

**A MEMORIAL FOR BOSNIA: FRAMEWORK
OF LEGAL ARGUMENTS CONCERNING THE
LAWFULNESS OF THE MAINTENANCE OF
THE UNITED NATIONS SECURITY
COUNCIL'S ARMS EMBARGO ON
BOSNIA AND HERZEGOVINA**

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INTRODUCTION: LEGAL QUESTIONS AT STAKE AND PREMISES ON
WHICH A *Memorial for Bosnia* IS BASED

A. *Overview of the Legal Questions at Stake*

This Memorial seeks to present a framework of legal arguments with respect to the validity and legal effects of an arms embargo imposed by United Nations Security Council Resolution 713 in September 1991 on the Socialist Federal Republic of Yugoslavia (Yugoslavia), before its dissolution, and since treated as being in force with respect to the new states that have succeeded Yugoslavia. More particularly, the Memorial addresses the legality of maintaining (or, at least, having maintained during the crucial time period) the arms embargo in force, either *de jure* or *de facto*, against the Republic of Bosnia and Herzegovina (Bosnia) in light of evidence that the arms embargo's maintenance vis-à-vis Bosnia has contributed to the inability of the Government of Bosnia to prevent the perpetration on Bosnia's territory of acts of genocide by Bosnian Serb forces as well as combined acts of genocide and aggression by the neighboring state of Serbia and Montenegro (Serbia).¹

The operative clause of Resolution 713 provides that the Security Council:

Decides, under Chapter VII of the Charter of the United Nations, that all States shall, for the purposes of establishing peace and stability in Yugoslavia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia until the Security Council decides otherwise following consultation between the Secretary-General and the Government of Yugoslavia.²

The purpose of the resolution was to prevent external interference in Yugoslav affairs (as well as the regional escalation that such interference

1. As will become evident, this Memorial does not argue that the initial *imposition* of the arms embargo by the Security Council was either invalid or produced an immediate conflict of obligations for Members. Rather, the Memorial calls into question the legalities related to the *maintenance* of the arms embargo after changes in the initial situation resulted in a conflict between Members' obligations to uphold the arms embargo on the one hand and Bosnia's (and other states') obligation to prevent genocide and Bosnia's right to self-defense in response to aggression on the other hand.

2. S.C. Res. 713, U.N. SCOR, 46th Sess., 3009th mtg. at 3, U.N. Doc. S/RES/713 (Readex 1991).

could potentially cause) and to prevent the dissolution of Yugoslavia.³ The resolution came at the request of the then-Yugoslav Government.⁴ Indeed, the decision to impose the arms embargo upon Yugoslavia was influenced by the view that such a measure was requested by Yugoslavia itself.⁵ Without the express request and consent of Yugoslavia, it is unlikely that the arms embargo would have been imposed by the Security Council.⁶ While the resolution has been "reaffirmed" in subsequent resolutions,⁷ Resolution 713 itself clearly states that the arms embargo applies to "Yugoslavia," an entity no longer existing⁸ and which is entirely distinct from the successor states, including Bosnia.⁹ Resolution 713 was adopted only a month before the collapse of Yugoslavia. Despite the fact that this collapse drew into question the international legal status and capacity of "Yugoslavia," to which Resolution 713 applies, most Security Council Members have treated the embargo as continuing to apply to post-Yugoslavia Bosnia.¹⁰

3. *See id.*

4. *See Letter from the Permanent Representative of Yugoslavia to the President of the Security Council*, U.N. SCOR, 46th Sess., U.N. Doc. S/23069 (Readex 1991).

5. *See Provisional Verbatim Record*, U.N. SCOR, 46th Sess., 3009th mtg. at 64,3317, U.N. Doc. S/PV.3009 (1991).

6. This may be gleaned by reference to the statements of the representatives of Zimbabwe, Yemen, Cuba, China, the U.S.S.R., the United Kingdom, Zaire, and France. *See id.* at 28, 36, 38, 49, 52, 55, 64, 66.

7. *See, e.g.*, S.C. Res. 727, U.N. SCOR, 47th Sess., 3028th mtg. at 2, U.N. Doc. S/RES/727 (Readex 1992) ("Reaffirms the embargo applied in paragraph 6 of resolution 713 (1991) and in paragraph 5 of resolution 724 (1991)"); S.C. Res. 724, U.N. SCOR, 46th Sess., 3023rd mtg. at 1, U.N. Doc. S/RES/724 (Readex 1991) ("Determined to ensure that the general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia imposed by resolution 713 (1991) is effectively applied"); *see also* S.C. Res. 871, U.N. SCOR, 48th Sess., 3286th mtg., U.N. Doc. S/RES/871 (Readex 1993); S.C. Res. 844, U.N. SCOR, 48th Sess., 3241st mtg., U.N. Doc. S/RES/844 (Readex 1993); S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (Readex 1993); S.C. Res. 821, U.N. SCOR, 48th Sess., 3204th mtg., U.N. Doc. S/RES/821 (Readex 1993); S.C. Res. 820, U.N. SCOR, 48th Sess., 3200th mtg., U.N. Doc. S/RES/820 (Readex 1993); S.C. Res. 819, U.N. SCOR, 48th Sess., 3199th mtg., U.N. Doc. S/RES/819 (Readex 1993); S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (Readex 1993); S.C. Res. 802, U.N. SCOR, 48th Sess., 3163rd mtg., U.N. Doc. S/RES/802 (Readex 1993); S.C. Res. 762, U.N. SCOR, 47th Sess., 3088th mtg., U.N. Doc. S/RES/762 (Readex 1992); S.C. Res. 758, U.N. SCOR, 47th Sess., 3083rd mtg., U.N. Doc. S/RES/758 (Readex 1992); S.C. Res. 757, U.N. SCOR, 47th Sess., 3082nd mtg., U.N. Doc. S/RES/757 (Readex 1992); S.C. Res. 752, U.N. SCOR, 47th Sess., 3075th mtg., U.N. Doc. S/RES/752 (Readex 1992); S.C. Res. 749, U.N. SCOR, 47th Sess., 3066th mtg., U.N. Doc. S/RES/749 (Readex 1992); S.C. Res. 740, U.N. SCOR, 47th Sess., 3049th mtg., U.N. Doc. S/RES/740 (Readex 1992).

8. *See* S.C. Res. 777, U.N. SCOR, 47th Sess., 3116th mtg., U.N. Doc. S/RES/777 (Readex 1992); G.A. Res. 47/2, U.N. GAOR, 47th Sess., 28th plen. mtg., U.N. Doc. A/RES/47/2 (Readex 1992).

9. Bosnia has continuously protested that the arms embargo does not apply against it. The argument that the arms embargo is formally inapplicable to Bosnia will be considered *infra* part IV, wherein the legal significance of S.C. Res. 727, *supra* note 7, will be discussed.

10. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugo. (Serbia and Montenegro)), 1993 I.C.J. 325,

B. *Situating A Memorial for Bosnia in the Context of the Ongoing Case in the International Court of Justice Brought by Bosnia Against Serbia Under the Genocide Convention*

1. The Case Brought by Bosnia Against Serbia and the Alleged Facts with Respect to Serbia's Responsibility for Conduct in Breach of the Genocide Convention

It is necessary to situate this Memorial in relation to the ongoing contentious case before the International Court of Justice (ICJ or Court) brought by Bosnia against Serbia, *Application of the Convention on the Prevention and Punishment of Genocide (Bosnia v. Serbia)*. This case was initiated on the basis of the contentious jurisdiction of the Court by virtue of Article IX's compromissory clause in the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).¹¹ Bosnia has sued Serbia both for acts of Serbian forces in Bosnia and for Serbian support of genocide carried out by Bosnian Serb forces, support which Bosnia argues to be sufficient to engage Serbia's state responsibility under the Genocide Convention.¹² Given the urgency

437-38 (Sept. 13) [hereinafter *Bosnia v. Serbia II*] (separate opinion of Judge Lauterpacht). Judge Lauterpacht argued that the arms embargo must apply to Bosnia and to other post-Yugoslavia states based on the intention seemingly manifested by the Security Council in the period after Bosnia's admission to the U.N. Judge Lauterpacht felt that:

[the] most compelling evidence of the Council's view in this regard is the record of the debate held on 29 June 1993 when six members sought, without success, to persuade the Council expressly to raise the embargo in relation to Bosnia-Herzegovina. The vote was 6 in favour, none against, with 9 abstentions.

Id. at 438.

11. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. IX, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention]. Art. IX provides for ICJ jurisdiction in the following terms:

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

Id. For a discussion of art. IX as the basis for a suit against a state other than Serbia, see *infra* Introduction, part B.3.

12. The Genocide Convention seeks to render genocide a crime under international law for which individuals, whether or not acting on behalf of state actors, can be punished. In this respect, art. II provides:

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

of the situation, Bosnia sought an indication of provisional measures from the ICJ twice in 1993. At the first Provisional Measures stage in April, the Court ruled in Bosnia's favor, ordering that Serbia cease and desist from all genocidal actions. Bosnia filed its second request in late summer of 1993, claiming that Serbia was not complying with the first order; again, the Court ruled in Bosnia's favor.¹³

2. The Attempt to Raise the Arms Embargo Issue in the Current Case

While Bosnia's central claim at each stage of the case was that Serbia was legally responsible for acts of genocide, Bosnia also sought to persuade the Court to consider the legal status and effects of the arms embargo in the context of Serbian responsibility. Bosnia, notably at the *Bosnia v. Serbia II* stage, recognized that the case was not ideally suited as a springboard to raising the issue of the arms embargo. The respondent state, Serbia, arguably was not engaging in positive acts to maintain the embargo; rather, Serbia was breaching the embargo by providing arms to Bosnian Serbs. Serbia therefore was in violation of the Genocide Convention, and Serbia would not (and did not) raise obliga-

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

Genocide Convention, *supra* note 11, art. II.

Art. III of the Genocide Convention then lists the modes of committing genocide for which individuals can be punished under international law:

The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

Id. art. III.

While the primary focus of the Genocide Convention is the facilitation of the prosecution of individuals, it is clear that states can incur state responsibility not only for failure to meet their obligations with respect to the punishment of individuals, see *id.* arts. IV-VII, but also for states' conduct causally connected to the perpetration of genocide, see *id.* art. IX, *supra*, and art. I ("The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish").

13. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugo. (Serbia and Montenegro)*), 1993 I.C.J. 3 (Apr. 8) [hereinafter *Bosnia v. Serbia I*]; *Bosnia v. Serbia II*, 1993 I.C.J. at 325.

tions flowing from Resolution 713 as a defense against Bosnia's claim. Thus, the legal force of obligations stemming from Resolution 713 was not a necessary issue in deciding whether or not Serbia had breached the Genocide Convention in the manner alleged by Bosnia.¹⁴ Despite the awkward fit between the substantive claims being made against Serbia and the logical necessity (or lack thereof) of addressing the arms embargo, Bosnia attempted nonetheless to convince the Court to use the occasion of the provisional measures request to "clarify the legal situation for the entire international community."¹⁵ Specifically, Bosnia wished to know whether it had rights of access to the means (including arms) to prevent genocide and whether these rights prevailed over Security Council obligations to uphold an arms embargo.¹⁶ Bosnia was clearly not seeking a binding order on nonparties, whether states or the Security Council itself,¹⁷ but rather was seeking something resembling an expression of judicial opinion on the matter. Bosnia hoped in part to justify the Court's stepping out of the pure bilateral jurisdictional context of the case (Bosnia versus Serbia) by pointing to the existence of latitude for judicial courage within Article VIII of the Genocide Convention.¹⁸

However, in both *Bosnia v. Serbia I* and *Bosnia v. Serbia II*, the Court declined to adhere to this line of argument based on its interpretation of the interaction between the wording of Article 41(1) of the Statute of the International Court of Justice (ICJ Statute) and the jurisdictional nexus (or *lis*) of the case. Article 41(1) states that "[t]he Court shall have the power to indicate, if it considers that circumstances so

14. The reader may recognize the structure of the case Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Lib. v. U.S.), 1992 I.C.J. 114 (Apr. 14) [hereinafter *Lockerbie*]. State *X* sues State *Y* for breach of a treaty obligation, and *Y* raises as a defense obligations to obey a Security Council resolution, which in effect "trump" the obligation to abide by the treaty to the extent the resolution and treaty conflict. The *Lockerbie* structure and the potential for replicating it in the context of a contentious case under the Genocide Convention will be discussed *infra* Introduction, part C.

15. See *Bosnia v. Serbia II*, 1993 I.C.J. at 344-45, for the Court's discussion of the way Counsel for Bosnia, Prof. Francis Boyle, framed the issue for the Court.

16. *Id.*

17. Of course, the Security Council is never directly bound by an ICJ judgment, as will be discussed *infra* part III.A.2.

18. Genocide Convention, *supra* note 11, art. VIII. Art. VIII states that "[a]ny Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III." *Id.* Art. VIII possibly should not be interpreted as a jurisdictional clause in the same sense as art. IX, *supra* note 11, although it clearly does serve to acknowledge an *erga omnes* "jurisdiction" (in the sense of standing) in all State Parties to raise issues of genocide in international fora. See *infra* part I.A.2.b.

require, any provisional measures which ought to be taken to preserve the respective rights of either party.”¹⁹ The Court clearly saw its power to issue provisional measures as limited to preservation of rights which could be the subject of binding legal judgment at the eventual Merits stage of a case. Since the Court’s eventual judgment at the Merits stage is only binding on the states before it, it was not free to issue provisional measures with respect to the “rights of either party” if the Court did not have jurisdiction over a state with the correlative obligation to respect those same rights.²⁰ Greater willingness to relate the arms embargo to Serbia’s alleged responsibility for genocide in Bosnia under the Genocide Convention is evident in Judge Lauterpacht’s opinion in *Bosnia v. Serbia II*.²¹ However, Judge Lauterpacht also voiced concern that the particular bilateral relationship of the case made it difficult for the Court directly to assess the legal status of the arms embargo imposed by Resolution 713 in terms of legal effects on obligations directly at stake in the litigation.²² Thus, while there was still the possibility that the Court might view the matter differently at the Merits stage, it was tolerably clear that the ideal respondent was not before the Court if the arms embargo was to come up for any judicial consideration by the Court as a whole.

3. ICJ Cases Contemplated by Bosnia in Late 1993

Bosnia, while not abandoning the arms embargo argument at the Merits stage of the case, hoped to present the issue of the arms embargo to the ICJ in a jurisdictional setting more conducive to addressing the question. Two avenues, apart from the ongoing case, were contemplated.

19. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 41(1) [hereinafter ICJ STATUTE].

20. See *Bosnia v. Serbia II*, 1993 I.C.J. at 344–45. As early as the first request for provisional measures, the Court declined to read art. VIII of the Genocide Convention as having any jurisdiction-conferring character and also seemed unwilling to use art. VIII interpretively, stating that “the Court considers [that] Article VIII . . . appears not to confer on it any functions or competence additional to those provided in its Statute” and that “accordingly the Court . . . is not required to do more than consider what provisional measures may be called for under Article 41 of the Statute.” *Bosnia v. Serbia I*, 1993 I.C.J. at 23.

21. Judge Lauterpacht’s suggestion is relatively soft:

I would be prepared to say that the Applicant may have an indication of a provisional measure in the following terms: that as between the Applicant and the Respondent the continuing validity of the embargo in its bearing on the Applicant has become a matter of doubt requiring further consideration by the Security Council.

Bosnia v. Serbia II, 1993 I.C.J. at 442 (separate opinion of Judge Lauterpacht).

22. *Id.* at 441–42.

a. Contentious Case Against
the United Kingdom

On November 15, 1993, Bosnia's Ambassador to the U.N. issued a public statement which was circulated to all Members:

[Bosnia] hereby states our solemn intention to institute legal proceedings against the United Kingdom before the International Court of Justice for violating the terms of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide We have already issued formal instructions to that effect to our Attorneys-of-Record before the World Court. They are currently drafting an Application and a Request for Provisional Measures against the United Kingdom. We have instructed our lawyers to file these papers with the World Court as soon as physically possible.²³

The Statement of Intention indicates that the United Kingdom, as a party without reservation to the Genocide Convention, could be sued under Article IX. The two most clearly articulated grounds invoked by Bosnia under the Genocide Convention were an alleged breach by the United Kingdom of its "duty to prevent" genocide, found in Article I of the treaty, and its duty under Article III(e) not to engage in "complicity with genocide."²⁴

On December 23, 1993, before proceedings could be initiated before the ICJ, a joint statement was released at the U.N. by the Ambassador of Bosnia and the Ambassador of the United Kingdom. The joint statement referred to an "agreement" between Bosnia and the United Kingdom that Bosnia would not pursue its stated intention to implead the United Kingdom.²⁵ It is not unlikely that the Government of Bosnia had been faced with a Hobson's choice of proceeding with the case or compromising Bosnia's already precarious political position at the peace negotiations, the success of which depended in significant measure on the role played by the United Kingdom.

23. Mission of Bosnia, Statement of Intention by the Republic of Bosnia and Herzegovina to Institute Legal Proceedings Against the United Kingdom Before the International Court of Justice 1, November 15, 1993 (on file with the *Michigan Journal of International Law*) [hereinafter Statement of Intention]. The Statement of Intention also mentions art. 22 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination as another basis for jurisdiction. *Id.* at 2-3.

24. *Id.* at 1-2.

25. See *Bosnian Government Not to Press Genocide Charges Against Britain*, BBC Summary of World Broadcasts, Dec. 24, 1993, available in LEXIS, News Library, Non-US File. The joint statement came six days after Bosnia's Ambassador to the U.N. addressed a letter to the President of the Security Council conveying Bosnia's decision not to proceed. See *Letter from the Permanent Representative of Bosnia and Herzegovina to the President of the Security Council*, U.N. GAOR, 48th Sess., U.N. Doc. S/26908 (Readex 1993).

b. Advisory Opinion Sought Through a Request to the ICJ from the General Assembly

Diplomatic and media sources report that while a contentious case was being considered against the United Kingdom, Bosnia succeeded in having one of the three drafts of General Assembly resolutions,²⁶ which were being negotiated in December 1993, include a request for an advisory opinion on the issue of the legal status and effects of the arms embargo resolution(s). At a very late stage, Bosnia asked that the clause requesting the advisory opinion be dropped; observers noted that the clause had more than enough support to be adopted.²⁷

c. The Ongoing Case and the Arms Embargo Argument

In late 1993, the authors of this Memorial were asked to explore the arguments relating to the arms embargo under the Genocide Convention. In early 1994, however, the Bosnian Government decided not to include any arguments pertaining to the arms embargo in its Memorial on the merits.²⁸ Especially in light of the cool reception that the majority of the Court gave the arms embargo arguments at the two Provisional Measures stages, it seems that Bosnia has quite sensibly decided that the best course of action is to secure a Court judgment that Serbia has violated the Genocide Convention and not to cloud the Court's inquiry with the controversial and jurisdictionally uncertain issue of the arms embargo.

26. These three resolutions were G.A. Res. 48/88, U.N. GAOR, 48th Sess., 84th plen. mtg., U.N. Doc. A/RES/48/88 (Readex 1993); G.A. Res. 48/143, U.N. GAOR, 48th Sess., 85th plen. mtg., U.N. Doc. A/RES/48/143 (Readex 1993); G.A. Res. 48/153, U.N. GAOR, 48th Sess., 85th plen. mtg., U.N. Doc. A/RES/48/153 (Readex 1994).

27. See G.A. Res. 48/88, *supra* note 26; G.A. Res. 48/143, *supra* note 26; G.A. Res. 48/153, *supra* note 26. All three resolutions were adopted on December 20, 1993, which was virtually the same date as the decision by Bosnia to withdraw its intention to sue the United Kingdom — three days after the Bosnian Ambassador's letter to the Security Council President and three days before the December 23 joint statement by Bosnia and the United Kingdom.

28. On April 15, 1994, Bosnia submitted its Memorial to the Court; Serbia has one year in which to submit its reply. Bosnia has, however, reserved its right to reinvoke various elements of its initial requests, which include those related to the status of the arms embargo, in response to the course of argument.

C. *A Contentious Case Brought Under Article IX of the Genocide Convention Against a State Engaged in Maintaining the Arms Embargo Would Create, According to a Structure Similar to Lockerbie, the Possibility for the ICJ to Address the Legal Status of Resolution 713 and Its Effect on States' Obligations*

It is clear that an application against the United Kingdom or other similarly situated party to the Genocide Convention would have squarely raised the issue of the validity and legal effects of the embargo. The United Kingdom could be sued for breach of the Article I duty to prevent genocide and perhaps the Article III(e) obligation not to be complicit in genocide. The basis for the Article I claim was clearly articulated in the separate opinion of Judge Lauterpacht in *Bosnia v. Serbia II*:

The duty to "prevent" genocide is a duty that rests upon all parties and is a duty owed by each party to every other First, there is the duty of the Respondent [and thus of any state party] both to prevent genocide and to refrain from conduct that inhibits the ability of the Applicant itself to prevent genocide or to resist it Third, there is the question of access by the Applicant to the *means* to prevent the commission of acts of genocide. The Applicant obviously has here in mind . . . the embargo placed by Security Council resolution 713 (1991) [I]t is not to be contemplated that the Security Council would ever deliberately adopt a resolution clearly and deliberately flouting a rule of *jus cogens*²⁹ or requiring a violation of human rights. But the possibility that a Security Council resolution might inadvertently or in an unforeseen manner lead to such a situation cannot be excluded On this basis, the inability of Bosnia-Herzegovina sufficiently strongly to fight back against the Serbs and effectively to prevent the implementation of the Serbian policy of ethnic cleansing is at least in part directly attributable to the fact that Bosnia-Herzegovina's access to weapons and equipment has been severely limited by the embargo. Viewed in this light, the Security Council resolution can be seen as having in effect called on Members of the United Nations, albeit unknowingly and assuredly unwillingly, to become in

29. For a more elaborate discussion of the concept of *jus cogens*, see *infra* part I. For the moment, it is sufficient to note that *jus cogens* refers to a norm from which no derogation is permitted and, to that extent, is analogous to high constitutional norms in domestic legal systems.

some degree supporters of the genocidal activity of the Serbs and in this manner and to that extent to act contrary to a rule of *jus cogens*.³⁰

If a suit were initiated based on a claimed violation of Article I (and possibly Article III(e)) of the Genocide Convention, the Applicant would not be seeking to establish that the Genocide Convention itself creates jurisdiction for some form of direct or binding review of the actions of the Security Council.³¹ However, the Article IX compromissory clause, if purposively and generously interpreted in accordance with the generally accepted principles of interpretation for human rights treaties, would seem to create considerable scope for a State Party unilaterally to seize the Court in a way that would permit the Court to render an opinion on how a Security Council resolution may or may not affect the obligations and rights of a State Party to the Genocide Convention.

Article IX's reference to "responsibility of states" makes clear that questions of the responsibility of states actively enforcing (or maintain-

30. *Bosnia v. Serbia II*, 1993 I.C.J. at 436-41 (separate opinion of Judge Lauterpacht). It will be recalled that the Statement of Intention, *supra* note 23, specifically characterizes the U.K.'s role as a Security Council member in maintaining the arms embargo (including "actively opposing all of the efforts by other States to 'lift' the arms embargo") as complicity in genocide and associates the art. I "duty to prevent" only with an affirmative obligation. The Statement of Intention refers for support to the reasoning of Judge Lauterpacht in *Bosnia v. Serbia II*. However, it should be noted that Judge Lauterpacht based his above-quoted argument on the premise that the art. I "duty to prevent" genocide (at least) embodies negative obligations; Judge Lauterpacht felt there was no strict need, for his purposes, to consider more positive duties to prevent genocide. The "complicity" argument as a basis for responsibility of an embargo-maintaining state like the United Kingdom will be discussed briefly *infra* note 119, as feeding into the interpretation of the art. I duty to prevent genocide.

The last sentence of Lauterpacht's argument is also particularly worth noting. In virtually the same breath, it touches both on the Security Council resolution as a juridical act (the status of which, in terms of validity, is clearly implied) and on the conflict obligations of states that cannot both obey the resolution and meet their duty to prevent genocide under art. I of the Genocide Convention. This coming together of the legal status of the resolution as a juridical act and its legal consequences for states' obligations (and thus for state responsibility) is discussed *infra* part IV.B. There, the argument is made that the most appropriate way to conceptualize Resolution 713's legal status is in terms of a doctrine analogous to what in some constitutional law systems is called "paramountcy doctrine." Under this doctrine, when one *prima facie* valid statute produces an obligation that conflicts with an obligation flowing from another *prima facie* valid statute, the result is inoperativeness, not voidness.

31. The Security Council as a nonstate actor cannot be a party before the Court and, as such, cannot be subject to the Court's binding judgment. ICJ STATUTE arts. 34(1), 59. In addition, there are very few treaties which have compromissory clauses which provide for advisory opinions with binding effect. See *Question of Treaties Concluded Between States and International Organizations or Between Two or More International Organizations, in Report of the International Law Commission on the Work of its Thirty-Second Session*, [1980] 2(2) Y.B. Int'l L. Comm'n 64, 87 n.251, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (Part 2) (listing conventions that have made provisions for advisory opinions with binding effect) [hereinafter 1980 Draft Vienna Convention]; see also *infra* part III.B.3 (discussing the near-binding effect of ICJ judgments on international organizations envisaged by art. 66 of the 1986 Vienna Convention).

ing through other forms of support) the arms embargo would be raised by asking the Court to determine whether this kind of enforcement constitutes involvement in genocide sufficient to amount to a breach of Article I or Article III(e) of the Genocide Convention. If this interpretation of the substantive scope of one or both of these provisions is valid, the question would then become whether the state in question could raise as a defense (or, phrased in the language of the International Law Commission (ILC), as a "circumstance precluding wrongfulness") the Security Council resolution in tandem with Articles 25 and 103 of the U.N. Charter.³² If the Court were to find initially that assisting in maintaining an unbalanced situation of arms in a context of genocide infringes Article I, a necessary element of the Court's reasoning would then have to include the legal effects of the resolution and of the obligations it places on states who are also parties to the Genocide Convention. The Court would not be reviewing the Security Council in any direct and binding sense, but it *would* be determining in a binding fashion the scope of states' rights and duties under the Genocide Convention.

The above kind of contentious case replicates the basic structure of *Lockerbie*, in which Libya sued both the United States and the United Kingdom for breach of obligations owed to Libya under the 1971 Montreal Convention. The two respondents raised as defenses two Security Council resolutions, the earlier one being a nonbinding recommendation and the later one being a binding decision taken under Chapter VII of the U.N. Charter. At the Provisional Measures stage, the ICJ ruled that the later resolution prevented the Court from indicating provisional measures because of the trumping effect of Article 103.³³ However, it is

32. Art. 25 provides that Security Council resolutions containing decisions of the Council create binding obligations for all parties to the U.N. Charter. U.N. CHARTER art. 25 ("The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter"). Art. 103 indicates that an obligation binding under art. 25 is to be treated as superior to any non-Charter treaty obligation a party might have that conflicts with its obligation to obey a Security Council resolution under art. 25. *Id.* art. 103 ("In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter should prevail").

For the "circumstances precluding wrongfulness" so far identified by the ILC in its ongoing work codifying the law of state responsibility, see *State Responsibility, in Report of the International Law Commission on the Work of its Thirty-Second Session*, [1980] 2(2) Y.B. Int'l L. Comm'n 26, 33-34 (arts. 29-34), U.N. Doc. A/CN.4/SER.A/1980/Add.1 (Part 2) [hereinafter 1980 Draft Articles on State Responsibility]. Those defenses do not explicitly mention art. 103, but the ILC commentary on the defense of legitimate countermeasures seems to suggest that it is implicitly found in art. 30 on countermeasures. See *State Responsibility, in Report of the International Law Commission on the Work of its Thirty-First Session*, [1979] 2(2) Y.B. Int'l Law Comm'n 87, 121, U.N. Doc. A/CN.4/SER.A/1979/Add.1 (Part 2) [hereinafter 1979 Draft Articles on State Responsibility].

33. *Lockerbie*, 1992 I.C.J. at 126-27.

clear that at this stage of the litigation, the Court felt that it only had to accept that the resolution was *prima facie* valid in order to establish its binding effect under Article 25 and its resulting effect under Article 103. For reasons to be discussed in Part III, *Lockerbie* leaves open a role for the ICJ, at least at the Merits stage of a case, in assessing whether a presumptively valid Security Council resolution is actually valid in terms of creating obligations for states with respect to which Article 103 can then be called in aid. It will be argued that the implication of *jus cogens* norms (related simultaneously to prevention of genocide and to the right of self-defense) in the context of a possible contentious case under the Genocide Convention dealing with the arms embargo creates the possibility, indeed responsibility, of the ICJ to find that Resolution 713 is not able, if certain facts obtain, to create obligations which enjoy the protection of Article 103.

D. *The Premises upon Which A Memorial for Bosnia Is Structured*

1. The Presumed Jurisdictional Context

It is crucial that the reader be clear on the context within which this Memorial is framed. The arguments set out in this Memorial presuppose that the respondent is not Serbia but rather an embargo-maintaining state that is also party to the Genocide Convention. As the foregoing narrative suggested, the respondent could be the United Kingdom, as a party without reservation to that treaty, but the Memorial does not depend on the specific identity of the respondent. Alternatively, it is conceivable that the issues could be raised in the structure of this Memorial by way of an appropriately phrased advisory opinion. In either possible jurisdictional context (contentious case or advisory opinion), the normative arguments found in Parts I to III and the institutional arguments found in Part IV (relating not to formal ICJ jurisdiction but to scope of review) are equally applicable, at least presumptively.³⁴ Moreover, the normative arguments involving *jus cogens*, genocide, and interpretation of the U.N. Charter found in Parts I, II, and III may be viewed as self-

34. "[P]resumptively" because this Memorial does not purport to be primarily about jurisdiction, and thus to that extent it is also not primarily about the differences that different jurisdictional contexts might make for the Court's scope of review once jurisdiction is established. Thus, arguments exist for bolder pronouncements by the Court on questions that arise from a request for an advisory opinion than on the same questions arising from a contentious case. For some comments of a schematic nature about the potential differences between the Provisional Measures stage and the Merits stage of a contentious case brought under art. IX of the Genocide Convention, see *infra* note 336.

standing in that they do not depend for their validity upon the ICJ's institutional competence to address them.³⁵

Thus, the Memorial is *not* grounded in the current case before the ICJ. It is also appropriate to clarify that it is *not* being argued that the ICJ has an implicit *inherent* jurisdiction, derivable from the U.N. Charter and ICJ Statute in combination, to review the actions of the Security Council, although such an argument is not new and may indeed be considered seriously some years hence.

2. The Presumed Facts

It is not the purpose, or the place, of this Memorial to establish the facts with respect to either Serbia's role in the underlying genocide or the causal connection, past or present, between the arms embargo and genocide. Rather, the Memorial is premised on the factual constellation essentially as pleaded by Bosnia at the two Provisional Measures stages.³⁶

In addition, the presumed facts for purposes of the arguments in this Memorial are limited to a specific chronological period, namely the period from the formation of Bosnia as a state in the first half of 1992 to the time of the two missed opportunities to place the arms embargo before the ICJ in a suitable jurisdictional context, that is late December 1993.

By way of summary, during this period, the Memorial takes as given that genocide was taking place on Bosnian territory against the predominantly Muslim population.³⁷ It was also widely, though not universally, accepted that the imbalance of arms greatly contributed to this genocide in the way described by Judge Lauterpacht, quoted in Part C of the Introduction. For example, in Resolution 47/121 of December 18, 1992, the General Assembly cited with approval the findings of

35. For example, the normative issues could be debated within the Security Council, within the General Assembly, between states, or in international society at large.

36. See James Gow, *One Year of War in Bosnia and Herzegovina*, RFE/RL RES. REP., June 4, 1993, 1, 1-13. The reader should also note two collections to be published in the near future, the purpose of which is to reproduce all the primary documentation relevant to the fragmentation of Yugoslavia, especially as it relates to Bosnia. See FRANCIS BOYLE, *THE BOSNIAN PEOPLE CHARGE GENOCIDE* (forthcoming 1995); MARC WELLER, *THE YUGOSLAV CRISIS IN INTERNATIONAL LAW: PART I, GENERAL ISSUES* (forthcoming 1995). Francis Boyle was counsel before the ICJ at the two Provisional Measures stages. The case at the Merits stage has since been taken over by a new legal team of which Marc Weller is a member.

37. The facts are by now well known to the general public. There are approximately 200,000 dead, many more wounded, 2.6 million refugees, 20,000 women raped, scores of towns and villages in ruins, and major cities under constant siege and sniper fire. The victims are predominantly civilians, with rudimentary weapons if any.

U.N. Commission on Human Rights Special Rapporteur Tadeusz Mazowiecki, stating that "another factor which had contributed to the intensity of 'ethnic cleansing' in areas under Serbian control was the marked imbalance between the weaponry in the hands of the Serbian and the Muslim population of Bosnia and Herzegovina."³⁸ Resolution 47/121 also equated so-called "ethnic cleansing" to a campaign of genocide for which the Yugoslav Army and the political leadership of the Republic of Serbia bore primary responsibility.³⁹ In this same resolution, the General Assembly, by a vote of 102 in favor, none against, and 57 abstentions, "urge[d] the Security Council . . . [t]o exempt the Republic of Bosnia and Herzegovina from the arms embargo as imposed on the former Yugoslavia under Security Council resolution 713 (1991)."⁴⁰ One year later, almost to the day, the General Assembly repeated its request for an arms embargo exemption in Resolution 48/88.⁴¹

Despite the fact that the Security Council has, in the summer of 1993, itself voted against the lifting of the embargo,⁴² there are signs that its Members are aware of the causal relationship between the embargo and genocide. In a letter from the President of the Security Council to the Secretary-General, the Members implicitly acknowledged the disastrous effects of the imbalance of arms by requesting that international observers be deployed on the borders of Bosnia, "with priority being given to the border between the Republic of Bosnia and the Federal Republic of Yugoslavia" in order to facilitate the implementation of the "relevant" Security Council resolutions.⁴³ Given that the border between Bosnia and Serbia has been the site of significant flows

38. G.A. Res. 47/121, U.N. GAOR, 47th Sess., 91st plen. mtg. at 2, U.N. Doc. A/RES/47/121 (Readex 1992).

39. See *id.* G.A. Res. 47/121 was re-affirmed in G.A. Res. 48/143, *supra* note 26, in which the General Assembly also drew specific attention to rape as genocide. Rape was referred to as a "systemic practice" and "an instrument of 'ethnic cleansing'" against the women and children in the areas of armed conflict in the former Yugoslavia. *Id.* at 3. Rape was termed "a deliberate weapon of war in fulfilling the policy of 'ethnic cleansing' carried out by Serbian forces in Bosnia and Herzegovina." *Id.* at 2.

40. G.A. Res. 47/121, *supra* note 38, at 3-4.

41. G.A. Res. 48/88, *supra* note 26, states that the Assembly "urges the Security Council to give all due consideration, on an urgent basis, to exempt the Republic of Bosnia and Herzegovina from the arms embargo." *Id.* at 5. The resolution further urges Member States, "as well as other members of the international community, from all regions, to extend their cooperation to the Republic of Bosnia and Herzegovina in exercise of its inherent right of individual and collective self-defence in accordance with Article 51 of Chapter VII of the Charter." *Id.*

42. See *Bosnia v. Serbia II*, 1993 I.C.J. at 437-38.

43. Letter from the President of the Security Council to the Secretary-General, U.N. SCOR, 48th Sess. at 1, U.N. Doc. S/26049 (Readex 1993).

of troops and arms to the Bosnian Serbs, one can conclude that the Council was seeking to enforce an embargo that had been effective against only one party — the victim of genocidal aggression.⁴⁴ Not only the sanctions applied by the Security Council against Serbia but also the belated agreement of Serbian President Milosevic in early summer 1994 to seal the border with Bosnia must be taken as a recognition by the U.N. and by Serbia that material support for the Bosnian Serb military had been reaching the Bosnian Serbs from Serbia despite the arms embargo.

To the extent that an arms imbalance continues to exist and the effects of the imbalance are to perpetuate genocide, the normative arguments in this Memorial retain their force. Therefore, if the current situation is judged to be sufficiently similar to the pre-December 1993 facts, then this Memorial's arguments would be as applicable now as they were when Bosnia first raised the issue of the validity of the embargo before the ICJ in April 1993. The authors, however, do not purport to make any statement about the existence of genocide as a result of the embargo today. The relative balance of military capacity in Bosnia as an ongoing matter and its relationship to genocide are factual and legal issues for the Security Council, the ICJ, and Member States of the U.N. to consider as the occasion may permit. This Memorial is thus limited temporally to the period before the Government of Bosnia considered including arms embargo arguments in its official written submissions to the Court and to the period shortly thereafter, when it was considering alternative cases that could be placed before the ICJ which might raise the issue more directly. The normative and institutional features of the Memorial assume specific factual and jurisdictional contexts, described above, that are beyond the scope of the current litigation between Bosnia and Serbia at the ICJ.

E. The Plan and Format of the Memorial

1. Plan of Memorial

The foregoing introduction has set out the factual background to the Memorial and the premises upon which it rests. Part I of the Memorial

44. Interestingly, another Security Council member, the United States, even considered the embargo in its domestic affairs. In June 1994, the majority of the House of Representatives voted to lift the embargo against Bosnia unilaterally, while the minority approved this action only in consultation with other Security Council members. In late November 1994, the United States announced that it would not enforce the embargo against the Bosnian Government forces.

will seek to demonstrate that the maintenance of an arms embargo on Bosnia, whether or not justified as being in conformity with obligations that Resolution 713 and subsequent resolutions purport to create for Member States of the U.N., conflicts with *jus cogens* obligations of states related to genocide, notably the duty to prevent genocide. Part II will then seek to establish that the maintenance of the arms embargo by and under the authority of the Security Council is *ultra vires* the Security Council's powers under the U.N. Charter because this maintenance overly fetters Bosnia's Charter-protected right to self-defense. Parts I and II, therefore, are primarily concerned with the normative state of affairs, putting aside, for the most part, questions of institutional authority. Thus, it is Part III that will canvass the institutional powers and responsibilities of the ICJ to pass judgment on the status of the implicated Security Council resolutions and their effects on the obligations of states. The institutional question having been addressed, Part IV then will address the legal effects, within the jurisdictional realm of the ICJ, of the unlawfulness established in Parts I and II. Brief submissions will conclude the Memorial.

2. Symbolic Format of the Memorial

Finally, a word should be said about the title and format of the Memorial. The arguments are presented in the format of a memorial for symbolic reasons. Research and formulation of the arguments were initially undertaken with a view to integrating them in the official Bosnian Memorial in the current *Bosnia v. Serbia* case. When the Bosnian Government decided that it was counterproductive to pursue the arms embargo issue in its current case before the ICJ, the authors continued to utilize the argumentative (and explicitly advocatory) format as they wished to present the arguments concerning this most critical issue in the form in which they *could have been* (and *still could be*) presented in a judicial context to the international community.

With the foregoing setting the context for the reader, the authors' arguments thus take the form of *A Memorial for Bosnia* — a memorial to Bosnians.

I. STATE CONDUCT IN ENFORCEMENT OF SECURITY
COUNCIL RESOLUTIONS' OBLIGATIONS TO MAINTAIN
AN ARMS EMBARGO PLACES STATE PARTIES TO THE
GENOCIDE CONVENTION IN CONFLICT WITH THEIR
Jus Cogens OBLIGATION TO PREVENT GENOCIDE

A. *Genocide, Jus Cogens, and the Genocide Convention*

1. The Principle of *Jus Cogens* Is Established in International
Law as the Highest Form of Law

a. International Law Recognizes the Existence of *Jus Cogens*

According to Article 53 of the Vienna Convention on the Law of Treaties (1969 Vienna Convention),⁴⁵ *jus cogens* are "peremptory norm[s] of general international law . . . accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted."⁴⁶ Leading publicists have more specifically defined *jus cogens* as "an inherent part of every legal system . . . [which] include those rules whose nonobservance would affect the very essence of the system,"⁴⁷ as rules which "involve . . . considerations of morals and of international good order,"⁴⁸ and as "overriding principles of morality or of paramount international interest."⁴⁹

The concept of *jus cogens* has been virtually universally accepted by states, courts, and publicists alike. The Members of the Sixth Committee of the U.N. General Assembly that discussed the inclusion of *jus cogens* in the 1969 Vienna Convention welcomed the introduction of the *jus*

45. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969) [hereinafter 1969 Vienna Convention].

46. *Id.* art. 53; *see also id.* arts. 64, 66, and 71 (dealing with the legal implications of *jus cogens* norms).

47. George Abi-Saab, *Introduction to THE CONCEPT OF JUS COGENS IN INTERNATIONAL LAW: PAPERS AND PROCEEDINGS* [hereinafter CONCEPT OF JUS COGENS] 7, 9 (1967).

48. Gerald G. Fitzmaurice, *Third Report on Law of Treaties*, [1958] 2(1) Y.B. Int'l L. Comm'n 20, 41, U.N. Doc. A/CN.4/Ser.A/1960/Add.1.

49. HERSCH LAUTERPACHT, *INTERNATIONAL LAW: COLLECTED PAPERS OF HERSCH LAUTERPACHT* 113-14 (Elihu Lauterpacht ed., 1970); *see also* IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 513 (4th ed. 1990); Gordon. A. Christenson, *Jus Cogens: Guarding Interest Fundamental to International Society*, 28 VA J. INT'L L. 585, 592 (1988); Egon Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 AM. J. INT'L L. 946, 949 (1967); Alfred Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT'L L. 55, 58 (1966).

cogens articles into the ILC's draft without exception.⁵⁰ Article 53 was considered "a very constructive contribution to the progressive development of international law."⁵¹ After the formulation at the ILC's 1963 session of what is now Article 53, fifty-one Member States commented on the draft in writing or in statements to the General Assembly. Of these, forty-three went on record as favoring the concept of *jus cogens* as part of the draft, the majority of them without reservations.⁵² Two years later at the Lagonissi International Law Conference on *jus cogens*, more than thirty participants, representing all parts of the world, were in agreement on the concept, at times even on the content, of *jus cogens*.⁵³ Although some ambiguity remains as to which rules of international law qualify as *jus cogens*,⁵⁴ "the concept has penetrated the consciousness of public international law discourse."⁵⁵ Moreover, "the concept of *jus cogens* . . . finds reception and recognition in all the principal legal systems of the world."⁵⁶

Over the past fifty years, various courts have also acknowledged the existence of peremptory norms of international law. As early as the Nuremberg Trials, discussion of absolute rules of morality or public order was prevalent. In the *Krupp* case, for instance, the Tribunal determined that an agreement between Germany and the Vichy Governments for the use of French prisoners of war in the armaments industry was void under the law of nations as being manifestly *contra bonos mores*.⁵⁷ Although never directly dealt with by the ICJ,⁵⁸ dicta in the opinions of

50. "The most striking feature of the record of the Commission's debates is the unanimity with which the members of the Commission accepted the idea of *jus cogens*." Erik Suy, *The Concept of Jus Cogens in Public International Law*, in CONCEPT OF JUS COGENS, *supra* note 47, at 17, 54.

51. *Id.* (quoting Jacovides of Cyprus).

52. See Schwelb, *supra* note 49, at 960.

53. See Suy, *supra* note 50, at 111. Professor Lissitzyn went so far as to remark that all the participants agreed on the *jus cogens* character of arts. 1 and 2 of the U.N. Charter, *see id.*, a position which seems, with the passage of time, to overstate the scope of *jus cogens* norms.

54. See Georg Schwarzenberger, *International Jus Cogens?*, 43 TEX. L. REV. 455 (1964).

55. Christenson, *supra* note 49, at 586.

56. V. Nageswar Rao, *Jus Cogens and the Vienna Convention on the Law of Treaties*, 3 INDIAN J. INT'L L. 362, 385 (1974).

57. *United States v. Krupp*, in 9 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 1, 1395-96 (1950).

58. The ICJ has shown caution in defining certain norms as peremptory. In its judgment in *North Sea Continental Shelf*, however, the Court gives implicit recognition to the existence of the concept itself by referring to it, even while it chooses to refrain from pronouncing on it. *North Sea Continental Shelf* (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 42 (Feb. 20); *see also* *Diplomatic and Consular Staff (U.S. v. Iran)*, 1980 I.C.J. 1, 42 (May 24) (referring to the "imperative character" of Iran's human rights obligations that cannot be altered by the

the Court have shaped what some consider a particular ideological vision of *jus cogens*.⁵⁹ In *Barcelona Traction*,⁶⁰ for example, Judge Ammoun associates self-determination with imperative norms of *jus cogens* he believes were sanctioned by representatives of most states at the Vienna Conference on the Law of Treaties.⁶¹ Similarly, in *Reservations to the Convention on Genocide*, the Court stated that conventions like the one before it have both civilizing and purely humanitarian "high purposes."⁶² In this case, despite the absence of an explicit reference to *jus cogens*, the Court leaves no doubt as to the limitation on the contractual liberty of states when "high purposes" are at stake.⁶³ Such a position distinctly parallels the provisions of Article 53 of the 1969 Vienna Convention, which also delimits the ability of states to contract by rendering void any treaty that conflicts with a peremptory norm.

b. *Jus Cogens* Norms Entail Obligations of a Special Nature

In keeping with their universal and general import, rules which derive from principles of *jus cogens* bind the international community as a whole; that is, even countries not signatories to the 1969 Vienna Convention are nonetheless bound by the content of its *jus cogens* provisions, most notably Articles 53, 64, and 71.⁶⁴ In light of the fact that nonobservance of the body of *jus cogens* rules may affect the very essence of the legal system to which they belong, universal applicability

diplomatic tensions between the United States and Iran][hereinafter *Tehran Hostages*]. Theodor Meron agrees that this statement by the Court is a version of *jus cogens*. See THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 222 (1989).

59. Christenson, *supra* note 49, at 619.

60. *Barcelona Traction, Light and Power Company (Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 5) [hereinafter *Barcelona Traction*].

61. See *id.* at 304 (separate opinion of Judge Ammoun) (implying that the U.N. Charter contains principles of *jus cogens* in its preamble).

62. *Reservations to the Genocide Convention (Advisory Opinion)*, 1951 I.C.J. 15, 23 (May 28).

63. Suy, *supra* note 50, at 60.

64. Karen Parker & Lyn B. Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 436 (1989). It is not clear whether nonparties to the 1969 Vienna Convention would be bound to a customary law equivalent of art. 66 because that provision is of a procedural nature and thus, as part of the supervisory machinery of the treaty, may be less apt to reflect or generate custom. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 4 (June 27) [hereinafter *Nicaragua*] (commenting that the reporting procedure in art. 51 of the U.N. Charter is specific to the treaty regime and has no customary analogue). That being said, the normative signal sent by art. 66 in permitting unilateral submission of *jus cogens* disputes to the ICJ would appear to be of significant corroborative relevance in assessing the special role that the ICJ should play in cases involving genocide when those cases get to the Court by a jurisdictional route other than art. 66 (for example, by way of the Genocide Convention).

is inherently necessary. Professor (now Judge) Ago further stipulates that peremptory norms are those “rules which, while embodied in a treaty, [are] still valid as customary rules for States not bound by the treaty, and hence for States in general.”⁶⁵

Existing as they do “in the higher interest of the whole international community” as opposed to “satisfying the needs of individual states,”⁶⁶ *jus cogens* norms dictate that states and other international actors depart from the absolute sovereign-state paradigm. Just as pure voluntarism is curbed by the limits imposed by Articles 53 and 64 of the 1969 Vienna Convention, so too are states obliged to act without self-interest and with regard to the welfare of the international community when *jus cogens* obligations are at issue. Hence, when principles of *jus cogens* have been or are in the process of being violated, a universal international reaction is justified.

Jus cogens rules, “by reason of the importance of their subject-matter for the international community as a whole, are — unlike the others — obligations in whose fulfillment all States have a legal interest.”⁶⁷ Indeed, it has been generally posited that *jus cogens* norms in the area of human rights must by their very nature be owed *erga omnes*,⁶⁸ due to their fundamental importance to the international community as a whole.⁶⁹ In the spirit of this movement towards a global consciousness where primary legal and moral values are simultaneously at stake, it follows that the observance of *jus cogens* principles can be demanded and enforced by all members of the international community.⁷⁰

65. Suy, *supra* note 50, at 53.

66. Verdross, *supra* note 49, at 58.

67. *State Responsibility, in Report of the International Law Commission on the Work of its Twenty-Eighth Session*, [1976] 2(2) Y.B. Int'l L. Comm'n 69, 99, U.N. Doc. A/CN.4/SER.4/1976/Add.1 (Part 2) [hereinafter 1976 Draft Articles on State Responsibility]. The ILC is here referring to *Barcelona Traction*, in which the Court declared that “all States can be held to have a legal obligation in [erga omnes rights] protection.” *Barcelona Traction*, 1970 I.C.J. at 33.

68. MENNO T. KAMMINGA, INTER-STATE ACCOUNTABILITY FOR VIOLATIONS OF HUMAN RIGHTS 163 (1992); 1976 Draft Articles on State Responsibility, *supra* note 67, at 95 (art. 19(3)(c)).

69. While *jus cogens* norms comprise a narrower category than *erga omnes* norms, it is clear that all *jus cogens* norms are also *erga omnes* norms even if not all *erga omnes* norms are *jus cogens* norms. See MERON, *supra* note 58, at 194.

70.

The quality of such norms of *jus cogens* may be attributed to only those legal provisions which are firmly rooted in the legal conviction of the community of states, which are indispensable for the existence of international law as an international legal order and the observance of which can be demanded by all members of the community of states.

Schwelb, *supra* note 49, at 951 (quoting an unidentified German Federal Constitutional Court decision in 1965) (emphasis added).

Ultimately, *jus cogens* principles represent the most powerful, compelling, and fundamental of expectations in a humane internal order. As such, they must necessarily involve duties among states to respect and protect these principles. Rules which truly express foundational norms are essential for the evolution and progress of world public order and must therefore be guarded by members of this order. In the end, giving effect to *jus cogens* norms would be "a step further in strengthening international law, by underlining the great importance of these principles and by recognizing that derogation from them constitute[s] a great danger to the international community as a whole and to the effectiveness of international law in international relations."⁷¹

2. The Genocide Convention Codifies the *Jus Cogens* Prohibition
Against Genocide, as well as the Corollary
Obligations Which Flow from This Prohibition

a. The Prohibition Against Genocide Is the Quintessential
Example of a *Jus Cogens* Norm

There is overwhelming evidence to support the fact that genocide is an act in violation of *jus cogens* principles. Both the preparatory work behind the Genocide Convention and subsequent judicial and scholarly opinion substantiate genocide's position among the most universally condemned acts in international law. Its prohibition represents the quintessential *jus cogens* norm, in conformity with the latter's function as guardian of the most fundamental moral and legally essential principles in the international system.

Article 1 of the Genocide Convention confirms that genocide *is* a crime under international law (that is to say, a crime for individuals) and therefore clearly expresses the consensus of the U.N. General Assembly concerning the codificatory nature of the document. Genocide has *always* been prohibited by international law, according to the Preamble.⁷² This interpretation is authoritatively supported by the U.S. Restate-

71. B. S. Murty, *Jus Cogens in International Law*, in CONCEPT OF *JUS COGENS*, *supra* note 47, at 79, 111.

72. Before the Genocide Convention, genocide was considered to be a crime against humanity under art. 6 of the Nuremberg Charter. Nigel S. Rodley, *Human Rights and Humanitarian Intervention: The Case Law of the World Court*, 38 INT'L & COMP. L.Q. 321, 322 (1989); see also Louis R. Beres, *International Law, Personhood and Prevention of Genocide*, 11 LOY. INT'L & COMP. L.J. 25, 28 n.15 (1989) ("For as long as we have recognized the validity of laws of land warfare, which is certainly since ancient times, genocidal action against enemy nationals during wartime has been illegal").

ment, which declares that the Genocide Convention "is generally accepted for purposes of customary law."⁷³

That the Convention embodies a universally compelling principle is further evidenced by its unanimous adoption and wide ratification. Work on the Draft Convention was completed in only two years and was adopted by the General Assembly without a dissenting vote as the U.N.'s first major human rights instrument.⁷⁴ Although there is some differences of opinion, all were in favor of adopting the Convention.⁷⁵ The collective resolve to formulate and adopt the Convention is representative of the unequivocal abhorrence of genocide common to all cultures and legal systems.

The ICJ itself made this universal condemnation and prohibition of genocide concrete in its advisory opinion in *Reservations to the Genocide Convention*:

The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as "a crime under international law" [T]he principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required "in order to liberate mankind from such an odious scourge" (Preamble to the Convention).⁷⁶

This language invites the interpretation that the provisions of the Genocide Convention move beyond customary law and acquire the character of peremptory norms in light of the Convention's dual "universal character."

Following the adoption of the Genocide Convention, eminent jurists considered the *jus cogens* character of the prohibition contained within the treaty. Members of the ILC, in their discussion on the Vienna Convention, stated that there are "obvious and best settled rules of *jus*

73. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702, cmt. d (1986); see also *id.* n.3.

74. NEHEMIAH ROBINSON, THE GENOCIDE CONVENTION 27 (1960).

75. *Id.* It is also interesting to note that, as recently as 1988, there have been some voices of dissent coming from the U.S. Senate, where ratification of the Genocide Convention was hotly debated for several years. Even those in the minority who voted against ratification in 1988 acknowledge that the prohibition of genocide "was a moral imperative and symbolically important." LAWRENCE T. LEBLANC, THE UNITED STATES AND THE GENOCIDE CONVENTION 8 (1991).

76. *Reservations to the Genocide Convention*, 1951 I.C.J. at 23.

cogens,” among them the prohibition against genocide.⁷⁷ In 1976, the ILC put forward its view that genocide is not only a crime under international law for individuals (*per* Article I of the Genocide Convention) but also is an “international crime,” that is, a crime for a state. The ILC adopted on first reading Article 19(3)(c) of the Draft Articles on State Responsibility, reiterating its view that “international law now in force includes obligations of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide, and apartheid.”⁷⁸ Similarly, the U.S. Restatement lists the prohibition against genocide as an example of *jus cogens*.⁷⁹ Finally, there is substantial consensus among individual scholars that the prohibition against genocide constitutes one of the few uncontested peremptory norms.⁸⁰

b. The Prevention and Punishment of Genocide Are Central to the Genocide Convention, as Evidenced by the *Travaux Préparatoires* and *Opinio Juris*

It is perhaps axiomatic at this point to state that the rules of *jus cogens* are those rules which derive from principles that the legal conscience of humankind deems essential to coexistence in the international community. The prohibition against genocide, as one of the most established of peremptory norms, represents the wish of the collective legal and moral conscience to condemn and suppress an act which is the antithesis of coexistence. As its aim is to exterminate whole populations, including whole peoples, the act of genocide not only violates the sanctity of life, but also undermines the international system itself by systematically destroying its constituent parts. It was in recognition of this reality that the Member States of the newly formed U.N. sought, as the organization’s first major achievement, to draft a convention that would consolidate international action against this “odious scourge.”

77. *Law of Treaties, in Report of the International Law Commission Covering the Work of its Fifteenth Session*, [1963] 2 Y.B. Int’l L. Comm’n 198–199, U.N. Doc. A/CN.4/SER.A/1963/Add.1 (discussing draft art. 37, which became art. 53 of the 1969 Vienna Convention). Sir Humphrey Waldock also cites “conspicuous instances of treaties that are void by reason of their inconsistency with a *jus cogens* rule,” including genocide. Sir Humphrey Waldock, *Second Report on the Law of Treaties*, [1963] 2 Y.B. Int’l L. Comm’n 36, 53, U.N. Doc. A/CN.4/156 and Add. 1–3.

78. 1976 Draft Articles on State Responsibility, *supra* note 67, at 95 (art. 19(3)(c)) (emphasis omitted).

79. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 702, cmt. d and n.3.

80. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, *supra* note 49, at 515; Stanislaw E. Nahlik, *Jus Cogens and the Codified Law of Treaties*, 33–36 TEMIS: REVISTA DE CIENCIA Y TÉCNICA JURÍDICAS 85, 102 (1973).

That the Genocide Convention's objective was to initiate action against genocide rather than simply to codify symbolic international condemnation of it is demonstrated in the Preamble and in Article I:

Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required, [the State Parties]

Hereby agree as hereinafter provided:

Article I

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.⁸¹

In the words of Raphael Lemkin, the lawyer who coined the term "genocide" and who was the prime mover behind the development of the Genocide Convention, by declaring genocide a crime under international law and by ensconcing it in the sphere of international concern, "the right of intervention on behalf of minorities slated for destruction has been established The usefulness of a future international treaty on genocide lies in facilitating the prevention and punishment of the crime and apprehension of criminals."⁸² While it is clear that suppression of genocide is an integral component of the Genocide Convention, the content of that obligation remains to be elucidated. For this purpose, it is necessary to examine the *travaux* as well as scholarly opinion and judicial statements on the matter.

The ICJ and the U.S. war crimes tribunal confirmed the status of Resolution 96(I) of the General Assembly, the Convention's point of conception, as the authoritative pronouncement on the status of genocide as a component of customary international law.⁸³ The resolution, adopted unanimously, stressed that "international co-operation be organized between States with a view to facilitating the speedy prevention and

81. Genocide Convention, *supra* note 11, preamble and art. 1.

82. Raphael Lemkin, *Genocide as a Crime Under International Law*, 41 AM. J. INT'L L. 145, 150 (1947).

83. See *Reservations to the Genocide Convention*, 1951 I.C.J. at 23; *United States v. Alstoeffer*, in 3 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 954, 979 (1951) (stating that the General Assembly is "the most authoritative organ in existence for the interpretation of world opinion. The General Assembly's recognition of genocide as an international crime [in Resolution 96(I)] is persuasive evidence of the fact").

punishment of the crime of genocide”⁸⁴ The use of U.N. mechanisms to this end was introduced later in Article XII of the Secretary-General’s Draft Convention: “The State Parties are to do everything in their power to give full effect to the intervention of the United Nations.”⁸⁵ The commentary to the Secretariat’s draft explains that Article XII was intended to facilitate preventive action by the U.N. “before the harm is done or before it has assumed wide proportions.”⁸⁶ However, it is also clear from the draft, according to Professor Matthew Lippman, that Article XII was “intended to *supplement*, rather than to preempt, the application of other mechanisms of prevention, suppression and redress. The draft text specified that Article XII was applicable ‘irrespective of any provision in the foregoing articles.’”⁸⁷ It is necessary, then, to take note of the “other mechanisms” that exist in the Convention.

During the General Assembly’s consideration of the Genocide Convention, Gerald Fitzmaurice of the United Kingdom stressed that the Convention involved not only rights for peoples but also obligations on governments — not only toward their own peoples, but also toward other states.⁸⁸ It is obvious that the implementation and enforcement of domestic legislation criminalizing acts of genocide (Article V) fulfills the internal obligation of a government to its people. It is equally obvious, therefore that individual state governments have the affirmative obligation to prevent genocide within their own borders. Fitzmaurice’s comment, however, displays an acknowledgment of the existence of “international” acts of genocide, that is, genocidal acts of one state against the people of another. Consistent with the nature of the prohibition against genocide as *jus cogens*, the affirmative obligation to prevent it extends beyond a state’s territorial boundaries. The awareness of the necessarily nonterritorial quality to the suppression of genocide was also recognized in the General Assembly’s discussion; for example, Mr. Perez Perozo of Venezuela stressed that the “signatory States would pledge themselves to prevent and punish genocide whenever it was committed and in whatever conditions.”⁸⁹ The question of the nonterritorial applicability of the Genocide Convention was raised in connection with the draft: “[I]t was the opinion of the Secretary-General

84. G.A. Res. 96(I), U.N. Doc. A/RES/96(I), at 189 (1946).

85. *Draft Convention on the Crime of Genocide*, U.N. ESCOR, 5th Sess. at 23, U.N. Doc. E/447 (Readex 1947) [hereinafter *Draft Convention on the Crime of Genocide*].

86. *Id.* at 45.

87. Matthew Lippman, *The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later*, 8 *TEMPLE INT’L COMP. L.J.* 1, 66 (1994).

88. U.N. GAOR, 3d Sess., 179th mtg. at 838, U.N. Doc. A/760, A/760/Corr.2 (1948).

89. U.N. GAOR 6th Comm., 3d Sess., 110th mtg. at 504 (1948).

and the experts involved that universality of repression seemed to have been the intention of the General Assembly's Resolution 96(I)."⁹⁰

Universality of application was eventually abandoned in the final text of the Convention (Articles VI and VII), but only with respect to punishment. This was due to the fear that the sovereign rights of a state would be abused by permitting a foreign state's court to punish acts committed outside its territory or by foreigners.⁹¹ This fear further resulted in the formation of the international Nuremberg tribunal and continues to reappear in the call for an international criminal court. The abandonment of universal application with respect to punishment, however, does not affect the universal preventative aspect of the Genocide Convention, preserved in the adopted wording of Article I, as evidenced by the statements of Fitzmaurice and Perez.

Statements by the ICJ in *Reservations to the Genocide Convention* and in *Barcelona Traction* strengthen this position of universal application with regard to prevention. In the former case, the ICJ noted "the clearly universal character of the United Nations under whose auspices the Convention was concluded and the very wide degree of participation"⁹² envisaged by the Convention. It further specified that, in this Convention, "the States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention."⁹³ As the Convention contains no restriction on universal application of the prevention of genocide, as it does for punishment in Articles VI and VII, the ICJ lends credence to the position that the preventative "high purpose" is to be universally accomplished, irrespective of any self-interest. Furthermore, the Court has clearly given further support to this interpretation by ascribing to genocide *erga omnes* obligations in *Barcelona Traction*.⁹⁴

Despite the overriding purpose of the Genocide Convention to prevent the recurrence of genocide, the only explicit provision to this

90. ROBINSON, *supra* note 74, at 31. See also Draft Convention on the Crime of Genocide, *supra* note 85, at 18.

91. ROBINSON, *supra* note 74, at 31.

92. *Reservations to the Genocide Convention*, 1951 I.C.J. at 21.

93. *Id.* at 23.

94. *Barcelona Traction*, 1970 I.C.J. at 32. While, as already noted, *erga omnes* is not equivalent to *jus cogens*, Meron has noted that the ICJ perhaps intended its particular examples of *erga omnes* norms to be *jus cogens* examples as well: "[t]he examples of basic human rights mentioned by the Court, protection from slavery and racial discrimination, may well reflect the Court's conception of *jus cogens* norms which it did not explicitly articulate." MERON, *supra* note 58, at 194. The examples of "basic rights" in the judgment included genocide and aggression which, *a fortiori*, must be caught by Meron's comment.

effect apart from Article I is contained in Article VIII, which allows a state to "call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide."⁹⁵ However, prevention is also implicit in the deterrent effect of the provisions relating to punishment. Given, *inter alia*, the clear reference in Article I to the duty of *states* to prevent genocide, given the commentary by and intentions of State Parties, given the negotiating history of Article VIII's precursor (draft Article XII), and given dicta by the ICJ, Article VIII cannot be construed as elucidating the only means by which genocide is to be prevented.⁹⁶ That is to say, states are not entitled to take the view that their duties to prevent genocide are met simply by virtue of calling upon U.N. organs to act in accordance with Article VIII; the generality of Article I and its positioning as the lead clause for the entire treaty preclude such a restrictive position.

Yet while it could clearly be contended that prevention generally is nonterritorial, the question of what specific measures are to be taken by individual states remains to be answered. The alarming failure of U.N. institutions to prevent genocide gives particular currency to this issue. This ineptness was envisioned, ironically enough, by the Yugoslav representative at the Sixth Committee discussion of the Draft Convention. The former Yugoslavia was one of the few states to abstain from voting on the Draft Convention, based on the belief that "the draft was not sufficiently strong and that, as a result, it would prove ineffective in combatting genocide."⁹⁷

Given the lack of specific, substantive provisions dealing with preventative action, therefore, the answer to the question of individual states' obligations to prevent genocide perhaps cannot be found within the black letter of the Convention and must be sought in the realm of purposive treaty interpretation, including the interpretive effect of *jus cogens* norms which exist parallel to the treaty.

95. Genocide Convention, *supra* note 11, art. VIII.

96. This does not mean that art. VIII is devoid of all relevance for this case. Rather, it will be argued *infra* part III.B.2 that it should be taken as an important interpretive baseline for the ICJ in determining both its jurisdiction in cases brought before it under art. IX and its scope of "review" once jurisdiction has been established.

97. Lippman, *supra* note 87, at 53. The Yugoslav representative, Mr. Kacijan, regretted that his delegation had to refuse to vote for a text which fell short of achieving the "real aim of the convention, namely, the prevention of genocide." U.N. GAOR 6th Comm., 3d Sess., 133d mtg. at 707 (1948). That the Convention fell short in the view of one of the delegates does not mean that the text, purposively interpreted in light of evolving customary norms, is not conducive to an interpretation that includes significant preventative elements.

c. Properly Interpreted, the Genocide Convention Must Necessarily
Codify the Universal Obligation Under General
International Law to Prevent Genocide.

As has been shown, the principles underlying the Convention are principles which are recognized by civilized nations as binding on states, even without any conventional obligation. The universal character of both the condemnation of genocide and the cooperation required “to liberate mankind from such an odious scourge” gives rise to a distinctly universal obligation to prevent it — an obligation towards the international community as a whole rather than simply vis-à-vis another state, as in the field of diplomatic protection.⁹⁸ At this highest level of *dédoublement fonctionnel*, states must consolidate their efforts and take preventative action on behalf of the community as a whole before genocide occurs, or at the very least, before it takes its final, annihilistic toll. As Shabtai Rosenne affirms, “the ICJ has established the *jus cogens* duty of all States to cooperate in the suppression of genocide.”⁹⁹ It would seem, therefore, that in addition to the duty of a state to prevent genocide within its own borders, there is the duty of all states to take action against perpetrators of genocide in other states, in fulfillment of their “duty owed to the international community as a whole.”

In order to reach this conclusion, it is necessary to make use of tools of treaty interpretation and developing doctrine on humanitarian, notably human rights, treaties in particular. The humanitarian object and purpose of the Genocide Convention and the international community’s desire to ensure universal protection from genocide dictate that the Convention should be accorded a broad and purposive interpretation. The principle of effectiveness as well as the integrity of the treaty must be considered in the process of interpretation. A rigid or textualist approach to the treaty would be inconsistent with the 1969 Vienna Convention, which requires that the terms of the treaty be assessed “in their context and in the light of its object and purpose.”¹⁰⁰ This is especially so in the case of a treaty with a purely humanitarian purpose, where a noncontextual approach may fail to “contribute to the fulfilment of an inclusive or common interest in the maintenance of minimum

98. *Barcelona Traction*, 1970 I.C.J. at 47.

99. *Summary Records of the Fifteenth Session*, 685th mtg., [1963] 1 Y.B. Int’l L. Comm’n 74, U.N. Doc. A/CN.4/Ser. A/1963/Add.1 (emphasis added).

100. 1969 Vienna Convention, *supra* note 45, art. 31.

world order.”¹⁰¹ The Inter-American Human Rights Court endorsed this approach to interpretation of human rights documents in *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, wherein it stated that “the ‘ordinary’ meaning of terms cannot of itself become the sole rule, for it must always be considered in light of the object and purpose of the treaty.”¹⁰² As a result, courts must interpret such documents in order “to give effect to the objectives of the [human rights treaty], for it does not advance the protection of the individual’s basic human rights and freedoms” to do otherwise.¹⁰³

Several members of the ICJ also have emphasized the necessity of according a broad, purposive interpretation to human rights treaties. In *Reservations to the Genocide Convention*, the majority of the Court observed that the Genocide Convention embodied principles of natural law that transcend particularistic state interests. Such principles guide any interpretation of the Convention:

The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other *to confirm and endorse the most elementary principles of morality*. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, *a common interest*, namely, the accomplishment of those high purposes which are the *raison d’etre* of the convention The high ideals which inspired the Convention provide,

101. W. Michael Reisman, *Allocating Competences to Use Coercion in the Post-Cold War World: Practices, Conditions and Prospects*, in *LAW AND FORCE IN THE NEW WORLD ORDER* 26, 45 (Lori F. Damrosch and David J. Scheffer eds., 1991). Note that this favorable citation of Prof. Reisman on the *normative* issue must be read with the understanding that Prof. Reisman has different views from those expressed in this Memorial on the institutional question of the role of the Court. See *infra* part III.A.3 (discussing Reisman’s work).

102. *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, 1984 Inter-Am. Court H.R. (ser. A) No. 4, at para. 23 (Advisory Opinion OC-4/84 of Jan. 19). See generally Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 AM. J. INT’L LAW 1 (1985); see also *Effect of Reservations on the Entry into Force of the American Convention*, 1982 Inter-Am. Court H.R. (ser. A) No. 2, at para. 29 (Advisory Opinion OC-2/82 of Sept. 24) (stipulating that the traditional concept of reciprocity is irrelevant for the application and interpretation of human rights instruments in that “[m]odern human rights treaties in general . . . are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights”). Consequently, the purposes of the treaty are to be emphasized and the *travaux* made less important than in the context of other treaties.

103. Advisory Opinion OC-4/84, 1984 Inter-Am Court H.R. at para. 26.

by virtue of the common will of the parties, the foundation and measure for all its provisions.¹⁰⁴

Indeed, this Convention may be *the* example of a purely humanitarian treaty as well as the quintessential case of a *jus cogens* norm; in their joint dissenting opinion in *Reservations to the Genocide Convention*, Justices Guerrero, McNair, Read, and Mo noted that “the enormity of the crime of genocide can hardly be exaggerated, and any treaty for its repression deserves the most generous interpretation.”¹⁰⁵ Beyond the necessary focus on the interpretive implications of the *humanitarian* content of a multilateral treaty like the Genocide Convention, these implications are reinforced when a treaty is categorized as dealing with the *public interest of the world community as a whole*. In general, multilateral conventions created in recognition of world-communitarian interests in international law are markedly different from ordinary multilateral conventions. As Judge Alvarez has stated in a now classic passage:

To begin with, they have a universal character; they are, in a sense, the *Constitution* of international society, the *new international constitutional law*. They are not established for the benefit of private interests but for that of the general interest; they impose obligations upon States without granting them rights, and in this respect are unlike ordinary multilateral conventions which confer rights as well as obligations upon their parties.¹⁰⁶

It is thus clear from *Reservations to the Genocide Convention* that considerations of sovereignty and the reciprocity of sovereign wills in the usual course of international relations must cede to more pressing, imperative obligations in the human rights context. The case of genocide, then, as the most egregious of such human rights violations, dictates particularly strong considerations of effectiveness and purposiveness as interpretive principles.

104. *Reservations to the Genocide Convention*, 1951 I.C.J. at 23 (emphasis added).

105. *Id.* at 47 (dissenting opinion of Judges Guerrero, McNair, Read, and Mo).

106. *Id.* at 51 (separate opinion of Judge Alvarez) (emphasis added). There is a remarkable similarity between Alvarez's approach to this species of universal treaties and the approach of the Inter-American Human Rights Court to human rights treaty interpretation. Interstate reciprocity of rights and obligations cannot serve as the baseline for interpretive principles or application of those principles.

Note also that Judge Tanaka has similarly pointed to the need for effectiveness in dealing with humanitarian treaties, stating in *South West Africa* that “[t]here must be no legal vacuum in the protection of human rights.” *South West Africa* (Eth. v. S. Afr., Liber. v. S. Afr.), 1966 I.C.J. 6, 298 (July 18) (dissenting opinion of Judge Tanaka).

B. *States Have a Duty to Prevent the Genocide
Occurring in Bosnia*

Article I of the Genocide Convention confirms “that genocide, whether committed in time of peace or in time of war, is a crime under international law *which [parties] undertake to prevent and to punish.*”¹⁰⁷ Thus, it is not simply the prohibition of genocide which is affirmed in the Convention; rather, states have undertaken positive obligations to prevent and punish genocide. It is, at a minimum, a delict in international law for states to fail to prevent and punish genocide.¹⁰⁸ Furthermore, the failure to prevent and punish genocide would be an international crime if the omission amounted to either conspiracy or complicity in the genocide itself.

The extent of the duty to prevent genocide contained in Article I of the Genocide Convention requires a broad interpretation, given the Convention’s object and purpose as an effective instrument in the elimination of the “odious scourge” of genocide. The minimum content of the duty to prevent genocide must be that a state has an obligation to take positive action to stop genocide which is imminent or ongoing within its territory or within territory subject to its control. Moreover, the undertaking to prevent genocide arguably includes within it an extraterritorial component even without the need to show general control over territory other than that of the state.

Under a broad and purposive interpretation, the meaning of “prevention” in the Genocide Convention must include a universal, collec-

107. Genocide Convention, *supra* note 11, art. I (emphasis added).

108. General principles of state responsibility would of course apply, including circumstances precluding wrongfulness. In particular, art. 23 of the Draft Articles on State Responsibility is applicable:

Article 23. Breach of an international obligation to prevent a given event

When the result required of a State by an international obligation is the prevention, by means of its own choice, of the occurrence of a given event, there is a breach of that obligation only if, by the conduct adopted, the State does not achieve that result.

1979 Draft Articles on State Responsibility, *supra* note 32, at 93.

This Memorial suggests that in order to breach a duty of prevention, a state’s own actions and omissions must be culpable (either through intention or negligence, presumably). Duties of result, contrary to the opinion of some, are not to be equated with absolute responsibility; the specific standard of care associated with a given duty of result must always be determined on a norm-by-norm basis. Thus, Bosnia would not be responsible for failing to prevent Serbian genocidal practices, since the failure has not been caused “by the conduct adopted” by Bosnia. Duly diligent efforts to prevent an event would not result in the breach of an obligation under art. 23.

tive obligation to suppress acts of genocide. As a *jus cogens* norm, the prohibition against genocide cannot be perceived as applicable to only the individual state within which genocide is being perpetrated. This is particularly compelling in a world where genocidal acts often occur at the hands of a government against its own citizens. If the "duty to prevent" is restricted to the containment of genocide domestically, then systematic extermination of a people would go normatively unchecked. Such an absurd result would be contrary to both the spirit of the Convention and to its characterization as a (perhaps *the*) fundamental human rights instrument, as well as antithetical to basic rules of human rights treaty interpretation, as discussed above. It follows, therefore, that there must exist some element of collective action within the definition of prevention.

As the object of the Genocide Convention is ultimately to protect *people* against extermination, the treaty must be interpreted with a view to individuals as subjects of international law. The doctrinal field of human rights has forced the international system to query the notion of the state as the supreme actor in international law.¹⁰⁹ Consequently, territorial boundaries lose rigidity, and the human family becomes a focus of international attention. Assumptions about treaty interpretation, the role of states, and the function of judicial institutions require conceptual rethinking and doctrinal adjustments in the context of human rights.¹¹⁰ Treaty interpretation must therefore achieve effectiveness relative to its subject; an obligation owed to the "international community as a whole," such as the *jus cogens* duty to prevent genocide, requires that states protect individual communities against genocide, regardless of territorial boundaries.

1. States Have a Positive Obligation to Intervene or Offer Assistance to Prevent the Genocide in Bosnia

While a state clearly has an obligation to prevent genocide within its territory, this is not the sole purpose of Article I of the Genocide Convention. Nowhere in the Genocide Convention is a state's duty to prevent genocide expressly limited to its territory or to persons within its jurisdiction.¹¹¹ This fact distinguishes the Genocide Convention from other international human rights instruments. For example, the Interna-

109. "The time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality." *An Agenda for Peace*, U.N. GAOR, 47th Sess. at 5, U.N. Doc. A/47/277 (Readex 1992).

110. Thomas Buergenthal, *supra* note 102, at 26.

111. *See supra* part I.

