LOW-INTENSITY CONFLICT AND THE LAW

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The term low-intensity conflict is relatively new in military and political language and is employed more or less synonymously with non-international conflict, especially when such a conflict becomes of international concern. The rubric non-international conflict itself is a refined term for what were formerly known as revolutions or civil wars, particularly when these have developed into major operations with the likelihood or reality of atrocities being committed against non-combatants, whether civilians or those hors de combat, a fact that is often more common in non-international than international conflicts, especially when ideological, ethnic, or religious differences are in issue. It is for this reason that it must be borne in mind that the term low-intensity has no relation to the severity or violence of the conflict. It is a term used to indicate that the conflict is not between recognized states nor that any major power is directly involved.

According to the classical writers and generally accepted customary international law these conflicts were outside the purview of international law since they were regarded as being totally within the domestic jurisdiction of the state in which they were being waged. Nevertheless, even Grotius, who regarded war as being limited to an engagement between sovereign states by way of their armed forces, conceded that if an over-mighty prince so ill-treated his subjects that they were compelled to rise up against his rule, other princes had a legal right, and perhaps were even under a duty, to come to the assistance of those subjects and even displace the prince against whom they were revolting. It must be recognized, however, that such intervention might well be little more than a cover for predatory activity by the savior, intent upon adding the territory in question to his own. Even so, it was generally considered that such intervention could only take place in the most exceptional of

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2. Id. at Lib. II, Cap. XX, § XL.
circumstances since, as indicated by Vattel, all states were equal, regardless of their size, so that no prince possessed jurisdiction over the acts of another.

It was not only classical writers who recognized that in extreme circumstances intervention might be legitimate when all humanitarian principles as then understood were being infringed. In the Middle Ages, princes were issuing codes of conduct for the behavior of their soldiery even though, to a very great extent, the campaigns in which they were involved were internal and dynastic rather than international. Thus, as early as 1385 Richard II of England issued orders concerning the rights of justice of commanders over their own men, and by the fifteenth century such military codes tended to forbid pillage and the destruction of private property as well as postulating respect for monasteries and priests, women, children, the infirm, and others and had developed sufficiently even for Shakespeare to have Fluellen, in Henry V, refer to a law of armes.

It is often said that the first war crimes trial was that conducted by representatives of a group of Hanseatic cities against Peter of Hagenbach at Breisach in 1474. In fact, the conflict in which Hagenbach's offenses were committed was a non-international conflict waged by some of the inhabitants of territory controlled by the Count of Anjou who were seeking their independence. In the course of suppressing their revolt, Hagenbach committed a number of atrocities which would now be classified as crimes against humanity and which the tribunal condemned as contrary to the laws of man and of God.

What may be described as the first modern statement providing a code of law for the behavior of the military was drawn up by Professor Lieber of Columbia College and promulgated by President Lincoln for the Government of Armies of the United States in the Field, 1863, which was to a great extent the outcome of his concerns during the Civil War:

3. VATTEL, Introduction to LE DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE § 18 (Charles G. Fenwick trans., Carnegie 1916) (1758): ("Strength or weakness counts for nothing. A dwarf is as much a man as a giant is; a small Republic is no less a sovereign State than the most powerful Kingdom.")


6. WILLIAM SHAKESPEARE, HENRY THE FIFTH act 4, sc. 7.


Ever since the beginning of our present War, it has appeared clearer and clearer to me, that the President ought to issue a set of rules and definitions providing for the most urgent cases, occurring under the Laws and Usages of War, and on which our Articles of War are silent.\(^9\)

While the Lieber Code is intended to apply to American forces whenever and wherever they may be engaged, it has been pointed out that

The first section of the Code [Arts. 1-30, 'Martial Law, Military Jurisdiction, Military Necessity, Retaliation'] appears on the whole to be ill organized and less convincing than it might have been had Lieber followed the plan of organization he had used in his previous lectures and writings. The sources of this section of the Code are, however, unmistakable - a quarter century of Lieber's thought modified to some degree in the light of the practice of the United States, particularly as concerned military occupation and relationships with the Confederate forces during the Civil War.\(^10\)

It is not necessary to specify the conduct which Lieber considered to be contrary to the law of war, nor the fact that his hope that it would form the basis for similar codes to be adopted by the European powers soon came to fruition.\(^11\) What is important is that it was applied during the Civil War and enforced against those guilty of breaches. Perhaps the most significant instance of enforcement of the law during this particular non-international conflict was the trial of Wirz in 1865.\(^12\) The charges against him were similar to those later brought against the Nazi war criminals at the end of World War II, and arose out of atrocities committed allegedly on his orders or as a result of orders conveyed by him against Northern prisoners. Already in this conflict we see a military tribunal guided by its Judge Advocate to apply the rules concerning superior orders and

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10. BAXTER, supra note 9, at 23.


12. Id. at 72-73.

command responsibility which were later established in relation to an international conflict:

With what detestation must civilized nations regard that government whose conduct has been such as characterized by this pretended confederacy. An ordinary comprehension of natural right, the faintest desire to act on principles of common justice, would have dictated some humane action, would have extorted from some official a recognition of international rules of conduct . . . . It was not . . . ignorance of the law; it was the intrinsic wickedness of a few desperate leaders, seconded by mercenary and heartless monsters, of whom the prisoner before you is a fair type . . . . It is urged that during all this time [Wirz] was under General Winder's\textsuperscript{14} orders . . . .

A superior officer cannot order a subordinate to do an illegal act, and if a subordinate obeys such an order and disastrous consequences result then both the superior and the subordinate must answer for it. General Winder could no more command the prisoner to violate the laws of war than could the prisoner do so without orders. The conclusion is plain, that where such orders exist both are guilty . . . . Strongly as it may strike you that strict justice would require the punishment of the arch-conspirator himself . . . you cannot stop the course of justice or refuse to brand [the accused's] guilt as the law and evidence direct . . . . [The accused] executed the bloody work with an industry which was almost superhuman and with a merriment which would have shamed a demon . . . .\textsuperscript{16} There could be no collision where the subordinate was only anxious to surpass an incomparable superior . . . . If [the accused] still answer that, admitting the facts charged, he did these things in the exercise of authority lawfully

\textsuperscript{14} Winder was Provost Marshal of the Confederacy.


\textsuperscript{16} He had apparently stated that he would "dance on the grave of every Yankee." Wall v. McNamara, 1 Term Rep. 536 (1779).
conferred upon him . . . . I answer him in the language of Lord Mansfield . . . .\textsuperscript{17}

In trying the acts done by military officers in the exercise of their duty . . . great latitude ought to be allowed, and they ought not to suffer for a slip of form, if their intention appears, by the evidence to have been upright . . . . [T]he principal inquiry to be made . . . is, how the heart stood, and if there appears to be nothing wrong\textsuperscript{8} there, great latitude will be allowed for misapprehension or mistake. But if the heart is wrong, if cruelty, malice, and oppression appear to have occasioned or aggravated the imprisonment, or other injury complained of, they shall not cover themselves with the thin veil of legal forms, or escape, under the cover of a justification the most technically regular, from that punishment which it is your province and your duty to inflict on so scandalous an abuse of public trust.\textsuperscript{19}

In fact, the tribunal decided that the crimes alleged against Wirz were so outrageous that a pardon which had apparently been extended to him was considered to be null and void. This decision indicates that as early as the American Civil War it was recognized that the laws and customs of war, derived from the Lieber Code and the generally accepted rules relating to armed conflict going back to feudal times,\textsuperscript{20} were applicable in a non-international conflict and could be used to punish offenses considered unacceptable by a civilized force.

While accepting that they had no right to intervene in civil wars, third states claimed the right to secure observance of the law even during a non-international conflict when their own interests were damaged. Thus, during the Spanish Civil War a number of European and Mediterranean Powers adopted the Nyon Agreement\textsuperscript{21} directed against unknown submarines which were attacking merchant vessels legitimately trading with the Spanish government. In this case the law was enforced not

\textsuperscript{17} Id.


\textsuperscript{19} Id.


\textsuperscript{21} Nyon Agreement, 181 L.N.T.S. 137; Schindler and Toman, supra note 8, at 88.
against the parties to the conflict, but the officially unidentified powers whose vessels were indulging in these unlawful attacks against neutral shipping.

Perhaps the first attempt to provide an international instrument with relevance to non-international conflicts was the Genocide Convention of 1948. This created a new crime in international law, that is to say an offense defined by international law, imposing an obligation upon the parties to enact legislation for its prevention and punishment.

Genocide embraces a number of specified acts intended to destroy, in whole or in part, a national, ethnic, racial or religious group, as such, and may be committed in both peace and war. While during an international conflict the intent of each belligerent is to destroy or disable as many of the personnel of the adverse part as possible, because they are personnel of that party and thus an identifiable group, the fact that an international conflict is involved tends to render this type of destruction lawful, provided the generality of the laws and customs of war are observed. In a non-international conflict, particularly as experienced since 1945, there is often evidence of atrocities intentionally directed against a national, ethnic, racial or religious group, as such, and the conflict in the former Yugoslavia with its ethnic cleansing is a clear example of this in operation.

Unfortunately, the method of enforcement envisaged by the Convention is somewhat ineffective. Genocide is not a crime that is capable of being committed by an individual acting on his own. Since it is directed at an identifiable group, it is almost certainly to be carried out as part of state policy and this is where the difficulty becomes evident. Until such time as there is an international tribunal with jurisdiction over this offense, it is punishable only in the courts of the state in which it has been committed. To the extent that it is state policy, it is unlikely that the local authorities will be prepared to take the steps necessary to try and punish those of its leaders who have instituted the policy. In so far as it has been committed during a non-international conflict, trials may well be instituted by the government of those of its opponents who have committed this crime, or by the revolutionary authority if it should capture governmental representatives responsible or, more likely, if it has succeeded in its endeavors, in which case it is likely to try the former rulers for any number of offenses which they may well describe as genocide.

More directly concerned with providing legal principles to operate during non-international conflicts are the 1949 Geneva Conventions

22. G.A. Res. 260 (III); Schindler and Toman, supra note 8, at 231.
relating to humanitarian law during war. Article 2 common to the four Conventions makes it clear that they are intended for inter-state situations. However, there is a new principle introduced by Article 3, which is to be found equally in each of the Convention. By this, in the event of an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum . . . [to] persons taking no part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause . . . [certain minimum rights to ensure that they] shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.

The four Conventions include an obligation for parties to inform each other of the laws they adopt to ensure their application, while those on prisoners of war and civilians impose a further obligation “to provide penal sanctions for persons committing, or ordering to be committed, any of the grave breaches” defined therein. However, the definition of grave breaches does not overlap the minimal rights detailed in Article 3. But to the extent that there is such overlap, it might be contended that, even in a non-international conflict in the territory of one of the contracting parties, the legislation would operate to penalize such breaches. It must be noted, however, that Article 3 makes it clear that its provisions “shall not affect the legal status of the Parties to the conflict.” This means that the governing authority of the territory concerned retains the right to treat its opponents as traitors or terrorists and subject them to the full rigors of the law as established in national legislation, even though this might be less than envisaged in Article 3.

Whatever lacunae regarding enforcement this may lead to, the situation has been remedied somewhat by developments in the field of human rights and recognition of crimes against humanity, which must not be confused with breaches of the Universal Declaration of Human Rights or either of the two Covenants, none of which imposes an enforceable

obligation upon the parties. However, constant reiteration in United Nations documents, together with assertions of their significance by both writers and states, as well as reference to them in World Court judgments, leads to the conclusion that these amount to *opinio juris ac necessitatis* and constitute either customary international law or general principles of law recognized by civilized nations.25

More important than any of these documents is the concept of crimes against humanity. This was first postulated as *black letter law* in the London Charter establishing the International Military Tribunal for the Prosecution of the Major War Criminals of the European Axis at Nuremberg.26 While it is true that this was formulated27 for the purposes of the Tribunal and to deal with such offenses as had been committed during the Holocaust and the Nazi occupation of Europe, the concept has been greatly widened. There is much to be said in favor of adopting the view expressed in its Interim Report28 by the Commission of Experts appointed by the Security Council to investigate the alleged atrocities committed during the civil war in Rwanda.

If the normative content of “crimes against humanity” had remained frozen in its Nuremberg form, then it could not possibly apply to the situation in Rwanda that existed... because there was not a “war” in the classic sense of an inter-state or international armed conflict.29

However, the normative content of “crimes against humanity” — originally employed by the Nuremberg Tribunal for its own specific purposes in connection with the Second World War — has undergone substantial evolution since the end of the Second World War.30

“[C]rimes against humanity” as a normative concept finds its very origins in “principles of humanity” first invoked in the early 1800s by a state to denounce another state’s

25. Statute of International Court of Justice art. 38.
27. G.A. Res., art. 6(c). *See also* at Schwelb, *Crimes Against Humanity*, 23 BRIT. Y.B. INT’L L. 178, 205 (1946).
29. *Id.* at para. 113.
30. *Id.* at para. 114.
human rights violations of its own citizens. Thus, "crimes against humanity as a juridical category was conceived early on to apply to individuals regardless as to whether or not the criminal act was perpetrated during a state of armed conflict or not and regardless of the nationality of the perpetrator or victim.

Secondly, the content and legal status of the norm since Nuremberg has been broadened and expanded through certain international instruments adopted by the United Nations since 1945. In particular, the Genocide Convention of 1948 affirms the legal validity of some of the normative content of "crimes against humanity" as conceived in article 6 (c) of the Nuremberg Charter, but does not overtake it. The International Convention on the Suppression and Punishment of the Crime of Apartheid

Thirdly, the Commission of Experts on [crimes in] the former Yugoslavia . . . has stated that it considered crimes against humanity to be: "gross violations of fundamental rules of humanitarian and human rights law committed by persons demonstrably linked to a party to the conflict, as part of an official policy based on discrimination against an identifiable group of persons, irrespective of war and the nationality of the victim." This view finds support in the writings of publicists.


32. *Id.* at para. 115.

33. The International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973, 13 I.L.M. 50. It should be noted that not all the major powers have ratified this instrument.


35. This quotation seems to have been take from the Interim Report since this wording does not appear in the Commission's Final Report, U.N. SCDOC.S/1994/674 (1994), but it forms a summary of paragraphs 84-6 of that Report.

Although there is a tendency among them to consider that many of the crimes against humanity committed in a non-international conflict do not need to be discriminatory and directed at any particular group. 37

The Commission of Experts on Rwanda [likewise] considers that "crimes against humanity" are gross violations of fundamental rules of humanitarian and human rights law committed by persons demonstrably linked to a party to the conflict, as part of an official policy based on discrimination against an identifiable group of persons irrespective of war and the nationality of the victim . . . . 38

By this reiteration of the concept of discrimination, the two Commissions seem to have made it clear that genocide, which is essentially a discriminatory offense, is in fact a crime against humanity hardly a necessary undertaking. The philosophy required to bring the concept of crimes against humanity into line with current thought cannot be argued with, in which case, provided the necessary tribunal exists, there would be little difficulty in asserting that such crimes committed during non-international conflicts are amenable to criminal prosecution. Since it is generally accepted that war crimes are subject to universal jurisdiction and there is a somewhat similar approach developing, if not already existing, with regard to crimes against humanity, it would lead to the conclusion that such offenses can be tried in any state in which an offender is found. The two ad hoc tribunals established in connection with crimes in the former Yugoslavia and Rwanda enjoy concurrent jurisdiction with such national tribunals, although the latter must give way to the claims of the former should these be lodged, as has in fact already ensued as between Germany and the Yugoslav tribunal and Tanzania and that for Rwanda. In addition, a Spanish judge has ruled that the torture and disappearance of Spanish nationals in Argentina during the dirty war in that country, a clear non-international or low-intensity conflict, amount to crimes against humanity grounding jurisdiction in Spain and imposing an obligation on all countries to recognize any warrant for arrest issued in respect of the alleged offenders. Moreover, a French court has sentenced Captain Alfredo Astiz of the Argentine Navy to life imprisonment for murdering two French nuns in 1977. However, the Argentine Under-

37. In fact, it was not the Tribunal which established the nature of crimes against humanity, but the Charter setting up the Tribunal which resulted in this interpretation. The Role of Law in Establishing Norms of International Behavior, in THE RULE OF LAW IN THE INTERNATIONAL LAW AND POLICY OF HUMAN WELFARE 239 (1978).

Secretary for Human Rights has made it clear that the Argentine Government will not cooperate in any way in regard to allegations against any Argentine subject charged with offenses during this particular low-intensity conflict, since "a foreign court has no jurisdiction over events that took place on Argentine soil." This does not mean, however, that any state in which such Argentine citizens may be found is prevented from recognizing the validity of an attempt by an accusing state to obtain the extradition of such accused by giving effect to such an international warrant or proceed to try the accused itself by exercising universal jurisdiction in respect of alleged crimes against humanity.

The most important developments in the law concerning non-international conflicts were effected by the 1977 Protocols annexed to the 1949 Geneva Conventions. Protocol I introduces a most fundamental change in the law of armed conflict. So long as an internal conflict is directed towards self-government, the Protocol provides for its recognition as an international conflict governed by the Conventions and the Protocol, as well as the ordinary law regarding international armed conflicts. By article 1(4), an armed conflict includes one:

in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

However, in the practice of the United Nations not all conflicts in which one of the parties claims to be seeking self-determination fall within the framework of this provision. To qualify as a national liberation movement so engaged, the entity making the claim must be recognized as such by the regional organization in the area in which it is operating. This would exclude the various guerrilla movements of Latin America, none of

41. U.N. CHARTER, art. 1. "The purposes of the United Nations are . . . (2) To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. . . ." See also U.N. CHARTER, art. 73(b).
which is recognized by the Organization of American States, and which movements in any case are revolutionary groups seeking to replace the local government rather than to overthrow domination, alien occupation or a racist regime. Equally, the Irish Republican Army, though it claims to be seeking self-determination from alien occupation, is not so recognized by either the Council of Europe or the North Atlantic Treaty Organization, the members of which regard the movement as being terrorist.

The same denial is extended to, for example, the struggle by the people of Chechniya seeking to break away from Russia; the various Kurdish groups trying by force of arms to separate from their various rulers; or the Sikhs aiming to establish a State of Kalistan distinct from India. Each of these claims to be fighting for self-determination, but none of them is accepted as a national liberation movement, nor regarded as falling within the scope of article 1(4) of Protocol I.

Moreover, the Protocol and the Conventions do not come into force automatically as they do with an international armed conflicts. Instead, by article 96(3) of the Protocol the authority representing the "people engaged against a High Contracting Party" must make a unilateral declaration of adhesion and compliance, sent to the Swiss government as depositary, undertaking to apply the Conventions and the Protocol during the conflict. While this entails:

the Conventions and the Protocol [being] brought into force for the said authority as a Party to the conflict with immediate effect [with that] authority assum[ing] the same rights and obligations as those which have been assumed by a High Contracting Party . . . and the Conventions and Protocol [becoming] equally binding upon all the Parties to the conflict."

the Protocol is silent as to the position if the governing authority has failed to ratify the Protocol or refuses to consider the national liberation movement as anything but a band of traitors. Moreover, its right to do so seems to be confirmed by article 4 of the Protocol for "the application of the Conventions and of the Protocol . . . shall not affect the legal status of the Parties to the conflict . . . ."

However, both parties would still be bound by the minimum conditions of humanitarian law, leaving it open, should that possibility arise, for the partisans of either to be tried for genocide or crimes against

43. Geneva Conventions, supra note 40, art. 3(1).
44. Protocol I, supra note 33, at art. 96.
humanity, especially in the light of the widened interpretation given to the concept of crimes against humanity already mentioned.

Should all the requirements in article 96 be satisfied, with the governing authority equally bound, both the national liberation movement and its opponent would become subject to all the provisions of the Conventions and Protocol including those relating to grave breaches. In addition, since such a conflict is now regarded as equivalent to an international armed conflict the laws and regulations, both customary and conventional, governing such a conflict would be operative, thus subjecting the members of both antagonists to any prosecution and punishment for war crimes that they might commit, including those relating to command responsibility or superior orders.

At present, with the vastly reduced number of colonial territories awaiting liberation, there are few areas which may be truly regarded as satisfying the conditions of article 1(4) with regard to self-determination. In the future, there is likely to be a proliferation of situations which were formerly regarded as civil wars or revolutions, thus reducing the possible significance of article 1(4), and the fact that the revolutionary authority describes itself as a national liberation movement seeking self-determination does not alter the legal position in any way.

To some extent, this type of situation is covered by Protocol II, which seeks to extend that part of humanitarian law which serves to protect non-combatants — a need that, in view of the ideological hatreds often aroused in such a conflict, is often more important in a non-international than an international armed conflict. But, acknowledging that internal order is a matter of domestic jurisdiction, the scope of Protocol II is somewhat limited. In the first place, the Protocol does not apply "to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, as not being armed conflicts," even though the armed forces whether regular or in the form of some national guard are needed to suppress them and restore governmental authority. Second, the threshold for operation of the Protocol is even higher than that required to bring article 1(4) of Protocol I into operation. For Protocol II to apply, the conflict must be between governmental armed forces "and dissident armed forces or other organized groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." 46

45. Protocol II, supra note 40, at art. 1(2).
46. Protocol I, supra note 40, at art. 1(1).
Protocol I does not require that the national liberation movement waging its war for self-determination be in control of any part of the national territory. It would suffice if all operations are directed from outside such territory so long as the conditions of article 96 are complied with. For Protocol II, however, the threshold is such that the Protocol cannot really come into operation until the conflict takes on the form of a civil war somewhat similar to that waged in Spain between the Republican government and the Nationalist authorities. For the dissidents merely to declare no go areas, as the Irish Republican Army tends to do, is insufficient.

Another failing of the Protocol is that it prescribes no method for its implementation and is silent on enforcement. Nor is there any provision as to breaches or their punishment, nor even to any obligation upon a governing authority to take steps to ensure that the humanitarian principles embodied therein are observed. Presumably, however, the reference in the article to the dissidents being under responsible command suggests that, to the extent that any liability might arise, some measure of command responsibility does in fact exist. While Protocol I calls upon the parties to disseminate and educate both the military and civilian populations, article 19 of Protocol II merely states “[t]his Protocol shall be disseminated as widely as possible.” In fact, when at Geneva during the drafting of the Protocol it was suggested that there should be a provision similar to that in Protocol I, the representative of one South American country, where revolutionary activity has not been rare, made it clear that there was no way his government would agree to any suggestion that it was obliged to inform its population as to what its rights might be in the event of an attempt by that population to resort to force aimed at the overthrow of the government.

To some extent this view finds some support in article 3 of the Protocol, a provision relating to state sovereignty which is somewhat wider than that to be found in Protocol I:

1. Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.

47. Id. at art. 83.
2. Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs. 48

There is no indication in the Protocol as to what is meant by all legitimate means open to the governing authority to maintain its position. Since silence cannot be construed as imposing any limitation on a sovereign's freedom of action, 49 this leaves it open to that authority to apply any means, under its national law - and this is traditionally not open to third party criticism - which it may consider necessary to achieve its purpose. Further, since the Protocol is an international instrument between states, it only confers rights upon the parties thereto. If a party to the Protocol involved in a non-international conflict were to ignore the provisions of Protocol II, the only rights arising in respect of that breach are the normal rights attending a breach of treaty, and, as the World Court has indicated, while a state may have the competence to bring an action, it can only succeed if it has itself suffered damage as a result of the breach. 50

Virtually all states in the modern world are parties to human rights instruments or have declared adherence to the principles embodied in such documents, and there has been constant reiteration of their significance in resolutions adopted by both the General Assembly and the Security Council, as well as other international organs, sufficient to maintain that these principles now amount to customary law and perhaps even jus cogens. 51 This means that, regardless of any obligations that might arise from Protocol II, there are certain obligations binding upon the parties engaged in a non-international conflict. Further, since the Protocol is additional to the 1949 Conventions, to which almost all states are party, the minimum rights embodied in article 3 of those agreements operate whatever be the position concerning Protocol II. Finally, it should be borne in mind that much of Protocol II is little more than a reaffirmation of the basic principles of humanitarian law binding on all states, military authorities, and civilian populations, breach of which would in many instances amount to crimes against humanity. When they do, all offenders, regardless of rank, status, or nationality, become amenable to

48. Protocol II, supra note 33, at art. 3.
49. See, e.g., S.S. Lotus, 1927 P.C.I.J. (ser. A) No.10; Hudson, 1934 WORLD COURT REPORTS 1, 163.
trial by any state in the territory of which they may be found, and this is especially so in the light of the extended interpretation now being given to crimes against humanity.

In addition to the means of enforcing the law in non-international or low-intensity conflicts outlined here, there is always the overriding power of the Security Council to declare that a particular situation amounts to a threat to the peace, a breach of the peace, or an act of aggression calling for enforcement action under chapter VII of the Charter and overriding the normal reservation regarding domestic jurisdiction embodied in article 2(7) of the Charter, as may well result from the presence of alien volunteers intervening on behalf of either the government or the dissidents. In this regard it should be noted that there is no effective way in which the Security Council may be held to have exceeded its competence. Moreover, in view of the new significance accorded to respect for human rights there is strong ground for believing that such intervention might be tolerated internationally, as it has been in some parts of the African continent. It has even been suggested that there might be created a standing army of African soldiers to intervene to protect civilians threatened by the collapse of a local nation state, and where civilian casualties are likely to be extremely high. Such a force "would not be allowed to take sides, but would set up safe areas where civilians could be protected." However, the establishment of such a safe area and protection of the civilians therein — hopefully more effectively than was the case in Bosnia — would almost certainly be regarded by one of the parties to the conflict as taking sides. Such intervention could be defended on the ground that it did not impinge upon article 2(4) of the Charter, since there was, theoretically at least, no threat to the territorial integrity or political independence of the state concerned. It would nevertheless appear that moving in because of the collapse of a nation state was in fact a denial, however temporary, of its political independence. Determination as to whether this is in fact so, however, would be by decision of the Security Council, which would probably decide that, in view of the significance of human rights, the intervention was clearly consistent with the purposes of the United Nations, which include "respect for the principle of equal rights and self determination of peoples," the

52. See, e.g., Lockerbie Aerial Incident (Libyan Arab-Jamahirya v. U.K.), 1992 I.C.J. 3, 15; see also, id. at 114, for a similar Order re Libyan request against United States.

53. See infra remarks concerning possible assumption of power on behalf of the United Nations.

54. THE TIMES (London), 1 Sept. 1996.

55. U.N. CHARTER art. 1, para. 2.
intervention having been directed to protecting the equal rights of the civilian population and to enable the entire people to exercise its right to self determination by way of a more acceptable administration.

In the course of its fifty years of existence the United Nations has on a number of occasions made use of national contingents provided by members to act as peacekeepers or interposition forces aimed at keeping the contestants apart, but without any right to intervene, even in the event of their witnessing acts which are clearly contrary to humanitarian law, although this does not mean that local commanders or the states sending them have not taken such an initiative, as the United States sought to do without success in Somalia.

Most significant has been the reaction of the Security Council to events consequent upon the break-up of the former Yugoslavia or following the mysterious death of the President of Rwanda in an air crash.

After Yugoslavia broke up into a number of independent states, conflict broke out between Serbia and Croatia, Serbia and Bosnia Herzegovina and Croatia and Bosnia Herzegovina. While these conflicts subsisted they were clearly international armed conflicts subject to the rules pertaining thereto. In Bosnia Herzegovina, however, dissident ethnic/national groups made up of local Serbs and Croats took up arms against the largely Muslim Bosnian government seeking either to establish an independent state of their own within Bosnian territory, or with the intention of seceding and adhering to Serbia or Croatia as the case might be. In addition, dissident Muslim groups also took up arms against the Bosnian government. These conflicts were clearly non-international, even though many of the officers involved had been officers in the former Yugoslav Army and in the earlier stages at least had received support and arms from the Croatian and particularly Serbian governments. While such assistance subsisted it might have been difficult to determine which breaches of the law were committed during an international conflict constituting war crimes, and those perpetrated during a low-intensity conflict, and which, though they might amount to genocide or crimes against humanity, would not fall within the normal understanding of the rubric war crimes. When assistance from Croatia and Serbia ended, the conflicts reverted to their status as non-international. The situation remained under some measure of legal control however, since the government of the former Yugoslavia had ratified the Geneva Conventions and the two Protocols and the governments of Croatia and Bosnia had announced their adherence thereto. To that extent, therefore, the conflicts were subject to those instruments, fully in the case of the international conflicts involved and, to the extent already analyzed, to the non-international conflicts in Bosnia as well.
In so far as Rwanda is concerned, there were no similar problems of classification. There it was a simple case of the larger ethnic group, the Tsutsis, taking up arms against the ruling minority ethnic group, the Hutus. During this conflict extensive atrocities were committed, especially by forces and officials owing allegiance to the overthrown Hutu administration.

In Bosnia Herzegovina the warring parties, and particularly the Serbs, pursued a policy of *ethnic cleansing* involving the expulsion of non-Serbs from their homes and from territory under Serb control. Many of the expelees died from starvation and exposure, while there was evidence that massacres on a fairly large scale were being perpetrated against expelled Muslims as a matter of policy. Even if the deaths are ignored, it is difficult to deny that such a policy would cause, in the terminology of the Genocide Convention, "serious bodily or mental harm to members of the group[s]" affected. Similarly, in Rwanda extensive massacres of Tsutsis by Hutus, and vice versa, ensued, including raids on refugee camps in neighboring countries. Such offenses were, in accordance with the terminology of the Genocide Convention, to be tried by the authorities of the territories in which the offenses were committed. Any such trials, however, were more likely to be based on a demand for vengeance than a pursuit of justice. If such acts of vengeance were to be avoided or minimized, some means of establishing an international criminal tribunal would have to be resorted to.

Acting on instructions from the Security Council, the Secretary General of the United Nations established two Commissions of Inquiry to seek out evidence of genocide, war crimes and crimes against humanity committed in both the former Yugoslavia and Rwanda, and, in the light of their reports, he proposed to the Council that international ad hoc tribunals be established to try offenders and submitted a draft statute for each of two distinct bodies. A problem soon arose concerning the competence of the Security Council to establish such a court since the Charter is silent on the matter. This issue of jurisdiction was raised in the case of Dusko Tadic, the first to be charged before the Yugoslav tribunal. In the course of its rejection of the plea, the Appeal Chamber, having ruled that the Council would certainly have been able to establish such a tribunal to deal with issues arising from an international conflict as being in breach of or threatening the peace, continued:

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56. In fact, Rwanda announced its intention to bring thousands of Hutu to trial.
58. *Id.*, para. 30.
But even if it were considered merely as an 'internal armed conflict', it would still constitute a 'threat to the peace' according to the settled practice of the Security Council [the constitutionality of which it was beyond the competence of the Tribunal to question] and the common understanding of the United Nations membership in general. Indeed, the practice of the Security Council is rich with cases of civil or internal strife which it classified as a 'threat to the peace' and dealt with under Chapter VII, with the encouragement or even at the behest of the General Assembly, such as the Congo crisis at the beginning of the 1960s and, more recently, Liberia and Somalia. It can thus be said that there is a common understanding, manifested by the 'subsequent practice' of the membership of the United Nations at large, that the 'threat to the peace' of Article 39 may include, as one of its species, internal armed conflicts. . . .

Here we have an instance of a specially created tribunal deciding that the organ of the United Nations establishing it possesses a power not apparent from the text of the Charter by construing the acquiescence of the membership as equivalent to *opinio juris ac necessitatis*, and perhaps even constituting a de facto amendment of the Charter itself. The Chamber then proceeded to find that the establishment of the Tribunal is fully within the competence of the Council, since it:

matches perfectly the description in Article 41 of 'measures not involving the use of force.' The measures set out in [that] Article are merely illustrative *examples* which obviously do not exclude other measures. All the Article requires is that they do not involve 'the use of force.' It is a negative definition . . . . Logically, if the organization can undertake measures which have to be implemented through the intermediary of its Members, it can a fortiori undertake measures which it can implement directly via its organs, if it happens to have the resources to do so. It is only for want of such resources that the United Nations has to act through its Members. But it is of the essence of 'collective measures' that they are collectively undertaken. Action by Member States on

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59 *Id.*

60. *Id.* (italics in original).
behalf of the Organization is but a poor substitute faute de mieux, or a 'second best' for want of the first. This is also the pattern of Article 42 on measures involving the use of armed force. In sum, the establishment of the International Military Tribunal falls squarely within the powers of the Security Council under Article 41.

The Security Council of the United Nations has resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of international peace and security, i.e., as a measure contributing to the restoration of peace in the former Yugoslavia. Article 39 leaves the choice of means and their evaluation to the Security Council, which enjoys wide discretionary powers in this regard, and it could not have been otherwise, as such a choice involves political evaluation of highly complex and dynamic situations.

The Appeals Chamber considers that the International Tribunal has been lawfully established as a measure under Chapter VII of the Charter.

This may be considered a somewhat extensive interpretation of the powers of the Security Council since there is nothing in the Charter to indicate any likelihood of the Council establishing a court additional to the International Court of Justice, although it may perhaps be contended that since the Charter describes the Court as the “principal judicial organ of the United Nations,” it leaves the way open for further tribunals to be set up. But the World Court is a civil tribunal and there is nothing in the Charter indicating a competence to establish criminal courts. Moreover, to establish such a court is inconsistent with the traditional attitude of states which has not been excessively favorable to the establishment of a tribunal having jurisdiction to try governmental leaders and hold them personally responsible for what may be claimed to be the illegal activities of the states they administer.

It was also claimed that the Tribunal was not properly set up since it was not established by law. The Appeal Chamber rejected this contention, holding that:

The important consideration in determining whether a tribunal has been "established by law" is not whether it was

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61. *Id.* at paras. 32-40.
pre-established or established for a specific purpose or situation; what is important is that it be set up by a competent organ in keeping with the relevant legal procedure, and that it observes the requirements of procedural fairness. . . .63

This suggests that if a revolutionary authority which had not yet created a proper legislative body established a tribunal by executive decree with the sole object of trying the president and other members of the overthrown administration, such a tribunal would be considered as established by law, provided it conducted itself in accordance with acknowledged principles of justice. We might question here, therefore, whether the tribunal established in Angola for the trial of mercenaries52 would be considered one established by law. Similarly, did the tribunal envisage by article 227 of the Treaty of Versailles64 to try Wilhelm II satisfy all these conditions since it was implied that the mere constitution of the tribunal would assure “him the guarantees essential to the right of defense . . . [and as i)n its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemnity of international undertakings and the validity of international morality[?]

It is not really of major significance from the point of view of the relevance of law to low-intensity or other non-international conflicts whether one accepts the Tribunal’s interpretation of Chapter VII of the Charter and the competence of the Security Council thereunder. The General Assembly has confirmed the existence of both tribunals and no member of the United Nations has contested this. Some, in fact, have already given effect to the obligation embodied in the relevant statute66 recognizing that, while there is concurrent jurisdiction as between the Tribunal and national courts, the former enjoys primacy. Thus, although German law grants jurisdiction to German courts to try those found on German soil who may be accused of crimes against humanity, German law was amended so that Tadic was surrendered to stand trial before the Tribunal at The Hague. Similarly, Tanzania extradited Akeyasu so that he might be tried by the Rwanda Tribunal.

63. Para. 45 “to Tadic case.”
64. See, e.g., Green, The Status of Mercenaries in International Law, in ESSAYS ON THE MODERN LAW OF WAR ch. 9 (1985); Lockwood, Report on the Trial of Mercenaries, 7 MANITOBA L.J. 183 (1972).
66. Statute of the Yugoslavia Tribunal art. 9 (2); Statute of Rwanda Tribunal art. 8 (2).
The various jurisdictional problems concerning the Yugoslav Tribunal did not arise in relation to the Tribunal for Rwanda for there was never any doubt that the conflict on that territory was anything but non-international. Moreover, the Rwanda Tribunal was not granted jurisdiction to try offenses against the laws and customs of war.

As to substantive issues of jurisdiction, the Yugoslav Tribunal has jurisdiction over violations of the laws and customs of war, genocide, and crimes against humanity. Its competence concerning the laws and customs of war relates to incidents perpetrated during the international conflicts occurring in the former Yugoslavia.

The Statute of the Yugoslav Tribunal indicates that violations of the laws and customs of war shall include, but not be limited to:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

(b) wanton destruction of cities, town or villages, or devastation not justified by military necessity;

(c) attack or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;

(d) seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education; the arts and sciences, historic monuments and works of art and science;

(e) plunder of public or private property. 67

Except for the last two items, it is submitted that this enumeration, together with other unspecified breaches of the laws and customs of war, in fact constitute crimes against humanity. It may be suggested, therefore, that it would perhaps have been better had the Statute not referred to this collection of offenses in any way. Had this been the case, many of the jurisdictional issues relating to the Yugoslav Tribunal might have been averted, for, in the light of the new attitude to crimes against humanity, there is little doubt that these crimes would now be regarded as subject to universal jurisdiction.
As to genocide, although the Convention provides for local jurisdiction pending the establishment of an international tribunal possessing jurisdiction over this offense, the international tribunals, though ad hoc and created for a limited purpose, satisfy this requirement. It may also be argued that genocide is in fact the gravest of all crimes against humanity and, therefore, it might have been as well that the Tribunals should simply have been endowed with jurisdiction over crimes against humanity and nothing else. However, in view of the universal horror resulting from the *ethnic cleansing* that took place in the former Yugoslavia and the openly inter-tribal massacres perpetrated in Rwanda, it was probably considered useful to indicate that genocide was so horrendous a crime as to warrant specific condemnation, rather than simply to include it in the generality of crimes against humanity.

Both Statutes, confirming the accepted practice with regard to crimes against international law, particularly those committed during conflict, confirmed that the status of an accused would not provide immunity and that individual responsibility would attach to anyone planning, instigating, ordering, or aiding and abetting in the planning or preparation of crimes within the tribunal’s jurisdiction, as well as to any superior who knew or had reason to know that a subordinate was about to commit any crime within the tribunal’s jurisdiction and who failed to take the necessary and reasonable measures to prevent such acts or punish the perpetrators, while at the same time it was made clear that superior orders could not be pleaded by way of defense.

The issue of competence in the case of the Yugoslav Tribunal with regard to crimes against humanity was really beyond question, once it was decided that the Security Council could establish it. The tribunal had no option but to try those charged with such crimes committed in the former Yugoslavia during those conflicts which were non-international, for article 5 of the Statute expressly conferred such jurisdiction over crimes against humanity “when committed in armed conflict, whether international or internal in character, and directed against the civilian population.” As regards its general competence, article 1 provided that it “shall have the power to prosecute persons responsible for serious violations of

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68. During the trial for genocide of Jean-Marie Akayesu, defense counsel cited the killing of at least one million, the prosecution claimed that 800,000 of these were Tsutsis, while the defense contended that “800,000 Hutus and 200,000 moderate Tsutsis have been killed in the 1994 massacres rather than the other way around.” *The Times* (London), Sept. 1, 1996, at 27.

69. Statute of the Yugoslavia Tribunal art. 7 (2); Statute of the Rwanda Tribunal art. 6 (2).

70. Statute of the Yugoslavia Tribunal, art. 7(1), (3), (4); Statute of the Rwanda Tribunal, art. 6 (1), (3), (4).
international humanitarian law committed in the former Yugoslavia since 1991. . . .” and international humanitarian law includes grave breaches of the Geneva Conventions and Protocol I, war crimes in the traditional sense, genocide, and crimes against humanity.

Many of the persons indicted by the Yugoslav Tribunal, including Tadic, Radic, Mladic, and Karadzic were charged with offenses which involved both personal as well as command responsibility. Among the charges leveled against Mladic and Karadzic were genocide, crimes against humanity, unlawful confinement of civilians and destruction of sacred sites, as well as unlawful shelling of civilian cities, including Sarajevo, together with seizure of a number of United Nations peacekeepers and holding them as hostages. The crime of genocide can not really be committed by a single individual acting alone, even though he may be committing his offenses in accordance with his own discriminatory prejudices. Nor is it likely to be initiated by a person holding inferior rank, for it is a question of executive or command decision on a highly sensitive policy issue. The same is true of any decision to seize and hold hostage United Nations personnel.

The first person to appear for trial before the Rwanda Tribunal Jean-Marie Akeyasu, was similarly charged with offenses involving personal and command responsibility. As the former mayor of Taba, he was charged with genocide, murder, and crimes against humanity arising from the massacre of local Tsustis, including the killing and mutilation of pregnant women. Overall, he was charged with prime responsibility for what had happened.71

Even if we ignore the existence of the two specially created tribunals, it may probably be said that it is now well established that crimes committed during a low-intensity or non-international armed conflict which amount to crimes against humanity are, like war crimes committed in an international conflict, subject to universal jurisdiction, amenable to trial in any country wherein the offender may be found.

In so far as either of the tribunals has authorized issue of an Indictment, that Indictment is universally valid and the named accused is liable to arrest wherever he may be found and then handed over to the tribunal for trial,72 even though the members of the Implementation Force in Bosnia appear unwilling to recognize the validity of such an instrument. It is thus, at least theoretically, impossible for anyone so indicted to claim asylum.

71. N.Y. TIMES, Sept. 27, 1996.
72. Statute of the Yugoslavia Tribunal, arts. 19(2) & 29; Statute of the Rwanda Tribunal, arts. 18(2) & 28.
Equally significant with regard to the applicability of universal jurisdiction in respect of crimes against humanity committed during a non-international conflict has been the decision of Judge Baltazar Garzon in Madrid. An allegation was brought by a Spanish woman alleging that her husband and two sons were tortured and disappeared during the dirty war in Argentina. Judge Garzon ruled that, regardless of the Argentine amnesty concerning such offenses and which, in any case, enjoyed no validity in Spain, he possessed jurisdiction over cases of torture and murder committed against Spanish citizens in Argentina during the period of civil disturbance. In his view, these acts amounted to crimes against humanity which were subject to universal jurisdiction, so that any warrant he might issue would be entitled to international recognition and enforceable universally. Similarly, in relation to the same low-intensity conflict in Argentina, France has sentenced Captain Alfredo Astiz of the Argentine Navy to life imprisonment for the unlawful killing of two French nuns in 1977. It must be noted, however, that Argentina's Under-Secretary for Human Rights has made it clear that the Argentine Government will not cooperate in any way with such proceedings, since "a foreign court has no jurisdiction over events that took place on Argentine soil." But this does not mean that any person named by a state as responsible for criminal activities amounting to crimes against humanity during Argentina's dirty war and found outside Argentina will not be handed over to a demanding country by the host state.

As to genocide as defined by the Convention, the lacuna concerning jurisdiction may be filled by acknowledging that genocide is a crime against humanity and so, regardless of the Convention nomenclature, clearly subject to universal jurisdiction.

Where war crimes are concerned, in a mixed situation involving both international and non-international conflicts, it may well be advisable to ignore these completely and lodge charges in accordance with the law concerning crimes against humanity, into which category at least the more serious war crimes would fall, and, if desired, to charge with genocide as well. In this way, any dispute concerning the applicability of the law of war with regard to any aspect of the conflict would be avoided, while at the same time ensuring that any crimes which might in the course of the


74. In the case of State of Israel v. Eichmann, 36 I.L.R. 5 (1961/2), the Israeli authorities did not prosecute him for genocide as such, since the Convention, with its international definition, was adopted after he had committed his crimes. Instead he was charged with a series of crimes which amounted to genocide in the ordinary meaning of that term as generally understood by the time of the trial.
international conflict amount to war crimes or grave breaches will in relation to the non-international conflict be equally subject to trial.

From an extra-judicial point of view other means exist for ensuring enforcement of the law in a non-international conflict. In the first place, it is open to the Security Council to decide, as it has done in establishing the tribunals for the former Yugoslavia and Rwanda, that the conflict constitutes a breach of the peace or a threat thereto, requiring enforcement action under chapter VII. In addition, events in Iraq following the 1991 Gulf War between that country and the Coalition forces, as well as in Bosnia, demonstrate that, when circumstances relating to a continuance of hostilities or denial of human rights are involved, the world community, or groups of states acting on their own or in the name of an international organization may decide that, for humanitarian reasons, it has become necessary to resort to measures which would normally, or under a narrow interpretation of the domestic jurisdiction reservation in article 2, paragraph 7, or the injunctions in article 2, paragraph 4, of the Charter be condemned as unwarranted intervention.

In Iraq no-fly zones were established to protect the Kurdish minority from abuse by the Iraqi government against which it was waging a conflict directed at securing independence. When the various Kurdish groups fought as between themselves, and one requested aid from the Iraqi government which aid was given, the United States, claiming to be enforcing protection of the Kurds in accordance with Security Council resolutions relating to the earlier invasion of Kuwait, protection of the civilian population and the restoration and preservation of peace in the area, unilaterally extended the no-fly area and attacked military installations in southern Iraq, even though the operations affecting the Kurds were taking place in the northern parts of the country.

Where Bosnia Herzegovina was concerned, an attempt was made to stop the fighting and prepare the way for the establishment of an elected government through the medium of arrangements set out in the General Framework Agreement for Peace drawn up in Paris in 1995. The United Nations peace-keeping force in the country was replaced by an Implementation Force (IFOR) deployed under NATO (North Atlantic Treaty Organization) auspices. The Force's remit was to ensure compliance with the cease-fire by all parties and supervise the election of a

75. "All Members shall refrain in their international relations form the 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."

democratic administration representing the various interests. The contingents making up IFOR were not authorized to intervene on behalf of the various ethnic groups, even against violence committed in their presence, although some local commanders acting on their own initiative did resort to protective intervention measures. Most significant, however, was the fact that the IFOR command interpreted their task under the Paris Agreement as precluding IFOR members from arresting persons who had been indicted by the ad hoc tribunal for the former Yugoslavia,\textsuperscript{7}\textsuperscript{7} such persons had been accidentally come upon, as in fact happened in the case of one intelligence officer who had been entrapped by altered road signs which diverted him from a route described as safe. He was sent to The Hague, but the charges against him were dropped. Some of the persons against whom indictments have been issued have participated in discussions with IFOR representatives concerning the application of the Paris Agreement, but this has not been considered sufficient to warrant their being arrested, despite the issuance by the Tribunal of internationally valid warrants.\textsuperscript{7}\textsuperscript{8}

It is submitted that there is enough legal authority to enforce the law in non-international conflicts without having recourse to any specially created tribunals. Since virtually all the breaches committed during such a conflict amount to crimes against humanity and frequently include genocide, there is sufficient evidence to support the contention that all such offenses are subject to universal jurisdiction, so that offenders may be tried by any country in which they may be found. This is not to suggest that the jurisprudence of the two ad hoc Tribunals which have been established is insignificant. Their creation has been accepted by the world community, and any problems that may have existed with regard to their constitutionality or competence are no longer in point, for the findings in regard thereto have equally been acquiesced in. If, therefore, any such tribunal were established in the future, it may be accepted that no such questions will be raised or given any weight.

\textsuperscript{77} See, e.g., case of an individual indicted by the international war crimes tribunal on charges of gang rape and running a slave/brothel for Bosnia Serb soldiers walked into the office of the U.N. police monitors to protest that he was being harassed by the Bosnian police, he was given the standard complaint form to fill out. When he said he was especially upset because while he routinely passed through NATO military checkpoints with no trouble, the Bosnian police were trying to arrest him, he was told that his difficulty would be investigated. When questioned, “senior officials of the U.N. police monitors said they felt no remorse at having missed the chance to detain Mr. Stankovic, since it 'was up to his colleagues in the Serbian police.'” N.Y. TIMES, Nov. 9, 1996.

\textsuperscript{78} Both Karadzic and Mladic fall into this category.
As regards the precedential value of any judgments delivered by the tribunals, whether in regard to international, non-international, or other low-intensity conflicts, these should be granted as much authoritative consideration as the Judgment of the International Military Tribunal at Nuremberg. Moreover, having been created by the United Nations, rather than by a group of victorious combatants granting jurisdiction only over named individuals, it might even be suggested that the decisions of these tribunals, as coming from a less biased court, should enjoy greater authority than is given to Nuremberg.

Furthermore, the events in Iraq and Bosnia demonstrate that, should humanitarian considerations warrant it, intervention on behalf of an international organization or perhaps even by a leading power, may become acceptable even in a non-international conflict. In this connection, reference might also be made to the possible use of extensive interpretation of chapter XII of the Charter, the concomitant creation of a replacement for the Trusteeship Council which, after all, was considered to have replaced the Permanent Mandates Commission of the League systems, although it is accepted that some other term than trusteeship would have to be found. When the governmental system of a state has disintegrated to an extent that it is no longer possible for the national authorities to protect the inhabitants or itself resorts to measures which in the past would probably have resulted in humanitarian intervention, it should be possible for the United Nations to decide that the state authorities in question have lost the competence to be considered a legitimate authority rendering it necessary for the United Nations itself, or powers authorized by it, to take over the administration of that state and supervise the re-establishment of a system that will once again permit local authorities to perform the proper functions of a government in so far as protection of its citizenry is concerned. To be properly performed, this would require the United Nations, despite its financial difficulties, to establish a core of administrators, much as Protocol I, 1977, envisages regarding the recruitment and training of qualified persons who may be required to act on behalf of a Protecting Power, trained to fulfill such tasks and immediately available should their services be required.

The arguments set out above should be sufficient to indicate that means now exist so that the law may be enforced in respect of offenses committed during non-international and low-intensity conflicts as much as it seeks to do in regard to international conflicts. Arguments based on the

79. International Trusteeship System.
80. See, e.g., the various rulings of the World Court with regard to South West Africa.
traditional view that such non-international conflicts are within the domestic jurisdiction and so outside the purview of international law have lost their validity. This means that the silence of Protocol II regarding both breaches and enforcement becomes irrelevant, and it can no longer be maintained, at least if genocide or crimes against humanity are committed, that these are matters within such jurisdiction and beyond the scope of international legal concern.