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YUGOSLAVIAN WAR CRIMES AND THE SEARCH FOR A NEW HUMANITARIAN ORDER: THE CASE OF DUSKO TADIC

MARK R. VON STERNBERG*

INTRODUCTION

On October 2, 1995, the Appeals Chamber of the Yugoslavian War Crimes Tribunal¹ issued a decision of considerable moment for the future growth of international law. In *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction in the Matter of Prosecutor v. Dusko Tadic*,² the Appeals Chamber was confronted with a series of arguments designed to divest it of subject matter jurisdiction over the war crimes process. Dusko Tadic, currently one of the leading defendants in the proceedings, contended that:

- (i) The United Nations Security Council was without jurisdiction to establish a war crimes tribunal as an aspect of its enforcement powers, since Chapter VII of the U.N. Charter (wherein the Security Council's jurisdictional competence is

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¹ See S.C. Res. 808, U.N. SCOR, 49th Sess., 3175th mtg. at 28, U.N. Doc. 5/INF/49 (1994). By resolution dated February 22, 1993, the U.N. Security Council decided to establish an international war crimes tribunal with the objective of prosecuting and, where appropriate, sanctioning certain violations of international humanitarian law deemed to have taken place in the former Yugoslavia since 1991. *Id.*; see also *Security Council Resolution on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia*, S.C. Res. 827, U.N. SCOR, 48th Sess. Res. & Dec., at 29, U.N. Doc. S/INF/49, 3217th mtg. (May 25, 1993), available in 32 I.L.M. 1203, 1203-1204 (1993). The appeal taken by Dusko Tadic was from a judgement of the Trial Chamber of the Yugoslavian War Crimes Tribunal. *Id.*; *Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia*, U.N. Doc. S/25704 (May 3, 1993), reprinted in 32 I.L.M. 1159, 1163-84 (1993).

² Case No. IT-94-1-AR72 (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed on the Territory of the Former Yugoslavia 1995), reprinted in 35 I.L.M. 32 (1996) [hereinafter "*Tadic Appeal*"].

detailed) does not specifically confer the authority to set up a judicial or adjudicative body.³

(ii) In all events, although the Tribunal may have the authority to criminally administer international humanitarian law in the case of an international conflict, no such jurisdiction existed where the misconduct occurred in a civil or internal war.⁴

The Appeals Chamber ruled against appellant Tadic on both of these issues. Its opinion upheld the authority of the Security Council to establish a judicial body under Chapter VII⁵ and to criminally enforce humanitarian law in the area of internal conflicts;⁶ both of which are decisions of first impression in the field of public international law. This article purports to explore the significance of the holdings in the context of two broad policy considerations. First, the relationship between enforcing international humanitarian law and the Security Council's goal of pursuing collective peace and security is considered. This paper then analyzes the scope of customary international humanitarian law as determined by the Appeals Chamber.

³ *Id.* at pars. 11-12, *reprinted* in 35 I.L.M. 32, 39. On its original Trial Chamber motion, appellant had asserted a three-pronged attack in challenging the Tribunal's jurisdiction, alleging the "(a) illegal foundation of the International Tribunal; (b) wrongful primacy of the International Tribunal over national courts; [and] (c) lack of jurisdiction *ratione materiae*." *Id.* at par. 2, *reprinted* in 35 I.L.M. 32, 32 (quoting appellant's *Defence Motion on Jurisdiction in the Trial Chamber of the International Court*, 10 Aug. 1995 (Case No. IT-94-1-T)).

⁴ *See Tadic Appeal*, *supra* note 2, at par. 35, *reprinted* in 32 I.L.M. at 44.

⁵ *Id.* at pars. 13-24, *available* in 32 I.L.M. at 39, 40. The Appeals Chamber recognized the "[p]ower of the Security Council to invoke Chapter VII" in promulgating the Tribunal and imbuing it with the requisite authority and jurisdiction in keeping with international law norms:

Article 39 opens Chapter VII of the Charter of the United Nations and determines the conditions of application of this Chapter. It provides that "[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with articles 41 and 42, to maintain or restore international peace and security."

Id. at par. 35, *reprinted* in 32 I.L.M. at 42 (quoting U.N. CHARTER, art 39). The Appeals Chamber concluded "that the . . . Tribunal ha[d] been established in accordance with the appropriate procedures under the United Nations Charter and provide[d] all the necessary safeguards of a fair trial. [Hence, as it was] . . . thus 'established by law' . . . [t]he first ground of appeal: unlawful establishment of the International Tribunal, [was] . . . accordingly dismissed." *Id.* at par. 47, *reprinted* in 32 I.L.M. at 48.

⁶ *See Tadic Appeal*, *supra* note 2, at pars. 35-71, *reprinted* in 32 I.L.M. at 44-45; *see also* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 Aug. 1949, art. 5, 75 U.N.T.S. 970; Convention Relative to the Treatment of Prisoners of War, 12 Aug. 1949, art. 5, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, art. 6, 75 U.N.T.S. 287.

These policy considerations and jurisdictional issues are examined, taking into consideration the recent jurisprudential shift away from regulating the rights of sovereign states *inter sese*, to a corresponding emphasis on protecting human rights of individuals within the international community. With respect to the maintenance of world peace and security, there has been a decline in the importance of the law governing aggression (the *jus ad bellum*) and a corresponding emphasis on protecting human rights in armed conflict (the *jus in bello*).⁷ The new analysis symbolizes a jurisprudential shift away from regulating the rights of sovereign states *inter sese*, to a corresponding emphasis on protecting the human rights of individuals within the international community.⁸

This new jurisprudence does not approach the problem of collective security from the conventional dualistic perception of international law, under which international norms reach individuals only through the medium of the State's legal machinery. Rather, the problem is addressed by means of an essentially monist view in which international jurisprudence has both primacy and direct control over human rights violations.⁹ Successfully addressing collective security through a direct application of humanitarian norms reflect a holistic reading of international law, emphasizing the rights of individuals and groups (rather than those of States) within a modern system.¹⁰ It is submitted that the increasing at-

⁷ See Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (the 1949 Geneva Convention). The issue of "proportionality" as it relates to balancing concepts of *jus in bello* and *jus ad bellum* is addressed by Protocol I. *Id.* See generally MYRES M. McDUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 241-44 (1961); JAMES T. JOHNSON, JUST WAR TRADITION AND THE RESTRAINT OF WAR 203, 204 (1981).

⁸ The law of human rights and humanitarian law evolved separately. See generally DIETRICH SCHINDLER, THE INTERNATIONAL COMMITTEE OF THE RED CROSS AND HUMAN RIGHTS 3-7 (International Committee of the Red Cross 1979). It is only in the course of time, and particularly after the Second World War, that these two bodies of jurisprudence have converged. *Id.* at 7-9. The United Nations now views human rights and international humanitarian law as having a formal nexus. *Id.* See generally *Respect for Human Rights in Armed Conflict, Report of the Secretary General*, U.N. Doc. A/7120 (1969) [hereinafter *Respect for Human Rights in Armed Conflict*]. This Report was prepared pursuant to G.A. Res. 2444 (XXIII), U.N. GAOR, 23d Sess., at 50, U.N. Doc. A/7218 (1969).

⁹ On the differences between the dualistic and monist approaches to international law, see IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 32-35 (4th ed. 1990). See also William V. O'Brien, *Teaching Humanitarian Law in Universities and Law Schools—The Jus in Bello in International Relation Studies*, 31 AM. U. L. REV. 1011, 1013 (1982) (discussing how "*jus in bello*" was downplayed to promote adoption of '*jus ad bellum*' ensuring peaceful settlement of disputes and maintenance of peace through collective security agreements).

¹⁰ The application of humanitarian norms evincing an emphasis on the rights of individuals as opposed to groups can also be classified as non-derogable rules of international law,

tractiveness of this approach must be understood as part of the quest for a new humanitarian order which integrates the law of peace with human rights and humanitarian law considerations.¹¹

An integral aspect of the new humanitarian order is the emerging doctrine of *jus cogens*.¹² *Jus cogens* represents the highest category of customary law.¹³ The advent of this doctrine constitutes a clear departure from the prevailing view held by the community of States that international law may be set aside when conflicting

i.e., "peremptory" norms or "*jus cogens*". OPPENHEIM'S INTERNATIONAL LAW § 2, at 7-8 (Robert Jennings & Arthur Watts eds., 9th ed. 1992). Such "peremptory" norms have also been described as "[s]itting atop the hierarchy of international law . . ." *Prinz v. Federal Republic of Germany*, 26 F.3d 1166, 1180 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1121 (1995). Moreover, "[b]oth human rights and humanitarian law arise out of the respect for the human dignity of the individual and reflect the need to protect the same, despite the historical differences in origins of these two branches of law." Richard D. Glick, *Lip Service to the Laws of War: Humanitarian Law and United Nations Armed Forces*, 17 MICH. J. INT'L L. 53, 62 n.15 (1995). Further, though there is no defined set of peremptory norms, those listed in article 2(4) of the U.N. Charter can probably be interpreted as encompassing the prohibition on the unlawful use of force in derogation of international humanitarian norms.

¹¹ The term "New Humanitarian Order" has historically been associated with the right of humanitarian initiative in man-made or natural disaster relief situations. See Jovica Patrnogic, *Some Reflections on Humanitarian Principles Applicable in Relief Actions*, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOR OF JEAN PICTET 925 (Christophe Swinarski ed., 1984). This essay, however, utilizes the term in its broadest sense to signify the primacy of human rights and humanitarian law as organizing principles of world order.

By "humanitarian order" the Jordanian Government clearly understood this term in a broad sense to mean in this context the human values applicable to the entire international order, whether found in the moral conscience or the law, or underlying the institution of international organizational arrangements. As such, the call for a new international humanitarian order amounts to a call for review of the entire international system of law and organization in the light and the re-affirmation of humanitarian values and in response to contemporary needs.

Id.; see also Glick, *supra* note 10, at 60-62 (quoting Final Act of the International Conference on Human Rights, at 18, U.N. Doc. A/CONF.32/41, Sales No. E/68.XIV.2 (1968) (Resolution XXIII: Human Rights in Armed Conflicts)).

¹² In this paper, the term *jus cogens* is used interchangeably with such terms as "peremptory norms" and "fundamental human rights." See U.N. Conference on the Law of Treaties, 1st and 2d Sess., Vienna Mar. 26-May 28, 1968, U.N. Doc. A/CONF/39/11/Add. 2 (1971), Statement of Mr. Suarez (Mexico) at 294. While definitions have sometimes been elusive, this term has been interpreted largely to mean "principles that the legal conscience of mankind deems[s] absolutely essential to coexistence in the international community." *Id.*; Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 414-416 (1989). An excellent discussion of these definitions is found therein. *Id.*; see also Lt. Colonel Elliott, 1993-APR. ARMY LAW. 19, 19 (1993). This author defines "*jus cogens*" as a "norm of international law . . . from which no deviation is permitted and differs from a rule of customary international law that depends on the consent of states." *Id.* *Jus cogens* norms are not based on consent but on the fundamental values of all states. *Id.*; *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993). The court characterized a state officially engaging in practice of torture as violation of *jus cogens* norms. *Id.*

¹³ See Parker & Neylon, *supra* note 12, at 416-17; see also BROWNLIE, *supra* note 9, at 513.

municipal law-making exists.¹⁴ Since rights recognized as *jus cogens* are not derogable by States, their enforcement by the international community is a development of significant importance to the monist conception of international law.¹⁵

I. JURISDICTION TO ESTABLISH A TRIBUNAL

Dusko Tadic's contention that the U.N. Security Council lacked jurisdiction to establish a tribunal was easily defeated.¹⁶ The United Nations Charter sets out specific powers in connection with what may properly be considered "enforcement action."¹⁷

That such "enforcement action" may include military and economic enforcement measures, implies that the Security Council is

¹⁴ In this regard it has been asserted that the doctrinal development of *jus cogens* has not only been relevant to customary international law, but to the law of treaties as well. See A. Mark Weisburd, *The Emptiness of the Concept of Jus Cogens, As Illustrated by the War in Bosnia-Herzegovina*, 17 MICH. J. INT'L L. 1, 18 (1995). A clear illustration of this on a domestic level is Restatement (Third) of the Foreign Relations Law. *Id.* (citing RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS § 102 (1987)). Section 103 posits that *jus cogens* rules "prevail over and invalidate international agreements and other rules of international law in conflict with them." *Id.* at cmt.k.; see also Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, (in force Jan. 27, 1980), available in 8 I.L.M. 679, 679 (1969). Similarly, the Vienna Convention on the Law of Treaties established the term most widely used currently: the description of "*jus cogens*" as a set of "peremptory norms of international law." *Id.*

¹⁵ See *Princz*, 26 F.3d at 1180 (describing peremptory norms); see also OPPENHEIM'S INTERNATIONAL LAW, *supra* note 10, § 2, 7-8 (classifying humanitarian norms emphasizing rights of individuals as underogable rules of international law); W. Paul Gormley, *The Right to Life and the Rule of Non-Derogability: Peremptory Norms of Jus Cogens, in THE RIGHT TO LIFE IN INTERNATIONAL LAW* 120, 122 (B.G. Ramcharan ed., 1985).

¹⁶ See *Tadic Appeal*, *supra* note 2, at par. 35, available in 32 I.L.M. 35, 36. In the *Tadic Appeal*, the Appeals Chamber of the International Tribunal affirmed the Trial Chamber's dismissal of "the appellant's motion insofar as it relate[d] to primacy jurisdiction and subject-matter jurisdiction under Articles 2, 3 and 5 and otherwise decide[d] the motion) to be incompetent insofar as it challenge[d] the establishment of the International Tribunal." *Id.* Reaffirming the Trial Chamber's decision, and further dismissing appellant Tadic's challenge to the Tribunal's appellate jurisdiction, the Appeals Chamber of the Tribunal, noting probable jurisdiction, observed that "Article 25 of the Statute of the International Tribunal . . . opens up the possibility of appellate proceedings within the International Tribunal." *Id.* at par. 4, reprinted in 32 I.L.M. at 37. Thus, the Appeals Chamber concluded "that the International Tribunal [indeed] ha[d] jurisdiction to examine the plea against its jurisdiction based on the invalidity of its establishment by the Security Council." *Id.* at par. 22, reprinted in 32 I.L.M. at 41.

¹⁷ See U.N. CHARTER art. 41. Under the U.N. Charter, art. 41, enforcement actions set forth by the U.N. Security Council include: "complete or partial interruption of economic relations and of all rail, sea, air, postal, telegraphic, radio or other means of communication, and the severance of diplomatic relations." *Id.*; U.N. CHARTER art. 42. Furthermore, should such actions prove inadequate in the Security Council's estimation, the Security Council may

take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea or land forces of Member States of the United Nations.

Id.

not limited to responding to the enumerated means when responding to threats to peace.¹⁸ The Appeals Chamber ruled to this effect, noting that the "appropriateness" of the means ultimately adopted to secure legitimate ends was within the discretion of the Security Council.¹⁹

The Tribunal's holding is not surprising. The Security Council previously acted under Chapter VII in a variety of ways not specifically contemplated by Chapter VII, and its action has not been questioned by Member States. One recent example of the Security Council's humanitarian involvement, undertaken pursuant to Chapter VII, was its resolutions during the Iraq-Kuwait conflict, including a request for Iraq to comply with international humanitarian law.²⁰ A second example was the unanimous resolution that obstacles to humanitarian assistance in Somalia created a threat to world peace.²¹ Yet another example was the banning of

¹⁸ See *Tadic Appeal*, *supra* note 2, at par. 33, reprinted in 32 I.L.M. 35, 44 (describing establishment of International Tribunal as "akin to emergency police action," operating as "a holding operation" until things cooled down).

¹⁹ See *id.* at par. 19, available in 32 I.L.M. 40. The Security Council can exercise, within certain constitutional limitations, a relatively wide breath of discretion in choosing what remedy or course of action it will implement in the case of a serious threat to peace. *Id.* Specifically:

... the Security Council has a broad discretion in deciding on the course of action and evaluating the appropriateness of the measures to be taken. The language of Article 39 is quite clear as to the channelling of the very broad and exceptional powers of the Security Council under Chapter VII through Articles 41 and 42. These two Articles leave to the Security Council such a wide choice as not to warrant searching, on functional or other grounds, for even wider and more general powers than those already expressly provided for in the Charter.

Id. at par. 31, reprinted in 32 I.L.M. 32, 42. Going on to describe these potential powers, the Appeals Chamber interpreted them as being "... coercive vis-à-vis the culprit State or entity. But they are also mandatory vis-à-vis the other Member States, who are under an obligation to cooperate with the Organization ... and with one another ... in the implementation of the action or measures decided by the Security Council." *Id.* Consequently, once "a threat to the peace, a breach of the peace or an act of aggression" is determined to exist, "the Security Council has a wide margin of discretion to choose the appropriate course of action and to evaluate the suitability of the measures chosen, as well as their potential contribution to the restoration or maintenance of peace." *Id.* at par. 32, reprinted in 32 I.L.M. at 44. Again, the condition is that the Security Council's discretion under Article 39 is limited by Articles 41 and 42. *Id.*; see also S.C. Res. 827, U.N. SCOR, 48th Sess., Res. & Dec., 3217th mtg. at 29, U.N. Doc. S/INF/49 (1993), reprinted in 32 I.L.M. 1203, 1203-1204 (1993).

²⁰ S.C. Res. 677, U.N. SCOR, 2951th mtg. (Oct. 29, 1990), reprinted in 29 I.L.M. 1560, 1564 (1990) (condemning Iraqi attempts to alter population of Kuwait); S.C. Res. 666, U.N. SCOR, 2929th mtg. (Sept. 13, 1990).

²¹ S.C. Res. 794, U.N. SCOR, 3145th mtg. (Dec. 3, 1992). See Mort Rosenblum, *Somalia Famine Avoidable, Aid Workers Say*, L.A. TIMES, Oct. 4, 1992, at A16. As a result of war and drought, by late 1992, Somalia's neighbors had to contend with about one million of the former's refugees; as its would-be leaders vied for military control, an estimated 25% of its children were dead and another 1.5 million faced starvation. *Id.* Faced with these stark and terrifying statistics, the U.N. Security Council finally took action through S.C. Res. 794,

military flights in the airspace over Bosnia-Herzegovina, an essential factor in the delivery of humanitarian aid and an indispensable step in the cessation of hostilities.²²

Despite these clear precedents and the unambiguous language of the Charter, the Tribunal's jurisdictional determination fails to address substantial questions. Although the conflict in the former Yugoslavia has currently reached a tentative conclusion with the adoption of the Dayton Accords,²³ a lingering question remains as to whether this development will lead to initiatives to divest the Tribunal of jurisdiction on the basis that the threat to peace and security has ended. Another unanswered question is determining the predicate for relieving a threat to the peace underlying the Tribunal's formation and its mandate to enforce international humanitarian law.

The Tribunal's function remains a vital one, a fact made abundantly clear in a recent editorial by Sir Hartley Shawcross, the chief British prosecutor at Nuremberg.²⁴ Shawcross criticized the decision of the North Atlantic Treaty Organization not to arrest major suspected war criminals, noting that there can be no peaceful reconciliation unless the perpetrators are made individually responsible for their actions.²⁵

U.N. SCOR, 3145th mtg., U.N. Doc. S/RES/794 (1992) *Id.*; Ana Puga, *Somalia: A Nation at the Abyss*, Hous. CHRON., Nov. 16-17, 1992, at A1. It has been widely observed, however, that from the outset, U.N. relief operations in Somalia were particularly troubled, due to an inadequate humanitarian budget, absence of cooperation among U.N. agencies, and a growing workload for the U.N., as conflict in the region worsened. *Id.*; Keith Richburg, *U.N. Envoy for Somalia Resigns Post, Blames Bureaucracy*, WASH. POST, Oct. 30, 1992, at A31. As a result of the U.N.'s delay and mounting instances of famine and death, Mohammed Sahnoun, U.N. Envoy for Somalia, resigned from his post in October of 1992. *Id.*

²² See S.C. Res. 781, U.N. SCOR, 3122nd mtg. (October 9, 1992), *reprinted in* 31 I.L.M. 1427, 1477-78 (1992); S.C. Res. 786, U.N. SCOR, 3133rd mtg. (Nov. 10, 1992) *available in* 31 I.L.M. 1427, 1479 (1992). By adoption of Resolution 781, the U.N. Security Council sought "to ensure the safety of humanitarian flights to Bosnia and Herzegovina" through the ban of military flights in air space over Bosnia-Herzegovina. *Id.*

²³ See Dayton Agreement on Implementing the Federation of Bosnia and Herzegovina, November, 10, 1995, *reprinted in* 35 I.L.M. 170, 172 (1996) [hereinafter Dayton Agreement] (recognizing establishment of Federation of Bosnia and Herzegovina as prerequisite to peace in region); *see also* Peace Implementation Conference for the Bosnian General Framework Agreement: Conclusions of the London Meeting, December 12, 1995, *reprinted in* 35 I.L.M. 223, 223 (1996) [hereinafter London Conference] (implementing Dayton Agreement); General Framework Agreement for Peace in Bosnia and Herzegovina, December 14, 1995, *reprinted in* 35 I.L.M. 75 (1996) ("Framework Agreement"); *cf.* Robin Knight, *Can There Be Justice as Well as Peace in Bosnia?*, U.S. NEWS & WORLD REP., Dec. 4, 1995, at 30 (reporting that Milosevic agreed at Dayton peace talks to cooperate fully with U.N. War Crimes Tribunal).

²⁴ Hartley Shawcross, *Order NATO to Round Up Suspects Indicted for War Crimes*, INT'L HERALD TRIB., May 23, 1996, at 8.

²⁵ *Id.* Shawcross pointed out that:

Shawcross' comments address a major theme of this study. In addition, they point out a considerable "hiatus" in the Appeals Court's ruling in the *Tadic* case.²⁶ A latent, but important source of conflict is glossed over and ignored by the Appeals Chamber's rationale that the "appropriateness" of the means is within the virtually unreviewable discretion of the Security Council.²⁷ The causal nexus between enforcing international humanitarian law and the goal of restoring collective security raises a question of significance.²⁸ Moreover, examination of this nexus would have enhanced, rather than detracted from, the Tribunal's jurisdictional competence and its role as a Chapter VII court. It also would have clarified the compelling nexus between the peace settlement crafted by the Dayton Accords and the need for human rights enforcement as undertaken by the Yugoslavian War Crimes Tribunal.²⁹

some say that arresting the indicted Serb principals may shatter Bosnia's fragile peace. In fact the opposite is true. There can be no reconciliation unless individual guilt for the appalling crimes of the last few years replaces the pernicious theory of collective guilt on which so much radical hatred hangs.

Id.

²⁶ *Id.*

²⁷ See *Tadic Appeal*, *supra* note 2, at par. 32, reprinted in 32 I.L.M. 35, 44. Examining the scope of U.N. Charter Articles 39, 41 and 42, the Appeals Chamber highlighted the importance of "... the Security Council[s] ... broad discretion in deciding on the course of action and evaluating the appropriateness of the measures to be taken ..." in choosing the remedy or course of action to implement in the face of a serious threat or breach to international peace. *Id.*

²⁸ See *id.* at par. 67, reprinted in 32 I.L.M. at 54. The Appeals Chamber observed that "International humanitarian law governs the conduct of both internal and international armed conflicts. . . [B]ut, contrary to Appellant's contention, the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities." *Id.* (citing Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 Aug. 1949, art. 5, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Convention Relative to the Treatment of Prisoners of War, 12 Aug. 1949, art. 6 U.S.T. 3316, 5 U.N.T.S. 135 [hereinafter Geneva Convention III], respectively); see also Convention Relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, art. 6, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

²⁹ There is, in this respect, an evident causal relationship between prosecuting those who have violated the *jus ad bellum* (by waging an aggressive war, for instance) and the needs of international peace and security. However, no apparent relationship obtains between the needs of maintaining a stable world order on the one hand and prosecuting those who have offended the *jus in bello* (by attacking civilian objects during actual hostilities, for example) on the other. See Dayton Agreement, *supra* note 23, reprinted in 35 I.L.M. 170, 172; London Conference, *supra* note 23, reprinted in 35 I.L.M. 223, 223; Framework Agreement, *supra* note 23, available in 35 I.L.M. 75, 75. It has often been maintained, in this regard, that regulating or "humanizing" war and preventing it are two mutually exclusive approaches; that there is an implied contradiction between ameliorating the harsher consequences of armed conflict and striving to prohibit it altogether. *Id.*; see also BROWNIE, *supra* note 9, at 513. Brownlie's argument proffers a solid philosophical groundwork upon which the primacy and legitimacy of establishing a court like the Yugoslavian War Crimes

Tacitly, the Tribunal must be understood as ruling that enforcing international humanitarian law, and thus upholding human rights in times of war, constitutes an arguably appropriate means of addressing the needs of international peace and security for the purposes of Chapter VII.³⁰ In this respect, although the United Nations Charter refers broadly to the development of human rights law as one of its primary purposes,³¹ it does not entrust this development to the Security Council, thus limiting the latter's competence in relieving threats to the peace.³² The broad relationship between human rights on the one hand, and collective security on the other, however, clearly provides the conceptual framework for Security Council jurisdiction over flagrant violations of basic human rights in armed conflict.³³

Tribunal to the ends of human rights enforcement may be justified. *Id.* But see ANDRE DURAND, THE DEVELOPMENT OF THE IDEA OF PEACE IN THE THINKING OF HENRY DUNANT 28-29 (Int'l Committee of the Red Cross 1986). Durand develops the Red Cross idea of peace as a dynamic concept which is informed with three essential elements: (i) protection and respect for human beings as the policy foundation for international law; (ii) the concept of universal solidarity among men; and (iii) a questioning of the notion that war is inevitable. *Id.*

³⁰ Indeed, it must be emphasized at this juncture that the relationship between human rights and international humanitarian law is arguably the only jurisdictional nexus permitting the U.N. to become involved in the development of humanitarian law at all. *Tadic Appeal*, *supra* note 2, at par. 143, reprinted in 32 I.L.M. 35, 73. The Appeals Chamber clearly lent support to this proposition when it justified the existence of the War Crimes Tribunal via a Security Council Resolution as one of enforcing international humanitarian law. *Id.* See generally A. van Baarda, *The Involvement of the Security Council in Maintaining International Peace and Security*, 2 NETH. Q. HUM. RTS. 137, 138-45 (1994).

³¹ U.N. CHARTER art. 55. See generally *supra* note 5 and accompanying text.

³² U.N. CHARTER arts. 39-51. See generally INTERNATIONAL COMMITTEE OF THE RED CROSS, REPORT ON THE PROTECTION OF WAR VICTIMS 30 (1993). The differences between human rights and humanitarian law have generally been described in the following terms:

[T]he personal field of application of international humanitarian law is not exactly the same as that of human rights. To be sure, humanitarian law has seen its field of application considerably enlarged as the effects of warfare have become more numerous. The civilian population, for example, is today protected under foreign military occupation as well as in the event of enemy attack. But humanitarian law does not protect all persons on the territory of a belligerent country against excesses committed by the authorities governing them. In particular, guarantees laid down for persons deprived of their freedom cover only those imprisoned for acts or reasons "related to the armed conflict." Even in warfare, therefore, persons imprisoned for penal law offenses are, generally speaking, protected only by human rights law.

Id. (Footnotes omitted; emphasis in original).

³³ See van Baarda, *supra* note 32, at 143. In this sense, the question of the Security Council's competence to establish a Tribunal is not unrelated to the subject matter jurisdiction argument which was raised by Tadic. *Id.* It had been Tadic's contention on appeal that the criminal provisions of international humanitarian law applicable in the circumstances related to the corpus of humanitarian principles governing international wars, but did not reach misconduct occurring in internal armed conflict. *Id.* As noted below, the Tribunal answers the question of subject matter jurisdiction by finding that certain rules of custom-

II. JURISDICTION TO APPLY INTERNATIONAL HUMANITARIAN LAW TO INTERNAL CONFLICTS

The practical force of Tadic's contentions becomes clear when the subject matter jurisdiction of the Yugoslavian Tribunal is examined.³⁴ As Professor Theodor Meron has observed, neither the Geneva Convention's "grave breaches" provisions (including those of Protocol I)³⁵ nor the Hague Convention³⁶ extend universal jurisdiction over purely internal wars, although the contrary is true

ary international law apply during internal armed conflict — even in the absence of specific treaty provisions criminalizing these rules. *Id.*

However, in so doing, the Tribunal (again) fails to make clear the implications for world order of bringing international law to bear on crises of a purely internal character. The law to be applied by the Tribunal clearly embraces situations where a State agency is not necessarily involved (humanitarian law may be applied against the insurgents) and where the Tribunal's mandate under Chapter VII (to restore peace and security) depends upon its enforcing human rights and humanitarian norms directly against individual violators not acting under color of State law. The internal aspect of the Yugoslavian war accentuates the departure of the law of peace from regulating the relations of States *inter sese*, and its corresponding emphasis on protecting groups and individuals even against non-State actors, the traditional province of municipal jurisprudence. *Id.*

³⁴ See Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 555-58 (1995) (criticizing use of Common Article 3 and Protocol II as a basis of universal jurisdiction); Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, 72 FOREIGN AFF. 122, 127-28 (1993) (discussing application of law to of war crimes); Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 AM. J. INT'L L. 78, 83 (1994) (noting prohibitions of Common Article 3 on parties of internal onlicts, are not grave breaches provisions of Geneva Convention).

³⁵ See Geneva Convention I, *supra* note 28. "Grave breaches" referred to in each of the Geneva Conventions are defined as acts, committed against other participants in the Conventions, of "willful killing, torture or inhuman treatment, biological experiments, [and] willfully causing great suffering or serious injury to body or health." *Id.*; see also Geneva Conventions for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 12 Aug. 1949, art. 51, 6 U.S.T. 3217, 75 U.N.T.S. 85, 116 [hereinafter Geneva Convention II] (amelioration of condition of wounded, sick and shipwrecked armed forces at sea). Acts against armed forces personnel, wounded or ill in the field or shipwrecked at sea, that are aimed at the unlawful disabling or taking of property, which are not justifiable, are also considered grave breaches of the Conventions. *Id.*; Geneva Convention III, *supra* note 28, 75 U.N.T.S. 135, 238. The deprivation of a fair trial or compulsion of a prisoner of war to serve on enemy forces also constitute grave breaches. *Id.*; Geneva Convention IV, *supra* note 28, 75 U.N.T.S. 287, 388. The unlawful confinement of civilians and the taking of hostages are punishable offenses. *Id.*; Protocol Additional I to the Geneva Conventions of 1949 (relating to protection of victims of international armed conflict), Dec. 7, 1978, U.N. Doc. A/32/144/Annex I (1977), reprinted in 16 I.L.M. 1391 (1977) [hereinafter Protocol I] articles 11, 85 (applying to armed conflict which is international in character. Protocol Additional II to the Geneva Conventions of 1949 (Relating to the Protection of Victims of Non-international Armed Conflict), Dec. 7, 1978, 1125 U.N.T.S. 609, U.N. Doc. A/32/144/Annex II (1977), reprinted in 16 I.L.M. 1442 [hereinafter Protocol II], contains no "grave breaches" provisions, but clearly constitutes a restatement of fundamental human rights protected in non-international armed conflict violation of which may support a finding that a "war crime" has been committed.

³⁶ See Convention Respecting the Laws and Customs of War on Land, with Annex of Regulations, reprinted in THE LAW OF WAR: A DOCUMENTARY HISTORY 204, 270 (L. Friedman ed., 1972) (setting forth resolutions of second and fourth Hague Conventions in 1899 and 1907, respectively).

concerning "crimes against humanity" (under the Nuremberg Charter)³⁷ and violations of the Genocide Convention.³⁸ In this respect, neither Common Article 3 of the Geneva Conventions nor Protocol II thereto contains a criminal sanctions provision.³⁹ Despite their application to internal wars, both the Genocide Convention and the Crimes Against Humanity provision of the Nuremberg Charter contain highly restrictive jurisdictional limitations.⁴⁰

Accordingly, in the *Tadic Appeal*, the Appeals Chamber of the Yugoslavian War Crimes Tribunal⁴¹ was called upon to determine which violations of customary international law were of such gravity that they should form a basis for criminal jurisdiction under Article 3 of the Tribunal's statutes.⁴² Finding not all the rules applicable to international wars governed in internal struggles, the Appeals Chamber nonetheless determined that certain broad principles of international humanitarian law, which had previ-

³⁷ See Charter of the International Military Tribunal, August 8, 1945, art. 6(c), 59 Stat. 1544, 82 U.N.T.S. 284, 288 (1946) [hereinafter Nuremberg Charter]. It was the Nuremberg Charter which first criminalized the waging of an aggressive war. *Id.*; art. 6(a) at 288; see also *Tadic Appeal*, *supra* note 2, at pars. 138-40, reprinted in 32 I.L.M. 35, 72. The court referenced definition and application of the "crimes against humanity" provision of the Nuremberg Charter and the nexus required with "crimes against peace or war crimes".

³⁸ See Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277 [hereinafter *Genocide Convention*] (defining acts which constitute genocide and establishing procedure for trial and punishment); see also LAWRENCE J. LEBLANC, *THE UNITED STATES AND THE GENOCIDE CONVENTION* 22-33 (1991) (discussing development of United Nations rule on genocide and conception through drafting of Genocide Convention); WARREN FREEDMAN, *GENOCIDE: A PEOPLE'S WILL TO LIVE* 87-95 (1992) (detailing history and analysis of Genocide Convention, as well as current and suggested means of its implementation).

³⁹ See *supra* note 35 and accompanying text.

⁴⁰ See Genocide Convention, *supra* note 38, at arts. I, II. The Genocide Convention contains as a condition to its application, an intent on the part of the violator to destroy an ethnic, racial or religious group. *Id.* The offense "crimes against humanity," moreover, has been given an extremely restrictive interpretation by the Security Council which requires as an element of the violation that it be committed pursuant to an "official policy of discrimination." *Id.* See generally *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780* (1992), U.N. SCOR, 48th Sess., Annex, at 3, U.N. Doc. S/1994/674, Paras. 84-86 (1994).

⁴¹ See Ralph G. Steinhardt, *Fulfilling the Promise of Filartiga: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos*, 20 YALE J. INT'L L. 65, 104-05 n.156 (1995) (detailing establishment, jurisdiction, and key points of Yugoslavian War Crimes Tribunal); see also Mark R. von Sternberg, *Comparison of the Yugoslavian and Rwandan War Crimes Tribunals: Universal Jurisdiction and the "Elementary Dictates of Humanity"*, 22 BROOK. J. INT'L L. 111, 115-19 (1996) (discussing basis of subject matter jurisdiction on Yugoslavian Tribunal in comparison to that of Rwanda).

⁴² See *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, 48th Sess., Annex, art. 3, 3217th mtg., U.N. Doc. S/25704, art. 3, (1993), available in 32 I.L.M. 1159 (1993) (vesting power to prosecute international war crimes in International Tribunal).

ously applied only to international conflicts, were now relevant to conflicts of a civil nature by virtue of their relative primacy within the modern hierarchy of international human rights.⁴³

In making this determination, the Tribunal looked first to the provisions of Common Article 3 of the Geneva Conventions which, as the International Court of Justice had already concluded, codify the principle of *jus cogens*.⁴⁴ Common Article 3 prescribes: (i) the obligation to treat humanely those taking no active part in the hostilities, including combatants who have been removed from combat; (ii) the prohibition of certain delineated inhumane acts with respect to the foregoing protected persons; and (iii) the responsibility to care for the sick and wounded.⁴⁵

The prohibitions of Common Article 3 are supplemented by those of Protocol II, which contain injunctions, in addition to those contained in Common Article 3, regarding the manner in which hostilities are conducted. Part IV of Protocol II prohibits: i) direct

⁴³ Although not expressly resolved in its judgement, the determination of the Appeals Chamber that customary international law could be applied criminally is consistent with a finding that the principles which the court determined to be governing were *jus cogens*. For a full discussion, see *infra* notes 101-118 and accompanying text. See generally CHRISTOS L. ROZAKIS, THE CONCEPT OF JUS COGENS IN THE LAW OF TREATIES 73 (1976). The author maintains that the results of the 1969 Vienna Convention suggest a required adherence to *jus cogens* norms. *Id.*

⁴⁴ See Military and Paramilitary Activities In and Against Nicaragua (*Nicar. v. U.S.*), 1986 I.C.J. 4, 105, par. 200, reprinted in 25 I.L.M. 1023 (1986) [hereinafter *Nicar. v. U.S.*] (discussing effect of customary international law practices within framework of U.N. Charter) see also LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW 725 (1988) (citing International Court of Justice decision in *Barcelona Traction*, author indicates that tribunal enforces view that all states maintain legal interest in protection of *jus cogens* norms).

⁴⁵ See, e.g., Geneva Convention IV, *supra* note 28, at art. 3, 75 U.N.T.S. 287. Common Article 3 provides that:

(1) Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

Id. 75 U.N.T.S. at 288-90.

attacks on the civilian population;⁴⁶ ii) making the civilian population the object of acts of terror;⁴⁷ iii) destruction of objects upon which the civilian population depends;⁴⁸ iv) acts of hostility against cultural objects or places of worship,⁴⁹ and v) the forced movement of civilians.⁵⁰

The foregoing summary of provisions illustrates a basic dichotomy in international humanitarian law. Common Article 3 (specifically adopted and supplemented in Articles 4 and 5 of Protocol II) sets forth a standard of humanity governing the treatment of those who are under the control of an adverse party to the conflict. In comparison, Part IV of Protocol II is concerned not with the treatment of those protected persons who fall under the control of an adversary, but with prescribing regulations governing the manner and means by which hostilities are waged. The Hague Tribunal does not completely adopt the provisions of Protocol II so as to make these automatically applicable in civil war situations. The Appeals Chamber, rather, looks to broad principles under the customary law of war, as that law affects international conflicts, to determine which of these principles should apply to internal conflicts, by virtue of their normative importance.⁵¹

The broad principles resolved by the Appeals Chamber include the following injunctions: (i) fundamental human rights continue to apply in civil war; (ii) a distinction must be maintained at all times between civilians and military operations; (iii) civilians should not be subjected to military attack; (iv) civilian dwellings and other such installations are not to be subjected to military attack; (v) military operations are not to be conducted against places used for the protection of civilians (i.e. hospitals, refugee centers,

⁴⁶ See generally Protocol II, art. 13, *supra* note 35 (affording general protection to civilian population until such time as they partake in hostilities).

⁴⁷ *Id.* at art. 13(2) (prohibiting “[a]cts or threats of violence [meant to] spread terror among the civilian population . . .”).

⁴⁸ *Id.* at art. 14 (prohibiting starvation of civilians and those acts which may lead to starvation).

⁴⁹ *Id.* at art. 16 (prohibiting hostile acts “directed against historic monuments, works of art or places of worship . . . and to use them in support of the military effort”).

⁵⁰ *Id.* art. 17 (prohibiting ordering or compulsion of civilian displacement in advancement of war).

⁵¹ *Tadic Appeal*, *supra* note 2, at paras. 52-53, *reprinted in* 32 I.L.M. 35, 49; see also *Nicar. v. U.S.*, at paras. 178, 200 (discussing application of customary international law by warring nations, where both may interpret and/or apply them differently).

etc.); and (vi) civilians should not be subjected to "reprisals, forcible transfers, or assaults on their integrity."⁵²

These findings conclusively reveal that the reach of customary international humanitarian law applicable in internal conflicts contains important principles regulating the ways and means of combat. The Yugoslavian War Crimes Tribunal in the *Tadic* Appeal determined that protection of the civilian population from military attack has virtually achieved status as a rule of *jus cogens* so that violations of this principle give rise to universal jurisdiction.⁵³ The sections that follow illustrate the growing interrelationship between general regulation of the conduct of hostilities, the right to life in international law, and the new dynamic concept of peace — a configuration of customary norms which this essay has characterized as the new humanitarian order.

⁵² *Id.* at Para. III (citing G.A. Res. 2675, UN GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (1970)). Prior to the ruling in the *Tadic Appeal*, the degree to which customary international law governed civil conflicts remained unclear. Where international wars were involved, however, customary law clearly mandated that civilians be protected against the effects of hostilities. See, e.g., Claude Pilloud, Jean de Preux, Yves Sandoz, Bruno Zimmermann, Philippe Eberlin, Hans Peter Gasser, Claude F. Wengel, *Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of the Victims of International Armed Conflicts (Protocol I)*, in COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 593 (Y. Sandoz et al. eds., 1987) [hereinafter *Commentary to Protocol I*]. The decision in the *Tadic Appeal* makes the principle of civilian protection applicable, as a matter of customary law, to internal wars. See also S.C. Res. 955, U.N. SCOR, 49th Sess., 3453 mtg. at 1, U.N. Doc. S./RES/955 (1994), the statute of the criminal tribunal established for violations of international humanitarian law deemed to have taken place in Rwanda. The latter resolution reposes jurisdiction in the tribunal for specified violations of common article 3 and Protocol II. *Id.* art. 4.

⁵³ This summary of the *Tadic Appeal*'s holding is based on a prior article by the author. See Mark R. von Sternberg, *The Plight of the Non-Combatant in Civil War and the New Criteria for Refugee Status*, 9 INT'L J. REFUGEE L. 170, 185-86 (1997). The *Tadic Appeal* is the first instance of an international tribunal holding that customary rules codified by the Geneva Conventions and by Protocol II governing internal conflicts can give rise to universal jurisdiction. *Id.* Although the Tribunal does not specifically say so, its ruling can only be explained by the rationale that the mandatory distinction between civilians and military operations really constitutes *jus cogens* and serves as the basis for criminal responsibility. *Id.* See generally Kenneth Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 838 (1988):

While the universality principle may be functionally distinguishable from the *jus cogens* or *erga omnes* doctrines, the customary law condemnation of these human rights offenses and that subjection of these offenses to the *erga omnes* and *jus cogens* doctrines may logically support the expansion of universal jurisdiction over these additional offenses ["murder and causing disappearances of individuals" and "prolonged arbitrary detention"].

Id. (emphasis in original).

III. RELATIONSHIP BETWEEN INTERNATIONAL HUMANITARIAN NORMS AND THE MAINTENANCE OF PEACE AND SECURITY

The Appeals Chamber began its analysis of the scope of customary law applicable in internal armed conflict with an abbreviated history of the development of human rights and humanitarian law since the period immediately preceding the outbreak of World War II. The Tribunal notes that international law has treated interstate wars and civil wars in distinctly different ways. While interstate wars were regulated by a developed body of rules, internal conflicts remained governed primarily by the State's domestic laws. This early position on humanitarian jurisprudence was attributed to the prevailing view that State sovereignty was the essential feature of the international system. International law was properly invoked only when States interacted, not when they sought to deal with internal upheaval.⁵⁴

Beginning in the 1930's, however, international rules began to be applied in civil wars. In general, this development was explained by the proliferation of internal wars caused by technological advances and access to weapons. The tendency of internal violence to draw in third States who exercised some political, economic or ideological interest in the conflict became increasingly common. Finally, in a dramatic transformation of international law, the rise of a human rights doctrine, and in particular, the 1948 *Universal Declaration of Human Rights*, fostered a markedly different approach to problem solving in the international community:

A State sovereignty approach has been gradually supplanted by a human-being oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a foothold in the international community as well. It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from beligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet re-

⁵⁴ See *Tadic Appeal*, *supra* note 2, at par. 53, reprinted in 32 I.L.M. 35, 49.

frain from enacting the same bans or providing the same protection when armed violence has erupted "only" within the territory of a sovereign State? If international law, while of course safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.⁵⁵

The analysis offered by the Appeals Tribunal parallels developments in international law growing out of the establishment of the United Nations Charter. The advent of the Charter heralded a new theory with respect to the relationship between sovereign states and the maintenance of international peace and security. The Charter's predecessor, the League of Nations, stressed procedures for the pacific resolution of international disputes. Most notably mandatory arbitration, judicial settlement and measures for collective security in the event of a breach, were found to be appropriate vehicles for maintaining the peace.⁵⁶

The United Nations Charter, however, adopted an entirely different approach.⁵⁷ The focus shifted from methods of the relief of interstitial strife to addressing the "underlying causes" of human rights violations which had in fact precipitated the outbreak of world conflict.⁵⁸ The Charter's preamble reaffirms the commit-

⁵⁵ *Id.* at par. 54.

⁵⁶ See Mark R. von Sternberg, *Per Humanitatem ad Pacem: International Humanitarian Norms as a Jurisprudence of Peace in the Former Yugoslavia*, 3 CARDOZO J. INT'L & COMP. L. 357, 374-84 (1995). The author further details the principles of humanitarian law, its enforcement and regulation. *Id.*; see also MARGARET E. BURTON, THE ASSEMBLY OF THE LEAGUE OF NATIONS 284 (1941). See generally LEAGUE OF NATIONS COVENANT arts. 12-17. Here guidelines were established by which League Members must conduct themselves as between fellow Members and non-Members. *Id.*

⁵⁷ U.N. CHARTER Preamble. The preamble of the United Nations Charter provides, *inter alia*, that the People of the United Nations undertake to adopt the Charter since they are determined:

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . .

Id.; see also U.N. CHARTER arts. 1, 55 and 56. These articles uphold the role of human rights in connection with the purposes of the organization.

⁵⁸ See I.F. Stone, *The Rights of Gorbachev*, N.Y. REV. OF BOOKS, Feb. 16, 1989, at 3. This commentator has summarized this evolution in the following way:

This was the chief difference between the Charter of the United Nations and the Covenant of the League of Nations which preceded it. The Covenant emphasized disarmament — not just that equivocal phrase 'arms control' . . . and the powerful resolution of disputes between nations to prevent another war. The Charter struck a new note. For the first time it added human rights to the international vocabulary. It sought to transcend national boundaries and mentalities, emphasizing the protection of human rights within nations, whether the rights of majorities or individuals. The change re-

ment of the "Peoples of the United Nations" to fundamental human rights and treats these rights as related to collective concern regarding the "scourge of war." These considerations are further made the subject of dispositive findings. In the *Universal Declaration of Human Rights*, the horrors of human rights violations in this century alone were denounced and a new world order recognizing human rights was aspired to.⁵⁹

The United Nations Secretary-General, in his first report on "Respect for Human Rights in Armed Conflict," recognized the relationship between protecting international human rights, world peace and security: "The Second World War gave conclusive proof of the close relationship between outrageous behavior of a Government towards its own citizens and aggression towards other nations, thus between respect for human rights and the maintenance of the peace."⁶⁰

Article 89 of Protocol I draws a clear and compelling nexus between human rights and humanitarian law. This article establishes that, in the event of "serious violations" of the Geneva Conventions or of Protocol I, the parties agree to act in cooperation with the United Nations.⁶¹ The term "serious violations" was generally considered to include "grave breaches" (although the scope of the provision is not so limited),⁶² and the United Nations action

flected the lessons of the Second World War, which demonstrated that internal regimes were not just a domestic matter but could themselves be a menace to world peace.

Id.

⁵⁹ See *The Universal Declaration of Human Rights*, G.A. Res. 217 (III) A, U.N. Doc. A/800 (1948) [hereinafter *Universal Declaration of Human Rights*]. This document provides that:

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.

Id.

⁶⁰ *Respect for Human Rights in Armed Conflict*, *supra* note 8, at para. 16.

⁶¹ See Protocol I, *supra* note 35, art. 89; see also Henry G. Schremer, *The Obligation to Intervene in the Domestic Affairs of States*, in *HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD* 590-92 (Astrid J.M. Delissen & Gerard J. Tanja eds., 1991) (describing United Nations as integral part of peacekeeping operations).

⁶² See *Commentary to Protocol I*, *supra* note 52, at 1035; see also JUDITH GAIL GARDAM, *NON-COMBATANT IMMUNITY AS A NORM OF INTERNATIONAL HUMANITARIAN LAW* 110-11 (1993) (discussing scope of Protocol I in relation to wars of self-determination). See generally Christine Van Den Wyngaert, *The Suppression of War Crimes Under Additional Protocol I*, in *HUMANITARIAN LAW OF ARMED CONFLICT CHALLENGES AHEAD*, *supra* note 61, at 198 (discussing how Protocol I has considerably expanded category of crimes now considered to be "grave breaches").

contemplated included the use of force.⁶³ The Commentary to Protocol I makes it clear that the wording of Article 89 is modelled after that of Article 56 of the United Nations Charter, which focuses on "cooperation for the achievement of universal respect for all with a view to ensuring peaceful and friendly relations among nations."⁶⁴ Article 89 attempts to achieve the same result with respect to human rights in armed conflict: "Acting for the protection of man, also in time of armed conflict, accords with the aims of the United Nations no less than does the maintenance of international peace and security."⁶⁵

The relationship between human rights and the law of armed conflict has been the subject of extensive commentary by treatise writers.⁶⁶ On occasion, commentators have recommended a fusion of these two bodies of law into a new jurisprudence to be named Human Law.⁶⁷ There has been general agreement, however, that the rights secured by international humanitarian law require more detailed protection than human rights in general,⁶⁸ the for-

⁶³ See *Commentary to Protocol I*, *supra* note 52, at 1035; see also THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 517-550 (Dieter Fleck ed., 1995) (detailing enforcement of international humanitarian law).

⁶⁴ *Commentary to Protocol I*, *supra* note 52, at 1033. See generally George H. Aldrich, *Why the United States of America Should Ratify Additional Protocol I*, in HUMANITARIAN LAW OF ARMED CONFLICT. CHALLENGES AHEAD, *supra* note 61, at 130 (stressing importance of Protocol I to humanitarian law).

⁶⁵ *Commentary to Protocol I*, *supra* note 52, at 1034. See U.N. CHARTER art. 56. Article 56 of the United Nations Charter provides as follows:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on the principle for equal rights and self-determination of peoples the United Nations shall promote:

* * *

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. *Id.*; see also Richard T. Baxter, *The Duties of Combatants and the Conduct of Hostilities*, in INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW 99-100 (1988). The author notes the compatibility of the mutual goals of Protocol I and the U.N. Charter. *Id.*

⁶⁶ See HUMANITARIAN LAW OF ARMED CONFLICT. CHALLENGES AHEAD (Astrid J.M. Delissen & Gerard J. Tanja eds., 1991) (collection of essays by experts in field of humanitarian law); see also NATIONAL IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW (Michael Bothe et al. eds., 1990) (same).

⁶⁷ See, e.g., JEAN PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 63-68 (1985) (discussing common principles of humanitarian law, including inviolability, nondiscrimination and security); see also Cornelius F. Murphy, Jr., *The Grotian Vision of World Order*, 76 AM. J. INT'L L. 477, 496 (1982) (reminding that human law is closely related to natural law, which is established by customs of nearly all nations and whose common usage creates general obligation of compliance).

⁶⁸ See Liz Philipose, *The Laws of War and Women's Human Rights*, HYPATIA, Sept. 1, 1996, at 46, available in 1996 WL 13340521 (discussing applicability of humanitarian law to discrete, extreme and unique circumstances of armed conflict, as compared to human rights law, which is applicable to everyday circumstances).

mer are designed to preserve such fundamental interests as the right to life within a climate of social violence.⁶⁹

IV. THE PRIMACY OF THE RIGHT TO LIFE IN INTERNATIONAL LAW AND THE RED CROSS IDEA OF PEACE

Essential among the human rights which humanitarian law seeks to preserve is the right to life.⁷⁰ This right is referred to extensively in international human rights instruments.⁷¹ Furthermore, the right to life is given paramount concern in seminal documents since the exercise of all remaining human rights necessarily depends on one's right to life being respected.⁷²

Both Common Article 3 and Protocol II afford detailed protection to this broad right.⁷³ As one commentator phrased it: "A more specific definition [than the one given in international human rights instruments] is needed, since the killing of enemy personnel is considered to be a legitimate act."⁷⁴ Hence, the background of lawful hostilities in which the right to life is being asserted re-

⁶⁹ See SCHINDLER, *supra* note 8, at 9-10; see also HANS HAUG, HUMANITY FOR ALL 611-27 (1993). See generally Hernan Salinas Burgos, *The Application of International Humanitarian Law as Compared to Human Rights Law in Situations Qualified as Internal Armed Conflict, Internal Disturbances and Tension, or Public Emergency, with Special Reference to War Crimes and Political Crimes*, in IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW 1-27 (Fritz Kalshoven & Yves Sandoz eds., 1989) (discussing need for human right guarantees for victims of armed conflict; guarantees which must be specific to their condition as victims of such conflicts).

⁷⁰ The discussion which follows is not intended to provide an exhaustive review of the relationship between international humanitarian law and the law of human rights. Rather, it is intended to focus broadly on the right to life. For further information, see THEODOR MERON, HUMAN RIGHTS IN INTERNAL STRIFE: THEIR INTERNATIONAL PROTECTION 23 (1987). The author describes the right to life as being non-derogable, stressing the importance of its protection during armed conflict. *Id.*

⁷¹ See *Universal Declaration of Human Rights*, *supra* note 59, at art. 3. "Everyone has the right to life, liberty and security of the person." *Id.*; see also *International Covenant on Civil and Political Rights*, G.A. Res. 2200 (XI), U.N. Doc. A/6316 (1966), art. 6(1). "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." *Id.* See generally Parker & Neylon, *supra* note 12, at 431 (1989). The right to life has a prominent position in virtually every major international human rights instrument. *Id.*

⁷² See David J. Scheffer, *International Judicial Intervention*, FOREIGN POLICY, Mar. 1, 1996, at 34, available in 1996 WL 10201027. Initially, there is a need to overcome years of human rights abuse in order for society to move forward. *Id.* With respect to the primacy of the right to life vis-à-vis other human rights, see generally B.G. RAMCHARAN, THE RIGHT TO LIFE IN INTERNATIONAL LAW (1985).

⁷³ See generally Charles Lysaght, *The Scope of Protocol II and its Relation to Common Article 3 of the Geneva Conventions of 1949 and other Human Rights Instruments*, 33 AM. U. L. REV. 9 (1983).

⁷⁴ SCHINDLER, *supra* note 8, at 10. See John Embry Parkerson, Jr., *United States Compliance with Humanitarian Law: Respecting Civilians During Operation Just Cause*, 133 MIL. L. REV. 31, 89 (1991) (noting difficulty in distinguishing between death resulting from lawful armed conflict and death arbitrarily caused as retribution).

quires that the mechanisms for protecting that right be set forth in detail.⁷⁵

Common Article 3 contains, in its initial clause, a bar against "violence to life and person, including murder of all kinds."⁷⁶ Article 4 of Protocol II prohibits violence to life and physical well-being including murder, mutilation, collective punishments and the taking of hostages.⁷⁷ Article 5 of Protocol II mandates a minimum standard of humanity for those under the control of an adverse party to the conflict: They shall be provided with adequate food and drink as well as safeguards with respect to their health; they shall also be allowed to receive individual and collective relief.⁷⁸

The integration of humanitarian law and human rights principles serve to creatively define peace as a process occurring among States and peoples, and founded on respect for freedom and equality of human rights.⁷⁹ In this way, the conventional and "negative"

⁷⁵ See von Sternberg, *supra* note 56, at 377-78 (detailing means of protecting fundamental right to life during lawful hostilities). See generally David Weissbrodt & Beth Andrus, *The Right to Life During Armed Conflict: Disabled Persons' v. United States*, 29 HARV. INT'L L.J. 59, 69-78 (1988) (interpreting fundamental right to life during armed conflict as being in accord with customary international law).

⁷⁶ Geneva Convention IV, *supra* note 28, art. 3; see also Glenn P. Orgeron, *The Responsibility for Training Foreign Military Personnel: Should Arms Transfers be Conditions as Training in the Law of Armed Conflict?*, 78 AM. SOC'Y INT'L L. PROC. 1, 8-9 (1984) (discussing right to life as it is protected by Common Article 3). *But see* Parkerson, *supra* note 74, at 89 (noting that Common Article 3 does not expressly guarantee "right to life").

⁷⁷ Protocol II, *supra* note 35, art. 4(2). See G.I.A.D. Draper, *The Development of International Humanitarian Law*, in INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW 84 (1988) (crediting Protocol II for protecting the human rights of those whose liberties are restricted by an armed conflict); see also Richard N. Kiwanuka, *Humanitarian Norms and Internal Strife*, in IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW 246-47 (Fritz Kalshoven & Yves Sandoz eds., 1989) (discussing Protocol II's aim of developing and augmenting Article 3). See generally Dennis J. Mitchell, *All is Not Fair in War: The Need for a Permanent War Crimes Tribunal*, 44 DRAKE L. REV. 575, 591 (1996) (discussing high threshold needed before Article 4 of Protocol II can be invoked to enforce its guarantee of humane treatment for civilians).

⁷⁸ Protocol II, *supra* note 35, art. 5(1)(b); see also Anwar T. Frangi, *The Internalized Noninternational Armed Conflict in Lebanon, 1975-1980: Introduction to Configology*, 22 CAP. U. L. REV. 965, 1014 (1993) (calling Article 5 of Protocol II "declarative of the customary rules of armed conflict"). *But see* Laura Lopez, *Uncivil Wars: The Challenge of Applying International Humanitarian Law to Internal Armed Conflicts*, 69 N.Y.U. L. REV. 916, 935 (1994) (noting Article 5 contains nothing to prevent arbitrary detention of innocent civilians).

⁷⁹ See, e.g., *World Red Cross Conference on Peace, Program of Action of the Red Cross as a Factor of Peace (1975)* in INTERNATIONAL COMMITTEE OF THE RED CROSS AND INTERNATIONAL FEDERATION OF RED CROSS AND RED CRESCENT SOCIETIES, HANDBOOK OF THE INTERNATIONAL RED CROSS AND RED CRESCENT MOVEMENTS 646, 647 (13th ed. 1994). The preamble notes that:

The Red Cross does not view peace simply as the absence of war, but rather as a dynamic process of cooperation among all States and peoples; cooperation founded on freedom, independence, national sovereignty, equality, respect of human rights, as well as a fair and equitable distribution of resources to meet the needs of peoples.

definition of peace, which characterizes peace as an absence of war, has been superseded by the new and dynamic definition embraced by the Red Cross.⁸⁰

[T]he Red Cross has increasingly turned toward this positive concept of peace. . . . [T]his concept of peace emerges out of modern international law, which is not limited in the traditional sense, but — as an international law of cooperation — increasingly brings about economic and social development, “better standards of life in larger freedom” (preamble to the UN Charter) and finally *Human Rights for All*.⁸¹

Regulating the manner in which hostilities are conducted promotes the right to life in international law while operating as an essential medium for redressing threats to the peace through human rights observance.⁸² There is, in this sense, a compelling relationship between the broad humanitarian policies underlying the customary law of war (as determined by the Appeals’ Chamber to apply in internal conflict by virtue of their fundamental character)⁸³ and the needs to be served by the emerging and dynamic concept of peace.

Jean Pictet has outlined these essential policies in his seminal work, *Development and Principles of International Humanitarian Law*.⁸⁴ A core principle is that the civilian population must be pro-

Id.

⁸⁰ *Id.* See Theodor Meron, *The Continuing Role of Custom in the Foundation of International Humanitarian Law*, 90 AM. J. INT’L L. 238, 239-40 (1996). Humanitarian principles were studied and utilized to formulate legal standards for the Hague Tribunal, which is currently adjudicating the war crimes that occurred in the former Yugoslavia. *Id.*

HAUG, *supra* note 69, at 586. See generally STUDIES AND ESSAYS IN INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET (Christopher Swinarski ed., 1984) (compiling collection written in four languages as part of quest for universal application of humanitarian law).

⁸¹ HAUG, *supra* note 69, at 586 [emphasis in original]. See Burrus M. Carnahan, *Unnecessary Suffering, The Red Cross and Tactical Laser Weapons*, 18 LOY. L.A. INT’L & COMP. L.J. 705, 706 (1996) (discussing Red Cross’ unique status in public international law).

⁸² See Matthew I. Kupferberg, *Balkan War Crimes Trials: Forum Selection*, 17 B.C. INT’L & COMP. L. REV. 375, 383 (1994) (stating that London International Assembly Commission recommended broad application of laws regulating armed conflict in order to encompass human rights).

⁸³ *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, 48th Sess., Annex, art. 3, 3217th mtg., U.N. Doc.S/25704 (1993), reprinted in 32 I.L.M. 1159.

⁸⁴ PICTET, *supra* note 67, at 71-78 (discussing how principles “proper to law of war” should serve to confine activities strictly to military objectives, prevent danger to non-combatants and eliminate undue suffering); see also Florentino P. Feliciano, *Marine Pollution and Spoilation of Natural Resources as War Measures: A Note on Some International Law Problems in the Gulf War*, 14 HOUS. J. INT’L L. 483, 513-14 (1992) (discussing Pictet’s principles of limitation).

tected from the dangers of military operations.⁸⁵ To that end, it is incumbent upon parties to the conflict to differentiate between the civilian populace and the combatants. The former must never be the object of attack or reprisals.⁸⁶ Acts intended to spread terror through the civilian population are forbidden.⁸⁷ Affirmative precautions are required to spare the civilian population or, at least, to minimize its injuries.⁸⁸ Property essential to the survival of the population cannot be destroyed.⁸⁹ Indiscriminate attacks are pro-

⁸⁵ See PICTET, *supra* note 67, at 72. The author outlines six procedures that should be adhered to in order to ensure the protection of civilians during military conflicts. *Id.*; see, e.g., Sylvie-Stoyanka Junod, *Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, in COMMENTARY ON THE PROTOCOLS OF 8 JUNE 1977 ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949, *supra* note 52, at 1443 [hereinafter *Commentary to Protocol II*]. The author notes that:

The principle of immunity of those who do not participate directly in hostilities has in fact been recognized for a long time, in situations of both national and international armed conflict. Thus, in 1863, the Lieber Code [prepared for the Union Army in the American civil war] already provided that "an unarmed citizen is to be spared in person, property and honor, as much as the exigencies of war will permit."

Id.

⁸⁶ See Protocol II, *supra* note 35, art. 13(2); see also *Commentary to Protocol II, supra* note 85, at 1459. It is observed that:

Further, it is not admissible that one of the parties could destroy or render useless objects indispensable to the civilian population living in the part of the territory under its control because it suspected that the latter supported or sympathized with the adversary. It should be recalled that collective punishments and pillage are prohibited by the Protocol.

Id.

⁸⁷ *Id.*; Alicia H. Petrarca, *An Impetus of Human Wreckage? The 1996 Amended Landmark Protocol*, 27 CAL. W. INT'L L.J. 205, 222 (1996). The Protocol removes any ambiguity surrounding the definition of "civilian": In case of doubt, the presumption must be made that the person in question is a civilian. *Id.* The distinction between civilians and combatants is extremely important because it ultimately determines who may legally kill and be killed. *Id.* See generally Glick, *supra* note 10, at 75. Those who suffer as a consequence of armed conflict must be protected.

See Protocol II, *supra* note 35, art. 13(2); see also Chris Jochnick & Roger Normand, *The Legitimization of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49, 79-83 (1994) (discussing historical use of the laws of armed conflict, which were invariably invoked to justify terrorist attacks against civilians). But see Frits Kalshoven, "Guerrilla" and "Terrorism" in *Internal Armed Conflict*, 33 AM. U.L. REV. 67, 78 (1983) (noting that attacks during war cannot refrain from spread terror among civilians).

⁸⁸ *Commentary to Protocol II, supra* note 85, at 1449. It was observed that:

The implementation of such practices requires that precautions are taken both by the party launching the attack during the planning, decision and action stages of the attack, and by the party that is attacked. For example, military installations should not be intentionally placed the midst of a concentration of civilians with a view to using the latter as a shield for the purposes of making the adverse party abandon an attack, without forgetting any other safety measures which are explicitly laid down in Protocol II.

Id.

⁸⁹ *Id.* See generally Major Vaughn A. Ary, *Concluding Hostilities: Humanitarian Provisions in Cease-Fire Agreements*, 148 MIL. L. REV. 186, 204-208 (1995). A description of the procedures used to care for the civilian population in a war zone is found therein. *Id.*

hibited, as are attacks which are likely to cause excessive loss and injury to civilians and their property in light of the concrete and direct military advantage anticipated.⁹⁰ The starvation of civilians is prohibited.⁹¹

Under accepted principles of customary international humanitarian law, civilians are exempted from the harsher realities of war by limitations on the ways and means of combat. These limitations seek to minimize the injury which could otherwise flow to either civilians or their property through austere application of prophylactic measures, including the rule of proportionality. Of critical moment in this regard is Article 15 of the Fourth Geneva Convention which provides for the establishment of "neutral zones" to safeguard civilians from the effects of combat.⁹²

In 1993, the Security Council drew on the concept of these "safety zones" under international humanitarian law to establish "safe areas" with respect to certain Bosnian cities for those not

Protocol II, *supra* note 35, art. 14. *But see* Stephanie N. Simonds, *Conventional Warfare and Environmental Protection: A Proposal for International Legal Reform*, 29 *STAN. J. INT'L L.* 165, 181 (1992) (noting exception to Article 54 of Protocol I if destruction is required by military necessity).

⁹⁰ See *Commentary to Protocol II, supra* note 85, at 1450. The idea that the proportionality rule applies in internal armed conflict by virtue of Common Article 3 (as supplemented by Protocol II) is itself supported by the Commentary to Protocol II:

It is appropriate to recall here the most important of these principles, i.e., the principle to use the minimum force required to harm the enemy, the principle of distinction and the principle of proportionality which only intervene when it is not possible to ensure the total immunity of the population:

— parties engaged in a conflict do not have the unlimited right as regards the means injuring the enemy;

— a distinction should be made at all times between persons participating in hostilities and the civilian population, so that the latter may be spared as far as possible;

— the relation between the direct military advantage anticipated from an attack and the harmful effects which could result on the persons and objects protected should be considered in advance.

Id. But see Edward Kwakwa, *Belligerent Reprisals in the Law of Armed Conflict*, 27 *STAN. J. INT'L L.* 49, 59-60 (1990). The author expresses his doubt that any prohibition of reprisal against civilians will ever be adhered to or effective. *Id.*

⁹¹ See Protocol I, *supra* note 35, art. 54; *see also* Charles A. Allen, *Civilian Starvation and Relief During Armed Conflict: The Modern Humanitarian Law*, 19 *GA. J. INT'L & COMP. L.* 1, 4-8 (1989) (discussing historical use of starvation, which was frequently employed as military tactic).

⁹² Geneva Convention IV, *supra* note 28, art. 15. This article states that:

Any party to the conflict may, either directly or through a neutral State or some humanitarian organization, propose to the adverse Party to establish, in the regions where the fighting is taking place, neutralized zones intended to shelter from the effects of war the following persons without distinction:

(a) wounded and sick combatants or non-combatants.

(b) civilian persons who take no part in the hostilities, and who, while they reside in the zones, perform no work of a military character.

involved in the conflict.⁹³ This step quite clearly constitutes a fusion of fundamental principles relating to the protection of non-combatants emanating from the law of war and the Security Council's essential function under the Charter to relieve threats to the peace. Such "safety zones" create "oases of humanity in war" which may serve as "seed beds" for the "coming peace."⁹⁴

Humanitarian law thus exempts large classes from the scourge of war through a device which it characterizes as a "safety zone."⁹⁵ These "zones of peace" (as they have sometimes been referred to)⁹⁶ are actually geographic localities wherein, by agreement of the belligerents, protected classes are sheltered from the ravaging effects of hostilities. These territorial enclaves are at once a practical containment of the conflicts' violence, as well as symbolic of the Red Cross' humane principle, sparing those taking no active part in hostilities. By proliferating its "zones of peace" and thus ex-

⁹³ *Id.* See Protocol I, *supra* note 35, art. 50 (establishing rules for non-combat zones); von Sternberg, *supra* note 56, at 383 (noting creation of zones of peace was mechanism for protecting those outside conflict, showing that Geneva Convention expresses concerns beyond combatants). See generally L. Lynn Hogue, *Identifying Customary International Law of War in Protocol I: A Proposed Restatement*, 13 *LOV. L.A. INT'L & COMP. L.J.* 279, 301 (1990) (reviewing what can and cannot be done with demilitarized zones).

See S.C.Res. 824, U.N. SCOR, 48th Sess., 3208th mtg., at 2, U.N. Doc. S/RES/824 (1993). The Resolution declares that:

The capital city of the Republic of Bosnia and Herzegovina, Sarajevo, and other such threatened areas, in particular the towns of Tuzla, Zepa, Guradze, Bihac, as well as Srebrenica, and their surrounding areas should be treated as safe areas by all the parties concerned and should be free from armed attacks and from any other hostile acts.

Id. The "safe areas," although not expressly established under Article 15 of the Fourth Geneva Convention, clearly reflect the Security Council's analogizing from principles of international humanitarian law to create the practical equivalent of "Red Cross Zones." *Id.*; see also S.C.Res. 819, U.N. SCOR, 48th Sess., 3199th mtg., S/RES/819 (1993) (demanding that Srebrenica become safe area free from military attack); John E. Fink, *From Peacekeeping to Peace Enforcement: The Blurring of the Mandate for the Use of Force in Maintaining International Peace and Security*, 19 *MD. J. INT'L & TRADE L.* 29 (1995) (explaining that Resolution 819 was needed to procure humanitarian assistance in face of highly unsettled conditions).

⁹⁴ See HAUG, *supra* note 69, at 588.

⁹⁵ See COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 120, 129 (Jean Pictet ed., 1958); see also *Report of the Secretary-General Pursuant to Security Council Resolution 836*, U.N. Doc. S/25939 at 1-2 (1993) (noting one of main goals of safe haven operations was to protect civilians from military attack); Sean D. Murphy, *The Security Council, Legitimacy, and the Concept of Collective Security After the Cold War*, 32 *COLUM. J. TRANSNAT'L L.* 201, 212 (1994) (observing that many acts on part of United Nations Security Council are designed to protect civilians from armed attack). See generally Marian Nash (Leich), *War Powers Resolution*, 88 *AM. J. INT'L L.* 522, 523 (1994) (stating that among other places, Sarajevo was specifically classified as "no fly zone" because of numerous civilian attacks).

⁹⁶ For a discussion identifying the "safety zones" with the broader concept of "zones of peace," see von Sternberg, *supra* note 56, at 392-93 and authorities cited therein.

panding the protections available to select classes and groups, humanitarian law seeks to advance the peace process in a very real sense.

A necessary complement to the "zones of peace," however, is the dissemination of humanitarian ideals. As noted in the Commentary to Protocol I, in keeping with the *jus ad bellum* principle, incidental to promoting peace, humanitarian law also limits the "effects of [wartime] hostilities."⁹⁷

It is the didactic aspect of international humanitarian law which most strongly urges its forceful application as an indispensable element of the ongoing peace process governed by the Dayton Accords.⁹⁸ The group animosities which have been festering by the specter of unpunished atrocities must be redressed on an individual basis to avoid collective retribution. Palpable violations of international humanitarian law have helped to fuel the cycle of violence and passions which originally provoked the war. Ignoring these violations contributes to the public view that the offended law is without social importance and that the violative behavior can continue.

Failing to redress this sense of public injustice proliferated by criminal misconduct will ultimately create a peace structured on vulnerable foundations. At the very least, the norms which are advanced in the war crimes process, the humanitarian ideal of peace through human rights observance, must be vindicated if the Dayton settlement is to endure.⁹⁹ Any resolution of the Bosnian

⁹⁷ *Commentary to Protocol I*, *supra* note 52, at 26. The Commentary states:

A moral and humanitarian argument can be added to this legal aspect [i.e., the principle that *jus ad bellum* may be permissible in certain instances]: Just as the dissemination of humanitarian law contributes to the promotion of humanitarian ideals and a spirit of world peace among nations, the faithful application of such law can contribute to reestablishing peace, by limiting the effects of hostilities.

Id.

⁹⁸ See Richard Falk, Essay, *The Complexities of Humanitarian Intervention: A New World Order Challenge*, 17 MICH. J. INT'L L. 491, 508 (1996) (pointing out that negotiations were held with accused war criminals); Sharon Healey, *Prosecuting Rape Under the Statute of the War Crimes Tribunal for the Former Yugoslavia*, 21 BROOK. J. INT'L L. 327, 377-78 (1995) (observing difficulties maintaining credibility of tribunal to prosecute war crimes when negotiation settlements were taking place almost simultaneously). See generally TJAGSA Practice Notes, International and Operational Law Notes, *International Criminal Tribunal for the Former Yugoslavia Update*, 1996-Mar. ARMY LAW. 128, 128 (1996) (noting difficulty of negotiating with numerous officials accused of war crimes).

⁹⁹ See James Podgers, *The World Cries for Justice*, 82 APR. A.B.A. J. 52, 52 (1996) (recognizing that Tribunal to prosecute war criminals is most important factor in whether Dayton Accords will hold). But see Anthony D'Amato, *Peace vs. Accountability in Bosnia*, 88 AM. J. INT'L L. 500, 500 (1994) (contending that providing amnesty for war criminals in Bosnian conflict might end hostilities sooner and save more lives).

crisis must adopt a commitment to the view that respect for human rights constitutes an organizing principle of society and that lasting international tranquility depends upon its enforcement. It is the nexus of peace and human rights which constitutes the distinguishing feature of the new humanitarian order.¹⁰⁰

V. THE RISE OF *JUS COGENS* AND THE MONISTIC INTERPRETATION OF INTERNATIONAL LAW

The *Tadic* court found that the defendant had committed "serious" violations of customary law. It also found support for the notion that such violations should give rise to universal jurisdiction, both in the practice of States and in select resolutions adopted by the United Nations General Assembly. The court thus found a practical convergence between State and "international" practice.¹⁰¹

While the Appeals Chamber's approach follows accepted lines of analysis, it neglects to explicitly address the theory which would have been the most appropriate in light of the "human-being" approach to international law which the Tribunal adopted. In summary form, the theory concerns the violations of Common Article 3 and of fundamental principles expressed in Protocol II, which together foster the rise of universal jurisdiction on the ground that the foregoing instruments codify *jus cogens* norms.

Jus cogens (or peremptory norms) pertain to those principles which have risen to the apex of the international human rights

¹⁰⁰ See Michel Veuthey, *Vers une Politique Humanitaire*, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW IN HONOR OF JEAN PICTET 989, 1004 (Christophe Swinarski ed., 1984); see also *An Agenda for Peace-Preventive Diplomacy, Peacemaking and Peace-Keeping: Report of the Secretary-General*, U.N. SCOR 47th Sess., Agenda Item 10, § 17, U.N. Doc. S/24111 (1992). The Secretary-General has outlined a plan in which he approaches preventive diplomacy, peacekeeping, peacemaking, and peace-building and the role human rights must play in this process. *Id.*; Judy Gallant, *Humanitarian Intervention and Security Council Resolution 688: A Reappraisal in Light of a Changing World Order*, 7 AM. U. J. INT'L L. & POL'Y 881, 904-05 (1992). Human rights violations could affect ongoing efforts for peace in the region, due largely to the globalization of human rights norms. *Id.*; Diego Garcia-Sayan, *Human Rights and Peace-Keeping Operations*, 29 U. RICH. L. REV. 41, 43 (1994). An outline to the Secretary-General's approach is supplied therein. *Id.*

¹⁰¹ See *Nicaragua v. U.S.*, at 98-108. The court relied on United Nations Resolutions for its normative content in support of finding violations of customary law. *Id.* See generally Victor Mayer-Schonberger & Terece E. Foster, *More Speech, Less Noise: Amplifying Content-Based Speech Regulation Through Binding International Law*, 18 B.C. INT'L & COMP. L. REV. 59, 95 (1995). Members of the United Nations have bound themselves to the international norms embodied within its Charter. *Id.*; Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM. J. INT'L L. 413, 416 (1983). Classifying a resolution as a norm or merely a document with legal significance is still debated. *Id.*

hierarchy.¹⁰² Accordingly, such norms cannot be deemed merely customary in the accepted sense. Rather, these norms have achieved a status of such importance in the international community that State action deemed inconsistent with such norms will be declared void. As set forth in the Vienna Convention on the Law of Treaties: "A peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."¹⁰³

In this way, *jus cogens* is binding not only on State action, but also on international arrangements which are inconsistent with applicable peremptory norms. This result flows from the very centrality and indispensability of the norms themselves. If the international order can only be held together by universal respect for the bar against genocide, for instance, the proclivity of a State to violate the norm or to countenance violation of it must be preempted as a matter of international public policy.

It is now a widely accepted doctrine with respect to international criminal jurisdiction that the norms on which that jurisdiction is based can be either conventional or customary. Violations of fundamental human rights included within the category of *jus cogens* may be made the subject of universal jurisdiction on the premise that States have an obligation *erga omnes* to bring the violators to justice. As one writer concluded: "One might argue that 'when committed by individuals,' violations of *erga omnes* obligations and peremptory norms 'may be punishable by any State under the universality principle.'¹⁰⁴ In such instances, universal

¹⁰² See, e.g., Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1, 1-2 (1986). "Fundamental human rights" have risen to a distinction of a peremptory norm, distinguishing it from other commonly thought of rights. *Id.*; see also RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS § 102 cmt.k (1987). Peremptory norms are ones permitting no derogation. *Id.* See generally Jonathan I. Charney, *Third State Remedies in International Law*, 10 MICH. J. INT'L L. 57, 65 (1989). Much international human rights law would be unenforceable without the status of *jus cogens*. *Id.*

¹⁰³ Vienna Convention on the Law of Treaties, May 23, 1968, art. 64, 1155 U.N.T.S. 331, 347 (in force Jan. 27, 1980). See RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS § 102 cmt.k (1987).

¹⁰⁴ See RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS § 102 cmt.k (1987) (quoting OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 264 (1979)).

jurisdiction may be grounded in customary international law on the premise that the violator remains *hostis humani generis*.¹⁰⁵

The scope of protection under that customary law, as noted in the Commentary to Common Article 3, quite clearly extends to all those who are not participants in combat, irrespective of nationality, race, religion or other affiliation of the victim. The status as *jus cogens* of Common Article 3's requirement to treat these protected persons humanely is indisputable.¹⁰⁶

Article 3 norms have been declared by the International Court of Justice to be *jus cogens* and to constitute "elementary considerations of humanity."¹⁰⁷ The comparative primacy of Common Article 3 principles within the international order can be appreciated from the description given in the Commentary to the Geneva Convention. There, Common Article 3 principles are described as demanding respect for rules already recognized as essential to civilized existence long before the Conventions were signed.¹⁰⁸

¹⁰⁵ See *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 232 (1884) (finding pirate is enemy of all mankind); *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 197 (1820) (finding robbery on high seas within criminal jurisdiction of all nations); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161 (1820) (holding pirate is accountable under international law as enemy of all mankind); see also *Randall*, *supra* note 53, at 830 (contending that since violators of *jus cogens* norms affect all states, they therefore should be prosecuted whether or not states are involved). See generally 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (U. Chi. ed. 1979) (explaining that *hostis humani generis* act is without any pretense of state authority and offend all nations); Jordan J. Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 HARV. HUM. RTS. J. 51, 59 (1992) (acknowledging private actor responsibility under customary international law).

¹⁰⁶ See THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 34 (1989). "Article 3(1)(a)-(c) are of such fundamental character and "echo so many provisions in other humanitarian and human rights treaties, that they must be regarded as embodying minimum standards of customary law . . ." *Id.* Common Article 3 (1)(a)-(c) prohibits violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture taking of hostages and outrages upon personal dignity, in particular humiliating and degrading treatment with respect to persons taking no active part in the conflict. *Id. Nicar. v. United States*, 1986 I.C.J. 4, 105, para. 105, reprinted in 25 I.L.M. 1023 (1996). Common Article 3 of the Geneva Convention was utilized for its *jus cogens* status in this case. *Id.*; Parker & Neylon, *supra* note 12, at 434. The I.C.J. recognized Common Article 3 as a peremptory norm. *Id.* See generally Jordan J. Paust, *Recent Development, Applicability of International Criminal Laws to Events in the Former Yugoslavia*, 9 AM. U. J. INT'L L. & POL'Y 499, 505-06 (1994). Many Geneva provisions including Common Article 3 are reflective of *jus cogens* norms. *Id.*

¹⁰⁷ See *Nicaragua v. U.S.*, 1986 I.C.J. at 105.

¹⁰⁸ See COMMENTARY: GENEVA CONVENTION I FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK ARMED FORCES IN THE FIELD 50 (Pictet ed. 1952). To illustrate the universality of the principles under discussion, the Commentary indicates that the rules would apply even outside the scope of internal armed conflict, i.e., to civil disturbances which could be described as acts of banditry. *Id.*; see also I.C.R.C. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTION OF 12 AUGUST 1949 1340 (1987). Article 3 embodies universal rules by which states are governed, even in

On the other hand, violations of rules governing the conduct of hostilities (such as the proportionality rule) are equally grounded in considerations of humanity and are thus informed with the same irreducible ethical character as is Common Article 3. Perhaps, as the leading contemporary commentator on international humanitarian law has written:

It is inevitable that, in developing international law for internal armed conflicts, the central source for the rules will be the principles of humanity. No self-respecting state would challenge the applicability of such principles in internal armed conflict. More specific rules, such as proportionality, the prohibition of direct attack on civilians, the prohibition of indiscriminate and disproportionate attacks, the prohibition of means and methods of warfare that cause unnecessary suffering, can and should be regarded as necessary and proper derivations from the principles of humanity.¹⁰⁹

In other words, the long-standing nature of these fundamental principles, taken together with their classification as quintessential "dictates of humanity," establishes their priority status within the hierarchy of customary norms. Treatise law makes clear that the quintessential injunctions codified in Common Article 3 and Protocol II provide the cornerstone of modern human rights and humanitarian law, by setting forth rules which are essential to the continuation of a civilized international community. Accordingly, violators should be subject to universal jurisdiction as *hostes humani generis*.¹¹⁰

As stated earlier, the Yugoslavian War Crimes Tribunal does not explicitly adopt a *jus cogens* analysis. Instead, the Appeals Chamber "extends" customary international humanitarian law to internal conflicts on the basis of State practice and the perceived "illegitimacy" of differentiating between internal and interstate

the absence of treaty obligations. *Id.*; William Walker, *The International Law Applicable to Guerrilla Movements in Internal Armed Conflicts: A Case Study of Contra Attacks on Nicaraguan Farming Cooperatives*, 21 N.Y.U. J. INT'L L. & POL. 147, 152 (1988). Common Article 3 is used with elementary considerations of humanity to discern customary law. *Id.*

¹⁰⁹ See MERON, *supra* note 106, at 74.

¹¹⁰ See RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS § 404 (1987). Universal jurisdiction attaches for genocide, certain acts of terrorism and various traditional offenses characterizing the perpetrators as enemies of all mankind. *Id.*; Randall, *supra* note 53, at 785. Universal jurisdiction extends to acts for which there is universal condemnation despite the lack of a nexus between the actors, the site of the offense and the prosecuting nation. *Id.*; Jean-Marie Simon, *The Alien Tort Claims Act: Justice or Show Trials?*, 11 B.U. INT'L L.J. 1, 44-45 (1993). Universal jurisdiction is permissive and not mandatory. *Id.*

wars in light of the ultimate objective of all law, which is to protect human beings.

Had the Tribunal relied on a *jus cogens* analysis, however, the relationship between upholding human rights and international peace and security perhaps would have been clearer. As discussed above, the policy foundations behind establishing a hierarchy of international human rights stem from the existence of a narrow compass of rights violations which threaten peaceful coexistence in an international community.¹¹¹ Upholding these rights in armed conflict is a necessary and proper means of maintaining a stable world order.

There is a further aspect of the Tribunal's ruling which, although not explicitly explored by the Appeals Chamber, was clearly of moment. This aspect involved the applicability of a criminal standard over human rights violations even in the absence of State action or policy. It is manifest in this regard that Common Article 3, like Protocol II, may be applied not only to agents of the State but to the insurgents. In this connection, treaties interpreting crimes against humanity under Article 6(c) of the Nuremberg Charter had concluded that criminal responsibility vests only where individual action is supported by a State action or policy as an element of the offense.¹¹²

The recent ruling in *Tadic* clearly points out that violations of fundamental human rights in armed conflict may support criminal jurisdiction even in the absence of State involvement.¹¹³ The

¹¹¹ See Parker & Nylon, *supra* note 12, at 414-16 (noting that incorporating *jus cogens* into domestic actions helps to protect human rights).

¹¹² *Nuremberg Charter*, *supra* note 37, art. 6(c). The Tribunal had jurisdiction to punish persons guilty of certain offenses who acted in the "interest of the European Axis countries." *Id.* See M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 261 (1992). Crimes against Humanity are governed by Article 6(c) of the Nuremberg Charter. *Id.* Primarily prohibited are "murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial and religious grounds and other inhumane acts." *Id.*

¹¹³ See *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1996). In a case brought by victims of war crimes seeking tort compensation under the Alien Tort Claims Act, the court held that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as a private individual." *Id.*; see also William Aceves, *Affirming the Law of Nations in U.S. Courts: The Karadzic Litigation and the Yugoslav Conflict*, 14 BERKELEY J. INT'L L. 137, 138 (1996). The author notes the significance in finding non-state liability in this context. *Id.*; Thomas G. Larussa, *Second Circuit Holds That Individuals Can Be Liable for Violating International Law: Alien Torts Claims Act Applies to Individuals as Well as States; Torture Victim Protection Act Applies to Unrecognized States*, 10 GEO. IMMIGR. L.J. 558, 561 (1996). International law includes individuals as well as states. *Id.*

Tribunal's interpretation is clearly consistent with the modern development of international law and with generally accepted standards for the exercise of universal jurisdiction. Individual criminal responsibility historically existed for those acts which the international community viewed as heinous and inherently inimical to its collective well-being, even in the absence of treaty or other international agreement. The Commissioner of Experts for Rwanda was keenly aware of this aspect of international penal law, as is made clear in its Report detailing the historical applicability of international criminal norms to such activities as slave-trading, slave-trafficking and piracy.¹¹⁴

The direct applicability of international norms to individual responsibility (largely made possible by the rise of *jus cogens*) has profound implications for the future growth of international law. Clearly the punishment of non-State agents acting exclusively within an internal setting was previously thought to be the unique province of States. Professor M. Cherif Bassiouni linked crimes against humanity to a State action or a policy requirement, resulting from his concern that in the absence of such a condition, the municipal jurisdiction of States within the modern system would be impermissibly disturbed.¹¹⁵

The centrality of fundamental human rights principles to the international order mandates that these norms have primacy and direct effect insofar as individuals and groups are concerned. Disintermediation by States, the creation of an essentially dualistic interpretation of international law, cannot be allowed to condition the realization of peremptory norms in the world community. Rather, the principles represented by *jus cogens* must receive pri-

¹¹⁴ See Report of the Commission of Experts Pursuant to Security Council Resolution 780, U.N. SCOR, 49th Sess., Annex at 3, U.N. Doc. S/1994/1405, 27 (1994); see also *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980). The court found after the review of the work of jurists and commentators that official torture can be classified as violative of the law of nations. *Id.* It also noted the significance of *The Paquette Habana* in that the court there transformed a traditional prohibition against seizing non-combat ships during warfare into a settled international norm. *Id.* at 881.

¹¹⁵ BASSIOUNI, *supra* note 112, at 247. But see Christopher C. Joyner, *Enforcing Human Rights Standards in the Former Yugoslavia: The Case for an International War Crimes Tribunal*, 22 DENV. J. INT'L L. & POL'Y 235, 240 (1994) (noting that cardinal principle of Nuremberg precedent is that human rights prevail over municipal law); Leila Sadat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT'L L. 289, 358 (1994) (arguing that international law can be manipulated if left to municipal law, thereby changing its character).

ority as a matter of international public policy if peaceful coexistence within an international order of any sort is to continue.

The growing acceptance of *jus cogens*, however, and the direct application of international criminal law to individual violators parallels the monistic approach to human rights enforcement which is clearly espoused by the Appeals Chamber in *Tadic*. Rather than treating the upheavals caused by systematic violations of Common Article 3 as the unique province of States merely because the misconduct is internal, international law now seeks to apply peremptory norms directly. As noted by the Appeals Chamber in *Tadic*, distinguishing between international and internal wars makes little sense from a policy standpoint if it is primarily human beings (and not abstracts like the sovereign) who are the ultimate beneficiaries of humanitarian jurisprudence.

The Tribunal thus implicitly adopts a monistic interpretation of international law in formulating its underlying rationale for deciding Dusko Tadic's appeal. The pre-existing view that maintaining collective peace and security is best achieved by regulating the relationship between States has been tentatively superseded. The new approach favored emphasizes the relationship between States and military aggregates on the one hand, and individuals and groups on the other. By "piercing" the sovereign form and upholding the human rights of individuals and groups, international law now seeks to realize the ideal of collective security.

The monist theory of international law has had no more forceful advocate than Hersch Lauterpacht. The distinguishing feature of this theory is the "supremacy of international law, even within the municipal sphere."¹¹⁶ Accordingly, international human rights and humanitarian norms are not viewed as receiving exclusive or

¹¹⁶ See BROWNIE, *supra* note 9, at 33 (citing H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS (1950)). International law need not be expressly adopted to be part of municipal law. *Id.* at 11. It becomes applicable to individuals through a transference into municipal law. *Id.*; Jonathan Turley, *Dualistic Values in the Age of International Legal-prudence*, 44 HASTINGS L.J. 185, 198 (1993). Whereas dualistic models focus on international law, monistic views recognize international law as possessing independent legal authority that automatically permeates municipal law. *Id.*; see also Jacob Dollinger, *Brazilian Supreme Court Solutions for Conflicts Between Domestic and International Law: An Exercise in Eclecticism*, 22 CAP. U. L. REV. 1041, 1046 (1993). A radical view of monist theory believes in the application of international law to the complete exclusion of contradictory municipal law. *Id.*; Antonio Mendoza, *The Creeping Breach of International Law*, 16 LOY. L.A. INT'L & COMP. L.J. 107, 109-110 (1993). The way in which treaties are received are greatly influenced by a monist theory state which incorporates, without hesitation, the language of the treaty as part of its municipal law. *Id.*

even primary application under national law; rather, human rights achieve primacy and direct effect insofar as the individual and groups are concerned. Sir Ian Brownlie has characterized the "absolute" monist position in the following terms:

The State is disliked as an abstraction and distrusted as a vehicle for maintaining human rights; international law, like municipal law, is ultimately concerned with the conduct and welfare of individuals. International law is seen as the best available moderator of human affairs, and also as a logical condition of the legal existence of States and therefore of the municipal systems of law within the sphere and competence of States.¹¹⁷

The integration of the law of peace with a monist conception of international human rights and humanitarian norms, however, is what informs the new humanitarian order with its special character. The movement toward such an order is deeply influenced by the Red Cross concept of peace which is fundamentally linked to human rights and a concern for progressive social and human development. The Red Cross concept of peace postulates that peace is not simply the absence of war, but constitutes a process occurring among states and peoples of the world community founded on a respect for freedom and equality of human rights and a "fair and equitable distribution of resources according to peoples' needs."¹¹⁸

¹¹⁷ See BROWNLIE, *supra* note 9, at 33; Rachael E. Schwartz, *Chaos, Oppression, and Rebellion: The Use of Self-Help to Secure Individual Rights Under International Law*, 12 B.U. INT'L L.J. 255, 305 (1994). A similar perspective views states not as untrustworthy to protect human rights, but rather as less capable of effectively administering human rights law. *Id.*; see also Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1127-28 (1990). The harshness of commandeering debated and analyzed municipal law as urged by monist theorists is lessened when one considers that international law evolves over long periods of time with the help of commentators and jurists scrutinizing it at every level. *Id.*

¹¹⁸ HAUG, *supra* note 69, at 686. See Alexandre Hay, *Conference—The American Red Cross—Washington College of Law Conference: International Humanitarian Law*, 31 AM. U. L. REV. 811, 816 (1982). One of the main principles of the Red Cross is humanity and peace and the peace process is successful only when these two principles converge. *Id.*; John H.E. Fried, *The United Nations' Report to Establish a Right of the Peoples to Peace*, 2 PACE Y.B. INT'L L. 21, 23 n.10 (1990). A definition of peace is alluded to here, which was established at the Belgrade Conference of the International Committee of the Red Cross and later confirmed at another meeting of the Committee. *Id.* The baseline for the definition is that peace is based on the interplay of the concepts of freedom, independence, national sovereignty, equality, human rights and a fair and equitable distribution of resources. *Id.* at 23.

CONCLUSION: TOWARDS A NEW HUMANITARIAN ORDER

The new outlook eschews the traditional or negative definition of peace which stresses the law of aggression (the *jus ad bellum*) and conceives of peace only as the absence of military force. Rather, the new humanitarian order (which this essay has identified with the emerging concept of peace) seeks to maintain international peace and security through direct recourse to human rights and humanitarian norms. These norms include the individual and collective right to economic and social development and "better standards of life in a larger freedom."¹¹⁹

The contextual relationship between human rights and humanitarian norms on the one hand and world peace on the other is precisely the area where the *Tadic* appeal is not sufficiently detailed. The Tribunal effectively overlooks a vital element of the jurisprudence it is to apply by deferring mechanically to the Security Council's discretion. The failure of the Tribunal to orient its pronouncements on international humanitarian law to the evolving law of peace must be perceived as a drawback in an otherwise constructive and far-reaching achievement.

This essay has recommended not a modification to the Tribunal's approach, but an elaboration upon it. A central thrust of modern international humanitarian law is dissemination of the ideals which underlie its operative provisions. Ideals which the international community does not have a sincere desire to uphold, however, will be thrust aside in the practical world. That cannot be allowed to occur in the former Yugoslavia. As Hartley Shawcross has so eloquently asserted, lasting peace depends on those ideals being observed.¹²⁰

¹¹⁹ HAUG, *supra* note 69, at 586.

¹²⁰ See TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 634-39 (1992) (noting that Nuremberg War Crimes Trials were essentially "idealistic prosecution[s]," attempting to establish norms which would influence conduct of future belligerents).