

## Beyond the 1948 Convention - Emerging Principles of Genocide in Customary International Law

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## NOTES AND COMMENTS

### BEYOND THE 1948 CONVENTION—EMERGING PRINCIPLES OF GENOCIDE IN CUSTOMARY INTERNATIONAL LAW

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#### I. INTRODUCTION

“Is systematic genocide an internal matter or a matter for all mankind?” This question, posed by a former minister of education under Idi Amin,<sup>1</sup> has yet to be answered. Although the concept is old, crimes against humanity form a relatively new category addressed by international law.<sup>2</sup> The war crimes trials which were prosecuted after

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1. LEO KUPER, *THE PREVENTION OF GENOCIDE* 139 (1985).

2. G.I.A.D. Draper, *The Development of International Humanitarian Law, in INT'L DIMENSIONS OF HUMANITARIAN LAW* 67 (UNESCO 1988). Draper traces humanitarian law through the development of the law of war. Although early stages of

the Second World War, and included charges of genocide, focused the world's concern on humanitarian law.<sup>3</sup> Since that time there have been several international conventions and United Nations resolutions that address humanitarian issues.<sup>4</sup> The terms of the various conventions are limited, and principles that have evolved through international customary law may prove to be more useful in dealing with humanitarian crises.

One of the earliest conventions, the 1948 Convention on the Prevention and Punishment of Genocide,<sup>5</sup> was created in response to the atrocities committed by the Nazis during World War II.<sup>6</sup> Genocidal practices continue, however, and the 1948 Genocide Convention has failed to prevent them or provide the means of punishment for such actions.<sup>7</sup> Political tensions, principally between the United States and the Soviet Union, prevented effective action against these atrocities.<sup>8</sup> With little time to adjust to the post-Cold War atmosphere, the world suddenly finds itself faced with blatant acts of genocide occurring in the former Yugoslavian republic of Bosnia.<sup>9</sup> As of September 1993, the

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humanitarian law were apparent in the Hague Peace Conferences of 1899 and 1907, *id.* at 73, the inhumanity witnessed in World War II led to new innovations in humanitarian law such as the definition of war crimes. *Id.* at 79. The Genocide Convention went beyond traditional humanitarian law by extending its scope beyond situations of war. *Id.* at 80.

3. BRADLEY F. SMITH, *THE ROAD TO NUREMBERG* 3-4 (1981).

4. Most significant are the following: International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, 660 U.N.T.S. 195; International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171; and the Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277 [hereinafter Genocide Convention]. Also significant is the Convention on the Elimination of All Forms of Discrimination Against Women, *entered into force*, Sept. 3, 1981, Hein's No. KAV 2757. See THEODORE MERON, *HUMAN RIGHTS IN INTERNAL STRIFE: THEIR INTERNATIONAL PROTECTION* 4-5 (1987).

5. Genocide Convention, *supra* note 4, 78 U.N.T.S. 277.

6. KUPER, *supra* note 1, at 8.

7. Ethnic genocides have occurred in Tibet, Burundi and Iran; while political genocides have occurred in Cambodia, Indonesia, and Uganda. See *id.* at 128-33, 157-64.

8. *Id.* at 8. During the Cold War the Soviets deplored United Nations human rights initiatives as impermissible intervention. Thomas M. Franck, *Soviet Initiatives: U.S. Responses New Opportunities For Reviving the United Nations System*, 83 AM. J. INT'L L. 531, 533 (1989). Under Gorbachev, the USSR changed its attitude, evidenced by a 1988 aide-memoire promoting United Nations action, including peace keeping missions. *Id.* at 536. It remains to be seen whether Russia will continue this trend.

9. See *infra* part II.B.

conflict had resulted in an estimated 200,000 dead while another two million had fled their homes.<sup>10</sup> Without the severe ideological differences of the past, the world community should be capable of reacting to crimes against humanity with as much unity as it did against aggression in the Persian Gulf War.<sup>11</sup>

While the situation in Bosnia increasingly appears to be a case of genocide,<sup>12</sup> the Genocide Convention offers few practical solutions to the problem of ending the tragedy. It treats genocide as a crime perpetrated by individuals,<sup>13</sup> whereas most occurrences of genocide involve

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10. Julia Elliott, *Balkan atrocities stun Ottawa student; Croats' Massacre went Unreported*, *Volunteer* says, OTTAWA CITIZEN, Sept. 4, 1993, at C4.

11. Former British Prime Minister Margaret Thatcher, in her attack against the world's passive stance towards Bosnia, referred to the collective effort to punish aggression in Kuwait. CBS This Morning: Interview with Margaret Thatcher (CBS television broadcast, Apr. 14, 1993) transcript available in LEXIS, Nexis Library, Script File. The success of the Gulf War was possible because of the reduction in tensions between the United States and the Soviet Union. President Bush described this state of affairs by coining the term "new world order" which "refers to new ways of working with other nations to deter aggression and to achieve stability, to achieve prosperity and, above all, achieve peace." Don Oberdorfer, *Bush's Talk of a 'New World Order': Foreign Policy Tool or Mere Slogan?*, WASH. POST, May 26, 1991, at A31. Without the end of the Cold War, the Soviet Union would have sided with Iraq, a long-time friend, and used its veto in the Security Council to effectively prohibit collective action in the Gulf. Ronald Steel, *How did the Gulf War Change the World?*, NEWSDAY, Nassau and Suffolk Ed., July 28, 1991, Currents; Sunday Focus, at 29. It is also true, however, that the world cared about Kuwait not out of concern for its people, but concern for its oil. *Id.* In the former Yugoslavia, the Serbs have been trying to gain support from their Orthodox Christian co-religionists in Russia, see *Refugees Prevented from Leaving Srebrenica*, GAZETTE (Montreal), Apr. 7, 1993, at A8, but Russia has not blocked United Nations sanctions and has assisted in humanitarian efforts. See Paul Lewis, *Struggle in the Balkans; Belgrade Facing Severe Isolation Under U.N. Moves*, N.Y. TIMES, Apr. 19, 1993, at A1. Russia did not even object when United States planes operating under NATO authority shot down four Bosnian Serb planes which were violating the no-fly zone over Bosnia. John Lancaster, *United States Jets Down 4 Serb Bombers Over Bosnia: NATO Says Pilots in 'No-Fly' Zone Were Warned*, WASH. POST, Mar. 1, 1994, at A1.

12. Bruce W. Nelan, *More Harm than Good; Bosnia's Brutal Tragedy Grows Worse while the U.S. and its Allies Resolve to Remain Spectators*, TIME, Mar. 15, 1993, at 40. The author concludes that "Bosnia is effectively finished." *Id.* at 45. Even Croatian soldiers are becoming more brutal in their assaults on Muslim towns. Rod Nordland, *'Let's Kill the Muslims' Bosnia: An on-the-ground report of the brutal massacre in Stupni Do*, NEWSWEEK, Nov. 8, 1993, at 48.

13. Article VI refers to the punishment of "persons." Genocide Convention, *supra* note 4, 78 U.N.T.S. at 280-81. Article V defines the only obligation on nations: to enact legislation forbidding genocide, and to extradite offenders found within their borders. *Id.* at 280. The only reference to international responsibility is in article VIII which allows signatory nations to seek action from the UN to punish or prevent geno-

state action.<sup>14</sup> Also, the Convention can only bind signatory nations to the extent that they agree to its terms.<sup>15</sup> Therefore, in determining what constitutes legal action against a nation, it is necessary to examine whether international customary law obliges *nations* to refrain from acts of genocide and permits an outside response to violations. The competing principle of state sovereignty, especially the subordinate doctrine of non-intervention in a state's internal matters, adds another layer to the analysis.<sup>16</sup> If, however, genocide is not an internal matter, then the principle of non-intervention does not apply. Recent General Assembly and Security Council resolutions characterizing *apartheid*,<sup>17</sup> the Kurdish situation in Iraq,<sup>18</sup> and now the crisis in Bosnia<sup>19</sup> as threats to world peace indicate a growing recognition of the international nature of grave human rights violations. This Comment examines the situation in Bosnia and the legal principles that shape the available options.

## II. GENOCIDE IN BOSNIA

The horror of the Holocaust during World War II caused Raphael Lemkin to campaign for an international convention focussing on genocide separately from other crimes against humanity. He coined the term "genocide"<sup>20</sup> and defined it in the following way:

Generally speaking, genocide does not necessarily mean the im-

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cide. *Id.* at 282.

14. See Mark Huber, *Why the Genocide Treaty Trivializes the Horror of Genocide*, HERITAGE FOUND. REP., Feb. 14, 1986, available in LEXIS, Nexis Library, NWLTRS File.

15. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 321 (1987) [hereinafter RESTATEMENT (THIRD)].

16. PETER MACALISTER-SMITH, INTERNATIONAL HUMANITARIAN ASSISTANCE: DISASTER RELIEF ACTIONS IN INTERNATIONAL LAW AND ORGANIZATION 70 (1985). Domestic jurisdiction has never been defined by international law. M.S. RAJAN, THE EXPANDING JURISDICTION OF THE UNITED NATIONS 2 (1982). The consensus among nations at the time of the League of Nations and now is that what constitutes internal affairs must be decided on a case by case basis depending on the state of international law at the time. *Id.* at 2, 168-69.

17. G.A. Res. 34/93A, U.N. GAOR, 34th Sess., Supp. No. 46 at 29, U.N. Doc. A/34/46 (1979). For text see *infra* note 159.

18. S.C. Res. 688, U.N. SCOR, 46th Sess., 2982nd mtg. at 31, U.N. Doc. S/INF/46 (1991). For text see *infra* note 161.

19. S.C. Res. 771, U.N. SCOR, 47th Sess., 3106th mtg., U.N. Doc. S/RES/771 (1992); S.C. 787, U.N. SCOR, 47th Sess., 3137th mtg., U.N. Doc. S/RES/787 (1992). For text see *infra* note 163.

20. KUPER, *supra* note 1, at 9.

mediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be the disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.<sup>21</sup>

By contrast, the Convention's definition is very ambiguous, providing only a vague concept of genocide followed by examples of acts deemed to be illustrative of the crime. Article II states:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.<sup>22</sup>

On the other hand, when giving its consent to the ratification of the Convention, the United States Senate declared its understandings concerning the definition of genocide:

- (1) That the term "intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such" appearing in Article II means the *specific* intent to destroy in whole or in part, a national, ethnical, racial, or religious group as such by

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21. *Id.*

22. Genocide Convention, *supra* note 4, 78 U.N.T.S. at 280.

the acts specified in Article II.

(2) That the term "mental harm" in Article II(b) means permanent impairment of mental faculties through drugs, torture, or similar techniques.

....

(4) That acts in the course of armed conflicts committed without the specific intent required by Article II are not sufficient to constitute genocide as defined by this Convention.<sup>23</sup>

A study of the situation in Bosnia reveals a pattern of conduct that is clearly within the parameters of genocide as defined in both of the above definitions.

#### A. *Background of the Bosnian Conflict*

The crisis in Bosnia can be traced back to the third century A.D. when the Byzantine and Roman empires split.<sup>24</sup> Bosnia sits on what was the line of division between the two empires, where the ethnic cultures meet.<sup>25</sup> After the split, the versions of Christianity in the east and west differed: the east followed what is known today as the Eastern Orthodox tradition, and the German expansion in the west left that area mostly Catholic.<sup>26</sup> Later, the Ottoman empire strongly influenced the east, resulting in the Muslim population in Bosnia.<sup>27</sup>

The Serbs feel they are victims of past aggression by both the Catholics and Muslims.<sup>28</sup> The Ottoman empire took control of Serbia in 1389 and subjected Serbs to massacres and serfdom.<sup>29</sup> The Serbs finally threw out the Turks early in the 19th century.<sup>30</sup> During World War II, the puppet Nazi government in Croatia executed hundreds of thousands of Serbs.<sup>31</sup> After World War II, these ethnic divisions were subdued under the Communist rule of President Tito.<sup>32</sup> Unfortunately, Tito allowed the ethnic divisions to fester by not prosecuting war

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23. 132:15 CONG. REC. S1378 (daily ed. Feb. 19, 1986) (emphasis added). See generally *id.* for the Senate discussion on ratifying the Genocide Convention.

24. Roger Cohen, *Cross vs. Crescent; The Battle Lines Are Being Redrawn in Bosnia Along Old Religious Scars*, N.Y. TIMES, Sept. 17, 1992, at A14.

25. *Id.*

26. *The Eagle's Curse*, SUNDAY TIMES (London), Aug. 9, 1992, Features.

27. Cohen, *supra* note 24, at A14.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *The Eagle's Curse*, *supra* note 26.

criminals and by forbidding anyone to discuss the events of World War II.<sup>33</sup> With the death of Tito in 1980, and the later fall of the Soviet Union, old rivalries resurfaced.<sup>34</sup>

After the fall of the Soviet Union, Yugoslavia attempted to negotiate a satisfactory government for all six republics (Slovenia, Croatia, Serbia, Bosnia, Montenegro, and Macedonia),<sup>35</sup> but the negotiations for a loose, non-Serb controlled federation failed in the Spring of 1991.<sup>36</sup> Aware that the United States and the European Community supported territorial integrity, Serbian President Slobodan Milosevic felt no need to compromise.<sup>37</sup> Instead, the Serbian leadership refused to agree to a non-Serb controlled federation and "had the central army declare martial law, a move that had been explicitly ruled out by the federal presidency, which acted, or should have acted, as commander in chief."<sup>38</sup> Then, in May 1991, Croatia and Slovenia declared independence after the federal council defeated the election of a Croat, Stipe Mesic, who should have become president "under the constitutional arrangements of the federation."<sup>39</sup> Federal armed forces responded in Slovenia with military attacks on June 27, 1991.<sup>40</sup>

The Bosnian parliament voted for independence on October 15, 1991.<sup>41</sup> It was not until March 1, 1992, however, that Bosnia finally garnered the necessary two-thirds popular support for independence in a republic-wide referendum.<sup>42</sup> Bosnia then proceeded to seek United Nations membership, strongly supported by the United States and Europe.<sup>43</sup> Violence broke out later that month when the Bosnian Serbs repudiated the Statement of Principles for New Constitutional Ar-

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33. Nancy Nusser, *Never Again? Old Hatreds Fuel the Killing*, THE ATLANTIC J. AND CONST., Nov. 19, 1992, at A19.

34. *Id.*; *The Eagle's Curse*, *supra* note 26.

35. Marc Weller, *Current Development: The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569 (1992).

36. *Id.* Serb leadership previously dominated Bosnia. *Id.*

37. *Id.* at 570.

38. *Id.*

39. *Id.* His election was blocked by Serbia, Montenegro, and the two autonomous republics. *Id.*

40. *Id.*

41. Timothy Heritage, *Bosnia Moves Toward Independence in Fresh Blow to Yugoslavia*, REUTERS, Oct. 15, 1991, PM cycle, available in LEXIS, Nexis Library, Wires File, cited in John Webb, Comment, *Genocide Treaty—Ethnic Cleansing—Substantive and Procedural Hurdles in the Application of the Genocide Convention to Alleged Crimes in the Former Yugoslavia*, 23 GA. J. INT'L & COMP. L. 377 (1993).

42. Weller, *supra* note 35, at 593, 596.

43. *Id.* at 596-97.



rangements that the Croats, Muslims, and Serbs had worked out just ten days earlier.<sup>44</sup> The Bosnian Serbs preferred to remain part of Yugoslavia and, aided by Serbian forces and air power, initiated armed attacks against Bosnian Muslims.<sup>45</sup> The fighting quickly escalated, causing Bosnia to declare a state of emergency and appeal to the European Community to prevent aggression by the Serbs.<sup>46</sup> The European Community called for a cease-fire and acceptance of the Statement of Principles,<sup>47</sup> but the violence continued despite repeated attempts to negotiate cease-fires.<sup>48</sup> Marrack Goulding, a United Nations representative, went to Bosnia in late April, 1992, and determined that there was little hope for a workable cease-fire.<sup>49</sup> He also confirmed reports of intentional efforts by the Serbs to impose ethnic purification on regions of Bosnia.<sup>50</sup>

### B. *The Current Situation in Bosnia*

The very term "ethnic cleansing," the euphemism used by the Serbs, implies genocide. The early reports described forced expulsions of Muslims in sealed train cars.<sup>51</sup> As the fighting escalated, the Serbs destroyed Bosnian towns, beating, mutilating, or conducting mass murders of the Muslim residents.<sup>52</sup> The Serbs dealt with those Muslims not massacred by sending them to detention camps or forcing them to flee their homes after signing over their property.<sup>53</sup> Often the Serbs

44. *Id.* at 597.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 598-601.

49. *Id.* at 601.

50. *Id.* at 601-02. Goulding confirmed that Bosnian Serbs, aided by the Yugoslav National Army (JNA) were using military force and intimidation to create ethnically pure regions. *Id.*

51. Karen Breslau, *The Push for National 'Purity'*, NEWSWEEK, Aug. 3, 1992, at 36.

52. *See id.* at 37; Weller, *supra* note 35, at 602; Nusser, *supra* note 33, at A19. For example, after the surrender of the town of Biscani, the Serbs forced the male residents to lie on the asphalt and then they beat them. In another incident, one hundred women were called to the center of the town and told to disperse. While leaving, they were shot in the back. At another town the Serbs randomly called names from a list and killed those named. *Supplemental United States Submission of Information to the United Nations Security Council*, 3 DEP'T ST. DISPATCH, Nov. 2, 1992, at 802, 803 [hereinafter *Supplemental Report*].

53. Breslau, *supra* note 51, at 36-37; Andrej Gustincic, *Serb Police Chief Sees His Mission to Fight Islam*, REUTERS, LTD., Aug. 17, 1992, PM Cycle, available in LEXIS, Nexis Library, Wires File.

have massacred Muslims attempting to flee,<sup>54</sup> as well as those Muslims captured and detained at camps.<sup>55</sup> Muslims who had been prisoners also report that the Serbs are severely torturing detainees by, for example, forcing them to run a gauntlet of gun fire in order to reach the dining areas.<sup>56</sup>

Recent reports have surfaced of massive "rape camps" filled with Muslim girls and women who are systematically and viciously raped by Serbian soldiers and held captive until they die or become visibly pregnant with unwanted Serbian children.<sup>57</sup> The European Community investigation estimated that as many as 20,000 Muslim women have been systematically raped.<sup>58</sup>

The specific intent to destroy the Muslim people and culture in Bosnia is apparent. Generally, Serbs speak of stopping the spread of what they call Islamic fundamentalism.<sup>59</sup> They ignore the fact that Bosnian Muslims only recently have turned to fundamentalism in the face of the Serbian attacks.<sup>60</sup> Religious symbols such as mosques have been targeted.<sup>61</sup> By the end of July, thirty-seven *Imams*, Muslim cler-

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54. *Supplemental Report*, *supra* note 52, at 805.

55. The detention camps are not unlike the concentration camps of Nazi Germany. One survivor reported that while two to three hundred prisoners were held in one room made of sheet metal at Keraterm camp, the room was gassed. When the prisoners broke out to escape the gas, they were met with gunfire, which was also directed at those still inside. *Third United States Submission of Information to the United Nations Security Council*, 3 DEP'T ST. DISPATCH, Nov. 16, 1992, at 825, 826 [hereinafter *Third Report*].

56. *Id.*

57. Tom Post, *A Pattern of Rape*, NEWSWEEK, Jan. 4, 1993, at 32-36. Escaped Muslim women report being told, "When we let you go home you'll have to give birth to a Chetnik [Serbian extremist]. We won't let you go while you can have an abortion." *Third Report*, *supra* note 55, at 830.

58. *EC Report on Rape in Yugoslavia Submitted to U.N.*, REUTER EUROPEAN COMMUNITY REP., Jan. 26, 1993, BC Cycle, available in LEXIS, Nexis Library, Wires File. The investigators reached their estimate through the use of statistical data and medical records provided by hospitals, and through testimony of victims and medical experts in the area. *U.N. Finds Evidence of Large-Scale Rape in Yugoslavia*, REUTER LIBR. REP., Jan. 29, 1993, BC Cycle available in LEXIS, Nexis Library, Wires File. The Report stated that "[s]olid evidence was found that Croatian, Moslem and Serbian women have been detained for extended periods of time and repeatedly raped," although it also added that the majority of rape victims were Bosnian Muslims. *Id.*

59. A Serbian police chief described his mission as protecting Europe from Islam, telling a reporter, "[w]hat Europe has done is slyly put Serbia in the position of again defending it from Islam." Gustincic, *supra* note 53.

60. See Cohen, *supra* note 24, at A14; *The Eagle's Curse*, *supra* note 26.

61. It is estimated that 650 mosques have been destroyed since the outbreak of violence in Bosnia. Gustav Niebuhr, *Top Clerics Plea for End to Brutalities in Bosnia*,

ics, were reported to have been murdered.<sup>62</sup> The Serbian Militiamen commonly refer to Muslims as filth,<sup>63</sup> and they say they plan to continue fighting until all Muslims convert or are destroyed.<sup>64</sup> Crosses have been engraved on the foreheads of Muslim internees.<sup>65</sup> Serbs murdered Muslim patients at the medical center in Zvornik in order to make room for wounded Serbian soldiers.<sup>66</sup> Infants and children were among the many patients slaughtered while the Muslim doctors were forced to watch.<sup>67</sup> Some captured Serbian soldiers claimed that while serving as soldiers they were ordered by their superiors to rape Muslim women to degrade and humiliate them.<sup>68</sup> One member of the European Community investigation team described a Serbian "systematic will to humiliate a community, and thereby force it to leave."<sup>69</sup>

Even if only some of these reports are true,<sup>70</sup> it is clear that the Serbs are carrying out specific acts designed to degrade, expel, and murder Muslims because of their membership in a religious group. These acts are evidence of a "coordinated plan" to destroy the Muslim culture directed at the Muslims as an "entity."<sup>71</sup> Several of the acts listed in the Genocide Convention are occurring, including killing members of the group, intentionally causing mental harm through mass rape and torture, and subjecting the Muslim people to conditions calculated to cause physical harm.<sup>72</sup> These actions, combined with the intent expressed by the Serbs themselves, indicate a clear policy of genocide. Such acts are not mitigated by the allegations of Muslim atrocities

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WASH. POST, Dec. 19, 1992, at D10. See also Karen Detling, Comment, *Eternal Silence: The Destruction of Cultural Property in Yugoslavia*, 17 MD. J. INT'L L. & TRADE 41 (1993).

62. *Supplemental Report*, *supra* note 52, at 804.

63. John F. Burns, *Under Siege: A Muslim Family Survives, with Fear and Grace, in Sarajevo*, N.Y. TIMES, Nov. 19, 1992, at A12.

64. *Id.*

65. *Third Report*, *supra* note 55, at 829.

66. *Id.* at 828.

67. *Id.*

68. Post, *supra* note 57, at 34. One victim reported being told by a Serbian soldier, "Have orders to rape the girls. I am ashamed to be a Serb. Everything that is going on is a war crime." *Third Report*, *supra* note 55, at 831.

69. *EC Report on Rape in Yugoslavia Submitted to U.N.*, *supra* note 58.

70. Some Serbs believe the reporting is one sided and exaggerated to justify eventual intervention by foreign forces. Branko Miliakeric, *Bosnia-Herzegovina: Serb Anger at "Rape Camp" Claims*, INTER PRESS, Jan. 6, 1993, available in LEXIS, Nexis Library, Wires File.

71. See Lempkin's definition, *supra* note 21 and accompanying text.

72. Genocide Convention, *supra* note 4, art. II, 78 U.N.T.S. at 280.

against Serbs both recently and earlier, whether true or not.<sup>73</sup> Even assuming the Serbian genocidal acts were committed in self-defense of Muslim violations of international law, "self-help measures against the offending state many not include measures against the state's nationals that are contrary to the principles governing human rights and the treatment of foreign nationals."<sup>74</sup>

### III. CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE<sup>75</sup>

After witnessing the Nazi atrocities during World War II, the world vowed, "never again." In an attempt to prevent future acts of genocide, the United Nations issued a resolution declaring that genocide is an international crime.<sup>76</sup> The Convention on the Prevention and

73. In March, 1992, Serbs appealed to the United Nations and European Community to stop Croatian support of Bosnian paramilitary activities. Jonathan S. Landay, *Bosnia Serbs Accuse Croats and Muslims of "Aggression,"* PROPRIETARY TO THE UNITED PRESS INT'L, Mar. 26, 1992, Int'l Section, available in LEXIS, Nexis Library, Wires File. British Serbs have also organized a museum displaying photographs of Serbian victims of Muslim atrocities both recently and from World War II. Mary Braid, *Serbs Defy UK Ban on "Atrocities" Exhibition,* INDEPENDENT, Feb. 26, 1993, at 2. After the European Commission issued its report on Bosnian rapes, the Serbs supplied their own list of Muslim and Croat rape camps. Miliakeric, *supra* note 70.

74. RESTATEMENT (THIRD), *supra* note 15, § 905 cmt. b.

75. Genocide Convention, *supra* note 4, 78 U.N.T.S. at 277.

76. Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations.

Many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part.

The punishment of the crime of genocide is a matter of international concern.

*The General Assembly, therefore,*

*Affirms* that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices—whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds—are punishable;

*Invites* the Member States to enact the necessary legislation for the prevention and punishment of this crime;

*Recommends* that international co-operation be organized between States with a view to facilitating the speedy prevention and punishment of the crime of genocide, and, to this end,

Punishment of the Crime of Genocide was completed in 1948 and entered into force in 1951.<sup>77</sup> As with all treaties, the Convention only applies to the signatory parties.<sup>78</sup> Differences in the drafters' ideologies led to compromises on acts against political groups, universal jurisdiction, and preventive measures.<sup>79</sup> These compromises weaken the treaty's effectiveness. Moreover, the force of the treaty as a symbol of the world's moral outrage at acts of genocide was diminished by the refusal of the United States to ratify the treaty until 1988, and then only with reservations.<sup>80</sup>

### A. *The Provisions of the Genocide Convention*

The Genocide Convention begins by defining genocide and then

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*Requests* the Economic and Social Council to undertake the necessary studies, with a view to drawing up a draft convention on the crime of genocide to be submitted to the next regular session of the General Assembly. G.A. Res. 96(I), U.N. Doc. A/64/Add.1 at 188 (1946). This resolution was passed unanimously. 1 UNITED NATIONS RESOLUTIONS: RESOLUTIONS ADOPTED BY THE GENERAL ASSEMBLY; 1947-1948 xxvii (1973).

77. Genocide Convention, *supra* note 4, 78 U.N.T.S. at 277. Entry into force was triggered "on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession." *Id.* art. XIII, 78 U.N.T.S. at 284.

78. The parties to the Convention include: Afghanistan, Albania, Algeria, Antigua and Barbuda, Argentina, Australia, Austria, Bahamas, Bahrain, Barbados, Belgium, Bulgaria, Burkina Faso, Burma, Byelorussian Soviet Socialist Republic, Cambodia, Canada, Chile, China, Colombia, Costa Rica, Cuba, Cyprus, Czechoslovakia, Denmark, Ecuador, Egypt, El Salvador, Estonia, Ethiopia, Fiji, Finland, France, Gabon, Gambia, German Democratic Republic, Federal Republic of Germany, Ghana, Greece, Guatemala, Haiti, Honduras, Hungary, Iceland, India, Iran, Iraq, Ireland, Israel, Italy, Jamaica, Jordan, Democratic People's Republic of Korea, Republic of Korea, Laos, Lebanon, Lesotho, Liberia, Libya, Luxembourg, Maldives, Mali, Mexico, Monaco, Mongolia, Morocco, Mozambique, Nepal, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Papua New Guinea, Peru, Philippines, Poland, Romania, Rwanda, Saint Vincent and the Grenadines, Saudi Arabia, Senegal, Spain, Sri Lanka, Sweden, Syria, Tanzania, Togo, Tonga, Tunisia, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom, United States, Uruguay, Venezuela, Vietnam, Yemen (Aden), Yemen (Sanaa), Yugoslavia, Zaire, Zimbabwe. TREATIES IN FORCE - JANUARY 1992 329 (1992).

79. For a discussion of these compromises, see *infra* part III.C.

80. The United States delayed ratifying the Genocide Convention for two main reasons. First, the United States feared that other nations would use the Convention to harass it by bringing frivolous suits against the United States in the International Court of Justice. See Huber, *supra* note 14. Second, the United States felt that the Convention was full of loopholes. *Id.* For a discussion of the reservations see 132:15 CONG. REC. S1355-81 (daily ed. Feb. 19, 1986); Marian Nash Leich, *Protection of Human Rights*, 80 AM. J. INT'L. L. 612 (1986).

includes within the definition of genocide such acts as conspiracy, incitement, attempts, and complicity.<sup>81</sup> Article IV specifies that all individuals, including government officials, are liable for acts of genocide.<sup>82</sup> The Convention also obligates signatory nations to legislate against genocide,<sup>83</sup> to prosecute offenders in national or international courts,<sup>84</sup> and to extradite alleged offenders to countries with jurisdiction.<sup>85</sup> Finally, the Convention allows a contracting party to seek recourse from the United Nations<sup>86</sup> and dispute resolution in the International Court of Justice.<sup>87</sup>

### B. *The Binding Nature of the Genocide Convention*

Although Yugoslavia was a signatory to the Genocide Convention, the breakaway republics do not necessarily remain parties.<sup>88</sup> In its preliminary order concerning the situation in Bosnia, the International Court of Justice found that there was a basis upon which the Court might exercise jurisdiction over both Rump Yugoslavia (Serbia and

81. Genocide Convention, *supra* note 4, arts. II, III, 78 U.N.T.S. at 280.

82. *Id.* art. IV, 78 U.N.T.S. at 280.

83. *Id.* art. V, 78 U.N.T.S. at 280.

84. *Id.* art. VI, 78 U.N.T.S. at 280-82.

85. *Id.* art. VII, 78 U.N.T.S. at 282.

86. *Id.* art. VIII, 78 U.N.T.S. at 282.

87. *Id.* art. IX, 78 U.N.T.S. at 282.

88. Under customary international law, a new nation cannot automatically be bound by the treaties of the predecessor nation. RESTATEMENT (THIRD), *supra* note 15, § 210(3). However, the Vienna Convention on Succession of States in Respect of Treaties (Vienna Convention), once in force, will change that custom. Although the Vienna Convention is not in force, Yugoslavia signed and ratified the Vienna Convention, and is thereby bound not to undermine the objective of this Convention. *See* Vienna Convention of the Law of Treaties, May 23, 1969, art. 18, 8 I.L.M. 679, 686. The Vienna Convention on Succession of States in Respect of Treaties states:

(1) When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:

(a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed.

Vienna Convention on Succession of States in Respect of Treaties, Aug. 22, 1978, art. 34(1), 17 I.L.M. 1488, 1509. Additionally:

When, after separation of any part of the territory of a State, the predecessor State continues to exist, any treaty which at the date of the succession of States was in force in respect of the predecessor State continues in force in respect of its remaining territory unless:

(a) the States concerned otherwise agree;

(b) it is established that the treaty related only to the territory which has separated from the predecessor State; or

Montenegro) and Bosnia under the Genocide Convention.<sup>89</sup> The Court noted that the Federal Republic of Yugoslavia, composed of Serbia and Montenegro, issued a declaration stating that “[t]he Federal Republic of Yugoslavia, continuing the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally.”<sup>90</sup> Also, while Yugoslavia disputed Bosnia’s ability to *accede* unilaterally (essentially add itself as a party) to the Genocide Convention by filing a notice of succession on December 29, 1992, the Court did not accept the validity of that argument.<sup>91</sup> The Court noted that the Secretary-General of the United Nations treated Bosnia’s notice as a *succession*, or inheritance (as opposed to an accession). The Court further commented that even if Bosnia had attempted to accede to the Genocide Convention, the necessary 90 day period for objection to an acceding party required under articles XI and XIII of the Genocide Convention had passed.<sup>92</sup>

### C. *The Weaknesses of the Genocide Convention*

The Genocide Convention is thus relevant because it is binding upon all of former Yugoslavia. However, the Convention was subject to compromises, and the result is therefore an ambiguous and weak document.

The first compromise of the Genocide Convention concerns the question of political groups. Soviet bloc countries strongly opposed the inclusion of political groups in the Genocide Convention’s definition of

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(c) it appears from the treaty or is otherwise established that the application of the treaty in respect of the predecessor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

*Id.* art. 35, at 1509.

Taken together, these two sections of the Vienna Convention dictate that all of the former Yugoslavia is bound by treaties to which Yugoslavia was a party. The first section applies to all territories, whether or not the predecessor continues as a sovereign state. The latter section applies where, as Serbia claims, the predecessor State continues to exist. In both situations the treaties remain in force, and all the republics are bound.

89. Order on Request for the Indication of Provisional Measures in Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*), 32 I.L.M. 888, 896 (1993).

90. *Id.*

91. *Id.*

92. *Id.*

genocide.<sup>93</sup> As a result, although the United Nations resolution, which passed unanimously only two years before the drafting of the Genocide Convention, defines the elimination of political groups as genocidal, the Convention does not.<sup>94</sup> This omission was more important in the situations in Cambodia, Indonesia and Uganda than it is in Yugoslavia.<sup>95</sup> However, one of the reasons the United States hesitated to ratify the Genocide Convention was that it did not address the likely genocides against political groups.<sup>96</sup>

A second weakness in the Genocide Convention is the lack of universal jurisdiction. Although some authorities view genocide as a crime with universal jurisdiction,<sup>97</sup> the Convention grants jurisdiction only to the State where the acts took place or to a tribunal whose jurisdiction is accepted by both parties.<sup>98</sup> This lack of universal jurisdiction is a serious flaw because most genocides are state-sponsored, and victims can hardly expect to obtain relief from their own guilty government.<sup>99</sup>

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93. HUBER, *supra* note 14.

94. KUPER, *supra* note 1, at 126.

95. These were all situations involving "genocide" against political enemies. *See id.* at 126-47.

96. *See* 132:15 CONG. REC. S1355 (daily ed. Feb. 19, 1986) (comments of Senator Symms). Note that the enabling legislation known as the Proxmire Act, also omits "political." Proxmire Act, 18 U.S.C. § 1091 (1988).

97. RESTATEMENT (THIRD), *supra* note 15, § 404, reporters' note 1; Attorney General for the Government of Israel v. Eichmann, 36 I.L.R. 5, 10 (1968). Genocide is generally committed by governments, and governments are unlikely to punish themselves. With universal jurisdiction, more places would be available in which to seek justice.

98. Genocide Convention, *supra* note 4, art. VI, 78 U.N.T.S. at 280-82.

99. The whole Convention is based on the assumption of virtuous Governments and criminal individuals, a reversal of the truth . . . . In any event even if this assumption were correct, the criminal law of every civilized State provides sufficiently against individual acts of the kind which are enumerated in the Convention . . . . Thus, the Convention is unnecessary where it can be applied and inapplicable where it may be necessary . . . . In the absence of means to make it effective, the Convention on the Prevention and Punishment of the Crime of Genocide joins all the pacts and international declarations, which, for lack of enforcement provisions, remain pure show and all contain the mental reservation; "unless contrary to the higher interests of the State, of which the State is sole judge."

U.N., *Study of Genocide*, at 118-19, *quoted in* KUPER, *supra* note 1, at 17-18. Nevertheless, the surviving Bosnian government in Sarajevo has tried and convicted two Bosnian Serb soldiers for genocide. David Ottoway, *Bosnia Convicts Two Serbs in War Crimes Trial; U.N. Officer Seeks Amnesty to Promote Peace*, WASH. POST, Mar. 31, 1993, at A21. Both were sentenced to death. *Id.* The U.N. military commander in Bosnia strongly condemned these trials, convinced that such trials should be held before an international tribunal. *Id.*



Yet lawyers offering solutions under the Convention have focused on the ability of Bosnia, or escaped Bosnians, eventually to hold genocide trials.<sup>100</sup> Outside nations, then, are restricted to assisting in the collection of evidence, as opposed to directly trying to curb the atrocities themselves.<sup>101</sup> Jurisdiction is the clearest example of how the Convention suffers from its treatment of genocide as an individual act, instead of as a government policy.

Finally, the Convention proposes no preventative measures, although signatory nations are permitted to appeal to the United Nations for appropriate measures to control genocidal acts.<sup>102</sup> Bosnia has brought Yugoslavia before the International Court of Justice. The Court has only issued a provisional order which, while not deciding the merits of the case, asks Yugoslavia to "take all measures within its power to prevent commission of the crime of genocide" and to ensure that any armed forces supported by it do not commit acts of geno-

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100. "Bosnia is now a sovereign country. . . . It is perfectly possible under the Genocide Convention for Bosnia now to put together its own tribunal to try individuals for acts of genocide." Interview with David Scheffer, a senior associate and lawyer at the Carnegie Endowment for International Peace in Washington (NPR radio broadcast, Aug. 9, 1992), transcript available in LEXIS, Nexis Library, Script File. The United States has sought to promote an international tribunal to try war criminals from the Bosnian crisis, and has even prepared a list of those it believes should be tried. Elaine Sciolino, *U.S. Names Figures it Wants Charged with War Crimes*, N.Y. TIMES, Dec. 17, 1992, at A1. International pressure for such a tribunal is also strong. David Todd, *Pressure Mounts for a War-Crimes Tribunal; Canada is in the Vanguard of a Move to Set Up an Unprecedented Panel to Deal with Atrocities in the Former Yugoslavia*, GAZETTE (Montreal), Feb. 20, 1993, at B3. The United Nations finally passed a resolution to set up such a tribunal, intended to try war criminals from all sides. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993); Anthony Goodman, *U.N. Decides to Set Up Yugoslav War Crimes Tribunal*, REUTER LIBR. REP., Feb. 22, 1993, BC Cycle, available in, LEXIS, Nexis Library, Wires File. Even supporters of the tribunal admit, however, that the prosecution may only be able to make war criminals "prisoners in their own countries, subject to arrest if they ever travel abroad." Nordland, *supra* note 12, at 51. Both resistance from forces who control areas where atrocities have occurred, and poor funding by the Security Council have hampered investigatory activity. *Id.*

101. The War Crimes Commission is compiling reported accounts, identifying victims, criminals, and witnesses, to use as evidence in eventual war crimes trials before an international tribunal. Goodman, *supra* note 100. However, critics accuse the West of using the war crimes tribunal as "a substitute for real action to control the crimes." Nordland, *supra* note 12, at 51 quoting Muhamed Sacirbey, Bosnia's ambassador to the United Nations. Both Denmark and Germany, however, have gone further and brought criminal charges against alleged war criminals discovered within their borders. ABC World News Tonight (ABC, Inc., Feb. 18, 1994) transcript available in LEXIS, Nexis Library, Script File.

102. Genocide Convention, *supra* note 4, art. VIII, 78 U.N.T.S. at 282.

cide.<sup>103</sup> A few months later the Court issued a second statement demanding an "immediate and effective implementation" of its provisional order.<sup>104</sup> While the statement may push the United Nations Security Council to respond more effectively to the Bosnian crisis, its very necessity demonstrates the ineffectiveness of the Court's initial order.<sup>105</sup>

While all former Yugoslavian republics are bound by the Genocide Convention, the Convention itself is of little use. It obligates nations to control genocidal acts within their borders, and the republics do not seem willing or able to do this. The remaining Bosnians may only seek justice through their own courts or an international tribunal when the armed conflict is resolved.<sup>106</sup> Even then it may prove difficult. For example, only with international protection were the Kurds able to survive their oppression and gather Iraqi documents with which they hope to prosecute a case of genocide before the International Court of Justice.<sup>107</sup>

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103. See Order on Request for the Indication of Provisional Measures in Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*), 32 I.L.M. 888, 901 (1993).

104. Stephen Kinzer, *World Court Presses Belgrade on Genocide Issue*, N.Y. TIMES, Sept. 14, 1993, at A5.

105. *Id.*

106. The Bosnian government in Sarajevo has managed to try and convict two Serbian soldiers. See discussion *supra* note 99. Also, the Bosnians filed a claim of genocide against Serbia in the International Court of Justice. See case cited *supra* note 103 and accompanying text. In an unexpected unanimous opinion, the Court severely criticized Serbia's role as instigator of the violence, and ordered Rump Yugoslavia (Serbia and Montenegro) to "take all measures within its power to prevent commission of the crime of genocide." *Bosnia and Herzegovina v. Yugo. (Serbia and Montenegro)*, 32 I.L.M. at 901. The Russian Judge dissented only to the part of the opinion calling on Serbia to prevent any military forces associated with it from committing acts of genocide. *Id.* at 902. The Bosnians had hoped that the Court would find that Bosnia has a right to receive arms from other nations to defend itself, but the Court ignored the issue in its emergency opinion. Andrew Kelley, *World Court Orders Serbia to Prevent Genocide in Bosnia*, REUTERS LIBR. REP., Apr. 8, 1993, BC Cycle, available in LEXIS, Nexis Library, Wires File. Serbia denied any role in the Bosnian civil war. *Id.*; Andrew Kelley, *Serbia Rejects Bosnia's Genocide Charges in World Court*, REUTERS LIBR. REP., Apr. 2, 1993, BC Cycle, available in LEXIS, Nexis Library, Wires File. The lack of respect for the preliminary order was apparent even to the International Court of Justice, which issued a second order in September, 1993, demanding compliance with its original order. Kinzer, *supra* note 104, at A5.

107. Judith Miller, *A Case of Genocide, Files Captured by Rebels Outline Saddam Hussein's Murderous Campaign against Iraq's Four Million Kurds*, OTTAWA CITIZEN, Jan. 9, 1993, at B5.

### D. *Going Beyond the Convention*

There is no provision in the Convention that excludes available remedies under customary law, so these options may also be considered.<sup>108</sup> However, if genocide is strictly an internal matter, the customary principle of sovereignty, as well as the United Nations Charter, limits the actions that may be taken even by the United Nations.<sup>109</sup> The concept of "sovereignty" implies "freedom of states from external dominance in the determinance of their domestic and foreign policies and the equality of states under law."<sup>110</sup> The idea of domestic jurisdiction, which traditionally included human rights,<sup>111</sup> is codified in the United Nations Charter.<sup>112</sup>

Two approaches are available to legitimize international action to stop extreme humanitarian violations. The first approach examines the evolution of genocide in customary international law. Through its actions and statements, the world community has demonstrated a recognition that genocide can easily take on international proportions.<sup>113</sup> If genocide is an international concern, a world response is not intervention into the domestic affairs of a state. The second approach follows the evolution of the doctrine of non-intervention. This doctrine has always had exceptions,<sup>114</sup> and recently many observers have advocated recognition of a new exception in the face of humanitarian violations.<sup>115</sup> The main difference between these two approaches is in the justification for international action. In the former, world action is justified be-

108. THEODORE MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* 229-30 (1989). See also RESTATEMENT (THIRD), *supra* note 15, § 703(1) cmt. a.

109. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

U. N. CHARTER art. 2, ¶ 7.

110. Jost Delbruck, *Commentary on International Law: A Fresh Look at Humanitarian Intervention under the Authority of the United Nations*, 67 *IND. L. J.* 887, 889 (1992).

111. RAJAN, *supra* note 16, at 168.

112. U.N. CHARTER art. 2, ¶ 7. For text of paragraph see *supra* note 109.

113. See *infra* parts IV.B. & IV.C.

114. See *infra* note 179 and accompanying text.

115. See Richard Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives*, in *LAW AND CIVIL WAR IN THE MODERN WORLD*, 229-51 (1974); Ved P. Nanda, *Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti—Revisiting the Validity of Humanitarian Intervention Under International Law—Part I*, 20 *DENV. J. INT'L L. & POL'Y* 305 (1992).

cause genocide has an international impact outside domestic jurisdiction. Alternatively, under the latter approach, the action is acknowledged as intervention, but justified under a public policy of preventing massacres on the scale of genocide.<sup>116</sup>

#### IV. GENOCIDE IN CUSTOMARY INTERNATIONAL LAW

While the Genocide Convention treats genocide as an internal matter to be controlled by the state, it does not represent the entirety of international law on the subject. Even before the Convention was in existence there was some evidence of "humanitarian intervention on behalf of populations persecuted in a manner shocking to mankind."<sup>117</sup> More recently, some nations have acted on the presumption that genocide is not merely an internal, domestic matter.<sup>118</sup> These actions may point to principles of international law not embedded in the Genocide Convention.

Certain state practices may evolve into customary international law.<sup>119</sup> Although it is not always clear when a practice has become custom, there are two recognized criteria. The first criterion is the manifestation of a general and consistent practice among a significant number of states.<sup>120</sup> The second criterion is evidence that the states follow the practice out of a sense of legal obligation (*opinio juris*).<sup>121</sup> Once a custom is recognized, it is binding upon all nations, even those who enter the international community after the custom is recognized

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116. Oscar Schachter, *The Rights of States to Use Force*, MICH. L. R. 1620, 1628-29 (1984).

117. LEO KUPER, *GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY* 19-20 (1981).

In 1827, England, France and Russia had intervened to end the atrocities in the Greco-Turkish war. In 1840, the President of the United States, through his Secretary of State, intervened with the Sultan of Turkey on behalf of the persecuted Jews of Damascus and Rhodes. The French intervened to check religious atrocities in Lebanon in 1861. There were protests by various nations to the governments of Russia and Romania with respect to pogroms and atrocities against the Jews, and to the government of Turkey on behalf of the persecuted Christian minorities.

*Id.*

118. *See infra* part IV.B.

119. RESTATEMENT (THIRD), *supra* note 15, § 102 (2).

120. MERON, *supra* note 108, at 3. *See* RESTATEMENT (THIRD), *supra* note 15, § 102(2).

121. MERON, *supra* note 108, at 3. *See* RESTATEMENT (THIRD), *supra* note 15, § 102(2). *See also* Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L L. 1, 6 (1988).

as law.<sup>122</sup> In order to be exempt from customary law, a nation must object to the practice during its formation as custom.<sup>123</sup> Applying these criteria to evidence of state practice and attitudes toward genocide, it becomes clear that customary international law now permits an aggressive outside response to governmental policies of genocide.

### A. *The International Impact of Genocide*

Genocide generally has drastic effects outside the country where it occurs. For example, genocide can produce thousands of refugees, placing an enormous strain on nearby countries.<sup>124</sup> In addition, if the targeted ethnic group constitutes the majority of the population of a nearby country, that country is likely to be drawn into the conflict.<sup>125</sup> This possibility is extremely likely in former Yugoslavia, where the violence could spread to the Albanian population in the former Yugoslavian province of Kosovo, drawing Albania into the conflict.<sup>126</sup> A substantial number of Hungarians also reside in Croatia.<sup>127</sup> Moreover, as the West permits the situation to deteriorate, other Muslim nations are demanding much stronger action to protect Bosnian Muslims.<sup>128</sup> Certainly, genocide is capable of creating real international dangers. In fact, the United Nations Security Council has found the situation in

122. RESTATEMENT (THIRD), *supra* note 15, § 102 cmt. d.

123. *Id.*

124. Thousands of Kurds poured into Turkey to escape Iraqi persecution, Miller, *supra* note 107, and over two million refugees have fled the former Yugoslavia. Elliott, *supra* note 10, at C4.

125. During the 1971 civil war in Pakistan, India acted with military force in Pakistan to protect the Bengalis, with whom India had ethnic ties. Schachter, *supra* note 116, at 1629. Vietnam invaded Cambodia to end the oppressive regime in that country. KUPER, *supra* note 1, at 131. Burundi and Rwanda, both home to the warring Tutsi and Hutu, have likely interfered in massacres occurring in both countries. *See id.* at 153-55; *Where's the Outrage over the Slaughter in Bloody Burundi?*, CHI. TRIB., Aug. 28, 1988, at C3; *Burundi Minister Speaks of Ethnic Genocide by Military*, REUTERS LIB. REP., Oct. 23, 1993, BC Cycle, available in LEXIS, Nexis Library, Wires File.

126. *See generally* Roger Cohen, *Fear of the Serbs Spreads in the South*, N.Y. TIMES, May 30, 1993, at 4(5). Michael W. Galligan et al., *The Kosovo Crisis and Human Rights in Yugoslavia*, 46 REC. ASS'N B. CITY N.Y., 212, 236-57 (1991). For a frightening discussion on the possibilities for the spread of war and violence, *see* Barry James, *Balkan States Choose Sides, Trying to Contain the Crisis*, INT'L HERALD TRIB., Feb. 22, 1993.

127. *The Eagle's Curse*, *supra* note 26.

128. Ashraf Fouad, *Moslem States Urge U.N. to Use Force in Bosnia*, REUTERS LIBR. REP., Dec. 3, 1992, BC Cycle, available in LEXIS, Nexis Library, Wires File.

Bosnia to constitute a threat to the peace.<sup>129</sup> International efforts to curb genocide before it spreads outside one nation's borders are justified by the reality of genocide's international consequences.<sup>130</sup>

### B. State Action

Nations have taken action outside their borders to end genocidal policy or to punish perpetrators. For example, in 1978, Tanzania invaded Uganda and ended Idi Amin's reign.<sup>131</sup> Although prompted by an invasion of its own territory, Tanzania also justified its counter-invasion of Uganda on humanitarian grounds.<sup>132</sup> The action was approved by the West, and the new Ugandan government was recognized by many countries, including the United States.<sup>133</sup>

Indian troops invaded Pakistan during Pakistan's civil war of 1971 in order to protect the Bengalis, with whom India had ethnic ties.<sup>134</sup>

In 1979, the Vietnamese government invaded Cambodia and overthrew the government of Pol Pot.<sup>135</sup> The invasion was in response to the harsh government policies of mass killings of the educated, separation of families, and imposed migrations.<sup>136</sup> The United Nations refused to recognize the Vietnamese government, and the Pol Pot government retained its seat in the General Assembly.<sup>137</sup> Although the United Nations maintained that its decision was based on the rejection of aggressive intervention, politics probably played a larger role.<sup>138</sup>

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129. S.C. Res. 771, U.N. SCOR, 47th Sess., 3106th mtg., U.N. Doc. S/RES/771 (1992); S.C. Res. 787, U.N. SCOR, 47th Sess., 3137th mtg., U.N. Doc. S/RES/787 (1992). Once a matter reaches a point where it constitutes a threat to the peace, it no longer remains within the domestic jurisdiction of the state. RAJAN, *supra* note 16, at 33.

130. The only example of action taken by the United Nations on this premise occurred in the Congo. *Id.* at 153. However, in that situation, the United Nations was invited to intervene by the Congolese government, and effectively took control of many domestic matters to avoid civil war and maintain law and order. *See id.* at 142-60.

131. KUPER, *supra* note 1, at 226.

132. The President of Tanzania, Nyere, gave a speech indicating his desire to overthrow Idi Amin because of the oppressiveness of his regime. CAROLYN THOMAS, NEW STATES, SOVEREIGNTY, AND INTERVENTION 98-99 (1985).

133. *Id.* at 113. In Africa, only Nigeria and Sudan objected to the use of force against Uganda. *Id.* at 109.

134. Schachter, *supra* note 116, at 1629.

135. KUPER, *supra* note 1, at 131.

136. *See id.* at 130-31.

137. *Id.* at 136.

138. *Id.* at 90-91. The fact that Vietnam is a communist nation, as well as prior U.S. involvement there likely played a role in Western refusal to recognize Vietnam as the controlling government in Cambodia.

When oil interests were involved, the United Nations approved non-aggressive intervention in Iran to prevent the expected massacre of the Bahá'í during the period between 1980 and 1982.<sup>139</sup> Iran viewed the Bahá'í as "heretics, whose blood may be shed with impunity."<sup>140</sup> The 1979 Iranian Constitution recognizes only Christians, Jews, and Zoroastrians as religious minorities, although the Bahá'í outnumber the adherents of all those religions.<sup>141</sup> The strong Bahá'í International Community was able to persuade both the European Community and the United Nations to pass resolutions condemning the persecution of the Bahá'í in Iran and to monitor the situation.<sup>142</sup> International surveillance may well have prevented the expected massacre, although some persecution of the Bahá'í continues.<sup>143</sup>

Finally, in August 1992, without the mandate of a United Nations Resolution, the West began enforcing a no-fly zone in Iraq to protect the Kurds.<sup>144</sup> The trend of state practice, although sketchy, indicates that severe human rights violations are international matters.

### C. *Opinio Juris*

As far back as 1946, the French representative to the United Nations Commission on Human Rights spoke for the majority opinion when he said, "the question of human rights was a matter no longer of domestic, but of international concern."<sup>145</sup> The concept of universal jurisdiction was manifested in Israel's capture and trial of Adolf Eichmann, a Nazi war criminal.<sup>146</sup> The Israeli Supreme Court noted that, "it is precisely the fact that the crimes in question and their effects have extended to numerous countries that drains the territorial princi-

139. *Id.* at 163-64.

140. *Id.* at 152.

141. *Id.*

142. *Id.* at 163-64.

143. *Id.* at 164.

144. Jim Adams, *U.S. Joins No-Fly Zone Against Iraq*, REUTERS LIMITED, Aug. 26, 1992, AM Cycle, available in LEXIS, Nexis Library, Wires File. The no-fly zones were established to protect Shiites in the south and the Kurds in the north. Iraq's alleged placement of anti-aircraft missiles near the no-fly zone, which endangered reconnaissance planes, provoked the United States to militarily enforce the no-fly zone. *Highlights of Recent Disputes between Iraq and U.N.*, REUTERS, LTD., Jan. 12, 1993, BC Cycle, available in LEXIS, Nexis Library, Wires File.

145. G.A.O.R., 3rd Sess. Pt. I, 3rd Ctte., 57-58 quoted in RAJAN, *supra* note 16, at 98-99.

146. RESTATEMENT (THIRD), *supra* note 15, § 404. Israel also assumed jurisdiction on the principles of protective and passive personality. Attorney General of the Government of Israel v. Eichmann, 36 I.L.R. 5, 10 (1968).

ple of all content in the present case and justifies Israel in assuming criminal jurisdiction by virtue of the 'universal' principle."<sup>147</sup> Although the world strongly condemned the kidnapping of Eichmann from his home in Argentina as a violation of that nation's sovereignty, there was no world claim that Israel lacked jurisdiction over Eichmann.<sup>148</sup> Israel's position on universal jurisdiction is also reflected in the Restatement (Third) of the Foreign Relations Law of the United States.<sup>149</sup> Most recently, Germany is prosecuting a Bosnian Serb prison guard for aiding and abetting genocide under a German law granting universal jurisdiction over war crimes.<sup>150</sup>

More revealing is the changing interpretation of the phrase "threat to the peace" by the United Nations. Once a situation is recognized as a threat to the peace, by definition it is no longer a domestic matter.<sup>151</sup> There are two opposing views on the scope of threats to the peace. The strict view maintains that there must be an actual international threat.<sup>152</sup> The broader view would allow potential threats to be considered by the Security Council, with variable degrees of measures available.<sup>153</sup> Considering that the main purpose of the United Nations is to maintain peace and security, it is unreasonable to expect the United Nations to remain silent until potential threats arising under domestic jurisdiction expand across borders.<sup>154</sup>

United Nations practice shows a tendency toward the broad view. For example, in 1946 a subcommittee of the Security Council was able to conclude only that Franco's fascist regime in Spain was a potential menace to international peace and security.<sup>155</sup> Yet the subcommittee still maintained that a potential menace was sufficient to accord the matter international concern and fall under the Security Council's jurisdiction.<sup>156</sup> The General Assembly has found such broad matters as disarmament, domestic development, and the increasing gap between developing and developed states to be standing threats to the peace.<sup>157</sup>

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147. *Id.* at 303.

148. *Id.* at 6.

149. RESTATEMENT (THIRD), *supra* note 15, § 404 reporters' notes 1.

150. ABC World News Tonight (ABC, Inc. Feb. 18, 1994) transcript available in LEXIS, Nexis Library, Script File.

151. RAJAN, *supra* note 16, at 133.

152. *Id.* at 133-34.

153. *Id.* at 134.

154. *Id.* at 134-35. See also Delbruck, *supra* note 110, at 898-99.

155. RAJAN, *supra* note 16, at 12. The Soviet Union vetoed the subcommittee's proposal. *Id.* at 12-13.

156. *Id.*

157. *Id.* at 135.



Yet the United Nations has also acted with self-restraint. It did not take action in the civil war in Pakistan "until the internal conflict was internationalized by its spill over effects."<sup>158</sup>

The recent trends in the United Nations indicate an *opinio juris* that genocide is no longer a matter for domestic resolution. Although not on the scale of genocide, *apartheid*, another human rights violation, was considered by the United Nations a threat to international peace.<sup>159</sup> The United Nations has stated that as a member of the United Nations, South Africa could not claim that human rights violations addressed by the United Nations are domestic issues under article 2(7).<sup>160</sup> The United Nations has deemed the Kurdish situation in Iraq a threat to international peace and security,<sup>161</sup> permitting the West to use force within Iraqi borders to protect the Kurds.<sup>162</sup> Not surprisingly, the Security Council also has characterized the situation in the former Yugoslavia as a threat to the peace.<sup>163</sup>

#### D. Resulting Customary Law

Evidence of state practice and attitudes reflects that a new principle of customary international law has emerged. *Opinio juris* declared by Israel in the *Eichmann* case and by other nations through United

158. *Id.* at 193.

159. "Reaffirming that the policies and actions of the apartheid system constitute a threat to international peace and security." G.A. Res. 34/93A, U.N. GAOR, 34th Sess., Supp. No. 46 at 29, U.N. Doc. A/34/46 (1979). See Delbruck, *supra* note 110, at 894; Christiane Bourloyannis, *The Security Council of the United Nations and the Implementation of International Humanitarian Law*, 20 DENV. J. INT'L L. & POL'Y 335, 352 (1992).

160. Delbruck, *supra* note 110, at 893.

161. "Gravely concerned by the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas which led to a massive flow of refugees towards and across international frontiers and to cross border incursions, which threaten international peace and security in the region." S.C. Res. 688, U.N. SCOR, 46th Sess., 2982nd mtg. at 31, U.N. Doc. S/INF/46 (1991). See Delbruck, *supra* note 110, at 894.

162. *Chronology of Confrontation Between Iraq and West*, REUTERS, LIMITED, Jan. 13, 1992, BC Cycle, available in LEXIS, Nexis Library, Wires File.

163. "Recognizing that the situation in Bosnia constitutes a threat to international peace and security and that the provision of humanitarian assistance in Bosnia and Herzegovina is an important element in the Council's effort to restore international peace and security in the area." S.C. Res. 771, U.N. SCOR, 47th Sess., 3106th mtg., U.N. Doc. S/RES/771 (1992). "Reaffirming its determination that the situation in the Republic of Bosnia and Herzegovina constitutes a threat to the peace . . ." S.C. Res. 787, U.N. SCOR, 47th Sess., 3137th mtg., U.N. Doc. S/RES/787 (1992)(resolution authorizing the blockade).

Nations resolutions on South Africa, Iraq, and Bosnia have demonstrated a world belief that massive violations of human rights can assume international implications. Foreign state involvement in Uganda, Pakistan, Cambodia, Iran and Iraq has also demonstrated that outside action can be an appropriate response to genocide. *Opinio juris* and state action in this area strongly imply the emergence of a new principle of customary international law.<sup>164</sup> Sovereign states may no longer validly claim that their grave violations of human rights are domestic matters in which the rest of the world may not intervene.

### E. Exemption by Dissent

Assuming that customary international law now recognizes the international implications of genocide, Yugoslavia's dissent is not sufficient to exempt itself from that principle. In order to opt out of emerging customary international law, a nation must object persistently from the time the rule begins to emerge.<sup>165</sup> Although Yugoslavia has resisted proposed action by the United Nations concerning genocide, it has never clearly objected to the principle that genocide is an international concern. Yugoslavia proposed deferment of consideration of the situation in Cambodia<sup>166</sup> and opposed a resolution calling on China to respect the rights of the people in Tibet.<sup>167</sup> However, Yugoslavia must have objected consistently and clearly to avoid being bound by a principle. Instances where nations are not bound because of their past dissent are historically rare.<sup>168</sup> Although Yugoslavia has opposed action, it has

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164. While there is an argument that the state action on this issue is too scarce, many legal authorities maintain that *opinio juris* is more important than state practice in determining the emergence of new humanitarian international law. MERON, *supra* note 108, at 41-42, 246. Because of the unique circumstances in which human rights violations occur, including the lack of deliberation and limited access for impartial third parties, "the humanitarian conventions may have lesser prospects for actual compliance than other multilateral treaties, even though they enjoy stronger moral support." *Id.* at 44. *But see* Weisburd, *supra* note 121, at 38-39. State practice is not always representative of a State's attitude towards humanitarian international law. There may be political reasons for avoiding intervention in massive human rights violations on the scale of genocide.

165. G.M. DANILENKO, LAW MAKING IN THE INTERNATIONAL COMMUNITY 109 (1993).

166. KUPER, *supra* note 1, at 135-36.

167. *Id.* at 166.

168. RESTATEMENT (THIRD), *supra* note 15, § 102 cmt. d, reporters' note 2. The Restatement provides two examples. Scandinavian states were permitted to retain a four mile territorial sea, although only three miles was customary. *Id.*, reporters' note 2. Also, Norway was able to delineate its territorial zone under a non-customary sys-

not expressly dissented to the principle that grave violations of human rights are international concerns. In fact, in 1947 Yugoslavia actually supported Greek rebels, claiming that such support was justified by the Greek persecution of Slavo-Macedonian minorities.<sup>169</sup> Yugoslavia also voted for the resolution which characterized *apartheid* as a threat to international peace.<sup>170</sup> Without clear objection, Yugoslavia is bound by the development of this principle.

The situation in Bosnia is clearly a case of genocide, and arguably threatens the international peace and security. Rump Yugoslavia, bound by the principle that genocide is not a domestic affair, should not be permitted to deter outside action by insisting that such action constitutes impermissible intervention.

## V. STATE SOVEREIGNTY AND HUMANITARIAN INTERVENTION

An alternative approach to the issue of international involvement in preventing genocide derives from the evolution of the doctrine of non-intervention. Customary international law forbids intervention in the domestic affairs of a sovereign nation.<sup>171</sup> There have always been exceptions to this doctrine,<sup>172</sup> and recently some legal analysts have proposed that humanitarian intervention is a new exception.<sup>173</sup> The basic theory of humanitarian intervention allows increasing levels of intervention depending on the severity of the human rights violations.<sup>174</sup> Nevertheless, states are likely to be skeptical of this new theory out of concern that someday their own sovereignty might be threatened by a frivolous claim of human rights violation.

The development of international law has always been complicated by the doctrine of state sovereignty. The concept of sovereignty assumes absolute domestic authority. Intervention in the affairs of a sovereign state is generally prohibited.<sup>175</sup> This idea was codified in article

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tem. *Id.*

169. Michael Akehurst, *Humanitarian Intervention*, in, INTERVENTION IN WORLD POLITICS 95 (1984).

170. G.A. Res.00 34/93A, U.N. GAOR, 34th Sess., Supp. No. 46 at 29, U.N. Doc. A/34/46 (1979).

171. Nanda, *supra* note 115, at 307. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 108.

172. GERHARD VON GLAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 164-65 (1970), *quoted in* BARBARA HARFF, GENOCIDE AND HUMAN RIGHTS: INTERNATIONAL LEGAL AND POLITICAL ISSUES 42-43 (1984). For examples see *infra* notes 179-183 and accompanying text.

173. Nanda, *supra* note 115, at 309, 310.

174. *Id.* at 330.

175. *Id.* at 307.

II of the United Nations Charter.<sup>176</sup> Intervention has been defined as "dictatorial interference by one state in the affairs of another state for the purpose of either maintaining or changing the existing order of things, rather than mere interference per se."<sup>177</sup> Intervention is "any coercive attempt to usurp the decision-making capability of a theoretically sovereign state which does not originate within that state."<sup>178</sup>

The resulting doctrine of "non-intervention" has exceptions. For example, a country may exercise any intervention rights granted to it in a treaty.<sup>179</sup> Intervention is also permissible as a response to violations of recognized international law, and to violations of neutrality by belligerents.<sup>180</sup> Collective enforcement actions by a community of nations is also a form of permissible intervention.<sup>181</sup> Finally, a nation may intervene in the domestic affairs of another nation upon the invitation of the receiving nation or as an act of self-defense.<sup>182</sup> Some nations have also asserted the right to intervene on behalf of the rights of their own nationals.<sup>183</sup> Legal scholars argue that there is, or at least should be, an exception for humanitarian intervention.<sup>184</sup>

There are powerful policy arguments for allowing armed intervention to alleviate the most serious of human rights violations. Failure on the part of the international community to identify and prevent genocide sets a poor precedent. Asserting that the world would not interfere with his "final solution," Hitler once noted, "who, after all, speaks today of the annihilation of the Armenians [during World War I]?"<sup>185</sup> International law recognizes human rights violations as a crime, and

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176. U.N. CHARTER art. 2, ¶ 7.

177. VON GLAHN, *supra* note 172, at 163, *quoted in* HARFF, *supra* note 172, at 42.

178. THOMAS, *supra* note 132, at 21.

179. VON GLAHN, *supra* note 172, at 164-65, *quoted in* HARFF, *supra* note 172, at 42-43.

180. *Id.*

181. *Id.*

182. HARFF, *supra* note 172, at 43.

183. Nanda, *supra* note 115, at 309. Some examples of action to protect nationals include the 1960 Belgian deployment of troops to the Congo shortly after it gained independence; the 1964 rescue of hostages from the Congo by the United States and Belgium; the 1976 Israeli rescue of Israeli hostages held by terrorists in Uganda; and the 1980 attempt by the United States to rescue U.S. hostages held in Iran. Akehurst, *supra* note 169, at 99-102.

184. *See* Schachter, *supra* note 116, at 1622. For a discussion of the argument see *supra* note 125.

185. Vakahn N. Dadrian, *Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications*, 14 YALE J. INT'L L. 221, 225 (1989) (alteration added).

crimes have little meaning unless sanctions for violations are enforced. Obviously there are also important principles of morality and justice which demand an outside response to the unspeakably immoral act of genocide. Policy, however, is not law.

Even the universally recognized exceptions to non-intervention do not permit the use of armed or "subversive" intervention.<sup>186</sup> In 1965, the United Nations General Assembly declared that "armed intervention is synonymous with aggression . . . and a violation of the Charter of the United Nations."<sup>187</sup> The International Court of Justice has rejected the notion that there is any right of intervention, voicing a concern that such a right "would be reserved for the most powerful states, and might easily lead to perverting the administration of international justice itself."<sup>188</sup>

Not even a "substantial minority" of United Nations members have ever supported the validity of humanitarian intervention.<sup>189</sup> Despite the history of forceful actions to stop massive human rights violations, there is no *opinio juris* of the United Nations or the International Court of Justice supporting humanitarian intervention.

Horrible as human rights violations are, the community of nations, conscious of possible abuses and not willing to compromise each state's absolute sovereignty, has not collectively embraced the idea of humanitarian intervention.<sup>190</sup> Yet the United Nations has approved action to protect the Kurdish population.<sup>191</sup> A careful analysis of the resolution reveals that the United Nations considered the Kurdish situation a threat to international peace and security, and not an internal matter, because of the flight of large numbers of Kurds into neighboring countries.<sup>192</sup> Actions based on the recognition of the international conse-

186. *Id.*

187. HARFF, *supra* note 172, at 45.

188. Corfu Channel Case, 1949 I.C.J. at 35, *quoted in* Nanda, *supra* note 115, at 308-89.

189. Ian Brownlie, *Humanitarian Intervention*, LAW AND CIVIL WAR IN THE MODERN WORLD, 217, 218-19 (1974).

190. Schachter, *supra* note 116, at 1629. *See also* KUPER, *supra* note 117, at 161.

[T]he sovereign territorial state claims, as an integral part of its sovereignty, the right to commit genocide, or engage in genocidal massacres, against peoples under its rule. . . . To be sure, no state *explicitly* claims the right to commit genocide—this would not be morally acceptable even in international circles—but the right is exercised under more acceptable rubrics, notably the duty to maintain law and order, or the seemingly sacred mission to preserve the territorial integrity of the state.

*Id.*

191. *See supra* note 161 for text. Bourloyannis, *supra* note 159, at 352.

192. Bourloyannis, *supra* note 159, at 352.

quences of genocide are more attractive to the body of nations because they do not erode national sovereignty as would another exception to the doctrine of non-intervention. A theory that genocide is an international matter is also in tune with United Nations practice, which condemns intervention, but recognizes that matters addressed by international law are outside domestic jurisdiction.

## VI. EVALUATION OF VARIOUS ACTIONS AND OPTIONS IN BOSNIA

Peaceful means to end the conflict have failed utterly in Bosnia,<sup>193</sup> and if the slaughter is to be stopped before the Muslim population is destroyed, forceful measures are necessary. Only with a NATO ultimatum and threat of air strikes was the West able to bring about a period of relative peace in Sarajevo.<sup>194</sup> The world's reluctance to act has not only allowed genocidal acts by the Serbs to continue, but perhaps has also encouraged the Croatians to adopt such tactics.<sup>195</sup> The United Nations has already instituted a blockade to reduce the flow of arms into the area.<sup>196</sup> NATO jets are patrolling a no-fly zone, although many helicopters still fly over Bosnia without incident.<sup>197</sup> Muslim nations, however, are pushing for stronger measures including the use of ground forces.<sup>198</sup> At the very least, the Muslim nations, and some voices in the West, wish to lift the arms embargo for the Bosnian Muslims.<sup>199</sup>

Evaluation of all of these options without some consideration of the whole situation is rather artificial. Other factors to consider, beyond the acts of genocide, include the presence of an actual armed conflict in

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193. Kurt Schork, *U.N. Says Humanitarian Solution Failing in Bosnia*, REUTER LIBR. REP., Jan. 7, 1993, BC Cycle, available in LEXIS, Nexis Library, Wires File.

194. See John Pomfret, *Deadline Passes Without Airstrikes: NATO, U.N. Declare Serbs Have Complied*, WASH. POST, Feb. 21, 1994, at A1, A22.

195. Nordland, *supra* note 12, at 48-49. Croatian nationalists, wearing ski masks and shouting "let's kill the Muslims," entered the town of Stupni Do, raped and massacred the residents, and torched the buildings. *Id.* at 48.

196. S.C. Res. 787, U.N. SCOR, 47th Sess., 3137th mtg., U.N. Doc. S/RES/787 (1991).

197. Kurt Schork, *U.N. "Ignores" Helicopters in Bosnia No-Fly Zone*, REUTER LIBR. REP., Oct. 20, 1993, BC Cycle, available in LEXIS, Nexis Library, Wires File.

198. Fouad, *supra* note 128.

199. *Id.* Former British Prime Minister Margaret Thatcher strongly opposes the present policy of denying arms to the Bosnian Muslims. William Drozdiak, *Western Anxiety Deepens Over Bosnian Crisis; Unappealing Options, Sense of Helplessness Frustrate U.S. and Allied Leaders*, WASH. POST, Apr. 15, 1993, at A24. The United States also tried to raise support for lifting the arms embargo. William Drozdiak, *Allies Still Balk at Air Strikes, Arms Aid: Despite Bosnian Serbs' Vote U.S. Finding Consensus Elusive on How to Halt War*, WASH. POST, May 7, 1993, at A29.

progress, the world's recognition of Bosnia, and the "intervention" by Serbia. The use of force is an extreme step to take. It is important to justify such action under all available legal principles. The inclusion of genocidal policies as justification for the international response may also deter genocide in the future.

The Restatement of Law (Third) provides an overview of the use of countermeasures against violations of international law.<sup>200</sup> These measures apply not only to treaty violations, but also to violations of obligations *erga omnes*.<sup>201</sup> Generally, the permissible measures include freezing of assets and economic sanctions.<sup>202</sup> The unilateral use of force is limited by principles of necessity<sup>203</sup> and proportionality,<sup>204</sup> as well as by article 2(4) of the United Nations Charter.<sup>205</sup> The only exception to the prohibitions in the United Nations charter is in situations of self-defense.<sup>206</sup> The United Nations also possesses the power to call for a collective use of force.<sup>207</sup>

United Nations peacekeepers have gone into various areas in former Yugoslavia to attempt to protect relief convoys and help refugees reach relative safety.<sup>208</sup> Although United Nations agents have territorially entered former Yugoslavia, they do not present a threat to the existing sovereignty and are there pursuant to United Nations resolutions.<sup>209</sup> The United Nations relief efforts are welcomed by the Bosnian Muslims, but do not challenge Serbian forces.

The sanctions thus far imposed have been restrained. As the world first became aware of the seriousness of the situation, the United Nations initiated an arms embargo.<sup>210</sup> On November 16, 1992, the United

200. RESTATEMENT (THIRD), *supra* note 15, § 905 cmt. a.

201. *Id.* Obligations *erga omnes* are those that are applicable to every state, including human rights obligations under customary international law. *Id.* § 703 cmt. b.

202. *Id.* § 905 cmt. b.

203. *Id.* cmt. g.

204. *Id.*

205. U.N. CHARTER art. 2, ¶ 4 states, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

206. RESTATEMENT (THIRD), *supra* note 15, at § 905 cmt. g.

207. U.N. CHARTER Ch. VII, art. 42.

208. Schork, *supra* note 193. The United Nations efforts include rescuing Muslims from besieged Srebrenica to the safer city of Tuzla. John Burns, *Shelling Grounds Bosnian Evacuation*, N.Y. TIMES, Mar. 25, 1993, at A3.

209. S.C. Res. 770, U.N. SCOR, 47th Sess., 3106th mtg., U.N. Doc. S/RES/770 (1992).

210. S.C. Res. 713, U.N. SCOR, 46th Sess., 3009th mtg. at 42, 43, U.N. Doc. S/INF/46 (1991).

Nations, finding a definite threat to the international peace, authorized the establishment of a blockade to enforce the arms embargo.<sup>211</sup> Normally blockades are an act of war; however, mere policing of a coastline is not necessarily considered an act of war.<sup>212</sup> Limited pacific blockades have been carried out in Rhodesia, Vietnam, and Cuba.<sup>213</sup> The blockade of Serbia is solely to reduce the flow of arms into the region, enforcing a United Nations resolution<sup>214</sup> which imposes an arms embargo on the area. The blockade of former Yugoslavia is also pursuant to a United Nations resolution,<sup>215</sup> and the United Nations is authorized to call for appropriate measures once it has identified a threat to the international peace.<sup>216</sup>

In October, 1992, the United Nations banned military flights over Bosnia.<sup>217</sup> The prohibition of Serbian flights over Bosnia does not violate Serbia's sovereignty because Bosnia is not within Serbia's borders, and all nations are forbidden from sending military flights over the area. NATO is now authorized to patrol the air space to enforce the no-fly zone.<sup>218</sup> This action involves actual armed involvement within the borders of Serbia. By this point, however, the claims of genocide have been confirmed, and the international nature of the atrocities is apparent. The threat to the international peace is undeniable and has been declared by the Security Council.

The most controversial proposal concerns lifting the arms embargo on Bosnia to allow arms shipments to the Bosnian Muslims who are badly outmatched in weaponry.<sup>219</sup> The most recent advocate of this proposal is former British Prime Minister, Margaret Thatcher.<sup>220</sup> The legal nature of this proposal goes beyond discussions of intervention and the international nature of genocide. Advocates insist the Bosnian

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211. S.C. Res. 787, U.N. SCOR, 47th Sess., 3137th mtg., U.N. Doc. S/RES/787, annex ¶¶ 9-12 (1992).

212. INGRID DETTER DELUPIS, *THE LAW OF WAR* 268 (1988).

213. *Id.* at 269-70.

214. S.C. Res. 713, U.N. SCOR, 46th Sess., 3009th mtg. at 42, 43, U.N. Doc. S/INF/46 (1991).

215. S.C. Res. 787, U.N. SCOR., 47th Sess., 3137th mtg., U.N. Doc. S/RES/787, annex ¶¶ 9-12 (1992).

216. U. N. CHARTER Ch.. VII.

217. Anthony Goodman, *U.N. Orders Ban on Military Flights Over Bosnia*, REUTERS, LIMITED, Oct. 10, 1992, PM Cycle, available in LEXIS, Nexis Library, Wires File.

218. See *supra* note 197, and accompanying text.

219. Fouad, *supra* note 128.

220. See *Inside Parliament: Thatcher Casts her Shadow over Commons*, INDEPENDENT, Apr. 15, 1993, at 6 (discussing the opposing views in Parliament on the issue of lifting the arms embargo).



Muslims have a right to self-defense.<sup>221</sup> Self-defense is undeniably a right under international law.<sup>222</sup> The question is less obvious, however, when the assistance of third parties is involved.

Nevertheless, it seems logical that the Bosnians should not have less of a right to self-defense than those who are better armed. Well-armed nations or groups are less likely to suffer attack. Under the current circumstances, however, the right to self-defense is useless if aid is not permissible. Furthermore, Serbia is unlikely to negotiate a peaceful settlement as long as it has a clear military advantage.

Finally, the Arab nations are pushing for the ultimate intervention, the introduction of ground forces.<sup>223</sup> There can be no doubt that this would be the most significant imposition upon state sovereignty, and such intervention must be weighed against the necessity and proportionality of the situation. The situation is most serious, having been determined a threat to the peace by the Security Council. The realistic possibility that the violence could spread to Macedonia, and involve Greece and Turkey, two NATO powers, is of obvious international concern.<sup>224</sup> Countless negotiated cease-fires have failed within days of being concluded.<sup>225</sup> Although Serbia and Croatia have agreed to a peace agreement, Bosnian Muslims refuse to accept borders which allow the Serbians to keep land they gained through aggression.<sup>226</sup> It is not outrageous to suggest force is absolutely necessary to end the genocidal events in Bosnia.

NATO is considering a plan which would send 50,000 troops into Bosnia to enforce any plan agreed to by the Bosnians, Croats, and Serbs.<sup>227</sup> However, these troops would serve at the invitation of whatever governments may ultimately emerge in the Bosnian area, and they would not subvert the sovereignty of those nations.

After more than two years of genocide and war crimes in Bosnia, NATO finally took a more aggressive stance. After the world recoiled at the single shell which killed almost 70 civilians in the marketplace in Sarajevo, NATO issued an ultimatum backed by the threat of air

221. *Id.*

222. U.N. CHARTER art. 51.

223. Fouad, *supra* note 128.

224. James, *supra* note 126.

225. Weller, *supra* note 35, at 598-601.

226. *Bid to End Bosnian War is Defeated*, ATLANTA J. AND CONST., Sept. 30, 1993, at A10.

227. Giles Elgood, *Croat Soldiers in Sarajevo Face Tense Situation*, REUTERS, LIMITED, Sept. 25, 1993, PM Cycle, available in LEXIS, Nexis Library, Wires File.

strikes.<sup>228</sup> At the end of the time allotted to the Serbs to remove their big guns from around Sarajevo or turn them over to U.N. control, NATO backed off its threat, declaring the Serbs to be in "virtual compliance."<sup>229</sup> NATO claimed that its ultimatum led to peace in Sarajevo and ultimately brought the war closer to an end. Unfortunately, the Serbs merely made a show of reducing their guns around Sarajevo, and got the additional benefit of welcoming their allies, the Russians, to the scene.<sup>230</sup> Furthermore, other Bosnian cities remain under siege.<sup>231</sup> A blatant violation of the no-fly zone finally prompted NATO to engage in its first military attack and down two Bosnian Serb planes.<sup>232</sup> Even more aggressive, NATO attacked Serb positions outside the Moslem city of Gorazde, earlier declared a "safe area" by the U.N.<sup>233</sup> While NATO's statement explained that the bombing was in response to the Serb's attack on the city of Gorazde in violation of a U.N. Security Resolution, the threat to U.N. military personnel and humanitarian aid workers was the main impetus.<sup>234</sup> Unfortunately, humanitarian violations and war crimes were not listed among the reasons for the attack. It is possible that the new, more aggressive approach by NATO has brought peace initiatives from mere posturing to a point where slow progress is possible.<sup>235</sup>

## VII. CONCLUSION

The use of force should always be a last resort. Efforts at media-

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228. Pomfret, *supra* note 194, at A22; Ruth Marcus, *Clinton Can Claim Measure of Success: U.S. Now Faces Question of Expanding Ultimatum to Other Cities*, WASH. POST, Feb. 21, 1994, at A1.

229. Pomfret, *supra* note 194, at A1.

230. Julijana Mojsilovic, *Bosnian Serbs Celebrate Arrival of Russians*, WASH. POST, Feb. 21, 1994, at A19. Serbs shared brandy with the Russian peacekeepers who greeted Serbian leader Karadzic with the Serb victory sign. *Id.*

231. See David B. Ottaway, *Mostar's Muslims 'Living Like Rats': Besieged Bosnian Town Faces Conditions Like Those in Sarajevo*, WASH. POST, Feb. 21, 1994, at A1.

232. Lancaster, *supra* note 11, at A1.

233. Jonathan C. Randal, *U.S. Jets Strike Serb Forces Near Bosnian Town*, WASH. POST, Apr. 11, 1994, at A1.

234. *Id.*; John Lancaster, *NATO's 'Neutrality' may be Early Casualty*, WASH. POST, Apr. 11, 1994, at A1.

235. The Bosnian Muslims and Croats have agreed on a federation proposal which "creates a Bosnian state which can exist either independently or in confederation with Croatia." John Pomfret, *Emerging Balkan Peace Plan Could Be Wrenching*, WASH. POST, Mar. 29, 1994, at A12. The Croats have also reached a cease-fire agreement with the Serbs. *Serbs in Croatia Sign a Cease-Fire*, N.Y. TIMES, Mar. 30, 1994, at A10.

tion, peaceful negotiations and settlement must be pursued vigorously. Only when negotiations consistently fail, should the world community realize the more extreme options legally available. A commitment to armed enforcement of international law should not be taken lightly. There are, however, certain violations of international law that are so atrocious that the world should not hesitate to impose appropriate sanctions. In the case of genocide, the most extreme of human rights violations, the world should reject the myth that the situation is not one of international proportions.

In reality, the question of the legality of armed force in Bosnia has not restrained any nation from acting in Bosnia. Certainly the United States has acted swiftly for "humanitarian" reasons in Grenada and Panama, cases with legal bases much less clear than this one.<sup>236</sup> The commitment to end the crisis in Bosnia is a costly one, and that cost continues to grow. Earlier action might have curbed the inflammation, but that was not to be. Legal options for an outside response are available. It is up to the world, and especially Europe, to do some soul searching. The world community must be committed to do what it pledged to do after World War II, prevent and punish the perpetrators of the ultimate crime of genocide.<sup>237</sup> By starting to characterize grave human rights violations as threats to the peace, and not as matters solely within the domestic jurisdiction of a nation, the world is moving in the right direction.

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236. See Nanda, *supra* note 115, at 323-30.

237. Margaret Thatcher viciously attacked European policy, stating, "The aggressor's taken the view that yes, we have the weapons but we haven't the resolve to use them, and no one will stop him. Let that not be the message from the free world to any other evil dictator the world over." CBS This Morning Interview, *supra* note 11.