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APPLICABILITY OF INTERNATIONAL CRIMINAL LAWS TO EVENTS IN THE FORMER YUGOSLAVIA

Jordan J. Paust*

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;

* Professor of Law, University of Houston. After this paper was delivered at the April 3, 1993 regional meeting of the American Society of International Law (ASIL) and The American University's Washington College of Law International Workshop, I became an Advocate and Counsel for Bosnia-Herzegovina in its case before the International Court of Justice (ICJ). I am indebted to Professor Francis Boyle of the University of Illinois, who was a Co-Agent for Bosnia-Herzegovina and lead counsel before the ICJ, and to various members of the Applicant's legal team for several media citations in footnote 32. Some citations in footnotes 60 and 62 are also a product of team efforts.

1. U.N. CHARTER, June 26, 1945, 59 Stat. 1031, 3 Bevans 1153.

2. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]. Genocidal strategies and complicitous involvement aimed at genocide can also implicate the International Convention on the Suppression and Punishment of the Crime of Apartheid. *See* G.A.

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

Res. 3068, U.N. GAOR, 28th Sess., Supp. No. 30, at 75, U.N. Doc. A/9030 (1974) (ratified by the former Yugoslavia).

3. Geneva Conventions of 12 August 1949 for the Protection of War Victims, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 3 (1950) [hereinafter 1949 Geneva Conventions]. Four multilateral agreements comprise the 1949 Geneva Conventions: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (1950); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (1950); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (1950); Geneva Convention Relative to the Protection of Civilian Persons in the Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (1950) [hereinafter Geneva Civilian Convention].

4. Protocol Additional to the Geneva Civilian Convention, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977), 1977 U.N. Jurid. Y.B. 95, *reprinted in* 16 I.L.M. 1391 (1977) [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (1977), 1977 U.N. Jurid. Y.B. 135, *reprinted in* 16 I.L.M. 1442 (1977) [hereinafter Protocol II].

5. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, *reprinted in* 6 I.L.M. 368 (1967) [hereinafter CCPR].

6. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. E/CN.4/1984/72/Annex (1984), *reprinted in* 23 I.L.M. 1027 (1984) [hereinafter Torture Convention].

7. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., 61st mtg., Annex (1989), *reprinted in* 28 I.L.M. 1457 (1993). This treaty is also applicable in the context of war. See Cynthia Price Cohen, *Remarks, in* CONTEMPORARY INTERNATIONAL LAW ISSUES: SHARING PAN-EUROPEAN AND AMERICAN PERSPECTIVES: PROCEEDINGS OF THE JOINT CONFERENCE HELD IN THE HAGUE, THE NETHERLANDS, JULY 4-6, 1991, at 177-78 (Dean C. Alexander ed., 1992) (panel on Humanitarian Law and the Iraq-Kuwait Crisis) (discussing the effect of the Convention on the Rights of the Child on the rights of children affected by the Iraq-Kuwait conflict). Cohen notes that the convention extends the rights of the 1949 Geneva Conventions and Protocols I and II to children. *Id.* at 177. Moreover, these "civil-political rights" are generally absolute under the Convention on the Rights of the Child. *Id.* at 178.

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.⁸ 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.

Of the successor states to the Socialist Federal Republic of Yugoslavia, the Federal Republic of Yugoslavia (Serbia and Montenegro) and the Republic of Bosnia and Herzegovina have formally declared successions to obligations assumed by the Socialist Federal Republic of Yugoslavia. See Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), 1993 I.C.J. 15 para. 22 (April 8), reprinted in 32 I.L.M. 888, 896 (1993) [hereinafter Prevention of Genocide case]. One declaration stated that the Federal Republic would "strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally." 32 I.L.M. at 896 para. 22 (quoting a formal declaration adopted by the Federal Republic on Apr. 27, 1992). Bosnia-Herzegovina declared its formal succession to the Genocide Convention on Dec. 29, 1992. *Id.* at 896 para. 23. This succession notice retroactively affirmed Bosnia-Herzegovina's succession to the Genocide Convention from March 6, 1992, when Bosnia-Herzegovina became independent. *Id.* Additionally, Bosnia-Herzegovina has formally succeeded to the Vienna Convention on Succession of States in Respect of Treaties. See Letter from Dr. Haris Silajdžić, Minister of Foreign Affairs, Republic of Bosnia and Herzegovina, to H.E. Boutros Ghali, U.N. Secretary-General (July 8, 1993) (on file with *The American University Journal of International Law and Policy*) (expressing that the Republic of Bosnia and Herzegovina "considers itself bound by the Vienna Convention on Succession of States in Respect of Treaties").

accept a treaty obligation will not take effect while hostilities are ongoing,⁹ and then, not for certain periods thereafter.¹⁰

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."¹¹ These duties include prohibitions of outlawed acts of aggression, genocide, and the deprivation of fundamental individual human rights.¹² 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/39/127, 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-breach 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

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").

14. See, e.g., Geneva Civilian Convention, *supra* note 3, arts. 1, 146-47; Paust & Blaustein, *supra* note 8, at 9 & n.30, 27-29; Jordan J. Paust, *Universality and the Responsibility to Enforce International Criminal Law: No U.S. Sanctuary for Alleged Nazi War Criminals*, 11 HOUS. J. INT'L L. 337, 337-40 (1989) [hereinafter Paust, *No U.S. Sanctuary*]; Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. S.C. Doc. S/25704, at 9 para. 35 (1993), reprinted in 32 I.L.M. 1163 (1993) [hereinafter Report of the Secretary General] (stating that grave breaches of the Geneva Conventions, genocide, and other crimes against humanity are undoubtedly a part of customary international law). The U.N. Security Council approved the report. U.N. S.C. Res. 827 (1993), reprinted in 32 I.L.M. 1203, 1204 (1993).

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).

16. See Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), at 13 para. 38, in Letter Dated 9 February

II. CUSTOMARY INTERNATIONAL LAW

Customary international law binds all nations,¹⁷ as well as nationals of former states.¹⁸ 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.¹⁹ 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, 148.

17. Jordan J. Paust, *Customary International Law: Its Nature, Sources and Status as Law of the United States*, 12 MICH. J. INT'L L. 59, 64-67 & n.14 (1990) [hereinafter Paust, *Customary International Law*]. See also Commission Report I, *supra* note 16, at 13-14 para. 40; 15 paras. 46, 49-50; 20 para. 72.

18. See, e.g., Paust & Blaustein, *supra* note 8, at 10; RESTATEMENT, *supra* note 11, § 210.

19. See, e.g., CCPR, *supra* note 5; Protocol I, *supra* note 4, art. 75 (concerning due process guarantees for the accused); Protocol II, *supra* note 4, art. 6; Jordan J. Paust, Gerhard von Glahn & Gunter Woratsch, *Report of the ICJ Mission of Inquiry Into the Israeli Military Court System in the Occupied West Bank and Gaza*, 14 HAST. INT'L & COMP. L. REV. 1, 17-61, 65-66 (1990); 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 Human-

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*.²⁰ Other peremptory norms include violations of fundamental human rights in times of either armed conflict or relative peace.²¹ Thus, *jus cogens* norms reflected in Geneva law and the 1966 Covenant similarly apply.²² 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 derogations²³ under the CCPR,²⁴ and the 1989 Convention on the Rights of the Child.²⁵

ty"). Report of the Secretary General, *supra* note 14, para. 35; *see also id.* paras. 37, 41-42, 44, 45, 47-48 (otherwise erroneously stating that "Crimes against Humanity were first recognized" in the Nuremberg Charter).

20. *See, e.g.*, I.C.J. Second Request, *supra* note 12, para. 100 (separate opinion of Judge Lauterpacht); RESTATEMENT, *supra* note 11, § 702(a) cmts. d, n; Jordan J. Paust, *Congress and Genocide: They're Not Going to Get Away With It*, 11 MICH. J. INT'L L. 90, 92-94 & n.3 (1989) [hereinafter Paust, *Congress and Genocide*].

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).

25. Convention on the Rights of the Child, *supra* note 7, arts. 5, 10(2), 13(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-Herzegovina³⁰ and the presence of both military and paramilitary forces engaging in hostilities.³¹ 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).

30. See, e.g., U.N. SCOR, 47th Sess., 3137th mtg., at 1, U.N. S.C. Res. 787 (1992), reprinted in 31 I.L.M. 1481, 1483 (1992); U.N. SCOR, 47th Sess., 3106th mtg., at 1, U.N. S.C. Res. 771 (1992), reprinted in 31 I.L.M. 1470-71 (1992); U.N. SCOR, 47th Sess., 3093d mtg., at 3, U.N. S.C. Res. 764 (1992), reprinted in 31 I.L.M. 1465-67 (1992).

31. See, e.g., U.N. SCOR, 47th Sess., 3137th mtg., at 1, U.N. S.C. Res. 787 (1992); U.N. SCOR, 47th Sess., 3119th mtg., at 1, U.N. S.C. Res. 780 (1992); U.N. SCOR, 47th Sess., 3118th mtg., at 1, U.N. S.C. Res. 779 (1992); U.N. SCOR, 47th Sess., 3106th mtg., at 1, U.N. S.C. Res. 771 (1992) (expressing concern with the reports of gross international humanitarian law violations which occurred within the territory of the former Yugoslavia and with particular concern over the occurrences in Bosnia and Herzegovina which included deliberate attacks on hospitals, ambulances and other non-combatants).

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

[b]ecause the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) has continued its actions and policies in support of groups seizing and attempting to seize territory in Croatia and Bosnia-Herzegovina by force and violence, the national emergency declared on May 30, 1992, and the measures adopted pursuant thereto to deal with that emergency, must continue in effect beyond May 30, 1993.

Exec. Order No. 12,831, 58 Fed. Reg. 5,253 (1993), reprinted in Nash, *supra*, at 614.

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.³³

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.³⁴ 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."³⁵ 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,³⁶ however, should not be determinative since that phrase is contained within a general section

"just battle." *Id.* para. 59 (separate opinion of Judge Lauterpacht). The communique of the Republic of Yugoslavia (Serbia and Montenegro) noted that it was being "forced to adjust all future aid . . . to reduce it exclusively to essential contingents of food and medicaments." *Id.* para. 60. Similarly relevant was a statement on May 11, 1993, by Slobodan Milosevic, President of the Republic of Serbia. B.B.C. Summary of World Broadcasts (May 13, 1993), available in LEXIS, News Library, BBCSWB File (BE/1687/C1) (emphasizing the great deal of assistance sent to Bosnian and Herzegovina fighters along with aid to Serbs who were at war), quoted in I.C.J. Second Request, *supra*, paras. 58-61 (separate opinions of Judges Shahabuddeen and Weeramantry).

33. See, e.g., U.N. SCOR, 47th Sess., 3118th mtg., at 2, U.N. S.C. Res. 779 (1992) (authorizing the U.N. protection force to aid the Yugoslav army in withdrawing from Croatia).

34. See, e.g., U.N. SCOR, 48th Sess., 3175th mtg., at 1, U.N. S.C. Res. 808 (1993) (noting the numerous occurrences of Geneva Convention violations among other international humanitarian laws in Bosnia-Herzegovina).

35. See Commission Report I, *supra* note 16, at 14 para. 45. The United States, in its April proposal for the creation of an international criminal tribunal, viewed the conflict in the former Yugoslavia after June 25, 1991 to be of an international character with respect to the laws of war, including Geneva law. Marian Nash, *Law of War: Proposed Tribunal for Crimes Against International Humanitarian Law*, 87 AM. J. INT'L L. 435, 439 (1993).

36. See, e.g., U.N. SCOR, 48th Sess., 3175th mtg., at 2, U.N. S.C. Res. 808 (1993) (expressing alarm at continuing reports of widespread violations of international humanitarian law in Bosnia-Herzegovina); U.N. SCOR, 47th Sess., 3119th mtg., at 1, U.N. S.C. Res. 780 (1992); U.N. SCOR, 47th Sess. 3118th mtg. at 1, U.N. S.C. Res. 779 (1992); U.N. SCOR, 47th Sess., 3093d mtg., at 3, U.N. S.C. Res. 764 (1992).

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,"³⁷ 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.³⁸ Persons protected under common Article 3 of the Convention are certainly "persons . . . protected by the present Convention."³⁹ 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,⁴⁰ but it is also

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

38. See Jordan J. Paust, *Legal Aspects of the My Lai Incident: A Response to Professor Rubin*, 50 OR. L. REV. 138, 143-46 (1971) [hereinafter Paust, *My Lai*] (discussing the possible limitations concerning "protected persons" covered under Part III of the Geneva Civilian Convention).

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.⁴¹ 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."⁴²

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.⁴³ 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."⁴⁴ In this situation, Bosnian-Serbs and Muslims may con-

obligations. LAND WARFARE, *supra* note 26, at 178 para. 499, 181 para 506(b). A violation of Article 3 is a violation of the law of war and a war crime. *Id.* Customary international law is a presumptive background for the interpretation of any treaty. Vienna Convention on the Law of Treaties, *supra* note 12, art. 31(3)(c). It would, therefore, be improper to deny application of Article 147 to infractions of Article 3. Yet, in view of such customary law, it would not matter ultimately whether Geneva law reflects customary obligations to initiate prosecution or extradite those reasonably accused of criminal activity in violation of common Article 3 because such obligations pertain under customary international law with respect to any violation of the law of war. *See* LAND WARFARE, *supra*. The United States has domestic legislation which allows compliance by prosecuting in federal courts or military tribunals. Paust, *No U.S. Sanctuary*, *supra* note 14, at 343-44. Victims may also institute civil claims in the United States. *Jane Doe I and Jane Doe II v. Karadzic*, Nos. 93 Civ. 1163 (PKL), 93 Civ. 0878 (PKL) (S.D.N.Y. 1993). *Infra* note 43.

41. *See* LAND WARFARE, *supra* note 26, at 181 para. 506(b).

42. Draft Articles on the Code of Crimes Against the Peace and Security of Mankind (I.L.C. first reading, 1991), art. 22(2)(a), at 50, U.N. GAOR, 46th Sess., Supp. No. 10, at 238-50, U.N. Doc. A/46/10 (1991) [hereinafter Draft Code] (listing over twelve specific criminal acts considered to be exceptionally serious international crimes).

43. *See* Jordan J. Paust, *Suing Saddam: Private Remedies for War Crimes and Hostage-Taking*, 31 VA. J. INT'L L. 351, 357 & n.27 (1991) [hereinafter Paust, *Suing Saddam*]. They are also recognizably customary. The nature of most portions of the Geneva Conventions are now viewed as customary law. *Id.* at 369-70 & n.90.

44. *See* Paust, *My Lai*, *supra* note 38, at 143-46.

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,⁴⁵ even against a population's own government.⁴⁶ It further includes all individuals exposed to grave danger of whatever nature in war.⁴⁷ 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 Nuremberg⁴⁸ 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 Aggression⁴⁹ assumes a more broad-based approach towards a state's use of armed force in contravention of the U.N. Charter,⁵⁰ 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.

48. See Opinion and Judgment of the International Military Tribunal at Nuremberg, Oct. 1, 1946; see also U.N. I.L.C., Principles of the Nuremberg Charter and Judgment, VI(a), G.A. Res. 488, U.N. GAOR, 5th Sess., Supp. No. 12, at 11-14 para. 99, U.N. Doc. A/1316 (1950).

49. G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1975) [hereinafter 1974 Declaration on Aggression]. The ICJ used the 1974 Declaration on Aggression as evidence of customary law. See Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States), 1986 I.C.J. 14 para. 195 (June 27) (tracing the origins of the definition of aggression to customary international law, under which the sending of armed bands into the territory of another state is also classified as an armed attack).

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-

STATEMENT, *supra* note 11, § 102 cmt. k, reporters' note 6 (stating that it is "generally accepted that the principles of the United Nations Charter prohibiting the use of force . . . have the character of *jus cogens*"); I.C.J. Second Request, *supra* note 12, (separate opinion of Judge Kreca, dissenting, noting "the prohibition of intervention . . . is, by its nature, *jus cogens*").

51. 1974 Declaration on Aggression, *supra* note 49, art. 3(g).

52. 1974 Declaration on Aggression, *supra* note 49, art. 1.

53. Draft Code, *supra* note 42, art. 15, at 30-32 (defining aggression and classifying it as a crime against the peace and security of mankind).

54. U.N. SCOR, 47th Sess., 3137th mtg., at 1, U.N. S.C. Res. 787 (1992). *See also* U.N. SCOR., 48th Sess., 3269th mtg., at 1, U.N. S.C. Res. 859 (1993), *addressed in* I.C.J. Second Request, *supra* note 12, para. 55 (order and separate opinion of Judge Bola Ajibola); G.A. Res. 47/121 (1992). Such rights, of course, include the "inherent right" of self-defense and self-defense assistance affirmed in Article 51 of the U.N. Charter. *See also* Paust & Blaustein, *supra* note 8, at 11 n.39 (concerning self-defense and self-determination assistance in the context of genocidal attacks); Richard Falk, *The Decline of Normative Restraint in International Relations*, 10 YALE J. INT'L L. 263, 269 (1985) (permitting outside support for people of Afghanistan); W. Michael Reisman, *Article 2(4); The Use of Force in Contemporary International Law*, 78 PROC. AM. SOC. INT'L L. 74, 79 (1984) (entitling people to receive assistance to exercise their right to self-determination bestowed by the U.N. Charter); *Id.* at 93-94 (concurring remarks by Jordan J. Paust that outside assistance to aid in the exercise of self-determination is proper).

An interrelated issue concerns the duty of all signatories to the now customary Genocide Convention to take action to prevent genocide during both peace and war-time. Genocide Convention, *supra* note 2, art. I; *see also* U.N. CHARTER, arts. 55(c), 56 (setting forth the obligation to respect and ensure respect for human rights); Order of Provisional Measures, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*), 1993 I.C.J. para. 52(A)(1) (Apr. 8) (requiring Respondent to immediately take all measures within its power to prevent commission of genocide); U.N. G.A. Res. 3074, U.N. GAOR, 28th Sess., Supp. No. 30, at 78, U.N. Doc. A/9030

firmed the unlawfulness of any taking of territory by force,⁵⁵ and demanded the immediate cessation of all forms of interference from outside the Republic.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;⁵⁷ to engage in violations of basic human rights;⁵⁸ and, in particular, to engage in genocidal "ethnic cleansing," including a use of forceful restraint to "cleanse" through a process of starvation.⁵⁹ Genocidal "ethnic cleansing" is prosecutable in

(1973) (obligating nations to cooperate with others with the intent to halt and prevent crimes against humanity, and furthermore, take necessary measures, both domestic and international, to achieve that purpose). States cannot deny the victims of ongoing genocide the assistance needed to prevent and to defend against acts of genocide without violating that duty. RESTATEMENT, *supra* note 11, § 702 cmt. d (determining that a state violates customary law by encouraging genocide or otherwise condoning it). Also, in view of the fact that the prohibition of genocide and related crimes (such as complicity in genocide) is customary *jus cogens*, relevant state obligations, such as seeking to avoid complicitious involvement in genocide, should remain even in the face of contrary resolutions of the U.N. Security Council. *See supra* notes 15, 50 (concerning related U.N. Charter prohibitions of the use of force as *jus cogens*).

55. U.N. SCOR, 48th Sess., 3269th mtg., at 1, U.N. S.C. Res. 889 (1993); U.N. S.C. Res. 787 para. 2 (1992). *See also* U.N. SCOR, 48th Sess., 3200th mtg., at 2, U.N. S.C. Res. 820 (1993) (nullifying all commitments and statements obtained under duress, especially those regarding land and property).

56. U.N. SCOR, 48th Sess., 3269th mtg., at 1, U.N. S.C. Res. 889 (1993); U.N. S.C. Res. 787 paras. 3, 5 (1992). *See also* U.N. SCOR, 48th Sess., 3200th mtg., at 2, U.N. S.C. Res. 820 (1993) (nullifying all commitments and statements obtained under duress, especially those regarding land and property).

57. *See* U.N. CHARTER art. 1(2) (equal rights and self-determination), art. 2(4) (prohibition against certain uses or threats of force); Paust & Blaustein, *supra* note 8, at 11 n.39, 18-19, 30 (discussing international guidance concerning proscribed acts of force and aggression by a government against its own people and permissible forms of sanction strategy in response to such aggression); Jordan J. Paust, *Aggression Against Authority: The Crime of Oppression, Politicide and Other Crimes Against Human Rights*, 18 CASE W. RES. J. INT'L L. 283, 286-90, 297-98, 303 (1986) [hereinafter Paust, *Aggression Against Authority*].

58. U.N. CHARTER arts. 2(4), 55(c), 56; *see* U.N. CHARTER art. 1(3) (citing the human rights purpose as one of those referred to in art. 2(4)); Paust, *Aggression Against Authority*, *supra* note 57, at 288-89, 293-94, 303 (discussing the right to self-determination).

59. *See generally* Paust, *Aggression Against Authority*, *supra* note 57, at 292-94 (noting that acts of genocide may be interconnected with the oppression of members of national, ethnic, racial, or religious groups, and that this also violates norms concerning the process of authority and self-determination); *infra* note 62.

any nation as genocide⁶⁰ and, in time of war or belligerency at least, as a war crime.⁶¹ The same applies with respect to genocidal strategies of

60. Genocide Convention, *supra* note 2, art. 2; see I.C.J. Second Request, *supra* note 12, paras. 69-70, 87, 126 (separate opinion of Judge Lauterpacht) (ethnic cleansing and other Serbian acts fit within the category of genocide, and Respondent clearly agrees that ethnic cleansing is genocide); Commission Report I, *supra* note 16, at 16 paras. 55-56; 20 para. 72. Paragraph 56 addresses the means used to carry out "ethnic cleansing":

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

Id. para. 56. See also Paust, *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. *Id.*; see also *supra* note 32.

61. See *supra* note 40 (stressing that any violation of the law of war is a war crime). Such a willful strategy also implicates several of the Geneva "grave breach" provisions. Geneva Civilian Convention, *supra* note 3, art. 147. On the illegality of ethnic cleansing, see U.N. SCOR, 3217th mtg., U.N. S.C. Res. 827 (1993) (also discussing the severity of the war crimes in the former Yugoslavia and the decision to establish an international tribunal); U.N. SCOR, 3200th mtg., U.N. S.C. Res. 820 (1993) (imposing sanctions); U.N. SCOR, 3199th mtg., U.N. S.C. Res. 819 (1993) (deciding on the necessity of a mission to Bosnia and Herzegovina to monitor the human rights situation and report to the U.N. Security Council); U.N. SCOR, 3137th mtg., U.N. S.C. Res. 787 (1992) (deciding on necessary efforts concerning the situation in Yugoslavia); U.N. SCOR, 3119th mtg., U.N. S.C. Res. 780 (1992) (requesting the Secretary General to establish a Commission of Experts to examine evidence and information on the breaches of the Geneva Conventions and other humanitarian law, pursuant to U.N. Security Council Resolutions 771 and 780); U.N. SCOR, 3106th mtg., U.N. S.C. Res. 771 (1992) (deciding on the necessity to collect substantial information on violations of humanitarian law and submit it to the U.N. Security Council); Report of the Secretary General, *supra* note 14, paras. 6, 9, 11, 48 (addressing crimes against humanity including "ethnic cleansing").

In particular, rape used as a tactic for such purposes is covered by customary laws of war. 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)-(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(c) (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. Rts. 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."⁶³ More recently, the U.N. International

Mar. 22, 1993, at A6 (controlling passage of food shipments to Srebrenica); Bill Schiller, *Bosnian Aid Mission Failing, Officials Say*, TORONTO STAR, Dec. 31, 1992, at A3 (reporting that Serbian authorities are largely to blame for the failed mission); John F. Burns, *Christmas in Sarajevo: Prayers and Anguish*, N.Y. TIMES, Dec. 25, 1992, at A1 (highlighting the control by Serbian forces over access to food and major roads across former Yugoslavia); Roy Gutman, *No More Escape: Bosnia Waits in Vain for Outside Help*, NEWSDAY, Oct. 26, 1992, at 7 (quoting international relief agencies to confirm that Croats are blocking all food shipments). The systematic nature of controlling access to food, "ethnic cleansing," and the committing of rape, were so deliberate, widespread, and frequent that local commanders and even those outside formal lines of authority did not need direct orders to understand that use of these strategies was expected and approved. *Id.* In any event, criminal dereliction of duty and complicity are necessarily involved.

63. See, e.g., Paust, *Aggression Against Authority*, *supra* note 57, at 294 (listing offenses included among those prosecuted under crimes against humanity). The Nuremberg Charter invoked customary human rights law when it charged the Nazi war criminals with committing crimes against humanity. LOUIS HENKIN ET AL., *INTERNATIONAL LAW* 986 (2d ed., 1987). The Commission Report further sets forth offenses against human rights and/or "crimes against humanity." Commission Report I, *supra* note 16, paras. 39, 49-50. The precept of crimes against humanity applies to the conflict, and an act can be both a war crime and a crime against humanity. *Id.* paras. 46, 49-50; see also Paust, *Aggression Against Authority*, *supra* note 57, at 290-96 (discussing offenses against human rights, genocide and political oppression as well as crimes against humanity); *Forti v. Suarez-Mason*, 694 F. Supp. 707, 710 (N.D. Cal. 1987) (using O.A.S.'s recognition that causing "disappearance of individuals" is a "crime against humanity"); LORD WRIGHT, *HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION* 35 (1948) (noting the early state practice of Great Britain, France and Russia involving condemnation of 1915 massacres as "crimes against humanity"); Commission Report I, *supra* note 16, at 117 (recognizing the appropriate-

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.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,⁶⁵ and "private" actors have private duties with respect to human rights law.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."⁶⁷

ness of criminal sanctions by making all persons who violate the laws and customs of war and the "laws of humanity" liable to criminal prosecution). A former U.S. Secretary of State wrote that the slave trade constitutes a "crime against humanity." Robert Lansing, *Notes on World Sovereignty*, 15 AM. J. INT'L L. 13, 25 (1921). Author George Curtis remarked that slavery is a "crime against humanity." III ORATIONS AND ADDRESSES OF GEORGE WILLIAM CURTIS 208 (Charles E. Norton ed., 1894). Yet another notable author, Frank C. Newman, discussed forms of redress, including criminal sanctions, that most often assist victims of human rights. Frank C. Newman, *Redress for Gulf War Violations of Human Rights*, 20 DENV. J. INT'L L. & POL'Y 213, 216-18 (1992). Such early state practice, *opinio juris* and textwriter opinions are relevant concerning the recognition of and customary nature of such crimes prior to Nuremberg. They also demonstrate that crimes against humanity, like genocide (a special category thereof), can occur in times of relative peace. It is necessary to punish crimes against humanity regardless of their nexus to war. Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2590 (1991).

64. Draft Code, *supra* note 42, at 44-48, art. 21.

65. Draft Code, *supra* note 42, at 25-26, art. 13; 46.

66. Draft Code, *supra* note 42, at 46. The language of a treaty can imply private duties whereas human rights instruments additionally point to the need to recognize certain private duties and to further demonstrate contours of private duty. Jordan J. Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 HARV. HUM. RTS. J. 51 (1992) [hereinafter Paust, *Private Duties*]; Genocide Convention, *supra* note 2, art. 4 (addressing "private individuals"). But see Nigel S. Rodley, *Can Armed Opposition Groups Violate Human Rights?*, in HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY 297, 298 (Kathleen Mahoney & Paul Mahoney eds., 1993) (resting his primary conclusions on a false, positivist and state-oriented view of obligations and a false notion that human rights claims arose "contemporaneously with the rise of positivist doctrines of law and state sovereignty").

67. See Paust, *Private Duties*, *supra* note 66 (discussing whether the language of a treaty implies private duties, or whether human rights instruments recognize certain private duties and demonstrate "additional contours of private duties"). Cf. Commission Report I, *supra* note 16, para. 49 (focusing on "official policy").

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.⁶⁸ 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 criminal⁶⁹ or civil sanctions.⁷⁰ There is al-

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.

69. See Jordan J. Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 MIL. L. REV. 99, 113-18, 122, 130-31, 169, 184-85 (1972) [hereinafter Paust, *Norms, Myths*] (discussing from the historical perspective the American commitment to the international law of war, actual cases and sanctions); U.S. DEP'T OF ARMY, PAMPHLET 27-161-2, II INTERNATIONAL LAW 221-22, 226-35 (1962); LAND WARFARE, *supra* note 26, at 182 para. 508 (addressing penal sanctions and requiring punishment for violations of the law of war to be proportionate to the gravity of the offense). See generally M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL LAW CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL 105-08, 225 (1987) [hereinafter BASSIOUNI, DRAFT ILC CODE AND TRIBUNAL]; M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW—A DRAFT INTERNATIONAL CRIMINAL CODE 160-62 (1980) (also noting the differences of penalty and sanctions between the Draft International Criminal Code and the draft statute for an international criminal tribunal). Under international law and relevant U.S. domestic law, international crimes do not have to be defined with great precision. *Id.* See, e.g., *Ex parte Quirin*, 317 U.S. 1, 27-29 (1942); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 162 (1820).

70. See, e.g., Paust, *Suing Saddam*, *supra* note 43, at 360-71, 378 (analyzing the "right to an effective remedy" and its applicability in domestic U.S. litigation); Jordan J. Paust, *On Human Rights: The Use of Human Rights Precepts in U.S. History and*

so a well-recognized customary international law concerning leadership or command responsibility for war crimes,⁷¹ complicity,⁷² and the question of superior orders,⁷³ which together can form the general basis for recognizable criminal responsibility.⁷⁴

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.⁷⁵ Customary international law of a peremptory nature already

the Right to an Effective Remedy in Domestic Courts, 10 MICH. J. INT'L L. 543, 611-28, 640-41 (1989) (discussing the customary human right to an effective remedy for human rights infractions). More generally, every violation of "an engagement involves an obligation to make reparation." *Factory at Chorzow, Claim for Indemnity* (Germany v. Poland), 1928 P.C.I.J. (ser. A) No. 13, at 29 (Sept. 13).

71. See generally Hays Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1 (1973); Paust, *Norms, Myths*, *supra* note 69, at 175-84 (pointing out the limits of leader responsibility); Jordan J. Paust, *Superior Orders and Command Responsibility*, in 3 INTERNATIONAL CRIMINAL LAW: ENFORCEMENT 73, 78-88 (M. Cherif Bassiouni ed., 1987); see also O'Brien, *supra* note 32, at 649, 651-53.

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.

75. See U.N. SCOR, 3175th mtg., U.N. S.C. Res. 808 (1993) (contemplating the establishment of an international tribunal to prosecute violators of international humanitarian law); see also Revised Report of the Working Group on the Draft Statute for an International Criminal Court, I.L.C., 45th Sess., U.N. Doc. A/CN.4/L.490 & Add. 1 (1993); M. CHERIF BASSIOUNI, DRAFT ILC CODE AND TRIBUNAL, *supra* note 69; BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT—A STEP TOWARD WORLD PEACE (1980); M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT'L & COMP. L. REV. 1 (1991); M. Cherif Bassiouni & Christopher L. Blakesley, *The Need for an International Criminal Court in the New International World Order*, 25 VAND. J. TRANSNAT'L L. 151 (1992) (positing that the establishment of an international criminal court would provide an effective method of resolving international problems); Benjamin B. Ferencz, *An International Criminal Code and Court: Where They Stand and Where They're Going*, 30 COLUM. J. TRANSNAT'L L. 375 (1992) (contemplating the future direction of the international criminal code and court).

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.⁷⁶ 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.⁷⁷

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?