at 11.

354. *Report on Human Rights*, *supra* note 112, at 57; *see Seventh Report*, *supra* note 17,

compasses an amalgam of terror tactics and violence inflicted against non-Serb ethnic communities, it violates numerous international human rights conventions,<sup>355</sup> including: (1) the Convention on the Elimination of all Forms of Discrimination Against Women,<sup>356</sup> (2) the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment,<sup>357</sup> (3) the Convention on the Rights of the Child,<sup>358</sup> (4) the Geneva Convention,<sup>359</sup> and (5) the Genocide Convention.<sup>360</sup>

The use of systematic rape<sup>361</sup> and forced impregnation of non-Serb women<sup>362</sup> to ethnically cleanse territory<sup>363</sup> violates both Article 1 of the Convention on the Elimination of All

at 4 (reporting Bosnian Serb massive violations of human rights as not comparable to violations committed by government forces); *Ninth Report, supra* note 157, at 20-21 (reporting current campaign of Bosnian Serb ethnic cleansing as largest since height of conflict).

355. *Report on Human Rights, supra* note 112, at 56-57.

356. Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 118, art. 1, 1249 U.N.T.S. at 16, 19 I.L.M. at 36.

357. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *supra* note 122, art. 1, U.N. Doc. A/RES/39/46 at 3, 1991 Gr. Brit. T.S. No. 107 at 3.

358. Convention on the Rights of the Child, *supra* note 127, arts. 19, 34, 37(a), U.N. Doc. A/RES/44/25 at 10, 16, 17, 1992 Gr. Brit. T.S. No. 44 at 7, 11, 12.

359. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 147, art. 3, 75 U.N.T.S. at 288-90, 1958 Gr. Brit. T.S. No. 39 at 216; *see Report on Human Rights, supra* note 112, at 56. The Special Rapporteur suggested that ethnic cleansing might violate the Convention on the Rights of the Child, the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War. *Id.*

360. Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 142, art. 2, 78 U.N.T.S. at 280, 1970 Gr. Brit. T.S. No. 58 at 4.

361. *Sixth Report, supra* note 157, at 51; *see* William Drozdiak, *Serbs Raped 20,000, EC Team Says, supra* note 202, at A12, A17 (discussing widespread rape by Serb forces).

362. 2 HELSINKI WATCH, *WAR CRIMES IN BOSNIA AND HERZEGOVINA* 21-22 (1993). A team of experts sent by the Human Rights Commission collected testimony that indicated that the practice of forced impregnation was widespread among Bosnian Serb forces. *Report on Human Rights, supra* note 112, annex II, at 70-71. The report reads, in part:

Another ethnic Croat woman was detained in a 'special house' where she was raped by several men every night for approximately two months. . . . She reported that, while raping her, the men were shouting: 'you will have a Serbian child.' She also reported being told that, if she were pregnant, she would be 'forced to stay there until six months of pregnancy.'

*Id.*

363. *Report on Human Rights, supra* note 112, annex II, at 74.

Forms of Discrimination Against Women,<sup>364</sup> and Article 1 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.<sup>365</sup> Rape is both a violation of a woman's right to be free from discrimination based on gender, and a form of torture.<sup>366</sup> Consequently, the pervasive sexual abuse of women and girls throughout Bosnia constitutes massive violations of these conventions.<sup>367</sup> As part of their campaign of ethnic cleansing, Bosnian Serb forces have also employed rape, and other forms of violence, against minors in violation of the Convention on the Rights of the Child.<sup>368</sup>

The use of terror and violence to ethnically cleanse territory of civilian populations constitutes a violation of the Geneva Convention.<sup>369</sup> The subjection of civilians to summary execution, mutilation, beatings, and rape, the typical practices of ethnic cleansing,<sup>370</sup> violate Article 3(1)(a) of the Geneva Convention.<sup>371</sup> The rampant shelling of civilian population centers,<sup>372</sup>

364. Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 118, art. 1, 1249 U.N.T.S. at 16, 19 I.L.M. at 36.

365. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *supra* note 122, art. 1, U.N. Doc. A/RES/39/46 at 3, 1991 Gr. Brit. T.S. No. 107 at 3.

366. *Id.*

367. *Sixth Report*, *supra* note 157, at 13; *Fifth Report*, *supra* note 157, at 5; see Drozdiak, *Serbs Raped 20,000, EC Team Says*, *supra* note 202, at A12, A17. The EC report concluded that rape was being committed throughout Bosnia on a massive scale, not as random attacks, but as part of a deliberate campaign of ethnic cleansing. *Id.*

368. See Convention on the Rights of the Child, *supra* note 127, arts. 19(1), 27(1), 34, 37(a), 37(b), 38(4), U.N. Doc. A/RES/44/25 at 10, 14, 16-18, 1992 Gr. Brit. T.S. No. 44 at 7, 10-12 (presenting articles that are violated by ethnic cleansing of children); *supra* notes 131-41 and accompanying text (discussing James Grant's letter expressing distress at widespread abuse of children in Bosnia).

369. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 147, art. 3(1), 75 U.N.T.S. at 288-90, 1958 Gr. Brit. T.S. No. 39 at 216; see *supra* note 149 and accompanying text (providing and discussing language of Article 3(1)). In Resolution 764, the Security Council reaffirmed that all parties were bound to comply with the Geneva Convention. S.C. Res. 764, U.N. SCOR, at ¶ 10, U.N. Doc. S/RES/764 (1992).

370. See *supra* note 112 and accompanying text (defining and discussing practice of ethnic cleansing).

371. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 147, art. 3(1)(a), 75 U.N.T.S. at 290, 1958 Gr. Brit. T.S. No. 39 at 216; see *supra* note 102 and accompanying text (presenting text of Article 3(1)(a) of Geneva Convention).

372. See *supra* note 208 and accompanying text (discussing Bosnian Serb forces' massive shelling of Sarajevo); *Seventh Report*, *supra* note 17, at 1-4 (reporting Bosnian Serb offensive against enclave of Gorazde and associated civilian casualties and suffering).

intentional interruption of water and electrical services, and the hijacking of food and humanitarian aid deliveries<sup>373</sup> illustrate the grave and pervasive violation of this convention.<sup>374</sup> Additionally, the use of rape as an instrument for degrading women and coercing their departure from territory violates Article 3(1)(c) of the Geneva Convention.<sup>375</sup>

The ethnic cleansing of a religious or ethnic community with the intent to destroy that community violates the Genocide Convention.<sup>376</sup> The Bosnian Serb forces' use of ethnic cleansing against Bosnian Muslims, to the extent that the Bosnian Muslim community is in danger of being exterminated,<sup>377</sup> constitutes genocide under the Genocide Convention.<sup>378</sup> Similarly, ethnically motivated killing, sexual mutilation, and other violent forms of torture and harassment intended to make life unbearable violate the Genocide Convention.<sup>379</sup> In addition, forced impregnation of women also violates the Genocide Convention.<sup>380</sup> In sum, ethnic cleansing, the policy of massacring and terrorizing populations to achieve ethnic homogeneity, epitomizes genocide as defined by the Genocide Convention.<sup>381</sup>

The Security Council recognized the prevalence of human rights violations in Bosnia and, subsequent to Resolution 713, adopted resolutions mandating that parties respect international human rights conventions.<sup>382</sup> The Special Rapporteur's most re-

373. See *supra* note 213 and accompanying text (discussing shortages of aid supplies due to hijacking and blockading).

374. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 147, art. 3, 75 U.N.T.S. at 288-90, 1958 Gr. Brit. T.S. No. 39 at 216.

375. *Report on Human Rights*, *supra* note 112, annex II, at 73-74.

376. Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 142, art. II, 78 U.N.T.S. at 280, 1970 Gr. Brit. T.S. No. 58 at 4; see *supra* note 143 and accompanying text (providing text of Genocide Convention Article II).

377. See *supra* note 189 and accompanying text (discussing danger of Bosnian Muslim extermination as consequence of ethnic cleansing).

378. Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 142, art. II, 78 U.N.T.S. at 280, 1970 Gr. Brit. T.S. No. 58 at 4.

379. *Id.*; see *supra* note 184 and accompanying text (discussing U.N. International Tribunal indictment of Serbian concentration camp commander for commission of genocide).

380. Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 142, art. II, 78 U.N.T.S. at 280, 1970 Gr. Brit. T.S. No. 58 at 4. The Article II(d) prohibition against preventing births within a group should be deemed violated when a woman is forced to give birth to a child of another group. *Id.*

381. *Id.* art. II.

382. Resolution 771, *supra* note 225, at 1, ¶¶ 1-5; Resolution 798, *supra* note 231, at 1, pmb.; Resolution 819, *supra* note 241, at 1-3, pmb., ¶¶ 7-8; Resolution 824, *supra*

cent reports, however, document the continued commission of massive human rights violations in Bosnia.<sup>383</sup> Therefore, at the time of the Special Rapporteur's last report the Security Council had not yet restored international peace and security in Bosnia, as required by Article 51.<sup>384</sup>

*C. Evidence of the United Nations' Failure: The Continuation of Massive Human Rights Violations*

The United Nations' failure to protect the safe area of Bihac from Bosnian Serb attack epitomizes the inability of the United Nations to suppress the continued commission of human rights violations, and thereby restore international peace and security in Bosnia.<sup>385</sup> Immediately after this public display of impotence and discord, the United Nations abandoned the threat of force as a means of pressuring the Bosnian Serb forces to comply with Security Council resolutions.<sup>386</sup> Instead, the United Nations elected to pursue a political settlement to the conflict exclusively through dialogue.<sup>387</sup>

While the ensuing cease-fire agreement temporarily reduced the level of fighting in Bosnia, the safe area of Bihac has been subjected to an unrelenting assault.<sup>388</sup> Serb forces are currently subjecting 180,000 predominantly Muslim civilians in the

note 244, at 1-2, pmb.; Resolution 827, *supra* note 247, at 2, ¶ 2; Resolution 836, *supra* note 250, at 1-2, pmb.

383. *Tenth Report*, *supra* note 157, at 11-12; *Ninth Report*, at 20-21; *Eighth Report*, *supra* note 157, at 6-7; *Seventh Report*, *supra* note 17, at 1-4.

384. See *supra* note 86 and accompanying text (presenting text of Article 51 and recognizing its role as sole exception to Article 2(4) general prohibition on use of force).

385. *Conflict in the Balkans*, *supra* note 8, at A1. The episode of finger-pointing to assign blame between the United Nations and NATO for the meager military response to the Bosnian and Croatian Serb attacks, and the de facto abandonment of Bihac as a safe area, led U.S. Secretary of Defense William Perry to conclude that NATO and the United Nations were powerless to reverse the Bosnian Serb gains. Michael R. Gordon, *Serbs' Gains Irreversible Perry Asserts*, N.Y. TIMES, Nov. 28, 1994, at A11; Michael R. Gordon, *Britain Cool to French Plan to Step Up U.N. Bosnia Effort*, *supra* note 314, at A10.

386. *Thoughts About Bosnia*, *supra* note 7, at A12; Roger Cohen, *Bosnia Truce Frayed by Fighting and Disputes*, *supra* note 317, at A4.

387. *A Fragile Truce in Bosnia: No Will or No Way*, *supra* note 311, at A3.

388. *Cease-Fire in Bosnia Starts, and Sides Meet on Details*, N.Y. TIMES, *supra* note 320, § 1, at 3; *Bosnia Truce Frayed by Fighting and Disputes*, *supra* note 317, at A4; *A Fragile Truce: No Will or No Way*, *supra* note 311, at A3; *World News Brief: Mediators Break Off Mission in Bosnia*, N.Y. TIMES, Jan. 26, 1995, at A2; *Accord Takes Effect, Allowing Sarajevans to Leave the Capital*, N.Y. TIMES, Feb. 7, 1995, at A7; *Fighting Erodes Cease-Fire*, *supra* note 8, at A8.

Bihac area<sup>389</sup> to direct shelling, sniper attacks, and a deprivation of food and medicines.<sup>390</sup> This conduct demonstrates the continued violation of both the Geneva Convention<sup>391</sup> and the Genocide Convention.<sup>392</sup> Furthermore, the lack of response by the United Nations to the flight ban violation by helicopter sorties used to resupply the Serbian positions conducting the offensive against Bihac illustrates the failure of the Security Council to enforce its resolutions.<sup>393</sup> Indeed, when sixty-two helicopter sorties flew from Serbia into eastern Bosnia on military resupply missions, the United Nations again failed to respond.<sup>394</sup> These failures of the Security Council to enforce its resolutions, and thereby prevent the commission of massive human rights violations, demonstrate the continuing inability of the Security Council to take the measures necessary to restore international peace and security in Bosnia.<sup>395</sup>

### CONCLUSION

The absence of international peace and security in Bosnia, evidenced by continuing reports of massive human rights viola-

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389. *United Nations Reports Serbian Helicopter Sorties in Bosnia*, *supra* note 276, at A12.

390. *See supra* notes 300-02 and accompanying text (discussing subjection of residents of Bihac region to constant attacks and accompanying deprivations).

391. *See supra* notes 149-54 and accompanying text (discussing prohibited acts under Geneva Convention).

392. *See supra* note 143 and accompanying text (discussing prohibited conduct under Genocide convention).

393. *A Fragile Truce in Bosnia: No Will or No Way*, *supra* note 311, at A3.

394. *United Nations Reports Serbian Helicopter Sorties in Bosnia*, *supra* note 276, at A12.

395. U.N. CHARTER art. 51. "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security." *Id.* The political statements of the international community provide the best gauge as to whether the Security Council's measures, in the form of resolutions, have been given enough time to have their intended effect. *See supra* note 3 and accompanying text (indicating international community's dissatisfaction with Security Council's efforts to implement its resolutions). In the form of General Assembly Resolutions, the international community has expressed its dissatisfaction with the performance of the Security Council, and has reflected its lack of confidence in the Security Council's ability to enforce its resolutions. General Assembly Resolution 48/88, *supra* note 9, at 1-5, pmb., ¶¶ 5, 12, 15, 17; General Assembly Resolution 49/10, *supra* note 9, at 1-4, 6, pmb., ¶¶ 17-19, 21-22; *see* Provisional Verbatim Record of the Three Thousand Two Hundred and Forty-Seventh Meeting, *supra* note 9, at 1-149 (calling for Security Council to exempt Bosnia from arms embargo for purpose of allowing Bosnia to exercise its inherent right to self-defense). The vote of the Security Council, six in favor, none against, and nine abstaining, was insufficient to adopt the draft Resolution. *Id.* at 148.

tions, demonstrates that the Security Council has failed to satisfy the Article 51 criteria authorizing the termination of Bosnia's right to self-defense. Having failed to meet this criteria, the Security Council must rescind those resolutions that impede Bosnia's ability to exercise self-defense. Resolution 713 represents the greatest impediment to Bosnia's ability to exercise self-defense, and must be rescinded. Furthermore, the U.N.'s failure to take the measures necessary to restore international peace and security in Bosnia, has compromised its credibility, and has undermined its ability to respond to future conflicts.