IS RESISTING GENOCIDE A HUMAN RIGHT?

David B. Kopel∗
Paul Gallant†
Joanne D. Eisen‡

Closely examining the Darfur, Sudan, genocide, and making reference to other genocides, this Article argues that the genocide prevention strategies which are currently favored by the United Nations are ineffective. This Article details the failures of targeted sanctions, United Nations peacekeepers, and other antigenocide programs. Then, this Article analyzes the Genocide Convention and other sources of international human rights law. Because the very strong language of the Genocide Convention forbids any form of complicity in genocide, and because the Genocide Convention is jus cogens *(meaning that it prevails over any conflicting national or international law), this Article concludes that the Genocide Convention forbids any interference, including interference based on otherwise valid laws, against the procurement of defensive arms by groups which are being victimized by genocide.*

INTRODUCTION

No one has a legal duty to be a victim of genocide. The statement is

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∗ Research Director, Independence Institute, Golden, Colorado. www.davekopel.org. Author of *The Samurai, the Mountie, and the Cowboy: Should America Adopt the Gun Controls of Other Democracies?* (1992). Coauthor of *Gun Control and Gun Rights* (2002). Editor-in-Chief of the *Journal on Firearms and Public Policy*. In 1981–1982, Kopel served as head of the Brown University chapter of Oxfam-America, an international aid and relief organization. His writings on international firearms issues have appeared in the *S.A.I.S. Review* and the *Small Arms and Human Security Bulletin.*

† Senior Fellow, Independence Institute, Golden Colorado. www.independenceinstitute.org. We would like to thank Peter Allen and Eugene Volokh for their helpful insights.

‡ Senior Fellow, Independence Institute, Golden, Colorado. www.independenceinstitute.org. Coauthor (with Kopel and Gallant) of numerous articles on international gun policy in publications such as the *Texas Review of Law and Politics*, *Engage*, the *UMKC Law Review*, *National Review Online*, and *Brown Journal of World Affairs*.

The authors would like to dedicate this Article to the memory of Alan G. Eisen, a devoted husband who admired and supported Joanne's scholarship, and whose love of freedom and truth continues to inspire us.

indisputable not only as a moral principle and as a matter of natural law, but also as a clear rule of positive international law.

It is also clear, as a general principle of legal interpretation, and as a positive rule of international human rights law, that there can be no right without a remedy. Indeed, a right with no effective means of enforcement would merely be a nominal right, not an actual one. Surely the right not to be a victim of genocide should be a strongly enforced right, not just a pretend right.

In this Article, we explore various methods of enforcement of antigenocide law, with particular reference to the continuing genocide in Darfur, Sudan. That the genocide has been occurring since August 2003 is well known throughout the civilized world. Never in human history has a genocide in progress been so visible.[1] Yet, the United Nations and the rest of the international community have refused to take action to stop it. The inaction suggests that there are fatal (literally) deficiencies in the antigenocide mechanisms currently favored by the United Nations.

The first half of this Article, Parts I through III, details the catastrophic inadequacy of current antigenocide remedies. Part I shows how nonviolent economic and other sanctions have failed. Part II examines the lack of success on the part of multilateral "peacekeeping" forces, such as the U.N. Stand-by High Readiness Brigade (SHIRBRIG), or the Standby Force of the African Union. Part III acknowledges that unilateral military action by states acting in their own self-interest has sometimes stopped a genocide in progress; however, such unilateral action is considered illegal according to the predominant interpretations of the U.N. Charter.

The second half of this Article examines an alternative approach. Under international law there must be an effective remedy to genocide. Given that the international community has manifestly failed—and is, as we write, continuing to fail—to prevent genocide, there must be some other antigenocide remedy which is genuinely effective. Our alternative remedy focuses on empowering genocide victims,[2] rather than asking them to wait helplessly until the international community rescues them; waiting for the United Nations to act is often just as futile as waiting for Godot, and hundreds of thousands or millions of people die while waiting. Part IV points out that civilian armament has historically been very effective at preventing genocide. Indeed, genocide scholars have found that genocides

1 *See* Jay Nordlinger, *About Sudan*, NAT'L REV., May 23, 2005, at 39, 42 ("A curious fact about this genocide is that it may be the best known in history.").

2 In this Article, we use the term "genocide victims" to refer to the spectrum of the entire targeted group. So when we speak about empowering "genocide victims," we are referring to members of the targeted group who might still be saved, in addition to members who have already been murdered.

are carried out almost exclusively against populations which have first been systematically disarmed. Because genocidal regimes consider prior disarmament the sine qua non for beginning a genocide, it seems indisputable that civilian armament deters genocide in most cases. Part IV considers the practical possibilities of arming the Darfur genocide victims.

In Part V, we carefully analyze the international law implications of arming genocide victims. Genocide victims who acquired arms, and persons who supplied arms to genocide victims, would almost certainly be in violation of the gun control laws in the country where the genocide was taking place. In addition, the arms acquisition might violate international treaties against bringing arms into a nation without the consent of the national government. Under international law, could the genocide victims and their arms suppliers claim that their actions were nevertheless legal? We answer "yes."

To begin with, the Universal Declaration of Human Rights affirms the existence of a universal, individual right of self-defense, and also a right to revolution against tyranny.[3] Many other international human rights instruments recognize similar rights, and also a right to life. The various international human rights instruments also recognize that people have a right to an effective remedy to protect their human rights. Taken in conjunction with Anglo-American human rights law, the human rights instruments can be read to reflect a customary or general international law recognizing a right of armed resistance by genocide victims.

More specifically, the Genocide Convention, which is binding, positive international law, establishes an affirmative duty of its signatory nations to "prevent" genocide.[4] When the case of *Bosnia v. Yugoslavia*[5] was brought before the International Court of Justice, Judge Lauterpacht's opinion stated that the U.N. Security Council's arms embargo violated the Genocide Convention.[6] Although the embargo was facially neutral, its effect was to leave genocide victims defenseless against genocide perpetrators. Because the Genocide Convention is *jus cogens* (a peremptory rule of international law which takes precedence over other international or national laws), the Genocide Convention took precedence over the Security Council resolution. Therefore, the arms embargo was

3 *See* Universal Declaration of Human Rights, G.A. Res. 217A, pmbl., at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter Universal Declaration]; *id.* art. 3, at 72.

4 Convention on the Prevention and Punishment of the Crime of Genocide art. 1, *opened for signature* Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

5 Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Yugo.), 1993 I.C.J. 325 (Sept. 13).

6 *Id.* at 441–41 (separate opinion of Judge Lauterpacht).

void as a matter of international law, to the extent that the embargo interfered with arms acquisition by Bosnians who were potential genocide victims.

Thus, as Judge Lauterpacht recognized, a facially neutral arms control law is void to the extent that it conflicts with the Genocide Convention by making the possession and acquisition of arms by genocide victims illegal. Accordingly, no law-abiding state, or group of states, should violate the Genocide Convention by following the unlawful dictates of victim disarmament laws. Similarly, no law-abiding court anywhere in the world should violate the Genocide Convention by giving force to victim disarmament laws.

Part VI applies the principles of *Bosnia v. Yugoslavia* and the Genocide Convention to some contemporary legal issues. First, Sudan's highly restrictive gun licensing law, which in effect prohibits gun acquisition by the Darfur victims, is invalid (as applied to the Darfur victims, not in general).

Second, the U.N. Security Council has imposed an arms embargo on the transfer of arms to groups within Sudan, and to the Sudanese dictatorship in Khartoum. Because the embargo maintains the status quo of the enormous military superiority of the Sudanese government and its proxies (the Arab Janjaweed militias), it is a violation of the Genocide Convention to enforce the embargo against the black genocide victims in Darfur.

In 2005, the U.N. Protocol against the Illicit Manufacturing of and Trafficking in Firearms became legally binding on signatory states.[7] The Protocol imposes requirements for various controls on the manufacturing, record keeping, and transfer of firearms. The Protocol also recognizes "the inherent right to individual or collective self-defence" and of "self-determination of all peoples."[8] The best reading of the Protocol is that the ordinarily applicable controls do not apply when their enforcement would conflict with the inherent rights of self-defense and self-determination.

To the extent that the Protocol might interfere with self-defense by genocide victims in Sudan or elsewhere, the Protocol must give way to the *jus cogens* self-defense norm of the Genocide Convention. Additionally, any future international treaty restricting cross-border arms transfers should include an exception for genocide resistance. Even without an explicit exception, the *jus cogens* status of the Genocide Convention would prohibit

7 Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention Against Transnational Organized Crime, *opened for signature* May 31, 2001, G.A. Res. 55/255, U.N. Doc. A/RES/55/255 (entered into force July 3, 2005) [hereinafter Firearms Protocol].

8 *Id.* art 1.

any restrictions on arms transfers to genocide victims.

Finally, we examine the broader implications of the universal human right to resist genocide. For example, the Sudanese government has until very recently been committing genocide against the Christian and Animist Africans in southern Sudan. Although the south Sudan genocide has stopped, would it be prudent for international law to recognize a continuing right of the south Sudanese victims to acquire defensive arms—especially since the events in western Sudan (Darfur) demonstrate that the Sudanese government has not abandoned genocide as an instrument of state policy?

More broadly, because it is usually difficult to predict, over the long term, where genocide will take place, it could be argued that antigenocide principles should lead to the recognition of a right of all peoples to possess arms for resisting genocide—rather than recognition of the right only when genocide has already begun. At the least, would it be sensible to recognize the right in nations which have many of the immediate precursors of genocide—such as undemocratic rule, suppression of the free press, and active incitement of hatred against minority groups? The extension of an antigenocide right to arms could, in some cases, cause problems because of increased misuse of arms; however, the human disaster of genocide is so enormous that any policy which prevented or drastically reduced worldwide genocide would result in an extremely large net gain for personal security and human rights.

In this Article, we address only the issue of the fundamental human right to resist genocide. We do not argue for or against an international human right to possess arms for other purposes—such as hunting, target shooting, gun collecting, self-defense against lone criminals, or self-defense against governments which are criminal but not genocidal.

I. NONVIOLENT COERCIONS: SANCTIONS

The United States government has imposed extremely comprehensive economic sanctions on Sudan. An American in Khartoum cannot even use a credit card to buy lunch at a restaurant, because the credit card's American host bank is forbidden to process the transaction. In compliance with the sanctions, state government pension funds are being forced to divest their holdings in companies that do business in Sudan.[9]

Most of the rest of the world, however, has decided to continue commercial relationships with Sudan, notwithstanding the genocide. For

9 *See, e.g.*, Amy Borrus, *Hitting Sudan in the Pocketbook: Pension Funds Are Taking Notice of a Growing Push To Cut Ties to the Rogue State*, BUS. WK., May 2, 2005, at 72 (describing the increasing political pressure for state pension funds to divest from companies that have substantial ties with Sudan).

example, several European airlines offer nonstop flights to Khartoum. European oil companies have formed joint ventures with the Sudanese government to explore for oil in eastern Sudan. At the United Nations, the French government has been especially adamant against restrictions on business with Sudan, for fear of lessening France's traditionally important commercial influence in Africa.[10]

In Darfur, as innocent black Africans were under attack, and women and children were dying, the U.N. Security Council could not even agree to include the word "sanctions" in its Resolution 1556 of July 30, 2004.[11] Because of the veto threats from China and Russia,[12] the United Nations' September 18, 2004, Resolution 1564 took no action other than to merely threaten the use of sanctions against Sudan's oil industry and individual Sudanese officials.[13] Nor could the United Nations prioritize the $200 million in funds estimated to be required "to save the lives of" the displaced population of Darfur.[14]

Yet even if the United Nations were truly united in a sanctions policy on Sudan, history suggests that sanctions would be unlikely to stop the genocide. According to the Executive Office of the Secretary-General,

> The only real disagreement in the contemporary sanctions literature relates to the degree to which sanctions fail as an instrument for coercing changes in the behaviour of target states. No study argues that sanctions are in general an effective means of coercion, although individual sanctions regimes can and sometimes do succeed.[15]

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10 *See* Nordlinger, *supra* note 1, at 41.

11 *See* S.C. Res. 1556, U.N. Doc. S/RES/1556 (July 30, 2004).

12 *See* Thalif Deen, *Oil, Arms Stymie United Nations Effects on Sudan*, INTER PRESS SERVICE (Johannesburg), Nov. 5, 2004, http://ipsnews.net/interna.asp?idnews=26175 ("'On the U.N. Security Council, both Russia and China continue to oppose sanctions, for their own economic and political interests.'" (quoting Ann-Louise Colgan, Director for Policy Analysis and Communications, Africa Action)); *World 'Ignoring' War Torn Darfur*, BBC NEWS, Jan. 14, 2005, http://news.bbc.co.uk/2/hi/africa/4173829.stm ("The New York-based Human Rights Watch singles out UN Security Council veto holders China and Russia for blocking tougher action against Sudan. It says they are more concerned about protecting oil contracts and arms sales to Khartoum than saving lives.").

13 S.C. Res. 1564, ¶ 14, U.N. Doc. S/RES/1564 (Sept. 18, 2004); *see also* Fred Bridgland, *Darfur Sanctions Deadlock as ICC Considers Prosecutions*, INST. FOR WAR & PEACE REPORTING, Feb. 28, 2006, http://allafrica.com/stories/printable/200603010149.html; Deen, *supra* note 12. As late as Feb. 28, 2006, the sanctions deadlock continued. Bridgland, *supra*.

14 *See US Presents New Darfur UN Draft*, BBC NEWS, Sept. 14, 2004, http://news.bbc.co.uk/2/hi/africa/3654196.stm.

15 Strategic Planning Unit, United Nations, *UN Sanctions: How Effective? How Necessary?*, *in* SECOND INTERLAKEN SEMINAR ON TARGETING UNITED NATIONS FINANCIAL SANCTIONS 101, 102 (1999) [hereinafter *UN Sanctions: How Effective? How Necessary?*],

Comprehensive sanctions—such as a total prohibition on all trade with a particular nation—have been used against rogue regimes that violate human rights. However, those sanctions are sometimes more destructive to the victim population than to the regime in power; sanctions also may harm the populations of nonsanctioned states because of the reduction of trade.[16]

More recently, the United Nations has attempted to design specific "targeted" or "smart" sanctions which would affect only the wrongdoers. Thinking about sanctions has become a big business in the international community. The United Nations has created the Interlaken Process to study and refine financial sanctions. There is a Bonn-Berlin Process for travel sanctions and arms embargoes. The Stockholm Process takes the Interlaken and Bonn-Berlin proposals and looks for ways to make their implementation more effective.[17] The sanctions advocates have done a

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available *at* http://www.seco.admin.ch/imperia/md/content/aussenwirtschaft/sanktionenundembargos/47.pdf. *But see* GARY CLYDE ET AL., ECONOMIC SANCTIONS RECONSIDERED: EXECUTIVE SUMMARY, http://www.iie.com/research/topics/sanctions/sanctions-summary.cfm (last visited Mar. 3, 2006).

Hufbauer examined 115 cases of economic sanctions and found that thirty-four percent were "at least partially successful." *Id.* Robert Pape examined the forty cases of sanctions that Hufbauer had claimed were successful, and found that only five of these were, in his opinion, actually successful. He noted, "If I am right, then sanctions have succeeded in only 5 of 115 attempts, and thus there is no sound basis for even qualified optimism about the effects of sanctions." Robert A. Pape, *Why Economic Sanctions Still Do Not Work*, 23 INT'L SECURITY 66, 66 (1998); *see also* Arne Tostensen & Beate Bull, *Are Smart Sanctions Feasible?*, 54 WORLD POL. 373, 379 (2002) ("The ineffectiveness of conventional sanctions—along with the need to breach human rights conventions to enforce them—has driven the search for smart sanctions.").

16 *See* Gary C. Hufbauer & Barbara Oegg, *Targeted Sanctions: A Policy Alternative?*, 32 LAW & POL'Y INT'L BUS. 11, 11 (2000) ("'It cannot be too strongly emphasized that sanctions are a tool of enforcement and, like other methods of enforcement, they will do harm.'" (quoting The Secretary-General, *Report of the Secretary-General on the Work of the Organization*, U.N. GAOR, 53d Sess., Supp. No. 1, ¶ 64, U.N. Doc. A/53/1 (Aug. 27, 1998))); *see also* Joy Gordon, *Sanctions as Siege Warfare*, THE NATION, Mar. 22, 1999, at 18, 22, *available at* http://www.thenation.com/doc/19990322/gordon ("Although there is controversy over the precise extent of human damage, all sources agree that it is severe. . . . [N]o amount of tinkering will make sanctions anything other than a violent and inhumane form of international governance."); *UN Sanctions: How Effective? How Necessary?*, *supra* note 15, at 102 ("The most widespread charge against sanctions, particularly comprehensive sanctions, is that they impose widespread suffering on ordinary people, while leaving the regimes they target, not only unscathed, but sometimes enriched and strengthened."); *id.* at 107 ("The humanitarian suffering associated with some sanctions regimes has become a major political issue, both within the Organisation and in the wider international community.").

17 *See* MAKING TARGETED SANCTIONS EFFECTIVE: GUIDELINES FOR THE IMPLEMENTATION OF UN POLICY OPINIONS, at iii–iv (Peter Wallensteen et al. eds., 2003) [hereinafter STOCKHOLM PROCESS], *available* *at*

good job of political marketing; everyone is naturally inclined to be for a program which is "smart," "selective" and "targeted." Nevertheless, as socialist pacifist authors David Cortright and George A. Lopez observe, "[T]he success record of selective measures is ambiguous."[18]

A. The Interlaken Process

The Interlaken Process, named for its host town in Switzerland, is a U.N.-led program initiated in 1998 to refine knowledge on targeted sanctions, especially financial ones.[19] But as Kimberly Ann Elliott has observed, "In general, the problem with trying to extend the targeted approach to financial flows is that the more targeted the sanctions are, the easier they will be to evade."[20]

Because money is (mostly) fungible, unless global society unanimously agrees to a particular set of targeted financial sanctions, and effectively enforces those sanctions, the selected target will be easily able to circumvent the sanctions.[21] If just one state will maintain ordinary financial relations with the pariah state, the pariah state has de facto access to worldwide financial resources.

Even were it possible to achieve unanimous enforcement of financial sanctions, a great deal of time would be required to build the international agreement. The negotiating time provides a large window of opportunity for the potentially targeted state to start hiding and dispersing its financial assets, and begin cultivating relationships in the black market financial network. Indeed, the existence of the Interlaken Process itself has already

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http://www.smartsanctions.se/stockholm_process/reports/Final%20report%20complete.pdf.

18 David Cortright & George A. Lopez, *Assessing Smart Sanctions: Lessons from the 1990s*, *in* SMART SANCTIONS: TARGETING ECONOMIC STATECRAFT 1, 1 (David Cortright & George A. Lopez eds., 2002) [hereinafter SMART SANCTIONS]. Cortright, who prefers nonviolent solutions, nevertheless understands their limitations. *See* David Cortright, *The Power of Nonviolence*, THE NATION, Feb. 18, 2002, at 13, *available at* http://www.thenation.com/doc.mhtml?i=20020218&s=cortright.

19 For a general discussion of the Interlaken Process, see TARGETED FINANCIAL SANCTIONS: A MANUAL FOR DESIGN AND IMPLEMENTATION (Thomas J. Watson Jr. Inst. for Int'l Studies ed., 2001) [hereinafter TARGETED FINANCIAL SANCTIONS], *available at* http://www.seco.admin.ch/imperia/md/content/aussenwirtschaft/sanktionenundembargos/48.pdf.

20 Kimberly Ann Elliott, *Analyzing the Effects of Targeted Sanctions*, *in* SMART SANCTIONS, *supra* note 18, at 171, 179.

21 *See* TARGETED FINANCIAL SANCTIONS, *supra* note 19, at 8 ("To be effective, targeted financial sanctions must be implemented by *all States* . . . . The ease of transferring financial assets means that resolutions that fall short of this standard weaken the effectiveness of sanctions by allowing circumvention."); *see also* R. Richard Newcomb, *Targeted Financial Sanctions: The U.S. Model*, *in* SMART SANCTIONS, *supra* note 18, at 41, 62 ("[A] sanctions fence is only as strong as its weakest link.").

alerted some guilty parties that they should diligently investigate novel ways of hiding their financial dealings. According to Elliott, "[I]t seems likely that potential targets are already taking steps to protect themselves from any future sanctions."[22]

Five years into the Interlaken Process, Cortright and Lopez stated: "The development of financial sanctions theory currently outpaces the development of practical systems to implement these sanctions."[23] Arne Tostensen and Beate Bull summarized:

> [T]he optimism expressed in some academic circles and among decision makers at national and international levels appears largely unjustified. While smart sanctions may seem logically compelling and conceptually attractive at face value, they are no panacea. The operational problems—due to persistent technical inadequacies, legal loopholes, institutional weaknesses, budgetary and staff scarcities, and political constraints—are daunting.[24]

B. The Bonn-Berlin Process

The Bonn-Berlin Process was intended to redesign travel sanctions and arms embargoes to ameliorate earlier failings. According to the Bonn International Center for Conversion, "Arms embargoes and travel and aviation sanctions are attractive because they are less blunt than comprehensive economic sanctions, but often they have had little or no discernible effect on the target."[25] It would be gratifying to many in the world community if the success of these sanctions could be realized. Can they be designed to target individuals guilty of human rights abuses, and cause them to change their objectionable behavior without also harming the innocent?

1. Travel Sanctions

According to Laura Norris and Jacqueline Simon, travel sanctions have symbolic value, and "they do not generally have, or have not had, unwanted negative humanitarian side effects."[26] Thus, travel sanctions are

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22 Elliott, *supra* note 20, at 178.

23 David Cortright et al., *Targeted Financial Sanctions: Smart Sanctions That* Do *Work*, *in* SMART SANCTIONS, *supra* note 18, at 23, 37.

24 Tostensen & Bull, *supra* note 15, at 402.

25 BONN INT'L CTR. FOR CONVERSION, DESIGN AND IMPLEMENTATION OF ARMS EMBARGOES AND TRAVEL AND AVIATION RELATED SANCTIONS: RESULTS OF THE 'BONN-BERLIN PROCESS' 10 (Michael Brzoska ed., 2001), *available at* http://www.bicc.de/events/unsanc/2000/pdf/booklet/booklet_sanctions.pdf.

26 LAURA NORRIS & JACQUELINE SIMON, BONN INT'L CTR. FOR CONVERSION, CONFERENCE DISCUSSION SUMMARY REPORT: SMART SANCTIONS, THE NEXT STEP: ARMS

less politically controversial, and it is relatively easy to gain consensus and implement them. Travel sanctions can be as minor as restricting travel of a few specified individuals; for example, a dictator and his major advisors might be prohibited from entering European Union nations.[27] Travel sanctions can also be as severe as total prohibitions on international travel; the targeted country's airlines can be banned from the airspace of the sanctioning countries, and the sanctioning countries can prohibit their own airlines (and ships and trains) from entering the targeted country.

Nevertheless, the potential for unintended adverse consequences exists. Richard W. Conroy explains: "The evidence suggests that travel sanctions reduce humanitarian costs but they do not entirely eliminate humanitarian consequences. . . . [N]or should travel sanctions be expected to work on their own."[28] Gary Hufbauer and Barbara Oegg point out that an international flight ban can prevent a nation's aircraft from being serviced at foreign airports; as a result, the entire national commercial air fleet may be grounded, and relief workers may find it impossible to travel within the country, as domestic flights also cease.[29]

Travel sanctions on government officials may sometimes be circumvented, such as by using false identification documents. After all, the targeted governments usually have a secret police capable of producing or buying high-quality false foreign passports and similar documents.

As Conroy pointed out, it is difficult to assess the success of travel

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EMBARGOES AND TRAVEL SANCTIONS—IMPROVING THEIR EFFECTIVENESS 3 (1999), *available at* http://www.bicc.de/events/unsanc/1999/pdf/sanctionssummary.pdf.

27 In 2003, France defied European Union travel sanctions in order to host a visit of Zimbabwe's mass-murdering tyrant Robert Mugabe and his retinue. Jon Henley, *Tension Surrounds Mugabe Visit*, GUARDIAN (London), Feb. 21, 2003, at 1, *available at* http://www.guardian.co.uk/zimbabwe/article/0,2763,900001,00.html.

28 Richard W. Conroy, *The UN Experience with Travel Sanctions: Selected Cases and Conclusions*, *in* SMART SANCTIONS, *supra* note 18, at 145, 163–64.

29 Hufbauer & Oegg, *supra* note 16, at 14. Hufbauer and Oegg elaborated:

> The assumption that flight bans exert minimal humanitarian impact may not always hold true. In August 1996, the Security Council voted to impose a flight ban on the government of Sudan because of its suspected support of international terrorism. The United Nations delayed implementing the ban, however, and the UN Department of Humanitarian Affairs subsequently issued a report on its possible humanitarian effects. The report showed that even a selective flight ban could cause humanitarian suffering. Because the Sudanese national airline relies on international airports for its aircraft maintenance, a selective ban might have grounded the entire airline. This, in turn, would have created severe problems for relief organizations that relied on the airline to reach remote areas of the country. After evaluating these considerations, the UN Security Council refused to implement the flight ban.

Id. (citations omitted).

sanctions.[30] After seven years of U.N. sanctions on Libyan travel, the Qaddafi dictatorship announced that it was giving up its weapons of mass destruction. Kofi Annan, referring to the Libyan travel sanctions, said, "'I prefer to think it played a role.'"[31] One can understand why a U.N. official would "prefer to think" that the United Nations deserved credit. But Elliott disagreed that "the relatively minor inconveniences"[32] of U.N. travel sanctions changed Qaddafi's heart after seven years. Rather, "[h]is desire to attract additional foreign investment was perhaps a more important factor in his decision than the relatively minor inconveniences imposed by the travel sanctions."[33]

2. Arms Embargoes

In general, arms embargoes have not been successful.[34] According to Cortright and Lopez, "arms embargoes have been empty gestures" because of nonexistent or weak enforcement.[35] As Loretta Bondi stated, "The unwillingness of member states to provide the financial resources that would make arms embargoes viable makes these bans toothless gestures."[36] Academics such as Cortright, Lopez, and Bondi detail numerous reasons for the failures of arms embargoes, but insist that we only need to work harder to make them effective. Bondi suggested that "such bans, if properly enacted, implemented, and enforced, offer the international community a powerful tool to lessen abuses. . . . Nor should a decade of intensive experience with arms embargoes lead to pessimism. . . . Rather, this accumulated experience should pave the way to more radical

30 *See* Conroy, *supra* note 28, at 148–51.

31 *Id.* at 151 (quoting Press Release, The Secretary-General, Transcript of Press Conference by Secretary-General Kofi Annan at Headquarters, U.N. Doc. SG/SM/6944 (Apr. 5, 1994)). Annan was referring to sanctions applied in the hopes of forcing Libya to extradite two terrorist suspects.

32 Elliott, *supra* note 20, at 174.

33 *Id.* In addition, many international analysts believe that Qaddafi's sudden change about WMD policy was caused by the toppling of the Saddam Hussein regime in Iraq, predicated in part on charges that the Saddam regime possessed WMDs. Qaddafi may have calculated that the benefits of possessing WMDs were outweighed by the risks of being toppled because of the WMDs.

34 *See generally* R.T. Naylor, *Gunsmoke and Mirrors: Financing the Illegal Trade*, *in* RUNNING GUNS: THE GLOBAL BLACK MARKET IN SMALL ARMS 155 (Lora Lumpe ed., 2000) [hereinafter RUNNING GUNS] (explaining the financing of the illegal arms market); Brian Wood & Johan Peleman, *Making the Deal and Moving the Goods*, *in* RUNNING GUNS, *supra*, at 129 (describing methods for circumventing arms embargoes).

35 Cortright & Lopez, *supra* note 18, at 15.

36 Loretta Bondi, *Arms Embargoes: In Name Only?*, *in* SMART SANCTIONS, *supra* note 18, at 109, 113.

innovations and courageous thinking."[37] Others[38] have echoed this sentiment.[39]

However, the path is a dead end. As R. Richard Newcomb noted, "[I]f money is available, goods will be smuggled."[40] Elliott pointed out that there is an "enormous profit potential involved in moving arms from where they are in surplus to where they are in demand, an incentive that usually increases when embargoes are imposed."[41]

Bondi acknowledges that black markets in arms flourish because of the "flawed design" of embargoes,[42] but she cannot suggest a methodology to eliminate those flaws. Nor can anyone suggest a realistic plan to eliminate black markets in which governments, with their enormous financial resources, are the buyers.

Although arms embargoes almost never force a genocidal regime to desist, they do tend to increase the difficulty, and hence the price, of procuring weapons. If an arms embargo applies equally to genocide perpetrators and victims, then the price increase may make the victims relatively worse off, because they will have inferior arms to begin with, and less wealth for acquiring new arms. For example, regarding Bosnia, the U.N. Security Council adopted Resolution 713, calling for a "general and complete embargo on all deliveries of weapons and military equipment to

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37 *Id.* at 117.

38 *See* Michael Brzoska, *Putting More Teeth in UN Arms Embargoes*, *in* SMART SANCTIONS, *supra* note 18, at 125, 140 ("Much more needs to be done, however, to substantially increase the chances that arms embargoes will be able to fulfill their promise as means of limiting armed violence."); *see also* STOCKHOLM PROCESS, *supra* note 17, at 70–71; Jim Wurst, *Black Market Small Arms Readily Available Despite Global Efforts*, U.N. WIRE, June 30, 2004, http://www.smallarmssurvey.org/PressCoverage2004ybk/UN%20Wire%2030%20June%202004.pdf (reporting that Glenn McDonald, one of the authors of *Small Arms Survey 2004*, stated that a solution to the illicit small arms market was to "'give United Nations arms embargoes more teeth . . . . The absence of verification betrays states' lack of interest in abiding by their obligations'").

39 The Stockholm Process was the sequel to the Interlaken and Bonn-Berlin Processes. According to a U.N. Press Release, "[i]ts recommendations seek to increase sanctions' efficiency by reforming and improving their implementation, while minimizing unintentional negative consequences." Press Release, Security Council, 'Stockholm Process' Findings—Year-Long Study on Targeted Sanctions—Presented to Security Council, U.N. Doc. SC/7672 (Feb. 25, 2003), *available at* http://www.smartsanctions.se/stockholm_process/reports/press%20release%20sc7672.htm; *see also* STOCKHOLM PROCESS, *supra* note 17, at iii–vii.

40 Newcomb, *supra* note 21, at 62; *see also* Brzoska, *supra* note 38, at 128 ("Unfortunately, the effectiveness of an arms embargo raises the economic incentive to break it: the higher the extra cost of weapons, the more attractive the illegal deals.").

41 Elliott, *supra* note 20, at 175.

42 Bondi, *supra* note 36, at 115.

Yugoslavia"[43] (meaning rump Yugoslavia, plus Croatia and Slovenia). After the embargo was enacted, Bosnia seceded from Yugoslavia. Although sovereign nations are normally expected to acquire and own arms, Resolution 713 defined Bosnian weapons as illicit. Thus, the unarmed non-Serb population was denied its legitimate right to self-defense. In effect, the United Nations deprived Bosnia of its right to self-defense, a right guaranteed under Article 51 of the U.N. Charter.[44] Because the Serbs possessed most of the old Yugoslav army's weaponry, the embargo froze the status quo of Serb military superiority over the Bosnians, and thereby allowed the Serbs to perpetrate genocide against Bosnia.[45]

When we tally the cost of arms embargoes, we need to include in that equation the deaths of Bosnians, the people of Darfur, and other people who might have lived if they had easier access to the means of their survival.

On July 30, 2004, the U.N. Security Council imposed an arms embargo on nongovernment groups in Darfur, Sudan—namely the Darfur rebels fighting for independence, and the Arab Janjaweed militias which have been raping and massacring civilians in Darfur.[46] In March 2005, the Security Council affirmed the prior embargo and extended it to cover the central government in Khartoum,[47] maintaining the inequality that existed on the ground.

We will examine the issue in more detail in Parts V and VI.

II. COERCION INVOLVING THE USE OF FORCE: A U.N. CONSTABULARY

In Part V, we will discuss in detail the Convention on the Prevention

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43 S.C. Res. 713, ¶ 6, U.N. Doc. S/RES/713 (Sept. 25, 1991).

44 U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."). *See generally* William C. Bradford, *"The Duty To Defend Them": A Natural Law Justification for the Bush Doctrine of Preventive War*, 79 NOTRE DAME L. REV. 1365 (2004) (arguing that the U.N. Charter and the historical sources of international legal obligation that preceded it reveal a natural legal basis for the State's right to self-defense).

45 *See* Dave Kopel, Paul Gallant & Joanne Eisen, *When Policy Kills*, NAT'L REV. ONLINE, Jan. 27, 2003, http://www.nationalreview.com/kopel/kopel012703.asp.

46 S.C. Res. 1556, *supra* note 11.

47 S.C. Res. 1591, U.N. Doc. S/RES/1591 (Mar. 29, 2005).

and Punishment of the Crime of Genocide.[48] The Convention obligates signatory states to "prevent" genocide. One of the ways a state may attempt to fulfill the obligation is specified in Article 7, which provides that contracting parties 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 other acts enumerated in Article III."[49]

In September 2004, the United States government explicitly invoked the Genocide Convention to "call upon" the United Nations to stop the genocide in Sudan. The call by the United States was the *only* time any party to the Genocide Convention has ever invoked the Genocide Convention to call upon the U.N. Security Council to take action against a genocide.[50]

Of course, one of the difficulties of "calling upon" the United Nations to act is that a genocidal government has just as much of a voice in the United Nations as does a nongenocidal government. For example, Sudan itself is one of fifteen nations which currently have a seat on the U.N. Commission on Human Rights. Another government with a seat is Zimbabwe, which is currently perpetrating genocide by starvation against tribes which have objected to the Mugabe dictatorship.[51] Cuba and Communist China are among the other nations who sit on the Commission, supposedly to promote human rights around the world, notwithstanding their own atrocious records on human rights.

Referring to Rwanda and Bosnia, U.N. Secretary-General Kofi Annan stated in January 2004: "And yet, genocide has happened again, in our time. And States even refused to call it by its name, to avoid fulfilling their

48 *See* Genocide Convention, *supra* note 4.

49 *Id.* art. 7. U.N. "organs" include not just the Security Council and the General Assembly, but also the Economic and Social Council, the Trusteeship Council, the International Court of Justice, and the Secretariat. WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 453 (2000) (citing U.N. Charter art. 7). Each of these organs may have subordinate bodies; for example, the Commission on Human Rights is a subordinate of the Economic and Social Council. Four U.N. organs (either directly, or through subordinate organs) took some form of action during the Rwanda genocide: the Security Council, the General Assembly, the Secretariat, and the Economic and Social Council. *Id.* Obviously none of the organs took the slightest *effective* action to save any of the genocide victims.

50 Scott Straus, *Darfur and the Genocide Debate*, FOREIGN AFF., Jan.–Feb. 2005, at 123, 130.

51 *See* David B. Kopel, *Dailies Ignoring Looming Genocide*, ROCKY MTN. NEWS (Denver), Sept. 1, 2002, at 7E, *available at* http://www.davekopel.com/Media/RMN/2002/Zimbabwe.htm; Dave Kopel, Paul Gallant & Joanne Eisen, *Ripe for Genocide*, NAT'L REV. ONLINE, Feb. 13, 2001, http://www.nationalreview.com/kopel/kopel021301.

obligations."[52] Yet by then, the genocide in Darfur had already commenced. Still, the United Nations refused to call genocide by its name.[53] Other than the U.S. government, no other government in the world has used the word "genocide" to describe what is going on in Sudan.

A January 25, 2005, U.N. report did admit that the atrocities rose to the level of "crimes against humanity" and suggested, among other things, reparations to the victims.[54] Kofi Annan responded: "What is vital is that these people are indeed held accountable. Such grave crimes cannot be committed with impunity. That would be a terrible betrayal of the victims, and of potential future victims in Darfur and elsewhere."[55]

We share Secretary-General Annan's hopes that the perpetrators of the Darfur genocide will be punished, and the surviving victims will eventually be compensated. However, post hoc prosecution and compensation cannot ameliorate the failure to stop a genocide while it can be stopped. By evading the word "genocide," the United Nations evaded the affirmative duty of all signatories of the Genocide Convention—and of the United Nations itself—"to prevent" genocide.

Among the U.N. organs which a state may "call upon" to stop a genocide is the Security Council, which has the power to authorize the use of force. The working groups of the Stockholm Process[56] did not shy away from acknowledging the option of armed humanitarian intervention.[57]

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52 Press Release, Secretary-General, Genocide Is Threat to Peace Requiring Strong, United Action, Secretary-General Tells Stockholm International Forum, U.N. Doc. SG/SM/9126/Rev. 1 (Feb. 11, 2004).

53 *See* Int'l Comm'n of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, U.N. Doc. S/2005/60 (Jan. 25, 2005) [hereinafter *Darfur Report*], *available at* http://www.un.org/News/dh/sudan/com_inq_darfur.pdf. The U.N. Report on Darfur stated, among other things: "[I]t is clear from the Commission's findings that most attacks were deliberately and indiscriminately directed against civilians. . . . International offences such as the crimes against humanity and war crimes that have been committed in Darfur may be no less serious and heinous than genocide." *Id.* at 3–4; *see also UN Commission Finds Sudanese Government Responsible for Crimes in Darfur*, UN NEWS CENTRE, Feb. 1, 2005, http://www.un.org/apps/news/story.asp?NewsID=13199&CR=sudan&Crl= ("Summarizing the 177-page report, Secretary General Kofi Annan called on the Security Council today to consider possible sanctions over what the Commission called 'serious violations of international human rights and humanitarian law amounting to crimes under international law.'" (quoting *Darfur Report*, *supra*, at 3)).

54 *See Darfur Report*, *supra* note 53, ¶¶ 150, 180.

55 Press Release, Secretary-General, Those Responsible for Darfur Crimes Must Be Held Accountable, Secretary-General Says as He Transmits Commission of Inquiry Report to Security Council, U.N. Doc. SG/SM/9700 AFR/1101 (Feb. 1, 2005), *available at* http://www.un.org/News/Press/docs/2005/sgsm9700.doc.htm.

56 *See* STOCKHOLM PROCESS, *supra* note 17.

57 *See* Saban Kardas, *Humanitarian Intervention: A Conceptual Analysis*,

Unfortunately, previous U.N. peacekeeping[58] missions have not successfully protected victim populations, and they have occasionally failed even to protect themselves.[59] For example, Dutch peacekeepers under U.N. control, hampered by a limited mandate and an insufficient force, were attacked and taken as hostages in Bosnia. They were impotent in preventing the slaughter that occurred in 1995 in Srebrenica.[60]

In the Democratic Republic of Congo, U.N. peacekeepers withdrew in the face of violence.[61] According to U.N. spokesman Fred Eckhard,

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ALTERNATIVES, Fall & Winter 2003, at 21, 21 (2003), *available at* http://www.alternativesjournal.net/volume2/number3and4/kardas.pdf ("Defined as forcible action by a state, a group of states or international organizations to prevent or end gross violations of human rights on behalf of the nationals of the target state, through the use or threat of armed force without the consent of the target government, with or without UN Security Council authorization, humanitarian intervention has been one of the controversial topics in international law, political science and moral philosophy.")

58 *See* U.N. Dep't of Pub. Info., *United Nations Peacekeeping: Meeting New Challenges: Frequently Asked Questions*, ¶ 1, U.N. Doc. DPI/2350/Rev. 1 (July 2004) [hereinafter *United Nations Peacekeeping*], *available at* http://www.un.org/Depts/dpko/dpko/faq/qa_english.pdf. The United Nations defines "peacekeeping":

> Peacekeeping is a way to help countries torn by conflict create conditions for sustainable peace. UN peacekeepers—soldiers and military officers, civilian police officers and civilian personnel from many countries—monitor and observe peace processes that emerge in post-conflict situations and assist ex-combatants to implement the peace agreements they have signed. Such assistance comes in many forms, including confidence-building measures, power-sharing arrangements, electoral support, strengthening the rule of law, and economic and social development.

Id. Note that "peacekeeping," according to U.N. terminology, does not involve rescuing civilians from violence and refers only to "post-conflict" situations where peace has presumably already been established. "Keeping" an existing peace is not the same as creating peace.

59 *See, e.g.*, DENNIS C. JETT, WHY PEACEKEEPING FAILS, at xii (Palgrave 2000) (1999) (describing the capture of over 500 U.N. peacekeepers in May 2000 in Sierra Leone); *see also* NETH. INST. FOR WAR DOCUMENTATION, SREBRENICA—A 'SAFE' AREA: RECONSTRUCTION, BACKGROUND, CONSEQUENCES AND ANALYSES OF THE FALL OF A SAFE AREA pt. 3, ch. 1, § 18 (2002) [hereinafter SREBRENICA], *available at* http://213.222.3.5/srebrenica/ (follow "Table of Contents" hyperlink; then open "Chapter 1: The military and political situation in spring 1995" menu under "Part III"; then follow "18. Conclusion" hyperlink).

60 *See* Kopel, Gallant & Eisen, *supra* note 45; *see also* The Secretary-General, *Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica*, ¶ 490, *delivered to the General Assembly*, U.N. Doc. A/54/549 (Nov. 15, 1999), *available at* http://www.haverford.edu/relg/sells/reports/UNsrebrenicareport.htm; SREBRENICA, *supra* note 59, at pt. 3, ch. 7, § 16.

61 This led to an unfortunate occurrence. Because of civilian anger and an ensuing demonstration against the United Nations, three people were shot dead by U.N.

> The mandate was not to make war. The mandate was based on a peace agreement. Here, the peace agreement has been violently breached. It's for the parties to sort out.
>
> Once they can sort out their differences and reaffirm their peace agreement, then there's a role for the U.N. When war breaks out, the role of peacekeepers ends.[62]

Although Kofi Annan requested an additional 13,100 troops for the Congo,[63] it is not likely he will get them, because of monetary constraints. And even if the additional troops were deployed, it is unlikely that the augmented troops would be able to take on a combat role and pacify the area.[64]

In the Sudan, the African Union (AU) has deployed thousands of peacekeepers, at the request of the United Nations.[65] In October 2005, a group of the AU peacekeepers was taken hostage by one of the rebel factions in Darfur; four of the AU personnel were killed, and the others were released a day later.[66] AU Commission spokesman, Adam Thiam, worried: "'[T]his is targeting the AU as a fighting force, although the AU is there as a peace force!'"[67] As Mr. Thiam implicitly acknowledges, the AU forces do not have the ability to resist any attempt to use force against them—or against the refugees whom they are supposed to protect.

A few days after the AU soldiers were killed, the United Nations acknowledged its inability to protect even its own staff, and announced the

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peacekeepers. *See UN Troops Open Fire in Kinshasa*, BBC NEWS, June 3, 2004, http://news.bbc.co.uk/2/hi/world/africa/3773629.stm ("'Our troops had, as a last resort, to open fire.'" (quoting Jean-Marie Guéhenno, Under-Secretary-General for Peacekeeping Operations, United Nations)). There are many disturbing reports of peacekeepers raping women and sexually exploiting children. *See, e.g.*, Kate Holt, *DR Congo's Shameful Sex Secret*, BBC NEWS, June 3, 2004, http://news.bbc.co.uk/2/hi/africa/3769469.stm.

62 Susannah Price, *Peacekeepers "Powerless" in DR Congo*, BBC NEWS, June 3, 2004, http://news.bbc.co.uk/2/hi/world/africa/3774013.stm.

63 *See* Duncan Woodside, *Annan Gets Half the Peacekeepers He Needs for Congo*, BUS. DAY (Johannesburg), Oct. 4, 2004, at 6.

64 Nor would one expect that the United Nations would be able to prevent the ongoing mini-genocide against the DR Congo's pygmies. *See DR Congo Pygmies "Exterminated,"* BBC NEWS, July 6, 2004, http://news.bbc.co.uk/2/hi/africa/3869489.stm ("'The International Criminal Court is being urged to investigate 'a campaign of extermination' against pygmies in the Democratic Republic of Congo.'" (quoting Luis Moreno-Ocampo, Chief Prosecutor, International Criminal Court)).

65 The deployment is discussed in detail, *infra* Part II.B.

66 *See Peacekeepers Die in Darfur Ambush*, BBC NEWS, Oct. 8, 2005, http://news.bbc.co.uk/2/hi/africa/4323288.stm.

67 *AU Peacekeepers Seized in Darfur*, BBC NEWS, Oct. 9, 2005, http://news.bbc.co.uk/l/hi/africa/4324746.stm.

withdrawal of nonessential aid workers from west Darfur.[68]

The timid policies of the AU and of the United Nations—including the Security Council's imperfect mandates—are not necessarily wrong. A more forceful approach could easily involve the United Nations and the African Union in wars they could not realistically hope to win.

We must recognize, though, that the phrase "U.N. protection" is an oxymoron, and not just in Darfur. For example, as Dennis Jett explained in his book *Why Peacekeeping Fails*, Sierra Leone "nearly became the UN's biggest peacekeeping debacle" in May 2000 when 500 peacekeepers there were taken hostage by the barbaric rebels of the Revolutionary United Front (RUF).[69]

Jett observed: "The RUF troops are unspeakably brutal to civilians, but will not stand up to any determined military force. Yet the UN peacekeepers, with few exceptions, handed over their weapons including armored personnel carriers and meekly became prisoners."[70] It was only the deployment of British troops to the former colony that saved civilian lives and averted a "complete UN defeat."[71]

Nor can the United Nations claim ignorance of what happens when victims are abandoned to their oppressors. The Srebrenica scenario is reminiscent of the 1994 genocide in Rwanda, when promises by the United Nations to protect Rwandan civilians proved empty. There, too, U.N. personnel knew that the victim groups had been previously disarmed—in this case, by laws enacted in 1964 and 1979. Early on in the genocide, thousands of Rwandan civilians gathered in areas where U.N. troops had been stationed, thinking they would be protected. They were not. If the Rwandans had known that the U.N. troops would withdraw, they would have fled, and some might have survived. "The manner in which the troops left, including attempts to pretend to the refugees that they were not in fact leaving, was disgraceful," a report later concluded.[72]

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68 *See* Jonah Fisher, *UN Staff Withdrawn from Darfur*, BBC NEWS, Oct. 13, 2005, http://news.bbc.co.uk/2/hi/africa/4339286.stm ("A UN spokeswoman confirmed that the deterioration in security meant that all staff not considered essential to the aid operation would be flown out. Those who remain will be unable to leave the capital, El Geneina.").

69 JETT, *supra* note 59, at xii. The RUF has been described by Human Rights Watch as a "barbarous group of thugs," who "lived off the country's rich diamond fields and terrorized the population with its signature atrocity of chopping off arms and hands of men, women and often children." Kenneth Roth, *International Injustice: The Tragedy of Sierra Leone*, WALL ST. J. EUR., Aug. 2, 2000, http://www.hrw.org/editorials/2000/ken-sl-aug.htm.

70 JETT, *supra* note 59, at xii.

71 *Id.*

72 Indep. Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda, *Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda*, pt. III, ¶ 12, U.N. Doc. S/1999/1257/Annex (Dec. 15, 1999), *available at* http://www.ess.uwe.ac.uk/documents/RwandaReport1.htm.

Lakhdar Brahimi analyzed the problems of the present system of U.N. peacekeeping operations and made numerous recommendations[73] that fall short of a permanent U.N. constabulary because the creation of such a force is problematic: big countries are reluctant to cede power to the United Nations, while smaller countries which abuse human rights are afraid that a U.N. force could be used against them.[74]

Many people hope that a volunteer permanent rapid deployment force that would be available immediately might succeed,[75] despite the past failures of U.N. peacekeepers, who had been borrowed from member states which supplied them reluctantly and belatedly. Peter Langille described just such a force:

> It would be permanent, based at a designated UN site, with two mobile field headquarters. It thus could move to quell an emergency within forty-eight hours after authorization from the UN Security Council. With individuals recruited from the best volunteers worldwide, it would not suffer the reluctance of UN members to deploy their own national units. With 14,000 personnel, carefully selected, expertly trained and well-equipped, it would not fail in its mission due to a lack of

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73 *See* Panel on United Nations Peace Operations, *Report of the Panel on United Nations Peace Operations*, U.N. Doc. S.2000/809/Annex, A/55/305/Annex (Aug. 17, 2000), *available at* http://www.un.org/peace/reports/peace_operations/docs/full_report.htm (also known as the Brahimi Report); *see also* WILLIAM J. DURCH, UN PEACE OPERATIONS AND THE "BRAHIMI REPORT," (rev. ed. 2001), *available at* http://www.stimson.org/fopo/pdf/peaceopsbr1001.pdf.

74 As Kofi Annan explained:

> There is also a resistance from the big powers that they do not want to give the UN or the Secretary-General that capacity but the resistance doesn't only come from them. Some of the smaller ones do not want to have a standing army which can be used against them on the basis that they are either abusing their people, say humanitarian reasons, or they are not doing what they ought to do. So you have, let me say, general uneasiness about giving the UN a standing army.

Kofi Annan, *Question and Answer Session Following Statement (SG/SM/7741) at the United Services Institution of India*, OFF THE CUFF, Mar. 15, 2001, http://www.un.org/apps/sg/offthecuff.asp?nid=158; *see also* Saul Mendlovitz & John Fousek, *A UN Constabulary To Enforce the Law on Genocide and Crimes Against Humanity*, *in* PROTECTION AGAINST GENOCIDE 105, 118–20 (Neal Riemer ed., 2000) (discussing some of the difficulties involved in creating a force under the direct control of the Security Council).

75 *See, e.g.*, Brian Urquhart, *For a U.N. Volunteer Military Force*, N.Y. REV. BOOKS, June 10, 1993, at 3, 3 ("There will certainly be future conflicts in which an early display of strength by the Security Council will be needed if later disasters are to be prevented. . . . Clearly, a timely intervention by a relatively small but highly trained force, willing and authorized to take combat risks and representing the will of the international community, could make a decisive difference in the early stages of a crisis."). Urquhart, former Under Secretary-General of the United Nations, admits that without such a force, the United Nations is merely a paper tiger. *Id.*

preparation, skills or enthusiasm to engage in robust operations.[76]

Peter Langille likened a U.N. constabulary force to a 911 emergency system.[77] He articulated the growing frustration of many in the world community: "Despite evidence of ongoing ethnic cleansing, gang rape, mass murder and, once again, early official reluctance to even mention the word 'genocide' with reference to Darfur, the 'never again' promise now echoes back as 'again' and 'again.'"[78] Although a 911 system is sometimes useful, even the sophisticated 911 system in the United States rarely results in the rescue of victims from harm during a violent crime, because police can almost never get to the scene of a crime during the seconds the victims are most in need.[79]

Langille's U.N.-run humanitarian intervention might take months to arrive—if at all. Such waiting is not an option for people who are trying to survive until the next moment. As Langille himself admitted, "By their nature, emergencies usually require prompt, reliable and effective responses. Such a response is, alas, unlikely."[80]

Observing the ineffectiveness of U.N intervention, genocide scholar Matthew Krain concludes: "Interventions that directly challenge the perpetrator or aid the target appear most likely to reduce the severity of genocide or politicide."[81]

Even if we hypothesize the creation of an effective U.N. military force, that force would only act when the United Nations decided it must, and would still be limited by the U.N. political mandates. The track record of recent deployments of U.N.-directed forces should cause skepticism that

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76 Peter Langille, *Preventing Genocide: Time for a UN 911*, GLOBE & MAIL UPDATE (Toronto), Oct. 19, 2004, http://www.theglobeandmail.com/servlet/story/RTGAM.20041019.wdafur19/BNStory/Front/; *see also* JOHN G. HEIDENRICH, HOW TO PREVENT GENOCIDE 233–50 (2001) (considering the feasibility of a volunteer legion); Michael J. Smith, *Humanitarian Intervention Revisited: Is There a Universal Policy?*, 22 HARV. INT'L REV. 72, 75 (2000) ("It seems obvious that a standing force at the disposal of the UN Security Council could help. An international policing force has the potential to make a huge difference in our capacity to prevent genocide."); Brian Urquhart, Former Under Secretary-General, United Nations, Address at the U.N. Association in Canada's International Agenda for the Twenty-First Century Conference: The United Nations' Capacity for Peace Enforcement (May 12–14, 1994), *available at* http://www.iisd.org/security/unac/urqudoc.htm.

77 *See* Langille, *supra* note 76. In the United States, a person may make an emergency phone call to request police assistance by dialing the digits 9-1-1.

78 *Id.*

79 *See* David Kopel, Paul Gallant & Joanne Eisen, *911 Is a Joke . . . or Is It? Let's Find out*, TCS DAILY, Jan. 5, 2005, http://www.tcsdaily.com/article.aspx?id=010505H.

80 Langille, *supra* note 76.

81 *See* Matthew Krain, *International Intervention and the Severity of Genocides and Politicides*, 49 INT'L STUD. Q. 363, 378–79 (2005).

the United Nations would actually use its military power to stop a genocide in progress.[82]

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82 As Michael Walzer wrote:

> Nor would a UN army with its own officers, capable of acting independently in the field, always find itself in the right field (that is, the killing fields). Its presence or absence would depend on decisions of a Security Council likely to be as divided and uncertain as it is today, still subject to great-power veto and severe budgetary constraints.

Michael Walzer, *The Politics of Rescue*, 62 SOC. RES. 53, 65 (1995). Currently, the introduction of U.N. forces into an area can cause more harm than good, because of the propensity of U.N. peacekeepers to sexually abuse local women and children, a propensity which the U.N. military and political leadership has been very reluctant to attempt to control. For example:

> In the months he had been in charge of rooting out sexual abuse by U.N. peacekeepers, Prince Zeid Raad Hussein of Jordan thought the organization was getting a handle on the problem. But on the same day this year that the U.N. top peacekeeping official and the head of Congo's U.N. mission were visiting the eastern town of Bunia, a soldier raped a girl "practically within earshot" of the two senior officials, he said.
>
> > "I thought to myself, 'My God, what would it take for that man not to do it?'" Zeid recalled.
> >
> > That question is haunting the United Nations and the traumatized populations the soldiers are supposed to safeguard as countries rebuild from war. . . .
> >
> > A "hyper-masculine" culture and a tradition of silence among peacekeepers are making it more difficult than U.N. officials expected to halt soldiers' sexual exploitation of the people they are charged with protecting . . . .
>
> Instead, the soldiers are protecting one another, providing alibis for their fellow troops and making death threats against investigators . . . .

Maggie Farley, *Abuse by U.N. Troops Entrenched*, L.A. TIMES, Oct. 19, 2005, at A11; *see also* HUMAN RIGHTS WATCH, SIERRA LEONE: "WE'LL KILL YOU IF YOU CRY"—SEXUAL VIOLENCE IN THE SIERRA LEONE CONFLICT 4 (2004), *available at* http://www.hrw.org/reports/2003/sierraleone/sierleon0103.pdf ("Human Rights Watch has documented several cases of sexual violence by peacekeepers with the United Nations Mission in Sierra Leone (UNAMSIL), including the rape of a twelve-year-old girl in Bo by a soldier of the Guinean contingent and the gang rape of a woman by two Ukrainian soldiers near Kenema. There appears to be reluctance on the part of UNAMSIL to investigate . . . ."); IRIN, OUR BODIES—THEIR BATTLEGROUND: GENDER-BASED VIOLENCE IN CONFLICT ZONES 12, 12 (2004), http://www.irinnews.org/webspecials/GBV/gbv-webspecial.pdf ("Allegations of sexual violations perpetrated by some UN peacekeepers in the last two years have been widely reported by media and human rights groups."); *Annan Issues Rules of Conduct for U.N. Peacekeepers*, CNN.COM, Aug. 10, 1999, http://edition.cnn.com/WORLD/europe/9908/10/un.peacekeepers/ ("[M]ore specific rules include restrictions on the types of weapons that can be used by U.N. troops and the protection of women against rape and enforced prostitution. . . . The bulletin also addresses increased reports of serious misconduct by the peacekeepers, including murder, rape, torture and black marketeering. Women are to be guarded from rape and forced prostitution and 'children shall be protected against any form of indecent attack,' the U.N. bulletin says.");

A. SHIRBRIG

One existing U.N. force is the U.N. Stand-by High Readiness Brigade (SHIRBRIG), created by a Dutch-Danish initiative in 1994.[83] SHIRBRIG

Jehan Khaleeli & Sarah Martin, *Addressing the Sexual Misconduct of Peacekeepers*, REFUGEES INT'L, Sept. 23, 2004, http://www.refugeesinternational.org/content/article/detail/4047 ("Allegations of sexual exploitation and abuse have become widespread within United Nations peacekeeping missions. . . . The inability of the UN to deal with cases of sexual misconduct by peacekeepers is in stark contrast to announced policy, which is 'zero-tolerance' concerning crimes committed by UN peacekeepers (military personnel, civilian police, military observers and civilian staff)."); Michelle Malkin, *The United Nations's Rape of the Innocents*, NEWSMAX.COM, Feb. 16, 2005, http://www.newsmax.com/archives/articles/2005/2/16/80407.shtml ("Kofi Annan must have the world's thickest set of industrial-quality earplugs. How else can he block out the cries of Congolese girls raped by U.N. 'peacekeepers' sent to protect the innocents from harm? Fifty U.N. peacekeepers and U.N. civilian officers face an estimated 150 allegations of sexual exploitation and rape in the Congo alone. Last Friday, ABC's '20/20' program aired a devastating expose by investigative reporter Brian Ross highlighting some of the worst alleged crimes."); *Mano Rivier Union: Reports That Child Refugees Sexually Exploited Shock Annan*, IRINNEWS.ORG, Feb. 27, 2002, http://www.irinnews.org/print.asp?ReportID=23126 ("Refugee children in Guinea, Liberia and Sierra Leone have been subjected to sexual abuse and exploitation, reportedly by employees of national and international NGOs, UNHCR and other UN bodies . . . ."); *UN Acts To Halt Abuses by Staff*, BBC NEWS, Oct. 18, 2005, http://news.bbc.co.uk/1/hi/Americas/4354934.stm ("The UN has tightened the rules for its staff, following a series of rows over claims of financial impropriety and sexual abuse involving UN employees. . . . UN peacekeepers in the Democratic Republic of Congo have been accused of sexually exploiting local women."); *UN Reforms Aim To End Sexual Abuse by Peacekeepers*, IRINNEWS.ORG, May 10, 2005, http://www.irinnews.org/S_report.asp?ReportID=47031&SelectRegion=Southern_Africa ("In recent years UN peace missions have been marked by allegations that some peacekeeping troops have sexually exploited the very people they were sent to protect. The alleged abuses . . . have ranged from the exchange of food, money, or goods for sex, to the sexual exploitation of minors."). The U.N. army is hardly the first army in world history to abuse civilians. But some modern armies—including most of the armies of NATO members—have become very aggressive about preventing and punishing abuse of civilians. The United Nations has, in practice, done almost nothing to enforce its platitudes about ending sexual abuse by U.N. forces.

83 *See* Dep't of Nat'l Def. & the Can. Forces (DND/CF), The Origins and Status of SHIRBRIG (Sept. 21, 2000), http://www.forces.gc.ca/site/newsroom/view_news_e.asp?id=180 ("SHIRBRIG is an initiative for a multi national brigade-sized force to be drawn, when required, from the UN Standby Arrangements System. Upon activation by the UN, it would be comprised of four to five thousand peacekeeping troops. . . . Current participants include Argentina, Austria, Canada, Denmark, Finland, Italy, Netherlands, Norway, Poland, Romania, and Sweden."). For a more detailed description of SHIRBRIG and its operational components, see PRESIDENCY, SHIRBRIG STEERING COMM., SHIRBRIG: MULTINATIONAL STAND-BY HIGH READINESS BRIGADE FOR UNITED NATIONS OPERATIONS (n.d.),

was declared available to the United Nations in early 2000. Its first deployment came that year, after Ethiopia and Eritrea forged a peace agreement and consented to a U.N. peacekeeping force to be deployed to the border area. Security Council Resolution 1320 of September 15, 2000, mandated that the force "monitor the cessation of hostilities."[84] The U.N. Mission in Ethiopia and Eritrea (UNMEE) was authorized until March 15, 2006; its strength, as of January 31, 2006, was 3,359 military personnel.[85]

The UNMEE mandate does not include the protection of civilians, and does not extend beyond the Ethiopia-Eritrea border. While the UNMEE troops were deployed on Ethiopia's northern border (with Eritrea), the Ethiopian government was committing, with U.N. knowledge, genocide against the Anuak[86] people in the southwestern state of Gambella, Ethiopia.[87] According to Genocide Watch, "Additional reports indicate that the federal government of Ethiopia may have dispatched intelligence

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http://www.odin.dep.no/archive/fdvedlegg/01/01/Shirb044.pdf.

84 S.C. Res. 1320, ¶ 2(a), U.N. Doc. S/RES/1320 (Sept. 15, 2000), *available at* http://www.un.org/Depts/dpko/missions/unmee/mandate.html.

85 *See* UNMEE: United Nations Mission in Ethiopia and Eritrea—Facts and Figures, http://www.un.org/Depts/dpko/missions/unmee/facts.html (last visited Mar. 11, 2006).

86 *See* Genocide Watch, Genocide Watch: The Anuak of Ethiopia, http://www.genocidewatch.org/THE%20ANUAK%20OF%20ETHIOPIA.htm (last updated Jan. 23, 2004) ("Genocide Watch has received numerous reports of genocidal massacres of Anuak people in and around Gambella, Ethiopia in December 2003. . . . Genocide Watch has checked these reports carefully with eyewitnesses in Gambella as well as with the United States State Department and the United Nations, who have confirmed that the massacres were committed by Ethiopian government forces."); Nyikaw Ochalla & Deidre D'Entremont, *Oil Development in Ethiopia: A Threat to the Anuak of Gambela*, CULTURAL SURVIVAL Q., Fall 2001, at 26, 26 (providing a brief history of the Anuak people); Nyikaw Ochalla, *Ethnic Cleansing and Genocide Against the Anuak in Gambela State, Ethiopia*, ETHIOMEDIA.COM, July 16, 2002, http://www.ethiomedia.com/release/anuak_genocide.html ("The ongoing massacre of unarmed Anuak civilians at Itang and its surroundings by the armed forces that claim to fight the regional and federal regimes in the country is devastating the entire Gambela state. . . . The massacre of the innocent women, children, men, and elderly at Itang district is a part of an indirect ethnic cleansing and genocide by both the government in power and the armed rebels movements against the indigenous Anuak people in their own territories."); *see also* Oxfam America, Violence in Gambella (2004), *available at* http://www.oxfamamerica.org/newsandpublications/news_updates/art7332.html (last visited Mar. 5, 2006) ("The conflict is raging between the Anuak, an indigenous people who have always lived in Gambella, and the highlanders, a local term for Ethiopians who have moved to the Gambella region of western Ethiopia within the past 20 years."). It should be noted that two acceptable spellings of Gambela exist, and are used interchangeably: "Gambela" and "Gambella."

87 Gambella lies about fifty miles east of Sudan, and approximately 450 miles south of the border between Eritrea and Ethiopia. *See* http://www.lib.utexas.edu/maps/africa/sudan.jpg (last visited Feb. 6, 2005).

operatives to neighboring countries to assassinate exiled Anuak leaders . . . . [T]he massacres on 13–16 December 2003 were ordered by the commander of the Ethiopian army in Gambella, Nagu Beyene . . . ." [88]

As is typical with genocides, the people most likely to protect the intended victims were first disarmed. Genocide Watch and Survivors' Rights International observed: "[D]isarmament of Anuak police in Gambella . . . preceded the genocidal massacres of December 13–16, 2003."[89]

B. The African Union and Its Forces

Another force currently available to the U.N. Security Council is the African Standby Force, established by the African Union.[90] A 1998 joint statement by African heads of state and President Clinton promised a "concerted effort" to prevent the resurgence of genocide in Africa.[91]

By October 2005, the African Standby Force in Darfur had grown to approximately 6,200 peacekeepers.[92] Given sufficient foreign funding, the force is eventually supposed to reach 12,000.[93] The U.N. Security Council supports the AU activities in Darfur, and urges member states to donate the

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88 *See* Press Release, Genocide Watch & Survivor's Rights Int'l, Survivors' Rights International & Genocide Watch Call for Immediate Steps To Stop Massacres in Southwestern Ethiopia (Feb. 28, 2004), *available at* http://www.genocidewatch.org/PressReleaseAnuak022804.htm.

89 *Id.*

90 *See* Protocol Relating to the Establishment of the Peace and Security Council of the African Union, art. 13, ¶ 1, July 9, 2002, *available at* http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol_peace%20and%20security.pdf (providing that "[i]n order to enable the Peace and Security Council [to] perform its responsibilities with respect to the deployment of peace support missions and intervention pursuant to article 4 (h) and (j) of the Constitutive Act, an African Standby Force shall be established. Such Force shall be composed of standby multidisciplinary contingents, with civilian and military components in their countries of origin and ready for rapid deployment at appropriate notice."); *see also* Peter Kagwanja, *Darfur: An African Union Peace-Keeping Crucible?*, Paper Presented at Centre for Int'l Political Studies: Keeping Peace in Tough Neighbourhood (Sept. 14, 2004), *available at* http://www.up.ac.za/academic/cips/Publications/KTP_Dr_Peter_Kagwanja_ICG.pdf ("The ASF is conceived along the lines of the UN 'standby arrangement' where a state identifies, trains and equips specific contingents for peace-keeping operations until the time comes for deployment.").

91 *See* SCHABAS, *supra* note 49, at 496–97 (quoting Entebbe Summit for Peace and Prosperity, Joint Declaration of Principles, Mar. 25, 1998, *available at* www.state.gov/www/regions/africa/entebbe_dop_9803.html).

92 *See AU Peacekeepers Seized in Darfur*, *supra* note 67.

93 *See* StrategyPage.com, Sudan: The Bandits Find a Way (Oct. 9, 2005), http://www.strategypage.com/qnd/sudan/articles/20051009.aspx.

required resources.[94] Yet by late 2005, the situation on the ground was growing worse and worse, with violence against refugees continuing to increase.[95]

Notably, the mandate for the African Standby Force is only to protect international aid workers, not to protect the people of Darfur.[96] As Human Rights Watch accurately predicted, "Without such a mandate, the AU force could be put in the position of watching helplessly while civilians are slaughtered."[97]

By protecting aid workers, the AU forces are making an important contribution, because they facilitate the delivery of food aid to the refugee camps where over a million Darfuris have fled. Without the food aid, the genocide would be even worse; historically, starvation has been a major tool of genocidal tyrants, such as Stalin against the Ukranian people, Mao Zedong against the Chinese people, and Pol Pot against the Cambodian people.

But the AU forces generally do not try to stop the mass murders and mass rapes which the proxies of the Sudanese government (the Arab Janjaweed militias) perpetrate against the Darfuris. At least sometimes, though, AU soldiers go beyond their formal mandate, and help protect civilians. At the Abu Shouk camp for internally displaced persons, AU soldiers have escorted women in their search for firewood once a week

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94 S.C. Res. 1574, ¶ 13, U.N. Doc. S/RES/1574 (Nov. 19, 2004) (declaring that the Security Council "[*s*]*trongly supports* the decisions of the African Union to increase its mission in Darfur to 3,320 personnel and to enhance its mandate to include the tasks listed in paragraph 6 of the African Union Peace and Security Council's Communiqué of 20 October 2004, *urges* Member States to provide the required equipment, logistical, financial, material, and other necessary resources, and *urges* the Government of Sudan and all rebel groups in Darfur to cooperate fully with the African Union.").

95 *See PSC Adopts Decision on Deteriorating Darfur Security Situation*, ALL AFRICA GLOBAL MEDIA, Oct. 13, 2005, http://allafrica.com/stories/200510130352.html; *see also* Judy Aita, United States Wants Action, Not Words for Darfur, http://usinfo.state.gov/af/Archive/2005/Oct/11-106336.html (last updated Oct. 12, 2005).

96 Duncan Woodside, *Mandate Unclear as AU Heads for Darfur*, BUS. DAY (Johannesburg), Oct. 29, 2004, at 10 ("However, key questions about the expanded operation remained unresolved. Most notably, while there have been calls for the mission to extend its mandate from providing security for observers to protecting civilians it is not clear if this will transpire. The AU is now calling upon peacekeepers to protect civilians under threat in their 'immediate vicinity.'").

97 Michael Clough, *Darfur: Whose Responsibility To Protect?*, *in* HUMAN RIGHTS WATCH, WORLD REPORT 2005, at 25, 36, (2005) *available at* http://www.hrw.org/wr2k5/wr2005.pdf; *see also* Eric Reeves, *Why Labeling Matters*, NEW REPUBLIC ONLINE, July 19, 2005, http://www.tnr.com/etc.mhtml?pid=2731 ("Absent U.N. action or direct intervention by Western democracies (ideally in the form of NATO troops) the currently deployed and deeply inadequate African Union force is all that stands as an international response. This ensures that the genocide will continue.").

outside the camp, where they were at high risk of rape.[98]

Unfortunately, the ad hoc protection of civilians appears to contradict the African Union's own mission statement for Sudan. That document states: "[P]rotection of the civilian population is the responsibility of the GoS [Government of Sudan]."[99] The AU's position, then, is nearly identical to that of Sudanese Foreign Minister Mustafa Ismali, who claims that "the security of Darfur is the responsibility of Sudan alone."[100] Ismali's claim is functionally equivalent to a Nazi government statement that the security of Jews in Germany is the responsibility only of the National Socialist Workers Party government.

C. U.N. Forces in South Sudan

Darfur is not the only place in Sudan where government-supported forces have been perpetrating crimes against humanity. Southern Sudan has long been troubled by efforts of the Arab Muslim central government to impose Shari'a law, and wipe out the black Christians and Animists of the south. The government used Arab militias as its main offensive force. These militias enriched themselves by destroying African villages, and then capturing the inhabitants, who were sold into slavery.[101] Sudan is the only country in the world where chattel slavery still exists with government approval.[102]

In late 2004, the armed resistance movements in southern Sudan finally forced the government to agree to a cease-fire. The U.S. government also applied substantial diplomatic pressure in favor of the cease-fire.

On March 24, 2005, the U.N. Security Council voted to deploy 10,000

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98 S*ee AU Protects Women from Attacks in North Darfur Camp*, IRINNEWS.ORG, Apr. 14, 2005, http://www.irinnews.org/report.asp?ReportID=46632.

99 African Union Peace & Sec. Council, *Communiqué of the Seventeenth Meeting of the Peace and Security Council* ¶ 6, PSC/PR/Comm. (XVII) (Oct. 20, 2004), *available at* http://www.africa-union.org/News_events/Communiqu%C3%A9s/Communiqu%C3%A9%20_Eng%2020%20oct%202004.pdf.

100 *Sudan Rejects AU Peace Force*, BBC NEWS, Aug. 9, 2004, http://news.bbc.co.uk/1/hi/Africa/3549208.stm.

101 JOK MADUT JOK, WAR AND SLAVERY IN THE SUDAN 1–18 (2001).

102 *See generally* INT'L EMINENT PERSONS GROUP, SLAVERY, ABDUCTION, AND FORCED SERVITUDE IN SUDAN (2002), *available at* http://www.state.gov/documents/organization/11951.pdf. British colonialists, such as Governor Charles Gordon, tried very hard to wipe out the slave trade, but were not successful. *See id.* at 17 (explaining that "[s]lavery was officially abolished in 1924 under the Anglo-Egyptian Condominium and the trade suppressed, though the practice of slavery continued").

U.N. troops to monitor the recent peace in the south of Sudan.[103] The U.N. troops in the south will be monitoring a peace agreement—not protecting civilians.

Ann-Louise Colgan, of the Washington-based Africa Action, hopefully noted: "'Some commentators have suggested that the deployment of a 10,000-strong peacekeeping force to southern Sudan might ultimately provide 'peacekeeping by stealth' for Darfur, noting that once these troops are in place in Sudan, it may later be possible to re-deploy them to meet the urgent needs in Darfur.'"[104]

However, moving forces inside Sudan without the consent of its dictatorship would violate Sudan's sovereignty, and the United Nations has almost never authorized such actions.[105] And it seems doubtful that

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103 S.C. Res. 1590, ¶ 1, U.N. Doc. S/RES/1590 (Mar. 24, 2005); *see also More than 10,000 Troops Proposed for UN Peace-Support Mission for Sudan*, UN NEWS CENTRE, Feb. 3, 2005, http://www.un.org/apps/news/story.asp?NewsID=13231&Cr=sudan&Crl= ("Secretary-General Kofi Annan today formally recommends that the United Nations establish a peace-support mission in southern Sudan, and calls on Member States to contribute more than 10,000 troops and 700 civilian police to the operation, warning that the civil war that has just ended there 'cannot quickly or easily be dispatched to history.'" (quoting The Secretary-General, *Report of the Secretary-General on the Sudan*, ¶ 98, U.N. Doc. S/2005/57 (Jan. 31, 2005)); Press Release, Security Council, Security Council Endorses Establishment of 3-Month Advance Team in Sudan To Prepare for UN Peace Support Operation, U.N. Doc. SC/8120 (Nov. 6, 2004), *available at* http://www.un.org/News/Press/docs/2004/sc8120.doc.htm ("The future operation will face many tasks, including the coordination of disarmament, demobilization and reintegration programmes for ex-combatants, the monitoring of ceasefire arrangements; the return of refugees and other humanitarian activities; the organization of elections; and the destruction of landmines."). *See generally Introduction of the Secretary General's Report on the Sudan by Jan Pronk to the Security Council*, UN NEWS CENTRE, Feb. 4, 2005, http://www.un.org/News/dh/sudan/infocusnewssudan.asp?sNewsID=875&sID=23 ("The core of this consists of 750 military observers. They will have to carry out a difficult task in a wide area of 1000 by 1250 km, with very poor communications. Professional planning requires that they will have to be assisted by an enabling force of round [sic] 5000 and a protection force of about 4000, all included in the total number of 10,000. In the light of the circumstances this is a relatively lean deployment. We are ready to send them to begin their work on the ground as soon as we have the necessary Status of Forces Agreement (SOFA).").

104 Thalif Deen, *New UN Force for Sudan Will Skirt Darfur Crisis*, INTER PRESS SERVICE (Johannesburg), Feb. 8, 2005, http://www.ipsnews.net/interna.asp?idnews=27365.

105 *See* INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 37 (2001) [hereinafter THE RESPONSIBILITY TO PROTECT], *available at* http://www.iciss.ca/pdf/commission-report.pdf ("Military action can only be justified if it stands a reasonable chance of success, that is, halting or averting the atrocities or suffering that triggered the intervention in the first place."); *see also* Press Release, Secretary-General, Secretary-General Addresses International Peace Academy Seminar on 'The Responsibility to Protect,' U.N. Doc. SG/SM/8125 (Feb. 15, 2002) ("Your title really describes what I was talking about: the fact that sovereignty implies responsibilities as well

deploying 10,000 U.N. troops from southern Sudan to Darfur would stop the Darfur genocide.

Sudan can field an army of 115,000 troops;[106] and with the recent peace in the south, 91,000 troops have now become available for redeployment to Darfur.[107] Successful ground intervention in Darfur would almost certainly require vastly more than the 10,000 U.N. troops slated for southern Sudan.[108] An army of peacemakers (not just peacekeepers)[109] would need to be much larger,[110] better trained, and

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as powers; and among those responsibilities, none is more important than protecting citizens from violence and war. . . . . Human rights and the evolving nature of humanitarian law will mean little if a principle guarded by States [sovereignty] is always allowed to trump the protection of citizens within them.").

106 *See Sudan: Fielded Forces*, *in* MILNET—THE ONLINE MILITARY ENCYCLOPEDIA, http://www.milnet.com/pentagon/centcom/sudan/sudff.htm.

107 Rodrique Ngowi, *Accord Calls for Troop Pullback*, WASH. TIMES, Jan. 3, 2005, http://washingtontimes.com/world/20050102-093738-17784r.htm.

108 One estimate is that 50,000 soldiers would be required to suppress the Arab militias in Darfur. Strategypage.com, Sudan (Apr. 30, 2005), http://www.strategypage.com/qnd/sudan/articles/20050430.aspx. Marine Captain Brian Steidle estimated that between 25,000 and 50,000 troops would be required, and General Romeo Dallaire estimated 44,000. Bradford Plumer, *Do Something . . . But What?*, SUDAN TRIB., May 11, 2005, http://sudantribune.com/article.php3?id_article=9489.

109 "Peacemaker" is a euphemism for soldier. Without an invitation by Khartoum, any inserted force would be considered at war with the regime.

110 *See* Evelyn Leopold, *Sudanese Tell UN To Hold Off on War Crimes Trial*, SUDAN TRIB., Feb. 8, 2005, http://www.sudantribune.com/article.php3?id_article=7916. John Garang, leader of the main southern rebel group in Sudan and slated to become Vice President, suggested a peacekeeping force of up to 30,000 troops in Darfur. John Garang was killed in a helicopter crash on July 30, 2005. *See Garang Death Inquiry Begins Work*, BBC NEWS, Aug. 14, 2005, http://bbc.co.uk/2/hi/Africa/4151122.stm; *see also* Gray Phombeah, *Obituary: John Garang*, BBC NEWS, Aug. 3, 2005, http://news.bbc.co.uk/2/hi/africa/2134220.stm; *Sudan Crash Cause Is 'Not Clear,'* BBC NEWS, Aug. 5, 2005, http://news.bbc.co.uk/2/hi/africa/4748061.stm ("The cause of the helicopter crash which killed veteran southern Sudanese leader John Garang is 'not clear,' Ugandan President Yoweri Museveni has said. All previous official comments have insisted that the crash was an accident. Mr. Garang was travelling in Mr. Museveni's helicopter when he died."); *Sudan Launches Garang Crash Probe*, BBC NEWS, Aug. 9, 2005, http://news.bbc.co.uk/2/hi/africa/4134160.stm ("Mr. Garang died with 13 others while returning to southern Sudan from Uganda when the Ugandan presidential helicopter flew into a cliff face. Both the government and the SPLM have said it was an accident . . . . Some analysts feared that his death could threaten the peace but all sides have pledged to stick to the agreement signed in January."); *Ugandan Police Charge Journalist*, BBC NEWS, Aug. 13, 2005, http://news.bbc.co.uk/2/hi/africa/4148998.stm ("Ugandan journalist Andrew Mwenda has been charged with sedition after a radio debate speculating on the death of Sudan's vice-president John Garang. . . . The Sudanese ex-rebel leader died in a helicopter crash on his way back from talks in Uganda on 30 July. Sudan has repeatedly said it was an accident. . . . Conspiracy theories on Mr. Garang's death ranging from sabotage to

better supplied than any U.N. army ever has been.[111]

As long as Khartoum is intent on using genocide to "stabilize" Darfur, only a force willing to engage in combat can save the unarmed victims. The United Nations will not, in the foreseeable future, be able to field such a force,[112] or cause such a force to be unleashed.

D. A No-Fly Zone

Although the use of ground forces to stop the Darfur genocide would be very difficult, there is a relatively easy step which could substantially reduce the Sudanese government's military advantage over the genocide victims in Darfur:

> If the UN and EU really are outraged by the Sudanese air attacks, they could declare a "no fly zone" in Darfur region. The no-fly zone in Darfur would operate like the no-fly zones the US and Britain enforced over northern and southern Iraq after 1991. A dozen French and German fighter aircraft based in Chad could protect the defenseless Darfurian villages from air attack. Is this a likely scenario? Of course it isn't—at the moment the political will does not exist in the UN and EU to take such a decisive military action. Imposing a no-fly zone, however, would save lives.[113]

E. Conclusion on Internationally Authorized Force

Kofi Annan admitted, "Quite frankly, our approach is not working,"

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hijackings have raged in the Ugandan media.").

111 Even the British army, the preeminent international force of the late nineteenth century, was defeated in 1885 in Khartoum by Sudanese Jihadists led by the "Mahdi," a supposed messianic prophet. CHARLES CHENEVIX TRENCH, THE ROAD TO KHARTOUM: A LIFE OF GENERAL CHARLES GORDON 125–39 (1979) (noting Gordon's adamant determination to wipe out the slave trade).

112 As of January 31, 2006, the United Nations was fielding 71,554 military personnel and civilian police in fifteen peacekeeping operations (with additional personnel and troops committed to three "political missions" falling under the jurisdiction of the Department of Peacekeeping Operations). Although the bulk of United Nations peacekeeping personnel are troops, the personnel also include military observers, civilian police, international civilian personnel and local staff. The total number of personnel serving in all of the United Nations's peacekeeping operations was 85,676. *See* U.N. Dep't of Pub. Info., *United Nations Peacekeeping Operations: Background Note*, U.N. Doc. DPI/1634/Rev. 51 (Feb. 28, 2006), *available at* http://www.un.org/Depts/dpko/dpko/bnote010101.pdf; *see also United Nations Peacekeeping*, *supra* note 58; Dep't of Peacekeeping Operations, United Nations, *Rapid Deployment Level: Terms of Reference*, http://www.un.org/Depts/dpko/milad/fgs2/unsas_files/rapid_deployment/torrdl.htm (last visited Jan. 20, 2006).

113 StrategyPage.com, Sudan (Feb. 1, 2005), http://www.strategypage.com/qnd/sudan/articles/20050201.aspx.

and suggested that the United Nations ought to step up pressure on the Sudanese government.[114] Samantha Power correctly recognized that force, not sanctions, would be the most effective answer to the Darfur victims' plight, noting that "[t]he only hope for peace is an international protection force. . . . Yet amid all the talk of oil embargoes, travel bans and asset freezes, no statesman . . . has attempted to rally the money, troops and political cooperation needed for such a force."[115] Power recognized the futility of sanctions and the positive aspect of force. Yet, she stopped short of naming the obvious practical immediate solution: acknowledging the efficacy of self-protection by the victims themselves.

At the 2004 Stockholm International Forum on Genocide, Gareth Evans summarized the consensus principles for military intervention: There must be large-scale loss of life, and the motive for the intervention should be to save lives. Outside extra-national force should be used as a last resort, and only with the authorization of the Security Council.[116]

The Stockholm Forum participants acknowledged a problem: "[T]he UN Security Council's record of paralysis in humanitarian crises."[117] Evans suggested:

> C. The Security Council should deal promptly with any request for authority to intervene where there are allegations of large scale loss of human life or ethnic cleansing. It should in this context seek adequate verification of facts, or conditions on the ground that might support a military intervention.
>
> D. The Permanent Five members of the Security Council should agree not to apply their veto power, in matters where their vital state interests are not involved, to obstruct the passage of resolutions authorizing military intervention for human protection purposes for which there is otherwise majority support.[118]

It would be wonderful if the Security Council acted as Evans says it "should," but the genocide victims in Sudan must live in a world based on what the Security Council actually *does*—which, in regard to the Sudanese

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114 *Annan Urges Security Council and UN to Rapidly Rethink Joint Approach to Sudan*, UN NEWS CENTRE, Dec. 22, 2004, http://www.un.org/apps/news/storyAr.asp?NewsID=12898&Sudan&crl.

115 Samantha Power, *It's Not Enough to Call It Genocide*, TIME, Oct. 4, 2004, at 63.

116 Gareth Evans, State Sovereignty and the Responsibility To Protect, Paper Presented at Stockholm Int'l Forum: Preventing Genocide, Threats and Responsibilities (Jan. 27, 2004), *available at* http://www.dccam.org/Projects/Affinity/SIF/DATA/2004/page1553.html.

117 STOCKHOLM INT'L FORUM 2004, PREVENTING GENOCIDE: THREATS & RESPONSIBILITIES, SUMMARY REPORT 7 (2004), *available at* http://www.armeniaforeignministry.com/doc/id/summaryreport.pdf.

118 THE RESPONSIBILITY TO PROTECT, *supra* note 105, at xiii.

genocide, is far too little. Indeed, if the Security Council actually acted as it "should" according to the hopes of the U.N. founders, then war would have long disappeared from the world.

III. FATAL FLAW: THE U.N. SECURITY COUNCIL VERSUS UNILATERALISM

Although the Security Council has never stopped a genocide, various nations—acting on their own and in violation of international law—have stopped genocides; however, the end of the genocide was usually a byproduct of an invasion undertaken for other reasons.

For example, the Nazi genocide of Jews and Gypsies, and the Japanese genocide in China, were ended when Nazi Germany and Imperial Japan were conquered by the Allies. At least some of the Allied actions violated international law. In 1942, U.S. forces invaded the territory of a neutral nation—the northwest African colonies belonging to Vichy France.[119]

Idi Amin's genocide in Uganda ended in 1979 when neighboring Tanzania invaded Uganda and deposed Amin. Pol Pot's genocide in Cambodia ended when the communist dictatorship in Vietnam invaded Cambodia and drove him into exile in 1978–1979.[120] The genocide perpetrated by the government of West Pakistan (now Pakistan) against the people of East Pakistan (now Bangladesh) was ended by Indian military intervention in 1971.[121]

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119 According to the June 22, 1940, armistice between France and Germany, most of metropolitan France was occupied by the German military government, but a portion of southern France, with a capital at Vichy, retained independent self-government, and retained sovereignty over French colonies. *See* 2 J.R.M. BUTLER, GRAND STRATEGY, 202–05, 231–33 (1957). Like Spain, Vichy France was a neutral, fascist state which conducted trade with both the Allies and the Axis; because neutral Vichy shared a small border with Switzerland, it was Switzerland's lifeline to the rest of the world.

120 If the definition of "genocide" is read narrowly, then the Khmer Rouge murders of approximately two million people were not "genocide," because the Khmer Rouge were not trying to eliminate a particular ethnic group. They were killing Cambodians of various ethnicities, as part of their plan to create a perfect totalitarian state, based on principles they had studied at Paris universities.

Similarly, an argument can be made that the mass murders in Sudan are not "genocide," because, perhaps, the Khartoum government and its Arab nomad militias are not trying to exterminate all of the black population in Darfur, but only to carry out ethnic cleansing. U.S. President George Bush and Secretary of State Colin Powell called Darfur a "genocide," but the United Nations has not used that word. *See* Nordlinger, *supra* note 1, at 39, 42. If the Darfur mass murders are not a "genocide," then this Article's argument about the Genocide Convention taking precedence over local or international antigun laws (detailed in Part V) would still be valid as a general rule, but would not be applicable to the present situation in Sudan.

121 SCHABAS, *supra* note 49, at 499.

Even if India, Tanzania, and Vietnam had acted for purely altruistic, humanitarian motives, their actions to end the Bangladeshi, Ugandan, and Cambodian genocides would have been illegal, according to the United Nations. As Michael Byers and Simon Chesterman wrote, "[A]ny decision to engage in a humanitarian intervention was to be made by the [Security] council alone . . . ."[122] They explained: "The ordinary meaning of Article 2(4) [of the U.N. Charter] is clear: the use of force across borders is simply not permitted. This meaning is supported by the U.N. Charter's context, object, and purpose—a global effort to prohibit unilateral determinations of the just war by vesting sole authority for the non-defensive use of force in the Security Council."[123]

U.N. Secretary-General Kofi Annan expressed concern about the violation of international law, even for a clearly morally justifiable purpose: "Is there not a danger of such interventions undermining the imperfect, yet resilient, security system created after the Second World War, and of setting dangerous precedents for future interventions without a clear criterion to decide who might invoke these precedents, and in what circumstances?"[124] Yet when referring to Rwanda, he also asked: "If, in those dark days and hours leading up to the genocide, a coalition of States had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorization, should such a coalition have stood aside and allowed the horror to unfold?"[125]

Nicholas Wheeler argues that if the Security Council does not respond promptly, and a state or coalition of states illegally intervenes, the

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122 Michael Byers & Simon Chesterman, *Changing the Rules About Rules? Unilateral Humanitarian Intervention and the Future of International Law*, *in* HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS, AT 177, 181 (J.L. Holzgrefe & Robert O. Keohane eds., 2003) [hereinafter HUMANITARIAN INTERVENTION].

123 *Id.* The U.N. Charter states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. Charter art. 2, para 4. There is an exception for self-defense. *See also* Adam Roberts, *The So-Called Right of Humanitarian Intervention*, *in* TRINITY PAPERS 4 (Trinity Coll., Univ. of Melbourne, Trinity Papers Series No. 13, 2000), *available at* http://www.trinity.unimelb.edu.au/publications/papers/TP_13.pdf ("Do states or regional bodies have any right to act in such circumstances? This question threatens to become deeply divisive in international relations. Particularly in the absence of Security Council authorization, there may be cases of intervention which are in a legal 'grey area': neither legal nor illegal, but rather the outcome of a difficult process of balancing competing principles.")

124 Press Release, Secretary-General, Secretary-General Presents His Annual Report to General Assembly, U.N. Doc. SG/SM/7136 GA/9596 (Sept. 20, 1999) [hereinafter Sept. 20, 1999, Secretary-General's Press Release], *available at* http://www.un.org/News/Press/docs/1999/19990920.sgsm7136.html.

125 *Id.*

intervention would be "morally justified" in instances where the humanitarian need is great.[126] Another set of principles for humanitarian intervention has been developed by Peter Baehr, in an address to the International Peace Academy.[127] In other words, there is higher moral law which overrules man-made international law (and the man-made construct of the sovereign state) in dire circumstances.

The arguments made by Wheeler and Baehr have an eminently respectable intellectual pedigree. Among the intellectual ancestors of Wheeler and Baehr, in supporting humanitarian intervention, is Thomas Aquinas, who explicated principles of Just War in his multi-volume *Summa Theologica*, which served as the foundation of Catholic intellectual thought for most of the second millennium.[128] Aquinas's affirmative duty to "rescue" and "deliver"[129] appear to authorize Just War for humanitarian purposes, not merely for reasons of national self-defense.

Aquinas was the preeminent founder of the philosophical method of Scholasticism in the thirteenth century. Several centuries later, the "Second Scholastics" flourished at the University of Salamanca, in Spain. Among them was Francisco de Vitoria, a leading political philosopher of the late sixteenth century. At the time when Spain was encountering the Indians of the New World, Vitoria argued that the Spanish had no right to enslave or take the property of Indians in the New World. That the Indians were pagans did not deprive them of their natural rights. At the same time, Vitoria wrote, the Spanish had a right, indeed a moral duty, to intervene to protect the Indians who would otherwise become victims of cannibalism or

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126 *See* NICHOLAS J. WHEELER, SAVING STRANGERS 294–95 (2000); Klinton W. Alexander, *NATO's Intervention in Kosovo: The Legal Case for Violating Yugoslavia's National Sovereignty in the Absence of Security Council Approval*, 22 HOUS. J. INT'L L. 403, 449 (2000) (arguing that States may look to international law, and not just the Security Council, when deciding to intervene in another State's affairs for humanitarian purposes); *see also* Christopher Greenwood, *International Law and NATO Intervention*, 49 INT'L & COMP. L.Q. 926 (2000).

127 *See* Shashi Tharoor & Sam Daws, *Humanitarian Intervention: Getting Past the Reefs*, WORLD POL'Y J., Summer 2001, at 21, 28 (citing Peter R. Baehr, Emeritus Professor, Utrecht Univ., Humanitarian Intervention and Codification, Address at the Humanitarian Action Symposium (Nov. 20, 2000)).

128 Aquinas drew on roots from the Roman Republic, as well as from prior Christian philosophy and the Bible. Like Wheeler and Baehr, Aquinas emphasized the importance of ethical constraints on warfare—such as not deliberately targeting civilians, and using force only when there is a reasonable possibility for success. 2 THOMAS AQUINAS, SUMMA THEOLOGICA 1359–63 (Fathers of the English Dominican Province transl., Benziger Bros. 1947).

129 *Id.* at 1360 ("Rescue the poor: and deliver the needy out of the hand of the sinner . . . ." (quoting *Psalms* 81:4)).

human sacrifice.[130]

The Dutch philosopher Hugo Grotius, along with other founding scholars of international law, argued that foreign intervention was legitimate to "'stop the maltreatment by a state of its own nationals when that conduct is so brutal and large-scale as to shock the conscience of the community of nations.'"[131]

Even modern nations who profess the highest regard for U.N. procedures sometimes violate international law and, in doing so, save innocent lives. On November 4, 2004, Ivory Coast President Laurent Gbagbo broke an eighteen month truce between his government and the rebels, the *Forces Nouvelles*, by attacking the rebel stronghold in the northern town of Bouake.[132] The attack killed or injured several dozen civilians[133] and nine French peacekeepers.

The African Union asked the U.N. Security Council to enlarge the AU's mandate in Ivory Coast in order to protect civilians[134] caught between the two warring factions. While the Security Council discussed the situation, French President Jacques Chirac took immediate action: he ordered French troops to destroy the Ivorian air force, and thereby make it more difficult for Gbagbo to pursue his violent agenda.[135] A cynic might

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130 *See* BRIAN TIERNEY, THE IDEA OF NATURAL RIGHTS 271 (1997) (citing FRANCISCO DE VITORIA, OBRAS DE FRANCISCO DE VITORIA (T. Urdanoz ed., 1960)). The priests of the Aztec Empire murdered many thousands of people every year by ripping out their living hearts. Children were the favorite "sacrifice" of these bloodthirsty priests. The priests also liked to flay their victims, so the priests could wear the victims' skins. One reason that Mexico fell so rapidly to Cortes and the Spanish was that the other Indian tribes of Mexico, who had lost the Flower Wars with the Aztecs and were being forced to supply victims for the Aztec death cult, eagerly joined forces with the Spanish liberators. During the 1487 rededication of the Great Temple in Tenochtitlan, 80,400 victims were slaughtered in human sacrifice. *See* Ross Hassig, *Aztecs*, *in* ENCYCLOPEDIA OF RELIGION AND WAR 29, 30 (Gabriel Palmer-Fernandez ed., 2004).

131 Roger Sandall, *Can Sudan Be Saved?*, COMMENT, Dec. 2004, at 38, 44 (quoting Grotius, without attribution to a particular work; *see also* T. BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 3 (2002) (citing L. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 137 (1973); E.C. STOWELL, INTERVENTION IN INTERNATIONAL LAW 53 (1921)).

132 *See Army Bombs French Military, Nine Killed*, IRINNEWS.ORG, Nov. 7, 2004, http://www.irinnews.org/report.asp?ReportID=44029.

133 *UN Condemns Ivory Coast Bombing*, BBC NEWS, Nov. 5, 2004, http://news.bbc.co.uk/2/hi/africa/3981539.stm.

134 Press Release, Office of the Comm'r for Peace and Sec., Press Statement on Côte d'Ivoire (Nov. 6, 2004), *available at* http://allafrica.com/stories/printable/200411060003.html.

135 For a brief description of the background to the rebellion in Ivory Coast, see Editorial, *Restoring Peace to Ivory Coast*, N.Y. TIMES, Jan. 17, 2003, at A26; *see also UN Condemns Ivory Coast Bombing*, *supra* note 133.

describe Chirac's response as involving only punishment for French deaths. But were French actions, in effect, an example of a developing international norm for unilateral intervention to save civilians?[136]

Perhaps another example of the developing international norm appeared in March 1999, when President Clinton and some NATO allies claimed authority under the Genocide Convention to bomb Serbia, even though the offensive action had never been authorized by the United Nations.[137]

More unilateral military actions, especially by democratic nations, might save many people from being killed by dictatorships. Yet according to Joel Rosenthal, Carnegie Council president at the Fletcher School of Diplomacy of Tufts University, "[T]here is not a coherent and comprehensive legal framework in place to answer the question of whether to intervene. . . . We can find, without much trouble, a spectrum of opinion ranging from staunch anti-interventionism to reluctant interventionism to duty-bound interventionism."[138]

Kofi Annan observes "the developing international norm in favor of intervention to protect innocent civilians from wholesale slaughter."[139] Unfortunately, the norm of intervention to stop wholesale slaughter is extremely underdeveloped in practice. Neither the Security Council, nor any other multilateral body, nor any nation(s) acting unilaterally have stopped the genocide in Sudan. Nor are they stopping the genocide by government-caused starvation in Zimbabwe. Nor did they stop the

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136 *See* Sept. 20, 1999, Secretary-General's Press Release, *supra* note 124; *see also* Editorial, *'Never Again' Has Not Come To Pass*, J. NEWS (New York), Feb. 1, 2005, at 6B ("A genocide bleeds on at this moment in the Darfur region of Sudan. . . . Citizens must let leaders know that they consider preventing or stopping a genocide to be a sign of their nation's moral health.").

137 SCHABAS, *supra* note 49, at 447, 499; John M. Broder, *President's Reasons: Moral Revulsion & Weight of U.S. Interests*, N.Y. TIMES, Mar. 25, 1999, at A15; Francis X. Clines, *Flood of Refugees: Raids Focus on Halting the Serbs' Attack on Ethnic Albanians*, N.Y. TIMES, Mar. 30, 1999, at A1. The Security Council voted 12-3 against a Russian-sponsored resolution to condemn the bombing; rejecting a measure to condemn the bombing is, obviously, not the same as providing authorization for the bombing. Tharoor & Daws, *supra* note 127, at 22–23.

138 Joel Rosenthal, Carnegie Council, Lecture at Tufts Univ. Fletcher Sch. Of Diplomacy: Dilemmas of Humanitarian and Peace Operations (March 10, 2001) (transcript available at http://www.carnegiecouncil.org/viewMedia.php/prmID/720). Fernando R. Tesón, who argues in favor of humanitarian intervention, writes: "[A] major purpose of states and governments is to protect and secure human rights, that is, rights that all persons have by virtue of personhood alone . . . . Sovereignty serves valuable human ends, and those who grossly assault them should not be allowed to shield themselves behind the sovereignty principle . . . ." Fernando R. Tesón, *The Liberal Case for Humanitarian Intervention*, *in* HUMANITARIAN INTERVENTION, *supra* note 122, at 93, 93.

139 Kofi Annan, *Two Concepts of Sovereignty*, ECONOMIST, Sept. 18, 1999, at 50.

genocides in the Soviet Union, Communist China, Guatemala, or Rwanda. Even when a genocidal government (such as Hitler's Germany, Amin's Uganda, or Pol Pot's Cambodia) made the error of provoking a stronger nation and prompting an invasion, that invasion eventually stopped the genocide, but did not prevent the genocide from being initiated.

A policy that relies on the Security Council to prevent genocides has historically proven to be ineffective. A policy that relies on unilateral invasions to prevent genocide may save lives, but such a policy has, historically, resulted in action that, at best, came far too late to save millions of genocide victims. Moreover, humanitarian, nondefensive unilateral intervention is, by the dominant interpretation of international law, illegal.

We face an unacceptable contradiction:

> 1. As we will detail in Part V the Genocide Convention and natural moral law are both clear that genocide is a violation of international law, and that no person has a legal duty to be subjected to genocide. Because there is no right without a remedy, there must, necessarily by international law, be a remedy for genocide victims.
>
> 2. All remedies dependent on international state action are failures. Comprehensive sanctions, "smart" sanctions, international peace keeping forces, and U.N. Security Council mandates are ineffective in preventing genocide. Unilateral action by a single state, or by several states, does save some victims—towards the end of the genocide process—but has not protected the early genocide victims in any state, or any of the genocide victims in most states where genocide has been perpetrated.

Accordingly, there must necessarily, by international law, be some other remedy to prevent genocide. In the remainder of this Article, we propose a particular remedy which we argue is mandated by international law. If some readers dislike this remedy, we remind them of the international law obligation created by the two statements above. If someone proposes a better remedy—which in practice actually saves more genocide victims than does our remedy—we accede. But the terrible genocides of the last century suggest that there is no remedy better than the one we will detail.

IV. DEFENSELESS VICTIMS

Sudan is ruled by a racist, Islamist tyranny in Khartoum.[140] For many years, the Arab Sudanese dictatorship pursued a policy of genocide against

140 *See, e.g.*, Eric Reeves, *The Current Khartoum Government*, NEW REPUBLIC ONLINE, July 19, 2005, http://www.tnr.com/etc.mhtml?pid=2731.

the Christian and Animist black Africans who live in southern Sudan, killing about 2.2 million, and driving 4.5 million from their homes.[141] Victims who were not killed were often sold into slavery. Rape was extensively used as an instrument of state terror.[142] Thanks to the continuing success of armed resistance by the south Sudanese, the Khartoum government finally accepted a cease-fire in late 2004. The government has promised that in 2010, the south Sudanese will be able to vote on a referendum for independence.[143]

The vast Darfur region consists of three states in western Sudan.[144] As in the south, much of the population is black African. Unlike in the south, the black Africans of Darfur are Muslims.[145] Also inhabiting Darfur are camel-riding Arab nomads, who have a long-standing conflict with black African farmers. The Arabs consider the blacks to be racially inferior, and fit only for slavery.

> Beginning in the mid-1980s, successive governments in Khartoum inflamed matters by supporting and arming the Arab tribes, in part to prevent the southern rebels from gaining a foothold in the region. . . . Arabs formed militias, burned African villages, and killed thousands. Africans in turn formed self-defense groups, members of which eventually became the first Darfur insurgents to appear in 2003.[146]

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141 Nordlinger, *supra* note 1, at 39.

142 *See, e.g.*, Eric Reeves, *The Case for NATO Intervention*, NEW REPUBLIC ONLINE, July 22, 2005, http://www.tnr.com/etc.mhtml?pid=2735 ("The more than 150 camps for displaced persons, with at least 2 million registered and unregistered people, must be fully secured. That means replacing the Sudanese police and security forces with A.U. and NATO military police, including a substantial complement of female officers experienced in responding to sexual violence. The camp surroundings must also be secured, as women and girls are forced to venture further and further to find firewood for cooking, water, and animal fodder."); *see also* Eric Reeves, *Evidence of Genocide*, NEW REPUBLIC ONLINE, July 18, 2005, http://www.tnr.com/etc.mhtml?pid=2730 ("Janjaweed assaults, typically conducted in concert with Khartoum's regular military forces (including helicopter gunships and Antonov bombers), have been comprehensively destructive of both human life and livelihood: men and boys killed en masse, women and girls raped or abducted . . . .").

143 *See* INTERGOVERNMENTAL AUTH. ON DEV., THE IMPLEMENTATION MODALITIES OF THE PROTOCOL ON POWER SHARING (2004), *available at* http://www.igad.org/sudanpeace/final_implementation_agreement.pdf; *Peace in Sudan*, BBC NEWS, July 8, 2005, http://news.bbc.co.uk/1/hi/world/africa/3211002.stm.

144 The states (*wilayat*) are Gharb Darfur, Janub Darfur, and Shamal Darfur.

145 Straus, *supra* note 50, at 124–26.

146 *Id.* at 126; *see also* INT'L CRISIS GROUP, ICG REPORT NO. 76, DARFUR RISING: SUDAN'S NEW CRISIS 19 (2004) [hereinafter DARFUR RISING], *available at* http://www.crisisgroup.org/library/documents/africa/horn_of_africa/076_darfur_sudan_new_crisis.pdf ("The SLA drew its first recruits from Fur self-defence militias that had arisen during the 1987–1989 conflict. The emergence in 2001 of a group of largely Fur and Massaleit fighters in southern and western Darfur coincided with the decision of Zaghawa

Two movements seeking independence for Darfur were created in February 2003: the Sudan Liberation Army (SLA), and the Justice and Equality Movement (JEM). In April 2003, the rebels successfully attacked a government airfield, provoking massive retaliation by the Khartoum government.[147]

On the ground, the main force of the government's attack on the black Africans of Darfur is an Arab militia known as the Janjaweed (literally, "evil men on horseback" or "devil on a horse").[148]

The Janjaweed have caused the deaths of more than 300,000 black Sudanese, have raped many thousands, and have forced two million black Sudanese into refugee camps.[149] "When the jajaweed attack, they do unmistakably hurl racial abuse at their victims, alleging in particular that Africans are born to be slaves: 'Slaves, run! Leave the country. You don't belong; why are you not leaving this area for Arab cattle to graze?'"[150]

The Janjaweed attacks on villages are supported with aerial bombing by the Sudan Air Force.[151] There are no reports of response to these attacks from villagers or from the JEM or SLA. The rebel groups do not appear to have antiaircraft weapons, such as surface-to-air missiles. The

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young men to rebel against the government. The Zaghawa insurgents were unhappy about the government's failure to enforce the terms of a tribal peace agreement requiring nomads of Arab background to pay blood money for killing dozens of Zaghawas, including prominent tribal chiefs. The SLA grew out of this increased cooperation between the Fur, Massaleit and Zaghawa groups."). "Massaleit" is spelled in a variety of ways depending on the author.

147 *See* HUMAN RIGHTS WATCH, TARGETING THE FUR: MASS KILLINGS IN DARFUR 6–7 (2005), *available at* http://hrw.org/backgrounder/africa/darfur0105/darfur0105.pdf.

148 Straus, *supra* note 50, at 126–27.

149 Stuart Taylor Jr., *Genocide in Darfur: Crime Without Punishment?*, 37 NAT'L J. 511, 511 (2005). The mayhem is widespread. *See* BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, U.S. DEP'T OF STATE, PUBL'N NO. 11182, DOCUMENTING ATROCITIES IN DARFUR (2004) [hereinafter U.S. DEP'T OF STATE], http://www.state.gov/g/drl/rls/36028.htm ("The UN estimates the violence has affected 2.2 million of Darfur's 6 million residents."); Jonathan Karl, *The Darfur Disaster: Up Close and Personal with the Killers of Khartoum*, WKLY. STANDARD (Washington, D.C.), May 2, 2005, at 24, 25; Eric Reeves, *Who Is Dying*, NEW REPUBLIC ONLINE, July 20, 2005, http://www.tnr.com/etc.mhtml?pid=2732; Russell Smith, *How Many Have Died in Darfur?*, TURKISH WEEKLY ONLINE, Feb. 16, 2005, http://www.turkishweekly.net/news.php?id=4774; *Sudan Atrocities Under Spotlight*, UNITED NATIONS NEWS, Feb. 16, 2005, http://archive.wn.com/2005/02/16/1400/unitednationsnews/ ("Tens of thousands of people have been killed and some two million have been forced from their homes.").

150 Sandall, *supra* note 131, at 39. Although "Janjaweed" is more commonly used, "Jajaweed" is also used.

151 *Sudan 'Bombing Darfur Villages,'* SUDAN TIMES, Jan. 27, 2005, http://archive.wn.com/2005/01/27/1400/sudantimes ("The Sudanese air force has bombed villages in Darfur despite agreeing to stop using planes in the war-torn region, aid agencies say.").

rebels do possess small arms and light weapons, including firearms.[152]

Salah Gosh, head of Sudan's national security, admitted that the government is, indeed, bombing the villages, noting: "'The [rebel] militia are attacking the government from the villages. What is the government going to do? It will bomb those villages.'"[153] Notably, the majority of villages bombed were villages where there were no armed rebels.[154] Thus, the destruction of the villages should be seen not as an overzealous form of counter-insurgency warfare, but rather as a deliberate attempt to destroy an entire society. The ethnic cleansing of Darfur has been so thorough that, literally, there are no villages left to burn.[155]

Although ethnic cleansing is not uncommon where the population supports an antigovernment insurgency, it can also lead to deaths of innocent civilians on a large scale.[156] Intentionally targeting civilians has long been recognized as a violation of the laws of warfare. An Amnesty International report noted, "[I]nternational law also makes it clear that use of such tactics does not provide the other side with a license to kill civilians."[157]

The Sudanese government tells the international community that the central government is not responsible for the Arab versus African violence in Darfur. However, Human Rights Watch observed that "[g]overnment forces not only participated and supported militia attacks on civilians, they also actively refused to provide security to civilians seeking protection

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152 *See* Amnesty Int'l, *Sudan: Arming the Perpetrators of Grave Abuses in Darfur*, AI Index AFR 54/139/2004, Nov. 16, 2004, *available at* http://web.amnesty.org/library/pdf/AFR541392004ENGLISH/$File/AFR5413904.pdf. The President of the JEM, Khalil Ibrahim stated: "About 90% of our armament comes from what we have captured from Sudanese army barracks." However, arms are readily available to them from other opposition groups. *Id.* at 37.

153 *Id.* at 12 (alteration in original); *see also* HUMAN RIGHTS WATCH, SUDAN: DARFUR IN FLAMES–ATROCITIES IN WESTERN SUDAN 17 (2004) [hereinafter DARFUR IN FLAMES], http://hrw.org/reports/2004/sudan0404/sudan0404.pdf ("Clearly there was SLA presence in certain villages, which provides military justification for the use of force, however the use of force must be proportional to the expected military gain."); DARFUR RISING, *supra* note 146, at 18 (quoting a recent visitor explaining that "[t]hese were attempts to drain the population base supporting the rebels").

154 Straus, *supra* note 50, at 127.

155 *See New Clashes Break out in Darfur*, BBC NEWS, July 25, 2005, http://news.bbc.co.uk/l/hi/world/africa/4713751.stm ("Last week, the commander of the African Union peacekeeping force in Darfur, Festus Okonkwo, told the BBC that there had been no major attacks in the region since January and that there had also been a reduction in attacks on villages. But US aid official Andrew Natsios said this was chiefly because there were no villages left to burn down.").

156 *See generally* Benjamin Valentino et al., *"Draining the Sea:" Mass Killing and Guerrilla Warfare*, 58 INT'L ORG. 375 (2004).

157 *See* Amnesty Int'l, *supra* note 152, at 12.

from these militia attacks."[158]

Despite promises from the Sudanese government, the attacks on Darfur grew even worse in early 2005. The U.S. Department of State reported that brutal attacks were still occurring, and that "attacks on civilians, rape, kidnapping and banditry actually increased in April."[159] According to the *Sudan Tribune*, "Attention to Darfur's staggering death toll—which has grown to approximately 400,000 over the course of more than two years of genocidal conflict—has increased dramatically in the past several months."[160] U.N. Undersecretary for Humanitarian Affairs Jan Egeland warns that the death rate might increase to 100,000 per month.[161]

Egeland notes: "'The only thing in abundance in Darfur is weapons.'"[162] However, these weapons are distributed unevenly among Darfur's population. Despite the U.N. arms embargo,[163] Sudan has been funding its arms buildup using income from its oil sector to supply the Arab militia friendly to Khartoum.[164] According to Amnesty International,

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158 DARFUR IN FLAMES, *supra* note 153, at 24. The Human Rights Watch report also noted:

> In yet another telling example of the government's refusal to provide security for civilians, a number of tribal leaders of the Fur, Zaghawa and Masaalit communities reportedly made repeated attempts to inform government authorities of the grave abuses taking place. They appealed to the highest levels of government in Khartoum. They presented documented cases of violations, with no response. In at least one case, the Sudanese government warned the Darfurian representative to stop his appeals.

Id. at 26. Jan Pronk, the U.N. Secretary-General's Special Representative for Sudan stated: "'Those responsible for atrocious crimes on a massive scale go unpunished. . . . The government has not stopped them.'" *Sudan Rejects Calls for International Trials on Darfur*, SUDAN TRIB., Feb. 8, 2005, http://www.sudantribune.com/article.php3?id_article=7913; *see also* HUMAN RIGHTS WATCH, *supra* note 147, at 1 ("To date, the Sudanese government has neither improved security for civilians nor ended the impunity enjoyed by its own officials and allied militia leaders.").

159 Judy Aita, Brutal Attacks Still Occurring in Darfur, United Nations Reports, http://usinfo.state.gov/af/Archive/2005/May/17-385311.html (last updated May 12, 2005).

160 Eric Reeves, *Darfur Mortality Update: April 30, 2005*, SUDAN TRIB., May 1, 2005, http://www.sudantribune.com/article.php3?id_astitle=9364.

161 Eric Reeves, *Darfur and the Completion of the Naivasha Negotiating (II)*, SUDAN TRIB., Jan. 15, 2005, http://www.sudantribune.com/article.php3?id_article=7566.

162 Amnesty Int'l, *supra* note 152, at 26 (quoting Jan Egeland, Emergency Relief Coordinator, United Nations (July 1, 2004)).

163 S.C. Res. 1556, *supra* note 11, ¶ 7.

164 *See* Amnesty Int'l, *supra* note 152, at 38. The Amnesty report additionally notes that "[o]il now accounts for more than 11% of Sudan's Gross Domestic Product (GDP)." *Id.* at 39. Furthermore, the report noted: "Sudan's oil wealth has played a major part in enabling an otherwise poor country to fund the expensive bombers, helicopters and arms supplies which have allowed the Sudanese government to launch aerial attacks on towns and villages

the Janjaweed are so well supplied that the majority of them have five or six guns per person.[165]

But in Sudan, it is virtually impossible for an average citizen to lawfully acquire and possess the means for self-defense. According to the national gun control statutes,[166] a gun licensee must be over thirty-years-old, must have a specified social and economic status, and must be examined physically by a doctor. Females have even more difficulty meeting these requirements because of social and occupational limitations.

When these restrictions are finally overcome, there are additional restrictions on the amount of ammunition one may possess, making it nearly impossible for a law-abiding gun owner to achieve proficiency with firearms. A handgun owner, for example, can only purchase fifteen rounds of ammunition a year. The penalties for violation of Sudan's firearms laws are severe, and can include capital punishment.[167]

International gun control groups complain that Sudan's gun laws are not strict enough—but the real problem with the laws is that they have been—and are—enforced arbitrarily. A U.S. Department of State document stated: "After President Bashir seized power in 1989, the new government disarmed non-Arab ethnic groups but allowed politically loyal Arab allies to keep their weapons."[168] Meanwhile, there are many reports that the Arab militia have been armed and supplied by the government in Khartoum.[169]

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and fund militias to fight its proxy war." *Id.*

165 *Id.* at 27.

166 *See generally* CATHERINE FLEW & ANGUS URQUHART, STRENGTHENING SMALL ARMS CONTROLS: AN AUDIT OF SMALL ARMS CONTROL IN THE GREAT LAKES REGION AND THE HORN OF AFRICA 48 (2004), *available at* http://www.saferworld.org.uk/images/pubdocs/Horn%20Sudan.pdf (surveying regional gun control laws).

167 *See id.* at 16–28.

168 U.S. DEP'T OF STATE, *supra* note 149. Peter Verney, editor of London-based Sudan Update, describes "the government policy of selectively arming tribesmen while removing the weapons of the farmers, the Fur, Masalit and Zaghawa." Peter Verney, *Darfur's Manmade Disaster*, MIDDLE E. REP. ONLINE, July 22, 2004, http://www.merip.org/mero/mero072204.html. Moreover, "since 2001, Darfur has been governed under central government decree, with special courts to try people suspected of illegal possession or smuggling of weapons, murder and armed robbery. The security forces have misused these powers for arbitrary and indefinite detention." *Id.*; *see also* Amnesty Int'l, *supra* note 152, at 7 ("Special Courts set up under a state of emergency declared in Darfur in 2001 . . . have been handing down summary justice after flagrantly unfair trials.").

169 *See generally* Amnesty Int'l, *supra* note 152; *see also* PROJECT PLOUGHSHARES, ARMED CONFLICTS REPORT: SUDAN-DARFUR (2004), http://www.ploughshares.ca/libraries/ACRText/ACR-SudanDarfur.htm ("The Jajaweed and other Arab militias are alleged to have been armed by the Sudanese government, previously in order to fight against the Sudan People's Liberation Army (SPLA), and recently to

After a village has been softened up by government air bombardment, the Janjaweed enter and pillage, killing and raping in order to displace the population and steal the land.[170] The victim villagers are generally unarmed.[171]

Amnesty International reported the testimony of a villager who complained: "'[N]one of us had arms and we were not able to resist the attack.'"[172] One under-armed villager lamented: "'I tried to take my spear to protect my family, but they threatened me with a gun, so I stopped. The six Arabs then raped my daughter in front of me, my wife and my other children.'"[173]

In cases when the villagers were able to resist, the cost to the marauders rose: Human Rights Watch reported that "some of Kudun's residents mobilized to protect themselves, and fifteen of the attackers were reportedly killed."[174]

The Pittsburgh *Tribune-Review* asked a U.S. State Department official why there were no reports of the Darfur victims fighting back.[175] "Some do defend themselves," he explained.[176] But he added that the perpetrators have helicopters and automatic rifles, whereas the victims have only machetes.[177]

A teenage girl with a gun might not be the ideal soldier. But she is certainly not the ideal rape victim. It is not particularly difficult to learn how to use a firearm to shoot a would-be rapist from a distance of fifteen or twenty-five feet away. With an AK-47 type rifle, which is plentiful in

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engage non-Arab populations in Darfur."); Verney, *supra* note 168 ("One directive from February 2004, evoking the authority of President Omar Bashir, calls upon Darfur security heads to step up 'the process of mobilizing loyalist tribes and providing them with sufficient armory to secure the areas.'").

170 *See* HUMAN RIGHTS WATCH, *supra* note 147, at 22 (recommending that the Government of Sudan "[c]learly and unequivocally state that no one is entitled to retain or use any land illegally acquired during the conflict. A temporary measure interdicting any permanent land transfers should also be put in place"). *See generally*, Amnesty Int'l, *Sudan: Darfur: Rape as a Weapon of War—Sexual Violence and its Consequences*, AI Index, AFR 54/076/2004, July 19, 2004, *available at*, http://web.amnesty.org/library/pdf/AFR540762004ENGLISH/$File/AFR5407604.pdf.

171 *See* Amnesty Int'l, *supra* note 152, at 27.

172 *Id*.

173 *Id*. at 30.

174 *See* HUMAN RIGHTS WATCH, *supra* note 147, at 8.

175 Dimitri Vassilaros, *Gun Control's Best Friend*, PITTSBURGH LIVE.COM, Apr. 1, 2005, http://pittsburghlive.com/x/tribune-review/opinion/columnists/vassilaros/s_319251.html (quoting Bill Garvelink, Acting Assistant Administrator of the Bureau for Democracy, Conflict, and Humanitarian Development, part of the U.S. Agency for International Development).

176 *Id.*

177 *Id.*

some areas of the Third World, self-defense would be quite easy. Would every one of the Janjaweed Arab bullies who enjoy raping African girls be brave enough to dare trying to rape a girl who was carrying a rifle or a handgun?

The *Tribune Review* asked an Amnesty International representative, Trish Katyoka, whether the Darfur victims should be armed.[178] Her response is worth analyzing sentence by sentence.

She began: "'We at Amnesty International are not going to condone escalation of the flow of arms to the region.'"[179] The answer is not surprising. In the last decade, Amnesty International has become a leading worldwide advocate for total gun prohibition—a stance seemingly at odds with its declared policy of opposing government abuses of human rights.[180]

"'You are empowering (the victims) to create an element of retaliation.'"[181] The answer shows a serious confusion about self-defense. "Retaliation" is taking revenge for a misdeed after the fact. Self-defense is prevention of an imminent, unlawful, violent attack. Protecting a girl from an imminent gang rape has nothing to do with "retaliation."

"'Whenever you create a sword-fight by letting the poor people fight back and give them arms, it creates an added element of complexity. You do not know what the results will be.'"[182] Ms. Katyoka's statement was entirely accurate. A situation in which the victim and the attacker both have arms is much more complex than a situation in which the attacker is armed and the victim is helpless. In the latter, uncomplex situation, the result is easy to predict. In Sudan, it is easy to predict continued genocide in excess of ten thousand murders a month[183]—or over three hundred per day—and innumerable mass rapes.

When the attacker faces a risk of being killed by his intended victim, the attacker faces a much more complicated situation. He must balance his potential pleasure of murder and rape against his potential risk of death or injury. Sometimes, the attacker may decide that even a fairly small risk of death outweighs the momentary pleasures of murder and rape.

She summarized: "'Fighting fire with fire is not the solution to

178 *Id.* (quoting Trish Katyoka, Director of Africa Advocacy, Amnesty International).

179 *Id.*

180 Amnesty International is a member of the International Action Network on Small Arms (IANSA), which is the consortium of international gun prohibition organizations. Amnesty International even has a special website dedicated to arms prohibition. *See* Amnesty Int'l et al., Control Arms, http://www.controlarms.org (last visited Mar. 5, 2006).

181 Vassilaros, *supra* note 175.

182 *Id.*

183 *See supra* text accompanying notes 159–61; *see also* Bureau of Intelligence & Research, U.S. Dep't of State, Sudan: Death Toll in Darfur (March 25, 2005), www.state.gov/s/inr/rls/fs/2005/45105.htm (providing various monthly estimates).

genocide. It is a dangerous proposition to arm the minorities to fight back.'"[184] Generic platitudes should rarely be dispositive when considering a life or death question. Besides, "fighting fire with fire" is an excellent strategy. When a large outdoor area is burning, fire-fighters create a firebreak. They do so by burning a strip of land that lies in the path of the advancing wildfire. When the wildfire reaches the burnt firebreak, there is no fuel left for the wildfire to burn, so the wildfire cannot advance, and eventually burns itself out, unable to advance beyond the firebreak.

Similarly, it is common to fight firearms with firearms. That is why almost all governments issue firearms to police officers, so they may fight criminals who have firearms.

To allow minorities to fight back against the perpetrators of genocide is undoubtedly "dangerous" to the perpetrators. But not fighting back against genocide perpetrators can be extremely dangerous to the targeted group. Making the situation more dangerous for the perpetrators would tend to increase the possibility that some victims might be saved.[185] Because genocide perpetrators have no moral or legal right to nondangerous working conditions, the balance of equities favors arming of victims.

Amnesty International's proposed alternatives to arming the victims are two-fold: First, the organization hopes that the United Nations does something.[186] Given that the United Nations has *never* ever stopped any of the many genocides that have taken place during the organization's six-decade history, telling the genocide victims to wait passively until the United Nations rescues them is shockingly foolish and callous. The victims would be better off praying for a meteor to strike Khartoum—since human history does at least record occasional instances of large meteor strikes, whereas the historical record is bereft of any instance of meaningful U.N. action against genocide in progress.

Amnesty International's other hope is for the prosecution of Sudanese leadership in the International Criminal Court.[187] On March 31, 2005, the

184 Vassilaros, *supra* note 175.

185 The particular results will depend on the facts of the given situation, so it is impossible to make absolute predictions about what would happen. It is possible that in a slow-motion genocide, victim resistance might provoke the perpetrators to speed up the killing. In other situations, such as Europe in 1944, the killings were already proceeding as fast as possible. Some victim populations might prefer to endure a slow genocide, in the hope that some outside power would eventually rescue them. Other victims might prefer to fight for their lives. The victims, not the perpetrators, should be the ones who decide what type of resistance is appropriate.

186 Vassilaros, *supra* note 175.

187 *Id.*

U.N. Security Council referred the Sudanese situation to the prosecutors of the International Criminal Court.[188] The Genocide Convention requires signatory states to "punish" genocide.[189] It is possible that prosecution of genocide perpetrators from Nazi Germany, Serbia, and Rwanda may have deterred some other genocides. Prosecution of the Sudanese genocide perpetrators would also be a good thing. But the hope of prosecution at some time in the future is not saving the victims who are being killed right now. Post-hoc prosecution of a murderer is not an adequate substitute for attempting to save the victim's life before the murder is accomplished. The threat of prosecution by the International Criminal Court has apparently not dissuaded the Sudanese government from its current policy of genocide.

The historical record shows that, almost without exception, genocide is preceded by a very careful government program that disarms the future victims. Genocide is almost never attempted against an armed population. Armenia, Rwanda, Bosnia, China, Guatemala, Cambodia, Uganda, the Soviet Union, and Nazi Europe are among the places where genocidal tyrants made very sure that the victim populations were disarmed; only after disarmament did genocide begin.[190]

Conversely, when genocide victims can obtain arms, the genocidal government's work becomes much more difficult. For example, the Nazis had to spend more time subduing the Warsaw Ghetto than they did conquering the entire nations of Poland or France.[191] As Holocaust historian Abram L. Sachar wrote: "The indispensable need, of course, was arms. As soon as some Jews, even in the camps themselves, obtained possession of a weapon, however pathetically inadequate—a rifle, a knife, an ax, a sewer cover, a homemade bomb—they used it and often took Nazis with them to death."[192]

In 1967, the International Society for the Prevention of Crime held a

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188 *See* Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Court., U.N. Doc. SC/8351 (Mar. 31, 2005).

189 Genocide Convention, *supra* note 4, art 1.

190 *See generally* AARON ZELMAN & RICHARD W. STEVENS, DEATH BY "GUN CONTROL": THE HUMAN COST OF VICTIM DISARMAMENT (2001).

191 Poland only took eighteen days. The Germans chanted *Es klingt wei eine Sage—Polen in achtzen Tage!* (It sounds like a legend—Poland in eighteen days!). CHAIKA GROSSMAN, THE UNDERGROUND ARMY: FIGHTERS OF BIALYSTOK GHETTO 3 (Shmuel Beeri trans., 1987) (1965). Of course there are many differences between Warsaw and the French/Polish campaigns. The national campaigns involved more fighters on both sides. And while the Warsaw uprising upset the Nazis, there was not a compelling military need for the Nazis to finish off the ghetto as fast as possible. Nevertheless, it is worth noting that Poland and France both fell unexpectedly quickly, whereas the Warsaw ghetto resisted much longer than its enemies had thought possible.

192 ABRAM L. SACHAR, THE REDEMPTION OF THE UNWANTED: FROM THE LIBERATION OF THE DEATH CAMPS TO THE FOUNDING OF ISRAEL 47–48 (1983).

Congress in Paris on the prevention of genocide. The Congress concluded that

> defensive measures are the most effective means for the prevention of genocide. Not all aggression is criminal. A defense reaction is for the human race what the wind is for navigation—the result depends on the direction. The most moral violence is that used in legitimate self-defense, the most sacred judicial institution.[193]

If the Darfuris in the refugee camps possessed simple firearms, the refugees would hardly be able to march on Khartoum and overthrow the government. But the refugees would be able to drive off the Janjaweed who come to a camp for plunder, murder, and rape. Similarly, the refugees would be able to leave the camp in order to search for firewood. If every family in Darfur were armed, perhaps some groups of families would be able to return to the villages and farms from which they were recently driven by Khartoum's ethnic cleansing.

V. THE RIGHT OF GENOCIDE VICTIMS TO POSSESS DEFENSIVE ARMS

A. The Genocide Convention

The Sudanese government has not, in general, attempted to interfere with the sovereignty of other nations. Thus, in a world in which "sovereignty" reigns supreme in international law, the Sudanese dictatorship claims that it should be left alone to do as it wishes to the people of Darfur.[194]

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193 V.V. Stanciu, *Reflections on the Congress for the Prevention of Genocide*, *in* 7 YAD VASHEM STUDIES ON THE EUROPEAN JEWISH CATASTROPHE AND RESISTANCE 185, 187 (Livia Rothkirchen ed., 1968).

194 Elsewhere, it has been argued that sovereignty inheres in the people, and, by derivation, in governments which rule by the consent of the people. Although tyrannical regimes are often treated by other States as if the tyrant were a sovereign ruler, a "government" without consent is not truly a government; it is nothing more than a successful form of organized crime. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("That to secure these rights, Governments are instituted among men, deriving their just powers from the consent of the governed."); *see also* David B. Kopel, Paul Gallant & Joanne D. Eisen, *Firearms Possession by "Non-State Actors": The Question of Sovereignty*, 8 TEX. REV. L. & POL. 373 (2004); A.P.V. Rogers, *Humanitarian Intervention and International Law*, 27 HARV. J.L. & PUB. POL'Y 725, 733 (2004) ("[A] completely unique and distinct legal argument . . . posits that authority to govern must be based on the will of the people . . . when a government does not have the support of the population . . . such government has no power to represent that population . . . ."). In this Article, we do not press the sovereignty question further, because it is unnecessary. The Genocide Convention itself is a limited waiver of sovereignty and it obliges signatory states to disregard another nation's sovereignty when necessary to halt genocide.

However, the present Sudanese government has voluntarily surrendered a portion of its sovereignty. On October 13, 2003, Sudan ratified the Convention on the Prevention and Punishment of the Crime of Genocide.[195] The Convention became legally binding on the Sudanese government on January 11, 2004.[196]

The Convention states: "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."[197] Neither the text of the Genocide Convention nor the drafting history provide guidance about the scope of the legal obligation to prevent genocide.[198] However, international law is clear that the duty to prevent is real, and is entirely distinct from the duty to punish.[199]

The Genocide Convention prohibits more than the direct killing of humans. Other actions—if undertaken with genocidal intent—can constitute genocide. For example, rape would not normally be genocide, but if a political or military commander promoted the widespread rape of a civilian population—with the intent of preventing normal reproduction by that population—then the pattern of rape could constitute genocide.[200]

Similarly, many governments do not provide their citizens with minimal food rations or medical care. Such omissions are not genocide. On the other hand, if a government eliminated food rations to a particular group but not to other groups, and the change in rations policy was undertaken with the intent of exterminating the particular group by starvation, then the government's termination of food aid could constitute genocide.[201]

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195 Genocide Convention, *supra* note 4.

196 Prevent Genocide Int'l, Information on the Genocide Convention, http://www.preventgenocide.org/law/convention/index.htm#ratifications (last visited Feb. 3, 2006).

197 Genocide Convention, *supra* note 4, art. 1 (emphasis added). The affirmative duty is consistent with the long-established duty in the Napoleonic tradition for an individual to act to rescue another person in danger. *See* SCHABAS, *supra* note 49, at 171 (citing C. PÉN. art. 434-1).

198 SCHABAS, *supra* note 49, at 72. Article 5 requires states to enact legislation to enforce the Convention. Genocide Convention, *supra* note 4, art. 5. States are clearly obliged to enact criminal laws against genocide, and to take additional steps, but the scope of those additional steps is uncertain. SCHABAS, *supra* note 49, at 74–75.

199 *See, e.g.*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo. (Serb. & Mont.)), 2001 I.C.J. 572 (Sept. 10); Application of the Convention of the Crime of Genocide (Bos. & Herz. v. Yugo. (Serb. & Mont.)), 1993 I.C.J. 325, 443–44 (Sept. 13) (separate opinion of Judge Lauterpacht).

200 Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment 2, ¶ 731 (Sept. 2, 1998).

201 SCHABAS, *supra* note 49, at 170–71 (citing United States of America v. von Weizaecker (The Ministeries Case), 14 T.W.C. 314, 557–58 (1948)) (explaining that

Similarly, under normal conditions, governments have extensive authority over arms possession within their borders. But to the extent that a government enacted or applied arms control laws for the purpose of facilitating genocide, then the government's actions would constitute genocide.[202]

B. The Universal Declaration of Human Rights and Other Human Rights Instruments

Another international law source of the right to resist genocide is the Universal Declaration of Human Rights, which was adopted by the United Nations in 1948.[203] The Universal Declaration never explicitly mentions "genocide," but a right to resist genocide is an inescapable implication of the rights which the Declaration does affirm.

First, the Declaration affirms the right to life.[204] Of course the right to life is recognized not just by the Universal Declaration, but also by several other international human rights instruments.[205]

Second, the Declaration affirms the right to personal security.[206] The right of self-defense is implicit in the right of personal security, and is explicitly recognized by, inter alia, the European Convention on Human Rights[207] and by the International Criminal Court.[208]

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government cuts in special food rations applied only to Jews, and not to general German population, but cuts were not a form of genocide, because they were not so severe as to cause sickness or death).

202 Notably, the Genocide Convention abrogates the Head of State immunity which applies in most other applications of international law. Genocide Convention, *supra* note 4, art. 4; Att'y Gen. of Israel v. Eichmann, 36 I.L.R. 5, 44–48 (D.C. Jer., 1961), *aff'd*, 36 I.L.R. 277 (S. Ct. Isr. 1962); Att'y Gen. of Israel v. Eichmann, 36 I.L.R. 277, 308–12; Prosecutor v. Blaskic, Case No. IT-95-14-AR108*bis*, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of July 18, 1997, ¶ 41 (Oct. 29, 1997); SCHABAS, *supra* note 49, at 316. Given that the Genocide Convention explicitly abrogates one of the most well established principles of general international law, it would hardly be surprising that the Convention also abrogates, by implication, some forms of ordinary internal state authority, such as the power to set standards for food rations, medical rations, or arms possession.

203 Universal Declaration, *supra* note 3.

204 *Id.* art. 3.

205 *Id.*; *see also* Organization of American States, American Convention on Human Rights art. 4, Nov. 22, 1969, 1144 U.N.T.S. 123; International Covenant on Civil and Political Rights art. 6, *opened for signature* Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171; Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Nov. 4, 1950, 213 U.N.T.S. 221, art. 2.

206 Universal Declaration, *supra* note 3, art. 3.

207 European Convention on Human Rights art. 2(2), Nov. 4, 1950, 213 U.N.T.S. 221; Gilbert Guillaume, *Article 2*, *in* LOUIS-EDMOND PETTITI, EMMANUEL DECAUX & PIERRE-HENRI IMBERT, LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME: COMMENTAIRE

The preamble of the Universal Declaration of Human Rights recognizes a right of rebellion as a last resort: "Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law . . . ."[209] The *travaux* (drafting history) of the Universal Declaration clearly show that the preamble was explicitly intended to recognize a preexisting human right to revolution against tyranny.[210]

Finally, Article 8 of the Universal Declaration states that "[e]veryone has the right to an effective remedy."[211] The Universal Declaration therefore comports with the long-established common law rule that there can be no right without a remedy.[212]

Thus, the Declaration recognizes that when a government destroys human rights and all other remedies have failed, the people are "compelled to have recourse, as a last resort, to rebellion against tyranny and oppression."[213] Because "[e]veryone has the right to an effective remedy," the people necessarily have the right to possess and use arms to resist tyranny, if arms use is the only remaining "effective remedy."[214]

ARTICLE PAR ARTICLE 152 (Paris, Economica, 2d ed. 1999); *see also* M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL 109–10 (Boston, Martinus Nijhoff 1987) (right to self-defense recognized in model code written by leading scholar of international criminal and human rights law, who serves as President of the International Human Rights Law Institute, as President of the International Institute of Higher Studies in Criminal Sciences, and who served as President of the International Association of Penal Law).

208 Rome Statute of the International Criminal Court art. 31, July 17, 1998, 2187 U.N.T.S. 90.

209 Universal Declaration, *supra* note 3, pmbl.

210 JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING & INTENT 307–12 (1999).

211 Universal Declaration, *supra* note 3, art. 8.

212 *Cf.* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 392 (1971) ("'[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts would be alert to adjust their remedies so as to grant the necessary relief.'" (quoting Bell v. Hood, 327 U.S. 648, 684 (1946)).

213 Universal Declaration, *supra* note 3, pmbl.

214 The rights in the Declaration's Articles 1 through 3, including the right to armed self-defense as a last-resort defense of other rights, clearly belong to individuals:

> *Article 1*. All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.
>
> *Article 2*. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any

In international law, a "Declaration" does not directly have a binding legal effect, although it may be used as evidence of customary international law. For example, the Statute of the International Court of Justice gives the court authority to apply

> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> (b) international custom, as evidence of a general practice accepted as law;
>
> (c) the general principles of law recognized by civilized nations;
>
> (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[215]

Thus, the Universal Declaration of Human Rights would not be applied under subsection (a), because the Declaration does not, by its own terms, create legally-enforceable international law. However, a court could apply some or all of the Universal Declaration pursuant to subsections (b) or (c)—"international custom" or "general principles of law recognized by civilized nations."

The Anglo-American legal tradition supports the right to armed resistance among the "general principles of law recognized by civilized nations." For example, the United States Supreme Court noted that the right to arms, like the right to peaceably assemble, is not created by positive law,[216] but rather derives "'from those laws whose authority is acknowledged by civilized man throughout the world.' It is found wherever civilization exists."[217]

William Blackstone's *Commentaries* on the common law is by far the most influential legal treatise ever published. Published in 1765, Blackstone's treatise was regarded as the foundation of the common law throughout the English-speaking world, and in the one-third of the globe

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other limitation of sovereignty.

Article 3. Everyone has the right to life, liberty and security of person.

Id. arts. 1–3.

215 Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993. "Publicists" in the statute means legal scholars and commentators.

216 United States v. Cruikshank, 92 U.S. 542, 551–53 (1875).

217 *Id.* at 551 (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824)). The "civilized man" quote comes from the Court's discussion of the right to assemble; the right to arms discussion follows immediately, and adopts the same reasoning as the right to assembly analysis. For a more detailed analysis of *Cruikshank*, see David B. Kopel, *The Supreme Court's Thirty-five Other Second Amendment Cases*, 18 ST. LOUIS. U. PUB. L. REV. 99, 176–78 (1999).

where British law ruled. The *Commentaries* is part of the common-law heritage of any present or former British colony or member of the Commonwealth of Nations.

In the explanation of human rights under the common law, Blackstone first described the three primary rights: personal security, personal liberty, and private property.[218] He then explained the five "auxiliary rights" which protected the primary rights:

> The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence, suitable to their condition and degree, and such as are allowed by law . . . and is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.[219]

C. Jus Cogens

Under international law, some laws are accorded the status of *jus cogens*, which means that in case of conflict, they override other laws.[220] Many commentators agree that the duty to prevent genocide must be considered *jus cogens*.[221] Indeed, it would be difficult to articulate a more

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218 WILLIAM BLACKSTONE, 1 COMMENTARIES *130–40.

219 *Id.* at *143–44.

220 A *jus cogens* norm is "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of international law having the same character." Vienna Convention on the Law of Treaties art. 53, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331; *see also* BLACK'S LAW DICTIONARY 864 (8th ed. 2004) (defining *jus cogens* as "[a] mandatory or peremptory norm of general international law accepted and recognized by the international community as a norm from which no derogation is permitted"); M. Cherif Bassiouni, *International Crimes:* Jus Cogens *and* Obligatio Erga Omnes, 59 L. & CONTEMP. PROBS., Autumn 1996, 63 (1996); Gordon A. Christenson, Jus Cogens*: Guarding Interests Fundamental to International Society*, 28 VA. J. INT'L L. 585 (1988); Karen Parker & Lyn Beth Neylon, Jus Cogens: *Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411 (1989).

221 *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. 6 (1987) (explaining that an international agreement that encourages, practices, or condones genocide is void under *jus cogens* principles); SCHABAS, *supra* note 49, at 500–01 (citing various sources, including M.N. Shaw, *Genocide and International Law*, *in* INTERNATIONAL LAW AT A TIME OF PERPLEXITY 797, 800 (Yoram Dinstein ed., 1989)); Louis René Beres, *After the Gulf War: Prosecuting Iraqi Crimes Under the Rule of Law*, 24 VAND. J. TRANSNAT'L L. 487, 490–91 (1990); Amnesty Int'l, United States of America: A Killing that No Respectable Government Can Condone, AI Index AMR 51/033/2003, Mar. 4, 2003 ("The Inter-American Commission on Human Rights, for example, recently stated that norms of *jus cogens* derive 'their status from fundamental values held by the international community, as violations of such peremptory norms are considered to shock the conscience of humankind and therefore bind the international community as a whole,

fundamental principle than the prevention of genocide.

It bears noting that the father of the principle which was eventually named *jus cogens* was Francisco Suárez, a scholar and Jesuit who is recognized as a founder of modern international law.[222] Suárez's views are, therefore, highly significant regarding which human rights should be considered so fundamental as to be *jus cogens*.

The record is clear that Suárez strongly believed in a natural human right of self-defense.[223] Self-defense, said Suárez, was "'the greatest of rights,'" a right which belonged to individuals and to communities.[224] This right of self-defense included a right of defense against tyrants.[225]

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irrespective of protest, recognition or acquiescence.' The Commission noted that commonly cited examples of rules of customary law that have attained the status of jus cogens norms include the prohibitions on genocide and slavery." (quoting Domingues v. United States, Case 12.285, Inter-Am. C.H.R., Rep. No. 62/02 (2002)), *available at* http://web.amnesty.org/library/pdf/AMR510332003ENGLISH/$File/AMR5103303.pdf)).

222 TIERNEY, *supra* note 130, at 301; Mark Toufayan, *The World Court's Distress When Facing Genocide: A Critical Commentary on the* Application of the Genocide Convention Case (Bosnia & Herzegovina v. Yugoslavia (Serbia and Montenegro), 40 TEX. INT'L L.J. 233 (2005).

223 One of the important issues of the day was the ownership of property by Franciscan monks, the Order founded by St. Francis of Assisi. Franciscans renounced all property. So if a person saw a Franciscan using a pen and paper to write an essay, would the person commit injustice if he took away the Franciscan's paper and pen—since the Franciscans did not have "ownership" of anything? Suárez explained the error of such thinking. Even without owning property, Franciscan monks had a natural right of self-defense of their own bodies, and a correlative natural right to defend the things they used. TIERNEY, *supra* note 130, at 308 (citing Fransisco Suárez, *De Statu Perfectionis*, *in* XV OPERA OMNIA (Paris 1859)). The Scholastics agreed that people were born free. Hence, submission to government was based only on consent. In book four of the multi-volume *De Legibus ac Deo Legislatore*, Suárez argued that a prince had just power only if the power was bestowed by the people. *Id.*

224 *Id.* at 314.

225 *Id.* The last of Suárez's books was *De Defensio Fidei Catholicae Adversus Anglicanae Sectae Errores*, published in 1613. He directly challenged the English King James I's assertion of divine right. *Id. De Defensio* was publicly burned in London in 1614. *Id.* Suárez's analysis of the right of revolution was so powerful that the Catholic *Parlement* in Paris burned the book the same year. *Id.* According to *De Defensio*, in the case of a pure usurper—a tyrant without title—a private person could kill the tyrant. The individual would not be usurping the role of the government. Rather he would be participating in the defense of the community, pursuant to the God-given power to defend innocents. *Id.* (citing Francisco Suárez, *Defensio Fidei Cathiolicae*, *in* OPERA OMNIA (Paris 1859); Francisco Suarez, *De Charitate*, *in* OPERA OMNIA (Paris 1859)). If a legitimate king made actual war upon his own people, then individuals would have a similar right to resist.

What if a legitimate king ruled tyrannically, but without constant violence against the people? Then, an individual could resist only to defend his own life. Any other resistance would have to await the community's decision to exercise its own natural right of self-defense, and to enforce the king's contractual obligation to govern "politically not

According to the great British historian Lord Acton, "the greater part of the political ideas" of John Milton and John Locke "may be found in the ponderous Latin of Jesuits who were subjects of the Spanish Crown," including Suárez.[226]

Thus, it seems apparent that the prevention of genocide is a *jus cogens* norm. Moreover, the roots of the *jus cogens* principle necessarily implicate a natural right of self-defense against genocide.

Accordingly, the legal duty to prevent genocide would be superior to whatever limits the U.N. Charter sets on military action which is not authorized by the Security Council. Similarly, the legal duty to prevent genocide would be superior to treaties or conventions restricting the transfer or possession of arms.

D. Application of the Genocide Convention Against Arms Control: The Case of Bosnia

Since the Genocide Convention came into force half a century ago, there has been very little exposition of the meaning of the Convention's affirmative duty on signatory states "to prevent" genocide. Perhaps not entirely by coincidence, very little has actually been done to stop ongoing genocides in the last half century.

The first legal analysis of the prevention duty came from the dissenting judges in a 1951 advisory opinion by the International Court of Justice, in which the Court made a nonbinding ruling on whether the "reservations" which some states attached to their ratification of the Genocide Convention were legally effective.[227] The dissenting judges' words have often been quoted by human rights activists: "[T]he enormity of the crime of genocide can hardly be exaggerated, and any treaty for its repression deserves the most generous interpretation."[228]

The first, and so far only, contested case involving the scope of the duty to prevent genocide was *Bosnia v. Yugoslavia*, in which an opinion by Judge Lauterpacht squarely faced the duty to prevent issue.[229]

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tyrannically." A "public council" could assemble and authorize forceful removal of the tyrant. *Id.* at 314; Howell A. Lloyd, *Constitutionalism*, *in* THE CAMBRIDGE HISTORY OF POLITICAL THOUGHT 1450–1700, at 254, 295 (J.H. Burns ed., 1991).

226 Alejandro A. Chafuen, *Liberty, Right, and Nature: Individual Rights in Scholastic Thought*, 3 J. MARKETS & MORALITY 127 (2000) (book review), *available at* http://acton.org/publicat/m_and_m/2000_Spring/pdf/mm-v3nl-bookreviews.pdf.

227 Reservations of the Convention on the Punishment and Prevention of Genocide, Advisory Opinion, 1951 I.C.J. 15, 47 (May 28) (Guerrero, McNair, Read, & Hsu Mo, JJ., dissenting).

228 *Id.*

229 Application of the Convention of the Crime of Genocide (Bos. & Herz. v. Yugo. (Serb. & Mont.)), 1993 I.C.J. 325, 407–48 (Sept. 13) (separate opinion of Judge

Yugoslavia had been created by the Treaty of Versailles in 1919,[230] and until the country broke up in 1991, it was the largest nation on the Balkan peninsula.

Yugoslavia was turned into a Communist dictatorship in 1945 by Marshal Tito. When Tito died in 1980, his successors feared civil war, so a system was instituted according to which the collective leadership of government and party offices would be rotated annually. But the new government foundered, and in 1989, Serbian president Milosevic began re-imposing Serb and Communist hegemony. Slovenia and Croatia declared independence in June 1991.[231]

Slovenia repelled the Yugoslav army in ten days, but fighting in Croatia continued until December, with the Yugoslav government retaining control of about a third of Croatia. Halfway through the Croat-Yugoslav war, the U.N. Security Council adopted Resolution 713, calling for "a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia" (meaning rump Yugoslavia, plus Croatia and Slovenia).[232]

It was universally understood that the Serbs were in control of most of the Yugoslavian army's weaponry, and that the embargo therefore left them in a position of military superiority. Conversely, even though the embargo was regularly breached, it left non-Serbs vulnerable. The United Nations had, in effect, deprived the incipient countries of the right to self-defense, a right guaranteed under Article 51 of the U.N. Charter.

Macedonia seceded peacefully from Yugoslavia in early 1992, but Bosnia-Herzegovina's secession quickly led to a three-way civil war between Bosnian Muslims (Bosniacs), Serbs (who are Orthodox), and Croats (who are Roman Catholic). It was generally recognized that the Bosnian Serbs received substantial military support from what remained of old Yugoslavia (consisting of Serbia and Montenegro, and under the control of Slobodan Milosevic).[233]

Lauterpacht).

230 2 Bevans 43, *excerpts reprinted in* 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 417 (Leon Friedman ed., 1972) (1863).

231 *See* BUREAU OF EUROPEAN & EURASIAN AFFAIRS, U.S. DEP'T OF STATE, BACKGROUND NOTE: CROATIA (2005), *available at* http://www.state.gov/r/pa/ei/bgn/3166.htm; *see also* U.S. DEP'T OF STATE, BACKGROUND NOTE: SLOVENIA (Aug. 2005), *available at* http://www.state.gov/r/pa/ei/bgn/3407.htm.

232 S.C. Res. 713, ¶ 6, U.N. Doc. S/RES/713 (Sept. 25, 1991).

233 *See, e.g.*, The Secretary-General, *Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica*, ¶ 490, *delivered to the General Assembly*, U.N. Doc. A/54/549 (Nov. 15, 1999) [hereinafter *The Fall of Srebrenica Report*], *available at* http://www.haverford.edu/relg/sells/reports/UNsrebrenicareport.htm ("On 25 September 1991, when the fighting in Croatia was at its height, the Security Council adopted resolution 713 (1992) which decided that, 'All States shall, for purposes of

Security Council Resolution 713 now operated to make it illegal for the new Bosnian government to acquire arms to defend itself from Yugoslav aggression.

Bosnia sued Yugoslavia in the U.N. International Court of Justice.[234] In April 1993, the International Court of Justice ruled, with only one dissenter, that Yugoslavia was perpetrating genocide, and ordered it to stop.[235]

A few months later, Bosnia brought forward additional legal claims. Among the new claims was a request to have the U.N. embargo declared illegal, as a violation of the Genocide Convention. The majority of the International Court of Justice voted only to reaffirm portions of the April 1993 order; they stated that the court had no jurisdiction over the Security Council's embargo. The majority's ruling was not implausible, since the Security Council was not a party to the case.

Several judges who had voted in favor of the majority opinion also wrote separate opinions. One of the judges, Judge Elihu Lauterpacht, wrote a separate opinion which was the first international court opinion ever to address the legal scope of the Genocide Convention's affirmative duty "to prevent" genocide.

Judge Lauterpacht cited the findings of a Special Rapporteur about the effect of the arms embargo, and pointed to the "direct link . . . between the continuation of the arms embargo and the exposure of the Muslim population of Bosnia to genocidal activity at the hands of the Serbs."[236]

Normally, Security Council resolutions are unreviewable by the International Court of Justice. However, Judge Lauterpacht ruled that the

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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 . . . .' The resolution was adopted unanimously, though several observers noted at the time that the major effect of the embargo would be to freeze the military holdings of each of the parties—a move which would overwhelmingly benefit the Serbs, who were dominant both in the Yugoslav military and, to a lesser extent, in the arms industry."); *see also* SREBRENICA, supra note 59, pt. 1, ch. 2, § 9 ("It was furthermore a measure that Yugoslavia itself had requested. . . . This was not so strange, because the authorities in Belgrade themselves at that time only stood to gain from an embargo. They had considerable military stocks of what until recently had been one of the largest armies in Europe.").

234 For a history of the case, which has been before the International Court of Justice in various settings ever since 1993, see Press Release, Int'l Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Dec. 8, 2004), *available at* http://www.icj-cij.org/icjwww/ipresscom/ipress2004/ipresscom2004-37_bhy_20041208.htm.

235 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos. & Herz. v. Yugo. (Serb. & Mont.)), 1993 I.C.J. 325 (Sept. 13) (Requesting the Indication of Provisional Measures Order of Apr. 8).

236 *Id.* at 438 (separate opinion of Judge Lauterpacht).

prevention of genocide is *jus cogens*.[237] He concluded that the Security Council arms embargo became void once it made U.N. member-states "accessories to genocide."[238]

Formal repeal of the Security Council embargo was impossible, because Russia threatened to use its veto to prevent any action harmful to its client-state Serbia. However, Judge Lauterpacht's opinion stated that the U.N. embargo was already void as a matter of law, the moment it came into conflict with the Genocide Convention. Accordingly, Bosnia acted in accordance with international law when Bosnia subverted the U.N. arms embargo, by importing arms from Arab countries. The U.S. Clinton Administration, which winked at the Bosnian arms smuggling, was compliant with international law, even though the administration was subverting a Security Council resolution which purported to set a binding international rule.

VI. INTERNATIONAL LAW IMPLICATIONS

Decisions of the International Court of Justice are binding only on the parties to the case. So even if Judge Lauterpacht had written the majority opinion, rather than a concurring opinion, the opinion would not, ipso facto, create a binding international standard of law. Nevertheless, Judge Lauterpacht's opinion brings together several principles which seem difficult to deny:

- The Genocide Convention imposes an affirmative duty to prevent genocide.

- The Genocide Convention is *jus cogens*. (If the Genocide Convention is not so important as to be *jus cogens*, then hardly anything else could be.)

- Numerous international standards affirm a right of self-defense, including a right to self-defense against criminal governments perpetrating genocide.

- In some cases, a state's compliance with an otherwise-valid arms control law may bring the state into violation of Genocide Convention, if the arms control law facilitates genocide.

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237 *Id.* at 439–44.

238 *Id.* at 501. Malaysia was among the voices which argued that the Security Council's enforcement of the arms embargo against Bosnia and Herzegovina made the Council's members accomplices in genocide. Craig Scott et al., *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*, 16 MICH. J. INT'L L. 1 (1994).

> • Therefore, in the case of conflict between the arms control law and the Genocide Convention, every state and the United Nations, including their courts, is obligated to obey the Genocide Convention.

To see that the final principle is an inescapable standard of international law, one only need state the converse, which is self-evidently immoral and abhorrent: "An international or national court must always enforce arms prohibition laws, even if enforcement makes the court complicit in genocide."

The majority of the United Nations International Court of Justice was, understandably, reluctant to confront the United Nations Security Council by declaring a Security Council resolution to be unlawful. In this Article, though, we are not primarily concerned with whether the International Court of Justice will develop the institutional strength to confront illegal actions of the Security Council. Rather, our focus is on the standard of conduct for all persons, including domestic and international judges, who are concerned with obeying international human rights law, especially the Genocide Convention.

Let us now examine some particular applications of the international human right of genocide victim self-defense.

A. Sudanese Gun Controls

Sudan's national gun control laws are invalid, insofar as they are enforced to prevent the genocide victims of Darfur from obtaining firearms for lawful defense against genocide. The antigenocide rule does not affect the validity of Sudanese gun laws as applied in areas of the country, such as Khartoum, where no genocide is taking place.

The practical juridicial effect of our finding about the enforcement of Sudanese gun laws in Darfur is limited. After all, Sudanese enforcement of national gun control laws in Darfur tends to proceed mainly by killing people, not by putting them on trial.

Moreover, even if a Sudanese court did try a gun law prosecution, it would not be realistic to expect the Sudanese court to rule, in effect, "Sudan's gun laws, while prima facie valid, cannot presently be enforced against the people of Darfur who are trying to defend themselves against the genocide sponsored by the Sudanese government." A regime which perpetrates genocide is unlikely to tolerate an independent judiciary which would interfere with the genocide.

Acknowledgement that enforcement of the Sudanese gun laws against the people of Darfur is a violation of the Genocide Convention could, perhaps, be of significance to non-Sudanese government officials. For example, if a Sudanese national smuggled arms to the Darfur victims, and then took refuge in another country, that country's executive or judicial

officers might refuse to extradite the smuggler to Sudan. Notwithstanding an extradition treaty with Sudan, application of the extradition treaty, in the particular case of the antigenocide arms smuggler, would make the host country complicit in genocide.

B. The Sudanese Arms Embargo

As we have previously mentioned, the U.N. Security Council has imposed an arms embargo which prohibits the transfer of arms to the government of Sudan, the Janjaweed Arab militias, and the resistance movements in Darfur (the SLA and the JEM).[239]

The application of the embargo to the Darfur resistance is a violation of the Genocide Convention, for the same reasons that Judge Lauterpacht stated that application of the Security Council arms embargo to Bosnia was a violation of the Genocide Convention: a facially neutral arms control which leaves genocide victims helpless against genocide perpetrators is a violation of the Genocide Convention; enforcement of such an embargo makes the enforcer complicit in genocide.

Accordingly, no state has a legal obligation to interfere with the delivery of arms to the people of Darfur. To hinder their acquisition of arms would be to assist the genocide being perpetrated in Darfur.

C. Protocol Against the Illicit Manufacturing of and Trafficking in Firearms

In July 2005, the Protocol against the Illicit Manufacturing of and Trafficking in Firearms[240] became law, for the more than forty nations which have ratified the Protocol. Briefly stated, the Protocol requires that parties to the Protocol enact laws requiring that all firearms manufactured in the host country have a serial number and a manufacturer identification.[241] (The United States enacted a similar law decades ago.) Further, ratifying countries must keep registration records of firearms sales and owners, for the purpose of combating international arms smuggling.[242] However, at the behest of Communist China, which is a major international source of illegal firearms, firearms may be manufactured with no marking other than the country of origin. Because no serial number is required, China can maintain plausible deniability in its illegal supplying of new firearms to human rights violators.[243]

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239 S.C. Res. 1591, U.N. Doc. S/RES/1591 (Mar. 29, 2005).
240 Firearms Protocol, *supra* note 7.
241 *Id.* art 8, § 1(a).
242 *Id.* art. 7.
243 *Id.* art. 8, § 1(a).

For the same reason that Sudanese gun laws and the Security Council embargo cannot be enforced against the victims in Darfur, neither can the Protocol. Thus, if a defendant were charged in a national or international court with violating the Protocol, he should be allowed to raise an affirmative defense showing that he was supplying arms to genocide victims.

The affirmative defense would be consistent with the spirit of the Preamble to the Protocol, which recognizes "the inherent right to individual or collective self-defence" and "the principle of equal rights and self-determination of peoples."[244] However, even with the Preamble, the Protocol must yield to the Genocide Convention whenever the Protocol conflicts with the Convention. It is the prohibition of genocide, not the imposition of paperwork rules on arms transfer, that is the *jus cogens*, the expression of fundamental human rights.

D. Proposed Convention Prohibiting Transfer of Firearms to "Nonstate Actors"

In 2001, the United Nations held a convention on "small arms" which many people hoped would produce an international treaty restricting the possession and transfer of firearms.[245] No such treaty was produced, mainly because of adamant opposition from the American delegation. A new convention, with similar objectives, is scheduled to take place at the U.N. headquarters in June and July 2006.

Among the most sought objectives of the treaty advocates is an international prohibition on the transfer of firearms to "nonstate actors"—that is, to anyone not approved by government.[246] Should an international

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244 The Preamble to the Protocol reads:

> *Reaffirming* the inherent right to individual or collective self-defence recognized in Article 51 of the Charter of the United Nations, which implies that States also have the right to acquire arms with which to defend themselves, as well as the right of self-determination of all peoples, in particular peoples under colonial or other forms of alien domination or foreign occupation, and the importance of the effective realization of that right . . . .
>
> . . . .
>
> *Bearing in mind* the principle of equal rights and self-determination of peoples, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations . . . .

Id. pmbl.

245 *See* David Morton, *Gunning for the World*, FOREIGN POL'Y, Jan.–Feb. 2006.

246 *See generally* David B. Kopel, *In Their Own Words: Does Anything Need To Be Done To Control Transfers To (and Misuse of Weapons by) Non-state Actors? (e.g. Armed Groups and Insurgents)? If So, What?*, SMALL ARMS & HUM. SECURITY BULL., June 2004, at

treaty be created, it should include an explicit exemption to authorize supplying arms to genocide victims. Such an exception must exist, implicitly, because of the *jus cogens* status of the Genocide Convention. However, it would be clearer for the treaty to include an explicit exception. Indeed, any nation's delegation which refused to vote in favor of an exception for genocide victims would necessarily raise doubts about its own commitment to human rights.

E. The Nairobi Protocol

The United Nations has been promoting regional gun prohibition plans around the world. In the Great Lakes and Horn of Africa region, the prohibition plan is "The Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa."[247] The Protocol was signed on April 21, 2004, by representatives of eleven nations: Burundi, Democratic Republic of the Congo, Djibouti, Eritrea, Ethiopia, Kenya, Rwanda, Seychelles, Sudan, Uganda, and Tanzania. The Nairobi Protocol will become legally binding when it is ratified by two-thirds of the signatories.[248]

Of the signatories, only Eritrea (which won independence in 1991 in a revolutionary war against Ethiopia) has been democratic for at least half its existence as an independent nation. The majority of signatories of the Nairobi Protocol have witnessed genocide in their nations within the last several decades, including the current genocides being perpetrated in the

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6, *available at* http://www.hdcentre.org/datastore/Bul3-English.pdf.; David B. Kopel, Paul Gallant & Joanne D. Eisen, *supra* note 194.

247 Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa [hereinafter Nairobi Protocol], *available at* http://www.nbisecsalw.org/pdf/Nairobi%20Protocol.pdf; *see also* Ramazani Baya, Editorial, PROGRESS (Nairobi Secretariat on Small Arms et al., Nairobi, Kenya), June 2005, at 1, *available at* http://www.nbisecsalw.org/pdf/Progress%205%20%Eng%20final%20proof.pdf. Baya is the Minister of Foreign Affairs and International Cooperation for the Democratic Republic of the Congo.

A similar protocol is being promoted for the sixteen nations that comprise the Economic Community for West Africa (ECOWAS). Mali and Niger are among the West African nations where tribes such as the Tuareg have successfully taken up arms to defend themselves against the depredations of the kleptocracy based in the capital city. Accordingly, it is not surprising that preventing the public from possessing firearms would be a popular idea among the kleptocracies which rule most of West Africa. *See* David B. Kopel, Paul Gallant & Joanne D. Eisen, *Micro-Disarmament: The Consequences for Public Safety and Human Rights*, 73 UMKC L. Rev. 969 (2005); David B. Kopel, *United Nations Gives Tyranny a Hand*, NAT'L REV. ONLINE, Aug. 6, 2001, http://www.nationalreview.com/kopel/kopel080601.shtml.

248 Nairobi Protocol, *supra* note 247, art. 23.

Democratic Republic of the Congo (including Pygmies), Ethiopia, and Sudan. The genocidal and dictatorial governments of the regions, together with the nominally or actually democratic governments, promised in the Nairobi Protocol to incorporate in their national laws

> (i) the prohibition of unrestricted civilian possession of small arms;
>
> (ii) the total prohibition of civilian possession of . . . all light weapons and automatic and semi-automatic rifles and machine guns;
>
> (iii) the regulation and centralised registration of all civilian-owned small arms . . . ;
>
> . . . .
>
> (viii) provisions for effective control of small arms and light weapons including the storage and usage thereof, competency testing of prospective small arms owners and restrictions on owners' rights to relinquish control, use, and possession of small arms;
>
> . . . .
>
> (ix) the monitoring and auditing of licenses held in a person's possession, and the restriction on the number of small arms that may be owned . . . .[249]

The Protocol also requires "heavy minimum sentences for . . . the carrying of unlicensed small arms,"[250] as well as programs to encourage citizens to surrender their guns,[251] widespread searches for firearms, and educational programs to discourage gun ownership.[252] Although the Nairobi Protocol is restrictive, it not a complete prohibition on firearms. In contrast, the regional agreement which the United Nations is promoting in West Africa, for the Economic Council of West African States, calls for the total prohibition of firearms imports, except for firearms which governments buy for their own use.[253]

Regional antifirearms agreements, even if generally valid, cannot lawfully be enforced, if their enforcement would conflict with the Genocide Convention.

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249 *Id.* art. 3(c).

250 *Id.* art. 5(b)(i).

251 *Id.* art. 12.

252 *Id.* art. 13.

253 Declaration of a Moratorium on the Importation, Exportation, and Manufacture of Light Weapons in West Africa, Oct. 31, 1998, *available at* http://www.smallarmsnet.org/docs/saaf07.pdf.

F. The Precautionary Principle: The Right of Potential Genocide Victims To Possess Defensive Arms

In all of the above applications of the antigenocide rules—to national laws, to Security Council resolutions, and to international protocols or treaties—we have argued that the self-defense rule of the Genocide Convention takes precedence over other laws *only* when genocide is actually taking place. That is the status of the current international law, as embodied in Judge Lauterpacht's opinion in *Bosnia v. Yugoslavia*.[254]

We have also confined ourselves to cases of genocide in progress, because they are the easiest cases to see clearly. In this section, we explore the potential boundaries of the right of self-defense against genocide. Our approach here is suggestive, not definitive.

During World War II, although Jews resisted Hitler more so than any other group behind Nazi lines, the majority of Jews did not engage in armed resistance. One huge barrier to resistance was that the Jews were unarmed. Except in the Zionist self-defense units, there was very little familiarity with firearms among most of Europe's Jews. Pre-war Poland, the home of the largest number of Jews who were murdered, was a poorly armed nation. The anti-Semitic government was hostile to gun ownership by workers.[255]

Unlike all the other undergrounds in Europe, the Jewish partisans received no weapons from the Allies.[256] Holocaust scholar Nechama Tec summarizes: "As regards resistance, in practical terms, the Allies had virtually no interest in the Jews. This indifference translated into a rejection of all known Jewish pleas, including those requesting arms and ammunition. It goes without saying that the Jews experienced a chronic arms shortage."[257] (The United States and Britain did supply arms to the French Resistance, which had a large number of Jews. The Americans and British also supplied arms to the Soviet Union, which in turn supplied some arms to Soviet partisan units, and some of the Soviet units included Jews.[258])

According to Emmanuel Ringlebaum's history of the Warsaw Ghetto, "We state firmly that had the responsible Polish authorities extended moral

254 Application of the Convention of the Crime of Genocide (Bos. & Herz. v. Yugo. (Serb. & Mont.)), 1993 I.C.J. 325, 407–48 (Sept. 13) (separate opinion of Judge Lauterpacht).

255 GROSSMAN, *supra* note 191, at 3.

256 Yuri Suhl, *Introduction*, *in* THEY FOUGHT BACK: THE STORY OF JEWISH RESISTANCE IN NAZI EUROPE 5 (Yuri Suhl ed. & trans., Schocken Books 1975) (1967).

257 NECHAMA TEC, JEWISH RESISTANCE: FACTS, OMISSIONS, DISTORTIONS 17 (1997).

258 *See* GROSSMAN, *supra* note 191, at 3; TEC, *supra* note 257, at 17; Suhl, *supra* note 256, at 5.

support and helped us with arms, the Germans would have had to pay for the sea of Jewish blood shed in July, August, and September 1942," as Jews were deported to Treblinka.[259]

Holocaust historian Abram L. Sachar observed: "[T]he difference between resistance and submission depended very largely upon who was in possession of the arms that back up the will to do or die."[260]

If the Genocide Convention had been international law throughout the twentieth century, then European Jews in Nazi-controlled areas would have had the international legal right to possess defensive arms—once the Nazi genocide began. But, obviously, Jewish resistance would have been much more successful if the Jews had been able to acquire arms *before* genocide commenced. After all, a group which is targeted for imminent genocide is usually under extreme totalitarian control, prohibited from acquiring arms, and with almost no ability to obtain firearms from benevolent third parties.

Similarly, Alan J. Kuperman pointed out that

> In the case of Rwanda, however, even a policy of reacting immediately to evidence of genocide would have been insufficient to save most of the victims. To be more successful, a lower threshold for action would have been required, perhaps authorizing intervention as soon as the risk of genocide was deemed sufficiently high.[261]

So would it be reasonable to extend the right of self-defense against genocide to include a right of at-risk groups to acquire arms before a genocide actually begins? As the historical record of genocide shows, if the victim population is armed, the armament is likely to deter the initiation of genocide. Is it possible to create a precautionary principle which deters genocide? Can the precautionary principle be narrowly construed, so that it does not make gun control legally impossible?

The easiest case for a precautionary extension of the self-defense rule would be to groups in countries where: (1) Genocide has taken place in the recent past against the group; and (2) Genocide is currently taking place against a different group. The second part of this two-part test shows that the national government still uses genocide as an instrument of state policy. The first part of the two-part test shows that the group faces a notably large risk. Therefore, the two-part test would suggest that defensive firearms should not be denied to the African Christians and Animists of southern Sudan. Over a million of them were killed by Sudanese genocide, and the Sudanese government still practices genocides, in west Sudan, against the people of Darfur.

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259 Suhl, *supra* note 256, at 5.

260 SACHAR, *supra* note 192, at 60.

261 ALAN J. KUPERMAN, THE LIMITS OF HUMANITARIAN INTERVENTION: GENOCIDE IN RWANDA 100 (2001).

Similar arguments could be made for the defensive rights of at-risk groups in other nations whose current regime has recently perpetrated genocide.

The human rights organization Genocide Watch has created a model of the eight stages of genocide: classification, symbolization, dehumanization, organization, polarization, preparation, extermination, and denial.[262] Most of this Article has focused on cases where the genocide has advanced to the extermination stage. At the least, the precautionary principle should authorize arms acquisition by victims when a genocidal government has advanced to the stage of "preparation."

Of course there may be good faith uncertainty about whether a particular government really has entered the preparation stage. After all, governments intent on genocide almost never make candid announcements about their intentions. And sometimes third parties will, for reasons of their own, remain willfully blind to genocidal preparations; for example, in early 1994, the U.N. peacekeeping mission was warned *well in advance* by a "well-placed informer" that the Rwandan government was planning a genocide.[263] Yet the United Nations did nothing.[264]

Moreover, there is a risk that sending arms to an at-risk group might provoke a genocide where none would have otherwise occurred. For example, during World War II, persons (such as immigrants of Japanese descent living in Peru and other South American countries) who were sympathetic to the Japanese-Americans who were placed in internment camps might have feared that the camps were a prelude to genocide. If the Japanese-Peruvians had been smuggling arms to the Japanese-Americans, the arms smuggling might have provoked much more severe, repressive U.S. government actions against innocent Japanese-Americans.

Other scholars who examine the issue may suggest more detailed guidelines. For example, it could be argued that smuggling light weapons (such as bazookas or mortars) to a group should only take place once a genocide has actually begun. Conversely, the supplying of ordinary

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262 Gregory H. Stanton, Genocide Watch, Eight Stages of Genocide, http://www.genocidewatch.org/8stages.htm (last visited Feb. 3, 2006). The U.S. State Department and Central Intelligence Agency have established their own early warning center for genocide. Dana Priest & John M. Goshko, *Genocide Warning Center Established*, WASH. POST, Dec. 11, 1998, at A52.

263 SCHABAS, *supra* note 49, at 550–51.

264 Fausto Pocar, *Preventing Genocide and Crimes Against Humanity*, 98 AM. SOC'Y INT'L L. PROC. 46, 47 (2004) ("[T]here was clear evidence that the situation in the Balkans and even more so in Rwanda might have resulted in genocidal acts. But it did not induce the international community to act."); *see also* SCHABAS, *supra* note 49, at 550–51 (describing reluctance among states to label conduct in Rwanda "genocide" so as to avoid triggering an obligation to respond).

firearms (rifles, shotguns, and handguns) should be authorized for "at-risk" situations, because governments which rule by legitimate consent should have no reasonable fear of ordinary citizens possessing ordinary firearms.

In this Article, we do not attempt a final resolution of the precautionary question. We do suggest that once a morally accountable person—such as a head of state, a diplomat, a judge, or any other person—makes a good faith determination that a particular government has entered the preparation stage of genocide, then the moral person should immediately refrain from any action (including the enforcement of ordinarily applicable gun control laws) which might interfere with the ability of the targeted genocide victims to arm themselves defensively.

Unfortunately, at the present time, despite intense examination of risk factors associated with various social conflict situations,[265] the predictability of genocidal activity remains poor.[266] Although, at some point, we may learn to anticipate conflict, according to Barbara Harff, we now know "little about what types of crises with what magnitude are likely to occur."[267]

According to Ted Gurr, "Geographer Bernard Nietschmann estimates that there are three thousand to five thousand 'nations' in the world, defined as communities whose shared identity is based on common ancestry, institutions, beliefs, language, and territory."[268] Gurr identified at least 233 groups that may be at risk.[269] Heidenrich suggested that "there are a very large number of hate groups worldwide, only a fraction of whom will ever become a major political menace."[270]

To illustrate the difficulty of predicting future genocides, Daniel

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265 *See* Donald Krumm, *Early Warning: An Action Agenda*, *in* PREVENTIVE MEASURES: BUILDING RISK ASSESSMENT AND CRISIS EARLY WARNING SYSTEMS 248, 248–49 (John L. Davies & Ted Gurr eds., 1998) [hereinafter PREVENTIVE MEASURES] ("Many organizations are doing early warning work of one sort or another. Some of the systems are already quite sophisticated, and all are being improved. . . . The literature abounds with discussion about early warning."). *See generally* Pauline H. Baker & John A. Ausink, *State Collapse and Ethnic Violence: Toward a Predictive Model*, PARAMETERS, Spring 1996 at 19, *available at* http://carlisle-www.army.mil/usawc/parameters/96spring/baker.htm (proposing an early warning and evaluation system for the prevention of ethnic violence).

266 *See* Barbara Harff, *Early Warning of Humanitarian Crises: Sequential Models and the Role of Accelerators*, *in* PREVENTIVE MEASURES, *supra* note 265, at 70, 71 ("At present, early warnings are rarely 'early,' seldom accurate, and moreover lack the capacity to distinguish among different kinds of conflict or crises.").

267 *Id*. at 70.

268 TED ROBERT GURR, MINORITIES AT RISK: A GLOBAL VIEW OF ETHNOPOLITICAL CONFLICT 5 (1993).

269 *Id.*

270 JOHN G. HEIDENRICH, HOW TO PREVENT GENOCIDE: A GUIDE FOR POLICYMAKERS, SCHOLARS, AND THE CONCERNED CITIZEN 75 (2001).

Polsby and Don B. Kates wrote about a thought experiment suggested by Robert Cottrol:

> Let us travel by some means back in time to the year 1900, and there convene a committee of the most exalted thinkers from all over the world. We inform them that within fifty years a great and cultured nation will try to exterminate, with near success, one of its most important ethnic, racial, or religious minorities. We now ask them to forecast who the victim group and the perpetrator nation will be. Would any predict the Holocaust?[271]

In no case was the Germany of 1900 predicted as the perpetrator of the Holocaust.[272] The prospects of twentieth-century U.S. genocide against blacks or Indians, or Russian genocide against the Jews, or even English genocide against the Irish would have seemed, to a well informed person in the year 1900, far more likely than German genocide against the Jews.

As an empirical matter, Jews for the Preservation of Firearms Ownership (JPFO) may be correct that if every family in the world owned a good-quality rifle, then genocide would disappear.[273] In the JPFO scenario of a gun in every household, it is possible that there would be more killings because of arguments between neighbors, and various other quotidian disputes, because a deadly weapon was nearby.[274] On the other hand, some cultures, such as the Swiss, have pervasive arms ownership, but very little violence.[275] Even if one makes the direst assumptions about increased mortality as a result of increased firearms ownership, the net gain in lives would seem to be very large. Mass killings require the kind of mass organization that only a government can provide; during the twentieth century, genocide killed over 262 million people. [276]

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271 *See* Daniel D. Polsby & Don B. Kates, Jr., *Of Holocausts and Gun Control*, 75 WASH. U. L.Q. 1237, 1262 (1997).

272 *See generally id.*

273 ZELMAN & STEVENS, *supra* note 190, at 29–30.

274 *But see* Paul Gallant & Joanne D. Eisen, *Trigger Happy: Rethinking the 'Weapons Effect,'* 14 J. ON FIREARMS & PUB. POL'Y 89 (2002) (describing the "Weapons Effect" hypothesis, which suggests that guns can psychologically control people and cause them to be violent, and analyzing research about the weapons effect to conclude that evidence does not support the hypothesis).

275 *See generally* DAVID B. KOPEL, THE SAMURAI, THE MOUNTIE, AND THE COWBOY: SHOULD AMERICA ADOPT THE GUN CONTROLS OF OTHER DEMOCRACIES? 278–302 (1992) (surveying the gun laws of Switzerland and several other countries in light of their respective cultures and public policies)

276 Accepting the U.N. figure of 500,000 annual deaths from small arms and light weapons (SALW), and accepting the estimated 262 million genocidal deaths in the twentieth century, the net gain becomes obvious. *See* David B. Kopel, Paul Gallant & Joanne D. Eisen, *Global Deaths from Firearms: Searching for Plausible Estimates*, 8 TEX. REV. L. & POL. 113 (2003) (criticizing earlier estimates of global firearms deaths as not

Yet although widespread armament might make sense as an antigenocide *policy*, we do not in this Article argue that international antigenocide law, in its current stage of development, forbids gun prohibition within a particular nation. Rather, we argue that international law, as it presently exists, forbids the denial of arms to people currently suffering from genocide. We also agree with the dissenting judges for the 1951 International Court of Justice opinion, that "the enormity of the crime of genocide can hardly be exaggerated, and any treaty for its repression deserves the most generous interpretation."[277] Accordingly, the fundamental human right of self-defense against genocide should be applied to cases where genocide has reached the extermination stage, and also to cases where genocide preparation has begun.

CONCLUSION

Kofi Annan spoke eloquently: "Throughout the world, the victims of violence and injustice are waiting; waiting for us to keep our word. They notice when we use words to mask inaction. They notice when laws that should protect them are not applied . . . . Let our generation not be found wanting."[278]

Sadly, the antigenocide promise "Never Again!" has been a worthless platitude. Half a century after the international community made the Genocide Convention into binding international law, overt genocide is being perpetrated in Sudan. As with every other genocide in the last half-century, the international community, including the United Nations, has

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based on sound empirical data; also noting that estimates of 300,000 annual deaths from SALW in wartime were based on the mistaken assumption that all wartime deaths are caused by SALW, and no deaths are caused by heavier weapons); R.J. RUMMEL, DEATH BY GOVERNMENT 4 (2000) (providing historical genocide data); *see also* Rudy J. Rummel, Reevaluated Democide Totals for 20th C. and China, http://www.ciolek.com/SPEC/rummel-on-democide-2005.html (last updated Dec. 12, 2005) (upwardly revising the world total of democide in the 20th century to 262 million, which, "Just to give perspective on this absolutely incredible murder by government, if all these bodies were laid head to toe, with the average height being 5', then they would circle the earth ten times. Also, this democide murdered 6 times more people than died in combat in all the foreign and internal wars of the century. Finally, given popular estimates of the dead in a major nuclear war, this total democide is as though such a war did occur, but with its dead spread over a century"). The figure of 262 million amounts to 4.1% of the estimated world's population as of 2005. *Id.*

277 Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 47 (May 28) (Guerrero, McNari, Read, & Mo, JJ., dissenting).

278 Kofi Annan, The Secretary-General, United Nations, The Rule of Law Remains Elusive, Address at the Opening of the General Debate of the Fifty-ninth Session of the General Assembly (Sept. 21, 2004), *in* U.N. CHRONICLE ONLINE, Nov. 3, 2004, http://www.un.org/Pubs/chronicle/2004/issue3/0304p4.asp.

been collectively unwilling to take action which would stop the genocide.

The United Nations has consistently ignored its legal and moral obligations to prevent genocide, clearly laid out in one of its founding documents. Ten years from now, instead of apologizing for Srebrenica and Rwanda, the United Nations will be apologizing for its failure in Darfur.[279]

Kofi Annan, expressing grief at the United Nations's failure to protect seven thousand unarmed men and boys in Srebrenica in 1995, stated:

> When the international community makes a solemn promise to safeguard and protect innocent civilians from massacre, then it must be willing to back its promise with the necessary means. Otherwise, it is surely better not to raise hopes and expectations in the first place, and not to impede whatever capability they may be able to muster in their own defense.[280]

Secretary-General Annan is precisely right. The civilized world, by ratifying the Genocide Convention, made "a solemn promise to safeguard and protect innocent civilians from massacre."[281] Yet the civilized world has failed its legal obligation "to prevent" genocide. Accordingly, the world has a duty "not to impede whatever capability [the genocide victims] may be able to muster in their own defense."[282]

When the Genocide Convention was being drafted, the Czechoslovak delegate noted with regret that the Convention could not really prevent genocide.[283] The delegate was correct in his prediction that nations could not, as a practical matter, be forced to affirmatively act on their legal duty "to prevent" genocide. However, it may be a simpler matter to persuade governments, including law enforcement officers and courts, simply to follow their passive legal duty not to interfere with self-defense against genocide.

In this Article, we have shown that, under existing international law, genocide victims are not obliged to wait for foreign governments or world organizations to rescue them. According to normative principles of international law and according to positive international law, genocide

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279 *See* Editorial, *Never Again?*, J. NEWS (New York), Jan. 27, 2005, at 6B. On January 24, 2005, Kofi Annan stated:

> "The United Nations must never forget that it was created as a response to the evil of Nazism, or that the horror of the Holocaust helped to shape its mission. . . . We rightly say, 'Never Again.' But action is much harder. Since the Holocaust, the world has, to its shame, failed more than once to prevent or halt genocide."

Id.

280 *The Fall of Srebrenica Report*, *supra* note 233, ¶ 504.

281 *Id.*

282 *Id.*

283 SCHABAS, *supra* note 49, at 79 (citing U.N. GAOR, 6th Comm., 3d Sess., 133d mtg. at 710, U.N. Doc. A/C.6/SR.133 (Dec. 2, 1948)).

victims have a fundamental human right to use armed force to resist genocide. Because the prohibition of genocide is a peremptory *jus cogens* norm of international law, any local, national, or international laws or government actions which interfere with self-defense by genocide victims are necessarily unlawful. In particular, arms control laws which may be generally valid may not be enforced against genocide victims or against persons who supply arms to genocide victims; enforcement would make the enforcing court or other state agency complicit in genocide.

Accordingly, the Security Council 2005 arms embargo on Sudan may not lawfully be enforced so as to deny defensive arms to the genocide victims in Darfur. The new U.N. Protocol against firearms trafficking and manufacturing is equally inapplicable to arms acquisition by genocide victims, including the Darfur victims. All future international small arms control treaties should explicitly recognize that the treaty does not (and, as a matter of existing international law, can not) apply so as to prevent genocide victims from acquiring and using defensive arms.

Any interference—including interference under color of law—with the self-defense rights of genocide victims constitutes a grave violation of the most fundamental of all international and moral laws.