Applicability of International Criminal Laws to Events in the Former Yugoslavia

Jordan J. Paust
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INTRODUCTION

An analysis of the applicability of international criminal laws to events in the former Yugoslavia, and more specifically in Bosnia-Herzegovina, should begin with the recognition that there are two basic categories of international criminal law which serve as bases for delineating individual responsibility. First, various multilateral treaties form a basic framework of recognized legal standards and a basis for criminal sanctions. Second, several norms of customary international law, many of which are interrelated, provide another basis for standards and sanctions.

I. TREATY OBLIGATIONS OF THE FORMER YUGOSLAVIA

The former Yugoslavia was a signatory to several relevant treaties, including the United Nations Charter;¹ the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention);² the 1949 Geneva Conventions³ and the 1977 Protocols⁴ thereto;

the 1966 Covenant on Civil and Political Rights (CCPR),⁵ the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention);⁶ and the 1989 Convention on the Rights of the Child.⁷ Treaty law binds the nationals of a signatory state, regardless of a person’s economic, social, political, or official position. Furthermore, under generally accepted principles of international law, the new states or entities which emerge from the former Yugoslavia, as well as the participants in these processes, remain


bound to observe Yugoslavia's multilateral treaty commitments. This obligation will continue to persist until a new government expresses a formal and otherwise permissible claim to the contrary. Under the 1949 Geneva Conventions and the 1977 Protocols, a country's refusal to

8. See Vienna Convention on Succession of States in Respect of Treaties, arts. 34, 35, U.N. Doc. A/CONF./80/31, reprinted in 17 I.L.M. 1488, 1509 (1978) (discussing the succession of states to treaties of the former state, whether or not the predecessor State continues to exist). Both articles specify that existing treaty obligations apply to the new, or newly independent state, unless the "states concerned" agree otherwise. Id. arts. 34-35. See also Detlev F. Vagts, State Succession: The Codifiers' View, 33 VA. J. INT'L L. 275, 289-94 (1993) (discussing state succession to various types of international treaties and agreements). Especially obligatory are treaties which purport to espouse "general principles of international law." Id. at 289. Among these treaties are the Genocide Convention and the CCPR. See sources cited supra notes 2, 5; Vagts, supra, at 290 (noting that these treaties represent international commitments that many consider binding on States as a part of customary international law). See also Jordan J. Paust & Albert P. Blaustein, War Crimes Jurisdiction and Due Process: The Bangladesh Experience, 11 VAND. J. TRANSNAT'L L. 1, 9 & n.28 (1978) (memorandum for the new State of Bangladesh also discussing the relationship between international law and the State of Bangladesh). Specifically, the article notes that the new State of Bangladesh, under generally accepted principles of international law, should be obligated to honor Pakistan's treaty commitments concerning the laws of war, genocide, and human rights, until a formal and permissible claim of contrary obligations is asserted by Bangladesh. Id. at 9.

accept a treaty obligation will not take effect while hostilities are ongoing, and then, not for certain periods thereafter. Each of the aforementioned treaties is of a recognizably higher status than ordinary international agreements. The International Court of Justice (ICJ) in 1970 affirmed that certain obligations under international law “are the concern of all States . . . [and i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection.” These duties include prohibitions of outlawed acts of aggression, genocide, and the deprivation of fundamental individual human rights. War crimes, as covered by Geneva law, should also be

9. See, e.g., Geneva Civilian Convention, supra note 3, arts. 6, 158, 6 U.S.T. at 3522, 3623, 75 U.N.T.S. at 292, 392; Protocol I, supra note 4, arts. 3(b), 99; Protocol II, supra note 4, arts. 2(2), 25.

10. See, e.g., Geneva Civilian Convention, supra note 3, arts. 6, 158, 6 U.S.T. at 3522, 3623, 75 U.N.T.S. at 292, 392; Protocol I, supra note 4, arts. 3(b), 99; Protocol II, supra note 4, arts. 2(2), 25.

11. Case Concerning the Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 4, 32 (Feb. 5), quoted in RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 703 reporters’ note 3 (1987) [hereinafter RESTATEMENT] (distinguishing between obligations of a state toward the general international community and those obligations with respect to a specific state involving diplomatic protection). The ICJ noted that the former obligations are of greater primacy in the international system and are obligatio erga omnes. Id. at 32.

12. Id. Also significant with respect to the higher status and erga omnes nature of several such treaties is the fact that neither termination nor suspension of performance is available for treaty provisions relating to protection of basic human rights, such as the provisions of the 1949 Geneva Conventions and the subsequent Protocols. See Vienna Convention on the Law of Treaties, May 22, 1969, art. 60(5), U.N. Doc. A/CONF.39127, at 289 (1969), reprinted in 8 I.L.M. 679, 701 [hereinafter Vienna Convention on the Law of Treaties] (expressly protecting human rights provisions from unilateral termination due to a material breach of a treaty by another Party to the treaty); Geneva Civilian Convention, supra note 3, arts. 27, 33, 148 (forbidding, in all cases, certain treatment of protected persons, collective punishment of protected persons, reprisals, and attempts to absolve oneself or another Party of liability); see also Paust & Blaustein, supra note 8, at 33-34 (observing that a breach of a human rights provision of a given treaty by one Party does not justify a counter-breaches by another Party to the treaty).

Specifically regarding genocide, Judge Elihu Lauterpacht of the ICJ has added that “[t]he duty to ‘prevent’ genocide . . . rests upon all parties” and is furthermore a duty which all parties owe to each other. See Case Concerning Application of the Convention on the Prevention of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Further Requests for the Indication of Provisional Measures, 1993 I.C.J. 325 para. 86 (Sept. 13) [hereinafter I.C.J. Second Request] (separate opinion of Judge Lauterpacht).
included among a state's *erga omnes* duties, especially in view of common Article 1 of the Geneva Conventions,\(^{13}\) and the universally obligatory criminal sanction provisions.\(^ {14}\) As these obligations are of a higher, universal nature, it would be inappropriate to adopt more ordinary and formalistic rules concerning the succession of new states to these treaties.

To date, there have been no formal attempts to denounce either the succession to or the general application of such treaties. They remain binding on nationals of the former Yugoslavia with respect to illegal uses of force, genocide, violations of Geneva law, and to human rights protected therein and under various other treaties. The same analysis applies with respect to other obligations under the U.N. Charter which, in view of Article 103, also retain a higher status over ordinary treaty obligations.\(^ {15}\) In its interim report in January 1993, the Commission of Experts, established pursuant to Security Council Resolution 780, affirmed that each of the Republics in the former Yugoslavia was bound by the constraints of the 1977 Protocols to the Geneva Conventions as well as by other agreements.\(^ {16}\)

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\(^{13}\) Geneva Civilian Convention, *supra* note 3, art. 1 (which requires all signatories "to respect and to ensure respect for the Convention[s] in all circumstances").


\(^{15}\) Article 103 of the U.N. Charter reads: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." U.N. CHARTER, *supra* note 1, art. 103.

Judge Lauterpacht of the ICJ rightly adds, however, that *jus cogens* norms will trump Article 103. *See* I.C.J. Second Request, *supra* note 12, para. 100 (separate opinion of Judge Lauterpacht). Most assuredly, this follows from the fact that customary *jus cogens* will trump any treaty. *See* Vienna Convention on the Law of Treaties, *supra* note 12, arts. 53, 64. Yet, several *jus cogens* norms are reflected in the U.N. Charter. *See* RESTATEMENT, *supra* note 11, § 702(a).

II. CUSTOMARY INTERNATIONAL LAW

Customary international law binds all nations, as well as nationals of former states. Today, such customary law includes the prohibition of genocide, war crimes, criminal sanction responsibilities recognized under the 1949 Geneva Conventions, and many of the basic rights of the human person evidenced in the CCPR, including several due process guarantees for the accused. Thus, regardless of whether or not norms

1993 from the Secretary-General Addressed to the President of the Security Council, U.N. S.C. Doc. S/25274 (1993), Annex [hereinafter Commission Report I]. The Federal Republic of Yugoslavia (Serbia and Montenegro) expressly and formally declared that it "shall strictly abide by all the commitments" of the former Yugoslavia. Prevention of Genocide case, supra note 8, at 896 para. 22. The Commission of Experts adds with respect to the 1949 Geneva Conventions and the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, that each of the "parties to the successive armed conflicts in the former Yugoslavia have concluded a series of ... special agreements ... to bring into force ... all or part of the provisions of these conventions," including the obligations to halt violations and initiate prosecution of those accused of violations. See Commission Report I, supra, at 14 para. 43. Of course, such special agreements may set a minimum, but they are not determinative of applicability more generally. See, e.g., Geneva Civilian Convention, supra note 3, arts. 1, 3, 7, 8, 14.


18. See, e.g., Paust & Blaustein, supra note 8, at 31-33. In my opinion, trials in absentia would violate such rights of the accused, but an indictment in absentia, with adequate court-appointed or other counsel, may not. The International Tribunal will not have trials in absentia. See, e.g., U.N. S.C. Res. 827 (1993), para. 2, reprinted in 32 I.L.M. 1203, 1204 (1993) (establishing a tribunal and adopting the Statute annexed to the Report of the Secretary General); Report of the Secretary General, supra note 14, at 25 para. 101. The Secretary General's Report also recognized that "[t]he part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions ... the Hague Convention (IV) ... the Convention on the Prevention and Punishment of the Crime of Genocide ... and the Charter of the International Military Tribunal of 8 August 1945," i.e., the Nuremberg Charter (which includes "Crimes Against Humani-
expressed in multilateral treaties retain their applicability through their bases in treaty law, several remain applicable as customary international law and, indeed, as customary *obligatio erga omnes*.

Additionally, the prohibition of genocide is a well-recognized example of a peremptory norm *jus cogens*. Other peremptory norms include violations of fundamental human rights in times of either armed conflict or relative peace. Thus, *jus cogens* norms reflected in Geneva law and the 1966 Covenant similarly apply. In addition, one should recognize that the U.N. Charter, the Genocide Convention, the CCPR, the 1984 Convention Against Torture, and the 1989 Convention on the Rights of the Child also apply in all circumstances of social violence or relative peace, with the possible exception of permissible derogations under the CCPR, and the 1989 Convention on the Rights of the Child.

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21. See, e.g., RESTATEMENT, *supra* note 11, § 702 cmt. n, reporters' note 1; In re Estate of Marcos, 978 F.2d 493, 500 (9th Cir. 1992), *quoting* Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 715, 717 (9th Cir. 1992) (noting that international prohibition against official torture has "the force of a *jus cogens* norm"); see generally Jordan J. Paust, *The Reality of Jus Cogens*, 7 CONN. J. INT'L L. 81 (1991). The customary *jus cogens* prohibitions recognized by the Restatement include: genocide; slavery or slave trade; the murder or causing the disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination; and a consistent pattern of gross violations of internationally recognized human rights. RESTATEMENT, *supra* note 11.

22. See Commission Report I, *supra* note 16, at 15 para. 46 ("applicability" of fundamental human rights norms and the prohibition of genocide is further assured by "their character as peremptory norms of international law").

23. Derogations are not permitted with respect to all articles and are limited. For example, derogations are limited in the CCPR to times of "public emergency" which threaten the life of the nation, when officially proclaimed, and by the necessity standard contained in the phrase "to the extent strictly required" as well as by the express proviso "that such measures are not inconsistent with . . . other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin." CCPR, *supra* note 5, art. 4(2).

24. CCPR, *supra* note 5, arts. 4-5; see also id. arts. 12(3), 13, 18(3), 19(3), 21, 22(2).

Geneva law, however, is limited to circumstances of armed conflict. These involve either an Article 2 conflict of an international character, or an Article 3 conflict which is not international in character. The customary laws of war which are not reflected in common Article 3 of the Geneva Conventions, and Protocol II thereto, are also applicable in times of armed conflict. These customary laws, however, are recognizably limited to circumstances of war involving states or nations, and to so-called “true” civil wars which attain the status of a “belligerency.” The latter exemplifies one such situation which does not depend upon statehood status for both participants. An example of this type of situation is the United States Civil War.26

III. THE ARMED CONFLICT IN BOSNIA-HERZEGOVINA

With respect to the armed conflict occurring in the former Yugoslavia, at a minimum, common Article 3 of the Geneva Conventions should clearly apply. Accordingly, Protocol II also would apply. Even with a severely restricted focus on Bosnia-Herzegovina and the fighting within such territory, Bosnian-Serb and Muslim combatants generally meet recognized criteria, at least minimally, for insurgent status. These include: (1) sustained use of force; (2) an armed force with a responsible command structure; (3) general control of significant territory; and (4) the semblance of a governmental structure, especially one negotiating at the international level.27

In addition, the Bosnia-Herzegovina conflict certainly qualifies as an international armed conflict meeting several criteria. First, it is evident that within Bosnia-Herzegovina proper, there exists a “belligerency,” or true civil war, with outside de facto, if not also de jure, recognition of local participants as civil war belligerents. Having attained the status of

14(3), 15(2).

26. See, e.g., Paust & Blaustein, supra note 8, at 11 & n.38, 13 & nn.43-45, 14 (noting that once a conflict has transformed from an insurgency into a belligerency, the bulk of the Geneva Conventions apply to the conflict); U.S. DEP’T OF ARMY. FM 27-10, THE LAW OF LAND WARFARE 9 para. 11(a) (1956) [hereinafter LAND WARFARE] (applying the customary law of war to civil war when rebels become recognized as belligerents).

27. See, e.g., Paust & Blaustein, supra note 8, at 12 (describing the insurgent status of the forces of Bangladesh during the conflict with Pakistan); JEAN S. PICTET, COMMENTARY, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 31, 34-37; see also Protocol II, supra note 4, art. 1(1) (discussing the situations under which Protocol II applies).
a "belligerency," common Article 2 of the Geneva Conventions along with all of the general proscriptions and Protocol I thereto applies, in addition to the more general customary law of war.  

28. Second, outside intervention in several forms by neighboring nations has definitely internationalized the conflict.  

29. It cannot be reasonably characterized as a local insurgency. Third, it is arguable that United Nations intervention in the form of recognizing and condemnatory resolutions, and authorizations for certain forceful measures, has further internationalized the conflict to such an extent that the Geneva common Article 2 threshold has been reached.  

Resolutions of the U.N. Security Council have specifically recognized the existence of an armed conflict in the Republic of Bosnia-Herzegovina and the presence of both military and paramilitary forces engaging in hostilities. The U.N. Security Council has further noted outside intervention by other military forces, in particular, the participa-

28. See, e.g., Paust & Blaustein, supra note 8, at 11 & n.38, 12-14; Protocol I, supra note 4, arts. 1(4), 96(3) (noting applicability of Protocol I); PICTET, supra note 27, at 118-19 (pointing out that Part II of the Geneva Convention also applies to "belligerents' own nationals"). It would not be policy-serving to argue that although the customary laws of war apply to a belligerency, the common Article 2 threshold of Geneva law does not, especially when many of the Geneva norms are now customary. See Commission Report I, supra note 16, at 14 para. 40 (noting that the Commission of Experts also recognizes that "rules of customary international law may be found in the Geneva Conventions"). Although the treaty should expressly recognize such a clear cutback of coverage in its text, it fails to do so. See Vienna Convention on the Law of Treaties, supra note 12, art. 31(3)(c) (customary international law is a presumptive background for the interpretation of any treaty and thus the Geneva Conventions).

29. Paust & Blaustein, supra note 8, at 13 (noting that a conflict with international impact triggers Article 2 of the Geneva Conventions).


tion by "elements of the Croatian army,"32 the Federal Republic of

32. See, e.g., U.N. SCOR, 47th Sess., 3137th mtg., at 1, U.N. S.C. Res. 787 (1992) (requiring the immediate cessation and withdrawal of all forms of outside interference including action taken by units of the Yugoslav People's Army (JNA) and elements of the Croatian Army); see also I.C.J. Second Request, supra note 12, paras. 54-62, 67 (separate opinion of Judge Lauterpacht) (referring to the Yugoslav intervention and additionally addressing reports of statements by U.S. Ambassador Madeleine Albright, European Community Mediator Lord Owen, and U.S. Senator Joe Biden (D.-Del.)); see generally U.N. G.A. Res. 47/121 (1992) (pointing out the failure to stop either the direct or indirect support by the JNA's aggressive acts); U.N. Commission on Human Rights, U.N. Doc. E/CN.4/1992/S-2/6, at 3 (1992) (condemning ethnic cleansing being carried out in Bosnia and Herzegovina and recognizing that, among others, "the Yugoslav Army" bears "primary responsibility"), quoted in Payam Akhavan, Punishing War Crimes in the Former Yugoslavia: A Critical Juncture for the New World Order, 15 HUM. RTS. Q. 262, 267 (1993); Second Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), in Letter Dated 5 October 1993 from the Secretary-General Addressed to the President of the Security Council, U.N. S.C. Doc. S/26545/Annex, at 16 para. 68 (1993) (determining that alleged perpetrators of rape include special forces, consisting of some individuals from outside Bosnia and Herzegovina) [hereinafter Commission Report II]; John Darnton, Croatia Forced to Admit That Its Army Is in Bosnia, N.Y. TIMES, Feb. 16, 1994, at A4 (noting that thousands of Croatian regular troops have frequently crossed the porous border into Bosnia); Paul Lewis, U.S. Official Visits Graves in Croatia, N.Y. TIMES, Jan. 7, 1994, at A3 (citing that thousands of Croatian soldiers and dozens of tanks were sent into Bosnia-Herzegovina by the Zagreb Government); David Binder, C.I.A. Doubtful on Serbian Sanctions, N.Y. TIMES, Dec. 22, 1993, at A3 (reporting that the Serbian Government supplied the Serbian forces which took control of over two-thirds of Bosnia); Tony Barber, Muslim Numbers Make Up for Forces Lack of Weapons, INDEPENDENT, June 24, 1993, at 10 (providing a statement by military specialist James Gow that JNA soldiers reinforced Bosnian Serbs and assisted with helicopter missions); Louise Branson & Bosanska Raca, Golden Highway Makes a Joke of Bosnian Blockade, SUNDAY TIMES, May 23, 1993 (Overseas News); Marcus Tanner, Serbs to 'Examine' Plan for Border Observers, INDEPENDENT, May 19, 1993, at 12 (reporting that trucks and petrol tankers continue to cross the border from Serbia to Bosnia in defiance of the blockade); David B. Ottaway, Serbia's Cross-Border Embargo Far from Airtight: Fuel Tankers Roll Into Nationalist-Held Bosnia, WASH. POST, May 13, 1993, at A18; Stephen Kinzer, Conflict in the Balkans: 2 Major Mosques Blown up by Serbs, N.Y. TIMES, May 8, 1993, § 1, at 1 (reporting the official declaration by the Yugoslav and Serbian Governments of their future intent to cut off all military and logistical support given to Bosnian Serbs); NATO Reports Violations of Bosnian No-Fly Zone, Reuter Lib. Rep., May 1, 1993, available in LEXIS, News Library, TXTNWS File 3 (recounting the capture of two military helicopters from Serbia which were violating the no-fly zone over the former Yugoslav Republic); Laura Silber, Mladic Scorns Western Threats, FIN. TIMES, Apr. 16, 1993, at 2 (reporting on Serbian President Milosevic's selection of General Mladic to oversee the war in Bosnia); Roger Cohen, Yugoslavia Role in Bosnia, N.Y. TIMES,
Mar. 22, 1993, at 6 (observing the well-coordinated efforts of the military operation by Yugoslav and Bosnian Serb forces in the Srebrenica area); Carol J. Williams, Serb Attack in Krajina May Renew All-Out War, HOUS. CHRON., Jan. 28, 1993, at A13 (reasoning that the Serbian attack on southern Croatia was in retaliation for offensive measures by the Croatian Government); Chuck Sudetic, Serbs Attack Muslim Slavs and Croats in Bosnia, N.Y. TIMES, Apr. 4, 1992, at I3 (noting the irregulars and the JNA fighting in Bosnia); Chuck Sudetic, Croat Towns Bombed in Bosnia and Herzegovina, N.Y. TIMES, Apr. 8, 1992, at A10 (recounting the JNA airstrikes on towns in Bosnia); John F. Burns, Pessimism Is Overshadowing Hope in Effort to End Yugoslav Fighting, N.Y. TIMES, May 12, 1992, at A1 (reporting on the JNA units and equipment transfer to Bosnian Serb units); Chuck Sudetic, Serbian Gunners Pound Sarajevo, N.Y. TIMES, May 30, 1992, at I1 (counting over 80,000 Yugoslavian soldiers joining the Serb Army when Yugoslavia withdrew from the Republic); James C. O'Brien, The International Tribunal for Violations on International Humanitarian Law in the Former Yugoslavia, 87 AM. J. INT'L L. 639, 647 (1993) (reporting "a number of fronts and partisan or proxy groups participating on behalf of each other"); Dr. Milan Vego, Federal Army Deployments in Bosnia and Herzegovina, 4 JANE'S INTELLIGENCE REV. 445 (Oct. 1992) (relating that the Republic of Yugoslavia (consisting of Serbia and Montenegro) exercises operational command-and-control over JNA forces and other Serbian forces in Bosnia-Herzegovina); Mark Weller, The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia, 86 AM. J. INT'L L. 569, 593, 602 (1992) (noting that JNA units as well as elements of the Croatian Army are involved in the fighting occurring in Bosnia-Herzegovina); Exec. Order No. 12,808, 3 C.F.R. 305 (1992) (quoting a statement by then-U.S. President George Bush that "the actions and policies of the Governments of Serbia and Montenegro, acting under the name . . . Federal Republic of Yugoslavia, in their involvement in and support for . . . force and violence utilizing, in part, the forces of the so-called Yugoslav National Army") (emphasis added), reprinted in Marian Nash, Contemporary Practice of the United States Relating to International Law, 87 AM. J. INT'L L. 595, 614-15 (1993). President Clinton stated that


Two communiques dated on or about May 8, 1993, one from the Government of the Republic of Serbia and one from the Government of Yugoslavia (Serbia and Montenegro) are also relevant. In separate opinions, Judges Lauterpacht, Shahabuddeen, and Weeramantry addressed both the communiques. See I.C.J. Second Request, supra note 12, paras. 58-61 (adding a statement by Judge Lauterpacht that they "are of special cogency" as "declarations against interest" demonstrating governmental "assistance to the Serbs in Bosnia in breach of the Security Council embargo"). In pertinent parts, the communiques affirmed such involvement. The communique of the Republic of Serbia stated that it "has been unreservedly and generously helping" in a
Yugoslavia (Serbia and Montenegro) Army forces, and general involvement in the Republic of Croatia.

Finally, the United Nations has noted the applicability of humanitarian law. Aspects of relevant humanitarian law found applicable include the Geneva Conventions and certain general prohibitions thereunder which are covered in Parts II and III of the Civilian Convention that apply only when the threshold contained in common Article 2 of the Geneva Conventions has been reached. The Commission of Experts adds that "the character and complexity" of what it terms "the armed conflicts," alongside the numerous agreements on humanitarian issues, justifies use of the term "international armed conflicts." They also recognize that classifying the armed conflict in Bosnia-Herzegovina as merely a local conflict would be seriously misplaced.

The fact that the U.N. Security Council has also recognized the likely occurrences of "grave breaches" of Geneva law, however, should not be determinative since that phrase is contained within a general section...
of the 1949 Geneva Conventions concerning sanctions for violations of the Conventions and, thus also, violations of Article 3. The "grave breaches" sanction provisions in the Civilian Convention relate to acts committed against "persons . . . protected by the present Convention," as opposed to what has been interpreted as a more limited phrase, "protected persons," found, for example, in Article 27 of Part III of the Civilian Convention. Persons protected under common Article 3 of the Convention are certainly "persons . . . protected by the present Convention." This reading of the Civilian Convention is not merely consistent with the ordinary meaning of the language of the treaty considered in light of its humanitarian object and purpose, but it is also

37. See Geneva Civilian Convention, supra note 3, art. 147.


39. See, e.g., Paust & Blaustein, supra note 8, at 28 n.101 (explaining that any acts committed against a person constituting a "grave breach" under the Geneva Civilian Convention equally fall under the scope of Article 3 of the Geneva Convention); see also PicTet, supra note 27, at 591 (citing common Article 3 in connection with discussion of the general section on criminal sanctions).

40. Nothing in the text of the Geneva Civilian Convention states that grave breaches of Article 3 are excluded from Article 147. The text of Article 147 reaches "persons . . . protected by the present Convention," and thus those protected by Article 3 of the Convention. See Geneva Civilian Convention, supra note 3, arts. 3, 147. Moreover, Article 147 does not attempt to classify persons or to address from which parts of the Geneva Civilian Convention persons are protected. Id. The purpose of the general sanctions section is to assure that infractions of the Geneva Civilian Convention are punished, especially "grave" breaches or infractions classified according to the gravity of conduct, outcomes or effects, regardless of the nationality of offenders or victims, or the place where offenses have been committed. PicTet, supra note 27, at 587, 597, 602 (noting also that the universal jurisdiction allowed for grave breaches evidences the intent to punish such conduct); Paust, No U.S. Sanctuary, supra note 14, at 340. Further, a treaty must be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." Vienna Convention on the Law of Treaties, supra note 12, art. 31(1); see also Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 I.C.J. 4, 8 (Mar. 3) (emphasizing use of "relevant words in their natural and ordinary meaning in the context in which they occur"). Both the ordinary meaning of the text and the purpose of Article 147 of the Geneva Civilian Convention compel recognition that grave breaches of Article 3 are included.

Moreover, there is no specific denial of the customary rule that every violation of the law of war is a war crime, subject to criminal sanctions and relevant state
especially compelling in view of such a purpose and the now customary obligation of states to seek out, arrest, and initiate prosecution of or extradite all persons reasonably accused of having committed war crimes. In terms of subsequent opinio juris, the U.N. International Law Commission's 1991 Draft Code of Crimes Against the Peace and Security of Mankind included among “exceptionally serious war crimes” many of those covered in common Article 3 of the Geneva Conventions, and expressly recognized that its criminal sanctions provisions reached circumstances of “non-international armed conflicts covered by Article 3 common to the four 1949 Geneva Conventions.”

Another technical point concerns protective coverage under the Civilian Convention when common Article 2 applies. The protections under common Article 3 are considered to be a minimum set of standards. Given the broad scope of the protections, it will encompass many of the alleged crimes. Without the broad nature of the protections, Article 4 would limit general protection under Part III of the Civilian Convention to those “in the hands of a Party to the conflict . . . of which they are not nationals.” In this situation, Bosnian-Serbs and Muslims may con-
stitute different "nations" even though they exist within a territorial state. Nonetheless, it would not be policy-serving to apply unrealistic standards of "national" nexus which function in such a way as to deny humanitarian protection. The provisions of Part II of the Civilian Convention find greater application by covering the entire population of each country involved, even against a population's own government. It further includes all individuals exposed to grave danger of whatever nature in war. Thus, Part II of the Civilian Convention, like common Article 3, protects persons regardless of nationality or any other link between victims and perpetrators.

The threshold for applicability of the crime of "aggression" or relevant Crimes Against Peace is reached at the commencement of a war, or just prior to a war, as in the case of planning a war of aggression. The International Military Tribunal at Nuremberg recognized such a situation. Recently, however, the threshold appears to have been lowered. For example, the language of the U.N. General Assembly's 1974 Declaration on Aggression assumes a more broad-based approach towards a state's use of armed force in contravention of the U.N. Charter, the "sending by or on behalf of a State of armed bands, groups,

45. See Geneva Civilian Convention, supra note 3, art. 4 (finding the provisions of Part II defined in Article 13). The provisions of Part II cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the suffering caused by war. Id.

46. See Geneva Civilian Convention, supra note 3, art. 13; PICTET, supra note 27, at 50, 118-19; Paust, My Lai, supra note 38, at 145-46.

47. See Geneva Civilian Convention, supra note 3, art. 16; Paust, My Lai, supra note 38, at 147-49 (setting forth the categories of persons protected under Art. 16, Part II). These categories are: 1) people exposed to great danger; 2) the wounded, sick and infirm; 3) expectant mothers; 4) people who have been shipwrecked; 5) orphans and children separated from their families under the age of 15; and 6) members of hospital staffs. Id.; Paust, Suing Saddam, supra note 43, at 356-57.


50. 1974 Declaration on Aggression, supra note 49, Annex, art. 2. See also Re-
[or] irregulars . . . which carry out acts of armed force against another State" of a certain "gravity" or, a curious phrase, "its substantial involvement therein,"51 and "the use of armed force by a State . . . in any other manner inconsistent with the [U.N.] Charter."52 Also, the U.N. International Law Commission's 1991 Draft Code of Crimes53 retains these recognitions relevant to opinio juris, and thus each provides factors or circumstances for the lowering of such a threshold.

The U.N. Security Council recognizes the existence of armed conflict in the region, is concerned with threats to the territorial integrity of the Republic of Bosnia and Herzegovina and has declared that as a State Member of the United Nations, Bosnia-Herzegovina enjoys the rights provided for in the U.N. Charter.54 The Security Council also reaf-
firmed the unlawfulness of any taking of territory by force,\textsuperscript{55} and demanded the immediate cessation of all forms of interference from outside the Republic.\textsuperscript{56}

Additionally, aggressive use of force “inconsistent with the [U.N.] Charter” recognizably includes the use of force to engage in politicide or to deprive a people of their right to self-determination, including so-called crimes against self-determination;\textsuperscript{57} to engage in violations of basic human rights;\textsuperscript{58} and, in particular, to engage in genocidal “ethnic cleansing,” including a use of forceful restraint to “cleanse” through a process of starvation.\textsuperscript{59} Genocidal “ethnic cleansing” is prosecutable in
any nation as genocide\textsuperscript{60} and, in time of war or belligerency at least, as a war crime.\textsuperscript{61} The same applies with respect to genocidal strategies of

\begin{itemize}
  \item murder, torture, arbitrary arrest and detention, extra-judicial executions,
  \item rape and sexual assault, confinement of civilian population in ghetto areas, forcible removal, displacement and deportation of civilian population, deliberate military attacks or threats of attacks on civilians and civilian areas, and wanton destruction of property. Those practices constitute crimes against humanity and can be assimilated to specific war crimes.
\end{itemize}

\textit{Id.} para. 56. \textit{See also} Paust, \textit{Congress and Genocide}, supra note 20, at 90-94 (stating that genocide is a generally recognized crime under international law); G.A. Res. 121, U.N. GAOR, 47th Sess., Supp. No. 49, U.N. Doc. A/147-149 (1992) (finding that ethnic cleansing constitutes genocide); U.N. GAOR, 6th Comm., 3rd Sess., 82nd mtg., at 184-85 (1948) (citing Mr. Bartos, representative of Yugoslavia, who stated that genocide is also committed when a group is compelled to leave its home). As an example of such genocide, Mr. Bartos referred to the instance of a "Nazi disbursement of a Slav majority from a certain part of Yugoslavia in order to establish a German majority there," forcing Slavs to abandon their homes. \textit{Id.}; \textit{see also supra} note 32.


In particular, rape used as a tactic for such purposes is covered by customary laws of war. \textit{See, e.g.}, Geneva Civilian Convention, supra note 3, arts. 3(1)(a)-(c), 16, 27 (rape), 31-33, 147; Protocol I, supra note 4, arts. 51(2); 75(1)-75(2)(a), (b), (d);
forced starvation.62

76(1); Protocol II, supra note 4, arts. 4, 13(1)-(2); Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (listing war crimes as presented to the 1919 Paris Peace Conference; including Serbia as a member of the Commission) [hereinafter 1919 Commission Report]; crime no. 1 (systematic terrorism); crime no. 5 (rape); crime no. 6 (abduction of women and girls in order to enslave them in prostitution); crime no. 12 (attempts to denationalize citizens of an occupied territory); U.N. S.C. Res. 827, Preamble (1993); U.N. S.C. Res. 820 (1993); Commission Report I, supra note 16, para. 56 (describing means by which ethnic cleansing has been implemented), para. 59 (stating that acts of sexual assault are prohibited); Theodor Meron, Rape as a Crime Under International Humanitarian Law, 87 AM. J. INT’L L. 424 (1993); Jordan J. Paust, Correspondence, 88 AM. J. INT’L L. 88 (1994); see also Commission Report II, supra note 32, at 13 para. 50(e) (analyzing the outcome of the strategy by explaining how victims of rape often left their homes only to settle in refugee camps or be killed). Rape is also used as part of an ethnic cleansing strategy. Report on the Situation of Human Rights in the Territory of the Former Yugoslavia, U.N. GAOR, Hum. Rs. Comm., 49th Sess., at 66 para. 24, 108 para. 48, U.N. Doc. E/CN.4/1993/50 (1993); INTERNATIONAL HUMAN RIGHTS LAW GROUP, NO JUSTICE, NO PEACE: ACCOUNTABILITY FOR RAPE AND GENDER-BASED VIOLENCE IN THE FORMER YUGOSLAVIA 23 (1993).

62. Compare Genocide Convention, supra note 2, art. 2 with Protocol I, supra note 4, art. 54; Protocol II, supra note 4, art. 14; 1919 Commission Report, supra note 61 (listing war crimes: crime no. 4 (concerning the calculated attempt to starve civilians)); Panel, International Law and Food Crisis, 69 PROC. AM. J. INT’L L. 50-51 (1975) (addressing the use of food as a political weapon); see also U.N. S.C. Res. 787 (1992) (condemning as violations of humanitarian law the deliberate impeding of the delivery of food and medical supplies to the civilian population); U.N. S.C. Res. 771 (1992) (deciding on the necessity to collect substantial information on such violations of humanitarian law and to submit it to the U.N. Security Council).

The deliberate attempt to starve Muslim civilians is a stratagem that is genocidal in purpose and effect. It is also a wilful violation of the customary laws of war. For example, the Responsibilities Commission of the Paris Peace Conference designated crime no. 4 as “deliberate starvation of civilians.” 1919 Commission Report, supra note 61. Moreover, deliberate starvation is a “grave breach” of Geneva law. The duty to protect all persons exposed to grave danger from ill-treatment includes starvation. Geneva Civilian Convention, supra note 3, arts. 3, 16. Further duties include the protection against wilful killing. Id. arts. 23, 147; see also Roy Gutman, Bosnian Talks Threatened by Sarajevo Siege, NEWSDAY, Aug. 2, 1993, at 14 (discussing the blockage of overland food shipments by the Bosnian Croat forces to the Bosnian interior); Murray Kempton, The UN Shuffles Toward Destiny, NEWSDAY, May 7, 1993, at 13 (cataloguing the action of the Serbs to include sabotaging water supplies, blockading the delivery of medicine and food shipments, and using arms against an unarmed populace); Carol J. Williams, Rescue of Wounded in Bosnia Aborted Amid Serb Shelling, DALLAS MORNING NEWS, Mar. 25, 1993, at 16A (describing how the Bosnian Serbs blocked convoys of food to Muslim enclaves in eastern Bosnia); John F. Burns, U.N. Aide Seeks Deal on Stranded Serbs, N.Y. TIMES,
IV. HUMAN RIGHTS AND THE LAW OF ARMED CONFLICT

Human rights are often intertwined with the law of armed conflict and each may inform the other and, in turn, shape and clarify normative contours and content. Often, issues of human rights emerge in times of armed conflict and many of the prohibitions in Geneva law reflect basic human rights. Violations of human rights can result in both prosecutions of war crimes and "crimes against humanity" (which contain a set of crimes under customary international law characteristically involving human rights infractions and which are also informed by both Geneva and human rights law). Violations of human rights as such, however, have too infrequently been the direct subject of criminal sanctions. The most notable instance occurred at the International Military Tribunal at Nuremberg and in subsequent Nuremberg proceedings under the heading "Crimes Against Humanity." More recently, the U.N. International
Law Commission's 1991 Draft Code of Crimes extended recognition of such offenses to include "systematic" murder or torture, murder or torture "on a mass scale," and the "forcible transfer" of a population.\textsuperscript{64}

The U.N. International Law Commission appropriately stressed that offenses against human rights can occur regardless of the status of the perpetrator, as was the case with Nuremberg. Moreover, head-of-state or official elite status does not provide immunity,\textsuperscript{65} and "private" actors have private duties with respect to human rights law.\textsuperscript{66} In fact, there is simply no requirement in general human rights instruments that human rights infractions be perpetrated at the hands of officials, under "color of law," a curious American phrase, or as a matter of "official policy."\textsuperscript{67}
There is no logical reason why both criminal and civil sanctions against private perpetrators of human rights infractions are not more broadly applied. Similarly, in human rights instruments, there is no limitation of available sanctions to civil remedies.

Finally, international penalties recognized in a new international code or in a statute for a new international tribunal could merely mirror any relevant domestic law penalties as well as penalties evident in the customary practice of nations. Those who attempt to invoke *nulla poena sine lege*, or *sine crimen*, arguments that were rightly denounced at Nuremberg could thereby be estopped from doing so. As recognized at Nuremberg, penalties might simply include any of the sanctions allowed under customary international law as evidenced by *opinio juris* and the practice of nations. In cases of war crimes, penalties have ranged from letters of reprimand to death. The long history of such practice forms the basis for criminal or civil sanctions. There is al-

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68. See International Military Tribunal, *supra* note 48, at 218-19, 248-49 (Hague Convention IV binding on German nationals as customary international law despite Germany’s failure to ratify it). The customary range of criminal penalties applies even though the convention contains no enumeration of general penalties, no expression of criminal sanctions as such, and makes no differentiation between criminal or civil sanctions. *Id.* The International Tribunal can impose any penalty of imprisonment, but cannot impose the death penalty, and can consider typical sentences “applicable in the courts of the former Yugoslavia.” Report of the Secretary General, *supra* note 14, paras. 111-15.


so a well-recognized customary international law concerning leadership or command responsibility for war crimes, complicity, and the question of superior orders, which together can form the general basis for recognizable criminal responsibility.

CONCLUSION

In conclusion, there are several types of international criminal laws applicable to the events in the former Yugoslavia. Hopefully, the International Tribunal will aid in the enforcement of some or all of these laws in the near future, and a permanent International Criminal Tribunal will be established to supplement enforcement of international criminal law. Customary international law of a peremptory nature already


72. Paust, Norms, Myths, supra note 69, at 166-69.

73. Paust, Norms, Myths, supra note 69, at 170-75; Bassiouni, DRAFT ILC CODE AND TRIBUNAL, supra note 69, at 74-78; Yoram Dinstein, The Defense of 'Obedience to Superior Orders' in International Law (1965); Leslie C. Green, Superior Orders in National and International Law (1976).

74. Draft Code, supra note 42, at 5-8, 22-25, arts. 3, 11-12.

places an obligation on each nation-state to search for and bring into custody, and to initiate prosecution of or to extradite all persons within its territory or control who are reasonably accused of having committed, for example, war crimes, genocide, crimes against humanity, breaches of neutrality, and other crimes against peace. Thus, each state will retain such responsibility regardless of the existence of the International Tribunal, or whether the particular accused are indicted before such a court or the tribunal.

Once again there is genocide occurring in Europe. Affirmative steps must be made this time to stop such crimes and to punish those who

76. See Paust, No U.S. Sanctuary, supra note 14, at 337-41 (discussing the obligations of states to enforce criminal sanction provisions).

77. The International Tribunal was created by U.N. Security Council Resolution 827 on May 25, 1993, and U.N. Security Council Resolution 808 on Feb. 22, 1993. See Peter H.F. Bekker, Election of Judges of the International Tribunal for Violations of Humanitarian Law in the Former Yugoslavia, 87 AM. J. INT’L L. 668 (1993) (listing the names of the eleven judges of the International Tribunal who were elected on Sept. 17, 1993). The Report of the Secretary General recognizes the existence of “concurrent jurisdiction of the International Tribunal and national courts,” but also points out a “primacy” for that of the International Tribunal. Report of the Secretary General, supra note 14, paras. 64-68 (adopted by U.N. S.C. Res. 827 (1993)). Thus, each state retains the general responsibility to initiate prosecution of, or to extradite those reasonably accused. Once an accused has been “tried” by the International Tribunal, however, that individual cannot be “tried” again for the same acts “before a national court.” Id. paras. 66, 68 (Article 10(1)). Such a scheme “shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law.” Id. para. 7 (1993). Thus, state responsibilities concerning the right of victims to civil remedies remain. See, e.g., Paust, Suing Saddam, supra note 43, at 360-71, 378-79 (discussing the availability of remedies for violations of the law of war). State responsibilities with respect to the International Tribunal are binding under Article 25 of the U.N. Charter. See, e.g., Report of the Secretary General, supra, paras. 64-68 (deciding that the International Tribunal will carry out its work without prejudice to the right of victims to seek compensation for damages due to the violations of international law); Id. paras. 22-23, 28. Under Article 103 of the U.N. Charter, these special responsibilities supersede more ordinary treaty obligations. See QUESTION OF INTERPRETATION AND APPLICATION OF THE 1971 MONTREAL CONVENTION ARISING FROM THE AERIAL INCIDENT AT LOCKERBIE, 1992 I.C.J. 15 para. 39 (Apr. 14). They should not, however, supersede customary jus cogens. See supra note 15.

Germany is fulfilling its responsibility by prosecuting a person reasonably accused of international crimes. See, e.g., Stephen Kinzer. Germans Arrest Serb as Balkan War Criminal, N.Y. TIMES, Feb. 16, 1994, at A4. Under Article 9, paragraph 2 of its statute, however, the International Tribunal can request Germany to defer to its competence, which “shall have primacy.” See Report of the Secretary General, supra, para. 68.
have committed, planned, encouraged, condoned, or otherwise participated in such atrocities and crimes against Creation.

Countless buried
Shout still,
Against the sword,
Rape, Crimes Against Humanity

When will
Doubtless varied
Claims ignored,
Shape signs of our own sanity?