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# A COMPARISON OF THE YUGOSLAVIAN AND RWANDAN WAR CRIMES TRIBUNALS: UNIVERSAL JURISDICTION AND THE "ELEMENTARY DICTATES OF HUMANITY"\*

*Mark R. von Sternberg\*\**

## I. INTRODUCTION

By resolution dated February 22, 1993,<sup>1</sup> the U.N. Security Council determined 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 within the former Yugoslavia since 1991.<sup>2</sup> Jurisdiction was predicated under Chapter VII of the U.N. Charter.<sup>3</sup> By resolution dated November 8, 1994, a similar measure was adopted with respect to grave human rights violations arising out of the recent climactic violence affecting Rwanda.<sup>4</sup>

Part II of this article analyzes the subject matter jurisdiction of both the Yugoslavian and the Rwandan war crimes tribunals; Part III gives specific reference to the violations determined to have been committed by U.N. fact-finding commissions. Such findings of violations have included "grave breaches" of governing provisions of the Geneva Conventions of 1949 and of Protocols I and II thereunder;<sup>5</sup> crimes against

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1. S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg. at 28, U.N. Doc. 5/INF/49 (1994).

2. The war crimes process is now quite advanced and a number of indictments have been handed down. See *Justice Without Victors*, ECONOMIST, Jan. 7-13, 1995, at 44.

3. U.N. CHARTER art. 39.

4. S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 1, U.N. Doc. S/RES/955 (1994) [hereinafter *Statute of the Rwandan Tribunal*].

5. Geneva Convention for the Amelioration of the Condition of the Wounded

humanity and war crimes within the meaning of the Nuremberg Charter;<sup>6</sup> violations of the Genocide Convention;<sup>7</sup> and criminal misconduct under customary international humanitarian law (including the Hague Convention (IV) Respecting the Laws and Conventions of War on Land).<sup>8</sup>

Part IV presents the thrust of this article. It sets forth the approach of the United Nations in finding the applicable law and elucidates the organization's methodology in determining the precise scope of international penal jurisdiction.

A comparison of the two war crimes tribunals is of moment. According to U.N. findings, the war in Yugoslavia primarily entails international armed conflict.<sup>9</sup> By contrast, Rwanda has been plagued essentially by civil war.<sup>10</sup> As Professor Theodor Meron has observed, neither the Geneva Conventions' "grave breaches" provisions nor the Hague Con-

and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 50, 6 U.S.T. 3114, 3146, 75 U.N.T.S. 31, 62 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 51, 6 U.S.T. 3217, 3250, 75 U.N.T.S. 85, 116 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 130, 6 U.S.T. 3316, 3420, 75 U.N.T.S. 135, 238 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 147, 6 U.S.T. 3516, 3618, 75 U.N.T.S. 287, 388 [hereinafter Fourth Geneva Convention]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I] (arts. 11 and 85 apply to armed conflict which is international in character); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 609 [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).

6. Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter].

7. Convention on the Prevention and Punishment of the Crime of Genocide, art. 6(b)-(c), *adopted* Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention].

8. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague Convention].

9. *Final Report of the Commission of Experts Pursuant to Security Council Resolution 780*, U.N. SCOR, 49th Sess., Annex, at 3, U.N. Doc. S/1994/674 (1994) [hereinafter *Report of the Commission of Experts for Yugoslavia*].

10. *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994)*, U.N. SCOR, 49th Sess., Annex, at 3, U.N. Doc. S/1994/1405 (1994) [hereinafter *Report of the Commission of Experts for Rwanda*].

vention extend universal jurisdiction over purely internal wars, although it is otherwise with "crimes against humanity" under the Nuremberg Charter and violations of the Genocide Convention.<sup>11</sup> This limitation upon the tribunals' jurisdictional base has constrained the U.N. legal specialists to devote considerable analysis to the "bases and ranges" of international criminal jurisdiction. To the extent that this legal thinking constitutes the most interesting aspect of the various reports of the United Nations' impanelled legal experts, it will form the central focus of this discussion.

U.N. legal experts have not been absolutely clear respecting the scope of international humanitarian penal jurisdiction, particularly in the area of internal armed conflict. On the one hand, U.N. legal scholars have given a restrictive interpretation to the scope of crimes against humanity under the Nuremberg Charter, such as murder, extermination, deportation, and other inhuman acts committed against the civilian population in both internal and international war, by the requirement that such acts be pursuant to an *official* policy of discrimination.<sup>12</sup> At the same time, U.N. scholars have argued (and the war crimes tribunal for Yugoslavia has agreed) that common article 3 to the Geneva Conventions, applicable in civil war and prohibiting substantially the same violations as the Nuremberg Charter but not requiring any official policy of discrimination, may be criminally enforced even though common article 3 is not a "grave breach" provision giving rise to universal jurisdiction.

This paper urges a construction of article 6(c) of the Nuremberg Charter which would render the substantive violations identified in it to be the practical equivalent of those described in common article 3.<sup>13</sup> Such an interpretation con-

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11. Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, FOREIGN AFF., Summer 1993, at 122, 124, 130.

12. For a full discussion of the applicable provisions of the Nuremberg Charter and the Geneva Conventions, see *infra* notes 88-160 and accompanying text.

13. That is, a violation would not have to be premised on an official policy of discrimination. It must be noted that the class of persons protected under common article 3 (those who have laid down their arms or who are otherwise *hors de combat*) is substantially broader than those identified in article 6(c) of the Nuremberg Charter which protects only civilians. Compare Nuremberg Charter, *supra* note 6, art. 6(c) with First Geneva Convention, *supra* note 5, art. 3, 6 U.S.T. at 3116, 75 U.N.T.S. at 32; Second Geneva Convention, *supra* note 5, art. 3, 6 U.S.T. at 3220, 75 U.N.T.S. at 86; Third Geneva Convention, *supra* note 5, art. 3,

forms to the plain language in both instruments and is consistent with the peremptory norms therein expressed.

It is imperative to note in this respect that extrajudicial murders, exterminations, deportations, and other cruel and inhumane acts (at least when committed in internal armed conflict) relate to violations of basic human rights which are protected under the emerging doctrine of *jus cogens*.<sup>14</sup> Violators of such fundamental norms may, in appropriate circumstances, be made the subject of universal jurisdiction even in the absence of a convention since the offenders themselves are deemed *hostes humani generis*.<sup>15</sup>

This paper advances a plain meaning interpretation of "crimes against humanity" under the Nuremberg Charter and common article 3 which would give full effect to the peremptory norms underlying their provisions. It is furthermore submitted that such a construction is to be preferred to an interpretation which departs from the plain language of the text so as to derogate from the customary law of human rights with which both instruments are in unambiguous agreement.

## II. SUBJECT MATTER JURISDICTION

The bases of subject matter jurisdiction in the Rwandan and the Yugoslavian war crimes tribunals differs substantially. Both tribunals draw from the same substantive body of law, i.e., the laws of war, customary and prescribed, such as the prohibition of "crimes against humanity" and genocide. However, each emphasizes a different element of this corpus of jurisprudence for its jurisdictional base.

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6 U.S.T. at 3318, 75 U.N.T.S. at 136; Fourth Geneva Convention, *supra* note 5, art. 3, 6 U.S.T. at 3518, 75 U.N.T.S. at 288.

14. The term *jus cogens* is used interchangeably with such terms as "peremptory norms" and "fundamental human rights." While definitions have sometimes been elusive, this term has been interpreted largely to mean "principles that the legal conscience of mankind deem[s] absolutely essential to coexistence in the international community." U.N. CONFERENCE ON THE LAW OF TREATIES, SUMMARY RECORDS OF THE PLENARY MEETINGS AND OF MEETINGS OF THE COMMITTEE OF THE WHOLE at 294, U.N. Doc. A/CONF/39/11, U.N. Sales No. E.68.V.7 (1969) (statement of Mr. Suarez (Mexico)). For an excellent discussion of definitions, see Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 412, 414-16 (1989).

15. See *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 232 (1884) (determining that piracy gives rise to universal jurisdiction under customary international law).

As suggested earlier, this difference is largely mandated by the fact that, whereas the Yugoslavian tribunal is concerned with criminal violations arising out of an "international war" in which the full scope of humanitarian law applies, the Rwandan tribunal is engaged in the more problematic and less regulated area of civil war. The following is a summary of the international criminal provisions which the two tribunals are to apply.

#### A. *Yugoslavian War Crimes Tribunal*<sup>16</sup>

Primary in the tribunal's arsenal are the "grave breaches" provisions common to all four conventions.<sup>17</sup> As stated previously, these prohibitions reach only international armed conflict. Specifically, they make punishable:

[W]ilful killing, torture, inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, . . . or wilfully depriving a protected person of the rights of a fair and regular trial proscribed in the present Convention, taking of hostages, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.<sup>18</sup>

In all four Conventions this provision relates specifically to "protected persons," i.e., those who are sick and wounded in the field, the wounded and sick at sea, prisoners of war, and civilians.<sup>19</sup>

Similarly article 85(3) of Protocol I to the Geneva Conven-

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16. Subject matter jurisdiction is set forth in the statute of the tribunal which is to be found in the *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, 48th Sess., U.N. Doc. S/25704 (1993) [hereinafter *Statute of the Yugoslavian Tribunal*].

17. See, e.g., First Geneva Convention, *supra* note 5, art. 50, 6 U.S.T. at 3146, 75 U.N.T.S. at 62; Second Geneva Convention, *supra* note 5, 6 U.S.T. at 3250, 75 U.N.T.S. at 116; Third Geneva Convention, *supra* note 5, 6 U.S.T. at 3420, 75 U.N.T.S. at 238; Fourth Geneva Convention, *supra* note 5, art. 147, 6 U.S.T. at 3618, 75 U.N.T.S. at 388 (relating to the protection of civilian persons in time of war).

18. Fourth Geneva Convention, *supra* note 5, art. 147, 6 U.S.T. at 3618, 75 U.N.T.S. at 388.

19. See *supra* note 17.

tions<sup>20</sup> renders punishable a wide spectrum of willful misconduct where international armed conflict is concerned. The following offenses are proscribed if committed against a protected person: making the civilian population an object of attack; launching an indiscriminate attack affecting the civilian population knowing that such attack will cause excessive loss of life or injury to civilians or damage to civilian property; launching an attack against works containing dangerous forces knowing that such attack will cause excessive injury to civilians or their property; and making non-defended localities and demilitarized zones the object of attack.<sup>21</sup> Also punishable under article 85(4) of Protocol I are: the transfer by the occupying power of its own civilian population into the occupied territory and the transfer of the population of the occupied territory outside the territory; practices of apartheid and inhuman practices entailing racial discrimination; and making places of worship, historical monuments, and works of art the objects of attack.<sup>22</sup>

The Commission of Experts for Yugoslavia has determined that the war in that country is primarily of an international character,<sup>23</sup> a determination which, from a jurisdictional point

20. Protocol I, *supra* note 5, art. 85(3), 1125 U.N.T.S. at 42.

21. *Id.* art. 85(3)(a)-(d).

22. *Id.* art. 85(4)(a), (c)-(d). Apartheid as an offense is included as a war crime under Protocol I. *Id.* art. 85(4)(c). The Apartheid Convention forbids practices aimed at racial segregation and at inhuman acts aimed at assuring the domination of one racial group over another. Included within the proscribed acts are the following:

(a) Denial in a member or members of a racial group or groups of the right to life and liberty of person:

(i) By murder of members of a racial group or groups;

(ii) By infliction upon members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;

(iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups.

*International Convention on the Suppression and Punishment of the Crime of Apartheid*, G.A. Res. 3068, U.N. GAOR, 28th Sess., Supp. No. 30, art. II(a), at 75, U.N. Doc. A/9030 (1974).

23. *Report of the Commission of Experts for Yugoslavia, supra* note 9, ¶ 44. Indeed, the Commission of Experts for Yugoslavia has indicated that, should the war be determined to be of a non-international character, there would be a substantial effect on subject matter jurisdiction. Specifically, the Commission of Experts for Yugoslavia has found:

The treaty law designed for internal armed conflict is common article 3

of view, is of moment. Neither the Geneva Conventions, nor their implementing Protocols, contain sections specifically criminalizing (i.e., rendering a "grave breach") activity which takes place during non-international (i.e., internal) armed conflict. The Geneva Conventions do, however, contain a common article 3<sup>24</sup> which relates, by its terms, to wars not of an international character. The norms provided for under common article 3 have been generally recognized as *jus cogens*, i.e., as non-derogable rules of international law,<sup>25</sup> and the International Court of Justice has described common article 3 as setting forth "elementary considerations of humanity."<sup>26</sup>

of the Geneva Conventions, Additional Protocol II of 1977, and article 19 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. These legal sources do not use the term "grave breaches" or "war crimes." Further, the content of customary law applicable to internal armed conflict is debatable. As a result, in general, unless the parties to an internal armed conflict agree otherwise, the only offenses committed in internal armed conflict for which universal jurisdiction exists are "crimes against humanity" and genocide, which apply irrespective of the conflicts' classification.

*Id.* ¶ 42.

24. For example, article 3 of each of the Geneva Conventions provides in material part:

(1) Persons taking no 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 judgement pronounced by a regularly constituted court, affording all of the judicial guarantees which are recognized as indispensable to civilized peoples.

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

First Geneva Convention, *supra* note 5, art. 3, 6 U.S.T. at 3116, 75 U.N.T.S. at 32; Second Geneva Convention, *supra* note 5, art. 3, 6 U.S.T. at 3220, 75 U.N.T.S. at 86; Third Geneva Convention, *supra* note 5, art. 3, 6 U.S.T. at 3318, 75 U.N.T.S. at 136; Fourth Geneva Convention, *supra* note 5, art. 3, 6 U.S.T. at 3518, 75 U.N.T.S. at 288.

25. Parker & Neylon, *supra* note 14, at 434-35.

26. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 4, 105



Common article 3 is really divided into two parts. Sections 3(1) and (2) contain "affirmative" duties: those not taking an active part in the fighting are to be treated humanely,<sup>27</sup> and the wounded and sick are to be cared for.<sup>28</sup> Common article 3(1)(a)-(d) sets forth the core of this provision and expressly prohibits with respect to any "protected person": murder, mutilation, cruel treatment and torture; the taking of hostages; humiliating treatment; and the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court.<sup>29</sup>

The Nuremberg Charter, on the other hand, clearly extends criminal jurisdiction to misconduct taking place both in international and in non-international armed conflict. Among its prohibitions are "crimes against humanity." These include:

[M]urder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, *before or during* the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.<sup>30</sup>

Also applicable both to international and to internal armed conflict is the Genocide Convention.<sup>31</sup> The Genocide Convention renders unlawful acts whose purpose is to "destroy, in whole or in part, a national, ethnical, racial or religious group," including acts directed at eliminating the group's intellectual, political, academic or business leadership.<sup>32</sup> The intent to destroy the designated group must be present for a violation to

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(June 27).

27. See *supra* note 24 (text of article 3(1)).

28. See *supra* note 24 (text of article 3(2)).

29. See *supra* note 24 (text of article 3(1)(a)-(d)).

30. Nuremberg Charter, *supra* note 6, art. 6(c), 59 Stat. at 1547, 82 U.N.T.S. at 288-89 (emphasis added). Unlike the statute for the Rwandan tribunal (discussed in part II.B), the statute for the Yugoslavian tribunal mirrors faithfully the provisions of the Nuremberg Charter and does not require that violations be pursuant to a policy of discrimination. *Statute of the Yugoslavian Tribunal*, *supra* note 16, ¶ 5. Notwithstanding, the Commission of Experts for Yugoslavia has determined that an article 6(c) violation must be based on an official policy of discrimination. *Report of the Commission of Experts for Yugoslavia*, *supra* note 9, at 23, ¶ 84.

31. Genocide Convention, *supra* note 7.

32. *Id.* arts. I-II, 78 U.N.T.S. at 280-81.

be established. Included as offenses under this convention are conspiracy, incitement or attempt to commit genocide.<sup>33</sup> For example, imposing measures calculated to prevent births within a group and transferring children of the group to another area can constitute violations within the meaning of the convention if undertaken with the intent to bring about the group's destruction.<sup>34</sup>

### B. *The Rwandan War Crimes Tribunal*<sup>35</sup>

Although it is clear that the recent war in Rwanda was not exclusively internal, it was primarily so. Accordingly, those provisions in the Geneva Conventions applicable to international armed conflict, i.e., all of the "grave breaches" provisions, do not expressly govern. Moreover, as noted earlier, the only bodies of law containing criminal sanctions which at least facially apply to non-international armed conflict are the Genocide Convention and the Nuremberg Charter's article 6(c) which prohibits "crimes against humanity."<sup>36</sup> The Genocide Convention<sup>37</sup> applies in full force to the 1994 conflict in Rwanda. Moreover, U.N. legal experts have defined "crimes against humanity" as:

[G]ross violations of fundamental rules of humanitarian and human rights law committed by persons demonstrably linked to a party to the armed conflict, as part of an official policy based on discrimination against an identifiable group of persons, irrespective of war and the nationality of the victim, and includes acts such as the following:

- Murder;
- Extermination;
- Enslavement;

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33. *Id.* arts. II-III, 78 U.N.T.S. at 280-81.

34. *Id.* art. II, 78 U.N.T.S. at 280-81.

35. Subject matter jurisdiction is contained in the statute of the tribunal which is set out in the Security Council resolution establishing the tribunal. *Statute of the Rwandan Tribunal*, *supra* note 4.

36. Although the Nuremberg Tribunal interpreted article 6(c) to relate only to offenses committed during the course of World War II, post-Nuremberg developments indicate that the offense "crimes against humanity" applies both in international and in non-international armed conflict and "irrespective of the war and the nationality of the victim." *Report of the Commission of Experts for Rwanda*, *supra* note 10, ¶ 135 (articulating the Rwandan Commission's definition of "crimes against humanity").

37. *See supra* notes 17, 24.

Deportation and population transfer;  
Imprisonment;  
Torture;  
Rape;  
Persecutions on political, racial and religious grounds;  
Other inhuman acts;  
Apartheid.<sup>38</sup>

U.N. jurisprudential experts have accepted that common article 3, (the prohibitions of which substantially overlap with those of article 6(c) of the Nuremberg Charter, applies also.<sup>39</sup> Supplementing common article 3 are various provisions of Protocol II under the Geneva Conventions;<sup>40</sup> Protocol II being the instrument intended to expressly govern non-international armed conflict.

Specifically, article 4 of Protocol II renders unlawful with respect to those who are *hors de combat* the following: murder; cruel treatment; any kind of corporal punishment; collective punishments and the taking of hostages; acts of terrorism; humiliating and degrading treatment (e.g., enforced prostitution and any form of assault); slavery; pillage; and threats to commit any of the foregoing acts.<sup>41</sup> Similarly, article 13 provides that the civilian population shall not be the subject of attack,<sup>42</sup> while article 14 extends similar protection to objects

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38. *Report of the Commission of Experts for Rwanda*, *supra* note 10, ¶ 135. The official policy of discrimination must be based on ethnic, racial, religious, national or political grounds. *Statute of the Rwandan Tribunal*, *supra* note 4, art. 3. This approach was based on the definition offered by the Commission of Experts for Yugoslavia. See *Report of the Commission of Experts for Yugoslavia*, *supra* note 9, ¶ 22.

39. *Report of the Commission of Experts for Rwanda*, *supra* note 10, at 23, discussing the common article 3 of the Geneva Conventions. Common article 3 and Protocol II were specifically included in the Rwanda tribunal's jurisdictional base in the tribunal's statute. *Statute of the Rwandan Tribunal*, *supra* note 4, art. 5. Common article 3 contains no express criminal sanctions provisions making violation of its provisions a "grave breach" and just how it is to be made applicable is left in mystery by the Commission of Experts. As will be discussed at greater length in part IV.E of this paper, however, common article 3 has a bearing on universal jurisdiction in that it embraces a body of *jus cogens* norms, violations of which may constitute international crimes.

40. *Report of the Commission of Experts for Rwanda*, *supra* note 10, ¶ 110. Like common article 3, Protocol II contains no express criminal sanctions provision. See generally Protocol II, *supra* note 5.

41. Protocol II, *supra* note 5, art. 4, 1125 U.N.T.S. at 612.

42. *Id.* art. 13(2), 1125 U.N.T.S. at 615.

necessary for civilian survival.<sup>43</sup> Article 17 forbids the forced displacement of the civilian population except in the interests of civilian safety or for "imperative military reasons."<sup>44</sup>

Moreover, Protocol II develops and clarifies the "affirmative" responsibilities of the parties to the conflict contained in common article 3. Articles 5, 7 and 9, for instance, mandate that those who have been removed from active fighting receive "humane treatment" including medical care and proper hygiene; that there be no distinction among those receiving such aid except on medical grounds; and that "protected persons" shall be allowed to practice their religion.<sup>45</sup>

### III. THE VIOLATIONS

This section analyzes the putative violations of international humanitarian law which have taken place in Yugoslavia and Rwanda with specific reference to the above-cited provisions of international criminal law. The sources for the findings of probable violation are the following reports of the U.N. body of experts impanelled to elucidate the law and the facts in each case: (i) the Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780;<sup>46</sup> and (ii) the Preliminary Report of the Independent Commission of Experts Established in accordance with Security Council Resolution 935.<sup>47</sup>

#### A. *International Humanitarian Law Violations in Yugoslavia*

By way of preface, it is important to note that, whereas the Commission of Experts for Yugoslavia has concluded that the war in the former Yugoslavia is primarily of an international character, it actually is informed with characteristics of both internal and international armed conflict. A short comparison of the dates of the actual events and the time span forming the basis of the tribunal's jurisdiction is sufficient to make

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43. *Id.* art. 14, 1125 U.N.T.S. at 615.

44. *Id.* art. 17(1), 1125 U.N.T.S. at 612-14; see also *Report of the Commission of Experts for Rwanda*, *supra* note 10, at 22-25.

45. Protocol II, *supra* note 5, arts. 5, 7, 9, 1125 U.N.T.S. at 612-14; see also *Report of the Commission of Experts for Yugoslavia*, *supra* note 9, at 22-25.

46. *Report of the Commission of Experts for Yugoslavia*, *supra* note 9, at 3.

47. *Report of the Commission of Experts for Rwanda*, *supra* note 10, ¶ 1.

this essential point.

The tribunal's jurisdiction extends to international humanitarian law violations taking place in the former Yugoslavia since January 1991.<sup>48</sup> At that time, however, Yugoslavia was still an integrated sovereign state recognized as such by the international community. Disintegration began with the separation of Slovenia on June 25, 1991, which was followed by a unilateral declaration of independence by Croatia on June 29, 1991. Although both separations occasioned fighting, the declaration of independence by Croatia brought about substantial resistance on the part of the Serbs and many of the international humanitarian law violations to be considered by the tribunal arose in the ensuing Serb/Croat armed contest.<sup>49</sup>

The Croat separation was then followed by that of Bosnia-Herzegovina on March 6, 1992.<sup>50</sup> Armed conflict ensued which was carried out, on the Serb side, by paramilitary units consisting of Bosnian Serbs on the one hand and regular forces of the Yugoslav Popular Army (JNA) on the other.<sup>51</sup> As of June 1992, however, the JNA professes to have withdrawn from the conflict leaving the fighting entirely in the hands of Bosnian paramilitary groups such as Arken's "Tigers" and Seselj's "White Eagles" (commonly called "Chetniks").<sup>52</sup> The net effect of the JNA's claimed withdrawal from the fighting is to restore the hostilities, as of June 1992, once again to the status of internal armed conflict.

The violations within Yugoslavia can be divided into two general categories. The first classification falls under the broad heading of human rights violations which are infractions of the fundamental norms protected by: the Nuremberg Charter,<sup>53</sup> the "grave breaches" provisions of the Geneva Conventions,<sup>54</sup> the Genocide Convention,<sup>55</sup> and common article 3.<sup>56</sup> The second type of violation flows more from the provisions of Protocol

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48. *Report of the Commission of Experts for Yugoslavia*, *supra* note 9, at 7.

49. *Id.* at 29-33.

50. *Id.* at 30.

51. *Id.*

52. *Id.*

53. Nuremberg Charter, *supra* note 6, art. 6(c), 59 Stat. at 1547, 82 U.N.T.S. at 288-89.

54. *See supra* note 17.

55. Genocide Convention, *supra* note 7.

56. *See supra* note 24.

I regulating the manner in which armed conflict is to be waged.<sup>57</sup>

The Commission of Experts for Yugoslavia has determined that, since January 1991, the Serbs have pursued a policy of "ethnic cleansing" against other ethnic and religious groups within the former Yugoslavia.<sup>58</sup> The violators have sought to achieve their objective, moreover, by means of murder, torture, and rape; mass deportations; confinement in ghetto areas; and deliberate attacks on the civilian population and civilian property.<sup>59</sup> The Report of the Commission of Experts for Yugoslavia (Yugoslavia Report) annotates some arresting incidents of the policy of ethnic cleansing in action.

Among other things, the Yugoslavia Report sets forth actual events in which the entire civilian population of an important region, consisting of approximately 47,000 persons, was evacuated in the wake of a significant military attack against a substantially undefended location.<sup>60</sup> In the deportations which followed the evacuation, the Serbs segregated their captives into two groups: one consisting of women, elderly men, and boys, the other of comparatively young men. The two groups were then bused off to separate concentration camps where each suffered intense humanitarian abuse. The object of this wholesale attack, according to U.N. findings, was the destruction of the non-Serbian leadership in the area.<sup>61</sup>

The conditions maintained in the camps are characterized by large scale humanitarian law violations, including "killing, torture and rape."<sup>62</sup> Those persons targeted for punishment are often prominent members of the ethnic community under attack.<sup>63</sup> Rape has also been used by the Serbs as an instrument of policy, being deployed in order to promote shame and suffering in the victim as part of the perpetrators' overall displacement plan. The victims of this policy have been essentially the Bosnian Moslems.<sup>64</sup>

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57. See, e.g., Protocol I, *supra* note 5, art. 85(3)-(4), 1125 U.N.T.S. at 42.

58. *Report of the Commission of Experts for Yugoslavia*, *supra* note 9, ¶¶ 129-150.

59. *Id.*

60. *Id.* ¶¶ 163-167.

61. *Id.* ¶¶ 168-173.

62. *Id.* ¶¶ 228-229.

63. *Id.* ¶ 230(k).

64. *Id.* ¶ 251.

These violations quite clearly entail the broadest possible use of the tribunal's jurisdictional base. The deliberate imposition of suffering as part of a policy to eliminate an ethnic or religious group quite clearly falls within the Genocide Convention. Moreover, to the degree that these acts constitute inhuman conduct such as violence to life and person, murder, humiliating treatment, torture, and mass deportations, they would both fall within the "grave breaches" provisions of the Geneva Conventions and Protocol I (if committed during international armed conflict), and constitute colorable violations of article 6(c) of the Nuremberg Charter (if committed in civil war).<sup>65</sup> Whether the conflict is international or non-international in character is largely irrelevant where these kinds of violations are concerned.

Also included within the probable violations noted by the Commission of Experts for Yugoslavia are the following:

- (i) The siege of Sarajevo which commenced on April 5, 1992. The strongly civilian character of the targets impacted and the disproportionate number of shells actually launched against the City on a daily basis (200 to 1,000) indicate a violation of article 85(3) of Protocol I prohibiting both a deliberate attack against civilians and any attack wherein the resulting injury to civilians and civilian property would be excessive.<sup>66</sup>
- (ii) The Serbian bombardment of the City of Dubrovnik in Croatia by the JNA during 1991 through 1993. The loss of the City constituted a considerable historical calamity and its military significance was non-existent. The Commission of Experts has indicated that the bombardment constitutes a deliberate attack against civilians and their property in violation of article 85(3) of Protocol I.<sup>67</sup>
- (iii) The destruction of the Mostar Bridge in Bosnia-Herzegovina in 1993, probably by Croat soldiers acting on their own initiative. The Bridge was a cultural link between Muslim and Croat communities in Bosnia.<sup>68</sup>

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65. Nevertheless, as will be developed in part IV of this paper, a restrictive interpretation of crimes against humanity (i.e., one requiring that violations be pursuant to an "official policy of discrimination") may have an undesirable delimiting effect on subject matter jurisdiction in this respect.

66. *Id.* ¶¶ 188-194; see also Protocol I, *supra* note 5, art. 85(3), 1125 U.N.T.S. at 42.

67. *Id.* ¶¶ 298-301; see also Protocol I, *supra* note 5, art. 85(3), 1125 U.N.T.S. at 42.

68. *Report of the Commission of Experts for Yugoslavia*, *supra* note 9, ¶¶ 295-

Some of the military misconduct discussed above may well fall into that class of violation which is subject to the tribunal's jurisdiction only in the event that it determines the war in Yugoslavia to be of an international character. This characterization would be true, for instance, of attacks involving legitimate military targets where the resulting damage to civilians and civilian objects was disproportionate. Such activity, provided that it does not entail a direct attack on the civilian population, arguably relates to the manner in which armed conflict is waged and does not necessarily pertain to treatment of a "protected person" who is within the control of one of the warring parties.

Accordingly, such violations may give rise to universal jurisdiction only insofar as they are described in instruments specifically governing international war. In this case, such activity is proscribed in article 85(3) of Protocol I. To the degree that such misconduct occurs during internal conflict and does not involve the deliberate imposition of harm or suffering, it may escape being treated as a violation either under article 6(c) of the Nuremberg Charter or under common article 3 of the Geneva Conventions.<sup>69</sup>

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69. Compelling arguments have been advanced, however, to the effect that common article 3 has incorporated the proportionality principle codified in article 85(3) of Protocol I so as to make the latter applicable in internal armed conflict. See THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 34-36 (1989) [hereinafter HUMAN RIGHTS]. 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 an 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.

Sylvie-Stoyanka Junod, International Committee of the Red Cross, *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 (Protocol II)*, in COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA



*B. International Humanitarian Law Violations in Rwanda*

The Security Council Resolution establishing the Rwandan tribunal indicates that it is to consider international humanitarian law violations arising in Rwanda between January 1, 1994 and December 31, 1994.<sup>70</sup> The findings of United Nations experts are to the effect that massive violations of international humanitarian law, against members of the Tutsi tribe or ethnic Hutus who were either moderate or who actually opposed the regime of Rwanda's former President, Juvenal Habyarimana, have been committed within Rwanda.<sup>71</sup> The perpetrators have been mostly armed gangs trained by the Presidential Guard (the *interahamwe*) and supported by the Rwandese armed forces.<sup>72</sup>

The Report of the Commission of Experts for Rwanda (Rwanda Report) has determined that numerous killings and acts of torture and other cruel and degrading treatment have been committed by the former Rwandese Patriotic Front (RPF) army and extremist Hutus during 1994. The Rwanda Report notes that the systematic nature of these killings has extended back over many years. The years 1959, 1963, 1966, 1973, and 1990 through 1993 were periods of mass slaughter conducted against members of the Tutsi tribe.<sup>73</sup> In April 1994, however, the former President, Juvenal Habyarimana together with members of his entourage were killed when his plane was attacked.<sup>74</sup> This event served as the predicate for the large-scale violations of international humanitarian law which followed.<sup>75</sup>

According to the weight of the evidence reviewed by the Committee of Experts for Rwanda, the mass exterminations of Tutsis by Hutu elements were "committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such" so as to constitute a *prima facie* violation of the Genocide Convention.<sup>76</sup> Indeed, evidence consisting of au-

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CONVENTIONS OF 12 AUGUST 1949, 1449-50 (Y. Sandoz et al. eds., 1987) (footnotes omitted) [hereinafter COMMENTARY TO PROTOCOL III].

70. *Statute of the Rwandan Tribunal*, *supra* note 31, art. I.

71. *Report of the Commission of Experts for Rwanda*, *supra* note 4, ¶ 55.

72. *Id.* ¶ 65.

73. *Id.* ¶ 55.

74. *Id.* ¶ 56.

75. *Id.* ¶¶ 56, 58.

76. *Id.* ¶ 58.

dio tapes demonstrates the existence of *Escadrons de la Mort* set up by the Habyarimana for the purpose of carrying out exterminations.<sup>77</sup> Within a few hours of the plane crash, a “provisional government” was formed and barricades were erected along certain major thoroughfares. Since April 1994, more than 500,000 persons have lost their lives in Rwanda in the ensuing slaughter.<sup>78</sup>

On April 7, 1994, members of the Presidential Guard went to the homes of certain moderate political leaders and killed them.<sup>79</sup> On April 8, a systematic slaughter of Tutsis was commenced by the Presidential Guard in Kigali. At this time roadblocks had been set up and persons holding Tutsi national identification cards were singled out and summarily executed.<sup>80</sup> On April 9, this methodical killing was continued in Kigali by the Rwandese military, now aided by the *interahamwe* militia. Within the next week, an estimated 20,000 persons had been killed within Kigali by the Presidential Guard and militia.<sup>81</sup>

The Kigali killings set the pattern for others to follow. According to a Human Rights Watch Report relied on by the Rwandan Commission of Experts, the following are rough statistics with respect to extra-judicial killings in Rwanda in the wake of the death of Juvenal Habyarimana:

2,800 persons were killed in a church in Kinbungo; 6,000 Tutsis were killed in a church in Cyahinde; 4,000 were killed in a church in Kibeho; 2,000 were killed in a parish in Mibirizi; 4,000 were killed in Shanhi parish; sick patients in the hundreds together with medical staff were killed in Kigali and in Butare; 31 Tutsi orphans and 11 Red Cross volunteers were killed in an orphanage in Butare; 88 students were slain in their school in Gikongo.<sup>82</sup>

The obvious incentive for these crimes was the elimination

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77. *Id.* The extra-judicial executions of Tutsis by Hutu elements was unquestionably facilitated by the former government's classification of Rwandese by ethnic group. Such ethnic designation would have been indicated on each Rwandese's national identity card. *Id.* ¶ 61.

78. *Id.* ¶ 92.

79. *Id.* ¶ 68.

80. *Id.* ¶ 69.

81. *Id.* ¶ 72.

82. *Id.* ¶ 73.

of the Tutsi population according to a pre-planned program. The evidence at the disposal of the United Nations fact gatherers leads to the ineluctable conclusion that the Genocide Convention has been openly and transparently violated.<sup>83</sup> Although this reduces the tribunal's reliance on its remaining jurisdictional bases, it does not eliminate them. The mass killings described in the Report of the Committee of Experts for Rwanda quite clearly demonstrates violation of the Nuremberg Charter in that these exterminations are the equivalent of violations of fundamental human rights linked to a policy of discrimination against an identifiable group of persons.<sup>84</sup>

#### IV. COMMENT ON THE LAW AND THE VIOLATIONS

As indicated earlier, the essential questions treated in this discussion arise out of the fact that many of the violations taking place within the former Yugoslavia and all of the violations taking place within Rwanda have occurred in an environment of non-international war. The "grave breaches" provisions of the Geneva Conventions do not extend to military misconduct in the context of internal armed conflict.

The U.N. legal experts have been unclear regarding the scope of international penal jurisdiction, particularly in the area of internal armed conflict. The Commission of Experts for both Rwanda and Yugoslavia have given a highly restrictive interpretation of "crimes against humanity" in article 6(c) of the Nuremberg Charter limiting the tribunal's jurisdiction over mass exterminations, deportations, enslavement, and other cruel and inhuman acts perpetrated against civilians to misconduct which is committed pursuant to an official policy of discrimination.<sup>85</sup>

On the other hand, the Commission of Experts for Rwanda has accepted the suggestion of the Commission of Experts for Yugoslavia that common article 3 establishes criminal jurisdiction over such offenses committed in time of civil war.<sup>86</sup> How-

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83. *Id.* ¶ 156; *see also id.* ¶ 50.

84. *Id.* ¶¶ 125-146.

85. *Id.* ¶ 135; *Report of the Commission of Experts for Yugoslavia*, *supra* note 9, ¶ 84.

86. *Report of the Commissions of Experts for Rwanda*, *supra* note 10, ¶¶ 135-146.

ever, neither the Yugoslavian nor the Rwandan Commissions of Experts offers an explicit explanation of how article 3 is to play a role in establishing international criminal jurisdiction<sup>87</sup> (common article 3 contains prohibitions practically identical to those in article 6(c) of the Nuremberg Charter, but does not require that violations be committed under an official policy of discrimination). Furthermore, common article 3 does not contain a criminal sanctions provision. That is, it is not a "grave breach" giving rise to universal jurisdiction. Likewise, Protocol II of the Geneva Conventions, which governs explicitly non-international armed conflict, does not contain a criminal sanction provision.<sup>88</sup> Thus, the essential question raised is: to what degree does universal criminal jurisdiction obtain with respect to mass exterminations, deportations, enslavement, and other cruel and inhuman acts committed during internal armed conflict in the absence of an official policy based on discrimination?

#### A. Criminalization of Common Article 3

The most dramatic development regarding the tribunals' subject matter jurisdiction is the virtual criminalization of common article 3 of the Geneva Conventions by the U.N. Security Council. As indicated, this development has been accepted without explanation by the Rwandan Commission of Experts.<sup>89</sup> It should be noted that there has been considerable movement in this direction, mostly with respect to the Yugoslavian tribunal, notwithstanding that doubts have begun to materialize regarding the exclusively "international" character of the armed conflict taking place there.<sup>90</sup>

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87. The Report of the Commission of Experts for Yugoslavia, however, strongly suggests that article 6(c) of the Nuremberg Charter and common article 3 to the Geneva Conventions were co-extensive. *Report of the Commission of Experts for Yugoslavia*, *supra* note 9, ¶¶ 81-83. This treatment is not carried over into the Report of the Commission of Experts for Rwanda. *Report of the Commission of Experts for Rwanda*, *supra* note 10, ¶¶ 125-146.

88. See generally Meron, *supra* note 11, at 127-28.

89. See *supra* note 87 and accompanying text.

90. The internal/international war dichotomy of the two conflicts under discussion gives rise to a number of questions regarding the "bases and ranges" of both the Yugoslavian and the Rwandan war crimes tribunals' jurisdictional base. It must be mentioned that these questions tend to have more bearing on the Yugoslavian tribunal. The extrajudicial killings within Rwanda have been so transparently based on a policy of discrimination toward a targeted ethnic group that they

Among the arguments<sup>91</sup> which have been developed in favor of criminalization are:

(i) Article 3 of the statute of the Yugoslavian war crimes tribunal empowering the tribunal to apply the "laws and customs of war" embraces the customary law codified by common article 3.

(ii) As evidence that it is included within the "laws and customs of war," common article 3 has been incorporated into the municipal law of Yugoslavia and therefore it can be relied on by the tribunal as a basis for its own criminal jurisdiction.<sup>92</sup>

The conclusion that common article 3 may give rise to criminal jurisdiction has now gained acceptance in the war crimes process. Among other things, the appeals court for the Yugoslavian war crimes tribunal has ruled that individual criminal responsibility is obtained under common article 3 with respect to serious breaches of customary rules and principles on internal conflicts.<sup>93</sup> The opinion is careful to note, however, that criminalizing serious violations of international humanitarian law arising in internal armed conflict is "fully warranted from the point of view of substantive justice and

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satisfy both the Genocide Convention as well as the conservative interpretation of the Nuremberg Charter's "crimes against humanity" provision which has been offered by United Nations' legal experts. The assessment, however, that the nature of the Yugoslavian conflict is essentially international in nature may prove to be misplaced. As previously noted, many of the violations would have occurred while Yugoslavia was still a sovereign entity, and the violations taking place in Bosnia-Herzegovina (by far the most serious) would have occurred after the JNA professed withdrawal from that state relegating the conflict to the status of an essentially civil war.

91. See, e.g., Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 AM. J. INT'L L. 78 (1994).

92. *Id.* at 82-83. These two arguments are clearly related. Under the interpretation offered, the "laws and customs of war" would include the entire body of humanitarian law in force in the former Yugoslavia. *Id.* at 82. It should be noted in this respect that it is not only the "grave breaches" which the Geneva Conventions contemplate as criminal violations: the Conventions call upon the signatory parties to adopt measures "suppressing" violations of the Conventions, other than "grave breaches." See Fourth Geneva Convention, *supra* note 5, art. 146, 6 U.S.T. at 3616, 75 U.N.T.S. at 386.

93. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction in the Matter of Prosecutor v. Dusko Tadic, Case No. IT-94-1-AR72, at 70 (Int'l Trib. for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed on the Territory of the Former Yugoslavia since 1991).

equity."<sup>94</sup> In this respect:

[S]uch violations were punishable under the Criminal Code of the Socialist Republic of Yugoslavia and the law implementing the two Additional Protocols of 1977. The same violations have been made punishable in the Republic of Bosnia and Herzegovina by virtue of the decree of 11 April 1992.<sup>95</sup>

The premise that a violation of any of the provisions of the Geneva Conventions may provide the basis for international penal jurisdiction as an infringement of the "laws and customs of war" is considerably enhanced by the overriding viewpoint of the Commentary to the Conventions (Commentary) which is to the effect that "[t]he Geneva Conventions form part of what is called the laws and customs of war, violations of which are commonly called war crimes."<sup>96</sup>

The decision of the appellate tribunal that common article 3 confers criminal jurisdiction over serious violations of international humanitarian law taking place in internal armed conflict constitutes a dramatic step forward. The implicit limitations in the court's ruling, however, must not be overlooked. In this respect, express criminalization under municipal law may be essential to avoid application of the *nullum crimen sine lege* doctrine where crimes not entailing "grave breaches" or violations of well-established customary rules are concerned. Article 6(2) of Protocol II of the Geneva Convention provides that "no one shall be held guilty of any criminal offense on account of any act or omission which did not form a criminal offence, under the law, at the time when it was committed."<sup>97</sup>

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94. *Id.*

95. *Id.* at 70-71.

96. COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 583 (Oscar M. Vohler & Henri Carsier eds., 1958) [hereinafter COMMENTARY TO GENEVA CONVENTION IV].

97. Protocol II, *supra* note 5, art. 6(2)(c), 1125 U.N.T.S. at 614. Importantly, the Commentary to Protocol II indicates that "crimes against humanity" would not be precluded by the *nullum crimen sine lege* doctrine under article 6(2), but no other body of customary international law is referred to for purposes of the exception. The Commentary to Protocol noted:

The reference to international law is mainly intended to cover crimes against humanity. A breach of international law should not go unpunished on the basis of the fact that the act or omission (failure to act) concerned was not an offence under the national law at the time it was committed.

The tribunals for both Yugoslavia and Rwanda will have to decide what scope they will give to the *nullum crimen sine lege* doctrine. The Commentary to Geneva Convention IV, in making recommendations on municipal legislation, takes considerable pains to indicate that the legislation be as detailed as possible and contain specific provisions dealing with penalties.<sup>98</sup> Elsewhere the Commentary cites with approval such specific legislation as putting to rest entirely legitimate concerns regarding the pernicious effect of retroactively applied penal sanctions.<sup>99</sup> The need for specific legislation is particularly called for in the present circumstances in light of the novelty of the idea that common article 3 embraces a criminal standard.<sup>100</sup> The Commission of Experts for Yugoslavia had earlier concluded that, if the war were exclusively non-international in character, only the Genocide Convention and article 6(c) of the Nuremberg Charter would clearly apply as conferring universal jurisdiction.<sup>101</sup>

Accordingly, the only body of jurisprudence constituting established precedent for finding criminal responsibility for mass exterminations, deportations, enslavement, and other cruel and inhuman acts committed during internal conflict

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Junod, COMMENTARY TO PROTOCOL II, *supra* note 69, at 1400.

98. COMMENTARY TO GENEVA CONVENTION IV, *supra* note 96, at 591.

99. Commentary III provides that:

In Anglo-Saxon countries, the violation of a rule of international law, whether explicit or customary, and even if that rule does not make provision for penal sanctions, entitles national tribunals to pass sentence. In other countries, on the other hand, and in particular the countries of the European continent, penal law, if it is to be applicable, must include not only formal regulations but also provisions determining the nature and severity of the penalty. In these latter countries, the maxim of *nulla poena sine lege* remains fully valid.

COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 618 (Frederic Siordet & Claude Pilloud eds., 1960).

100. The Report of the Secretary General to the Yugoslavian tribunal's statute indicates that, in light of the *nullum crimen sine lege* doctrine, the tribunal should only "apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence by some but not all states to specific conventions does not arise." *Statute of the Yugoslavian Tribunal*, *supra* note 6, ¶ 34. That Report also notes that such customary law clearly embraces all of the Geneva Conventions of August 12, 1949. *Id.* Nonetheless, the Report notes that the Hague Convention, "as interpreted and applied by the Nuremberg Tribunal," provides the basis for the article in the statute relating to the "laws and customs of war." *Id.* ¶ 44. The Hague Convention relates only to wars of an international character.

101. *Report of the Commission of Experts for Yugoslavia*, *supra* note 9, ¶ 42.

continues to be article 6(c) of the Nuremberg Charter, proscribing "crimes against humanity."<sup>102</sup> Unlike common article 3, "crimes against humanity" have not suddenly surfaced in the war crimes process as constituting an independent basis for individual criminal responsibility. More importantly, article 6(c) of the Nuremberg Charter does not depend for its enforcement on the degree to which its standard has been adopted in corresponding municipal legislation by the country in which the international humanitarian law violations have putatively taken place. Rather, the offense "crimes against humanity" gives rise to universal jurisdiction over individual violators without the need for such external references. In this way, article 6(c) of the Nuremberg Charter provides a more vital mechanism for setting precedent in the area of protecting human rights in internal armed conflict than does common article 3.

In this context, the United Nations restrictive reading of article 6(c) becomes highly problematic. The conditions to its reach, namely that criminal acts must be pursuant to an official policy of discrimination, create a significant impediment to proving that otherwise qualifying violations amount to criminally sanctionable activity. As concerns Yugoslavia, for instance, there are findings that many of the violations in Bosnia-Herzegovina (organization of the camps; cruel and degrading treatment; rape as an instrument of policy) were for the express purpose of punishing and in some instances, eliminating, non-Serbian ethnic and religious groups. If such intent were to be proven at trial, this finding would place the misconduct in question squarely within the Nuremberg Charter's article 6(c), (as interpreted in this paper) and arguably within the Genocide Convention. Nevertheless, the requirement that the exterminations and other cruel and inhuman treatment be pursuant to "an official policy of discrimination" adds an important evidentiary hurdle which may not be possible to meet in every instance.<sup>103</sup>

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102. Nuremberg Charter, *supra* note 6, art. 6(c), 59 Stat. at 1547, 82 U.N.T.S. at 288-89.

103. Perhaps of more importance, the jurisdictional limitation announced by the Commission of Experts would delimit the jurisdictional competence of the Yugoslavian tribunal to try atrocities committed by the Bosnian Serbs under article 6(c) of the Nuremberg Charter. According to the Commission of Experts, violations must



*B. Summary of Arguments Against Interpretation of "Crimes Against Humanity" as Requiring an Official Policy of Discrimination*

As noted previously, this paper urges a construction of article 6(c) of the Nuremberg Charter which would essentially conflate the crimes identified in it with the substantive violations described in common article 3. The arguments supporting this interpretation are set forth in detail below. In summary form, they are as follows: first, the clear and unambiguous language of article 6(c) indicates that no policy of discrimination is necessary for a violation to be established in connection with murders, exterminations, deportations, and other cruel and inhumane acts—such a qualification existing only with respect to persecutions. Second, this interpretation is in conformity with the history of both common article 3 and of article 6(c) of the Nuremberg Charter which indicates that these two instruments were codifications of *jus cogens* norms. These norms have been described by the International Court of Justice as "elementary considerations of humanity."<sup>104</sup> The substantive provisions of both "crimes against humanity" and common article 3 reveal that they are directly derived from customary law relating to "war crimes," principles which are now codified in the "grave breaches" provisions of the Geneva Conventions of August 12, 1949. These provisions, which are *jus cogens*, do not themselves require a policy of discrimination to be present to confer universal jurisdiction.

Finally, since the core offenses underlying crimes against humanity and common article 3 are *jus cogens*, violators of these fundamental norms may, in appropriate circumstances, be made the subject of universal jurisdiction, even in the absence of convention, on the theory that the perpetrators have rendered themselves *hostes humani generis*. A plain meaning interpretation which gives plenary effect to the peremptory norms underlying article 6(c) of the Nuremberg Charter and

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be pursuant to an official policy of discrimination, implying that some state action is required. *Report of the Commission of Experts for Yugoslavia*, *supra* note 9, ¶ 84. If the Bosnian Serbs were acting on their own, however, and without any overt or covert encouragement from Belgrade, it is hard to see how crimes within the meaning of article 6(c) (as interpreted) could be established.

104. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 4, 105 (June 27).

common article 3 is to be preferred to an interpretation which departs from the unambiguous language of the provisions so as to derogate from these *jus cogens* norms.

### *C. A Plain Meaning Interpretation of Article 6(c) of the Nuremberg Charter*

The Rwandan Commission of Experts, in commenting on the scope of article 6(c) of the Nuremberg Charter, devoted considerable time to explaining the genealogy of "crimes against humanity." This genealogy makes it apparent that the Nuremberg tribunal considered article 6(c) as being specifically related only to war crimes and not as providing an independent jurisdictional basis which could cover offenses not arising in the course of World War II.<sup>105</sup> The Rwandan Report indicates that the post-Nuremberg history of the provision reveals clearly that article 6(c) may be applied in a non-international context. However, the Rwandan Report, citing the earlier Commission of Experts on the Former Yugoslavia, concludes that "crimes against humanity" are limited to mass exterminations and other inhuman acts which are predicated on an official policy of persecution or discrimination.<sup>106</sup> Such a reading, it is submitted, is undesirable in a number of respects.<sup>107</sup>

A plain meaning construction of the text of article 6(c) indicates that the words "on political, racial, or religious grounds" were not intended to modify the initial offenses set out in article 6(c) (i.e., murder, extermination, enslavement, etc.), but only the antecedent "persecutions."<sup>108</sup> In 1954, the

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105. *Report of the Commission of Experts for Rwanda*, *supra* note 10, ¶¶ 128-130.

106. *Id.* ¶ 134 (citing the *Report of the Commission of Experts for Yugoslavia*, *supra* note 9, ¶ 84).

107. For the view that post-Nuremberg developments have not embraced all offenses included in the text of article 6(c) of the Nuremberg Charter, and most particularly mass exterminations not undertaken pursuant to an official policy of discrimination or persecution, see M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 470-71 (1992).

108. Under the Vienna Convention on the Law of Treaties, treaties should be interpreted in accordance with the clear meaning of their terms and recourse should be had to the *travaux préparatoires* only in the event of ambiguity or to resolve confusion. Vienna Convention on the Law of Treaties, May 23, 1969, arts. 31-32, 1155 U.N.T.S. 331, 340 [hereinafter Vienna Convention]. Although the rules of the Vienna Convention do not expressly govern in that the Nuremberg Charter is not a treaty or convention in the customary sense, the Vienna rules should,

International Law Commission (ILC) adopted one of its several codifications of the term "crimes against humanity."<sup>109</sup> The definition contained in Article 2(11) of the 1954 Draft Code of Offenses (Draft Code) was the following:

Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of the authorities.<sup>110</sup>

The Draft Code of Offenses became subject to strong scholarly criticism. Most importantly, D.H.N. Johnson, in commentary which retains currency today as far as interpretation of article 6(c) is concerned,<sup>111</sup> was of the view that it was an undesirable restriction on the clear wording of the Nuremberg Charter to confine "inhumane acts" to the requirement that they be committed on social, cultural, political or racial

nonetheless, apply by analogy. This is so because "crimes against humanity," like treaty law, has a textual foundation. The offenses deemed to be "crimes against humanity" clearly derive from a written international agreement—the Nuremberg Charter—between major warring powers, the principles of which were later unanimously approved by the United Nations General Assembly and so became a part of general international law. For a history of the Nuremberg Charter in this respect, see J.L. BRIERLY, *THE LAW OF NATIONS* 411 (1963).

109. See generally *Report of the ILC to the General Assembly*, [1954] 2 Y.B. Int'l L. Comm'n 150, U.N. Doc. A/2673.

110. *Draft Code of Offenses against the Peace and Security of Mankind*, U.N. GAOR, 9th Sess., Supp. No. 9, art. 2(11), U.N. Doc. A/2693 (1954). The ILC has historically been concerned with distinguishing between those offenses which are properly classed as international crimes by states and criminal acts by individuals which give rise to universal jurisdiction. Accordingly:

[t]he ILC observed that in adopting the designation "international crime", the Commission intends only to refer to acts attributable to the State as such. Once again it wishes to sound a warning against any confusion between the expression "international crime" as used in . . . article [19 of the ILC's draft articles on state responsibility (part one)] and similar expressions such as "crime under international law", "war crime", and "crime against humanity", etc., which are used in a number of conventions and international instruments to designate certain heinous individual crimes for which those instruments require States to punish the guilty persons adequately.

MERON, *HUMAN RIGHTS*, *supra* note 69, at 210 n.226 (1989) (quoting [1976] 2 Y.B. Int'l L. Comm'n 119, UN Doc. E/CN.4/SERA/1976/Add.1).

111. See generally D.H.N. Johnson, *Draft Code of Offenses Against the Peace and Security of Mankind*, 4 INT'L & COMP. L.Q. 445 (1955).

grounds. Under the Nuremberg Charter, Johnson maintained, it was only "persecutions" which were required to be committed on "political, racial or religious" grounds. Johnson's evident concern on this point, which is the principal concern of this paper, was that the Draft Code, by conditioning "inhumane acts" in the same way as "persecutions," thereby created a heightened burden of proof for establishing "inhumane acts" which, under the Nuremberg Charter, exists only for "persecutions."<sup>112</sup>

Johnson was equally critical of the requirement that there be state action or involvement before prosecutions of individuals could be initiated. Johnson pointed to the provisions of the Genocide Convention<sup>113</sup> which indicate unequivocally that an individual can be held responsible "under any circumstances."<sup>114</sup> This highly salient criticism reveals the underlying weakness of the construction of "crimes against humanity" which mandates that violations of article 6(c) be pursuant to an "official policy of discrimination" or requires formal state action. Such an interpretation upsets the fundamental parallelism existing between "crimes against humanity" and genocide and shows conclusively why individuals can be held criminally responsible for violations of fundamental human rights in the absence of a formal state integument.

That the interpretation offered by Johnson of "crimes against humanity" was in conformity both with the clear language of article 6(c) and with the understanding of those who drafted the document now seems ineluctable. A recent treatise on the Yugoslavian war crimes process quotes with approval the following language from an authoritative history of the Nuremberg Charter and Judgment:

It might perhaps be argued that the phrase 'on political, racial or religious grounds' refers not only to persecutions but also to the first type of crimes against humanity. The British Chief Prosecutor possibly held that opinion as he spoke of 'murder, extermination, enslavement, persecution on political, racial or economic grounds.' This interpretation, however, hardly seems to be warranted by the English wording and still less by the French text . . . Moreover, in its statement

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112. *Id.* at 465.

113. Genocide Convention, *supra* note 7, art. IV, 78 U.N.T.S. at 280-81.

114. Johnson, *supra* note 111, at 465.

with regard to von Schirach's guilt the Court designated the crimes against humanity as 'murder, extermination, enslavement, deportation, and other inhumane acts' and 'persecutions on political, racial or religious grounds.'<sup>115</sup>

The interpretation that "crimes against humanity" requires state action, and specifically a state policy of discrimination, has been supported by eminent publicists, including M. Cherif Bassiouni.<sup>116</sup> It is important to note, however, that Bassiouni does not find such an interpretation grounded in the language of article 6(c). On the contrary, Bassiouni maintains that the need for state action flows from a dichotomy between those crimes which fall exclusively under municipal criminal jurisprudence and those which possess some nexus to the international community which justifies the latter in treating them as criminal violations.<sup>117</sup> Thus the crimes of murder, enslavement and torture are crimes under most of the world's criminal codes; accordingly, they would be punishable primarily under municipal law. Some "international element" is necessary to subject these acts to universal jurisdiction, and this Bassiouni finds in state action or policy. Specifically, the author writes:

The prerequisite legal element discussed above [state action or policy] is, therefore, indispensable to the legal nature of "crimes against humanity," and must be established before an international criminal charge can be brought against an alleged perpetrator. This becomes particularly important since Post-Charter Legal Developments have removed the connection between "crimes against humanity" and "crimes against the peace" or "war crimes." In the absence of such a link to internationally prohibited conduct, "crimes against humanity" becomes less viable as an international crime

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115. VIRGINIA MORRIS & MICHAEL P. SCHARF, 1 AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS 74 n.236 (1995) (citing THE CHARTER AND JUDGEMENT OF THE NUREMBERG TRIBUNAL: HISTORY AND ANALYSIS 67 (1949)). Despite the evident intent of the framers and the clear language in the text, the United States took the position that "crimes against humanity" had to be committed on "national, political, ethnic, racial, gender or religious grounds." *Id.* The interpretation ultimately adopted by the Commission of Experts was in substantial conformity with the United States position.

116. See generally BASSIOUNI, *supra* note 107, at 470-71.

117. *Id.* at 247.

unless another link joins it to the valid sphere of international criminalization.<sup>118</sup>

Yet, the author does not clarify why state action or policy provides the only acceptable link to the international community which would repose in the latter an interest in enforcement. Moreover, such an approach implies that fundamental human rights must be violated by the sovereign for international criminal jurisdiction to be obtained. Such interpretation clearly contradicts the plain meaning of the Genocide Convention under which an individual can be held responsible "under any circumstances,"<sup>119</sup> irrespective of whether there is a state policy of discrimination. The construction also runs counter to the spirit and letter of common article 3 which applies *pari passu* to violations by the government and by the insurgents alike.<sup>120</sup>

The requirement of state action as applied to "crimes against humanity" conflates principles of international criminal jurisdiction where individual criminal responsibility is concerned, with principles regarding how such responsibility on the part of the state or its agents is asserted. Universal jurisdiction over the latter type of offense always requires a state policy pursuant to which individual violations are accomplished,<sup>121</sup> whereas jurisdiction over the former generally does not.

As will be developed at greater length in Part IV.D of this paper, individual criminal responsibility historically was obtained over those acts which the international community

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118. *Id.* at 261.

119. See Genocide Convention, *supra* note 7, art. IV, 72 U.N.T.S. at 280-81; Johnson, *supra* note 111, at 465.

120. As noted above, the appellate tribunal overseeing the Yugoslavian war crimes process has resolved that common article 3 of the Geneva Conventions may be criminally enforced, its conclusion being based, at least in part, on the premise that common article 3 codifies customary law. No objection to the applicability of common article 3 appears to have been lodged in the appeal to the effect that the provisions of article 3 would govern in the absence of a State involvement, i.e., would apply to violations committed by the insurgents. See Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction in the Matter of Prosecutor v. Dusko Tadic, Case No. IT-94-1-AR72, at 49-71 (Int'l Trib. for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed on the Territory of the Former Yugoslavia since 1991).

121. See, e.g., Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1, 15 (1986).

viewed as heinous and as inherently inimical to its collective well-being, even in the absence of treaty or other international agreement. The Commission of Experts for Rwanda was keenly aware of this distinction in its report which makes its adoption of a state action requirement all the more problematic. Specifically, the Commission of Experts for Rwanda found:

The attribution of responsibility to the individual in *propria personam* is not entirely new. Indeed, military trials of individuals for having committed war crimes date back to at least 1419, as Keen documents in his work *The Laws of War in the Middle Ages*. There is also the international trial of Peter von Hagenbach, which took place in 1474 for acts that today are considered crimes against humanity. International legal norms stipulating individual responsibility for slave-trading and slave-trafficking and for piracy arose out of the Congress of Vienna in 1815. Today these norms are considered part of customary international law and probably of *jus cogens*.<sup>122</sup>

In short, the interpretation of article 6(c) of the Nuremberg Charter put forward by Bassiouni (and apparently accepted by the Commission of Experts for both Rwanda and Yugoslavia) fails to take into account the misconduct of social and military aggregates which, although they lack sovereignty in the formal sense, wield power of such magnitude that they affect the community of states in a more than incidental way. These are the characteristics of armed insurgencies, such as the one now extant within Bosnia-Herzegovina in which the rebels have committed the greater proportion of human rights violations in the conflict.

Two elements other than the existence of state action or policy are recommended by Bassiouni for determining whether a given offense should constitute an international crime. These are: (i) the extent of the collective victimizations caused by the violations; and (ii) the "impossibility of preventing, controlling or suppressing the conduct in question which necessitates its international criminalization."<sup>123</sup>

The foregoing considerations are more appropriately applied in situations of internal armed conflict since they ignore

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122. *Report of the Commission of Experts for Rwanda*, *supra* note 10, ¶ 169.

123. BASSIOUNI, *supra* note 107, at 260.

the requirement of state action or policy and concentrate on the substance of the violation itself. Under these criteria, moreover, the violations must have risen to a certain level of intensity before international jurisdiction can be invoked. The effect of this requirement is to equate the level of violence needed for international jurisdiction over human rights violations with that normally prevailing during time of civil war. It should be noted in this respect that there is no clear definition in common article 3 as to what constitutes a war which is of a non-international character.<sup>124</sup> Accordingly, an interpretation of article 6(c) of the Nuremberg Charter which conditions universal jurisdiction on a certain level of human rights violations would tend to bring "crimes against humanity" into conformity with the essential precondition to jurisdiction under common article 3: the widespread social destabilization caused by civil war.

A third element could easily replace the requirement of "state action or policy" in addition to the other two requirements to complete the criteria for international criminalization: the degree to which the misconduct over which international jurisdiction is sought has become repugnant in the public conscience as based on the state of public international law. Of critical concern in this respect is the text of the Martens Clause contained in the preambles to the Hague Conventions of 1907:

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.<sup>125</sup>

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124. COMMENTARY TO GENEVA CONVENTION IV, *supra* note 96, at 35. It was thought best to leave the definition vague.

125. Hague Convention, *supra* note 8, pmb. ¶ 8, 36 Stat. at 279-80. For a discussion of the effects of the Martens clause on interpretation of the Geneva Conventions and Protocols, and on the Law of Geneva as a whole, see generally Shigeki Miyazaki, *The Martens Clause and International Humanitarian Law*, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOR OF JEAN PICTET 433 (Christophe Swinarski ed., 1984).



It is submitted in this connection that extrajudicial murders, torture, cruel and inhuman treatment, deportations and enslavements committed under conditions of significant internal upheaval are, in contemplation of international law, of such an unconscionable nature that perpetrators of these crimes are viewed as *hostes humani generis* irrespective of whether the violators are the sovereign state or the insurgents. Critical in making the determination of whether the misconduct in question offends the conscience of mankind and the dictates of humanity is whether the activity involved offends a *jus cogens* norm.<sup>126</sup>

As will be developed at greater length in Part IV.D. of this paper, not only have the core offenses of common article 3 which overlap with those contained in article 6(c) of the Nuremberg Charter been identified as peremptory norms, they also have been determined by the International Court of Justice to be "elementary considerations of humanity" in language clearly intended to mirror the provisions of the Martens Clause.<sup>127</sup> This determination, and the opinion of scholars discussed in the sections which follow, establish conclusively that the offenses contained in common article 3 and article 6(c) of the Nuremberg Charter are violations of peremptory norms which should be classed as international crimes under the criterion listed above, particularly that the acts proscribed are violations of fundamental human rights, given the state of *opinio juris*, and thus offend the usages of civilized peoples and the conscience of mankind.

Based on the foregoing, U.N. legal scholars, once having determined that the Nuremberg Charter had been construed to extend both to internal as well as international armed conflict, ought to have given article 6(c) an interpretation which was consistent with its plain or facial meaning. Such an approach would most clearly have given actual significance to the words used and would have avoided a construction under which "crimes against humanity" becomes a clear distortion of the unambiguous language appearing in the text. The clear language of article 6(c) does not require official action of any kind. Furthermore, article 6(c) unambiguously conditions only perse-

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126. Miyazaki, *supra* note 125, at 436-39.

127. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 4, 105 (June 27).

cutions by a policy of discrimination, giving rise to a construction that none of the other offenses listed in article 6(c) is so limited: *Expressio unius est exclusio alterius*.

*D. Prohibition of "Crimes against Humanity" and Common Article 3 as "Elementary Dictates of Humanity"*

At the outset of this discussion, it is imperative to note the direction which the war crimes process has taken as a whole. The statute for the Yugoslavia tribunal quite clearly defined "crimes against humanity" in broad terms and without the requirement that the violation be pursuant to an official policy of discrimination.<sup>128</sup> Apparently following the definition given in the Report of the Commission of Experts for Yugoslavia, however, the statute of the Rwandan tribunal adopted a more restrictive interpretation of article 6(c) of the Nuremberg Charter, i.e., that "crimes against humanity," to constitute violations, had to be committed on "national, political, ethnic, racial or religious grounds."<sup>129</sup> Thus, while not requiring an "official

128. *Statute of the Yugoslavia Tribunal*, *supra* note 16, art. 5. Article five provides that:

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.

*Id.*

129. *Statute of the Rwandan Tribunal*, *supra* note 4, art. 3. Article three provides that:

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation;
- (e) Imprisonment;
- (f) Torture;

policy" of discrimination, as is set forth in the Reports of the Commission of Experts for both Yugoslavia and Rwanda, the statute of the Rwandan tribunal evidently mandates that "crimes against humanity" be committed pursuant to a systematized pattern of discrimination.

Consistent with the foregoing evolution towards an ever more restrictive construction of article 6(c), the interpretation of "crimes against humanity" which is published in the Rwanda Report constitutes something of a departure from the definition provided in the Yugoslavia Report.<sup>130</sup> In the latter report, the Commission of Experts for Yugoslavia acceded that, to constitute violations of the Nuremberg Charter, the mass exterminations of civilians and other inhuman conduct had to be widespread and systematic as well as pursuant to a plan of "persecution or discrimination."<sup>131</sup> Yet, the same report maintains that the prohibitions of article 6(c) of the Nuremberg Charter, like common article 3 and the "grave breaches" provisions of the Geneva Conventions, are "mere codification of elementary dictates of humanity."<sup>132</sup> Because of its importance to the scope of "crimes against humanity," the Yugoslavian Commission's rationale in developing the relationship between article 6(c) of the Nuremberg Charter on the one hand, and common article 3 (together with relevant provisions of Protocol II) on the other, will be set out in full below:

In the context of crimes against humanity, it is relevant to observe that the same kind of prohibited acts listed in common article 3 (relevant conflicts not of an international char-

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- (g) Rape;
  - (h) Persecutions on political, racial and religious grounds;
  - (i) Other inhumane acts.

*Id.*

130. *Report of the Commission of Experts for Yugoslavia, supra* note 9, ¶¶ 81-83.

131. *Id.* The Yugoslavia Commission, however, offered some guidance as to what it meant by a common plan of persecution or discrimination:

Crimes against humanity are not confined to situations where there exists an intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such, which are preconditions for genocide. Crimes against humanity are, however, serious international violations directed against protected persons, in contradistinction to a fate befalling them merely as a side-effect, for example, of a military operation dictated by military necessity.

*Id.* ¶ 83.

132. *Id.*

acter) in the four Geneva Conventions of 1949, and in Protocol II to the Geneva Conventions are mere codifications of elementary dictates of humanity. Article 3 prohibits "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; taking of hostages; outrages upon personal dignity, in particular humiliating and degrading treatment; and the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituent court, affording all of the juridical guarantees which are recognized as indispensable by civilized peoples." Article 4 bans "violence to the life, health and physical or mental well-being of persons, in particular murder, as well as cruel treatment such as torture, mutilation or any form of corporal punishment; collective punishment; taking of hostages; acts of terrorism; outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assaults; slavery and the slave trade in all their forms; pillage; and threats to commit any of the foregoing acts."<sup>133</sup>

The history of both common article 3 and of article 6(c) of the Nuremberg Charter reflect that these instruments have a common source, and that both instruments were intended as codifications of norms previously applicable only to situations of international armed conflict. Like "crimes against humanity," common article 3 was designed to make these norms applicable internally so as to effect relations within the state existing between sovereign and citizen.<sup>134</sup>

Bassiouni gives a short history of the provisions of article 6(c) of the Nuremberg Charter and their direct derivation from

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133. *Id.* ¶ 82. Indeed, if it was not the intent of the Commission of Experts for Yugoslavia to extend this fundamental policy under common article 3 of the Geneva Conventions to "crimes against humanity," it is difficult to understand why the Commission of Experts took such pains to examine article 6(c) of the Nuremberg Charter in the light of the prohibitions of common article 3 and Protocol II. Moreover, requiring an *official* policy of discrimination or persecution as a predicate of universal jurisdiction for such offenses as mass exterminations would necessarily have the effect of ousting from jurisdiction inhuman conduct committed by insurgents who, by definition cannot be acting pursuant to any such State-controlled plan of action. This would have considerable effect on the war crimes process in the former Yugoslavia since, after the withdrawal of the JNA from Bosnia-Herzegovina in mid-1992, the main offenders have been the Bosnian Serbs who are in the posture of insurgents.

134. See, e.g., JEAN PICTET, *DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW* 47 (1985); BASSIOUNI, *supra* note 107, at 177-78.

"war crimes" as theretofore established under international customary law.<sup>135</sup> Specifically, "murder, extermination, enslavement, deportation and other inhumane acts against any civilian population" had, at the time that article 6(c) was adopted, been rendered unlawful by a variety of international instruments if committed by a belligerent power against the civilian population of another warring state.<sup>136</sup> These norms, derived from the customary law of war, were specifically drawn upon in framing the "crimes against humanity" provisions of the Nuremberg Charter. In his Report to the President of the United States, Chief Prosecutor Robert Jackson referred to the proscriptions in article 6(c) of the Nuremberg Charter in the following way: "[t]hese principles . . . result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience."<sup>137</sup>

On the other hand, common article 3 similarly derives from the same fundamental norms which were originally applicable in international armed conflict. Jean Pictet has summarized the interesting compromise which resulted in adoption of common article 3.<sup>138</sup> Opponents to the idea of creating a legal regime to govern internal armed conflict took the position that, by applying humanitarian law to civil wars, a state would render vulnerable its own sovereignty and security. The result would be an open door to those advocating rebellion and anarchy; it would elevate insurgents to the status of warring states and so inhibit lawful government in the legitimate repression of insurgency.

The solution was to distinguish between "fundamental" provisions of the Geneva Conventions (those applicable "in all circumstances") from the other provisions which the parties could adopt by means of special agreement. Only the former provisions, those pertaining to what are now called "grave breaches" in the Geneva Conventions, would be applied to internal armed conflict. These are the very norms determined to be *jus cogens* and "elementary considerations of humanity"

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135. BASSIOUNI, *supra* note 107, at 177-78.

136. *Id.* at 178.

137. *Id.* at 178-79 (citing REPORT OF CHIEF PROSECUTOR ROBERT L. JACKSON TO PRESIDENT FRANKLIN D. ROOSEVELT 51 (June 7, 1945)). This statement was an unambiguous reference to the Martens clause.

138. JEAN PICTET, HUMANITARIAN LAW AND THE PROTECTION OF THE VICTIMS OF WAR 58 (1973).

by the International Court of Justice.<sup>139</sup>

The writings of Jean Pictet are even more forceful in showing the clear link between the Martens Clause underpinnings of “crimes against humanity” and the *jus cogens* nature of common article 3. Pictet has described the core norms underlying common article 3 as: “the rudiments of humanity, a minimum applicable at all times, in all places and circumstances . . . part of the customs of peoples from which none may disengage himself.”<sup>140</sup>

Hence, both instruments have a common source in the customary law of war. Because common article 3 and “crimes against humanity” were relevant to the relationship between the state and its citizens, however, both achieved direct association with human rights law. In this respect, the London International Assembly, in formulating the need for article 6(c), indicated that prosecuting such offenses would recognize a minimum standard for mankind the observance of which would be essential for the survival of the human species.<sup>141</sup> The U.N. War Crimes Commission subsequently noted the need to prosecute those who committed “attacks on the fundamental liberties and constitutional rights of people and individual persons.”<sup>142</sup>

Like “crimes against humanity,” common article 3 was similarly viewed as protecting fundamental human rights in internal armed conflict. Nowhere are the human rights implications of common article 3 more arrestingly made than in Protocol II of the Geneva Convention, applicable to internal wars, and intended to supplement common article 3. The Preamble of Protocol II emphasizes that international human rights constitute a basic protection of the human person in non-international armed conflict.<sup>143</sup> Commentary to Protocol II indicates the following with respect to the relationship be-

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139. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 4, 105 (June 27).

140. JEAN PICTET, *PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW* 26 (1966).

141. BASSIOUNI, *supra* note 107, at 179-80 (citing LONDON INTERNATIONAL ASSEMBLY, *THE PUNISHMENT OF WAR CRIMINALS: RECOMMENDATIONS OF THE LONDON INTERNATIONAL ASSEMBLY* 9 (1948)).

142. *Id.* at 180 (citing UNITED NATIONS WAR CRIMES COMMISSION, *HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR* 192-93 (1948)).

143. Protocol II, *supra* note 5, pmbl., 1125 U.N.T.S. at 611.

tween international human rights and the humanitarian law generally, with specific reference to the provisions applicable to internal armed conflict:

This irreducible core of human rights, also known as "non-derogable rights," corresponds to the lowest level of protection which can be claimed by anyone at any time. Protocol II contains virtually all the irreducible rights of the Covenant on Civil and Political Rights, which constitute the basic protection mentioned in the paragraph under consideration here. These rights are based on rules of universal validity to which States can be held, even in the absence of a treaty obligation or any explicit commitment on their part. It may be accepted that they form a part of *jus cogens*. This view may be controversial for some of these rights, but there is no doubt whatsoever as regards, for example, the prohibition of slavery and torture, even without entering a discussion whether *jus cogens* exists at all.<sup>144</sup>

Neither international humanitarian law applicable to armed conflict, nor the "crimes against humanity" provisions of the Nuremberg Charter reflect a desire to incorporate a standard of discrimination as the basis upon which they are to be applied. In this respect, the law of war from which both common article 3 and article 6(c) of the Nuremberg Charter are derived makes no reference to a policy of discrimination as a requirement of finding criminal responsibility.

In fact, incorporation of the laws of war into the crimes against humanity provision of the Nuremberg Charter appeared to be proceeding away from, and not toward, requiring discriminatory intent on the part of the perpetrator as a condition to criminal responsibility. Previously, the law of war had required that the nationality of the victim be different from that of the belligerent inflicting the harm or suffering. Article 6(c), on the other hand, eliminated the old requirement that such a distinction in nationalities exist, thereby providing that protection would be conferred universally upon civilians and would not be dependent upon the discriminatory animus existing between warring peoples of differing nationalities. In this sense, article 6(c) of the Nuremberg Charter "took a step forward in the form of a jurisdictional extension when it provided

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144. Junod, COMMENTARY TO PROTOCOL II, *supra* note 69, at 1340-41.

that the victims of the same types of conduct that constitute war crimes were protected without the requirement that they be of a different nationality than that of the perpetrators."<sup>145</sup>

The essential doctrine that protection is universal so far as civilians are concerned and not dependent on a policy of discrimination is made more explicit in common article 3. The principles of humanity codified in common article 3 do not require that there be a common plan of discrimination or persecution for a violation to exist; nor is it a requirement that the victim of the offense be in the hands of a party to the conflict of which he is not a national, as is the case with the "grave breaches" provisions. As explained in the Commentary to Geneva Convention I:

The principle of respect for human personality, which is at the root of all the Geneva Conventions, was not a product of the Conventions. It is older than they are and independent of them. Until 1949 it only found expression in the Conventions in its application to military personnel. But it was not applied to them because of their military status: *it is concerned with persons, not as soldiers but as human beings, without regard to their uniforms, their allegiance, their race, or their religious or other beliefs, without regard even to any obligations the authority on which they depend may have assumed in their name or in their behalf. Wounded or sick, they are entitled as such to the care and aid which the respect for human personality enjoins.*<sup>146</sup>

The recommended plain meaning interpretation of article 6(c) would have given rise to an interpretation which is more in line with the general theory of the Yugoslavian Commission of Experts that "crimes against humanity" under the Nuremberg Charter and common article 3 to the Geneva Conventions are codifications of customary law which predates the adoption of either the Charter or the Conventions and which can be characterized as "elementary dictates of humanity." These fundamental principles, of which common article 3

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145. BASSIOUNI, *supra* note 107, at 179.

146. COMMENTARY: I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD 39 (Jean S. Pictet ed., 1952) (emphasis added) [hereinafter COMMENTARY TO GENEVA CONVENTION I].



stands as the most concise restatement, are significantly indifferent to the source or motivation of the inhuman conduct actually meted out. The foundation of humanitarian law is preservation of and respect for the human personality. Accordingly, the norms contained in common article 3 extend to all persons who are *hors de combat*, irrespective of their race, religion or nationality and regardless of their affiliation in the conflict.<sup>147</sup> The protections against inhuman conduct, in other words, are absolute and flow from the "care and aid which respect for the human personality enjoins."<sup>148</sup>

### *E. Universal Criminal Jurisdiction Over Violations of a Jus Cogens Norm*

The construction of article 6(c) put forward by the Commission of Experts for Yugoslavia and Rwanda substantially omits contemporary scholarly opinion which maintains that the deliberate violation of a fundamental international human right may constitute a crime giving rise to universal jurisdiction even in the absence of a treaty or convention. Furthermore, a reading of article 6(c) which conforms with the views of these commentators, will show why the Yugoslavian Commission's identification of "crimes against humanity" as a codification of customary principles which are also restated in common article 3 to the Geneva Conventions was substantially correct.

The critical consideration supporting the broad interpretation of article 6(c) of the Nuremburg Charter in such a way as to render it coextensive with common article 3 is the fact that

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147. *Id.*

148. *Id.* Thus a fundamental policy under international humanitarian law is that of universal protection, irrespective of distinctions based on nationality, race, religion, ethnicity or political persuasion. A violation is not dependent upon the perpetrator's executing a national policy of discrimination; rather, certain acts (extrajudicial killings, torture, deportations and other inhuman acts) are punishable per se if committed against a protected person. The universality principle has even greater bearing with respect to the instant interpretation of "crimes against humanity." As noted earlier, the construction offered requires that violations be pursuant to an *official* policy of discrimination, implying that the policy be state-sponsored. If that is the case, such a policy could not be entertained by insurgents who would thereby be exempt from the tribunal's jurisdiction. Such an interpretation would contravene one of the most established policies of international humanitarian law, i.e., that the parties to the conflict be treated equally. See, e.g., Junod, COMMENTARY TO PROTOCOL II, *supra* note 69, at 1345.

such a reading will give full force to the *jus cogens* character of "crimes against humanity." 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 give rise to obligations *erga omnes*. Because of the fundamental nature of the norm which has been violated, states have a compelling interest, as well as an obligation, *inter se* to cooperate in the criminal process and bring violators of such fundamental norms to justice.<sup>149</sup>

It is, however, not the explicitly proscribed character of the crime which activates its *erga omnes* character, but rather the importance of the right violated within the international legal order.<sup>150</sup> Rights which can properly be classified as *jus cogens*, i.e., which have universally binding effect even in the face of contrary state legislation, enjoy the highest status to which any jurisprudential norm can aspire—non-derogability. One writer has concluded that "[o]ne 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.'"<sup>151</sup> In such instances, universal jurisdiction may be grounded under customary international law on the premise that the violator remains *hostes humani generis*.

Thus, it is arguable that conventional human rights law may have ceased to progress to the extent that it has successfully subjected to the universality principle offenses such as mass exterminations not carried out pursuant to a policy of discrimination or persecution. Such a claim cannot be made with respect to customary international law. As noted previously, common article 3 to the Geneva Conventions stands as a codification of customary norms which are external to and independent of the development of conventional international law. The scope of customary international law, as noted in the

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149. *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5) (new application).

150. See, e.g., Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 836 (1988) (deeming it the "correct view" that "genocide remains a crime giving rise to universal jurisdiction under customary international law").

151. *Id.* at 830 (quoting OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 264 (1979)).

Commentary to common article 3, clearly extends to inhuman conduct exercised toward those who are not participants in the combat and irrespective of nationality, race, religion or other affiliation of the victim. The status of these norms as *jus cogens* now cannot be doubted. As perhaps the leading contemporary commentator on international humanitarian law has observed:

I believe that the norms stated in Article 3(1)(a)-(c) are of such an elementary ethical 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 also applicable to non-international armed conflicts. This is also true for the obligation to treat humanely persons who are *hors de combat*, which is rooted in Hague Regulations 23(c)-(d), which undoubtedly reflect customary law, and in the customary obligation contained in the law of human rights to treat with humanity all persons deprived of their liberty.<sup>152</sup>

As noted earlier, violation of a *jus cogens* norm can constitute a crime giving rise to universal jurisdiction where individual criminal responsibility is asserted.<sup>153</sup> In the instance of widespread extrajudicial killings, deportations, torture, and other inhuman acts carried out during internal conflict, the case for universal jurisdiction is enhanced by the indispensability of the rights protected by the peremptory norms of common article 3 to the international legal order. In short, a compelling argument can be advanced that these violations of international humanitarian law must be made subject to the universality principle in that the interests protected are those which the "legal conscience of mankind deem[s] absolutely essential to coexistence in the international community."<sup>154</sup>

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152. MERON, HUMAN RIGHTS, *supra* note 69, at 34.

153. For an argument supporting the view that universal jurisdiction may generally be conflated with the *jus cogens* doctrine, see Randall, *supra* note 150, at 838. Randall opines that:

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 the 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 the disappearance of individuals" and "prolonged arbitrary detention"].

*Id.*

154. Parker & Neylon, *supra* note 14, at 415 (citing U.N. Conference on the

The fundamental importance of the customary rules codified by common article 3 to the international legal order cannot be sufficiently emphasized. Article 3 norms have been declared by the International Court of Justice to be *jus cogens* and as constituting "elementary considerations of humanity."<sup>155</sup> The extraordinary force of these principles, and their comparative primacy within the international order can also be appreciated from the description given of them in the Commentary to the Geneva Convention. There, article 3 norms are described as demanding respect for rules which were already recognized as being essential to civilized existence long before the Conventions were signed.<sup>156</sup>

The longstanding 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 injunctions codified in common article 3 provide the cornerstone of modern human rights and humanitarian law, setting forth rules which are essential to the continuation of a civilized international community. Accordingly, violators should be subjected to universal jurisdiction as *hostes humani generis*.

As noted previously, an interpretation of article 6(c) of the Nuremberg Charter should be arrived at which is consistent with the unambiguous expression of *jus cogens* norms contained in the provision thus bringing "crimes against humanity" into conformity with common article 3. In this respect, there is a valid presumption that an international legal instrument purporting to restate *jus cogens* norms is, in fact, consistent with those norms. The presumption here is enhanced by the clear history of both common article 3 of the Geneva Conventions and of article 6(c) of the Nuremberg Charter which reveals that both instruments derive from customary law governing fundamental violations of the laws of war which do not require a policy of discrimination for individual responsibility

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Law of Treaties, 1st and 2d Sess., Vienna, Mar. 26-May 24, 1968, U.N. Doc. A/CONF/39/11/Add.2 (1971).

155. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 4, 105 (June 27).

156. COMMENTARY TO GENEVA CONVENTION I, *supra* note 146, at 50. 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.*

to obtain.

Of more importance, common article 3 is a codification of customary norms which, by virtue of their *jus cogens* character, give rise to universal jurisdiction over inhuman acts and it is irrelevant that these have not been undertaken pursuant to an "official policy" of discrimination. These norms have a legal existence independent of conventions and treaties, even when the latter seek to codify them. A reading of "crimes against humanity," therefore, which would seek to condition universal jurisdiction over inhuman acts by requiring that such acts be committed under a state policy of discrimination might have the effect of infringing upon the new hierarchy of international human rights in which *jus cogens* is supreme law.<sup>157</sup> Such an interpretation would place article 6(c) of the Nuremberg Charter in the practical position of a treaty provision (or of pre-existing customary law) which had been superseded by a conflicting peremptory norm. In this respect:

This rule [i.e., that in domestic legislation a subsequent statute will defeat an inconsistent treaty] can have no bearing on a *jus cogens* norm for the obvious reason that *jus cogens* norms exist and are enforceable apart from treaties. Equally obvious, any act or treaty which conflicts with a *jus cogens* norm is void—such a conflicting document does not legally exist.<sup>158</sup>

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157. See generally Meron, *supra* note 121.

158. Parker & Neylon, *supra* note 14, at 451. That violations of international humanitarian law can give rise to universal jurisdiction based on the *jus cogens* content of its provisions is accepted by commentators. *Id.* at 455 (footnotes omitted):

The idea of universal jurisdiction and individual responsibility for violations of international law developed largely with the law of war. At the end of World War II, an ad hoc international court, established by the Nuremberg Charter, exercised jurisdiction over World War II criminals. Reinforcing individual responsibility, the tribunal stated: "The very essence of the Charter [establishing the tribunal] is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State." Since *jus cogens* obligations transcend national boundaries, jurisdiction over violations of these international standards must be universal.

*Id.*

## V. CONCLUSION

This paper has examined the Rwandan and the Yugoslavian war crimes tribunals with a view to exploring the "bases and ranges" of international humanitarian penal jurisdiction. The essential concern herein has arisen with respect to violations of fundamental human rights committed in internal armed conflict for which no official policy of discrimination can be established. The Appellate Chamber for the War Crimes Tribunal of the former Yugoslavia has tentatively resolved this lack of jurisdiction by finding that violations of common article 3 may give rise to individual criminal responsibility. However, the court's ruling is qualified by the implicit condition to criminal liability that the misconduct be rendered criminal under applicable municipal law.

At the same time, the tribunal has left undisturbed the essential finding of the Yugoslavian and Rwandan Commissions of Experts that "crimes against humanity" must be undertaken pursuant to an official policy of discrimination in order to constitute criminal violations. This limited reading of article 6(c) of the Nuremberg Charter will have a dramatic effect on the war crimes process affecting the former Yugoslavia where the primary violators have been not a sovereign entity, but rather the Bosnian Serbs themselves. As concerns the latter, jurisdiction under the Nuremberg Charter's provision governing "crimes against humanity" seems highly vulnerable. Because the Bosnian Serbs are not a state party, no *official* policy of discrimination appears possible.

This paper strongly supports the result reached by the Appellate Chamber to the effect that violations of basic human rights in internal armed conflict may give rise to individual criminal responsibility under common article 3, while being mindful of the necessary limitations entailed in such a ruling. An alternative has been recommended herein which largely rests on the *jus cogens* character of both common article 3 of the Geneva Conventions and article 6(c) of the Nuremberg Charter. An interpretation has been proposed, strongly suggested by the Commission of Experts for Yugoslavia, that the substantive violations set forth in the two instruments are coextensive and are codifications of peremptory norms. This reading is supported by accepted rules pertaining to the interpretation of treaties, by the clear history of both instruments,

and by the new hierarchy of international legal norms under which *jus cogens* constitutes supreme law.

Yet, whatever construction is given to article 6(c), and irrespective of any inherent limitations surrounding the criminalization of common article 3, there can be little doubt of the *jus cogens* character of the norms contained in these instruments and their effect upon universal jurisdiction even in the absence of conventional law. Article 53 of the Vienna Convention on the Law of Treaties provides that:

[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.<sup>159</sup>

This paper has stressed the criminalization of these norms in the Nuremberg Charter in light of the *nullum crimen sine lege* doctrine which, as developed in the commentary to the Geneva Conventions and Protocols, reflects some concern over the application of a criminal sanction developing out of a purely customary norm which has received no express implementation in international or national jurisprudence. This limitation has conditioned the growth of international precedent with respect to common article 3 on criminalization under municipal law. Moreover, it has been the need for a clear and unqualified precedent under international law establishing universal jurisdiction over criminal atrocities committed during internal armed conflict which has prompted an interpretation of article 6(c) of the Nuremberg Charter which seeks to make a living legal reality of the Charter's clear commitment to the "usages established among civilized peoples, [and to] the laws of humanity, and the dictates of the public conscience."<sup>160</sup>

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159. Vienna Convention, *supra* note 108, art. 53, 1155 U.N.T.S. at 344.

160. Hague Convention, *supra* note 8, 8th pmbl. para. 8, 36 Stat. at 279-80.