

New England School of Law
Rwanda Genocide Prosecution Project

ISSUE # 5
Article 4 of the Statute of ICTR and the principle of *nulla poena sine lege*

Prepared by: Thomas D. Seymour

For 2 credits; and UCWR

December 9, 1997

TABLE OF CONTENTS

I	Introduction.....	1
II	Summary of conclusions.....	2
III	Background.....	8
IV	Analysis.....	11
	A. Basic Principles and History of International Humanitarian Law.....	11
	1) History.....	12
	2) Definitions and Principles.....	13
	B. <i>Hostis Humani Generis</i>	17
	C. Precedent / History.....	19
	1) United States Court Decisions.....	19
	2) Nuremberg.....	22
	3) National Courts.....	28
	4) Yugoslavia Tribunal.....	29
	D. Plain Language Construction of Nuremberg Charter.....	34
	E. Rwanda as a Party to Common Article 3 and Protocol II.....	40
V.	Application of Arguments to Selected Defendants.....	40
VI.	Conclusion.....	46

INDEX OF AUTHORITIES TO TABS

NOTE BOOK NUMBER 1

- 1) Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, reprinted in 7 *Crim. L.F.* 51.
- 2) Theodor Meron, *International Criminalization of Internal Atrocities*, 89 *Am. J. Int'l.* 554 (July 1995).
- 3) Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 *Am. J. Int'l L.* 78, (1994)
- 4) *Application of Humanitarian Law in Noninternational Armed Conflicts*, Proceedings of the Eighty-Fifth Annual Meeting of the American Society of International Law, 85 *Am. Soc'y Int'l L. Proc.* 83 (1991).
- 5) William J. Fenrick, *Attacking the Enemy Civilian as a Punishable Offense*, 7 *Duke J. Comp. & Int'l L.* 539 (1997).
- 6) W. J. Fenrick, *International Humanitarian Law and Criminal Trials*, 7 *Transnat'l L. & Contemp. Probs.* 23 (1997).
- 7) W. J. Fenrick, *Some International Law Problems Related to Prosecutions Before the International Criminal Tribunal for the Former Yugoslavia*, 6 *Duke J. Comp. & Int'l L.* 103 (1995)
- 8) Christopher Blakesley, *Jurisdiction, Definition of Crimes, and Triggering Mechanisms*, *Denver J. Int'l L. & Policy* (Winter 1997).
- 9) Mark R. Von Sternberg, *A Comparison of the Yugoslavian and Rwandan War Crimes Tribunals: Universal Jurisdiction and the "Elementary Dictates of Humanity"*, 22 *Brook. J. Int'l.* 111 (1996).
- 10) Richard Gladstone, *Exposing Human Rights Abuses - A Help or Himerance to Reconciliation?*, 22 *Hastings Const. L. Q.* 607 (1995).
- 11) William A. Schabas, *Sentencing by International Tribunals: A Human Rights Approach*, 7 *Duke J. Comp. & Int'l L.* 461 (1997).

NOTEBOOK NUMBER 2

- 12) Tara Sapru, *Into the Heart of Darkness: The Case Against The Foray of the Security Council Tribunal into the Rwanda Crisis*, 32 *Tex. Int'l L. J.* 329 (1997)
- 13) Egon Schwelb, *Crimes Against Humanity*, 23 *Brit. Y. Book of Int'l L.* 177 (1946).

- 14) R.R.B. Brit. Y. Book of Int'l L. 381 (1951)
- 15) Jordan J. Paust, It's No Defense: Nullum Crimen, International Crime and the Gingerbreadman, 60 Alb. L. Rev. 657 (1997).
- 16) Jordan J. Paust, Nullum Crimen and Related Claims, 25 Denv. J. Int'l L. & Pol'y 321 (1997)
- 17) Michael Scharf & Valerie Epps, The International Trial of the Century? A "Cross-Fire" Exchange on the First Case Before The Yugoslavia War Crimes Tribunal, 29 Cornell Int'l L. J. 635 (1996).
- 18) S/RES/955 (1994)
- 19) Virginia Morris & Michael P. Scharf, An Insider's Guide to the International Criminal Tribunal for Rwanda, (advance Copy)
- 20) Kevin R. Chaney, Pitfalls and Imperatives: Applying the Lessons of Nuremberg to the Yugoslav War Crimes Trials, 14 Dick. J. Int'l L. 57 (1995).

NOTEBOOK NUMBER 3

- 24) Report of the International Law Commission on the Work of its Forty-Eighth Session (6 May - 26 July 1996), G.A. Official Records. 51st sess. Supp. No. 10 (A/51/10).
- 25) 22 Trial of Major War Criminals before The International Military Tribunal at Nuremberg (1945)
- 26) 1 Official Documents 218, IMT at Nuremberg
- 27) The Brig Amy Warwick, 67 U.S. 635 (1862).
- 28) The Brig Malek Adhel v. U.S., 43 U.S. 210 (1844).
- 29) Demjanjuk v. Petrovsky, 776 F.2d 571, Sixth Cir. (1985)
- 30) Cook v. U.S., 11 S.Ct. 268 (1891)
- 31) Hirota v. General of the Army Douglas MacArthur, 69 S.Ct. 1238 (1949).

ARTICLE ON INSIDE OF NOTEBOOK NUMBER 3 (NO TAB)

- **) Geoffrey R. Watson, The Humanitarian Law of the Yugoslavia War Crimes Tribunal: Jurisdiction in *Prosecutor v. Tadic*, 36 Virg. J. Int'l L. 658 (1997)

I INTRODUCTION

The issues which This brief will address concern Article 4 of the Statute of ICTR and the principle of *nulla poena sine lege*. Defense Counsel will argue that; neither Common Article 3 of the Geneva Conventions of 1949 (Common Article 3) nor the Additional Protocol II of 1977 to the Geneva Conventions (Protocol II) includes any penal provisions, or any provisions for individual criminal liability.

This memo will examine both the *nulla poena sine lege* principle¹ and the closely related *nullum crimen sine lege* principle.² Both principles are components of the domestic *ex post facto* principle.³ This memo will examine the application of these principles to the ICTR.

This memo examines the application of these principles by first examining some basic principles and their historical evolution under international law. By following these principles this memo then shows that people who violate the prohibitions of international humanitarian law fit into a recognized category under international law. By being able to apply an internationally recognized label to this category of criminals they are subject to individual responsibility and punishment.

This memo will then go on to examine the application of these principles by U.S. Courts,

¹ No penalty without law. Or, if the instrument which is relied on for jurisdiction does not provide for penalties then a person may not be punished under that instrument.

² No crime without law. Or, unless the instrument which is relied upon jurisdiction clearly states the elements of the criminal act then a person may not be prosecuted, because they were without adequate notice of the criminality of the behavior.

³ After the fact; by an act or fact occurring after some previous act or fact, and relating thereto. . . . See Black's Law Dictionary, Abridged Sixth Addition.

the IMT at Nuremberg, by national courts following WWII and by the Yugoslavian Tribunal. Then an argument will be made in favor of a plain language construction of the Nuremberg Charter.

Finally the arguments will be applied to individual defendants that are or will be in front of the ICTR. Although specific facts are not available at this time there are enough facts to allow for a clear application of the arguments which are contained in this memo. After the application of the arguments a brief conclusion is stated.

II SUMMARY OF CONCLUSIONS

One of the first questions asked was: Why an international tribunal? As explained, there are usually four choices after a war, particularly a civil war, or internal conflict.⁴ Given all of the problems with the first three choices, the fourth choice (creating an international tribunal) is arguably the only real choice for Rwanda.

The first principle to keep in mind, when applying the arguments, is the concept of international humanitarian law. This body of law consists of those "international rules intended to solve humanitarian problems directly arising from international and non-international armed conflicts."⁵ Furthermore, this body of law (1) "limit[s] the right[s] of parties to [a] conflict to use the methods and means of warfare of their choice" and (2) "protect[s] person[s] and properties that are or maybe affected by conflict."⁶ The purpose of international humanitarian law has also been said to be: (1) to protect both combatants and noncombatants from unnecessary suffering,

⁴ See note 30, *Infra*.

⁵ See note 46, *Infra*..

⁶ *Id*.

(2) safeguarding certain fundamental human rights of a specified category of people in times of armed conflict and (3) facilitating the restoration of peace.⁷ Parts 1 and 2 of this second definition of the purpose are consistent with the first definition given above. The only additional element is the purpose of the restoration of peace.

Since one purpose is to safeguard the fundamental human rights of a category of protected persons, it is important to keep in mind that human rights are widely accepted as a matter of international concern.⁸ Also, the United Nations General Assembly, in Resolutions 2444 and 2675, has unanimously affirmed that the principles of international law found in Common Article 3 and Protocol II are correct statements of principles of customary international law.⁹ In addition, the Appeal's Chamber in the Tadic case found that Common Article 3 is customary international law,¹⁰ and the International Court of Justice, in Nicg. v. U.S., has come to the same conclusion.¹¹

Another important principle which is worthy of reiteration concerns the principle of legality (*nulla poena sine lege, nullum crimen sine lege*). The Tribunal, or any court, cannot examine these principles in the same light as if it is looking at a domestic statute. "[T]he lex should be understood in the international context as comprising not only written law, but also unwritten law . . ."¹² More important, the body of law which we are dealing with "is not static,"¹³ and must

⁷ See note 52, *Infra*.

⁸ See note 53, *Infra*.

⁹ See note 54, *Infra*.

¹⁰ See note 102, *Infra*.

¹¹ See note 127, *Infra*.

¹² See note 44, *Infra*.

not be interpreted as it was in the past "but as it has evolved and exists among the nations of the world today."¹⁴

Under international law crimes are seldomly spelled out with detailed elements. In fact the word crime often does not appear, and penalties are rarely set forth. Despite this, it is generally accepted that "international criminal laws do not thereby run afoul of the principle[s] of nullum crimen sine lege"¹⁵ or nulla poena sine lege. The body of humanitarian law is found in treaties, universally recognized customs and practices of states, and from general principles of justice applied by jurists and practiced by military, and national courts.¹⁶ The history of the concept of humanitarian norms goes as far back as the 6th century BC.¹⁷ The concept has always formed the basis of the concept of war crimes, and the two terms are synonymous in the international community today. Under the label of war crimes there has been individual criminal responsibility and punishment as far back as 1474.¹⁸ In more recent times there have only been a few international war crime tribunals. However, there were over 25,500 war crime trials held by national courts after WWII.¹⁹ In the absence of an international court or tribunal a national court should be viewed as acting as an agent of the international community.²⁰

¹³ See note 72, *Infra*.

¹⁴ See note 73, *Infra*.

¹⁵ See note 75, *Infra*.

¹⁶ See note 57, *Infra*.

¹⁷ See note 40, *Infra*.

¹⁸ See note 42, *Infra*.

¹⁹ See note 91, *Infra*.

²⁰ See note 92, *Infra*.

The Nuremberg Tribunal and the Tribunal for the Former Yugoslavia have set forth certain requirements which should be considered when establishing whether an act is a violation that is open to prosecution and whether there is individual criminal responsibility. The Appeals Chamber for the Tribunal for the Former Yugoslavia promulgated a set of requirements which should be considered in determining whether a violation is subject to prosecution. According to that court:

- (1) the violation must constitute an infringement of a rule of international humanitarian law.
- (2) The rule must be customary in nature or, if it belongs to treaty law, the required condition must be met.
- (3) The violations must be serious, that is to say it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim, and
- (4) The violation of the rule must entail under customary or conventional law, the individual criminal responsibility of the person breaching the rule.²¹

According to The IMT at Nuremberg the relevant factors to consider in finding individual criminal responsibility are:

- (1) A clear and unequivocal recognition of the rules of warfare in international law;
- (2) State practice intending to criminalize the prohibition, including statements by government officials and international organizations;
- (3) Punishment of violations by national courts and military tribunals.²²

²¹ See note 98, *Infra*.

²² See note 108, *Infra*.

The main body of this brief sets out four main arguments as to why jurisdiction under Article 4 of the Statute of the ICTR does not violate the principles of *nullum crimen, nulla poena sine lege*. There is, however, a fair amount of overlap of some of the subarguments, or supporting arguments. The first of these arguments is: that, just like pirates, violators of international humanitarian law should be considered, and treated, as *hostis humani generis*.²³ As an enemy of the whole human race their acts would be "unauthorized by the law of nations . . . and criminal in their character."²⁴ The miscreants would also be subject to punishment as traditionally set out by the international community. This does place the perpetrators into a recognized category of criminals under international law. However, there still exists the problem of defining which acts are criminal, and what are the penalties under international law. The support for, and the answer to, these questions are to be found within the second argument.

The second argument is a simple straight forward interpretation of history and precedent. After the Nuremberg Trials, and the over 25,500 national trials, which followed WWII it has been well accepted by the world community that there is individual criminal responsibility for violations of international humanitarian law.²⁵ Although the majority of post WWII trials concerned violations in the context of international conflicts, the core principles of crimes against humanity, which are the same for international humanitarian law, were applied internally. This combined with the statements of governments and the acceptance of the principles by the international community now makes international humanitarian law applicable to non-international conflicts as

²³ See argument as set out on pp. 17 & 18, *Infra*.

²⁴ See note 62, *Infra*.

²⁵ See note 79, *Infra*.

these core principles are a matter of international concern.

Also, with the penalties handed down by these courts there is adequate notice of punishment, under the lex of international law. The fact that WWII was an international conflict and Rwanda was an internal armed conflict in no way diminishes this fact. This is supported by the evolution of thought surrounding the concepts of "war" and "war crimes." As outlined above, it is widely accepted that the core protections of international humanitarian law are applicable in internal armed conflicts, as well as in an international setting.

The third argument can also support the second, although, either can stand alone. This argument is that a plain language "construction of Article 6(c) of the Nuremberg Charter would render the substantive violations identified in it to be the practical equivalent to those described in Common Article 3."²⁶ Since, the Charter and Judgement of Nuremberg are accepted as a statement of customary law,²⁷ and Common Article 3 and Protocol II are an evolution, or restatement, of its principles, the criminality and penal aspects, as recognized by the international community, follow along as well.

The last argument is: Since Rwanda is a party to both Common Article 3 and Protocol II they are part of the law of Rwanda and can be invoked without falling afoul of principles of legality.²⁸ With this argument it is still necessary to show that there are individual responsibility and punishment. The way to do this would be to rely on precedents set by international tribunals, national courts and statements of government officials. Also, they could look to the national laws

²⁶ See note 113, *Infra*.

²⁷ See note 126, *Infra*.

²⁸ See note 128, *Infra*.

of Rwanda for the penalties and statements of individual responsibility.

Perhaps a suitable close to this summary would be to refer to the words of the British Chief Prosecutor at Nuremberg, Sir Hartley Shawcross. At the close of the case against the individual defendants, when commenting on crimes against humanity, he said that the judgement of the Tribunal "gives warning for the future" that if individuals commit atrocities, even if in their own territory, "they act at their own peril, for they affront the international law of mankind."²⁹ Although these comments were made concerning crimes against humanity they are equally applicable to violations of international humanitarian law in internal armed conflict, because most of those tried and convicted were found guilty of violations of international law, crimes against humanity or both.

III BACKGROUND

The most recent violence in Rwanda started with the death of the Rwandan President Juvenal Habyarimana. The president died when his plane was shot down by a surface to air missile on 6 April 1994. For the next 100 days approximately 500,000 to 1,000,000 people were killed. Most of those killed were men of the Tutsis population, or moderate members of the Hutu population. These atrocities sparked widespread condemnation in the world community, and started the wheels of justice in motion. This, of course, led to the establishment of the present tribunal, which is only the second such tribunal since the end of World War II.

"Historically after wars, and particularly civil wars, the options available are":

- (1) grant everyone amnesty;
- (2) create a high level body, often called a truth commission, to write a report on what happened so that the events are documented;
- (3) prosecute those who are sus-

²⁹ Schwelb, *Infra* note 47, at 198-99.

pected of violating the law in the local courts; (4) create an international court to try those who have violated the laws of war or other agreed upon norms.³⁰

As a general statement, the aforementioned four options are the available avenues.

However, some would argue that the fourth option is the only viable choice for Rwanda. The argument in support of this view is that history has ample evidence that "while prosecution and punishment can serve as a strong deterrent, the granting of immunity through amnesty breeds contempt for the law and encourages future violations."³¹ A truth commission has the same problem because it documents the atrocities and labels them as criminal but there are not any conclusive steps taken prosecute the criminals. If left solely to local courts "[w]hat is referred to as universality of jurisdiction over war crimes [and crimes against humanity] falls considerably short of that goal as long as the jurisdiction is exercised by a belligerent only over persons associated with its enemy."³²

As mentioned above, the Rwanda Tribunal is the second international war crimes' tribunal since the end of WWII. The other was the Tribunal for the Former Yugoslavia. This Tribunal faced many challenges to its competence. The Rwanda Tribunal anticipates many of the same challenges and therefore the similarities and differences between these two bodies should be

³⁰ The International Trial of the Century? A "Cross Fire" Exchange on the First Case Before the Yugoslavia War Crimes Tribunal, 29 Cornell Int'l L. J. 635, 637, (Statement by Valarie Epps and Agreed to by Michael Scharf at 639.)

³¹ Id. at 639-640, (Statement by Michael Scharf which asserted that amnesty for the Turkish officials after WWI was a contributory factor to the rise of Adolph Hitler. Then listing 8 more incidents of war crimes ranging from 1937 to 1992.); see also Arlene Levinson, Genocide a Thriving Doctrine in the 20th Century, FC The Star, Sept. 18, 1995, at 149.

³² R.R.B., 28 The British Year Book of International Law 382, 392 (1951).

examined.

The jurisdiction for the Tribunal for the Former Yugoslavia was promulgated in Articles 2 through 5 of its statute. Article 2 pertained to "grave breaches" of the Geneva Conventions and Article 3 covered "laws or customs of war."³³ The main arguments against using these articles as a basis for jurisdiction is that "grave breaches" and "laws and customs of war" have generally only been applied to situations of international armed conflict and not to internal armed conflicts.³⁴ The reason for this is that the source of this language is Common Article II of the Geneva Conventions and the Hague Convention which traditionally are only applicable to international conflicts.³⁵ This argument was partially mooted when the tribunal found that the conflict in Yugoslavia was both international and internal in nature. Also, as will be discussed below, the legal meaning of "war" and "laws of war" under international law have evolved since the time of these treaties. However these arguments are not applicable to the Rwanda Tribunal because such language has been avoided.³⁶

The International Tribunal for Rwanda has the power to prosecute three different crimes. They are (1) "genocide" (Article 2); (2) "crimes against humanity . . . when committed as part of

³³S.C. Res. 827, U.N. SCOR, 48th Session, 3217th mtg., U.N. Doc. S/RES/827 (May 25 1993), reprinted in 32 I.L.M. 1203(1993); See Geoffrey R. Watson, The Humanitarian Law of the Yugoslavia War Crimes Tribunal: Jurisdiction in Prosecutor v. Tadic, 36 Virginia Journal of International Law, 687, 689-690.

³⁴ Geoffrey Watson, The Humanitarian Law of the Yugoslavia War Crimes Tribunal: Jurisdiction in Prosecutor v. Tadic, 36 Vir. J. Int'l L.658, 708.

³⁵ Id.

³⁶ Article 4 of the Yougoslavia Tribunal confers jurisdiction over acts of "genocide" an Article 5 relates to "crimes against humanity." See S.C. Res. 827, See also Watson, 36 Vir. J.Int'l Law 687,690.

a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds" (Article 3); and (3) "violations of Common Article 3 and Additional Protocol II" (Article 4).³⁷

IV ANALYSIS

A. BASIC PRINCIPLES AND HISTORY OF INTERNATIONAL HUMANITARIAN LAW

The "*ex post facto*" criticism has been levied at Article 4 of the ICTR. The argument is that Common Article 3 and Additional Protocol II have never been used as the basis for individual criminal responsibility, therefore they run afoul of the principle of *nullum crimen sine lege*. A further argument is: Even if there is individual responsibility there are no provisions for punishment; therefore there is a violation of the concept of *nulla poena sine lege*.

It has been argued that there are two purposes for an *ex post facto* requirement, which are:

- (1) to ensure that the accused has notice that his or her conduct is illegal; and
- (2) it guards against abuse of power by the sovereign.³⁸

As will be discussed these requirements are met when Article 4 is used as the basis for individual responsibility. Common Article 3 and Additional Protocol II do provide for prosecution, although

³⁷ S.C. Res. 955, U.N. SCOR----th sess., 345th mtg., U.N. Doc S/RES/955 (Nov 8, 1994).

³⁸ Geoffrey Watson, The Humanitarian Law of the Yugoslavia War Crimes Tribunal: Jurisdiction in Prosecutor v. Tadic, 36 Vir.J.Int'l L. 687, 717.(1997).

it is discretionary and not mandatory prosecution.³⁹ This does put a person on notice of the criminal responsibility for violations of these conventions, and prosecution does mean that you will be punished. By allowing for discretionary prosecution there is notice that if a person commits violations of the core principles of international humanitarian law that person is subject to individual responsibility and punishment. For these and following reasons the prosecution of criminals, who violate the principles promulgated in Common Article 3 or Additional Protocol II, is not violative of the *ex post facto* principle.

1) HISTORY

The concept of humanitarian law can be traced as far back as the 6th century B.C. and the writings of Sun Tzu which dealt with the humane treatment of prisoners and civilians.⁴⁰ In the 5th Century BC the concept was recognized and recorded as follows: "The slaughter of the Persian envoys by the Athenians and Spartans was confessedly a transgression of the laws of men, as a law of human race generally. . . ."⁴¹ What is often viewed as the first international war crimes prosecution was in 1474, when Peter Von Hagenbach was convicted and sentenced to death for "murder, rape, perjury and other crimes against the laws of god and man."⁴² Although it was not until the 20th century that humanitarian law started gaining wide attention, these cases demonstrate that the world community does recognize certain humanitarian norms, and has done so for a very

³⁹ Tara Sapru, *Into the Heart of Darkness: The Case Against The Foray of the Security Council Tribunal Into the Rwanda Crisis*, 32 *Tex. Int'l L. J.* 329, 350 (Spring 1997).

⁴⁰ Timothy McCormick & Gerry J. Simpson (editors), *The Law of War Crimes: National and International Approaches*, p. 32-33 (1997).

⁴¹ *Id.* at 33, (internal cite omitted)

⁴² *Id.* at 37-38.

long time. These norms are a protection of fundamental concepts of decency, and a restriction on parties to a conflict. The breach of these norms has traditionally entailed individual responsibility and penalties.

2) DEFINITIONS AND PRINCIPLES

The ideas contained in Common Article 3 and Additional Protocol II are said to embody that law known as International humanitarian law. "Humanitarian law is that considerable portion of international law which is centered on the protection of the individual in time of war . . . [F]or it is upon this category of law, and no other, that the life and liberty of countless human beings depend if war casts its sinister shadow across the world."⁴³ When dealing with this area of law, it should be kept in mind that "although the principle of legality (*nullum crimen, nulla poena sine lege*) is a pillar of domestic criminal law, the *lex* should be understood in the international context as comprising not only written law, but also unwritten law, since international law is part customary law."⁴⁴ Because international law is largely unwritten or customary law it is not the same as a body of national laws, which is more comprehensive.⁴⁵ This body of law "is defined as 'international rules, established by treaties or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts and

⁴³ Virginia Morris & Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal For Rwanda*, (advance copy), p. 136, quoting Jean Pictet, *Development and Principles of International Humanitarian Law* 1 (1985).

⁴⁴ Claude Pillout *et. al.*, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*; See also Virginia Morris & Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for Rwanda*, (Advance Copy), 134. n. 572.

⁴⁵ W.J. Fenrick, *International Humanitarian Law & Criminal Trials*, 7 *Transnat'l L. & Contemp. Probs.* 23, 26 (Spring 1997).

which, for humanitarian reasons, limit the right of Parties to the conflict to use the methods and means of warfare of their choice or to protect person and property that are, or may be, affected by conflict."⁴⁶ As early as 1907 "laws of humanity have been seen as one of the sources of the law of nations."⁴⁷ Since treaties are generally viewed as a statement of the law of nations, as it exists in that point in time,⁴⁸ the tribunal should accept Common Article 3 and Protocol II as a statement of humanitarian law in the present. As such all of the elements of individual responsibility and punishment which have been established in the past, as being part of war crimes or international humanitarian law, are still part and parcel to this statement of law.

"A humanitarian norm is generally intended to regulate the relations between the parties to a conflict. . . ." ⁴⁹ The humanitarian norms which are restated in Common article 3 and Additional Protocol II require that the parties to a conflict protect the civilian population from abuses. This duty of protection applies equally to abuses perpetrated by individuals and members of the armed forces.⁵⁰ Since this body of law is designed to regulate relations between people and not necessarily between a state and a person, and since there is a duty it should naturally follow that there is individual responsibility and an element of punishment. To determine both individual responsibility and punishment the court needs always to keep in mind that international law has a

⁴⁶Morris & Scharf, *supra* note 43, p.136; See also Morris & Scharf internal note 576.

⁴⁷ Egon Schwelb, *Crimes Against Humanity*, 23 *Brit. Y. B. Int'l L.* 178, 180 (1946).

⁴⁸ 22 *Trial of the Major War Criminals before the International Military Tribunal at Nuremberg* 457, 464.

⁴⁹Remarks by Luigi Condorelli, *Proceedings of the Eighty-Fifth Annual Meeting of the American Society of International Law*, 18 April 1991, 85 *Am. Soc'y Int'l L. Proc.* 83, 91 (1991).

⁵⁰ *Id.* at 91.

large body of unwritten, or customary law.

The subject matter jurisdiction for the Yugoslavia Tribunal was derived from rules of international law applicable in international armed conflict that are declarations of customary law. However, the ICTR's jurisdiction is derived from instruments governing non-international armed conflicts.⁵¹ Although the instruments which give jurisdiction under Article 4 of the Rwanda Tribunal's Statute govern non-international armed conflicts they, are still a reflection of international humanitarian law. Consequently, it is important for the Tribunal to keep in mind the purposes of international humanitarian law, when passing judgement on the actions of the defendants. "The purposes of international humanitarian law include":

(a) protecting both combatants and noncombatants from unnecessary suffering; (b) safeguarding certain fundamental human rights of persons who fall into the hands of the enemy, particularly prisoners of war, the wounded, sick and shipwrecked, and civilians; and (c) facilitating the restoration of peace.⁵²

The international community recognizes that "human rights are a matter of international concern,"⁵³ and international humanitarian law is the body of law that has resulted from the application of human rights doctrine within the context of armed conflicts.⁵⁴ In Resolutions 2444 (1968) and 2675 (1970) the United Nations General Assembly confirmed that humanitarian law

⁵¹Theodor Meron, *International Criminalization of Internal Atrocities*, 89 *Am. J. Int'l L.*, 554, 559 (1995).

⁵² Fenrick, *Supra*, note 45 at 26.

⁵³Meron, *Supra*, note 51 at 555.

⁵⁴ Case No. IT-94-1-ar-72 (2 October 1995), Decision by the Appeals Chamber of the Yugoslavia Tribunal on the Defense Motion for Interlocutory Appeal on Jurisdiction, reprinted in 7 *Crim.L.F.* 51(1995). (Hereinafter Tadic)

applies in all types of conflicts whether international or internal in nature.⁵⁵

As already stated, the concepts of *nulla poena sine lege*, and *nullum crimen sine lege*, although separate doctrines do tend to be blurred together. Indeed many of the same arguments for individual criminal responsibility do apply equally to both. "The penal elements of international humanitarian law is still rudimentary, . . . [w]hen treaties fail to clearly define the criminality of prohibited acts, the underlying assumption has been that customary law and internal penal law would supply the missing links."⁵⁶ This view has been supported by scholars and in treaties.⁵⁷ This point reiterates the fact that elements of crimes under international law, and treaties, are sometimes not clear and it may be necessary, at times, to resort outside of the four corners of the document in order to fill in gaps. In other words, international law is not just written laws but is also, in part, customary or unwritten law. Since it has long been the accepted practice to look to other sources, great harm would be done to the underlying principles of international humanitarian law by ignoring the weight of past practices and denying jurisdiction of the tribunal thereby allowing the perpetrators to escape justice. This is especially true given the precedents which have been set for prosecuting these individuals, and that this body of law has been elevated to customary law.

⁵⁵ Geoffrey Watson, The Humanitarian Law of the Yugoslavia War Crimes Tribunal: Jurisdiction in Prosecutor V. Tadic, 36 Virginia Journal of International Law 687, 714; See G.A. Res. 2444, U.N. GAOR, 23rd Sess., Supp. No. 18, U.N. Doc A/7218 (1968); & G.A. Res. 2675, U.N. GAOR, 25th Sess., Supp No. 28, U.N. Doc. A/8028 (1970).

⁵⁶ Id. at 563.

⁵⁷ See: Hersch Lauterpacht, *The Law of Nations and The Punishment of War Crimes*, 21 Brit. Y. B. Int'l L. 58,65 (1944); See Also, Lord Wright, *War Crimes Under International Law*, 62 L.Q. Rev. 40, 42 (1946); *The Martens Clause*, Hague Convention No. IV, Oct. 18, 1907, 36 Stat. 2277; treaty of peace with Germany, June 28, 1919.

B. HOSTIS HUMANI GENERIS

"[C]oncepts of 'war' and 'laws of warfare' [have largely been] replaced by two broader notions: (1) that of 'armed conflict', essentially introduced by the 1944 Geneva conventions; and (ii) the correlative notion of 'international law of armed conflict' or the more recent and comprehensive notion of 'international humanitarian law,' which has emerged as a result of the influence of human rights doctrines on the law of armed conflict."⁵⁸ And like the law of war the principles of humanitarian law are to be found in treaties, universally recognized customs and practices of states as well as from the general principles of justice applied by jurists and practiced by military courts.⁵⁹ One problem that seems to be present when dealing with those who commit violations of international humanitarian law is how to classify them under international law. Although they have traditionally been subject to prosecution they have not been given a clear "label" under international law. There are some acts that are so widely condemned by the community of nations that those who violate the core principles should be considered "enemies of all people."⁶⁰ Violators of international humanitarian law are such people. There is another category of malefactors that the world has widely condemned and they are given a label which amply applies to the outlaws who violate international humanitarian law. Those individuals who commit acts which are widely condemned by the community of nations are considered *hostis humani generis*, or enemies of the human race. As enemies of the human race these people have traditionally been subject to individual responsibility and punishment under international law.

⁵⁸Tadic Supra , note 54, paragraph 87.

⁵⁹ IMT, Infra, note 72, at 463-64, see also note 102 Infra, at paragraph 87.

⁶⁰ Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (1985).

The United States Supreme Court has had occasion to consider the issue of piracy, or pirates, and as stated above violators of humanitarian law should be categorized the same as pirates. As the court recognized, the laws of piracy, like those of humanitarian law, are based upon general principles of the laws of nations, and in the view of the world community both concepts are customary law or *jus cogens*. In the words of the United States Supreme Court, "whether they do it for purposes of plunder, or for purposes of hatred, revenge, or wanton abuse of power a pirate is deemed and properly deemed, *hostis humani generis*."⁶¹ Given that the core principles of humanitarian law are *jus cogens* norms, the words "a violator of humanitarian law" can rightfully be substituted in for "a pirate" in the second sentence of the above quote from The Brig Malek Adhel. Whether a person violates international law in the context of an internal or international armed conflict does not matter. It is not logical to say that a violation is less egregious if committed against the people of your own nation. No matter in which context the violation is committed the world community has just as much interest in seeing that the criminal act is punished.

Therefore, whether it is done for purposes of hatred, revenge or wanton abuse of power, those who violate the core principles of international humanitarian law, as restated in Common Article 3 or Protocol II, are properly deemed *hostis humani generis*. Indeed, given how the concept of international humanitarian law has evolved in the views of the world community one who violates these basic dictates of humane behavior should be considered *hostis humani generis*. Where acts are done in violation of such norms they are understood to be "unauthorized by the

⁶¹ The Brig Malek Adhel v. U.S., 43 U.S. 210, 232 (1844)

law of nations . . . and criminal in its character.⁶² Also, when looking to penalties one looks to the law of nations as it exists at that time.⁶³ For penalties a court or a tribunal is justified in looking at the practices of past international tribunals, or national courts, or military tribunals, which have considered similar violations.

C. PRECEDENT / HISTORY

1. UNITED STATES COURT DECISIONS

When considering the *ex post facto* question the U.S. Supreme court has said that "any statute passed after the commission of an offense which, 'in relation to that offense or its consequences, alters the situation of a party to his disadvantage,' is an *ex post facto law*."⁶⁴ In the context of Rwanda no defendant is disadvantaged by the creation of this Tribunal because the defendants were subject to individual responsibility and punishment prior to the establishment of the Tribunal. Also, in Cook, the court stated "[an] 'ex post facto law' this court said in Gut v. State, 9 Wall. 35, 38, 'does not involve, in any of its definitions, a change of the place of trial of an alleged offense after its commission."⁶⁵ This is exactly what has happened in Rwanda. Instead of standing trial in Rwanda or in another country the alleged perpetrators are before the world community in a world court, even though it is an ad hoc tribunal. This addresses the *nullum crimen sine lege* element of the *ex post facto* principle, but there is also the element of *nulla poena sine lege* element which also needs to be addressed.

⁶²Id. p. 232

⁶³ Id. p. 235.

⁶⁴ Cook v. U.S., 138 U.S. 157, 183 (1891)

⁶⁵ Id. , 183.

The *nulla poena* element was addressed by the International Law Commission in the 48th session, when the Commission commented that:

"[i]t is in any event not necessary for an individual to know in advance the precise punishment so long as the actions constitute a crime of extreme gravity for which there will be severe punishment. This is in accord with the precedent of punishment for a crime under customary international law as recognized in the Nuremberg judgement and in [A]rticle 15 (2) of the International Covenant on Civil and Political Rights."⁶⁶

This also is directly applicable to the situation in Rwanda. While the defendants may not have known exactly what the punishment would be for violations of norms expressed in Common Article 3 and Protocol II they had to be aware that there is applicable punishment. This statement is true in light of the precedents that will be discussed below.

The U.S supreme Court has stated that "[t]he 'law of nations' is also called the 'law of nature', being founded on the common consent as well as the common sense of the world"⁶⁷ In this case (the Brig Amy Warwick) the Supreme Court also discussed the "laws of war" and the "maxims of humanity", and this was many years before the world community officially recognized their application to non-international armed conflicts. According to this Court "it [was] very evident that the common laws of war -- those maxims of humanity, moderation and honor -- ought to be observed by both parties in every civil war."⁶⁸ The Court felt that the U.S. Civil War, or any internal war, "is properly conducted according to the humane regulations of public law."⁶⁹ This

⁶⁶ Report of ILC on the work of its 48th session., *Infra* note 79, Article 3 Commentary 7 p. 29-30.

⁶⁷ *The Brig Amy Warwick*, 67 U.S. 635, 670 (1862).

⁶⁸ *Id.*, at 667.

⁶⁹ *Id.*

demonstrates that in 1862 the core principles of humanitarian law were already viewed as being applicable to internal armed conflicts.

As discussed above, since 1862, the time of the decision in The Brig Amy Warwick, the concepts of war and laws of warfare have undergone a transformation under international law. These ideas are now expressed in the more encompassing terms of armed conflict and the concept of international humanitarian law. This idea is broader than that which in 1862 was looked upon as war, civil or otherwise. The situation in Rwanda is clearly under the modern notion of an armed conflict. Recognizing what the U.S. Supreme Court did, in 1862, the "maxims of humanity" and the "regulations of public law" (or the law of nations or nature) are just as equally applicable even though the armed conflict is internal in nature. Simply because the potential victims are of the same nationality as the perpetrators does not lessen the fact that they are entitled to the same protections of humanity and decency available to any other citizen of the world.

As previously stated, *nullum crimen sine lege* and *nulla poena sine lege* are the two international law concepts associated with the domestic *ex post facto* principle. In the fifty years since Nuremberg the *ex post facto* norm has become part of international law.⁷⁰ This fact is demonstrated by this principle being "enshrined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights."⁷¹ However, ". . . the 'law of war' [or humanitarian law] is not static, but by continual adaptation follows the needs of a changing

⁷⁰Watson, *Supra* note 55 at 717.

⁷¹ *Id.* at 717; see also Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3rd Sess., Supp. No. 16, U.N. Doc A 810 (1948), And International Covenant on Civil and Political Rights, 999 UNTS 171.

world."⁷² This principle of adaptation is widely accepted by the international community and has even been recognized by the U.S. Court of Appeals for the 2nd Circuit. The Circuit Court, reaffirming the United States Supreme Court, stated the principle as such: "Courts must interpret international law not as it was [in the past], but as it has evolved and exists among the nations of the nations of the world today."⁷³ The *ex post facto* principle is part of customary international law. However, as already demonstrated above and expanded below, the core principles of international humanitarian law which apply to internal armed conflicts are also part of customary international law, and arguably *jus cogens* norm. Instead of fixing definitions of war and war crimes in the past it is the duty of any court or tribunal to consider the evolution of thought, and the changing needs of the world community, and apply the core principles to the realities of the present situation or conflict. When the Tribunal evaluates the *ex post facto* challenge in this way it becomes evident that jurisdiction under Common Article 3 and Protocol II does not violate this principle.

2) NUREMBERG

The critics who claim that by holding these miscreants responsible for their criminal acts we do violence to the *ex post facto* norm are arguing that the international legal system does not provide for criminal responsibility or punishment. In other words, a person would not know that acts which violate core principles of international law are criminal or that there is punishment for

⁷² 22 Trial of the Major War Criminals before The International Military Tribunal at Nuremberg, 459, 464.

⁷³ *Filartiga v. Pena-Irala*, 630 F2d 876, 881, 2nd Cir. (1980), *Ware v. Hylton*, 3 U.S. 198 (1795).

the commission of such acts. Also, these same critics would argue that there would need to be a reform of the international legal system before a person may be charged and punished for violations of international humanitarian law when committed in an internal armed conflict. " There is no need to reform the international legal system in order to afford the international community the right to intervene in cases of massive violation of humanitarian principles in internal conflicts. Such a right already exists, even outside the system of the U.N., and it is only a question of political will whether it is utilized or not."⁷⁴

Unlike many domestic statutes, international instruments setting forth international criminal proscriptions often lack detailed definitional orientations or elements of crimes. Penalties are rarely set forth, the word 'crime' often does not appear, and mention of particular fora for prosecution is scarce. It is widely recognized, however, that international criminal laws do not thereby run afoul of the principle *nullum crimen sine lege* or otherwise lack legal validity.⁷⁵

This consideration aside, and as mentioned above, "whether or not individual responsibility . . . [was] novel or unfounded in 1945 . . . [individual criminal responsibility] is because of Nuremberg, generally held to be customary law."⁷⁶ One note of interest is that all of those people executed under findings of the Nuremberg Tribunal were convicted of war crimes, crimes against humanity, or both.⁷⁷ Also, when dealing with pirates, which as shown above should be looked at

⁷⁴ Remarks by Luigi Condorelli, Application of Humanitarian Law in Noninternational Armed Conflicts, American Society of International Law Proceedings, April 17-20, 1991, 85 Am. Soc'y Int'l L. Proc. 83, 93.

⁷⁵ Jordan Paust, Nullum Crimen and Related Claims, 25 Denv. J. Int'l L. 57,87 (1997); see also, Paust, 60 Alb.L.Rev. 657at666, Infra note 96.

⁷⁶ Kevin Chaney, Pitfalls and Imperatives: Applying the Lessons of Nuremberg to the Yugoslavia War Crimes Tribunal, 14 Dick. J. Int'l L. 57,87 (1995); see Also: M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law 147 (1992)

in the same manner as dealing with those who violate international humanitarian law, the U.S. Supreme court said that "if it be an attack from revenge or malignity, from a gross abuse of power, and a settled purpose of mischief, then it assumes the character of a private unauthorized war, and may be punished by all the penalties which the law of nations can properly administer."⁷⁸ This again shows a clear parallel between pirates and violators of international humanitarian law. When a person commits an act which is prohibited under Common Article 3 or Protocol II they most often act from revenge or malignity, from a gross abuse of power, and a settled purpose of mischief. Therefore just like a pirate, or an enemy of all mankind, they are subject to the penalties which the law of nations can properly administer and Nuremberg has set the precedent for punishment.

Nuremberg and the other war crime tribunals which followed WWII set the precedent for individual criminal responsibility and punishment, by the international community, for violations of international humanitarian law. "The principle of individual responsibility and punishment for crimes under international law recognized at Nuremberg is the cornerstone of international criminal law. This principle is the enduring legacy of the Nuremberg Charter and Judgement which gives meaning to the prohibition of crimes under international law by ensuring that the individuals who commit such crimes incur responsibility and are liable for punishment."⁷⁹ Through the changing views of the international community, as evidence by such instruments as treaties, as well as acts of states and holdings of domestic courts, this responsibility also exists in

⁷⁷ McCormick & Simpson, *Supra* note 40, at 175.

⁷⁸ *The Brig Malek Adhel v. U.S.* 210, 236 (1844).

⁷⁹ Report of the International Law Commission on the Work of its forty-eighth session, G.A.O.R. 51st sess., Supp. No. 10 (A/51/10).Part I Art. 2 Commentary (1), p.19.

the context of non-international armed conflicts. Simply because the world community has been paralyzed since WWII by the cold war and political polarization does not lessen this fact.⁸⁰ Apart from this, every state has a right, or duty, to prosecute such acts under a theory of universal jurisdiction. The Sixth Circuit Court has reaffirmed that "[t]his 'universality principle' is based on the assumption that some crimes are so universally condemned that the perpetrators are enemies of all people."⁸¹ This 1985 case was an attempt by Ivan Demjanjuk (aka "Iwan Grozny/ aka Ivan the Terrible) to fight extradition to Israel to face charges of violating humanitarian law during WWII. Therefore, any person should be well aware that such acts are criminal and subject to punishment. The fact that the tribunal is ad hoc and was established after the commission of the criminal acts is also of no assistance to the defendants. As noted in the Demjanjuk case even though the State of Israel was not in existence when the crimes against humanity were perpetrated it was still proper for the State to exercise jurisdiction. The reasoning being is that they were prosecuting "offenses against the laws of nations or against humanity."⁸²

This point is made simply to illustrate that any reasonable person would be aware that there is individual criminal responsibility, and that where there is criminal liability there follows an element of punishment. It is not made to suggest that the tribunal is exercising jurisdiction under a purely universality theory. "[T]he Tribunal is not an agent of a state exercising jurisdiction on the basis of universality principle, but is rather an international tribunal exercising statutory jurisdiction

⁸⁰ Supra, note 30, at 642, (statement by Michael P. Scharf.)

⁸¹ Demjanjuk v. Petrovsky, Supra note 60, at p.582.

⁸² Id, p.582-83

on behalf of the world community."⁸³ The tribunal is neither exercising jurisdiction on a purely universality theory nor on a purely statutory theory. The Rwandan Tribunal should be looked at just like the IMT at Nuremberg in that by creating the Tribunal the members of the Security Council "have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer the law."⁸⁴ To say that an individual state may prosecute these vile affronts to mankind but that the collective will of the community of nations is impotent to so proceed would do grave violence to the underlying principles of humanitarian law and to basic notions of justice.

Although, according to some, the post WWII courts at Nuremberg and Tokyo may be viewed as victor's courts, and not courts set up by the international community, "[they] established important precedents in terms of the substantive offenses for which suspects could be tried, and reaffirmed the concept of individual responsibility for violations of international norms."⁸⁵

This is evident by comments of some political figures of the time. Justice Robert H. Jackson, Chief of Counsel for the United States in the Prosecution of Axis War Criminals sent a letter to the President of the United States. "[H]e characterized what has eventually been given the name of crimes against humanity in the following words":

Atrocities and offenses, including atrocities and persecutions on racial or religious grounds, committed since 1933. This is only to recognize the principles of criminal law as they are generally observed

⁸³ W.J. Fenrick, Some International Law Problems Related to Prosecutions Before The International Tribunal for the Former Yugoslavia, *Duke Journal of Comparative and International Law*, Fall 1995, 6 *Duke J. Comp. & Int'l L.* 103,106.

⁸⁴ *Supra* note 72, at 461.

⁸⁵ *Supra* note 1, at 638, (statement by Valarie Epps).

in civilized states. These principles have been assimilated as part of International Law at least since 1907. The Fourth Hague Convention provided that inhabitants and belligerents shall remain under the protection and the rule of the principles of the law of nations, as they result from the usage established among civilized peoples, from the laws of humanity and the dictates of the public conscience.⁸⁶

There was also a letter from President Truman which stated that "[a]n undisputed gain coming out of Nuremberg is the formal recognition that there are crimes against humanity."⁸⁷ It should be noted here that a crime against humanity is simply the same thing as a violation of international humanitarian law but without the element of an armed conflict and a crime against humanity needs to be widespread and systematic. What is important for the tribunal, or anyone, to keep in mind is that the core principles from which both fields have evolved are the same. Therefore it is easy to see how these statements are also applicable to violations of international humanitarian law even when committed in an internal armed conflict. Mr. Justice Jackson, also stated that crimes against humanity, and therefore violations of international humanitarian law as applied to internal conflicts, are the concern of the international community when they surpass those standards of decency and humanity which are tolerable by modern civilization.⁸⁸ The atrocities committed in Rwanda have far surpassed the tolerable limits of today's civilization and are a matter of international concern, and therefore the most appropriate forum for them is an international forum.

⁸⁶ Schwelb, *Supra* note 47, at 187.

⁸⁷ *Id.* at 225.

⁸⁸ *Id.* see also *Supra* note 33, p.195.

3) NATIONAL COURTS

"When [a treaty] does not [specify the state, or states component to exercise jurisdiction] it may be necessary to resort to interpretation to ascertain whether certain states only, third states, or all states parties to the treaty are permitted to exercise jurisdiction over the offense."⁸⁹ After WWII the Nuremberg Tribunals' jurisdiction was based on two conventions "which [did not] contain provisions on punishment of breaches or penalties . . ." ⁹⁰ The Trials of the Major War Criminals at Nuremberg has overshadowed the fact that there over 25,500 war crimes trials held by national civil courts following WW II.⁹¹ When acting in such a capacity, national courts should be viewed as agents of the international system.⁹² Lacking an international court or tribunal,

National courts [have] an essentially international character in terms of the functions they [perform]. They [are] called upon to prosecute international offenders on behalf not only of the states to which they belong but also of all other states. They [are] carrying out a task that should normally be carried out by an international jurisdiction. Thus they are acting as judicial bodies under an institutionally defective international legal order.⁹³

These national courts are important in establishing that these acts are criminal under international law, since they should be viewed as acting as agents of the international community. This same principle was recognized by the 6th Circuit Court in the Demjanjuk case when it said that a nation

⁸⁹Merone, Supra note 51, at 568.

⁹⁰Id. at 562.

⁹¹ Barry E. Carter and Phillip R. Trimble, International Law, 2d edition, Little, Brown and Co. (1995), 1433.

⁹² McCormick & Simpson, eds., Supra note 40, at 187.

⁹³ Id. , at 187, quoting Mr. Malek of Lebanon, formerly a member of the United Nations Office of Legal Affairs and later of the International Law Commission. Comment was concerning the national war crime trials which followed WW II.

which prosecutes violations of international humanitarian law is "acting for all nations."⁹⁴

4) YUGOSLAVIA TRIBUNAL

As stated above, the main challenges to the competence of the Rwanda Tribunal are similar to those presented against incorporation of Common Article 3 and Additional Protocol II into the statute establishing jurisdiction of the Tribunal for the Former Yugoslavia. More specifically, "Common Article 3, [and] Protocol II, [do] not clearly impose individual criminal responsibility."⁹⁵ A preliminary answer to this argument can be found the words of the IMT at Nuremberg. The IMT stated that:

it is to be observed that the maxim *nullum crimen sine lege* . . . is a general principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances [commit serious violations of humanitarian law], is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.⁹⁶

Although this statement was made concerning attacking a neighboring state, the general principle of justice is just as strong, if not stronger, in the present case where the targets are unarmed and defenseless civilians. The IMT at Nuremberg applied crimes against humanity to internal conflicts which, as stated above, may have been novel at the time but has become widely accepted. As the core principles of crimes against humanity are those same principles which underlie international

⁹⁴ Demjanjuk, *Supra* note 60, at 582.

⁹⁵ Watson, *Supra*, note 55, 36 *Virginia J. of Int'l L.* 687,711.

⁹⁶ *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1946-1949*, reprinted Jordon J. Paust, *It's no Defense: Nullum Crimen*, *International Law and the Gingerbread Man*, 60 *Alb. L. Rev.* 657, 666. (actual quote was "... those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue,...")

humanitarian law, the latter are also applicable to internal armed conflicts.

Article 3 of the Statute for the Former Yugoslavia, pertaining to the "laws or customs of war," was largely viewed as a catch all provision, much like Article 4 of the Rwanda Tribunal Statute. The Appeal's Chamber for the Yugoslavia Tribunal found that the provisions contained in Article 3 of the Yugoslavia Statute incorporated the body of humanitarian law found in Common Article 3 and Additional Protocol II. The Appeals Chamber in Tadic found that Common Article 3 is part of customary law and applies to all conflicts whether internal or international.⁹⁷ Since the Rwanda statute specifically refers to Common Article 3 and Additional Protocol II the problem of incorporation by reference is not present, as it was with the Tribunal for Yugoslavia. What is important are the requirements that the Appeal's Chamber set forth for a violation to be subject to prosecution. They are:

- i) the violation must constitute an infringement of a rule of international humanitarian law;
- ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;
- iii) the violations must be "serious", that is to say it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim;
- iv) the violation of the rule must entail under customary or conventional law, the individual criminal responsibility of the person breaching the rule.⁹⁸

Under the first part of this test the court has not found any requirement of an international armed conflict. All that is required is that the violation constitute an infringement of a rule of

⁹⁷ See note 54 supra.

⁹⁸ Fenrick, Supra note 45, at 35, quoting from Tadic decision Before The Appeals Chamber at Paragraph 94.

international humanitarian law. As discussed above, it has been widely accepted that Common Article 3 and Protocol II which apply to non-international armed conflicts are restatements of customary international law, as it exists today and at the time of the drafting of those conventions. Therefore, a violation of one or both of these conventions is a violation of international humanitarian law. A violation of these conventions will meet the second element of this test. In addition, the third element of the test is met because by its very nature a violation under one of these conventions is serious, in that there are grave consequences for the victim.

When applying the fourth element of the test all that is required, for the perpetrator to be subject to prosecution, is that the act must have entailed individual criminal responsibility under conventional law or customary international law, when the act was committed. Any defendant would be hard pressed to argue that stopping a car and shooting the occupants is not a murder under domestic law, or that the act does not violate international conventions, or the customs of nations. The same would be true of going into a village and taking unarmed civilians from their homes and killing them, or for violating any of the other humanitarian norms covered under Article 4 of the Tribunal Statute. In addition, these same types of crimes are covered under Common Article 3 and Protocol II, which as discussed above, are part of customary international law, and arguably *jus cogens*. "The core prohibitions of crimes against humanity and the crime of genocide constitute *jus cogens* norms."⁹⁹ Furthermore, after the war crimes' tribunals which followed WWII, and after the establishment of the Tribunal for the Former Yugoslavia, it is an uphill battle for any defendant to argue that they are unaware that killing unarmed civilians, rape, torture, or other atrocious crimes against the dignity and sanctity of mankind, are not criminal

⁹⁹ Meron, *Supra*, note 51, at 558.

offenses or are not punishable. The training and the orders received by these bands of armed thugs in Rwanda can only be compared to the actions of the special groups of German soldiers that gathered Jews from all over Europe for what they called "final solution".¹⁰⁰

The Appeal's Chamber for Yugoslavia Tribunal, in the case of Prosecutor v. Dusko Tadic, noted that the U.N. General assembly had unanimously passed both resolution 2444 and 2675.¹⁰¹ Also, the Appeal's Chamber found that these resolutions were a statement, by the international community, that treaties are to be used to specify and elaborate on the principles of international humanitarian law. In addition, the Appeal's Chamber confirmed that these principles are customary international law and to be applied in any armed conflict.¹⁰² Before the passing of G.A. Res. 2444, in which the world community recognized that basic humanitarian principles, which underlie Common Article 3 and Protocol II, applied in both internal and international armed conflicts,¹⁰³ the United States representative stated that resolution 2444 "constituted a reaffirmation of existing international law."¹⁰⁴ The U.S. department of state once again in 1972 reaffirmed the United States belief that the statements in Resolution 2444 are restatements of customary international law.¹⁰⁵ Resolution 2675, which was also unanimously passed was an elaboration on

¹⁰⁰ Schwelb, supra note 47, at 202-203 (for discussion of final solution)

¹⁰¹ Tadic, Supra note 54 at paragraph 110 p. 120.

¹⁰² reprinted in 7 Crim. L.F. 51, 121-122 (1995), Criminal Law Forum, Decision on the Defense Motion For Interlocutory Appeal on Jurisdiction.

¹⁰³ Id. at 120.

¹⁰⁴ Id. at 120; See also U.N. GAOR, 3rd Comm., 23rd Session 1634th mtg., at 2, U.N. Doc A/C.3/sr.1634 (1968), & 67 A.J.I.L. 122, 124

¹⁰⁵ Id. at 120.

Resolution 2444.¹⁰⁶ This resolution was also understood by the world community to apply to all conflicts, whether internal or international in character.¹⁰⁷ With the resolutions, the decision in the Tadic case and the statements of the U.S. it is clearly demonstrated that the core principles behind international humanitarian law are customary in nature, and that the world community is within its authority to turn to such documents as Common Article 3 or Protocol II to help define this body of law. All these factors strongly support the assertions that the core principles of international humanitarian law, as stated in Common article 3 and Protocol II, are *jus cogens* norms under international law and therefore violations of these principles are subject to individual responsibility and punishment.

As the Appeals Chamber, in the Tadic case reaffirmed: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."¹⁰⁸ The Nuremberg Tribunal also did promulgate that a number of factors are relevant in determining individual criminal responsibility. As restated in the Tadic decision, they are:

- 1) the clear and unequivocal recognition of the rules of warfare in international law.
- 2) State practice indicating an intention to criminalize the prohibition, including statements by government officials and international organizations.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Tadic, *Supra* note 54, paragraph 128, at 130, quoting 22 Trial of Major War Criminals, Proceedings of the International Military Tribunal Sitting in Nuremberg, Germany at 447

3) Punishment of violations by national courts and military tribunals.¹⁰⁹

Many states have acted with a clear and unequivocal recognition of the principles of humanitarian law, which as already shown, is the result of the evolution of thought within the world community. It is widely accepted that the old notions of laws of warfare have been replaced by the idea of international humanitarian law. The following countries have incorporated the concepts of these humanitarian norms into their laws; Canada, Britain, Australia, Netherlands, Mexico, Finland, Ethiopia, Sweden Germany, France,¹¹⁰ and Belgium.¹¹¹ There have been Military Tribunals as early as 1818 that have dealt with violations of humanitarian norms during times of armed conflict.¹¹²

D. PLAIN LANGUAGE CONSTRUCTION OF NUREMBERG CHARTER

There is one more argument in favor of criminal responsibility or application of penal sanctions to individuals. The argument is that a plain language "construction of Article 6 (c) of the Nuremberg Charter¹¹³ . . . would render the substantive violations identified in it to be the

¹⁰⁹ Tadic, Supra note 54 paragraph 128 at 130, also quoting IMT part 22 at 445-47; See also Meron, supra note 51, 562; See also Morris & Scharf, supra note 43, 133-34.

¹¹⁰ Paust, Supra note 96.

¹¹¹ ICTR-96-2-D, In The Matter of: An Application By The Prosecutor For A Formal Request For Deferral By The Kingdom of Belgium, January 1997.

¹¹² See McCormick and Simpson, Supra note 40, 40-41; Discussing the court martial, by a U.S. military tribunal, of two English citizen. Wherein the two British subjects were convicted and sentenced to death for "violations of the 'laws and usage of war.'" The British government accepted the decision even though the criminal jurisdiction was based on the law of nations.

¹¹³ Charter of the International Military Tribunal, August 8, 1945, 82 U.N.T.S. 279.

practical equivalent of those described in Common Article 3."¹¹⁴ According to this argument "the only bodies of law containing criminal sanctions which at least facially apply to non-international armed conflict are the Genocide convention and the Nuremberg Charter's Article 6(c) which prohibits `crimes against humanity."¹¹⁵ Advocates argue that this type of interpretation "will give full force to the *jus cogens* character of `crimes against humanity."¹¹⁶

Article 6(c) of the Nuremberg Charter reads:

(c) Crimes against Humanity: namely murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of any country where perpetrated.¹¹⁷

These comments do address crimes against humanity, however they do also concern "any civilian" population, which gives them an internal character. As already noted, crimes against humanity and international humanitarian law although parallel concepts have a common set of core principles from which each has evolved. It would be inconsistent to say that the core principles of crimes against humanity are applicable to internal conflicts but that the core principles of international humanitarian law are not. The truth of this proposition is self-evident because the core principles are the same for both and are said to be *jus cogens*. Article 6(c) of the Nuremberg Charter

¹¹⁴ Mark R. Von Sternberg, A Comparison of the Yugoslavian and Rwandan War Crimes Tribunals: Universal Jurisdiction and the "Elementary Dictates of Humanity", Brooklyn Journal of International Law, 1996, 22 Brook. J. Int'l L. 111, 113-14(1996)internal Cite Added).

¹¹⁵ Id. at 119.

¹¹⁶ Id. at 150-151.

¹¹⁷ 82 UNTS , 280, 286-87.

provided that these principles apply outside the area of armed conflicts and to "any civilian" population. Any civilian population has been accepted to mean a non-international context.

Common Article 3 is nothing more than the next step in the evolution of human rights law being applied in and around armed conflict. After Nuremberg it was accepted that these core principles were applicable to internal as well as international armed conflicts. Article 3 Part (I) applies to "[p]ersons taking no active part in the hostilities . . .".¹¹⁸ Also at the beginning of this Article it specifically states that it is to apply "[i]n the case of an armed conflict not of an international character. . .".¹¹⁹ As a statement of the core principles of international humanitarian law, which has always had elements of individual responsibility and punishment, Common Article 3 can be the basis for criminal proceedings especially when read together with Article 6 of the Nuremberg Charter. Article 6 has already been accepted as applying these same core principles, although in the context of crimes against humanity, to non-international armed conflicts.

This argument is also bolstered by the work of the forty-eighth session of the international law commission. In its report the commission was working on a "Draft Code of Crimes Against the Peace and Security of Mankind."¹²⁰ In Part I , Article 1, the scope of the code was put forth as:

1. The present code applies to the crimes against the peace and security of mankind set out in part II.

¹¹⁸ 75 UNTS 287,288.

¹¹⁹ Id., 288.

¹²⁰ G.A.O.R., 51st Sess., Supp No. 10 (A/51/10), Report of the International Law Commission on the Work of its forty-eighth session, 6 May-26 July 1996. (Hereinafter: Int'l Law Commission Report, 48th Session)

2. Crimes against the peace and security of mankind are crimes under international law and punishable as such, whether or not they are punishable under national law.¹²¹

What is important are the explanatory comments which follow. As already shown above, the ICJ has found Common Article 3 to be customary law. (see footnote 48) Also, Common Article 3, and Additional Protocol II, are part of the area of law known as humanitarian law, or crimes against humanity. The ICJ has also stated that the norms expressed in Common Article 3 are the "elementary considerations of humanity."¹²² With these points in mind commentary number four is very enlightening.

Commentary four reads as follows:

(4) The Commission decided not to propose a general definition of crimes against the peace and security of mankind. It took the view that it should be left to practice to define the exact contours of the concept of crimes against peace, war crimes *and crimes against humanity, as identified in Article 6 of the Charter of the Nuremberg Tribunal.*¹²³

This is important for a couple of reasons. First, by stating that it will be "left to practice" to define the offenses, the commission reinforced the fact that international law is part customary law. "Practice" should be understood to include both past and subsequent actions consistent with this area of law. Secondly, this comment also recognizes that the core principles of humanitarian law, and crimes against humanity are adequately covered under article 6 of the Nuremberg Charter. Furthermore, this Article has been accepted as providing a basis for individual criminal

¹²¹ Id., p.14

¹²² Nicar. v. U.S., Infra note 127, at 105.

¹²³ Int'l Law Commissions Report, 48th Sess., Supra note 43 at p.15; emphasis added.

responsibility and as allowing for punishment. In other words, Common Article 3 and Additional Protocol II were just further evolutions in the application of human rights law, or humanitarian law, as they are defined by the world community. This is a recognition that "crimes against the peace and security of mankind", which the ILC feels is customary law, already encompasses under its umbrella, violations of international humanitarian law even when committed in the context of an internal armed conflict.

In addition, commentary 6 and 7 provide that "international law provides for the criminal characterization" of these acts, and "the prohibition of such types of behavior and there punishability is a direct consequence of international law."¹²⁴ Furthermore, it is stated that "the provision is consistent with the Charter and Judgement of the Nuremberg Tribunal."¹²⁵ This commentary also validates the premise which underlies this article and the purposes of humanitarian law. As a note to commentary 7 the commission recognized the fact that by unanimous vote the General Assembly (Res. 95 (I) of 11 Dec. 1946) "affirmed the principles of international law recognized by the Charter of the Nuremberg Tribunal."¹²⁶ By such an act the world community spoke with one voice and they said that the dictates, or duties, of the core principles of humanitarian law, whether crimes against humanity or violations of international humanitarian law, are applicable whatever the nature of the conflict, they are customary law and are elevated to *jus cogens*. Or, that those who violate the core principles of humanitarian law are enemies of the human race and can be punished accordingly under international law.

¹²⁴ Id., Commentary 6, at p.15.

¹²⁵ Id. Commentary 7 at p.15.

¹²⁶ Id. note 18 to Commentary 7 at 15

Since Common Article 3 is part of customary law which deals with the "elementary considerations of humanity" it is arguably covered under Article 6 of the Nuremberg Charter. Although the bulk of the Nuremberg Charter applied to international armed conflicts, part 6(c) was applied internally. As noted above, the core principles which underlie Article 6(c) are the same that principles that underly international humanitarian law. For these reasons international humanitarian law is applicable by the tribunal to internal conflicts. The Charter has been recognized by the world community as a basis for individual criminal responsibility and punishability for violations of humanitarian law. As noted earlier "when treaties fail to clearly define the criminality of prohibited acts . . . then customary law . . . [can] supply the missing links." (See footnote 37, Supra). The Nuremberg Charter has been recognized as part of international law, and the basis' on which it stands is part of customary law, therefore, given that Common Article 3 and the Nuremberg Charter cover the same ground they should be read as coexistent. In other words, since Additional Protocol II and Common Article 3 do not clearly provide for individual criminal responsibility, and punishment, we must look to other sources for help in interpreting what they mean. The logical place to look would be a document which covers the same body of law. We find this in Article 6 of the Nuremberg Charter, which has been accepted by the nations of the world as declarative of international law. Since this is the law of nations and it does provide for individual responsibility and for punishment than so should Additional protocol II and Common Article 3. Or a tribunal can refer to decisions of prior international tribunals or national courts acting as agents of the international community.

E. RWANDA AS A PARTY TO COMMON ARTICLE 3 AND PROTOCOL II

The International Court of Justice has stated that Common Article 3 is customary law.¹²⁷ This coupled with the fact that Rwanda is a party, of both of the conventions, removes the issue of the customary law aspect. Just as with the Statute for the former Yugoslavia the prohibitions of Common Article 3 are part of the law of Rwanda "and the Tribunal can therefore rely on it without fear of invoking criminal law of which the defendant did not know."¹²⁸ The same is true for protocol II in Rwanda since it is also a party to that treaty.

APPLICATION OF ARGUMENTS TO SELECTED DEFENDANTS

There are three groups of individuals who share the responsibility for the atrocities committed in Rwanda. They are: (1) the planners, (2) the military supervisors and subordinates, and (3) unwilling accomplices.¹²⁹ Many of those within these groups may be guilty of other crimes, such as genocide, or may be punishable under another article of the Rwanda Statute, but here we are only concerned with Article 4 of the Rwanda Statute. To demonstrate the arguments advanced above they will be applied to some of the defendants, from the different groups.

The first person is the former Prime Minister of the interim Government of the Republic of Rwanda, Jean Kambanda. The allegations against Jean Kambanda are that he did nothing to prevent the commission of violations of international humanitarian law, and also, that he made statements meant to incite the massacres, and contributed to the establishment of the civilian

¹²⁷ Military and Paramilitary Activities in and Against Nicaragua (Nic. v. U.S.), 1986 ICJ REP. 14, 114.

¹²⁸ Meron, *Supra* note 51, at 582-83.

¹²⁹ Morris and Scharf, *Supra* note 43, at 59.

defense programme.¹³⁰ This defense programme is said to have been responsible for the arming of the militia that engaged in the massacres in Rwanda.¹³¹ As a high ranking government official who helped establish the civil defense program which armed the militia, and then made statements to incite the massacres carried out by this same militia, he is obviously a member of the first category of defendants (the planners). As a planner he is responsible for the actions of those who carry out his plan. Also as a leader of the government when he makes comments which are clearly meant to incite violence he should reasonably expect that his subordinates are going to act upon them. Given this reasonable expectation he is also responsible for those who act in accordance with his statements. When the plan was implemented it took the form of "violence to life," "outrages upon personal dignity," and summary executions, as well as other violations of international humanitarian law as set out in Common Article 3, and additional Protocol II. When the allegations are adequately proven they will fall under these Articles. Given the limited facts available at this time we cannot address the adequacy of the proof or the facts. We must at this time assume that they will be proven beyond a reasonable doubt.

The first question that should be asked is: What was the motive or the reason behind the acts? In this situation it is obvious that the plans and the statements of Jean Kambanda were motivated by "hatred," "revenge" or a "wanton abuse of power." With this purpose or motive he should be considered as an enemy of the human race, *hostis humani generis*. Being placed into this category of recognized criminals under international law Jean Kambanda is individually

¹³⁰ The Prosecutor v. Jean Kambanda, Case No.: ICTR-97-23-DP.

¹³¹ *Id.*

responsible and is subject to the penalties that the international community has traditionally placed along with violations of international humanitarian law. To discover this we should look at the decisions of former tribunals, and of national courts, acting as agents of the international community, when passing on this subject matter.

The first question to be answered is whether the violations are subject to prosecution?¹³² These violations are breaches of the rules of international humanitarian law. These rules are also customary in nature, as demonstrated by the decision of the ICJ, United Nations General Assembly Resolutions, and statements of governments. In addition, the acts are in contravention of the treaty requirements of Common Article 3 and Protocol II, both of which Rwanda has signed. These rules protect important values, and the breach involved grave consequences for the victims. Lastly, the infraction of these rules entails individual criminal responsibility under both customary and conventional law.

In establishing individual responsibility we can look to the determining factors as set out by the IMT at Nuremberg.¹³³ First there is a clear and unequivocal recognition of the rules of warfare. If this was not clear prior to 1945 it was made clear by the IMT and the national trials that followed, as well as, G.A. Resolution 95 which followed the tribunal. Given the number of states that have criminalized these violations and again the number national trials following WW II the second requirement of the IMT is met. The last element is punishment by national courts and military tribunals. From the national courts following WW II over 700 of those found guilty were sentenced to death.¹³⁴ Even though the exact number cannot be determined, due to the

¹³² See note 98, Supra.

¹³³ See note 108, Supra.

unavailability of records from the former USSR and West Germany,¹³⁵ the sheer number of trials and the magnitude of the punishment make it clear that there are penalties associated with violations of international humanitarian law.

Even if Jean Kambanda is not placed into the recognized category of *hostis humani generis*, the rest of the analysis is still applicable. It is not necessary to find that a person is an enemy to the human race for them to be subject to individual responsibility or to punishment. This is evident by the large number of war crime trials both by military tribunals and national courts. However, by trying these miscreants and by elevating violations to customary law or *jus cogens*, we have already stated that these criminals are enemies of the human race. It is time, given the mood of the international community that these people are recognized for what they truly are, *hostis humani generis*.

The second group, as mentioned above, consists of the military superiors and subordinates. This group is the middle level people who actually "supervised and carried out the actual killings."¹³⁶ Included in this group are Elie Ndayambaje,¹³⁷ Joseph Kanyabashi¹³⁸ and Alphonse Higaniro.¹³⁹ These three individuals are alleged to have been personally involved in the massacres

¹³⁴ Carter & Trimble, *Supra* note 91 at 1433.

¹³⁵ *Id.*

¹³⁶ Morris & Scharf, *Supra* note 43 *Supra*, at 60.

¹³⁷ Prominent member of the commune of Muganza in the Prefecture of Butare; later appointed Bourgmestre of Buganza.

¹³⁸ Bourgmestre of the commune of Goma in the Prefecture of Butare.

¹³⁹ Former Minister and Director of the para-statal SORWAL in the commune of Butare in the Prefecture of Butare.

in the Prefecture of Butare between April 1994 and June 1994.¹⁴⁰ Being high ranking officials who gave orders to subordinates and who actively participated they fall with in the second grouping of defendants. Looking at the underlying purpose or motive of these defendants, it is obvious that the motive was hatred or an abuse of power. Therefore, these defendants should also be considered as enemies of the human race. Although, under the existing condition of international customary law it is not necessary to so categorize them. Looking at past practice and precedent, just as done with the first group, it is evident that this group is also open to individual criminal responsibility and punishment. These three defendants, and all of those in this group, are rightfully subject to prosecution and punishment by an international tribunal.

The third grouping of defendants, the unwilling accomplices, are private citizens who were forced by those in the first three categories to kill. The way this worked was that the interahamwe would go into villages and would force citizens to kill their neighbors.¹⁴¹ This group of people presents a problem not presented by the first two groups, in that they were not acting of their own motives or purposes. Therefore, it would be impossible to claim that they are enemies of the human race. It would possible to say that the motive of those putting them under duress should be implied to them. However, the more diplomatic or pragmatic view may be to not prosecute those in this group in an international tribunal and leave this question to the national courts of Rwanda.

This approach would help further one of the purposes of international humanitarian law, in

¹⁴⁰ Decision of the Trial Chamber on the Application by the Prosecutor For a Farmal Request For Defferal to the Competence of the International Criminal Tribunal for Rwanda in the Matter of Elie Ndayambaje, Joseph Kanyabashi and Alphonse Higaniro, Case Number ICTR-96-2-D.

¹⁴¹ Morris & Scharf, *Supra* note 7 at 61.

that it would help in the process of reconciliation or the reestablishment of peace. By allowing the national courts to try these people it would be left to the people of Rwanda to determine if they can truly blame these people for their actions. Under conventional law there does exist a defense of duress, but this defense does not apply in the case of homicide. However, this can be considered as a mitigating factor when determining the culpability of the individual defendants.

Another problem with prosecuting these people in the international court is that although they have committed a criminal act they are also victims of violations of international humanitarian law, as found in Common Article 3 and Additional Protocol II. In that the act of forcing them to kill another, whether under threat to them or their loved ones, is an "outrage upon personal dignity." It also has a grave consequence to the victim for the rest of their life. For the rest of their life they will undoubtedly be haunted by the memories of the heinous act they were forced to commit. For these reasons it is felt that jurisdiction over this group is best left to the national courts. These people can still be prosecuted by the international court if jurisdiction is not given to the national courts.

To find them to be *hostis humani generis* it is only necessary that the purpose or motive of the act be hatred, revenge, or wanton abuse of power. This does not refer to the state of mind of the individual defendant, but only the underlying purpose of the act itself. This aspect of the act is provided by the planners and those who have forced these unwilling accomplices. In the alternative, the purpose of the forcing party can be imputed upon the forcee. The person being forced should have known that the act was wrong and should have refused despite the consequences. This sounds harsh, however, as mentioned above there is not a recognition of a defense of duress when applied to the crime of homicide. Also, this may be a mitigating factor

when it comes to punishment, and should not be considered on the question of individual responsibility. This also begs the question of whether the defenses traditionally recognized in cases of homicide are applicable in a setting of armed conflict; or giving the surrounding circumstances and the increased pressures on people if there should be different standards? This situation is a prime example. In a situation where a person comes into your home and makes a threat there may be something a person could do to stop or prevent the act. However, when your country is under the dark shadow of civil war and a person is confronted with a group of armed thugs bent on killing there would seem very little choice. Therefore, as mentioned above, perhaps the national court would be in a better position to pass judgement on this group of people.

As previously stated, no matter how desirable for the purpose of settling international law, it is not necessary to categorize people as *hostis humani generis* in order for there to be individual criminal responsibility or to subject a person to punishment. By following the precedents of the IMT and the Tribunal for the Former Yugoslavia these defendants are also subject to prosecution and punishment. By following the steps applied to the first group above it is obvious that these people may be prosecuted in an international setting. The only question for this group is whether it is truly desirable for the international community to proceed against this category of people.

CONCLUSION

For thousands of years there have been accepted methods of what is acceptable in the treatment of prisoners and civilians during armed conflict. They have not always been expressed

in the same terms. However, whether they were known as "war crimes" or "violations of international humanitarian law" they have always been present. Those who violate these laws have always been susceptible to prosecution and punishment. The Tribunals and the national trials following WW II have put the question to rest.

As applied to the situation in Rwanda, all three groups of defendants are individually responsible and subject to punishment. Customary law, as applied in the past make this point evident. The only real question is: How far should the international community go in its prosecution of these criminals? It is in the best interest of the advancement of the law of nations, and the interests of justice, to fully pursue and prosecute those in the first two groups. However, while it is possible under existing international law to prosecute those in the third group it may be the wiser course to defer to the national courts and the conscience of Rwanda when dealing with these unwilling accomplices. This however is a diplomatic decision of the international community. It should not, and does not take away from the fact that all of the defendants in The three groups are properly subject to individual responsibility and punishment under international law. Also subjecting them to such prosecution is not violative of the principles of *nulla poena sine lege*, or *nullum crimen sine lege*.